**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 678 of 2000**

**JANE WANGUI KINUTHIA ……..……...…… PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA.....….…..……...DEFENDANT**

**JUDGMENT**

The Plaintiff in this case filed this suit on 13th April, 2000. The Plaintiff has sued the Barclays Bank of Kenya Ltd, hereinafter referred to as the Bank seeking that the Bank be ordered to deliver the title deed for L.R. NO. NAIROBI/BLOCK 82/3632 together with a duly executed Discharge of Charge to her and that the Bank be permanently restrained by an order of this court from disposing off the Plaintiff's said land under the provisions of the Registered Land Act Cap 300 or any other law. The Plaintiff also seeks such further or other relief the court may deem fit to grant.

The Plaintiff avers that she was at all material times the registered proprietor of L.R NO. NAIROBI/BLOCK 82/3632. The Plaintiff avers that about 1997, after one STEPHEN GATHUNDU MUCHERU'S loan application for Kshs.1,500,000/= was approved by the Bank, the Plaintiff agreed to guarantee the repayment of the sum not exceeding Kshs.1,500,000/=, plus interest on the said sum only. The Plaintiff avers that pursuant to the agreement, she executed a charge over the suit land on 9th July, 1997 which charge was registered by the Land Registrar in Nairobi on 15th August, 1997 as Encumbrance No.3 against the Plaintiff's title. The Plaintiff avers that on the 28th September, 1999, the balance of loan stood at Kshs.283,711/= and that the entire outstanding amount was paid and credited into the loan account No.2203235. The Plaintiff avers that the Bank account reflecting the said credit, was furnished to the Plaintiff.

The Plaintiff avers that on the same day, the Bank advanced the said **STEPHEN GATHUNDU MUCHERU** a sum of Kshs.2,100,000/= which was secured by another security, without the Plaintiff's knowledge and or consent. The Plaintiff avers that since the sum for which she guaranteed was fully repaid, she was entitled to have her title documents returned to her and to have a Discharge of Charge dully executed by the Bank, discharging her property. The Plaintiff avers that the Bank had refused to return her title documents and to release the Discharge of Charge to her. The Plaintiff avers that the cause of action arose in Nairobi.

The Bank filed a defence and counter claim on 20th June, 2000. In it the Bank denies that the loan advanced to **STEPHEN GATHUNDU MUCHERU** and guaranteed by the Plaintiff, was fully repaid on 28th September, 1999 as alleged. The Bank averred that to the contrary the loan facility was only restructured, with the full knowledge and consent of the Plaintiff and the said loanee, and that the

Plaintiff's property **L.R No. NAIROBI/BLOCK 82/3632** was to be the continuing security for the loan so restructured.

The Bank avers that it was fully entitled to hold the title document for the aforesaid property until the Plaintiff discharged her liability towards the Bank which it averred, stood at Kshs.2,192,601.85, and was continuing to attract interest. The Bank counter claims for the said sum together with interest thereon at 12% above the Plaintiff's base rate 'currently' at 22% per annum until full payment. It also seeks costs of the suit and interest and any other relief the Court may deem fit and just.

Both parties to this suit gave evidence. The Plaintiff testified in person and gave oral evidence pretty much reflecting the averment in the plaint. The Plaintiff also produced the charge document she signed guaranteeing Kshs.1,500,000/= to the bank. The Plaintiff stated that the Bank sent her a statement form confirming that the loan she had guaranteed was paid back in full. She produced the Statement as P.exh.2. The Plaintiff drew the Court's attention to an entry in the statement made on 1st September, 1999 in which the balance in the account was shown as Kshs.283,711/=. The Plaintiff also identified another entry in the same account for 26th September, 1999 showing a credit entry of Kshs.283,711/= and reflecting balance on the account as nil.

There was another entry on 28th September, 1999, which is a debit of Kshs.2,100,000/=. The Plaintiff stated that she was not a party to that debit advancement and neither was she informed, nor did she authorize it. The Plaintiff stated that she went to the Bank and spoke with the Manager, to question the fresh debit in the loan account and to demand the release of her title document. Instead of her document being released, the bank referred her back to the borrower.

