Kangogo & another (Suing as the administrators of the Estate of the Late Richard Chelimo Kangogo) v Industrial and Commercial Development Corporation (Civil Case 2 of 2023) [2024] KEHC 4501 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4501 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CIVIL CASE 2 OF 2023

JRA WANANDA, J

APRIL 12, 2024

BETWEEN

CLARA JERUTICH KANGOGO ..... 1ST PLAINTIFF

CATHERINE JEPKEMOI ..... 2ND PLAINTIFF

SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE RICHARD CHELIMO KANGOGO

AND

INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION ..... DEFENDANT

JUDGMENT

1. This is an old matter and it is unfortunate that it has taken this long to be concluded. The suit has had a long and chequered history. Initially, it was filed on 24/06/2015 as Eldoret High Court (Environment and Land Division) Case No. 176 of 2015. That was before the Environment and Land Court (ELC) was established as a fully-fledged Court. In April 2018, the suit was transferred to the High Court (Civil Division) and renamed Eldoret High Court Civil Case No. 24 of 2019. When a High Court was established at Iten, the suit was in March 2023, transferred to Iten and assigned the current number, namely, Iten High Court Civil Case No. 2 of 2023. The suit has therefore been in Court for about 9 years which is unacceptable. A commercial suit of this nature should not be held up in Court for such a long time. Be that as it may, the task of bringing the matter to an end now finds itself in my hands.

2. I may also mention that I took over this matter in February 2023 after the trial had already commenced before Hon. Justice E. Ogola. The suit was therefore part-heard. The Plaintiffs had already closed their case with the 1st Plaintiff as their own one and only witness having already testified. On the part of the

Defendant, its first witness had also already testified but it had been directed that he returns to the dock to produce some documents.

3. I may also mention that I did disclose to the parties that I had previously worked in the same office elsewhere with the Defendant's Counsel, Mr. Lazarus Odongo, before I joined the Judiciary. I therefore inquired from the Plaintiff's Counsel, Mr. Matekwa, whether he would be comfortable with myself presiding over this matter. In response, Counsel confirmed that he had no objection to my role herein. In the circumstances, an d with the Counsel's concurrence, I proceeded to hear the matter.

Plaint

4. In the Plaint filed on 24/06/2015 through Messrs Mwinamo Lugonzo & Co. Advocates, the Plaintiffs pleaded that they were suing as the Administrators of the estate of the late Richard Chelimo Kangogo (hereinafter referred to as "the deceased") who was the registered owner of that parcel of land known as EM/Iten/Township/196 (hereinafter referred to as the "suit property"), that the Defendant has a Charge over the suit property placed on 17/03/1997, that the deceased never took any loan with the Defendant and therefore the Charge is irregular. The Plaintiffs pleaded, in the alternative, that if the deceased guaranteed any loan to any third party, the terms and conditions of the guarantee have expired and/or overtaken by events and therefore the continued charge is unjustified and the Charge should be lifted. Further in the alternative, the Plaintiffs pleaded that if the deceased gave the guarantee, then the terms thereof have been so drastically changed as between the Defendant and the loanee such that the same is no longer binding on the deceased and therefore the Defendant ought to discharge the suit property and return the Certificate of title. In the prayers, the Plaintiff sought the following:

    i. An order of declaration that the estate of the late Richard Chelimo Kangogo is not in any way liable for any debt whatsoever owing to the Defendant.

    ii. In the alternative, an order that if there ever was any guarantee executed by the late Richard Chelimo Kangogo, the same has been so altered by the Defendant that it is no longer binding on the estate of the late Richard Chelimo Kangogo.

    iii. An order of declaration that the Charge over the plot EM/Iten/Township/196 is irregular and unsustainable under the law.

    iv. An order compelling the Defendant to discharge the charge over the plot.

    v. Costs.

    vi. Any other relief that this Court might deem fit to award the Plaintiffs.

