



Masakha v Family Bank of Kenya & 2 others (Environment & Land Case 209 of 2019) [2023] KEELC 21587 (KLR) (6 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21587 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 209 OF 2019
LL NAIKUNI, J
NOVEMBER 6, 2023**

BETWEEN

DANIEL KM MASAKHA PLAINTIFF

AND

FAMILY BANK OF KENYA 1ST DEFENDANT

ANTIQUA AUCTIONS 2ND DEFENDANT

MASHINANI DISTRIBUTION LTD 3RD DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by Daniel K. M. Masakha the Plaintiff herein through a Complaint dated 22nd November, 2019 and filed on the same day against the Family Bank Limited, Antiqua Auctions and Mashinani Distribution Ltd the Defendants herein. Upon service of the pleadings and summons to enter appearance, the 1st Defendant entered appearance on the 11th December, 2019 and filed its statements of Defence on 23rd January, 2020. Despite of service, the 2nd and 3rd Defendants herein never entered appearance even after service of the summons.
2. On 25th October, 2023 upon all parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 on the pre-trial conference, it was fixed for full trial on the 21st March, 2023. Nonetheless, this matter proceeded for hearing by way of “Viva Voce” evidence with the Plaintiff’s witness PW - 1 testifying. On 21st March, 2023, the 1st Defendant called in a witness who testified as DW - 1. After which both the Plaintiff and the 1st Defendant closed their cases.



II. The Plaintiff's case

3. Based on the filed pleadings, the Plaintiff is described as a male adult of sound mind residing and working for gain within Mombasa County in the Republic of Kenya. He claimed That at all material times to this suit, he was lawfully married to one Joan Atamba Makatiani and the two were joint registered proprietors of the leasehold interest in all That parcel of land known as mombasa/mn/block 2/5 measuring approximately 0.2160 hectares and the said land is matrimonial property (hereinafter referred to as 'the suit property"). the plaintiff learnt of the impending sale of the suit property on 20th november 2019 through a friend who informed him That the 2nd Defendant, acting on the instructions of the 1st Defendant, had advertised in "the Daily Nation" Newspaper of Monday 11th November, 2019 to sell the suit property on 28th November, 2019 by public auction the said land.
4. Upon inquiry from his wife whether she was aware of the impending sale and the reasons for the same, his wife informed the Plaintiff That she was not aware and That the only information she could recall was That in year 2016, the General Manager of the 1st Defendant had wanted her to give a guarantee to the 3rd Defendant for the use of the title to the suit property for a facility of a sum of Kenya Shillings Six Million Three Hundred Thousand (Kshs 6,300,000.00). On That basis she had given the General Manager the title deed but she never executed a Charge document or a Contract of Guarantee in respect of the same.
5. The Plaintiff's wife subsequently conducted a search at Mombasa Lands office and discovered That on 24th June, 2016 a Charge dated 30th May, 2016 was purportedly registered in favour of the 1st Defendant over the above land for the sum of Kenya Shillings Six Million Three Hundred Thousand (Kshs. 6,300,000.00/=) advanced by the 1st Defendant to the 3rd Defendant. Despite being a joint registered owner of the suit property, the 1st Defendant never sought nor obtained his consent to the said Charge nor did he sign any contract of Guarantee committing the suit property for sale in the event the 3rd Defendant defaulted in the repayment of the loan.
6. It was the Plaintiff's case That the registration of a Charge over his property on 24th June, 2016 by the 1st Defendant was an illegality and unlawful as he never executed the said Charge in favour of the 1st Defendant and the act of the 1st Defendant continuing to hold onto his title was a continuing illegality for which the Plaintiff sought for general and aggravated damages.
7. In the alternative and without prejudice to the foregoing That even if his wife consented to the suit property being used as security, the 3rd Defendant confirmed to the Plaintiff's wife That the facility was repaid in full and within the 12 months provided in the Letter of Offer dated 3rd February 2016. The Plaintiff also learnt That vide Letters of Offer dated 3rd February 2016, 8th April 2017, 23rd March 2018 and 3rd December 2018, the 1st Defendant granted loan facilities to the 3rd Defendant on the security of his title without his consent and knowledge. The Plaintiff never executed Charges or Contracts of Guarantee over the said facilities.
8. The Plaintiff had never signed a continuous Charge of Contract of Guarantee in favour of the 1st Defendant over his property and there was no basis for the 1st Defendant to continue to use his title as security for banking facilities and loans. The 1st Defendant never had any legal right over his property hence the intended auction of his property on 28th November 2019 was against his interests and null and void.



9. The Plaintiff prayed for Judgment against the 1st, 2nd and 3rd Defendants jointly and severally for:-
- a. A declaration that land title no. mombasa/ municipality/ block/2/5 being matrimonial property is subject to the provisions of Sections 28 (a) and 93 (1), (2), (3) and (4) of the *Land Registration Act*, 2012
 - b. 2. A declaration That the Charge dated 30/5/2016 and registered over title No. Mombasa/Municipality/ Block 2/5 on 24/6/2016 in favour of the 1st Defendant is null and void for contravening the provisions of the provisions of Sections 28 (a) and 93(1), (2), (3)and (4) of the *Land Registration Act*, 2012
 - c. An Order directed against the 1st Defendant to forthwith discharge the Charge registered on Title No. Mombasa /Municipality/ Block/2/5 ON 24/6/2016 and forthwith release the title documents to the Plaintiff.
 - d. A declaration That banking facilities granted to the 3rd Defendant by the 1st Defendant through Letters of Offer dated 3rd February 2016, 8th April, 2017, 23rd March, 2018 and 3rd December, 2018 are null and void to the extent of the amount of money secured using Title No. Mombasa /Municipality/ Block/2/5.
 - e. A declaration That the statutory notices and advertisement for sale issued by the 2nd Defendant in respect of Title No. Mombasa /Municipality/ Block/2/5 on the instructions of the 1st Defendant are null and void.
 - f. General and Aggravated damages.
 - g. Costs of this suit.
 - h. Any other relief/remedy That this Honourable Court deems fit to grant in the circumstances

III. The testimonial evidence by the Plaintiff

10. On 21st March, 2023, the hearing for the Plaintiff commenced in earnest whereby he summoned one witness – the PW - 1. He testified as follows:-

A. Examination – in - Chief of PW - 1 by M/s Azei Advocate

11. PW - 1 was sworn and he testified in the English language. He was called Daniel K.M. Masakha. He lived at Mombasa Lotus Apartment and worked at Pipeline Company Mombasa as a Chief Technician. He recorded a statement on 25th November, 2019 and adopted it as part of his evidence in chief. He stated That he filed four documents dated 22nd November, 2019 which he produced as Plaintiff Exhibit 1 to 4. He had sued the 1st, 2nd and 3rd Defendants herein. In the year 2019 a friend of his had seen his property advertised in the Daily Nation under public auction advertisements.
12. The witness testified That he called his wife who told him she was unaware of the advertisement and proceeded to contact the auctioneers (the 2nd Defendant). They told her That there had been a facility granted on 3rd December, 2018 advanced to the 3rd Defendant. In the year 2016, the 3rd Defendant had asked her to guarantee them which they did, his wife accepted and gave the title to the 3rd Defendant to be used as security. A sum of Thirty Million (Kshs. 30,000,000/-) was advanced as loan facility to the 3rd Defendant which was supposed to be repaid in 12 months. on 28th June, 2018 he signed an affidavit



- letter of guarantee and indemnity which he signed. It was a guarantee for a sum of Kenya Shillings Six Million Three Hundred Thousand (Kshs. 6,300,000.00/-).

13. According to the witness he was supposed to be discharged after the loan was paid in full according to Clause 5. From the information within he was told That the loan was fully paid. He was not notified of any default or advancement of the loan or any instruction of the loan. Despite the advertisement in the newspaper, he was never served with any notice for statutory power of sale. His postal address was P.O. Box 93231 – 80100 Mombasa. He provided the address to the Bank at the time of signing the document.
14. He referred to the Defendant's documents, the address there was erroneous. He asked the Honourable Court to discharge his property. This was his matrimonial property where they had sentimental value. He had no other place to call home apart from the suit property in Mombasa. He asked the court to grant him the reliefs sought in the Plaint.

B. Cross examination of PW - 1 by Mr. Onsare Advocate

15. He confirmed That he signed the charge on 4th June, 2016 dated 30th May, 2016 and affidavit was dated 28th June, 2018. He said his title was used to guarantee a loan facility of Kenya Shillings Thirty Million (Kshs 30,000,000/-) and the loan was paid in full. When he saw the notice in the newspaper. He also learnt That there were many charges used to serve the loan of a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000/-). After the loan had been paid in full, the bank had the discharge and he was aware That the charge had a clause for continued security which was Clause 4 (a). At the point of signing the document, he had not known That his wife was a director of the 3rd Defendant. He may have been a director of the 3rd Defendant too.
16. He told the court That this property had never been used before as security. However he had just remembered it was used for KCB financing when he was building his matrimonial home. He made reference to page 15 of the 1st Defendant's document which showed That on 6th March, 2007 – Saving and Loan Kenya Ltd for an amount of Kenya Shillings Four Million Two Hundred and Fifty Thousand (Kshs. 4,250,000/-) and on 3rd July, 2015 secured a loan from Family Bank Limited for a sum of Kenya Shillings Six Million Three Hundred Thousand (Kshs. 6,300,000/-). He never had any proof That the loan of a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000/-) was fully paid i.e. from the statement.
17. The witness confirmed That he signed the Charge and Indemnity of Guarantee; he filed the case. To date he had never done anything to repay the loan as far as he was concerned. It's the title to indemnify his interest. He made reference to the Charge – the address indicated was P.O. Box 93232 which according to him was not his address. He referred to the Letter of Guarantee and Indemnity at Clause 5 provision; he never confirmed That the loan was fully paid. He was not aware of the default. When referred to the official batch in November 2019 he stated That after a few months the suit was filed. He found out That the property was still charged, he was expecting the bank to have notified him of the further charge over the suit property.
18. When recalled he stated That he signed the Charge at page 57. It had directions of the 3rd Defendant. It identified Dan Masakha and at page 56 it was Joan Makatiani as a director.

Re - examination of PW - 1 by M/s Azei Advocate

19. He testified That when he signed the Charge and Letter of Guarantee of Indemnity, it was for a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000/-). He never received any notices from the bank. His understanding was That the loan had been fully paid. On 30th July, 2015, there was a Discharge of



Charge dated the same day. He conducted an official search to his property as he was entitled to do at anytime. He made reference to the CR 12 form which indicated the directors of the 3rd Defendant as Francis Busudu and Jesinta Liona as per 4th July, 2022. His wife was Joan Atmara Makatiani.

20. He told the court That he was only made aware of the advertisement. Had it not been for it, he would have assumed That all was well yet the property was a matrimonial property with sentimental value. From the official search conducted on 27th September, 2019, the entry was the same as what was in the title deed by the 1st Defendant on page 15 of the document. the issue od further charge was what he was told by the 2nd Defendant That there had been a further charge of a sum of Kenya Shillings Fourty Five Million (Kshs. 45,000,000/-) against his title deed i.e. there were three subsequent loan; on 8th April, 2017, for a sum Kenya Shillings Twenty Three Million Four Twenty Three Thousand (Kshs. 23,423,000/-); on 6th April, 2018 and for a sum of Kenya Shillings Fourty Five Million (Kshs. 45,000,000/-); on 3rd December, 2018. These were according to the 1st Defendant's list of documents.
21. He stated That he had seen the CR – form 12 which was from the 3rd Defendant. It was prove of the registration by the director of the company. A charge was by the bank. From the charge, it may be the secretary/director borrower. The Plaintiff closed his case.