The Bank called one witness, **MARIAN KIDU,** it's Recoveries Manager. This witness confirmed that the Plaintiff guaranteed the loan in question of Kshs.1.5 million, and that she charged her property in favour of the Bank. The witness confirmed that as of 1st September, 1999, the outstanding amount was Kshs.283,711/=. The witness testified that the credit entry made in the account on 28th September, 1999 with the sum of Kshs.283,711/=, related to Sundry. Marian explained that Sundry meant an entry raised by the Bank which does not relate to any payment by the customer. The witness contended that it was a normal banking practice. The witness explained that the debit entry of Kshs.2,100,000/= made on 28th September, 1999 was an amalgamation of all the borrowers debts held in various accounts in the Bank into one account. In the instant case she identified **Pexh.2** and **Dexh.2** as the two accounts amalgamated to create the debit balance of Kshs.2,100,000/=. Marian testified that the restructuring was covered under the guarantee the Plaintiff gave the Bank. The witness read clause 2(a) of the guarantee, which provides that "Guarantee is a continuing security and shall secure the ultimate balance from time to time". Under paragraph 3 of the guarantee document, the witness read that the sum guaranteed was limited to Kshs.1.5 million, to which was to be added interest, fees, commission, costs, charges and expenses referred to in clause 1(b).

Marian produced a statement of the loan account and stated that as at 26th July, 2005 the last entry was a debit of Kshs.2,515,811.55. The witness asked the court to give judgment in the Banks favour for the outstanding amount.

Both counsel filed written submissions on which they relied entirely. I have carefully considered the evidence adduced by the two witnesses who testified, the exhibits produced, the pleadings filed by both parties and the filed written submissions. The facts which are not in dispute are that the Plaintiff is the registered proprietor of Land **L.R NO. NAIROBI/BLOCK 82/3632.** It is not disputed that the Plaintiff charged that property in the Bank's favour in 1997 as a guarantee for the repayment of a loan of Kshs.1,500,000/= advanced to one, **STEPHEN GATHUNDU MUCHERU,** by the Bank. It is not disputed that the charge was registered by the Land Registrar on 15th August, 1997 as Encumbrance No.3 against the Plaintiff's title.

The bone of contention is the nature of the guarantee signed by the Plaintiff. The Plaintiff's contention is that she secured an amount limited to Kshs.1.5 million only, together with interest and other Bank

charges. She relies on the charge she signed, Plaintiff's exh.1 and the Statement of the borrowers loan account, **P.exh.2.** At page 5 of the charge it provides:

"***AND PROVIDED FURTHER THAT the total moneys for which this charge constitutes a security shall not at any one time exceed the charge debt together with interest at the rate or rates aforesaid from the time of the principal sum becoming payable until actual payment thereof AND PROVIDED ALSO that the security hereby constituted shall be a continuing security for the payment of the charge debt and interest thereon or so much thereof as may from time to time be outstanding at any Branch of the Lender in the said Republic notwithstanding any settlement of account or other matter or thing whatsoever and shall not prejudice or affect any agreement which may have been made with the lender prior to the execution hereof relating to any security which the lender may now or at any time hereafter hold in respect of the charge debt or any part thereof."***

The Plaintiff also relies on part III of D.exh.1 which provides:

"***Part III***

*Principal sum secured by Guarantee*

***The Principal sum secured by this Guarantee is:***

*is limited to the principal sum of ONE MILLION FIVE HUNDRED THOUSAND shillings (Shs. 1,500,000/=) to which shall be added all interest, fees, commission, costs, charges and expenses referred to in Clause (b)."*

She also relies on clause 1(b) of same exhibit which provides:

"***(b) The total amount recoverable under this deed shall be limited to the principal sum stated in Part III of the Schedule to this Deed to which shall be added all interest, fees, commission, costs, charges and expenses referred to above which shall have accrued or shall accrue due to the Bank before or at any time after any demand made pursuant to the provisions of this Deed provided that if no principal sum is so stated, the liability of the Guarantor hereunder shall be unlimited."***