Statement of Defence

5. In its Statement of Defence filed on 13/08/2015 through Lazarus M. O. Odongo Advocate, it was denied that the 1st Plaintiff is the wife of the deceased and that the 2nd Plaintiff is the daughter of the deceased or that the Plaintiffs are the joint Administrators of the estate of the deceased. It was further pleaded that the Defendant is a statutory State Corporation established under the *Industrial and Commercial Development Corporation Act*, Cap. 445 of the Laws of Kenya and as such, a body corporate with perpetual succession and a common seal with power to hold land and to sue and be sued in its corporate name. The Defendant reiterated that the deceased was the registered owner of the suit property which was charged together with other lands to the Defendant for a loan of Kshs 5,000,000/- granted by the Defendant to Boaz Kipchumba Kaino (hereinafter referred to as "the borrower"), that prior to the suit property being charged to the Defendant, the deceased had already donated a Power of Attorney over the same to the borrower on 28/02/1997, that the borrower utilized the Power

of Attorney to charge the property to the Defendant, that once the borrower utilized the Power of Attorney to charge the property during the lifetime of the deceased, the Charge immediately became the subject of the Registered *Land Act*, Chapter 300 (now repealed) in whatever form re-enacted. It was pleaded further that the borrower read and understood the terms and conditions of the loan offer and unconditionally accepted the same and consequently the borrower and the Defendant entered into a legally binding loan agreement, that the terms and conditions are clear and within the ambit of legality and the same was executed by the parties willingly and without any unconscionable conduct or duress on the part of the Defendant.

6. The Defendant pleaded further that the loan agreement provided that the Plaintiff would repay to the Defendant the loan with interest added by instalment of capital or interest unpaid on the due date for payment thereof, that the rate of interest would be revised at the discretion of the Defendant and that the decision of the Defendant in this regard would not be questioned on any account whatsoever, that the loan or the balance thereof for the time being outstanding and all interest and other sums as aforesaid would at the option of the Defendant become immediately repayable. It was then pleaded that the borrower is in default of his obligations for he has failed to pay interest and other periodic payments due under the loan agreement and the Charge, that this default has continued for more than 1 month and the Defendant is entitled to sell the property, that the outstanding balance was Kshs 97,390,944.25 as at 30/06/2015 and the same continues to accrue interest at the current rate of 16% per annum until and unless the loan balance on a specific date is paid up in full.

Plaintiff's Evidence

7. PW1 was the 1st Plaintiff. She testified that the deceased was her husband and she then adopted her Witness Statement. She testified further that she did not know any person by the name Boaz Kipchumba Keino, that the deceased died on 10/08/1999 and that she did not know that the property's title deed was with the Defendant. In cross-examination, she denied that the deceased created any charge on the title in favour of the Defendant and that he guaranteed any loan, that she only discovered the loan when she went to pay land rates. In conclusion, she stated that she wants the title back and that nobody explained to her how the charge took place.

Defendant's Evidence

8. DWI was one Zephania Kiprop Rono who described himself as officer with the Defendant. He testified that he is not familiar with the Plaintiffs but was familiar with the deceased who had guaranteed a loan of Kshs 5,000,000/- to the borrower and offered the suit property as security, that the borrower was the loanee and was given a Power of Attorney. He added that the borrower defaulted in the loan repayment, that he made periodical promises to repay the loan but failed, that because of the failure, the Defendant proceeded to realize the security, that however, the security was not sold since one of the guarantors went to Court and objected to the sale, and that at the filing of the defence, by 30/06/2018, the loan balance was Kshs 97,390,944.25. In cross-examination, DW1 stated that the amount advanced to the borrower was Kshs 5,000,000/-, that the loan was to be paid by monthly instalments of Kshs 182,947.50, that the 1st instalment was due in May 1997 and the loan was to be repaid in 5 years, that by 31/08/2011 the balance was Kshs 53,976,623.16 and that upon default, demand letters were sent to the borrower and not to the deceased's wife. In Re-examination, he stated that the Power of Attorney was registered.