IV. The 1st Defendant's case

22. The Defendant is described in the Plaint as a registered Limited liability company incorporated in the Republic of Kenya under the provisions of the [Companies Act](#) (Cap 486 Laws of Kenya) and engaged in banking business and it is thus capable of suing and being sued. The 1st Defendant denied the contents of paragraph 5 of the Plaint in so far as the Plaintiff and his spouse, joan atamba makatiani, were the registered proprietors of the suit property, mombasa/mn /block 2/5. in response to the contents of paragraph 6 of the plaint, the 1st defendant averred as follows:
 - a. The 3rd Defendant sought for financial accommodation from the 1st Defendant vide a loan application form dated 17th August 2015;
 - b. The 1st Defendant agreed to loan the 3rd Defendant the loan amount and communicated the same to the 3rd Defendant vide a letter of offer dated 3rd February 2016;
 - c. The loan amount disbursed was a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000.00/-);
 - d. The loan facility was restructured and this was communicated to the 3rd Defendant vide a letter of offer dated 8th April 2017 and it brought the 3rd Defendant's liability to the 1st Defendant to Kenya Shillings Forty-Five Million (Kshs. 45,000,000.00/-);
 - e. The loan facility was restructured and this was communicated to the 3rd Defendant vide a letter of offer dated 6th April 2018;
 - f. This brought the 3rd Defendant's liability to the 1st Defendant to Kenya Shillings Twenty Three Million Four Hundred and Twenty Three Thousand (Kshs. 23,423,000.00/-);
 - g. The loan facility was further restructured and this was communicated to the 3rd Defendant vide a Letter of Offer dated 3rd December 2018;
 - h. This brought the 3rd Defendant's liability to the 1st Defendant to a total sum of Kenya Shillings Forty-Five Million Four Hundred Thousand (Kshs. 45,400,000.00/-);



- i. The letters of offer issued to the 3rd Defendant provided and/or indicated the monthly payable instalments;
 - j. The 3rd Defendant failed to service the loan facility forcing the 1st Defendant to exercise its right under the law;
 - k. The 1st Defendant as required by the law issued the Plaintiff and the 3rd Defendant with the requisite notices;
 - l. The Plaintiff and the 3rd Defendant failed to adhere to the notices issued;
 - m. As a result the 1st Defendant instructed the 2nd Defendant to proceed and auction the suit property;
23. In response to paragraph 7 of the Plaint, the 1st Defendant averred as follows;
- a. The Plaintiff and his spouse, Joan Atamba Makatiani, were the registered proprietors of the suit property;
 - b. The said proprietors offered their property as security for the loan advanced to the 3rd Defendant;
 - c. The said proprietors executed a charge instrument giving consent to the 1st Defendant to register the charge instrument against their title document;
 - d. The said proprietors were not coerced into executing the charge instrument;
 - e. The loan amount guaranteed was a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000.00/-) and not a sum of Kenya shillings Six Million Three Hundred Thousand (Kshs. 6,300,000.00/-) as alleged.
24. The contents of paragraph 8 of the Plaint were admitted in so far as a charge was registered in favour of the 1st Defendant. Further to the contents of paragraph 7 above, the 1st Defendant averred That the Plaintiff's consent was obtained together with the consent of his spouse who was also his co-proprietor of the suit property. Paragraph 9 and 10 were denied with the 1st Defendant averred That the charge instrument dated 30th March 2016 was registered with the full knowledge of the Plaintiff. In response to paragraph 12 and 13 of the Plaint, the 1st Defendant averred as follows:
- a. That the Plaintiff and his spouse, consented to their property being used as security for the loan advanced to the 3rd Defendant;
 - b. That the Plaintiff was made aware of the registration of the charge against his property;
 - c. That it was the Plaintiff who agreed to offer his property as security without being coerced;
 - d. That it was not the duty of the 1st Defendant to keep informing the Plaintiff of the loan applications made by the 3rd Defendant noting That the charge was still in force.
25. In response to paragraph 14 of the Plaint the 1st Defendant averred That the it had the legal right to auction the suit property on account of the charge instrument. In response to the entire contents of the Plaint, the 1st Defendant further stated That the Plaintiff's intention is only geared at scandalizing the 1st Defendant and painting them in bad light. This alarmist and malicious approach must be thwarted at all costs.



26. Indeed the 1st Defendant reiterated That it had always managed the loan account and loan facility herein with utmost diligence. The interest of the 1st Defendant was not to sale off the property herein but to recover its outlay. The Plaintiff was put to strict proof of allegations to the contrary. The 1st Defendant averred That what it was claiming was what was duly owed to it and nothing more. The land parcel number Title No. Mombasa /Municipality/ Block 2/5 herein was the security for the loan in issue. Failure by the borrower to service the loan leaves the 1st Defendant no option but to move to recover its outlay as it did. The 1st Defendant reiterated That it was the one likely to suffer harm because it had already advanced monies which monies were not being repaid at all. There was a suit over the same facility at the Mumias Principal Magistrates' Court being Civil Case Number 51 of 2019 - Mashinani Distributors Limited vs Family Bank Limited & Pawaba Auctioneers.

V. The Testimonial Evidence By The Defendants

27. On 21st March, 2023, the Defendant called its first witness. DW - 1 testified That:

A. Examination in Chief of DW - 1 by Mr. Onsare Advocate

28. DW - 1 was sworn and testified in English language. He was called Stanley Kipkoech Sing'oei, an employee of Family Bank – Mumias Branch. He had filed a witness statement dated 13th May, 2022; He had filed documents in three sets one dated 22nd January, 2020 filed on 23rd January, 2020 which had 11 documents marked as Defendant Exhibit - 1 to 11; a supplementary list of documents dated 13th May, 2022 with five documents which included the CR – 12 form dated 27th April, 2022 which he produced as Defendant Exhibit - 12 to 17.
29. He told the court That the 3rd set of documents was the 1st Defendant further list of documents (3 documents) marked as Defendant Exhibit No. 18, 19 and 20 respectively. The Plaintiff stated That he never signed the Charge nor the Letter of Guarantee. He made reference to paragraph 7 to 10 of the Plaintiff stating That there were two lists of documents:-
- i. The Charge on page 38 to 62;
 - ii. Letter of guarantee/indemnity;
 - iii. Spousal Consent affidavit.
30. According to the witness the Plaintiff signed it as the owner of the property. The rule was That as a bank, they only dealt with the borrower direct and not the guarantor. They assumed the borrower kept the guarantor informed. They notified the borrower once the loan was fully paid. From there the borrower may make two decisions; to further borrow or discharge the security.
31. He told the court That the meaning of continued facility means the borrower may use the same facility to borrow. They were not under any duty to inform the Guarantor of the further borrowing; They strictly dealt with the borrower. From the Charge, the wife of the Plaintiff was a director of the 3rd Defendant. At page 46 showed the spouse – Joan Makatiani was a director. They got the address they used from the Charge. The bank never drew/drafted the Charges. That was done by the advocates within the bank.

B. Cross examination of DW - 1 by M/s Azei Advocates

32. He told the court That he was the Bank Manager at Family Bank – Mumias. He had not produced any document to show That he occupied the position. There was a Letter of Offer dated 3rd February, 2016 for Mashinani Distributors Ltd for a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000/-) to



be repaid within 12 months. Amongst the security was the title to the suit property. 12 months would have ended in February 2017. The Plaintiff had started That the loan had been repaid in full. He had produced a statement indicating the loan repayment. He confirmed That there was another facility of a sum of Kenya Shillings Fourty Million (Kshs. 40,000,000/-) advanced to the borrower.

33. He told the court That they could assume That the loan of a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000/-) was fully paid. For every Letter of Offer, the purpose of the loan was started. The 2nd loan was for a sum of Kenya Shillings Fourty Five Million (Kshs. 45,000,000/-) purpose was Bill of duration for repayment for 12 months. The 3rd loan was for a sum of Kenya Shillings Twenty Three Million (Kshs. 23,000,000/-) for repayment for 6 months and the 4th loan was for a sum of Kenya Shillings Forty Five Million Five Huindred Thousand (Kshs. 45,500,000/-). The only statement produced in Court was for this facility. The 3rd and 4th loan were restructured as the 1st and 2nd loan were fully paid. The guarantee gave the bank a contract for the repayment of the 1st loan for a sum of Kenya Shillings Six Million Three Hundred Thousand (Kshs. 6,300,000/-) once the loan had been settled, the Guarantor was not informed by the bank. They used the same security on the facility. It was only the borrower who would inform the Guarantor. The bank continued utilizing the security; the bank and the borrower enjoys.
34. He told the court That for all these further loans, they never informed the Guarantor. They expected them to be informed by the borrower. In reference to Clause 5 proviso- there was no Discharge of Charge after the 1st loan was settled as there was no request made. There was a spousal consent was signed by the Plaintiff on 28th June, 2016. The Charge was dated 30th May, 2016 under Section 82 of the Registration *Land Act* (Now repealed) was on the further advancement. This was applicable so long as all the facilities had been cleared. It's the Advocates who were in the Panel who his address was P.O. Box 92233. They had a CR 12 form; they had not produced any documents to show That Joan who was a director in the 3rd Defendant Company.

C. Re - examination of DW - 1 by Mr. Onsare Advocate.

35. He confirmed That the 1st loan was taken by the 3rd Defendant who was their client and was to facilitate the importation of sugar. It was a Letter of Credit. They guaranteed the exporter That they shall pay for the goods. The bank offers to guarantee. The company was a going concern. It was not cash. The 2nd Facility they increased the amount but they experience challenges and opted to go for restructuring. This was very normal for those who deal with importation business.
36. He had no information whether the Plaintiff approached the bank to check the facility status. The Plaintiff's wife had not appeared before court to say That they never signed the charge. On the issue if the directorship, the wife had not appeared before court to state That she was not a director of the 3rd Defendant.
37. The 1st Defendant closed its case on 21st March, 2023.

VI. The Submissions

38. On 21st March, 2023 after both parties closed their case, the Honourable court directed That parties to file their submissions within stringent timeframe thereof on. Pursuant to That they all complied accordingly and on 20th June, 2023, the Honourable court reserved a date to deliver its judgement on notice to all the parties.



A. The Written Submissions by the Plaintiff

39. The Plaintiff through the firm of Messrs. Ameli Inyangu & Partners Advocates filed its written submissions dated 3rd April, 2023. The Learned Counsel informed Court That the suit was commenced by way of a Plaint dated 22nd November, 2019. The Plaintiff instituted this suit against the Defendants seeking ‘inter alia a Discharge of the Charge registered on Title Number Mombasa/ Municipality /Block/2/5 on 24th June, 2016 and a declaration That the intended sale was null and void. He further sought a declaration That the banking facilities granted to the 3rd Defendant by the 1st Defendant be declared null and void to the extent of the amount secured by the subject title.
40. According to the Learned Counsel, the gist of the Plaintiff’s suit was That he is the registered proprietor of suit land. A Charge was allegedly registered against the Property on 30th May, 2016 to secure a loan of a sum of Kenya Shillings Six Million Three Hundred Thousand (Kshs. 6,300,000.00/=) advanced to the 3rd Defendant. This loan was repaid in full. However, instead of discharging the property, the 1st Defendant proceeded to advance additional facilities over and beyond the principal amount stated in the charge to the 3rd Defendant while using the Plaintiff’s subject property as security. This, was done without the knowledge of the Plaintiff. Upon an alleged default by the 3rd Defendant to repay the facilities, the 1st Defendant, without any notice to the Plaintiff, advertised the Plaintiff’s property for sale by way of public auction. The suit was defended by way of a statement of defense filed on 23rd January, 2020. The 1st Defendant stated That by way of a Letter of Offer dated 3rd February, 2016, a loan amount of Kenya Shillings Thirty Million (Kshs. 30,000,000.00/=) was disbursed to the 3rd Defendant and the subject property was offered as security. This loan, as admitted by its witness DW - 1, was repaid in full. Upon repayment, the 1st Defendant went ahead and advanced further facilities with the latest of a sum of Kenya Shillings Forty Five Million Four Hundred Thousand (Kshs. 45,400,000.00/=) granted on 3rd December, 2018. The 1st Defendant stated That the 3rd Defendant failed to service the loan facility forcing the 1st Defendant to exercise its statutory power of sale.
41. The Learned Counsel from the above background, he posed the following five (5) issues fall for Court’s determination;
42. Firstly, on which documents formed the contractual relationship between the Plaintiff and the 1st Defendant. The Learned Counsel submitted That PW - 1 stated in his statement adopted in Court, That sometime in the year 2016, the subject property was offered as security to secure an advancement by the 1st Defendant to the 3rd Defendant. The advancement was made pursuant to a letter of offer dated 3rd February, 2016, signed by borrower and one of the guarantors/co-owners of the suit property, Joan Makatiani. Consequently, a charge dated 30th May, 2016 was registered in favour of the 1st Defendant. It was a stated term of the charge instrument and specifically clause 3 That the amount secured by the Charge shall be the aggregate of the principal amount plus cost and interest. The principal amount secured is defined in the introductory part of the instrument as Kenya Shillings Six Million, Three Hundred Thousand (Kshs.6,300,000.00).
43. He asserted That Clause 6 of the instrument, expressly provided That upon repayment of its secured obligations and performance of all other conditions and obligations under the Charge, the Chargor shall be entitled to discharge the Charge. It was worth noting, at this juncture, That there was no provision under the instrument allowing the chargor to continue holding the property as security in the event the Chargee never apply for Discharge. In addition to the charge instrument, the Plaintiff was said to have, simultaneously with the charge, executed an undated Letter of Guarantee and Indemnity. Clause 4 of the deed of guarantee limits the liability of the guarantor to the principal sum of Kenya Shillings Six Million Three Hundred Thousand (Kshs. 6,300,000.00/=).