I have already set out what the loan statement provided. The Defendant relies on guarantee and indemnity signed by the Plaintiff/Defendant Exh.1 and the Statement of account D.Exh.2. The Defendant says that the guarantee was a continuing security and relies on clause 2(a) of the guarantee which provides:

"***2(a) This Guarantee is a continuing security and shall secure the ultimate balance from time to time owing to the Bank by the Principal in any manner whatsoever notwithstanding the death, bankruptcy, liquidation, administration or other incapacity or any change in the constitution of the Principal or the Guarantor or any of the persons comprising the Guarantor or in the name or style thereof or any intermediate payment or settlement of account or other matter whatsoever subject only to termination by notice in accordance wit the provisions of this clause."***

The documents speak very clearly. From both the charge document and guarantee document, one can see the intention of the parties was for the Plaintiff to secure a sum limited to Kshs.1.5 million advanced to the borrower. That sum was described as the Principal sum in the guarantee document. The guarantee specifically provided that the total amount recoverable under the Deed was limited to the Principal sum. Under the guarantee, the only sum that could be added to the Principal sum was interest, fees, commission, costs, charges and expenses as provided under clause 1(b) of the Deed. The Charge document is very clear also. The charge provides that the total monies for which the charge constituted a security was not at any time to exceed the charge debt together with interest. The Charge debt was described as Kshs.1.5 million. The charge was limited to the charge debt.

I find that it is very clear what security the Plaintiff provided to the Bank and the fact it was limited to

the Principal debt or charge debt of Kshs.1.5 million. The Defendant Counsel submitted that the Plaintiff's security to the Bank was in the nature of a continuing security. Counsel relied on Clause 6(b) of the charge, which provides:

*"6(b) That the security hereby given to the Lender shall be without prejudice and in addition to any other security or charge or otherwise howsoever which the Lender may now or at any time hereafter hold on the property and assets of the Chargor or any part thereof for or in respect of all or any part of the indebtedness of the Chargor to the Lender howsoever arising or any interest thereon and the Lender hereby reserve the right to consolidate all mortgages and charges which it may from time to time hold from the Chargor on any account whatsoever and it is hereby declared that neither the property hereby charged nor any other property of the Chargor which at any time during the continuance of this security is subject to a mortgage or charge in favour of or vested in the lender shall be redeemed except on payment not only of all the moneys hereby or thereby secured but also of all moneys secured by every other such mortgage or charge (including this Charge) and to that extent Section 84 of the Registered Land Act shall not apply to this Charge and the Lender hereby expressly reserves and the Chargor hereby confirms the Lender's right of consolidation."*

Mr. Kamonde did not answer to this submission. However, I do find a clear indication in the charge why the clause 6 does not have the meaning ascribed to it by the Defendant's counsel. In clause 1 at page 5, as already quoted herein, the charge expressly provided that "The Security hereby constituted shall be a continuing security for the payment of the charge debt and interest thereon". At page 2 of the same charge clause (b) describes the charge debt as "not exceeding" kshs.1,500,000/=. There can be no two interpretations for this express, clear provisions in the charge document and the guarantee. The Bank had clearly no right under the charge document or guarantee deed to create a fresh debt under the two documents.

The next question is whether the borrower cleared his debt. Both parties rely on the Statements of the borrowers loan account. The Plaintiff relies on the Statement to say that on the 28th September, 1999, by the deposit of one payment in sum of Kshs.283,711/=, the borrower cleared his loan account. That the subsequent amount of Kshs.2,100,000/= indicated as a debit in the same account, was an advancement or facility granted to the borrower without the knowledge or consent of the Plaintiff.

The Bank hold the position that due to the normal banking procedure, the two amounts in question were indicated as "Sundry" and that "Sundry" in banking language meant, an entry generated by the Bank itself. DWI, Marian, was not at the Bank at the time the advancement was given or entries in the account made. Her evidence was purely from "normal banking practice". She explained that the Bank amalgamated the borrowers accounts into the loan account creating the said debit entry. It is clear the Plaintiff was not informed of the move. It is also clear that the effect of the amalgamation was to increase the borrowers indebtedness on the loan account to which the Plaintiff's charge was pegged.

