# Salat v Kanuli Information Technology Solutions & 3 others (Civil Case E011 of 2024) [2024] KEHC 15369 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15369 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KERICHO**

**CIVIL CASE E011 OF 2024**

**JK SERGON, J**

**DECEMBER 5, 2024**

**BETWEEN**

**KENNEDY KIMUTAI SALAT ................................................................ PLAINTIFF**

**AND**

**KANULI INFORMATION TECHNOLOGY SOLUTIONS ......... 1ST DEFENDANT**

**FAULU MICROFINANCE BANK LIMITED ............................... 2ND DEFENDANT**

**ANTIQUE AUCTIONS ..................................................................... 3RD DEFENDANT**

**ROBERT KANULI ............................................................................. 4TH DEFENDANT**

## RULING

1. The application coming up for determination is a chamber summons dated 19th August, 2024 seeking the following orders;

   (i) Spent

   (ii) Spent

   (iii) That this Honourable Court be pleased to grant temporary order of injunction restraining the Defendants/Respondents by themselves, their employees, servants, agents or auctioneers from doing any of the following acts; advertising for sale, selling whether by public auction or private treaty, disposing of, dealing with and/or transferring or otherwise howsoever completing by conveyance or transfer, taking possession, appointing receivers or exercising any power conferred by Section 90 (3) & 96 of *Land Act*, leasing, letting, charging or otherwise howsoever, interfering with the Plaintiff's ownership or title to all that parcel of land known as L.R NO. Kericho/Chepsir/S.S/311 pending hearing and determination of the main suit.

   (vi) That the costs of this application be granted to the Applicant.

2. The application is supported by grounds on the face of it and the supporting affidavit of Kennedy Kanuli Salat the Plaintiff/Applicant herein.

3. He avers that he is the registered owner of land parcel known as LR NO. Kericho/Chepsir/S.S/311 and that the 1st Respondent through the 4th Respondent, as its director, sought for and was advanced a banking facility by the 2nd Respondent for a total sum of Kshs. 11, 200,000/=

4. He avers that by request of the 4th Respondent, he guaranteed Kshs. 5,600,000/= and the guarantee was given in form of a legal charge created over land parcel L.R NO. Kericho/Chepsir/S.S/311 for a fixed amount of Kshs. 5,600,000/=.

5. He avers that by default, of the lst Respondent Company to service the loan facilities, the 2nd Respondent issued statutory notices through the 3rd Respondent and demanded from him an outstanding debt of Kshs. 32,998,454.42 /=. He maintains that where a guarantee limits the guarantor's liability to a fixed sum, the guarantor will be liable to the extent of the guaranteed sum only and not the entire debt therefore his liability as a guarantor is only limited to a fixed sum of Kshs. 5, 600,000/= (the guaranteed amount) not the entire debt of Kshs. 32,998,454.42 as claimed in the Redemption notice and Notification of sale dated 1st July, 2024. His liability as a guarantor could not be the same as that of the lst Respondent, the principal borrower, he is therefore not liable for the outstanding balances claimed from the principal borrower.

6. He avers that the Respondents have made it difficult for him to redeem the charged property by making demands that were and/or are not contained in the charge instrument & guarantee and indemnity document specifically requiring him to redeem Kshs. 32,998,454.42/= against the fixed sum of Kshs. 5,600,000/= as guaranteed.

7. He avers that he has made attempts to redeem the charged property but the same were declined by the Respondents who demand sums not due or owing thereby fettering and/or clogging his equity of redemption.

8. He avers that a guarantor has distinct obligations from the borrower only limited to the fixed amount guaranteed, thus he can only redeem the charged property to the tune of Kshs. 5,600,000/= as guaranteed.

9. He avers that there is an impending sale of his property, L.R No. Kericho/Chepsir/S.S/311, by the 3rd Respondent through a public auction scheduled for 6th September, 2024 with a view of disentitling him of rightfully owned land.

10. He avers that the move by the Respondent to recover the entire debt amount of Kshs. 32,998,454.42/ = by sale of his land, L.R No. Kericho/Chepsir/S.S/311, is contrary to mandatory statutory provisions that where a guarantee limits the guarantor's liability to a fixed sum, the guarantors will be liable to the extent of the guarantee only and not to the entire debt of the principal debtor.