44. Clause 5 of the Letter/deed of Guarantee, provides That the Clause on continuing security never prevented the Guarantor from being discharged in the event That all obligations of the Principal Debtor have been settled. Again, and as in the charge instrument, the deed of indemnity never arrogated the chargee the power to continue using the property as security in the event the chargor did not apply for discharge upon fulfilment of his obligations.
45. It was the Learned Counsel's submission That the aforesaid were the documents which formed the basis and create a contractual relationship between the Plaintiff and the 1st Defendant herein (separate from the borrower).
46. Secondly, on the issue of how many facilities were advanced by the bank, the Learned Counsel submitted That the evidence by PW-1 was That by way of a Letter of Offer dated 3rd February, 2016 and produced as Defendant Exhibit - 1, the 1st Defendant advanced to the 3rd Defendant a facility of Kenya Shillings Thirty Million (Kshs. 30,000,000.00/=). The purpose of this facility was to facilitate the importation of various commodities and was to be repaid within a period of 12 months. This facility, was secured by four securities among them being the suit property owned by the Plaintiff in which a charge instrument dated 30th May, 2016 was registered to secure an amount of Kenya Shillings Six Million Three Hundred Thousand (Kshs. 6,300,000.00/=) only. Contrary to what was stated in its defense That the aforesaid loan amount was restructured, DW-1, on cross-examination, confirmed to this court That the loan advanced by Letter of Offer dated 3rd February, 2016 was repaid in full. In fact, the witness told the court That it was only the 3rd and 4th facilities That were restructured. The full repayment of the loan thus entitled the Plaintiff herein to a Discharge of the Charge as stipulated in Clauses 6 and 5 of the Charge Instrument and Deed of Guarantee respectively. Therefore, and upon confirmation by the 1st Defendant of the full repayment of the facility, the Plaintiff had no other obligation owed to the 1st Defendant.
47. During examination in chief, DW-2 confirmed That after the initial loan advanced on 3rd February, 2016 was repaid in full, the 1st Defendant made additional advancements and created an additional loan account on 8th April, 2017 for the sum of Kenya Shillings Fourty Five Million (Kshs. 45,000,000.00/=). This facility was to be repaid within 12 months and was secured by Seven (7) securities among them, the suit property. A letter of Offer dated 8th April, 2017 was produced as Defendant Exhibit - 2 to support this position. The 6th April, 2018, another loan account was created and a further advancement of Kenya Shillings Twenty Three Million Four Twenty Three Thousand (Kshs. 23,423,000.00/=) was advanced to the 3rd Defendant. This facility was secured by 11(eleven) Securities and was to be repaid within a period of 6 months. This was evidenced by the Letter of Offer produced as Defendant Exhibit - 3. On 3rd December, 2018, the 1st Defendant again increased the 3rd Defendant's liability by advancing a facility of a sum of Kenya Shillings Forty Five Million Four Hundred Thousand (Kshs. 45,400,000.00/=) payable within 60 months. This facility was secured by 11 securities and was evidenced by the Letter of Offer produced as Defendant Exhibit - 4.
48. The Learned Counsel submitted That it was important to note from the three letters of offer creating the subsequent loan accounts, That, unlike in the first letter of offer dated 3rd February, 2016, the guarantors did not sign these subsequent Letters of Offer. In the first Letter of Offer, it was evident That the terms of the facility were approved by the one Joan Makatiani, whom together with the Plaintiff, appeared as one of the Guarantors in the Charge instrument and the Letter of Indemnity. Unfortunately, this was not the case with the subsequent Letters of Offers dated 8th April, 2017, 6th April, 2018 and 3rd December, 2018. This lent credence to the Plaintiff's position That he was not notified of the new loan accounts and further advancements made to the 3rd Defendant by the 1st Defendant after the 1st facility advanced on 3rd February, 2016 was repaid in full.



49. Additionally, and during cross-examination, DW - 1 confirmed to this Court That the Plaintiff was not informed of the further advancements made to the 3rd Defendant. He was also not aware That the terms of the subsequent Letters of Offer had been varied and That the 1st Defendant advanced sums to the 3rd Defendant over and beyond what was agreed upon in the charge instrument. It was further evident That the Plaintiff was not informed of fundamental information such as the additional securities That had been procured to secure the additional loans advanced to the 3rd Defendant. He was not informed of the change in term limits to repay the loan. The guarantor was also not informed of any purported restructure and or consolidation of loans. This information, he submitted, would have assisted the Plaintiff herein to make an informed decision on whether he would wish to continue to offer his property as security. The Learned Counsel argued That when such variations especially on increased liability and advancements were made, the Guarantors must have a say on and promise to be liable for the extra load.
50. To buttress his point, the Learned Counsel relied on the case of “Surya Holdings Limited & 4 others ICICI Bank Limited & another [2015] eKLR” where the Honourable Court held That:
- “The 1st Defendant act of consolidating the Foreign Currency Term Loan and the Working Capital Demand Loan, and loading the entire amount on securities offered by the 1st, 2nd, 3rd, and 4th Plaintiffs/ Applicants for the Foreign Currency consolidation happens, the guarantors must have a say on and promise to be liable for the extra load or consolidated load.”
51. The Learned Counsel contended That when asked to explain why the Plaintiff was not informed of the further advancements, DW-1 responded That they had no duty to inform the Plaintiff of the new loan accounts and subsequent advancements and That it was the duty of the borrower, the 3rd Defendant, to do so. This was despite the existence of a valid contract between the Plaintiff and the 3rd Defendant which contains an essential implied obligation of full disclosure. This, the Learned Counsel averred That, demonstrated an act of bad faith and an attempt by the 1st Defendant to defeat the equity of redemption as it seems the 1st Defendant is holding the Plaintiff’s property as a perpetual security. The failure to inform the Plaintiff of the new loan accounts absolves the Plaintiff from any liability. On this proposition, we are guided by the case of “Abraham K.Kiptanui - Versus -Delphis Bank Limited & Another Nairobi (Milimani Commercial Courts)HCCC No.1864 of 1991” cited in the case of “George Williams Omondi & another – Versus - Co-operative Bank of Kenya Ltd & 2 others [2016] eKLR”; where the Court held;
- “The act of a banker in requiring the second account to be opened without the consent of the guarantor discharges the guarantor from his liability. The true rule is That if there is any agreement between the principles with reference to the contract guaranteed, the surety ought to be consulted, and That if he had not consented to the alteration, although in cases where it is without inquiry evidence That the alteration is insubstantial, in That it cannot be otherwise than beneficial to the surety, the surety may not be discharged, yet That if it is not self-evident That the alteration isinsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration...”
52. The Learned Counsel submitted That there being evidence That the Plaintiff was not aware of the three letters of offer and subsequent loans advanced to the 3rd Defendant, it was their submission That indeed the Plaintiff never offered his subject property to be used to secure the subsequent facilities



advanced to the 3rd Defendant on 8th April, 2017, 6th April, 2018 and 3rd December, 2018. In its defense, the 1st Defendant avers That the subsequent facilities were secured by the subject property by virtue of the provisions of the Charge and deed of indemnity which contain a clause on continuing security. In attempting to understand the doctrine of continuing security, the Learned Counsel sought the guidance from the case of “Equip Agencies Limited - Versus - I & M Bank Limited (2017) eKLR” where Nzioka J. observed;

“That the doctrine of “continuing securities in banking transactions arises from the practice whereby the banks do offer facilities which may be rolled over or renewed if the terms and conditions of the facility remain materially unchanged, the doctrine takes effect. However, the said facilities must be within the headroom created by the securities.”

53. From the above definition, the question That lingered in our heads is whether the terms and conditions of the facilities remained materially unchanged for the doctrine of continuing security to be invoked. Their answer is in the affirmative as justified below;
54. The Learned Court invited the Honourable to look at the four Letters of Offer produced as Defendant Exhibit – 1 to 4. The first letter of offer is dated 3rd February, 2016 which advanced a facility amount of Kenya Shillings Thirty Million (Kshs. 30,000,000.00/= to be repaid within 12 months. It was not in dispute That this amount was repaid in full. This facility was secured by only four securities as seen in Clause 6 of the Letter of Offer. Importantly and as stated hereinabove, one of the Guarantors who was a Co -Owner of the subject proprietor (Joan Makatiani) was made aware of this facility and in fact signed the letter of offer. Upon repayment, the 1st Defendant increased the facility amount advanced to the 3rd Defendant to a sum of Kenya Shillings Fourty Five Million (Kshs, 45,000,000.00/=). A further loan of Kenya Shillings Twenty Three Million Four Twenty Three Thousand (Kshs. 23,423,000.00/=) to be repaid within 6 months and a sum of Kenya Shillings Fourty Five Million Four Hundred Thousand (Kshs. 45,400,000.00/=) (repayable within 60 months) was advanced to the 3rd Defendant. In making these advancements, a major alteration and or variation was made as the 1st Defendant called for and were furnished with additional securities without the knowledge of the Plaintiff whose discharge from the charge was already due as the facility he had guaranteed was repaid in full. Clearly, the terms of the facilities were materially changed without consulting the Plaintiff and the 1st Defendant could not be allowed to rely on the doctrine of continuing security.
55. On this point, the Learned Counsel relied on the case of: “Harilal & Co. & Another - Versus - The Standard Bank Limited (1967) EA 512”; also cited in the case of “George Williams Omondi & another – Versus – Co - operative Bank of Kenya Limited & 2 others [2016] eKLR” the East African Court of Appeal expressed itself as follows;
- “If there is any agreement between the principles with reference to the contract guaranteed, the surety ought to be consulted, and if he has not consented to the alteration, although in cases where it is without inquiry evident That the alternation is unsubstantial or That it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet That if it is not self-evident That the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the .court will not, in an action against the surety, go into an inquiry as to the effect of the alteration.”
56. The Learned Counsel further asserted That the failure to inform the Plaintiff That the 1st Defendant was furnished with additional securities, denied the Plaintiff the opportunity to make an informed decision on whether or not the subject property may continue to be used as security. In anyevent, the loan, the said property had secured, had already been repaid in full. In its defense, DW -



I testified That upon full repayment of the 1st loan, the Plaintiff never requested for a discharge and as such, the bank made a unilateral decision, to continue charging the property and benefiting from advancing further facilities to the 3rd Defendant. It was their submission, That there was no provision in the charge instrument and the deed of indemnity allowing the 1st Defendant to continue using the Plaintiff's property as security in the event the Plaintiff failed to apply for discharge. The unilateral action by the Defendant was therefore unlawful, illegal, in breach of the terms of the contract and an attempt to defeat the equity of redemption.

57. The second major variation was the lack of acceptance of the terms of the facilities by the guarantors. Unlike in the 1st Letter of Offer which was signed by one of the guarantors, neither the Plaintiff nor the 2nd Guarantor, Joan Makatiani signed subsequent Letters of Offer and accepted the advancement of the facilities to the borrower, the 3rd Defendant herein. The subsequent facilities therefore arose from contracts between the 1st and 3rd Defendant but at the detriment of the Plaintiff. This the Learned Counsel argued That it created a major variation to the loan arrangements and as such, as it was held in the above case of "Equip Agencies Limited - Versus - I & M Bank Limited (2017) eKLR", the doctrine of continuing security cannot be invoked.
58. It was further the Learned Counsel's submission That a contract could only be enforced between the parties thereto. The fact That the Plaintiff or the Co - Guarantor never signed the subsequent letters of offer between the 1st and 3rd Defendant, he could not be bound the terms thereof in respect to repayment of the debt amount or at all, hence any attempt to execute any liability flowing from the said letters of offer is illegal and or unlawful. A third major alteration and or variation is noted from the statutory notices allegedly sent to the Plaintiff. In the said notices, the 1st Defendant demanded from the Plaintiff an outstanding amount of a sum of Kenya Shillings Fourty Five Million Five Sixty Four Thousand Nine Sixty (Kshs. 45,564,960.53/=) which, he submitted was a gross violation of the provisions of the charge and the Land Act. It was evident from the chargeinstrument That the Plaintiff only agreed to guarantee the initial loan only to the extent of a sum of Kenya Shillings Six Million Three Hundred Thousand (Kshs. 6,300,000.00/=). From the statutory notices, this amount was seen to have been increased and the 1st Defendant was now demanding a sum of Kenya Shillings Fourty Fie Million Fve Sixty Four Thousand Nine Sixty Hundred (Kshs.45,564,960.00/=). The increase of the secured amount was done without the consent of the Guarantor through a signed memorandum as provided for under Section 84 of the Land Act. This the Learned Counsel argued was a violation of not only the charge instrument but also the provisions of the Section 84 (2) of the Land Act which provides as follows:-

“The amount secured by a charge may be reduced or increased by a memorandum which

- a) Comply with subsection (5) (a) and (b) be signed-
 - a. In the case of a memorandum of reduction by the charge; or
 - b. By the charger; and
 - c. State That the principal funds intended to be secured by the charge are reduced or increased as the case may be, to the amount or in the manner specified in the memorandum.



59. The Learned Counsel averred That this variation of the principal amount demanded without a signed memorandum was a violation of the provisions of Section 84 (2). He placed reliance on the case of “Kisimani Holdings Limited & another v Fidelity Bank Limited [2013] eKLR” where it was held; -

“Of course, in relation to paragraph 21 above, section 84 of the *Land Act*, 2012 allows the amount secured by a charge to be reduced or increased but by a memorandum which must be endorsed on or annexed to the Charge instrument which varies the Charge in accordance with the terms of the memorandum. The memorandum must be signed in the case of a reduction by the chargee or, in the case of an increase, by the chargor. It must also state That the principal funds intending to be secured by a charge instrument are reduced or increased, as the case may be, to the amount specified in the memorandum. It is clear That by not specifically (by memorandum) increasing the amount covered by the Charge instrument dated 14th February 2011, the Defendant was in breach of this sub-clause by including in its statutory demand, the amount of the 2nd Plaintiff’s current account overdraft and its US dollar account.”

60. He cited the case of:- “Gakenga – Versus - Consolidated Bank of Kenya Limited & 2 others (Civil Case 13 of 2018) (2022) KEHC 436 (KLR)(28 April,2022)(Judgment)” the Court held;

“My reading of the two sub clauses does not bind the plaintiff in any way in regard 300,000/- she had committed in the charge, the 1st defendant ought to have called be made against them in the future. In the absence of any such agreement, the 1st defendant could not have lawfully exercised its statutory powers beyond the charge which was also noted in the encumbrance section of L.R Nyeri/Waraza/1244.”