The Defendant relies on clause 8(1) at page 24 of charge to explain the amalgamation. Clause 8(1) provides:

*"8(1) To combine consolidate split determine or otherwise vary any credit to or accounts of the Chargor and to set off or transfer any sum or sums standing to the credit of any one or more of such accounts in such manner as the Lender shall in its sole discretion see fit;"*

Mr. Thiga for the Defendant explained that once the plaintiff signed the charge and guarantee, she bound herself fully to the Defendant in respect of the Principal borrower's indebtedness to the Defendant. I do not think that argument can carry the day. It is misplaced. In my understanding, clause 8(1) would apply where the chargor is also the borrower, and where it has other accounts with the Bank. It gives the Bank the right to amalgamate all accounts held by the borrower with the Bank and to use the charge to secure them. In the instant case, the chargor was not the borrower, and in addition there is no evidence that she held any account with the Defendant Bank. The clause does not apply.

The charge document and guarantee are clear that the Plaintiff bound herself to the Defendant to

guarantee repayment of a sum not exceeding Kshs.1.5 million. The amalgamation of the Principal borrowers accounts with the Defendant, to the extent it introduced into the account debts other than the Principal debt the Plaintiff guaranteed, was not part of the agreement of the parties. The issue would be quite different if the amalgamation was for charges, interest, commission costs as provided for under clause 1(b) of the guarantee. That was not the case.

In regard to the "Sundry" entries, we have no clear evidence that the sum of Kshs.283,711/= was not by the borrower himself. It it was generated by the bank as Ms. Marian stated in evidence, then the only explanation is that the borrower deserved the credit. It is not normal banking practise for the Bank to give credit to it's client who is in debt. It could only have been a credit deserved by the borrower, whether from a direct deposit or from other accounts held by the bank. Otherwise, why would the Bank have created two entries, one reducing indebtedness to zero, and the other creating a debt to the tune of Kshs.2.1 million? Marian could not clarify that issue to the court. On a balance of probabilities I find that the borrower cleared the loan owed to the bank to the tune of Kshs.1.5 million together with all charges fees etc as per the guarantee clause 1(b) and that in the circumstances, the debt guaranteed by the Plaintiff herein was fully paid.

In regard to the debit entry of Kshs.2.1 million, the only reasonable explanation in its regard is that the Bank amalgamated other debts owed to it by the borrower, which were not part of the debt guaranteed by the Plaintiff. Under the guarantee documents, the Principal debt was clearly described as limited to the sum of Kshs.1.5 million advanced to the borrower at the time of signing the guarantee under the charge. On the other hand the charge debt was clearly defined as limited to the sum of Kshs.1.5 million advanced to the borrower at the time of signing the charge. The Bank had no right, both under the charge document and the guarantee, after the debt secured by the charge was cleared, to create a new debt under either or both documents. The Kshs.2.1 million was a new debt not secured by the Plaintiff's charge. The Bank needed a new fresh mandate to charge the Plaintiff's title to the new debt. The words "continuing security" can only be interpreted within the descriptions given in the charge and guarantee documents, which are "limited to the sum advanced of Kshs.1.5 million". Which were the "Charge debt" and "Principal debt" respectively.

The upshot of this judgment is:

1) The Defendants counter claim is dismissed with costs to the Plaintiff.

2) Judgment be and is hereby entered for the Plaintiff against the Defendant as follows:

i) The Defendant be and is hereby ordered to deliver the title documents for L.R. No. NAIROBI/BLOCK 82/3632 together with a duly executed Discharge of Charge to the Plaintiff.

ii) The Defendant be and are hereby restrained by an order of this court from disposing off the Plaintiff's said land, under the Registered Land Act and/or any other law.

iii) The Plaintiff will have the costs of this suit.

Dated at Nairobi this 2nd day of November, 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of:

LESIIT, J.

JUDGE