9. Subsequently, the parties agreed to recall DW1 to return and produce some documents. It apparently however became difficult for the Defendant to bring DW1 and therefore, opted to, instead, call a different witness to come and produce the documents.

10. DW2 was one Ernest Lewa Mwahui. He testified that he is a Senior Portfolio Officer at Kenya Development Corporation (KDC) which used to be Industrial and Commercial Development Corporation (ICDC), the Defendant herein, after a merger. He then referred to DW1's Further Witness Statement and stated that DW1 used to be his colleague as a Principal Debt Officer at the Defendant bank but no longer works there since he has now retired, that he is however familiar with the Further Witness Statement and wished to adopt the same as his evidence and to produce the Loan Statement of Account. In the absence of any objection, DW2 adopted the Further Witness Statement and also produced the Loan Statement of Account.

11. In cross-examination, DW2 stated that the 1st instalment was due on 1/05/1997 and was paid on 9/10/1997, 5 months later, that the loan was to be repaid in 60 months, that the 60th month fell on 4/03/2002, that had he adhered to that schedule, the borrower would have paid a total of Kshs 9,176,610, approximately Kshs 4 million in interest. He added that a non-performing loan is one which the instalments are not forthcoming as expected and the loan herein was declared "non-performing", that once a loan is declared "non-performing", the bank issues a demand letter, then statutory notices and then the recovery process commences, that from the statement, the 1st instalment was paid on 9/10/1997 and the last on 23/09/2016, about 19 years in between, that the delay to recover was because the bank gives its customers time to settle, that by 23/09/2016, the borrower had paid Kshs 4,950,000/-, that the Defendant is now demanding Kshs 223,738,912.94 as at present, that the Defendant stopped charging interest as from 31/03/2021, that this was as a result of the Defendant's own internal arrangement, that it is good practice for lenders to stop charging interest when it realizes that the prospects of recovery are minimal, that although Clause 7 of the charge documents permits the Defendant to recover the full amount, recovery is at the discretion of the Defendant and that the Defendant does not have to immediately commence the recovery process.

12. In re-examination, DW2 elaborated further that KDC came into existence as a result of a merger between ICDC, Tourism Finance Corporation and Industrial Development Bank.

Appellant's Submissions

13. The Plaintiff's Counsel referred to the in duplum rule and submitted that the rule provides that interest on a debt will cease to run where the total amount of arrear interest has accrued to an amount equal to the outstanding principal debt. He cited Section 44A of the *Banking Act* and referred to the fact that the Defendant is demanding a sum of Kshs 223,378,912.94 and submitted that it is moral decay on the part of the Defendant to demand such huge unreasonable exorbitant amount from the Plaintiffs, that the same is against international best practice, and that the Defendant should not levy interest that exceeds the amount loaned. He also cited the case of Mugure & 2 Others vs HELB [2022] eKLR.

14. Counsel submitted further that the Defendant's documents contain correspondence between the Defendant and the borrower but no correspondence was ever sent to the deceased who was only but a Guarantor, or even his estate after he passed on, that the Defendant did not lay any evidence that it exhausted the resources of the borrower first who was a Member of Parliament.

15. Counsel submitted further that the borrower was advanced a sum of Kshs 5,000,000/- by the Defendant on 3/04/1997, that the 1st instalment was due for payment from the borrower on 1/05/1997, that the Defendant's witness confirmed that the borrower did not pay any instalment until 9/10/1997 (after 5 months). He cited Clause 5 of the Charge document and submitted that upon default on any instalment or any interest, the Defendant was to give a 10 days grace period to the borrower, that upon expiry of such 10 days, the Defendant was obligated to recover all amounts outstanding, that therefore in the 5 months that the borrower was in default, the Defendant should

have recovered all the monies that were due from the borrower, that the conduct of the Defendant was in breach and goes to the root of the Charge document, that the Defendant intended to be no longer bound by the terms of the Charge document constraining the estate of the deceased as discharged from any further performance, that the Defendant flouted the terms of the Charge document.