61. The Learned Counsel further submitted That in light of the above submissions and the definition of continuing security, we submit That there were major variations in the terms of the loan facilities and as such, the doctrine of continuing security never applied. The presence of the above variations without the involvement of the Plaintiff absolves him of any liability. See “The Modern Contract of Guarantee” at page10 where the author writes as follows;

“A contract of Guarantee is predicated upon the existence of a valid principal obligation owed by the principal debtor. If there is no such principal obligation, generally the obligation fails... In terms of general principle, not only must the principal obligation exist but it must also remain unchanged throughout the life of a Guarantee. Even slight unauthorized changes in the primary obligation may discharge the guarantor. Moreover, if the principal obligation determines, so does the guarantee”

62. Also, in the case of “Surya Holdings Limited & 4 others – Versus - ICICI Bank Limited & another [2015] eKLR” the Court, while referring to the Bank’s unilateral act of consolidating loan accounts without informing the guarantors held;

“There were unilateral variations of the agreement by the bank without consent of the borrower or the guarantors. Such variation would affect the lending contract as well as the quarantee. It may also afford the guarantors a defence and claim discharge of quarantee.”

63. Thirdly, on whether the Plaintiff was properly served with statutory notices. The Learned Counsel argued That it was the Plaintiff’s position That the 1st Defendant could not, in view of the many infractions discussed hereinabove, demand payment or purport to exercise a statutory power of sale.



Nonetheless and without prejudice to our submissions hereinabove, the Learned Counsel further submitted That on the service or non-service of the statutory notices as hereunder;

64. The 1st Defendant contended That all statutory notices were served upon the Plaintiff. The notices were produced as Defendant Exhibits 7, 8, 9 and 10 respectively. The said notices were allegedly sent via registered post through Post Office Box Number 93232-80100 Mombasa. The Plaintiff testified and herein held That he was not served with any statutory notices. This was because the alleged notices were sent to an incorrect address and one That never belonged to the Plaintiff. The Plaintiff testified That his correct address was P.O Box Number 93231-80100 Mombasa. This is as indicated in the copy of the Title Deed produced as Plaintiff Exhibit - 2, the Letter/Deed of Guarantee produced as Defendant Exhibit - 17 (page 3-12 of the Defendant's Further list of documents) and the Affidavit sworn on 28th June, 2016 annexed to the charge instrument. The 1st Defendant produced a charge instrument in which the Plaintiff's postal address is indicated as Post Office Box Number 93232-80100 Mombasa. Annexed to the charge instrument was a purported spousal consent signed by the Plaintiff herein in which he swore That his Postal Address is Post Office Box Number 93231 Mombasa. The 1st Defendant further produced a deed of indemnity. In this indemnity, the Plaintiff's address was correctly indicated as Post Office Box Number 93231 Mombasa. This was the same address contained in the title deed produced by the Plaintiff and the 1st Defendant.
65. In light of the above, it was clear That the 1st Defendant in drafting the charge instrument indicated an address That never belonged to the Defendant. This was supported by the documents produced by the same Defendant which contained the Plaintiff's correct address. The 1st Defendant could not therefore be allowed to rely on its mistake or wrong for its benefit. The Learned Counsel maintained That the Plaintiff was never served with any statutory notices since a notice addressed to a wrong address, was no notice at all. It was as if no such notice was issued and therefore no statutory power of sale arose.
66. For his support, the Learned Counsel relied on the case of "Robert Kipyegon Chepkwony - Versus - Barclays Bank of Kenya Limited & Another (2019) eKLR" where the Court held;
- "Section 90 (1) of the Land Act specifically provides That a 90-day notice be served upon the charger as a prerequisite for the exercise of the chargee's statutory power of sale. There is no two way about it and a notice sent to the wrong address is no notice at all"
67. As regards the crystallization of the 1st Defendant's statutory power of sale without issuance of proper notices or no notices, the Court in "Peter Ngure – Versus - Pioneer Building Society (In liquidation) (2014) eKLR" held;
- "The centrality of equity of redemption cannot be overemphasized, which now has statutory expression in section 86 of the Land Act. Extinguishing it requires strict adherence with the law, in this case the RLA (repealed). Therefore, exercise of the proprietary rights of the chargor nor pass any good title to a purchaser in an action which is founded on the illegality committed by the Chargee. Ringera J (as he then was) in the case of Simiyu v HFCK (HCCC 937 OF 2001) had the following to say on the effect of want of service of notice under Registered land Act and he concluded That:
- "..Without compliance with the statutory demand, there can be no valid exercise of the power of sale and accordingly, it cannot be said That the chargor's equity of redemption is extinguished in any sale conducted in breach thereof."
68. Fourthly, on whether the notices were valid. The Learned Counsel argued That it was not in dispute That a charge dated 30th May, 2016 was registered over the suit property to secure a principal amount of



Kenya shillings Six Million Three Hundred Thousand (Kshs. 6,300,000.00/=). This arose from a letter of offer dated 3rd February, 2016 in which a facility of a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000.00/=) was advanced to the 3rd Defendant. It was also not in dispute That the facility was fully repaid. This was confirmed by DW-1 in his testimony. The full settlement of the facility, entitled the Plaintiff to a discharge pursuant to Section 86 of the Land Act.

69. In That regard, it was the Learned Counsel’s contention That the notices allegedly issued by the 1st Defendant was unlawful because the secured amount was fully liquidated. It was his submission That the charge in dispute was not registered to secure additional facilities advanced after 3rd February, 2016. The charge was only meant to secure specific amounts stated in the charge instrument and not any other amount. The statutory notices were void and unwarranted. They could only issue for the secured sum which, in this case, was a sum of Kenya Shillings Six Million Three Hundred Thousand (Kshs. 6,300,000.00/=). This was in accordance with the provisions of Section 90 of the Land Act which provides;

“ 90

- (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

90

- (2) The notice required by Subsection (1) shall adequately inform the recipient of the following matters –

The notice required by subsection (1) shall adequately inform the recipient of the following matters—

- a) the nature and extent of the default by the chargor;
- b) if the default consists of the non-payment of any money due under the charge, the amount That must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
- c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so at to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;
- d) the consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to



in this section in accordance with the procedures provided for in this sub-part; and

- e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.”

70. The Learned Counsel submitted That hereinabove, the amount secured by the charge was a sum of Kenya Shillings Six Million Three Hundred Thousand (Kshs.6,300,000.00/=). However, in the statutory notices, the 1st Defendant was seen to demand an amount over and beyond what was secured under the charge. This he submitted was in breach of the provisions of the Land Act and in That regard, he urged the Court to find That the statutory notices were illegal, null and void.
71. Finally, on the general and aggravated damages. The Learned Counsel submitted That the Plaintiff had also prayed for aggravated and general damages. It was stated by the Court of Appeal in the case of “Miguna Miguna - Versus - The Standard Group Limited & 4Others (2017) eKLR” while quoting “John - Versus - GM (1993) QB 586” where the Court held That:
- “Aggravated damages will be ordered against a Defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defense of justification or failure to apologize.”
72. The Defendants’ actions were oppressive, arbitrary and unconstitutional. Their conduct was calculated to procure them some benefit at the expense of the Plaintiff. This conduct caused psychological harm to the Plaintiff and the Counsel humbly urged the Court to award of a sum of Kenya Shillings One Million (Kshs. 1,000,000.00/=) as damages.
73. In conclusion, the Learned Counsel submitted That during cross-examination, DW-1 confirmed to the court That pursuant to the provisions of the charge instrument, the 1st Defendant held the Guarantor’s suit property in perpetuity. This clearly defeated the equity of redemption which we urge the court to jealously guard. No evidence was adduced before the Court to show That the Plaintiff had any pending obligation flowing from the letter of offer dated 3rd February, 2016. Therefore, the Plaintiff could not be forced to take responsibility and become liable over contracts made secretly between the 1st and 3rd Defendants. In light of the foregoing submissions, the Learned Counsel urged the court to allow the Plaintiff’s claim as prayed.

B. The Written Submissions of the 1st Defendant

74. The 1st Defendant through the Law firm of Messrs. Maina & Onsare Partners Advocates filed its written submissions dated 15th June, 2023. Mr. Onsare Advocate commenced the rather lengthy and detailed submission by providing Court with brief facts of the case as follows:-
75. The Learned Counsels informed Court That the present case arose out of a financial accommodation provided by the 1st Defendant, Family Bank Limited, to the 3rd Defendant, Mashinani Distributions Ltd. The loan was secured against a property jointly owned by the Plaintiff, Daniel K.M. Masakha, and his spouse, Joan Atamba Makatiani. This was as regarding the suit property. The 3rd Defendant sought and was granted financial accommodation from the 1st Defendant, and the agreement was communicated through a letter of offer dated 3rd February 2016. The loan amount disbursed was a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000.00/-). The loan facility was restructured several times, bringing the 3rd Defendant’s liability to the 1st Defendant to a total sum of Kenya Shillings Forty-Five Million Four Hundred Thousand (Kshs. 45,400,000.00/-).



76. He stated That the Plaintiff and his spouse offered their property as security for the loan advanced to the 3rd Defendant. They executed a charge instrument giving consent to the 1st Defendant to register the charge instrument against their title document. This was done without any coercion, and the loan amount guaranteed was a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000.00/-, and not Kenya Shillings Six Million Three Hundred Thousand (Kshs. 6,300,000.00/-) as alleged by the Plaintiff. The 1st Defendant averred That it had always managed the loan account and loan facility with utmost diligence, and its interest was not to sell off the property, but to recover its outlay. It also avers That the suit land was the security for the loan in issue, and failure by the borrower to service the loan leaves the 1st Defendant with no option but to move to recover its outlay.
77. The Learned Counsel maintained the 1st Defendant had followed due process in all its actions, and the Plaintiff's suit was without merit and should be dismissed with punitive costs. The 1st Defendant prayed for the dismissal of the Plaintiff's suit, asserting That it was the one likely to suffer harm because it had already advanced monies which was not being repaid at all.
78. According to the Learned Counsel, the documents for the court's consideration were:-Plaint dated 22nd November 2019Plaintiff's witness statement dated 22nd November 2019Plaintiff's list of documents dated 22nd November 2019The 1st Defendant's statement of defence dated 22nd January 2020The 1st Defendant's list of documents dated 22nd January 2020The 1st Defendant's witness statement dated 13th May 2022The 1st Defendant's statement of issues dated 13th May 2022The 1st Defendant's supplementary list of documents dated 13th May 2022The 1st Defendant's further list of documents dated 31st October 2022
79. The Learned Counsel argued That one of the main issues of determination, was on jurisdiction, a bedrock principle of law That defined the scope of a court's authority. It was the Learned Counsel's firm contention was That this court never had jurisdiction to determine this matter, based on the nature of the dispute and the principles of law That govern jurisdiction.A careful examination of the Plaintiff's Complaint revealed the substance of the dispute. In the Complaint, the Plaintiff explicitly identified the crux of the contention as the validity of the charge, a contractual instrument between the Plaintiff and the 1st Defendant. The Plaintiff further sought in the Complaint to restrain the 1st Defendant from exercising its statutory power of sale, a power That stemmed directly from the charge. The particular paragraphs of the Complaint was reproduced in verbatim and seriatim as below:
80. The Learned Counsel submitted That the Plaintiff further stated That upon inquiry from his wife whether she was aware of the impending sale and the reasons for the same, his wife informed the Plaintiff That she was not aware and That the only information she could recall was That in the year 2016, the General Manager had wanted her to give a guarantee to the 3rd Defendant for the use of the title to the suit property for a facility of a sum of Kenya Shillings Six Million Three Hundred Thousand (Kshs. 6,300,000.00/=) and on That basis she had given the General Manager the title deed but she never executed a Charge document or a Contract of Guarantee in respect of the same.
81. The Plaintiff's wife subsequently conducted a search at Mombasa Lands office and discovered That on 24th June, 2016 a Charge dated 30th May, 2016 was purportedly registered in favour of the 1st Defendant over the above land for the sum of Kenya Shillings Six Million Three Hundred Thousand (Kshs. 6,300,000.00/=) advanced by the 1st Defendant to the 3rd Defendant. Despite being a joint registered owner of the suit property, the 1st Defendant never sought nor obtained his consent to the said Charge nor did he sign any contract of Guarantee committing the suit property for sale in the event the 3rd Defendant defaulted in the repayment of the loan.It was the Plaintiff's case That the registration of a Charge over his property on 24th June, 2016 by the 1st Defendant was an illegality and unlawful



as he never executed the said Charge in favour of the 1st Defendant and the act of the 1st Defendant continuing to hold onto his title was a continuing illegality for which the Plaintiff sought general and aggravated damages.