11. He avers that the purported sale is marred by illegalities and fraud, the statutory notices under Sections 90 & 96 of *Land Act* were not issued, the notice of sale issued to him were in contravention of Section 96(1) of the *Land Act* and ought to be declared a nullity.

12. He avers that he is willing to pay the guaranteed amount which is Kshs. 5,600,000/=but should not be condemned to pay the entire outstanding amount.

13. He avers that it is therefore imperative that the Defendants/Respondents be restrained by way of a permanent injunction.

14. The 2nd defendant filed a replying affidavit in response to the application which was sworn by Fredrick Nyabuti the Legal Officer of Faulu MicroFinance Bank Limited, the 2nd Defendant/Respondent herein.

15. He avers that he is fully conversant with the facts and circumstances of this matter, including the previous suits Environment and Land Court Case No. 61 of 2017 and HCCC No. 5 of 2018, both of which largely involved the same parties and the same subject matter as the current suit.

16. He avers that in Environment and Land Court Case No. 61 of 2017 (Kennedy Kimutai Salat v Kanuli Information Technology Solutions Limited & Faulu Microfinance Bank Limited), the Plaintiff/ Applicant sought similar orders to restrain the 2nd Defendant/Respondent from exercising its statutory power of sale.

17. He avers that on 16th November 2017, the court in Case No. 61 of 2017 delivered a ruling granting a temporary injunction pending hearing and determination of the suit for a period of 6 months. This order was conditional, requiring the Plaintiff/ Applicant to comply with Order 11 and fix the matter for hearing within the stipulated period, failing which the injunction would lapse. He further avers that subsequently, Case No. 61 of 2017 was transferred to the High Court and assigned HCCC No. 5 of 2018 (Kennedy Kimutai Salat v Kanuli Information Technology Solutions Limited & Faulu Microfinance Bank Limited).

18. He avers that throughout the proceedings in HCCC No. 5 of 2018, the Plaintiff/ Applicant engaged in a pattern of behavior aimed at delaying the hearing and frustrating the 2nd Defendant/ Respondent's legitimate efforts to recover the debt owed and that despite the court's indulgence and the 2nd Defendant/Respondent's accommodating stance, the Plaintiff/ Applicant persistently frustrated attempts to proceed with the hearing of the main suit in HCCC No. 5 of 2018.

19. He avers that on 20th May 2024, HCCC No. 5 of 2018 was ultimately dismissed due to the Plaintiff's/ Applicant's non-attendance at the hearing even after the date being taken by consent and following numerous delays and frustrated hearing attempts and that the current application is yet another clear demonstration of the Plaintiff's/ Applicant's persistent abuse of the court process, aimed at further delaying the 2nd Defendant/Respondent's legitimate efforts to recover the. debt owed.

20. He avers that the Plaintiff/ Applicant has consistently failed to honour his obligations and instead resorted to filing multiple suits and applications, including HC MISC E033 OF 2021, to delay the recovery process, despite being given ample opportunity by the court to comply with orders and proceed with the hearing of the main suit.

21. He avers that a guarantee & indemnity and a charge are distinct instruments. The recoverable amount under the guarantee was Kshs. 5,600,000/- plus added interest, fees, commissions, charges, costs and expenses. Whereas in the charge there is a covenant to pay principal money plus interest. Discharge is only upon full settlement of monies secured by the charge and all interest due and upon payment of all costs, charges and expenses incurred by the charge in relation to the suit property, therefore, the terms of the charge and guarantee and indemnity are clear and discernible.

22. He avers that the Plaintiff/Applicant guaranteed Kshs. 5,600,000/- plus other costs as earlier discussed. The harm is not irreparable. The property was offered as a commodity for sale in the transaction and sale was expected on default. The Plaintiff/Applicant has remedies in damages under section 99 (4) of the *Land Act* if aggrieved by the exercise of the power of sale.

23. He avers that the Plaintiff/Applicant's claim of willingness to pay the guaranteed amount of Kshs. 5,600,000/- is contradicted by his actions. Despite numerous opportunities over the past seven years, this amount has never been settled.

