



**Njuguna v Guaranty Trust Bank (Kenya) Limited & 2 others; Ngotho t/  
a Ndundu Cereals Stores & another (Defendant) (Commercial Suit 187 of 2011)  
[2025] KEHC 10290 (KLR) (Commercial and Tax) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10290 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL SUIT 187 OF 2011**

**NW SIFUNA, J**

**JULY 3, 2025**

**BETWEEN**

**DOROTHY WANJIKU NJUGUNA ..... PLAINTIFF**

**AND**

**GUARANTY TRUST BANK (KENYA) LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**THE REGISTRAR OF LANDS ..... 2<sup>ND</sup> DEFENDANT**

**GUARANTY TRUST BANK (KENYA) LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**DAVID NJUGUNA NGOTHO T/A NDUNDU CEREALS  
STORES ..... DEFENDANT**

**MONICA WAMAITHA NJUGUNA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff filed the suit through a plaint dated 19<sup>th</sup> May 2011, subsequently amended on 28<sup>th</sup> November 2018. Her case is that she was the wife of the late David Njuguna Ngotho, (Ngotho) the registered proprietor of Land Reference No. Dagoreti/ Kangemi/S.70, located in Nairobi District (the suit property).
2. The plaintiff claimed that holds a license to occupy the suit property on which her matrimonial home stood. On 19<sup>th</sup> December 2005, the plaintiff registered a caution against the suit property claiming a licensee's interest which the 2<sup>nd</sup> defendant, Registrar of Lands, registered forbidding all dealings with the property.



3. Thereafter, unknown to the plaintiff, the late David Njuguna Ngotho charged the property to the 1<sup>st</sup> defendant to secure a loan without the plaintiff's consent. The charge was registered against the property while the plaintiff was a licensee, thereby compromising her rights over the property.
4. The Registrar failed to enter the registration of the caution on the land register [Green Card] for the said land parcel, compromising her rights over the property. This enabled the 1<sup>st</sup> defendant to register a charge to the detriment of the plaintiff's rights as a licensee.
5. On 8<sup>th</sup> February 2011, the 1<sup>st</sup> defendant issued a three-month's notice to the late David Njuguna Ngotho of its intention to sell the property by public auction to recover the sum loaned to him.
6. This led the plaintiff to file this suit seeking:-
  - a. A declaration that the charge registered over Land Title No. Dagoretti/Kangemi/S.70 is null and void.  
 An order that the charge registered over Land Title No. Dagoretti/Kangemi/S.70 be removed.  
 An order the 1<sup>st</sup> Defendant do surrender the Title Deed and do execute a Discharge of Charge over Land Parcel No. Dagoretti/Kangemi/S.70.  
 The 2<sup>nd</sup> Defendant do deregister the Charge registered on the Land Title No. Dagoretti/Kangemi/S.70 and to enter on the land register the caution lodged by the Plaintiff registered on 09/12/05 against the Land Title No. Dagoretti/Kangemi/S.70.
  - b. The 1<sup>st</sup> Defendant be restrained by a permanent injunction order from selling, offering for sale or in any manner dealing with the Land Title No. Dagoretti/Kangemi/S.70 pursuant to the charge registered over the land parcel.
  - c. Costs of the suit.

### **Registrar of Lands' Defence**

7. In September 2014, the Registrar of Lands filed a defence dated 28<sup>th</sup> August 2014. She denied the plaintiff's claims against her. She indicated that she had no knowledge that the plaintiff was the wife of the late David Njuguna Ngotho. She denied that the plaintiff lodged a caution but admitted the charge to the 1<sup>st</sup> defendant.

### **Guaranty Trust Bank's Defence**

8. Through a ruling of 22<sup>nd</sup> November 2018, Fina Bank Limited was substituted with Guaranty Trust Bank (Limited) as the 1<sup>st</sup> defendant, following an application dated 21<sup>st</sup> June 2018.
9. The 1<sup>st</sup> defendant bank filed a defence and counterclaim amended on 6<sup>th</sup> December 2018, denying the plaintiff's claim. It admitted that the late David Njuguna Ngotho was the registered proprietor of the charged property. It also admitted that he charged the property to secure the banking facilities granted.
10. The 1<sup>st</sup> defendant denied that any caution was registered against the property at the plaintiff's instance on 10<sup>th</sup> December 2005 or at all. It also denied that the registered proprietor had to obtain the plaintiff's consent before creating and registering the charge over the property.
11. The 1<sup>st</sup> defendant asserted that if the caution was not registered, the plaintiff's interest was not noted contrary to Section 15 of the Registered *Land Act*. That in the circumstances, the alleged interest enjoys no legal protection. That the 1<sup>st</sup> defendant did not and could not have had any notice of the plaintiff's alleged interest since the caution was not registered. That it enjoys legal and statutory protection as



chargee under Sections 31 and 39 of the Registered Land Act in force at the time of the creation of the charge.