82. He stated That the Plaintiff also learnt That vide Letters of Offer dated 3rd February, 2016, 8th April, 2017, 23rd March, 2018 and 3rd December, 2018 the 1st Defendant granted loan facilities to the 3rd Defendant on the security of his title without his consent and knowledge. The Plaintiff never executed Charges or Contracts of Guarantee over the said facilities. The Plaintiff stated That he has never signed a continuous Charge of Contract of Guarantee in favour of the 1st Defendant over his property and there was no basis for the 1st Defendant to continue to use his title as security for banking facilities and loans. Also, the prayers sought in the same Plaint, the mother pleading, have nothing to do with the use of land. The prayers sought are anchored on the validity of the charge, propriety of the said instrument and the exercise of the statutory power of sale as an exercise appurtenant. The prayers were reproduced below as follows:
- a. A declaration that land title no. mombasa/ mucipality/ block/2/5being matrimonial property is subject to the provisions of Sections 28(a) and 93(1), (2), (3) and (4) of the [Land Registration Act, 2012](#)
 - b. A declaration That the Charge dated 30/5/2016 and registered over title No Mombasa /Municipality/ Block 2/5 on 24th June, 2016 in favour of the 1st Defendant is null and void for contravening the provisions of the provisions of Sections 28(a) and 93(1), (2), (3) and (4) of the [Land Registration Act, 2012](#).
 - c. An Order directed against the 1st Defendant to forthwith discharge the Charge registered on Title No. Mombasa /Municipality/ Block/2/5ON 24/6/2016 and forthwith release the title documents to the Plaintiff.
 - d. A declaration That banking facilities granted to the 3rd Defendant by the 1st Defendant through Letters of Offer dated 3rd February 2016, 8th April, 2017, 23rd March, 2018 and 3rd December, 2018 are null and void to the extent of the amount of money secured using Title No. Mombasa /Municipality/ Block/2/5.
 - e. A declaration That the statutory notices and advertisement for sale issued by the 2nd Defendant in respect of Title No. Mombasa /Municipality/ Block/2/5 on the instructions of the 1st Defendant are null and void.
83. The Learned Counsel submitted That this dispute, at its core, was a contractual matter between the parties, rooted in the terms of the charge. This was a quintessential commercial dispute, and never directly concerned issues of land use, environment, or land title That would fall within the ambit of the Environment and Land Court (ELC). He turned to the jurisprudence That had guided the determination of jurisdiction in similar matters. The case of “Keter – Versus - Ecobank Kenya Limited (Civil Case 16 of 2018) [2023] KEHC 2544 (KLR)” was particularly instructive. In this decision, the court reiterated That jurisdiction was not merely a procedural technicality but the lifeblood of any legal action. Without jurisdiction, any proceedings, regardless of their merit, were null and void. The court affirmedThat it would be inappropriate to transfer a suit filed in a court withoutjurisdiction to a court with jurisdiction.
84. The Learned Counsel submitted That in this case, the Environment and Land Court lacked jurisdiction to hear and determine the current dispute because the cause of action was rooted



in a contractual obligation between a mortgagor and a mortgagee, as clarified in the decision of “Cooperative Bank of Kenya Limited – Versus - Patrick Kang’ethe Njuguna & 5 Others”. The Court also cited the decision of the Court of Appeal in “Equity Bank Limited – Versus - Bruce Mutie Mutuku t/a Diani Tour Travel (2016)eKLR” where the Court quipped That jurisdiction was fundamental That where it lacked. Parties could not even seek refuge under the oxygen principle or the overriding objective under the [Civil Procedure Act](#), Act, Cap. 21. A court of law should not, through what could be termed as judicial craftsmanship, sanctify an otherwise incompetent suit.

85. The Learned Counsel drew the Court’s attention to the case of “Diamond Trust Bank Kenya Limited - v FHH (Civil Appeal 18 of 2020) [2022] KECA769 (KLR)”, in which the court held That disputes concerning the validity of a charge instrument and a bank’s attempt to exercise its power of sale fall within the purview of the High Court, not the ELC. The Court of Appeal expressly ruled That such disputes were commercial in nature, and thus not within the jurisdiction of the ELC. In a similar vein, the case of “Co-operative Bank of Kenya Limited – Versus - Patrick Kang’ethe Njuguna & 5 others (supra)” underscored their argument. Here, the court held That a charge never constituted ‘land use’ within the meaning of Article 162 of [the Constitution](#).
86. To advance his argument, the Learned Counsel relied on the case of “Republic – Versus - Karisa Chengo & 2 others [2017] eKLR”. The court, in this case, recognized the distinct and autonomous jurisdictions of the ELC, the Employment and Labour Relations Court (ELRC), and the High Court. It emphasized That these courts were of equal rank, and one could not encroach upon the jurisdiction of the others. In light of these precedents, it was evident That the ELC lacked jurisdiction to adjudicate disputes over charges and the exercise of statutory powers of sale arising from such charges. Given That this was the essence of the Plaintiffs cause of action as set out in the *Plaint*, it was clear That this court, with the utmost respect, never had jurisdiction over the matter.
87. The Learned Counsel submitted and maintained That their position was not merely a technical one but was grounded in the fundamental principle of jurisdiction, which was the cornerstone of the Kenyan legal system. This principle dictated That each dispute must be heard by the court That was best suited to adjudicate it, and in this case, That court was not the Environment and Land Court. The principles of jurisdiction and the precedents they had cited compelled them to submit That this court, with the utmost respect, never had jurisdiction over the matter. They therefore respectfully request That this case be dismissed for lack of jurisdiction. They believed That this outcome was in line with the rule of law, the principles of natural justice, and the fair administration of justice.
88. Having addressed the issue of jurisdiction, it was their confident submission That the Court was not vested with the requisite jurisdiction to adjudicate this matter. However, they also acknowledged the Court’s discretion and wisdom in these matters. Thus, notwithstanding the above submissions, in the event this Honorable Court found That it indeed had jurisdiction, they stood prepared and shall proceed to discuss the merits of the Plaintiff’s claim. It was their intention to engage on all necessary fronts to ensure justice was served, in line with the revered principles of the Kenyan legal system. In this regard, they shall now turned to the merit of the Plaintiff’s claim. While maintaining their primary position regarding jurisdiction.
89. The Learned Counsel’s contention was That the 1st Defendant delineated its position through the statement of issues, dated 13th May 2022. Yet, intriguingly, the Plaintiff elected not to follow suit by submitting a separate statement of issues. This unconventional choice had had implications for the clarity and coherence of their subsequent discourse. To remain responsive, they found themselves compelled to adapt their approach and confronted the matters embedded within the Plaintiff’s submissions, rather than adhere unwaveringly to their pre-established line of argument.



90. Given the convoluted nature of the issues presented in the Plaintiff's submissions, this strategic pivot was indispensable for fostering comprehensive discourse. The Plaintiff's submissions, albeit detailed, knit together several concerns within a single thread of argument, obscuring the individual strands of issues That warrant separate scrutiny. Their commitment to thoroughness obliged them to untangle these concerns, exploring each issue in its own right, to ensure none was left unaddressed in their response. The nature of the facility under contention further underscored the need for such a tailored approach. Unlike a conventional loan facility, the facility in question here was a Trade Finance Line. It encompassed various instruments like Letters of Credit, Post Import Finance, Bills Validation and Business Overdraft, each with its unique facets and implications for our discussion. A Trade Finance Line, by its inherent multiplicity, commanded a nuanced analysis That respects its distinct characteristics as compared to a traditional loan. Their approach, therefore, aimed to underscore this crucial distinction, to foster an understanding That not only illuminated the specific issues at hand but also aligned them with the unique context of a Trade Finance Line.
91. Thus in the spirit of coherence and completeness, their disclosure would deviate from the strict confines of the initial statement of issues and embraced a broader scope That was attuned to the issues outlined in the Plaintiff's submissions, enriched by a deeper understanding of the multifaceted nature of a Trade Finance Line.
92. On the issue of which documents form the contractual relationship between the Plaintiff and the 1st Defendant, the Learned Counsel submitted That by analyzing the contractual relationship between him and the 1st Defendant, anchored on two primary documents. The first was a charge instrument dated 30th May 2016. This instrument encompassed a primary sum of Kenya Shillings Six Million, Three Hundred Thousand (Kshs.6,300,000.00/=), along with supplemental costs and interest. The Plaintiff advocated That the charge instrument explicitly permitted Discharge of the charge once all stipulated obligations were met. However, he also pointed out That there was no clause That allowed for retention of the property as security if the chargee never requested discharge.
93. In addition, the Learned Counsel submitted That he executed an undated Letter of Guarantee and Indemnity, which limited the guarantor's liability to the principal sum and assured discharge of the guarantor when all of the Principal Debtor's obligations were fulfilled. The Plaintiff submits That this document, like the charge instrument, never provided the chargee with the authority to retain the property as security if the charger never applied for discharge after fulfilling all obligations. Therefore, the Plaintiff posited these two documents-the charge instrument and the Letter of Guarantee and Indemnity-as the foundation of his contractual relationship with the 1st Defendant. He argued That neither document allowed the chargee to hold onto the property as security once all due obligations were met, and no request for discharge had been initiated by the Chargor.
94. In reply to the Learned Counsel's submission, they respectfully drew attention to the nuanced intricacies within the charge and the Letter of Guarantee and Indemnity That shape the contractual relationship. Central to their argument was the charge instrument. It offered a narrative of both commitment and continuity. The underpinning of Recital (and Clause 4(a)) was their reinforcement of a consistent financial relationship, allowing for a steady flow of loans, financial facilities, or other accommodations, all secured by the property. This relationship was not meant to be intermittent or prematurely ended, but rather upheld until all obligations are fulfilled.
95. The narrative of continuity was strengthened by Clause 24, which designated the charge as a continuing security, undeterred by intermediate payments, settlements or even personal hardships. This highlighted That the security was not meant to be fleeting, but persistent until the obligations it secured were met. However, this persistence had an endpoint. Clause 40 outlined a clear path to



- discharge-one paved with the final balance of money, complete with interest and charges incurred by the bank. This path required a request from the chargor and/or borrower, a formal plea for discharge, upon which the bank shall lift the charge. This clause never implied a passive or silent discharge, but one invoked through formal request.
96. He asserted That the Letter of Guarantee and Indemnity also weaved in threads of continuity and conditionality. Its recital reveals an unconditional and irrevocable agreement by the Guarantor, brought about by the bank's continued financial support to the principal debtor. Similarly to the charge, Clause 5 emphasized the guarantee as a continuing security, steadfast until all obligations were fully satisfied. However, the gateway to discharge was not locked; it only required a key. Under Clause 7, the guarantor was granted the ability to unlock this door by providing a written notice, indicating the desire to end the guarantee. Overall, the foundational documents of the contractual relationship between the Plaintiff and the 1st Defendant-the charge and the Letter of Guarantee and Indemnity-paint a consistent theme of ongoing security, conditioned on the fulfillment of all obligations and accompanied by formal requests for discharge. This understanding served as a rich tapestry of obligations, responsibilities, and rights, intricately woven into the contractual relationship at hand.
97. The Learned Counsel posited That while they respectfully acknowledged the Plaintiff's submission and the and the perspective it offered, it retted, regrettably, on a partial interpretation of the charge and the Letter of Guarantee and Indemnity. This perspective oversimplified the intricate dynamics of these instruments, neglecting their complex layers of continuity and conditionality, thus misrepresenting the true essence of the contractual relationship. Hence, a comprehensive and careful examination of these documents, which appreciated the interplay among their provisions, leading the Counsel to a divergent narrative-one That perceived the charge and the Letter of Guarantee and Indemnity as fostering a lasting relationship, one That only unravels upon the satisfaction of all obligations and the initiation of a formal request for discharge.
98. Consequently, it was their submission That the narrative of continuing security, intertwined with a conditional discharge, formed the crux of the contractual relationship between the Plaintiff and the 1st Defendant. The portrayal put forth by the Plaintiff, the Learned Counsel respectfully submitted, missed this critical undercurrent and thus failed to present a precise depiction of the relationship at hand. The actual narrative illuminated an ongoing security, grounded in conditional discharge, highlighting the fulcrum of the contractual relationship depiction offered by the Plaintiff, omitted this key motif, thereby falling short in accurately capturing the relationship in question.
99. The Learned Counsel submitted That the Plaintiff's claim lacked tangible evidence to corroborate their assertion That the initial facility extended to the 3rd Defendant was indeed settled in its entirety. The discharge of obligations bound by the charge was contingent upon a formal request from the Plaintiff, which had hitherto been conspicuously absent. Consequently, the continued silence from the Plaintiff, coupled with the 3rd Defendant's active engagement with the facility, invariably sustained the validity of the charge. In the context of the Plaintiff's right to equity of redemption, the Learned Counsel maintained That the Plaintiff liberties were never curtailed. Indeed, there was no infringement upon their right to information, nor was there any ploy to impose a clog on their equity. It bore mentioning That the Plaintiff was, in fact, issued with the pertinent default notices in adherence to the terms of the charge agreement.
100. To elucidate further on the subject of signatures on the letters of offer, the Learned Counsel averred That it was essential to clarify That the role of appending signatures never fell to the guarantors. It was the borrower, as the primary beneficiary of the loan who was obligated to sign. In this case, the act was



performed by the 3rd Defendant's directors. Additionally the initial facility saw Joan Makatiani, the Plaintiff's spouse, co-signing the letter of offer not as a Guarantor but in her capacity as a director of the 3rd Defendant. It was important to note That the charge levied on the Plaintiffs property was merely one among numerous securities held by the bank. It was a misapprehension to assume That the loan quantum could not transcend the charge amount, considering the totality of the loan was secured by additional collateral beyond the Plaintiff's property.