24. He avers ·that the 2nd Defendant/Respondent has followed all due processes in exercising its statutory power of sale. Proper notices were issued and served and the Plaintiff was given ample opportunity to remedy the default.

25. He avers that the balance of convenience in this matter tilts heavily in favour of the 2nd Defendant/ Respondent. The sale has already been stayed for 7 years due to various court proceedings and interlocutory orders, which amounts to a misuse of the court process and further that based on the foregoing, the Plaintiff's application for an injunction fails to meet the criteria established in Giella v. Cassman Brown & Co. Ltd [1973]EA 358.

26. He therefore urged this Court to be cognizant of the Plaintiff/Applicant's pattern of using the court process to frustrate legitimate commercial transactions. The court should encourage commerce and not allow itself to be used as a tool for delaying rightful debt recovery.

27. This court directed the parties to file written submissions.

28. The Plaintiff/Applicant reiterated that it is not in dispute that the 1st Respondent herein approached the 2nd Respondent seeking a bank facility amounting to Ksh. 11,200,000/=. Further, there is no dispute as to the enjoinment, upon request by the 4th Respondent, of the Applicant to give a guarantee of Ksh. 5,600, 000/=. It is further undisputed that the same culminated in a legal charge created over all that parcel of land known as L.R No. Kericho/Chepsir/S.S/311 owned by the Applicant for the sum guaranteed and that the 1st Respondent consequently defaulted. He cited the case Court in Ebony Development Co. Ltd v Standard Chartered Bank Ltd [2008] KEHC 1363 KLR that the liability of a guarantor arises at the onset of the default by the principal debtor. The court stated:"…The security of charge was a guarantee. The obligation of a guarantor is clear. It becomes liable upon default by the principal debtor. The charge concerning this matter is the second charge updating the indebtedness of the borrower. It is not the guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum…"

29. The Plaintiff/Applicant sought to rely on the particulars section of the Guarantee and Indemnity relied upon by the Respondents and referenced Clause 2 which states that "The liability of the Guarantor is limited to the principal sum of KENYA SHILLINGS FIVE MILLION SIX HUNDRED THOUSAND ONLY (Ksh. 5,600,000/=) to which shall be added interest, fees, commission, costs, charges and expenses as provided above" The Plaintiff/Applicant contended that the liability on the Plaintiff/Applicant is plainly valued at Ksh. 5,600,000 whereas the Respondents intend to obtain in excess of a whopping Ksh. 32,998,454.42/= a strange figure that can neither be justified nor sustained by the Respondents in fact and in law. He maintained that the proposed sum is an archaic attempt at exploiting the Applicant who is a bona fide guarantor.

30. The Plaintiff/Applicant argued that having demonstrated that the liability accruing to the guarantor is capped at Ksh. 5,600,000/- and not the entire facility advanced upon the 1st Defendant/ Respondent contended the computation of interest by the Respondents, he argued that in their erroneous belief to calculate interests and additional costs on the base amount of Ksh. 11,200,000/= and heaping the same on the Applicant, the said computation of interest is barred before the law. He cited the case of Mugure & 2 others v Higher Education Loans Board (Petition E002 of 2021) [2022] KEHC 11951 (KLR), where the Court identified the in duplum rule and stated thus: "In duplum" is a Latin phrase derived from the word "in duplo" which loosely translates to "in double". Simply stated, the rule is to

the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced.

With regard to lenders, the court deemed it prudent to further state: "In my view, the rule was introduced in our Laws to tame the appetite of Lenders who had made recovery of interest on advances a cash cow. Simply put, the Legislature was expressing its displeasure with lenders who left amounts of advances to go over the roof due to interest before pouncing on the hapless borrowers."

31. The Plaintiff/Applicant contended that the conduct of the Respondents is akin to the threat to the right to own property protected under Article 40 of *the Constitution*. The intended deprivation therefore flies in the face of the in duplum rule by its virtue of relying on a computation that is beyond double the bank facility advanced upon the 1st Defendant/ Applicant. He further argues that the amount of Ksh. 32,998,454.42/= is an exaggerated, astronomical figure that is incapable of justification since it is nearly thrice the amount of Ksh. 11,200,000/= advanced to the 1st Defendant/ Respondent and an incomprehensible, colossal five times the amount secured by the Applicant totaling to Ksh. 5,600,000/=

32. The Plaintiff/Applicant contended that Respondents attempts to compute interest on the entire sum of Ksh.11,200,000/= and heaping it upon the unsuspecting Applicant while aiming to ward off his property is egregious and offensive to the Applicant who is duly shielded against the unlawfully greedy character depicted by the actions of the Respondents.