Defendant's Submissions

16. On his part, Counsel for the Defendant submitted that the 1st Plaintiff confirmed that the suit property was charged to the Defendant, that although the 1st Plaintiff stated that since the deceased did not take any loan from the Defendant, the Charge was irregular but that the 1st Plaintiff did not elaborate how or why the Charge was irregular, and that the 1st Plaintiff did not make any effort whatsoever to demonstrate that the Charge was not in accord with the law, rules, procedures or established custom as alleged. Regarding the allegation that the terms and conditions of the Guarantee had expired or overtaken by events, Counsel submitted that the 1st Plaintiff did not make any reference to any specific document to support her allegation nor did she demonstrate that the Guarantee had an expiry date which had since gone past. He submitted that the Court cannot take such an allegation seriously, that if the Court were to do so, it would offend Section 107 of the *Evidence Act* since the 1st Plaintiff has not discharged the heavy burden placed upon her by the law.

17. Regarding the allegation that the terms of the Guarantee have been so drastically changed as between the Defendant and the loanee such that it no longer bound the deceased or his estate, Counsel reiterated his averments above relating to the failure to demonstrate or support the allegation and the evidentiary burden of proof bestowed upon the 1st Plaintiff by law.

18. Counsel submitted further that the Plaintiffs did not discharge the burden of proof on the allegation that the 1st Plaintiff was the wife of the deceased and the 2nd Plaintiff the daughter or that the Plaintiffs were the joint Administrators of the estate of the deceased. He added that the Defendant's pleaded that prior to the suit property being charged, the deceased had already donated a Power of Attorney to the borrower on 28/02/1997, that DW1 produced the said Power of Attorney, that the Plaintiffs did not produce any evidence to counter the fact of the existence of the Power of Attorney or the ability of the borrower to utilize it to charge the suit property. Counsel also observed that the Plaintiff failed to include the borrower as a co-Defendant and added that once the borrower utilized the Power of Attorney to charge the property during the lifetime of the deceased, the Charge immediately became the subject of the Registered *Land Act* (now repealed) in whatever form re-enacted, that the Plaintiffs did not bring any evidence to challenge the averment that the borrower read and understood the terms and conditions of the loan offer or that the borrower and the Defendant executed the loan agreement willingly and without any unconscionable conduct or duress.

19. Counsel also averred that the loan agreement provided that the rate of interest would be revised at the discretion of the Defendant and that the decision of the Defendant in this regard would not be questioned on any account whatsoever, and that the loan balance outstanding would at the option of the Defendant become immediately repayable. He submitted further that the borrower is in default and which default has continued for more than one month and the Defendant is therefore entitled to sell the property and that the Plaintiffs did not bring any evidence to challenge this averment.

20. Regarding the evidence of DW2, Counsel submitted that the witness stated that the interest rate applied was 26% per annum such that the anticipated instalments translated to Kshs 152,943.50, that the total monies received in the account as repayment to date amounts to only Kshs 4,950,000/-.

21. On whether there was a contract between the Plaintiff and the Defendants in respect of the suit property, Counsel submitted that the Plaintiffs did not call either the borrower or the Land Registrar

to ascertain the validity of the Charge, that as such the Defendant's averment that there is a valid Charge remains uncontroverted. On whether the Defendant is entitled to demand the outstanding balance, Counsel submitted that this is a case where the maxim res ipsa loquitur is mot applicable, that the Defendant produced a statement of accounts, that the Plaintiffs did not also challenge the validity of the figures captured in the statement of accounts except to say that the sum demanded is unreasonable and exorbitant and offends the in duplum rule, and that in any event, the Plaintiffs have not made any prayer for taking of accounts.