101. While distinguishing the cited authorities by the Plaintiff's Counsel, the Learned Counsel held in the Plaintiff's references to cases such as "Surya Holdings Limited & 4 others – Versus - ICICI Bank Limited & another [2015] eKLR", and "Abraham K. Kiptanui – Versus - Delphis Bank Limited & Another" (Supra) were manifestly inapplicable in the context of the present case. The former revolved around loan consolidation, a circumstance conspicuously absent herein. Meanwhile, the latter focused on the creation of a second account without the guarantor's assent, an action That never transpired in this situation. All facilities were extended under the prevailing arrangement, a fact That the Plaintiff was not only privy to but also consenting. The notion of a continuing security seemed to be a concept That the Plaintiff struggled to comprehend fully The Plaintiff, by way of the charge and the Letter of Guarantee and Indemnity, conferred their tacit approval for the 1st Defendant to furnish multiple facilities to the 3rd Defendant until such time as the charge and the guarantee are formally dissolved.
102. The Learned Counsel opined That the scope of the Plaintiff's liability was unequivocally encapsulated in the charge and the Letter of Guarantee and indemnity. The charge over the Plaintiff's property, coupled with other securities, adequately covered these facilities. It would defy logical reasoning for the bank to keep the Plaintiff apprised of every loan extended to the 3rd Defendant, as it would serve to undermine the efficacy of a continuing security arrangement. The Plaintiff had bestowed their consent via the continuing security provisions enshrined in the charge and guarantee & indemnity, and it was under this agreement That the bank operated.
103. The Learned Counsel argued That the Plaintiff seemed to harbor a misconception That the facilities in question parallel a traditional loan structure. In reality, they formed a constituent part of a revolving Trade Finance Line, a perennial credit facility with the 3rd Defendant. Such an arrangement, by its very nature, encompasses a series of advances and repayments over an extended period, rather than a single, isolated loan transaction. The Defendant had acted in accordance with the stipulated contractual obligations throughout the course of these dealings. The Plaintiff unequivocally consented to the terms and conditions as laid out in the charge and Letter of Guarantee & Indemnity. Therefore, it was misleading to suggest That the Plaintiff was unaware of or never consented to the subsequent advancements of credit facilities.
104. The Learned Counsel submitted That the bank, operating within its rights as the lender, had acted in good faith and within the bounds of the contractual agreements. These agreements, which bore the Plaintiff's signature and signify their consent, committed them to the understanding That the loan facilities extended to the 3rd Defendant were continuous until such time That the charge and the guarantee were formally nullified. Any insinuation of foul play or bad faith lacked substance and proof. The bank had acted transparently, issuing the requisite default notices to the Plaintiff, as dictated by the agreement. Allegations of an information deficit could not excuse the Plaintiff of their liability, considering That the requisite information was indeed provided in compliance with the terms of the charge agreement. No legal or contractual rule obliged the 1st Defendant to inform the Plaintiff of each and every transaction or advancement made to the 3rd Defendant. The Plaintiff's repeated assertion to the contrary represented a misinterpretation of the principles governing continuing securities and contradicted the express terms of the agreements.



105. The Learned Counsel submitted That Plaintiff's insistence on this point of disclosure signified a misguided attempt to deflect blame and evaded liability. However, the crux of the matter remained That by endorsing the letter of guarantee & indemnity, the Plaintiff had irrevocably accepted the terms of the agreements, thereby rendering themselves liable for the obligations of the 3rd Defendant. The Plaintiff, having voluntarily engaged in the agreement and failed to formally terminate the same, remained bound by the obligations contained therein. The Plaintiff could not, ex post facto, revoke their consent and sought to evade obligations That were explicitly stipulated and agreed upon. This was the legal and equitable position.
106. Refuting the Plaintiff's arguments of material alteration, the Learned Counsel maintained That subsequent facilities never effected any significant change to the agreement's terms and conditions. The continuing usage of the Plaintiff's property as security was wholly consistent with the agreement That the Plaintiff had willingly signed. The facility's increased amount never constituted a material change in the contract's terms and conditions, nor did it alter the fact That the property remained as a security, as initially agreed upon. The argument That the introduction of additional securities without the Plaintiff's consultation breached the agreement was inherently flawed. The Plaintiff's initial consent to utilize the property as a guarantee for the loan was irrevocably given, and this position never changed, irrespective of whether additional securities were added.
107. He was of the view That this premise also held in the event of loan facility alterations While any significant changes to the contract would indeed necessitate consultation with the surety, there were no substantial alterations in this case. The provided facilities remained within the scope of the security i.e. the secured amount of Kenya Shillings Six Million Three Hundred Thousand (Kshs.6,300,000/-).It was also necessary to point out That the lack of acceptance of the facility terms by the guarantors never constituted a significant variation. The agreement signed by the Plaintiff allowed for the use of the property as a security for future loans, thereby dismissing the Plaintiff's counterclaim. The facility's increased amount never constituted a material change in the contract's terms and conditions, nor did it alter the fact That the property remained as a security, as initially agreed upon.
108. The Learned Counsel disparaged the argument That the introduction of additional securities without the Plaintiff's consultation breached the agreement was inherently flawed. The Plaintiff's initial consent to utilize the property as a guarantee for the loan was irrevocably given, and this position never changed, irrespective of whether additional securities were added. In disagreement with the Plaintiff's assertion, he could be held liable for repayment. By consenting to the agreement terms, which included the use of the property as a guarantee for future loans, the Plaintiff accepted this obligation. The increase in the secured amount never equated to a gross violation of the charge's provisions and the *Land Act*. This increase was well within the parameters established by the charge and the letter of guarantee and indemnity and never necessitated a signed memorandum, in line with the agreement That the Plaintiff had signed.
109. He argued, Importantly, there was no need for another agreement to validate any recoveries. The Plaintiff had previously agreed to the property's usage as a guarantee, a position That remained unchanged whether the loan amount was increased or not. The claim That variations in the loan facilities absolve the Plaintiff of liability was untenable. The agreement's terms, which the Plaintiff had consented to, included the use of the property as a security for future loans. Any allegations beyond what was covered in the Charge and the Letter of Guarantee and Indemnity.
110. The Learned Counsel submitted That there was fundamentally groundless and unenforceable. In the case of "Equip Agencies Limited – Versus - I & M Bank Limited (Supra), quoted by the Plaintiff, the



context was critical. The argument was made by one of the parties, not a direct pronouncement by the Judge. The more pertinent ruling made by Learned Judge Nzioka J, in paragraph 42, expressed:-

“The continuing guarantee clause is a continuing obligation of the guarantor despite completion of payment of the sum guaranteed.”

111. The Learned Counsel submitted additionally, the Plaintiff's allegation That the terms were materially altered is unconvincing, as the integrity of the continuing security clause remained unaffected by subsequent transactions. No material changes were made to the facilities, as the extent of the Plaintiff's exposure was clearly delineated in the Charge and the Letter of Guarantee & Indemnity, and this remained unaltered irrespective of the number of facilities or the amounts involved. The Plaintiff's reference to “Harilal & Co. & Another – Versus - The Standard Bank Limited (1957) EA 512” was misplaced. The precedent set in Harilal explicitly stated That a bank could not vary its charges without the customer's consent. However, this case differed significantly as there was no question of charge variations. In light of the case of “George Williams Omondi & another – Versus - Co-operative Bank of Kenya Ltd & 2 others [2016] eKLR”, it was clear That a surety's liability would only be discharged to the extent of the unsecured liability, if any. So, where was the prejudice to the Plaintiff? His liability was expressly outlined in the Charge and the Letter of Guarantee and Indemnity, which remained unaltered throughout the transactions.
112. His view was That the Plaintiff's claim did not demonstrate any legal anomalies and lacked merit. The introduction of additional securities or the increase in the facility amount never absolved the Plaintiff of his responsibilities. His liability, which was well defined in the charge and the letter of guarantee and indemnity, had not been altered by these subsequent events. Therefore, while the Plaintiff may argue variations in the loan facilities or consolidation of loan accounts, these never invalidated the original agreement. The Plaintiff consented to the terms, including the property's use as security for future loans, and thus remains liable.
113. The bank was only obligated to claim what was covered in the Charge and the letter of guarantee and indemnity. Any allegations That exceeded these limits were inherently baseless. The claims of the Plaintiff, therefore, fell short of establishing any legal malpractice or breach of contractual obligations. The Plaintiff in respect of whether the statutory notices were appropriately served. In light of the gravity of this issue, and to facilitate a comprehensive understanding of their position, they found it necessary to critically examine each submission in its proper context and clarify some essential points.
114. The Learned Counsel asserted That the 1st Defendant could not exercise a statutory power of sale or demand payment owing to a myriad of purported infractions. Before they delved into the specifics, they would like to set the stage with a broader perspective. This dispute had been mired in litigation for four full years, a span during which the Plaintiff had been aware of the default yet had remained steadfastly inert in taking action to remedy this situation. Such a protracted duration without action on the Plaintiff's part raised profound questions about the sincerity of his protestations against the issuance of statutory notices.
115. In respect of the service of the statutory notices, the Learned Counsel upheld the position taken by the 1st Defendant to wit That it was clear and unequivocal: all required notices were indeed served upon the Plaintiff in accordance with the stipulations of the law. These notices were dispatched through registered post to the address provided in the charge instrument, which is Post Office Box Number 93232-80100, Mombasa. The Plaintiff disputes this assertion, claiming an incorrect address was used for service. He asserted That his legitimate address is P.O Box Number 93231-80100, Mombasa. This address, he claimed was reflected in the Title Deed and other associated documents. However, it was crucial to remind the court That the charge instrument, which contained the address used for



- service, was executed by the Plaintiff without any subsequent objections or alterations pertaining to the contents therein, including the mentioned address. Therefore, it was reasonable to conclude That the Plaintiff accepted the address at the time of execution, making it the definitive reference point for all further proceedings.
116. He argued That the charge instrument That was presented by the 1st Defendant, wherein the Plaintiff's postal address was clearly indicated as Post Office Box Number 93232-80100, Mombasa. While the Counsel recognized That other documents indicated a different address, the foundational contract, i.e. the charge instrument, was what governed this relationship and established the parameters for service of notices. The charge instrument contained an incorrect address, an assertion That rested solely on his verbal claim. However, it was well-settled in law That the party who alleged must prove. Despite his insistence, the Plaintiff had not provided any evidence from the Postal Corporation of Kenya indicating That the address used by the 1st Defendant was not his and belonged to another person. In the absence of such conclusive proof, the Counsel held That they must rely on the address provided in the charge instrument. The 1st Defendant could not be faulted for relying on the address That the Plaintiff himself provided without objection in the legally binding charge instrument.
 117. The Learned Counsel submitted That the Plaintiff's referenced to the case of "Robert Kipyegon Chepkwony - Versus - Barclays Bank of Kenya Limited (Supra)" highlighted the importance of properly serving a 90-day notice. The Counsel wholeheartedly agreed with the principle. Nevertheless, such notice was correctly dispatched to the address stipulated in the charge instrument, fulfilling the prerequisite for exercising the chargee's statutory power of sale. Finally, in the case of "Peter Ngure - Versus - Pioneer Building Society (In liquidation) (2014)eKLR", the court emphasized the importance of the equity of redemption and strict adherence to the law in extinguishing it. They not only acknowledged but also uphold the sanctity of these principles. In the present case, all mandatory steps were undertaken as required by law, with the notices correctly served to the address contained in the charge instrument, thus rendering their exercise of the statutory power of sale legal and valid.
 118. The Learned Counsel affirmed That the 1st Defendant acted in good faith and within the confines of the law in serving the statutory notices and exercising the statutory power of sale. The Plaintiff's contention of improper service was devoid of merit, particularly when viewed against the backdrop of the address provided in the charge instrument. The Plaintiff's submissions, never carried the weight of evidence or legal precedence undermine their position. The Learned counsel therefore urged the court to consider these facts and rule in favor of the 1st Defendant.
 119. On whether the notice were valid, the Learned Counsel opined That the Plaintiff was expressing concerns about the amount demanded in the statutory notices, specifically claiming it exceeded the original sum secured under the charge. However, these concerns were, regrettably, based on a misunderstanding of the charge instrument. Bearing in mind the primary obligation of this Court to apply the law as it stood, a path guided by the signposts of evidence and clear legal principles rather than the winding, obscure route of conjecture or speculation.
 120. Acknowledging That a charge was indeed registered over the suit property on 30th May, 2016 to secure a principal amount of Kenya Shillings Six Million Three Hundred Thousand (Kshs. 6,300,000.00), the Learned Counsel noted That this arrangement was facilitated through a letter of offer dated 3rd February, 2016. This letter of offer permitted the advance of a facility amounting to Kenya Shillings Thirty Million (Kshs. 30,000,000.00) to the 3rd Defendant. Now, while the Plaintiff argued That this facility had been fully repaid, the truth of this assertion was indeed in contention. There was a glaring absence of any substantiating evidence presented by the Plaintiff to corroborate this claim of full repayment. Furthermore, there was no indication, much less proof, That the Plaintiff had ever issued a



formal notice for determination of the charge as provided for in clause 40 of the charge instrument or the letter of guarantee and indemnity (clause 7). Thus, the Plaintiff's contention overlooked the finer details and intricacies of the charge instrument and the circumstances surrounding its discharge.