12. The 1<sup>st</sup> defendant averred that the banking facilities which had been secured by the charge remain outstanding and unpaid despite persistent demands. It asserted that it is therefore entitled to realize its security comprised in the charge through exercise of its statutory power of sale. It also asserted that the plaintiff has no capacity to challenge the exercise of its rights since she is not a party to the charge. That the alleged omission to register the caution, cannot form a basis or cause of action to defeat its interests as a chargee.
13. At the time of filing this suit, the plaintiff had a pending suit against it, Nairobi HCCC No. 15 of 2009 and in which some reliefs similar to the ones sought herein were prayed for. A notice of withdrawal was subsequently filed but the plaintiff has not paid it the costs of that suit. The filing of this suit was an abuse of the court process. The same should be stayed until the plaintiff has paid the 1<sup>st</sup> defendant the costs.

### **Counterclaim**

14. The 1<sup>st</sup> defendant averred that through a letter of offer dated 23<sup>rd</sup> March 2007, it granted the late Ngotho a Kshs. 2,000,000 business loan. Through a guarantee and indemnity dated 28<sup>th</sup> March 2007, the 2<sup>nd</sup> defendant in the counterclaim, Monica Wamaitha Njuguna, agreed to pay to it on demand all liabilities of the late Ngotho whether future or contingent, on account of moneys advanced subject to a maximum of Kshs. 2,000,000/- together with interest thereon, bank charges as well as legal and other expenses
15. By way of a charge dated 4<sup>th</sup> May 2007, registered on 8<sup>th</sup> May 2007, the late Ngotho charged the suit property in its favour to secure the payment of the sum advanced together with interest and other bank charges. However, the late Ngotho did not repay the banking facility, and the same fell into huge arrears and became irregular. The outstanding amount on the late Ngotho's current account no. XXXXXXXXXXXX which is overdrawn stood at Kshs. 122,934.42 cts as at 29/02/2012 which sum continues to accrue interest at the rate of 33% p.a. from 1<sup>st</sup> March 2012 until payment in full. The amount on his loan account number LR XXXXXXXXXXXX stood at Kshs. 3,103,239.06 as at 20<sup>th</sup> February 2012 which sum continues to accrue interest at the rate of 39.5% per annum from 1<sup>st</sup> March 2012 until payment in full.
16. The 1<sup>st</sup> defendant has not been able to exercise its statutory power of sale over the charged property due to this suit.
17. The 1<sup>st</sup> defendant therefore seeks judgment by way of counterclaim for:-
  - a. The sum of Kshs. 3,103,239.06 cts due and owing on the 1<sup>st</sup> defendant's loan account LN 117500030 together with interest thereon at the rate of 39.5% per annum from 01/03/2012 until payment in full as against the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and severally;
  - b. The sum of Kshs. 122,934.42 cts due and owing on Current Account Number CA XXXXXXXXXXXX together with interest thereon at the rate of 33% per annum from 01/03/2012 until payment in full as against the 1<sup>st</sup> defendant.
  - c. Costs of the suit together with interest.



### **Plaintiff's reply to defence**

18. The plaintiff filed a reply to defence dated 13<sup>th</sup> June 2012, essentially reiterating the plaint. She averred that she was a spouse to the registered owner and a licensee over the suit property with a duly registered caution forbidding registration of any dealings with the suit property. She also contended that the charge created by the 1<sup>st</sup> defendant is invalid since there was already caution registered.

### **Monica Wamaita Njuguna's Defence**

19. The 1<sup>st</sup> and 2<sup>nd</sup> defendants in the counterclaim filed a joint statement of defence dated 12<sup>th</sup> July 2012, denying the counterclaim. The 2<sup>nd</sup> defendant also filed a separate defence dated 30<sup>th</sup> July 2012. They asserted that there was no meaningful explanation given. They prayed that the counterclaim be dismissed with costs. They were not properly informed of the effects of the charge. They denied that the plaintiff was entitled to equitable interest in the suit property.

### **Evidence**

20. Hearing commenced on 13<sup>th</sup> February 2023 and proceeded on 30<sup>th</sup> October 2023 and was concluded on 5<sup>th</sup> February 2024.