22. Regarding the in duplum rule, Counsel submitted that the expression "institution" at Section 2(1)(c) of the *Banking Act* means a bank or financial institution or a mortgage finance company, that the same refers to a "financial institution" as a company, other than a bank, which carries on, or proposes to carry on financial business and includes any other company which the Minister may, by notice in the Gazette , declare a financial institution, that the same Section also stipulates that a "mortgage finance company" means a company (other than a financial institution) which accepts from members of the public, money on deposits repayable on demand or at the expiry of a fixed period or after notice and is established for the purpose of employing such money in accordance with Section 15 of the Act, that the said Section 15 restricts the business of a mortgage finance company to the issuance of loans for the purpose of the acquisition, construction, improvement, development, alteration or adaptation for a particular purpose of land in Kenya, that the Act also allows a mortgage finance company to grant other types of credit facilities against securities other than land and to engage in other prudent investment activities, that Section 2(1)(c) states that a "bank" is a company which carries on or proposes to carry on banking business in Kenya and includes the Co-operative Bank of Kenya Limited but does not include the Central Bank.

23. According to Counsel therefore, the Defendant is not a bank since the Defendant does not accept from members of the public money on deposit repayable on demand or at the expiry of a fixed period or after notice and therefore the Defendant does not carry out financial business and is not a financial institution in the sense applied in the Act, that the Minister of Finance has not, by notice in the Gazette, declared the Defendant to be a financial institution for the purposes of the Act, that the Defendant is not a mortgage finance company and that the Defendant is not a bank. He cited the case of Karige Kihoro vs. Industrial Commercial Development Corporation [2011] eKLR in which, he submitted, the Court affirmed the position above.

24. On the application by the Courts of the in duplum rule, Counsel appreciated that in the case of Anne J. Mugure & 2 Others (supra), the Court held that the in duplum rule applied to all lenders as it did to banks, but urged this Court not to follow that authority and instead, follow the decision in the case of Momentum Credit Limited vs. Teresia Nduta Kabuiya (Civil Appeal E035 of 2022) in which, he submitted, that the Court held that the *Banking Act*'s relevant provisions did not apply to non-deposit taking institution such as the Defendant herein

Analysis & Determination

25. Before I delve further into identifying the issues for determination in this matter, I need to touch on the issue of in duplum rule upon which the parties have argued in their Submissions. It is clear that the issue was raised for the first time in the Plaintiff's Submissions. The same was never raised at all in the Plaint nor touched on in the Statement of Defence. The Plaintiff's case was based entirely on 3 grounds, first, that the deceased never took any loan from the Defendant, secondly, that in the alternative, if at all the deceased guaranteed any loan to any third party, then the terms thereof have expired or been overtaken by time and thirdly, that in the alternative, if at all the deceased guaranteed any loan to any

third party, then the terms of the guarantee have been so drastically changed such that it can no longer be binding upon the deceased or his estate.

26. Clearly therefore the issue of the in duplum rule has been introduced by the Defendant as an afterthought.

27. It is trite law that parties are bound by their pleadings and as such, the Plaintiffs having not pleaded the issue of violation of the in duplum rule in the Plaint, cannot "sneak in" the same through post-trial Submissions. On this point, in the case of Joshua Mungai Mulango & another v. Jeremiah Kiarie Mukoma (2015) eKLR the Court of Appeal held as follows:

> " Parties are bound by their pleadings. The court is bound to determine a dispute on the basis of the pleadings filed by the parties and the evidence adduced on the basis of such pleadings. In an adversarial system such as ours, it is the parties who set the agenda for the trial by their pleadings. The need for this cannot be gainsaid. For the purpose of ensuring certainty and finality, a party cannot be allowed to resile from its pleadings without due amendment. Each party knows the case he has to meet and cannot be taken by surprise. The purpose and importance of the rules in this regard clearly is to ensure that litigation is conducted in a framework that will guarantee fair play without prolixity and needless escalation of litigation costs"