121. The Learned Counsel held That the Plaintiff's argument That the notices were unlawful since the secured amount was allegedly fully liquidated revealed a fundamental misunderstanding of the nature of the charge instrument. The charge was not simply a one-off contract That secured the specified loan. Instead, it served as an enduring agreement with prospective application to future facilities as well. It was meticulously designed to secure any additional facilities advanced, firmly capturing the principle of continuing security. Therefore, the statutory notices issued by the 1st Defendant was squarely within the scope of the charge instrument and categorically cannot be termed as void or unwarranted.
122. He discerned That the lack of compelling evidence showing That the amount of Kenya Shillings Six Million (Kshs. 6,300,000/-) was fully paid off remained glaring. Neither was there any documented request for determination or discharge. This substantiated the continuing security nature of the charge instrument and the intention of the parties, standing firmly in line with the legal requirements thereof. Clause 40 of the charge instrument was indeed pivotal in this matter. The clause unequivocally states:
- “Upon final balance of the money hereby secured having been paid off and satisfied with all interest due thereon and upon payment of all costs, charges and expenses incurred by the bank in relation to the property, the bank shall, at the request and cost of the chargor and/or borrower, discharge this charge.”
123. This clause underscored the fundamental fact That the extent of the bank's exposure was up to the amount secured and related incidentals. Without an official request and demonstrated satisfaction of all financial obligations, the charge stood. In such circumstances, the statutory notices issued by the 1st Defendant was not only legally valid but also well-grounded in the contractual agreement between the parties.
124. On the general and aggravated damages, the Learned Counsel underscored That in response to the Plaintiffs claim for general and aggravated damages, he would like to carefully dissect the legal principles involved and analyze the evidence at hand. The Plaintiff, citing the case of “Miguna Miguna – Versus - The Standard Group Limited (Supra), which in turn quotes “John – Versus – GM (1993)QB 586”, argued That aggravated damages were awarded when a Defendant acted out of improper motive, for example, where malice is evident, or when there's an insistence on an evidently unjustified defense, or when a failure to apologize was noted. The Plaintiff then proceeded to categorize the 1st Defendant's actions as “oppressive, arbitrary and unconstitutional” and pleaded for an award of Kenya Shillings One Million (Kshs 1,000,000.00/=) in damages. With the utmost respect to the Plaintiffs arguments, the 1st Defendant strongly contended That their actions were, in fact, neither oppressive, arbitrary nor unconstitutional. The actions were instead guided by the contractual obligations of the parties as stipulated in the charge instrument. Every action taken was a result of a default by the Plaintiff, not an “improper motive”.
125. The Learned Counsel submitted That crucially, the Plaintiff had not provided any specific or detailed evidence of this alleged oppression, arbitrariness or unconstitutionality. There were no actions pointing towards any malice or an improper motive. The actions of the 1st Defendant were purely in response to the default in the payment of the loan secured by the charge and in line with the express terms of the charge instrument. The award of aggravated damages not automatic. It was an exceptional remedy awarded in circumstances where there was clear proof of high-handed, insulting or oppressive



- conduct. It was trite law That damages were not awarded on the mere basis of the Plaintiff assertions, but on concrete evidence or loss or suffering directly attributable to the Defendant's actions. In the case at hand, the Plaintiff had failed to substantiate his claims of suffering or loss with tangible evidence.
126. Further, the Learned Counsel asserted That the insistence on a defence could not be termed as "improper motive", nor could it be viewed as an act of malice. It was the right of every litigant to defend their position. It was noteworthy to mention That the 1st Defendant never failed to apologize, because there was no action taken That necessitated such an apology. The actions of the 1st Defendant were taken in a lawful manner, strictly adhering to the terms and conditions of the charge, which was duly executed by the parties involved. On the claim for general damages, it was a well-established principle That such damages were compensatory in nature, aiming to put the Plaintiff in the position they would have been in, had the alleged wrong not occurred. The Plaintiff had not demonstrated how they have been placed in a less favourable position as a direct result of the 1st Defendant's actions, nor shown evidence of the psychological harm alleged. Thus, this claim too lacked the necessary evidentiary support. The Plaintiff's claim for both general and aggravated damages was not substantiated and hence, should not be granted.
127. In conclusion, the Learned Counsel submitted That this suit provided a poignant example of the old adage That 'truth is the first casualty of war', and nowhere was this more apparent than in the realm of litigation. The shifting sands of the Plaintiff's narrative, the many inconsistencies and contradictions, did not merely muddy the waters of these proceedings but sought to cast a thick veil over the light of truth and justice. Throughout the course of this suit, the Plaintiff's actions had exhibited a troubling pattern of dishonest litigation. His own testimony stood in stark contrast to the initial pleadings, wherein he claimed That he had never signed the charge instrument, only to later admit under oath That he indeed had. This, amongst other discrepancies, signified a worrying level of disingenuity on the part of the Plaintiff. This claim, once scrutinized and considered in the cold light of day, bore little more than the hallmarks of a tale woven from threads of inaccuracy and inconsistency. It lacked the substantive underpinnings upon which any legitimate legal claims ought to rest, and thus it was contention That it had no firm ground to stand upon. Dishonesty, was a grave offence in any arena, but within the hallowed halls of justice, it bore an even greater weight. A dishonest litigant never deserved the audience and leniency of the court, for to reward dishonesty would be a disservice to the principles upon which this institution stands.
128. The Learned Counsel argued That this suit should be dismissed with costs. It represented a regrettable evasion of responsibility on the part of the Plaintiff who, in his roles as chargor and guarantor, seemed unwilling to face the consequences of his actions. The Plaintiff's actions had resulted in considerable prejudice to the 1st Defendant. The reputational harm, the financial strain, the uncertainty - these could not and should not be disregarded. The court should view this suit for what it truly was: a flimsy attempt by a chargor and guarantor seeking to evade his obligations under the guise of litigation.
129. In light of these factors, the Learned Counsel implored the court to uphold the sanctity of justice and truth. To give credence the Plaintiff's case was to reward deceptions and irresponsibility. The Learned Counsel submitted That the court should dismiss this case with costs, in favour of the 1st Defendant. By doing so, the Court would send a resounding message, both to the litigants before it and to the public at large, That honesty, integrity, and responsibility were the pillars of the Kenyan justice system. In closing, they humbly reminded the Honourable Court of the words of Sir Francis Bacon, who rightly observed That "truth is the daughter of time, not of authority." Time has, indeed, revealed the truth of this matter. It was now in the Court's authority to give effect to it.



VII. Analysis and Determination

130. I have keenly assessed the filed pleadings by all the parties herein, the evidence adduced by the witnesses summoned by both parties, the detailed and lengthy written submissions and the various cited authorities, the relevant and appropriate provisions of *the Constitution* of Kenya, 2010 and the statutes.
131. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following four (4) issues for its determination. These are: -
- a. Whether this Honourable Court has the requisite jurisdiction to determine this suit?
 - b. Whether the filed suit through a Complaint dated 22nd November, 2019 by the Plaintiff against the 1st, 2nd and 3rd Defendants herein has any merit whatsoever.
 - c. Whether the Plaintiff is entitled to the orders sought
 - d. Who bears the costs of the suit?

a). Whether This Honourable Court Has The Requisite Jurisdiction To Determine This Suit?

132. Under this Sub heading, the Honourable Court feels it imperative to commence, first and foremost by disposing off the issue of its Jurisdiction to hear and determine this matter hereof. It rather unfortunate its being raised at the tail end though parties are entitled to their right. Ideally, the Jurisdiction of this Court has been through extensive submissions called into question by the 1st Defendant who contends That this Court has no jurisdiction as the dispute arises from a contractual relationship between the Plaintiff and the Defendants herein thus of Commercial nature lending transaction. Jurisdiction is everything and without it, a Court of Law has no option but to down its tools. The Court must then first deal with the said issue.
133. In the case of “Lillian “S” – Versus - Caltex Kenya Limited [1989] eKLR”, the Court of Appeal held as follows:

“By jurisdiction is meant the authority which a court has to decide matters That are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion That it is without jurisdiction.”



134. Further to this, in the case of “Republic – Versus - Karisa Chengo & 2 Others [2017] eKLR”, the Supreme Court held as follows:

“By jurisdiction is meant the authority which a Court has to decide matters That are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

135. The Court has gone through the pleadings by the parties and more particularly the instant Application. The Court does note That indeed the Plaintiff/ Applicant has raised issues as to whether the 1st Defendant charged the interest exorbitantly making the same a commercial issue. However, there are also various issues That were raised with regards to whether the Statutory Notice was proper amongst other issues.

136. The Environment & Land Court has its Constitutional root from the bedrock of the provision of Article 162(2) (b) of *the Constitution* which provides as follows:-

- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to: -
 - a. Employment and labour relations; and
 - b. The environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

137. To give effect to Article 162 (2) (b) of *the Constitution*, Parliament enacted the *Environment and Land Court Act*, No. 19 of 2011 whereby its provision of Section 13 of the said Act which provides as follows:

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of *the Constitution* and with the provisions of this Act or any other written law relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162 (2) (b) of *the Constitution*, the court shall have power to hear and determine disputes relating to environment and land, including disputes-
 - a) Relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b) relating to compulsory acquisition of land;
 - c) relating to land administration and management;
 - d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e) any other dispute relating to environment and land.



- (3) –
- (4) –
- (5) –
- (6) –
- 7) – In exercising of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including –
 - a) Interim or permanent preservation orders including injunctions;
 - b) Prerogative orders;
 - c) Award of damages;
 - d) Compensation;
 - e) Specific performance;
 - f) Restitution;
 - g) Declaration; or
 - h) costs.

138. In its argument, the 1st Defendant has relied on several Court of Appeal decisions on the subject matter including and not limited to the now famous case of “Co - operative Bank of Kenya (Supra) wherein the Court of Appeal held That the High Court was the only one seized with the Jurisdiction to deal with accounting problems. Be That as it may, this Court having thotoughly assessed the pleadings and hearing of the evidence adduced, has indeed noted That indeed there exists several accounting issues in dispute herein but apparently the accounting issues are not the only ones in dispute. Indeed, there are numerous other issues such as the title deed of the suit land being utilized as collateral for the guaranting of the loans; whether the Statutory Notices were served upon the Plaintiff before the Redemption Notice was served upon the Plaintiff; the Redemption of the Auctioneers Notice of Sale of goods and so forth.
139. To me, I reiterate That these issues and in particular, the issue of whether the Auctioneer’s 45 Days Redemption Notice and Auctioneer’s Notification of Sale upon the Plaintiff was a nullity in law, it is the Court’s considered view That the said prayers fall within the jurisdiction of the Environment and Land Court. The provision of Section 150 of the Land Act, No. 6 of 2012 and Section 101 of Land Registration Act, No. 3 of 2012 also provide for the Jurisdiction of the Environment and Land Court as the two Acts address the land transactions and dispositions of land. The process through which a chargor can exercise its statutory power of sale is found in the said Acts and therefore the Jurisdiction of the Environment and Land Court (ELC) in dealing with the same is justified. See the case of “Lydia Nyambura Mbugua – Versus - Diamond Trust Bank Kenya Limited & another [2018] eKLR”.
140. On the other hand, the Matrimonial Property Act No. 49 of 2013 does not specifically define “court” but it is trite That division of matrimonial property is determined by the High Court under its jurisdiction as provided under Section 3A of the Civil Procedure Act and Article 165(3) (a) of the Constitution of Kenya 2010. It is my opinion That in one part of this claim and what this court is being called upon to do in terms of division of matrimonial property can only be done in the High court. However That part of the claim is severable and its inclusion does not invalidate any other claim That may be properly before this court and of which this court may possess jurisdiction to deal.



141. The issue of ownership of the properties arises in this matter. From the Plaintiff's claim is That he owns the house with his wife and the fact That the house has sentimental value to him. Ownership goes into the root and the issue of title and That is perfectly within the jurisdiction of this court as it is a challenge to the Defendant's title to the suit properties.

142. My sister Hon Justice Kemei had this to say in the case of "B W M – Versus - J M C [2018] eKLR" when confronted with a similar challenge in a matrimonial setup:

“ 16. Much as the Plaintiff purports to seek a declaration in her final prayers That the suit land be declared a matrimonial property, the substratum of the dispute at hand is ownership of the suit land. Having found That the suit land has a certificate of title registered in the name of the Defendant which the Plaintiff seeks to impair by claiming ownership of the suit land on account of the alleged developments, That places the case squarely in the jurisdiction of the ELC Act and consequently the ELC Court.”

143. Justice Mwangi Njoroge had no difficulty dealing in the same and manner which had similar issues as sated herein in the case of:-“Kitale Land Case No. 67 of 2011 (O.S) Nasibi Aore – Versus - Jane Anyona Omutsani” as consolidated with “Kitale ELC No. 86 Of 2012 - Jane Anyona Omutsani vs Nasibi Aore” as well as “Kitale Land Case No. 39 Of 2020 Chepkaptul Akudi James Kukui Lortole”.

144. Having stated this and taken into consideration the whole set of facts and inferences in this matter, I am of the strong view That this court has jurisdiction to strictly hear and determine all parts of this dispute as relate only to title, use and occupation of land as described in paragraph 143 herein before. For That reason, the argument raised belatedly by the Learned Counsel for the 1st Defendant through his submissions, on the fact That this Court is not clothed with Jurisdiction to entertain the matter, save for prayers 2, 3 and 4 of the Plaint fails outrightly.

b). Whether The Filed Suit Through A Plaint Dated 22Nd November, 2019 By The Plaintiff Against The 1st, 2Nd And 3Rd Defendants Herein Has Any Merit Whatsoever.