### **Plaintiff's Evidence**

21. The plaintiff, Dorothy Wanjiku (PWI) was the sole witness in her case. She adopted her witness statement dated 23<sup>rd</sup> May 2011, similar to the plaint as her evidence. She produced the plaintiff's list of documents, marked as plaintiff's exhibits 1 to 3, comprised of:-
1. Demand Notice from Macharia Mwangi & Njeru Advocates
  2. Caution dated 6<sup>th</sup> December 2005
  3. Application for Registration of Caution date 9<sup>th</sup> December 2005.
22. Ms. Wanjiku testified that she learned that the late Ngotho had charged the property when the auctioneers went to her shop because they wanted to value the land because he had taken a loan from Fina Bank.
23. Ms. Wanjiku testified that she lodged a caution over the suit property after her relationship with the late Ngotho deteriorated as she feared that he would either sell or charge the land. She indicated that the caution, which is dated 6<sup>th</sup> December 2005 was registered on 9<sup>th</sup> December 2005 at the Land Registry, Presentation Book Number 157-12-05 Receipt No. 0455724. She added that she never withdrew the caution and was never summoned by the Registrar over it or advised to withdraw it.
24. During cross-examination, Ms. Wanjiku confirmed that although the caution was intended to protect her interest as a licensee, she did not produce either a license agreement or a marriage certificate. She also acknowledged that the caution was not registered as indicated in her witness statement. She claimed that she only learned that the caution had not be registered later. Despite indicating that she had complied with all the requirements for registration of the caution, she admitted that she did not produce a receipt. She indicated that although the Registrar asked her to do a post-registration search, she postponed it due to the Christmas vacation and did it two years later.
25. She also confirmed that on 21<sup>st</sup> September 2010, her advocates, Mutinda and Associates Advocates wrote to the bank's advocates indicating readiness to discuss the issue with a view to settling the debt.



26. Ms. Wanjiku denied that she any part of the outstanding loan. However, she confirmed that in entry number 4 in the loan account statement produced by the defendant bank, showed that she paid Kshs. 20,000/- to the account. She claimed that this payment was for a school fee Banker's cheque. However, she was not given a copy of the Banker's cheque.
27. In re-examination, Ms. Wanjiku stated that she and the late Ngotho purchased the suit property from Mr. Kahuthu. She also stated that the letter from Mutinda and Associates Advocates was written on a without prejudice basis.

### **The 1<sup>st</sup> Defendant's Evidence**

28. The 1<sup>st</sup> defendant called, its manager, legal services, Beth Karanja, who adopted her witness statement dated 26<sup>th</sup> August 2023. She produced the 1<sup>st</sup> defendant's bundle of documents dated 4<sup>th</sup> June 2012, marked as 1<sup>st</sup> defendant's exhibits 1 to 20, which includes the loan application form dated 13<sup>th</sup> February 2007, Certificate of Registration of Ndundu Cereals Stores; letter of offer dated 23<sup>rd</sup> March 2007, copy of Fina Bank Limited's Standard Terms and Conditions, Charge dated 4<sup>th</sup> May 2007 over title number Dagoretti/ Kangemi/S.70 dated 25<sup>th</sup> February 2009, Deed of guarantee and indemnity dated 28<sup>th</sup> March 2007 by Monica Wamaitha Njuguna, Statutory notice under Section 65(2) of the Registered Land Act dated 14<sup>th</sup> July 2010, Copy of Certificate of Posting, Copy of Letter dated 21<sup>st</sup> September 2010 from M. Mutinda & Associates advocates to M/s Macharia-Mwangi & Njeru Advocates, Copy of Affidavit of service dated by Francis Mwaura Kamau, Copy of Notice to withdraw Nairobi HCCC No. 15 of 2009 Dorothy Wanjiku Njuguna v David Njuguna Ngotho & 2 others dated 7<sup>th</sup> July 2011, Copy of statutory notice under Section 74 of the Registered Land Act dated 8<sup>th</sup> February 2011, copy of certificate of posting, copy of affidavit of service by Francis Mwaura Kamau dated 11<sup>th</sup> February 2011, Copy of demand letter dated 4<sup>th</sup> April 2012 to Monica Wamaitha Njuguna, Copy of certificate of posting, Copies of statement of account on current account number CA XXXXXXXXXXXX and loan account number LN XXXXXXXXXXXX.
29. Ms. Karanja testified that there were repayments for about 5 months following which the loanee defaulted until now. She also indicated that the loan was insured, but the loanee defaulted in payments of premiums hence the policy expired and was not renewed.
30. Upon cross-examination, Ms. Karanja confirmed that the plaintiff did not participate in the loan application process. She also confirmed that the loan was disbursed to the late Ngotho.
31. Ms. Karanja stated that the loan was secured by the charge over the suit property, guarantee by Monica Wamaitha Njuguna and an insurance cover by UAP Insurance Limited. She indicated that the purpose of the insurance policy is that upon the demise of the policy holder, the insurance company would pay out any outstanding liability provided the policy holder has complied with the conditions. She indicated that the bank paid the first premium but stopped paying after the charger defaulted.
32. Ms. Karanja admitted that the bank did not conduct an official search before it disbursed the loan. She mentioned that the bank sent a valuer who in his report stated that there was a home on the suit property. She did not know whether there was any person such as a wife staying on the land.
33. Ms. Karanja stated that she indicated that at the time of registration of the charge, the law did not require spousal consent before a charge. She also indicated that the official search did not show any caution. She also stated that it was the chargor's responsibility to pay the insurance premiums. She clarified that according to the terms of the loan facility, the insurance premiums would be deducted upfront from the payments over 36 months.