28. Further, although the Defendant's Counsel, despite the issue not having been pleaded in the Plaint, still went ahead to respond extensively on the issue of the in duplum rule, his Submissions raised factual matters but which were never canvassed at the trial. For instance, in submitting that the Defendant is not a "deposit-taking institution" and that the Minister for Finance has not declared the Defendant to be a "financial institution", Counsel went to great lengths to demonstrate the workings and manner of operations of the Defendant. These are purely matters of fact. Clearly, Counsel found himself resorting to this because the issue of the in duplum rule was never canvassed at the trial, the same not having been pleaded in the Plaint in the first place.

29. For the reasons that, as aforesaid, the issue of the in duplum rule was never pleaded in the Plaint nor canvassed at the trial nor any evidence taken on the workings and manner of operations of the Defendant to determine whether or not the Defendant is a "deposit-taking institution" or "financial institution" for the purpose of determining whether the in duplum provisions in the *Banking Act* apply to the Defendant, I decline the invitation to stray into that issue of the in duplum rule.

30. In the circumstances, upon considering the record, including the pleadings, evidence presented, Submissions and authorities cited, I find the issues that arise for determination to be the following:

    i. Whether the loan alleged herein was advanced to the borrower.

    ii. Whether the deceased gave the borrower a Power of Attorney to charge the deceased's property, EM/Iten/Township/196, and also whether the deceased guaranteed the loan by giving out his said property as collateral or security thereof.

    iii. Whether the Guarantee has been so drastically altered or changed to the extent that it is no longer binding

    iv. Whether the borrower is in default of the loan.

    v. Whether therefore the Defendant is entitled to dispose of the suit property in recovery of the loan balance.

31. I now proceed to analyze and answer the said issues.

i. Whether the loan alleged herein was advanced to the borrower

1. That the Defendant advanced a sum of Kshs 5,000,000/- to the borrower, one Boaz Kaino, has not been seriously challenged. In any event, the Defendant has produced several documents to support the advancement of the loan. Among the documents so produced is the duly registered and witnessed Power of Attorney dated 28/12/1997 alleged to have been donated by the deceased to the borrower. The same provides as follows:

> "I, Richard Chelimo Kangogo hereby appoint Hon. Boaz Kipchumba Kaino of P.O. Box 44047 Nairobi .... And to charge my title No. Elgeyo Marakwet/Iten Township/196 to Industrial and Commercial Development Corporation (ICDC) Ltd."

33. I note that the deceased died on 10/08/1999, 2½ years after 28/02/1997, the date of the Power of Attorney, thus indicating that the Power of Attorney was executed during the lifetime of the deceased. It has not been alleged that the signature thereon alleged to be that of the deceased was a forgery or that the deceased was duped to sign the document or that he signed it under duress. The validity of the Power of Attorney has therefore not been challenged or contradicted by any controverting evidence.

34. The Defendant has then produced the Charge document dated 5/03/1997 (before the deceased died about 1 ½ years later on 10/08/1999) which Charge bears the signature of the borrower as signing it on behalf of the deceased (as guarantor) on the strength of the Power of Attorney. Recitation 1 of the Charge provides as follows:

> " The corporation has at the request of the Chargor agreed to advance the borrower the sum of ..... Kshs 5,000,000/- and it has been agreed that the repayment of the said sum with interest ..... shall be secured in the manner hereinafter appearing ....."

35. It is stated in the Charge that the same is collateral to a Charge of even date issued by the borrower over a separate property, namely, title number E/Marakwet/Kapsowar/2027.

36. The Defendant has also produced the Loan Agreement dated 5/03/1997, numerous subsequent correspondence exchanged between the Defendant and the borrower between August 2011 and October 2011 and also the statement of account all which further confirm advancement of the money to the borrower.