145. Under this sub heading, the Court notes That in a nutshell, the main substratum in this matter pertains to the usage of the title deed as collateral for securing and guaranteeing loan facilities from a financial institution through a duly executed Charge and the efforts to exercise Statutory power of sale upon the breaches of the Charge.

146. Primarily, before embarking on the indepth analysis to arrive at a decision, it is trite law That in any suit of this nature, the party who seeks to rely on the existence of a fact or a set of facts must provide evidence That those facts exist. This is what in law is termed as the “Burden of Proof” and is encapsulated for by Section 107 of the Evidence Act Cap 80 laws of Kenya which provides as follows:-

“ 107 Burden of Proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove That those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said That the burden of proof lies on That person’



147. In most cases where financial institutions give credit to companies, they will require that the Principal Borrower furnishes security inter-alia a Guarantee by the Directors of the Company. This is common among financial institutions who seek to protect themselves against loss on advances made to Principal Borrower. In the case of: “Ebony Development Company Ltd – Versus - Standard Chartered Bank Ltd (2008) eKLR”, the High Court stated the following regarding the obligation of a guarantor:

“The obligation of a guarantor is clear. It (sic) becomes liable upon default by principal debt....It is not guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum.”

148. Further, from Halsbury’s Laws of England 4th Edition Vol 20 Paragraph 194 puts the obligation of a Guarantor clearly and succinctly as follows:

“On the default of the principal debtor causing loss to the creditor, the guarantor is, apart from special stipulation, immediately liable to the full extent to his obligation, without being entitled to require either notice of the default or previous recourse against the principal....”

149. It is not in doubt that PW - 1 testified that by way of a Letter of Offer dated 3rd February, 2016 and produced as Defendant Exhibit - 1, the 1st Defendant advanced to the 3rd Defendant a facility of Kenya Shillings Thirty Million (Kshs. 30,000,000.00/=). The purpose of this facility was to facilitate the importation of various commodities and was to be repaid within a period of 12 months. This facility, was secured by four securities among them being the suit property owned by the Plaintiff in which a charge instrument dated 30th May, 2016 was registered to secure an amount of Kenya Shillings Six Million Three Hundred Thousand (Kshs. 6,300,000.00/=) only. Contrary to what is stated in its defense that the aforesaid loan amount was restructured, DW-1, on cross-examination, confirmed to this court that the loan advanced by letter of offer dated 3rd February, 2016 was repaid in full. In fact, the witness told the court that it was only the 3rd and 4th facilities that were restructured.

150. The Law at this instant then allows the 1st Defendant to exercise its statutory power of sale. However, in exercising its statutory power of sale, the law requires the 1st Defendant to comply with certain provisions, including issuing the Plaintiff with Statutory Notice and the Notification of sale. The 1st Defendant has averred that due process was followed as the borrower who is the 3rd Defendant was served with the requisite Notices. However, it is the Plaintiff’s contention that they were never served with the Statutory Notice and Notice to Sell, but were only served with the Redemption Notice, which was served upon the 3rd Defendant.

151. Legally speaking, a Contract of Guarantee is covered and regulated under the [Law of Contract Act](#) Cap 23, Laws of Kenya. A contract of Guarantee is a written promise by the Guarantor to answer for the debt of the Principal Debtor made to a person lender. On this point, I seek refuge from the case of “Robert Njoka Muthara & Another – Versus - Barclays Bank of Kenya Limited & Another [2017] eKLR, Civil Appeal No. 18 of 2014”:

“A guarantee by definition is a pledge by a person (guarantor), other than a party upon whom the contractual or other legal obligation is imposed, to the effect that if the party so bound (principal) fails to perform the act in question, the guarantor, will either perform or make good any loss or claim arising from the non-performance.”



152. The statutory notices stipulated under the Land Act are mandatory legal requirements. The right to exercise the statutory remedies accrues only after full compliance with the legal framework on statutory notices. The Statutory notice in the present case in my humble view was in accordance with section 90(2) of the Land Act and therefore the acts of the defendant in seeking to exercise its chargee's Statutory Power of sale are lawful.
153. Secondly, the provision of Section 96 of the Land Act, No. 6 of 2012 is explicit to the effect That after the borrower has failed to remedy the default in accordance with the notice issued under the law, the chargor, who is the guarantor is entitled to a notice of not less than 40 days under the provision of Section 96 (2) of the Land Act, before the chargee can sell the charged property. The notice under section 96(2) of the Land Act is mandatory, and is quite different from the Redemption Notice issued under rule 15 of the Auctioneers Act as herein explained.
154. Section 96(2) of the Land Act which provides as follows:-
- “Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell”.
155. The Court has perused the Statutory Notice and Notice of Intention to Sell That have been produced before it. The Court has also considered the Evidence adduced by the witnesses. It is not in doubt That the Plaintiff's address as provided in the Offer letter is P.O. Box 92233 – 80100 Mombasa. However the Plaintiff claims That his postal address was P.O. Box 93231 – 80100 Mombasa and That he provided the address to the Bank at the time of signing the document. DW 1 told the court That they were not under any duty to inform the guarantor of the further borrowing; they strictly deal with the borrower. From the charge the wife of the Plaintiff was a director of the 3rd Defendant at page 46 showed the spouse – Joan was a director. They got the address they used for the charge. The bank did not draw/draft charges, That was done by the advocates within the bank.
156. Therefore, it is not in doubt That these two addresses are different and the contention by PW - 1 That they never received the said Notices is merited. It is unreasonable to argue That it's the Plaintiff who ought to have proved That the correct address was his from information obtained from the Postal Corporation. Once a Guarantor alleges non-receipt of the Notices, it becomes incumbent upon the Chargee to prove That the Notices were sent out. In the instant case since the Notices were sent out to the wrong address, it is evident That the said notices are a nullity as the 1st Defendant has failed to prove That the Plaintiff received them.
157. In saying this, I rely on the case of: “Nyagilo Ochieng & Another – Versus - Fanuel Ochieng & 2 Others Civil Appeal No. 148 of 1995 [1995-1998] 2 EA 260” where the Court of Appeal while dealing with Section 74(1) of the repealed Registered Land Act held That:
- “It is trite That before a chargee can exercise his/her/its statutory power of sale there must be compliance with Section 74(1) of the Registered Land Act (Cap 300 Laws of Kenya). This section obliges the chargee to serve, by registered post, the relevant statutory notice. Three months after the chargor's receiving such notices the bank's power of sale arises. This is the basis upon which the bank can put up the properties for sale. The appellants stated, in their plaint, That they did not receive any statutory notices. This averment should have put the bank on guard. It is for the chargee to make sure That there is compliance with the requirements of Section 74(1) of the Registered Land Act. That burden is not in any



manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove That such notice was in fact sent. Although the last known address of the appellants was correct, it must be understood That in face of the denial of receipt of statutory notice or notices it is incumbent upon the chargee to prove the posting. It would have been a very simple exercise for the bank to produce a slip or letters containing statutory notice or notices. The bank did not do so. Instead an officer from the bank simply produced file copies of the notices to prove That the same were sent. Even on a balance of probability it is not sufficient to say That a file copy is proof of posting. Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the *Interpretation and General Provisions Act*, Cap 2, Laws of Kenya. It is quite possible That such notices were sent but That fact, in the face of the denial of receipt, must be proved. It is possible That the letters addressed to the two appellants were received by the first respondent who avoided telling the appellants of anything about the same as he was the “villain in the matter”. In the absence of proof of such posting the Court is constrained to hold That the sale by auction was void. The learned Judge fell into error and misdirected himself when he held That the notices were sent to their correct address on the supposition alone That the postal address of the appellants was P. O. Box 120, SARE...In coming to the conclusion, the Court has reached, it cannot but entertain the view That the bank ought to have been more careful in proving service of the statutory notices. Failure of such proof has resulted in an innocent purchaser for value being deprived of the title to the suit properties.”

158. Further to this, I wish to cite the case of:- “Martha Khayanga Simiyu – Versus - Housing Finance Co. of Kenya & 2 Others Nairobi HCCC No. 937 of 2001 [2001] 2 EA 540” the Court held That:

“...The irregularities in the exercise of the power of sale, which are remediable in damages, do not in the premises comprehend failure to serve adequate statutory notice...Service of both an adequate statutory notice and notification of sale are necessary conditions precedent for the valid exercise of the statutory power of sale under the R.L.A and without compliance with those statutory commands, there can be no valid exercise of the power of sale and therefore it cannot be said That the chargor’s equity of redemption is extinguished in any sale conducted in breach thereof. Neither can it properly contended That the chargor’s remedies if any such sale has taken place is in damages as provided in Section 77(3) of the Act. Without compliance with those conditions precedent, the purported sale would be void and liable to be nullified at the instance of the chargor...”

159. Therefore, it follows That as the Statutory Notice and Notification of sale as contemplated under the provision of Sections 90 and 96 of the *Land Act*, No. 6 of 2012 clearly were never served on the Plaintiff who is the guarantor as envisaged by law. Therefore, it is the Court’s considered view That the Auctioneer’s Notice is a nullity in law. To this effect the prayer sought by the Plaintiff succeeds.

c). Whether The Plaintiff Is Entitled To The Orders Sought.

160. As already held by the Court, this Court has no jurisdiction to handle the issues That relate to accounts with regards to the loan facility. Therefore the Court finds and holds That it has no jurisdiction to deal with prayers 2, 3 and 4 of the Plaint dated 22nd November, 2019.

161. However, the Court having found That the proper Statutory Notices were never sent out and hence held That the Auctioneer’s Redemption Notices were a nullity in law, then it finds That prayer no. (5)



is merited in terms of granting a declaration That the statutory notices and advertisement for sale issued by the 2nd Defendant in respect of Title No. Mombasa /Municipality/ Block/2/5 on the instructions of the 1st Defendant are null and void. The 1st Defendant are thus barred from selling the suit property by way of public auction at this stage until proper notice is given and procedure followed.

162. The Plaintiff has sought the discharged of the suit property claiming it to be his matrimonial property and That the suit property has sentimental value to him. According to DW 1 the in reference to Clause 5 proviso- there was no discharge of charge after the 1st loan was settled as there was no request made. There was a spousal consent was signed by the Plaintiff on 28th June, 2016. The charge was dated 30th May, 2016 under Section 82 of RLA was on the further advancement. This was applicable so long as all the facilities had been cleared. He told the court That they can assume That the loan of Kenya Shillings Thirty Million (Kshs 30,000,000/-) was fully paid. For every letter of offer the purpose of the loan is started. The 2nd loan was for Kenya Shillings Fourty Five Million (Kshs. 45,000,000/-) purpose was Bill of duration for repayment for 12 months. The 3rd loan was for Kenya Shillings Twenty Three Million (Kshs. 23,000,000/-) for repayment of 6 months and the 4th loan was for a sum of Kenya Shillings Fourty Five Million Five Hundred Thousand (Kshs. 45,500,000/-). The only statement produced in Court is for this facility. The 3rd and 4th loan were restructured as the 1st and 2nd loan were fully paid. The guarantee gave the bank a contract for the repayment of the 1st loan of a sum of Kenya Shillings Six Million Three Hundred Thousand (Kshs. 6,300,000/-) once the loan had been settled, the Guarantor was not informed.
163. As for the prayer sought for general damages and aggravated damages, the Plaintiff was a guarantor to a loan facility That the borrower defaulted on therefore incurring costs to the lender the 1st Defendant therefore the Plaintiff has not proved That they are entitled to the damages they seek. I shall therefore not award That prayer. Consequently, all said and done, the Honourable Court holds and finds That prayers 6 by the Plaintiff are not merited at this juncture and the said prayers are disallowed entirely.

d). Who bears the Costs of the Suit?

164. It is now well established That the issue of Costs is at the discretion of the Court. Costs meant the award That is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds That Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed That the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated That costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
165. In the present case, from the given circumstance of the case, it is just fair, reasonable and Equitable That each party herein to bear its own costs accordingly.

VIII. Conclusion and Disposition

166. In the end, having caused such an indepth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds That the Plaintiff has established his case against the 1st, 2nd and 3rd Defendants herein. Thus, the Court proceeds to make the following specific orders:



- a. That Judgement be and is hereby entered partially in favour of the Plaintiff against the 1st, 2nd and 3rd Defendants herein strictly with regard to prayers numbers 1 and 5 of the Plaint dated 22nd November, 2019.
- b. That a declaration that land title no. mombasa/ municipality/block/2/5 being matrimonial property is subject to the provisions of Sections 28 (a) and 93(1), (2), (3) and (4) of the [Land Registration Act](#), 2012.
- c. That a declaration That the statutory notices and advertisement for sale issued by the 2nd Defendant in respect of Title No. Mombasa /Municipality/ Block/2/5 on the instructions of the 1st Defendant are null and void.
- d. That further each party herein to bear its own costs.

It is so ordered accordingly.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 6TH DAY OF NOVEMBER 2023.

HON. JUSTICE L.L. NAIKUNI (MR.)

Judgement delivered in the presence of:-

- a. *M/s. Yumna – the Court Assistant.*
- b. *No appearance for the Plaintiff.*
- c. *No appearance for the 1st, 2nd & 3rd Defendants.*