## **The 2<sup>nd</sup> Defendant's Evidence**

34. The 2<sup>nd</sup> defendant, Monica Wamaitha Njuguna, DW1, adopted her witness statement dated 28<sup>th</sup> August 2021 as her evidence. She indicated that she was the late Ngotho's wife from 2002 to 2010. Sometime in 2006, he told her that he intended to take the subject loan from Fina Bank and offer the suit property valued at over Kshs. 5 Million as security. She knew the suit property belonged to him as she had visited him severally at his residential home located on the property as well as some rentals. She agreed to guarantee the loan based on their personal relationship and humanitarian grounds.
35. Upon cross-examination, Ms. Wamaitha confirmed that her name and signature were on the guarantee. She also confirmed that she knew the plaintiff, also the wife of the late Ngotho. She mentioned that they divorced in 2009. She did not know whether the plaintiff was living on the suit property when the late Ngotho applied for the loan. She indicated that she had no knowledge of a caution placed on the suit property.
36. Ms. Wamaitha intimated the late Ngotho was polygamous and he was staying with her at the time he applied for the loan. She did not know whether he repaid the loan. She only learnt that he had not repaid from this case. She faulted the bank for not pursuing the late Ngotho himself to pay the loan for over 10 years before his demise. She urged the court to release the title to the plaintiff, to dismiss the case against her and to order that the 1<sup>st</sup> defendant falls back on the insurance.

## **Plaintiff's Submissions**

37. The plaintiff filed written submissions dated 3<sup>rd</sup> April 2024. She argued that the entry of judgment in default by Havelock J. on 3<sup>rd</sup> May 2013, prayer (iv) of the plaint was automatically allowed. She also submitted that the entry of judgment permitted the de-registration of the charge over the suit property. She highlighted that none of the defendants have sought to set aside or appeal the judgment in default.
38. The plaintiff asserted that the suit property is her matrimonial property, where her matrimonial home is located. She contended that she produced in evidence the caution duly registered on 9<sup>th</sup> December 2005, the day the application for registration was lodged. She also contended that had the bank carried out proper due diligence, it would have obtained the caution. That the caution captures her interest as legal wife and licensee. That the late Ngotho was her husband since 1996. The suit property was purchased through their joint efforts. That she was residing in and had control of the property at the time it was taken as security by the bank.
39. The plaintiff submitted that the suit property is matrimonial property; that she had equitable interest in it and was in actual possession and control and that the late Ngotho only held the title to the property in trust for both of them. She also submitted that equitable interest combined with actual possession and control results in an overriding interest. She added that under common law, the equitable interest had a legal effect on any transactions involving the property. She relied on Mugo Muiru Investments Limited versus EWB and 2 Others [2017] eKLR and Williams & Glyn's Bank v Boland [1979] 2 All E R 697
40. The plaintiff relied on the Supreme Court decision in Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) to argue that the bank did not carry out sufficient due diligence before charging the suit property. She faulted the bank for failing to ascertain every material fact contained in the public document and to inspect the premises to ascertain the occupancy status of the premises.



41. The plaintiff challenged the bank's proposition that there was no requirement of spousal consent at the time of creation of the charge. She submitted that before the enactment of the [Land Registration Act](#) Cap 300, a married spouse's unregistered proprietary interest in a matrimonial home was protected under common law, the Married Women Property Act 1882 of England (now repealed) and the jurisprudence developed by Kenyan courts. Therefore, she argued the charge over the suit property is null and void ab initio and incapable of granting the 1<sup>st</sup> defendant the ability to exercise a chargee's power of sale.
42. The plaintiff submitted that the loan taken by the deceased was insured by the bank, which failed to renew the insurance policy. She also submitted that, therefore, the bank ought to be left to bear the consequences of its inaction.