33. The Applicant reiterated the in duplum rule and stated that in the event liability accrued by his guarantee was activated, the interest could only be computed with Ksh. 5,600,000/= as the basic principal sum and in any event, the interest ought not to surpass the principal amount above.

34. The Applicant contended that whereas the Respondents have alleged that the Applicant has failed to discharge his obligations as set out under the guarantee, the same has only been occasioned by the incessant, absurd demand by the Respondents on the Applicant to pay an astronomical amount that is nearly five times the amount he had secured on the charge.

35. The 2nd Respondent filed submissions and argued that The Charge creates a comprehensive security through its Covenant to Pay clause (clause 1), which requires payment of "all money and discharge all obligations and liabilities, whether actual or contingent, now or hereafter due, owing or incurred to the Chargee by the Chargor and/or the Borrower." This includes all current or other account liabilities, liabilities connected with foreign exchange transactions, all interest, commissions, fees and charges and legal and other costs on a full indemnity basis. In contrast to the Charge's comprehensive nature, the Guarantee creates a distinct and limited personal obligation. Clause 2 expressly limits "the total amount recoverable from the Guarantor under this guarantee" to the principal sum stated in the Particulars, being Kenya Shillings Five Million Six Hundred Thousand Only (Kshs. 5,600,000/=). While interest and other charges may be added to this sum, this limitation applies only to personal liability under the guarantee.

36. The 2nd Respondent argued that the above notwithstanding, the Plaintiff's interpretation would render meaningless the extensive Covenant to Pay provisions, negate the continuing security nature of the charge, artificially cap a security explicitly designed to cover all obligations and undermine the commercial purpose of having separate charge and guarantee instruments. The correct position, therefore, is that the Plaintiff's personal liability may be limited by the guarantee to Kshs. 5,600,000/- plus associated charges, however, the Bank's right to realize the charged property extends to the full amount of indebtedness as defined in the Covenant to Pay and Secured Obligations clauses. This interpretation respects both the letter and commercial purpose of the security arrangements.

37. The 2nd Respondent contended that the Applicant's reliance on the in duplum rule must fail for two independent reasons: The in duplum rule, was given statutory force through Section 44A of the Banking (Amendment) *Act No. 9 of 2006*, has a specific and limited scope. This principle was authoritatively established in Desires Derive Limited v Britam Life Assurance Company (K) Limited [2016] eKLR, where the court held: "The in-Duplum Rule which was given Statutory clothing in Kenya by Section 44A of The Banking (Amendment Vide *Act No.9 of 2006)* Act is applicable to Institutions as defined in the Act... A schedule to the *Central Bank of Kenya Act* has a list of Banks and Financial Institutions under Section 2 of the Act... The submission that the Provisions of Section 44A of The *Banking Act* does not bind [an entity not listed in that schedule] is therefore not without force." The 2nd Defendant, Faulu Microfinance Bank Limited, is regulated under the *Microfinance Act* and not the *Banking Act*. Critically, it is not listed in the schedule to the *Central Bank of Kenya Act* which enumerates banks and financial institutions under Section 2 of that Act. This places the 2nd Defendant squarely outside the rule's statutory scope and even if the rule were applicable, the account statement demonstrates clear compliance, with interest charges remaining well within the principal amount.

38. The Respondent argued that the Plaintiff's application for injunctive relief must fail both commercially and legally. The Court of Appeal in Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR established that the three conditions for granting an injunction must be applied as "separate, distinct and logical hurdles which the applicant is expected to surmount sequentially." The Plaintiff/Applicant failed at each hurdle to wit a prima facie case, irreparable harm and a balance of probability.