37. In any event, and in his legal team's wisdom, the Plaintiffs have inexplicably not joined the borrower into this case as a co-Defendant nor have they called him as a witness. Only the borrower can clarify whether or not he received the money and, in his absence, the Plaintiffs cannot, on the borrower's behalf, purport to deny advancement of the money. Any attempt to do so will amount to heresy evidence.

38. In the circumstances, I have no difficulty in reaching the finding that indeed the Defendant did advance to the borrower the loan of Kshs 5,000,000/-.

ii. Whether the deceased gave the borrower a Power of Attorney to charge the suit property, and whether the deceased guaranteed the loan by giving out the property as security

39. I have already referred to the said Power of Attorney alleged to have been donated by the deceased to the borrower during his lifetime. I have already observed that the same is duly registered and witnessed by an Advocate. In respect thereto, I have also already found that it has not been alleged that the signature appearing on the Power of Attorney and said to be that of the deceased has been forged. It has also not been alleged that the signature was procured under duress or by misrepresentation. The borrower, who is the donee of the Power of Attorney, has also not been joined in this suit as a co-Defendant or called as a witness. In the circumstances, I find that there is no material before this Court to question or doubt the validity or authenticity of the Power of Attorney.

40. On whether the deceased did guarantee the loan advanced to the borrower, I have already found that on the basis of the Power of Attorney referred to above, a Charge document was executed, witnessed and duly registered. By the said Charge, the deceased is stated to have given out the suit property as collateral to secure repayment of the loan advanced to the borrower. Indeed, an official Search Report confirming lodging of the Charge has also been produced in evidence. In the Plaint, the Plaintiffs also acknowledged existence of the Charge.

41. Existence of the Charge is therefore not in dispute. What could have been questioned is therefore only the validity of the Power of Attorney on the basis of which the borrower signed the Charge on behalf of the deceased. However, in respect thereto, I have already found that the validity of the Power of Attorney has not been questioned or challenged.

42. In the circumstances, the only inescapable conclusion that I can reach and which I do, is that there is no evidence presented to this Court to demonstrate that the deceased did not donate to the borrower the Power of Attorney to charge the suit property. There is also no evidence to controvert the statement that the deceased guaranteed the loan by giving out the suit property as security.

iii. Whether the Guarantee has been so altered to the extent that it is no longer binding

43. The Plaintiffs pleaded, in the alternative, that if the deceased guaranteed any loan to any third party, then the terms and conditions of the guarantee have expired and/or overtaken by events and that therefore, the continued Charge is unjustified and the Charge should be lifted. They also pleaded that if the deceased gave the guarantee, then the terms thereof have been so drastically changed as between the Defendant and the loanee such that the same is no longer binding on the deceased and therefore the Defendant ought to discharge the suit property and return the Certificate of title.

44. The basis of the Plaintiffs' submissions above seems to be that the Defendant's bundle of documents contains correspondence between the Defendant and the borrower but none between the Defendant and the deceased as guarantor or his estate, and that the Defendant did not demonstrate that it had exhausted assets of the borrower before turning to recover from the deceased as guarantor. The Plaintiffs also observed that although the loan was advanced on 3/04/1997 and the 1st instalment was payable on 1/05/1997, the 1st instalment was not paid until 9/10/1997, after 5 months in default. The Plaintiffs further observed that under Clause 7(a) of the Charge document, upon expiry of 10 days after default, the Defendant was obligated to recover all amounts that were pending without leaving a cent. The Plaintiffs therefore faulted the Defendant for the delay to recover.

45. Upon examination of the exhibits, I find that, contrary to the Plaintiff's submissions, there is indeed some correspondence addressed to the deceased. For instance, there is the 90 days statutory notice of sale dated 3/05/2004 addressed to the borrower and copied to the deceased. There is also another 90 days statutory notice of sale dated 18/12/2013 addressed to both the borrower and the deceased. The address used for both the borrower and the deceased is P.O. Box 44047 Nairobi which is the same one appearing in the Charge document. Although no proof of sending out the letters to the deceased

or receipt by him has been produced, I note that the borrower responded to the letters. Noting that the borrower held a Power of Attorney from the deceased permitting the borrower to charge the suit property, it can be safely presumed that acknowledgment by the borrower of receipt of the letters also represents receipt by the deceased.