### **1<sup>st</sup> Defendant's Submissions**

43. The 1<sup>st</sup> defendant filed written submission dated 14<sup>th</sup> April 2024. It submitted that the plaintiff has not proved her case on a balance of probabilities. It highlighted that the plaintiff admitted that the caution was not registered. There is no official search to confirm that it was registered. The 2<sup>nd</sup> defendant, Monica also admitted that she was not aware of any caution against the suit property.
44. The 1<sup>st</sup> defendant argued plaintiff failed to meet the registration requirement under Section 15 of the Registered [Land Act](#). Spousal rights over matrimonial property was not an overriding interest under Section 30 of the Registered [Land Act](#). The [Land Registration Act](#), which provides that spousal consent is a requirement, was enacted after the subject charge was created. In support, The 1<sup>st</sup> defendant relied on the ELC's decision in *Rose Chepkirui Mibei v Jared Mokuia Nyariki & 2 others* [2015] eKLR.
45. The 1<sup>st</sup> defendant highlighted that through a letter dated 21<sup>st</sup> September 2010, the plaintiff's advocates admitted that the debt was owed to it. It submitted that its interest as a chargee is noted on the register and the same cannot be subservient to the unregistered alleged licensee's interest. It also submitted that it enjoys protection of its interest as a chargee under the legal and statutory protection by virtue of sections 31 and 39 of the Registered [Land Act](#). It relied on *Isaac O. Litali v Ambrose W Subai & 2 others* HCCC No. 2092 of 2000 (unreported), cited in *Mohammed Khaled Khashoggi v Equity Bank Limited* [2013] eKLR.
46. The 1<sup>st</sup> defendant highlighted that while the case was ongoing, the late Ngotho passed on in 2021 and the suit against him stood abated. It thus submitted that the 2<sup>nd</sup> defendant is liable to pay the amount loaned to the deceased. It pointed out that during cross examination, the 2<sup>nd</sup> defendant admitted that she was the guarantor for the loan and that she had not paid the sum owing even after the demand.
47. The 1<sup>st</sup> defendant submitted that the essence of a guarantor is to discharge liability when the principal debtor fails to honor his duty. It relied on *Geraldine Andrews & Richard Millet* in "The Laws of Guarantees" at page 156 cited in *Robert Njoka Muthara & another Barclays Bank of Kenya Limited & another* [2017] eKLR".
48. The 1<sup>st</sup> defendant contended that the death of the late Ngotho did not invalidate the facility or the charge. It submitted that under clause 11(a) of the charge, the charger had an obligation to insure the suit property. It urged the court to decline the argument that the loan ought to be extinguished at the instance of the late Ngotho's demise.
49. The 1<sup>st</sup> defendant added that the issue of insurance is not borne of the parties' pleadings and urged the court to decline to make findings on issues not borne out of pleadings. It relied on *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others*; *Kenya National*



Commission on Human Rights & 3 others (Interested Parties) [2020] eKLR to the effect that parties are bound by their pleadings.

50. The 1<sup>st</sup> defendant asserted that it is entitled to realize the secured property in addition to recovery of its money. It also asserted that it is entitled to Kshs. 122,934.42 and interest at 33% being the amount overdrawn on the late Ngotho's current account number CA XXXXXXXXXXXX.
51. The 1<sup>st</sup> defendant urged the court to dismiss the plaintiff's claim and grant the prayers sought in its counterclaim dated 6<sup>th</sup> December 2018.

## **2<sup>nd</sup> Defendant's Submissions**

52. The 2<sup>nd</sup> defendant in the counterclaim filed written submissions dated 29<sup>th</sup> April 2024. She submitted that a charge over the suit property properly secured the loan and that there was a clear remedy being exercise of statutory power of sale. She relied on John P O Mutere v Kenya Commercial Bank Ltd and another, Nairobi High Court Civil Case Number 3125 of 1991.
53. The 2<sup>nd</sup> defendant also submitted that the 1<sup>st</sup> defendant never admitted indebtedness and therefore, she, as the guarantor, could not be included in these proceedings. She relied on Australia v Palmer (1897) AC 540 at 545 to the effect that as a matter of parole evidence, no other evidence can be adduced to contradict the legal charge.
54. The 2<sup>nd</sup> defendant asserted that there is no claim against the late Ngotho's estate for the loan amount as the loan was insured as per the evidence on record. She also asserted that the insurance policy was not within her purview and that it was the plaintiff's responsibility to ensure that the insurance policy was updated from time to time.
55. The 2<sup>nd</sup> defendant also submitted that the bank's claim against her is and afterthought and premature as it did not issue notices to her per sections 90(1), (2) and 96(2) of the Land Act.

## **Analysis and Determination**

56. I have considered the pleadings, the evidence, the submissions and the authorities by the respective parties. The issues for determination are whether the plaintiff and the 1<sup>st</sup> defendant have proved their respective claims.