39. The Respondent cited the Court of Appeal case in National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd (2002) 2 EA 563, where it was stated that it is not the business of courts to rewrite contracts between parties, who remain bound by their contractual terms unless coercion, fraud, or undue influence are pleaded and proved. The Respondent contended that the integrity of commercial transactions demands that courts enforce, not rewrite, clearly documented security arrangements. To do otherwise would introduce uncertainty into banking relationships, ultimately increasing the cost of credit and reducing its availability to the public. The Respondent therefore urged this court to dismiss the application.

40. Having considered the application, replying affidavit and submissions by the parties, the sole issue for determination is this curt ought to grant temporary injunctive relief restraining the Defendants/Respondents by themselves, their employees, servants, agents or auctioneers from interfering with the Plaintiff/Applicant's ownership or title to all that parcel of land known as L.R NO. Kericho/Chepsir/S.S/311 pending hearing and determination of the main suit.

41. It is not disputed that the Plaintiff/ Applicant is the registered owner of land parcel known as LR NO. Kericho/Chepsir/S.S/311 and that the 1st Respondent through the 4th Respondent, as its director, sought for and was advanced a banking facility by the 2nd Respondent for a total sum of Kshs. 11, 200,000/= and further that by request of the 4th Respondent, the Plaintiff/Applicant guaranteed a sum of Kshs. 5,600,000/= and the guarantee was given in form of a legal charge created over land parcel L.R NO. Kericho/Chepsir/S.S/311 for a fixed amount of Kshs. 5,600,000/=. It is not in dispute that the 1st Respondent fell into default and that the 2nd Respondent initiated the recovery process. The 2nd Respondent demanded from him an outstanding debt of Kshs. 32,998,454.42 /= which is the crux of the dispute between the parties.

42. The Plaintiff/Applicant argued that a guarantee limits the guarantor's liability to a fixed sum, the guarantor will be liable to the extent of the guaranteed sum only and not the entire debt, he therefore maintained his liability as a guarantor is only limited to a fixed sum of Kshs. 5, 600,000/= (the guaranteed amount). The 2nd Respondent conceded that the terms of the charge and guarantee and

indemnity are clear and discernible and that whereas the Plaintiff/Applicant's personal liability may be limited by the guarantee to Kshs. 5,600,000/- plus associated charges, the Bank's right to realize the charged property extends to the full amount of indebtedness as defined in the Covenant to Pay and Secured Obligations Clauses and that this interpretation respects both the letter and commercial purpose of the security arrangements. The 2nd Respondent reiterated that L.R NO. Kericho/Chepsir/S.S/311 was offered as a commodity for sale in the transaction and sale was expected on default and that in any event the Plaintiff/Applicant has remedies in damages under section 99 (4) of the *Land Act* if aggrieved by the exercise of the power of sale.

43. The 2nd Respondent set out a chronology of events and litigation history and faulted the Plaintiff/Applicant of using the court process to frustrate and/or delay the debt recovery process. The 2nd Respondent was adamant that the Plaintiff/Applicant's claim of willingness to pay the guaranteed amount of Kshs. 5,600,000/- is contradicted by his actions and despite numerous opportunities over the past seven years, this amount has never been settled.

44. This court having considered the arguments made by both parties, does find and hold that following the indebtedness by both the principal debtor and the guarantor, the 2nd Defendant/Respondent's right to exercise its power of sale has accrued and finds no basis to restrain the same.

45. When the Plaintiff/Applicant (guarantor) gave the parcel of land known L.R NO. Kericho/Chepsir/S.S/311 as security, he ought to have contemplated a situation where the same could be sold off in the event of default. There are no special circumstances to persuade this Court to grant injunctive relief, the reason being that the Plaintiff/Applicant is clearly in default and he has not made any steps to repay the guaranteed amount nor has it made any proposals to the bank.

46. The rights of both the borrower and the bank are within the contractual framework and this court would hesitate to so interfere unnecessarily.

47. In the end the chamber summons dated August 19, 2024 is without merit. It is ordered dismissed with costs to the 2nd Defendant/Respondent.

**DELIVERED, SIGNED AND DATED AT KERICHO THIS 5TH DAY DECEMBER, 2024.**

**..............................**

**J.K. SERGON**

**JUDGE**

In the Presence of:-

C/Assistant – Langat

Miss Kimathi holding brief for Onsare for 2nd Defendant

Miss Njogu holding brief for Kipkoech for Plaintiff