46. Regarding the delay by the Defendant to move to recover, it is true that no good reason has been given by the Defendant for the delay. However, the Plaintiffs have not demonstrated that the borrower had any alternative asset which the Defendant could have identified. Secondly, without having a recognized charge on assets owned by the borrower, how was the Defendant expect expected to realize such alternative assets from the borrower? There being a duly registered Charge in favour of the Defendant, I do not agree with the Plaintiffs that the Defendant had any obligation to demonstrate that it had exhausted its options of moving after the borrower.

47. In the circumstances, I do not find any evidence to support the Plaintiff's' assertions that the Guarantee has been so altered or changed to the extent that it is no longer binding on the deceased or his estate.

iv. Whether the borrower is in default of the loan

48. The Charge document is dated 5/03/1997 and the amount advanced to the borrower was Kshs 5,000,000/-. It is also evident that the loan was to be paid by monthly instalments of Kshs 152,947.50, the 1st instalment was due in May 1997 and the loan was to be repaid in 5 years.

49. The Defendant's case is that the borrower is in default since he has failed to pay interest and other periodic payments due under the loan agreement and the Charge. DW2 testified that the borrower, Boaz Kaino, made periodical promises to repay the loan but failed, that because of the failure, the Defendant proceeded to realize the security, that however, the security was not sold since one of the guarantors went to Court and objected to the sale. He added that by 31/08/2011, the balance was Kshs 53,976,623.16, at the time of filing of the defence, around 30/06/2018, it had accumulated to Kshs 97,390,944.25 and the amount now due as at present is about Kshs 223,738,912.94.

50. According to DW2, since the loan was to be repaid in 60 months (5 years), the 60th month would have fallen on 4/03/2002, that had he adhered to that schedule, the borrower would have paid a total of Kshs 9,176,610, approximately Kshs 4 million in interest. He further testified that by 23/09/2016, the borrower had only paid Kshs 4,950,000/-. He also stated that the Defendant stopped charging interest as from 31/03/2021, and that this was as a result of the Defendant's own internal arrangement since it is good practice for lenders to stop charging interest when they realize that the prospects of recovery are minimal. He testified that although Clause 7 of the charge documents permits the Defendant to recover the full amount, recovery is at the discretion of the Defendant.

51. The matters alleged above have not been challenged or controverted by the Plaintiffs. Further, the Defendant has produced sufficient evidence thereof, including letters from the borrower admitting the default and the debt. In his letters, the borrower continuously sought for extension of time to clear the loan. The Defendant also produced the statement of account confirming the amounts paid and the balance still outstanding.

52. There is therefore no doubt that, indeed, the borrower is in default of the loan.

v. Whether the Defendant is entitled to dispose of the suit property in recovery of the loan balance

53. Clause 7(a) of the Charge is premised as follows:

> " If the Chargee shall make default in the payment of any interest on the days hereinbefore provided or shall fail to pay any of the instalments on the days hereinbefore provided for

or within ten days of grace thereafter then and in such case the whole principal amount with interest then remaining due and owing by the Chargor under this security shall immediately become due and payable and the Corporation shall be entitled to recover the same forthwith"

54. I have already found that the borrower is in default of his loan repayment obligations. In view thereof and considering that the Charge permits the Defendant to realize the security in recovery of the outstanding balance, I find that the Defendant is entitled to dispose of the suit property in recovery of the loan balance.

Final Orders

55. The upshot of my findings above is that this suit is dismissed with costs to the Defendant.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 12TH DAY OF APRIL 2024

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WANANDA J. R. ANURO

JUDGE

Iten High Court Civil Case No. 2 of 2023