## **Judgment in default**

57. The plaintiff's notice of motion dated 25<sup>th</sup> October 2012 was heard on 28<sup>th</sup> November 2012 by Havelock, J. who ordered that:-

“The Attorney General representing the 2<sup>nd</sup> defendant herein is given leave to file and serve a defence by 14<sup>th</sup> December 2012. In default of the same, judgment will be entered for the plaintiff as prayed for in the notice of motion dated 25<sup>th</sup> October 2012.”
58. The plaintiff's advocate, Wachira Ndung'u & Co. Advocates in a letter dated 21<sup>st</sup> January 2012 to the Deputy Registrar of this court, sought entry of judgment in default of defence against the Registrar of Lands. The basis of the request was that the Registrar had not complied with the court's order of 28<sup>th</sup> November 2012.
59. On 3<sup>rd</sup> May 2013, Havelock J. entered judgment in default of defence against the 2<sup>nd</sup> defendant for non-compliance with orders of 28<sup>th</sup> November 2012.



60. In September 2014, the Registrar of Lands filed a defence dated 28<sup>th</sup> August 2014. However, there is nothing on record to show that either the 1<sup>st</sup> or 2<sup>nd</sup> defendants sought to have the judgment in default of defence against the Registrar of Lands set aside. Therefore, the defence dated 28<sup>th</sup> August 2014 was irregularly filed.
61. The plaintiff argued that pursuant to the entry of judgment against the 2<sup>nd</sup> defendant, prayer (iv) of the plaint was automatically allowed permitting the deregistration of the charge.
62. Through prayer (iv), the plaintiff sought that:-
- “(d) The 2<sup>nd</sup> defendant do deregister the Charge registered on the Land Title No. Dagoretti/Kangemi/S.70 and to enter on the land register the caution lodged by the Plaintiff registered on 09/12/05 against the Land Title No. Dagoretti/Kangemi/S.70.”
63. The plaintiff asserted that prayer (i), (ii) and (iv) in the plaint stand allowed and or ought to be allowed in her favour to prevent contradictory orders. She also asserted that the through the entry of default judgment, she is deemed to have proved her claim that she lodged the caution with the Registrar and that the same was registered and therefore ought to appear in the register. She added that the Registrar is also deemed to have the caution lodged by her as the custodian of government records. This means that the caution documents were easily accessible by the 1<sup>st</sup> defendant if at all it conducted proper due diligence.
64. From the above, I note that only prayer (iv) of the plaint sought orders against the Registrar. The main prayers are against the 1<sup>st</sup> defendant bank. In my view, the issues of validity of the charge must be determined by the court on the merits as against the 1<sup>st</sup> defendant. This is based on the rules of natural justice which require a person is afforded a right to be heard and a fair trial. Therefore, the plaintiff's propositions that judgment be entered against the 1<sup>st</sup> defendant in terms of the main prayers on the basis of the judgment in default against the 2<sup>nd</sup> defendants cannot hold.

### **Validity of the charge**

65. I will now move to the question of the validity of the charge registered by the 1<sup>st</sup> defendant over the suit property. The plaintiff's claim is grounded on an alleged breach of fiduciary duty and infringement of her equitable rights. Her case is that the charge registered against the property is invalid, having been effected without her consent, notwithstanding that the property hosts her matrimonial home. The plaintiff further averred that she had registered a caution to protect that interest as a licensee.
66. On the other hand, the bank argued that the plaintiff has not proved its case to the required standard because she did not produce an official search to confirm that the caution was registered.
67. The bank argued that there relied on the persuasive decision of Munyao J in *Rose Chepkirui Mibei v Jared Mokuia Nyariki & 2 others* [supra] to the effect that:-

“...prima facie, spousal consent was not a requirement while the RLA was still operative. Section 30 of the RLA, which provided for overriding interests, did not have "spousal rights over matrimonial property" as part of the overriding interests under the RLA. Spousal rights over matrimonial property were introduced as overriding interests by Section 28(a) of the *Land Registration Act*, 2012. Neither was there any requirement for spousal consent before a charge could be executed or registered. This came with the new land laws comprised in the *Land Registration Act* and *Land Act, Act No. 6 of 2012*. It cannot therefore be argued by the



applicant that the charge is invalid for want of spousal consent. The requirement for spousal consent in the new land statutes cannot apply retrospectively. This indeed was the holding in the case of Stella Mokeira Matara vs Thadeus Mose Mangenya & Family Bank Ltd, Kisii ELC No. 209 of 2012 (2014) eKLR cited by counsel for the 2nd and 3rd respondents.”

68. On the other hand, the plaintiff relied on Mugo Muiru Investments Limited versus EWB and 2 Others [2017] eKLR, the Court of Appeal held that:-

“Prior to coming into force of the Land Registration Act Cap 300, a married spouse's unregistered proprietary interest in the matrimonial home by dint of his or her contribution to its acquisition and, therefore, as a part-owner thereof, was held in trust on his or her behalf by the spouse registered as title holder and owner, and such unregistered proprietary interest was in common law an overriding interest which superseded any registered instrument conveying title in the matrimonial property including a transfer and a charge.”

69. The above case shows that before the Land Registration Act, 2012 came into force, a married spouses' equitable rights in a property was an overriding interest in common law. Nonetheless, the above case is distinguishable to the present case. In that case, the appellant was married to the chargee and the bank was aware that the marriage before it advanced the further loan, which formed the subject of that case.

70. However, in the present case, there is no proof that the plaintiff was married to the late Ngotho or that she contributed to the purchase of the suit property. The plaintiff confirmed during cross-examination that she did not produce a marriage certificate.

71. The plaintiff relied on a caution 6<sup>th</sup> December 2005 based on a license agreement that she had lodged for registration on 9<sup>th</sup> December 2005. Yet, the plaintiff acknowledged during cross-examination that she did not avail either a license agreement or a post-registration search to confirm registration of the caution. Therefore, there is no proof that the bank had notice of any overriding interest through the registration of a caution.

72. In a civil claim, the burden of proof is upon the claimant. Section 107, 108 and 110 of the Evidence Act provide that:-

“Section 107.

(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.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

110. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.”

73. Based on the evidence before the court, I find that the plaintiff has not proved its case to the required standard. I also find that the charge registered over the suit property was valid.



## Counterclaim

74. The next issue is whether the 1<sup>st</sup> defendant bank has made out a case for the entry of judgment as per the counterclaim.
75. According to the letter of offer dated 23<sup>rd</sup> March 2007, the loan issued to the late Ngotho was secured by a charge dated 4<sup>th</sup> May 2007 over the suit property, a guarantee and indemnity dated 28<sup>th</sup> March 2007 by Monicah Wamaitha Njuguna and Key-man insurance premium will be paid directly to the insurer.
76. It is common ground that the late Ngotho passed away while the case was ongoing. The 2<sup>nd</sup> defendant argued that since the loan was also secured by a life mortgage insurance policy, the bank ought to recover the outstanding loan from the insurance, not her.
77. The bank opposed the argument that the loan ought to be extinguished at the late Ngotho's demise. It submitted that the death of the late Ngotho did not invalidate the facility or the charge; that under clause 11(a) of the charge, the charger was obligated to keep the suit property and the buildings thereon insured and that the issue of insurance is not borne out of the pleadings.
78. First, I reject the argument that the issue of insurance should not be dealt with as it was not borne of the pleadings. In *Odd Jobs v Mubea* (1970) E A 476, it was held that a court may base its decision on an issue that is not in the pleadings as long as the same arises in the course of the proceedings and the same is fully canvassed by the parties.
79. The bank's witness testified that it was the chargor's obligation to pay the insurance premiums for the insurance; that the insurance premiums would be deducted from the loan repayments and that the insurance premiums were not paid due to the chargor's default.
80. Through the letter of offer dated 23<sup>rd</sup> March 2007, the late Ngotho accepted the offer for the banking facility of Kshs. 2,000,000/- together with the Keyman Insurance Premium of Kshs. 18,000/-, subject to conditions in the letter of offer and Bank's Standard Terms and Conditions.
81. The loan statements reflect the Kshs. 2,000,000/- together with the Keyman Insurance Premium of Kshs. 18,000/- in the balance brought forward on 10<sup>th</sup> May 2007. They also reflect the 5 instalments paid by the charger on 20/06/2007, 21/07/2007, 05/09/2007, 21/09/2007, 17/11/2007 and 30/11/2007. Following this, the charger defaulted until further instalments were paid sporadically on 27/03/2009, 20/04/2009, 20/05/2009, 20/06/2009, 21/07/2009, 14/12/2009 and 01/11/2010.
82. Clause 11(e) of the Standard Terms and Conditions reads:-  
  
“Each party shall maintain adequate insurance in relation to its business and assets with reputable underwriters or insurance companies against risks usually insured by persons carrying on a business such as that carried on by the Relevant Party and such other risks as the Bank from time to time reasonably require; In case of non-payment of mandatory insurance for properties used as security to the bank, the bank shall have the liberty to debit your account and make payment to the insurer in order to adequately keep the securities insured at all times.”
83. Under clause 2.1 of the Standard Terms and Conditions, the “Relevant Party” means “each of the borrower, each of the Subsidiaries and each guarantor (if any) of the Borrower's obligation to the Bank in relation to the facility”



84. Clause 3 (11) (a) of the Charge provides that “the charger further covenants that during the continuance of the security, the charger will insure and keep insured all buildings being or forming part of the charged property...”
85. From the above, it was the late Ngotho’s obligation to pay for the life mortgage insurance cover. From the evidence on record, the late Ngotho defaulted in repayment of the loan and also did not pay the insurance premiums. Therefore, the 2<sup>nd</sup> defendant’s contention that the bank ought to recover the outstanding loan from the insurance fails.

### **Guarantee**

86. The bank produced the guarantee and indemnity dated 28<sup>th</sup> March 2003 signed by Ms. Monica Wamaitha Njuguna. During trial, Ms. Wamaitha confirmed that her name and signature appeared on the said guarantee and indemnity. In her witness statement and evidence in court, she confirmed that she agreed to guarantee the late Ngotho’s loan. Therefore, the 2<sup>nd</sup> defendant agreed to guarantee the loan as per the terms of the guarantee and indemnity.
87. The bank sought interest of 39.5% per annum from 01/03/2012 on the sum of Kshs. 3,103,239.06 cts due and owing on the 1<sup>st</sup> defendant’s loan account LN 117500030.
88. In *Housing Finance Company of Kenya Limited v Scholarstica Nyaguthii Muturi & another* [2020] KECA 833 (KLR), the Court of Appeal observed as follows:-

“As we have shown section 44A of the *Banking Act* came into force on the 1st May, 2007. That provision of law sets up the maximum amount of money a banking institution that grants a loan to a borrower may recover on the original loan. The banking institution is limited in what it may recover from a debtor with respect to a non performing loan and the maximum recoverable amount is defined as follows in section 44A(2):

“The maximum amount referred in subsection (1) is the sum of the following –

- a) The principal owing when the loan becomes non performing;
- b) Interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non performing; and
- c) Expenses incurred in the recovery of any amounts owed by the debtor.”

By that provision if a loan becomes non performing and the debtor resumes payment on the loan and then the loan becomes non performing again the limitation under the said paragraphs shall be determined with respect to the time the loan last became non performing. In addition, by section 44A (6) it is provided:

“This section shall apply with respect to loans made before this section comes into operation, including loans that have become non performing before this section comes into operation.”

That is to say that the provision applies to loans and has retrospective effect.” *James Muniu Mucheru v National Bank of Kenya Limited* [2019] eKLR



89. In *Bett v Mwananchi Credit Limited & another* (Commercial Case 4 of 2016) [2022] KEHC 17246 (KLR) (1 December 2022) (Judgment), the court held that:-

“In determining a matter, the court does not re-invent the wheel. It works with the materials presented to it by the parties to arrive at a determination. It is not for this court therefore to take pen and paper and with the aid of a calculator, work out the figures and arrive at a conclusion as to what interest is payable. It is for this court to determine the matter basing on the evidence presented to it by the parties.” See also *James Muniu Mucheru v National Bank of Kenya Limited* [supra]

### **Overdraft**

90. The bank also prayed for the sum of Kshs. 122,934.42 cts due and owing on Current Account Number CA XXXXXXXXXXXX together with interest thereon at the rate of 33% per annum from 01/03/2012 until payment in full as against the 1<sup>st</sup> defendant

91. Notably, the late Ngotho passed away when the case was ongoing. There was no application for his substitution under Order 23 Rule 4(1) of the Civil Procedure Rules, 2010, therefore, the suit against him abated.

92. Consequently, the bank’s prayer fails.

### **Final Orders**

93. In the end, I make the following orders:

- a. The Plaintiff’s suit is dismissed with costs to the 1<sup>st</sup> Defendant.
- b. Judgment is hereby entered in favour of the 1<sup>st</sup> Defendant bank on the Counterclaim as against the 2<sup>nd</sup> Defendant, Ms. Monica Wamaitha Njuguna, for the principal amount, when the loan became non-performing.
- c. I direct that within 60 days from the date of this judgment, the 1<sup>st</sup> Defendant bank which was the Plaintiff in the Counterclaim do render a true and accurate statement of account with the particulars of debits made to the late Ngotho’s account, and the rate of interest charged, date when the loan became non-performing, the amount of the principal when the loan became non-performing and the total interest charged.
- d. In default of (c), the 2<sup>nd</sup> Defendant shall stand discharged from all claims for interest by the 1<sup>st</sup> Defendant bank or the Plaintiff in the Counterclaim.
- e. The 1<sup>st</sup> Defendant shall have 50% of the costs of the counterclaim, given the partial success of its claim. There shall also be Interest on the costs, at court rates from the date of the judgment until payment in full.

**DATED AND DELIVERED AT NAIROBI ON THIS 3<sup>RD</sup> DAY OF JULY 2025.**

**PROF (DR) NIXON SIFUNA**

**JUDGE**

