



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO.397 OF 2006

LINDA WACERU MATINDI and ORESTE NYAMU MATINDI

(as personal representatives of the estate of

ANDREW MATINDI NYAMU (Deceased)PLAINTIFF

VERSUS

K-REP BANK LIMITED.....DEFENDANT

JUDGMENT

1. This suit was commenced in 2006 by Andrew Matindi Nyamu. However, he died and by an amended plaint dated 30th April 2019 filed by R. W. Chege and Associates advocates Linda Waceru Matindi and Oreste Nyamu Matindi (as personal representatives of the late Andrew Matindi Nyamu-deceased) replaced him in this suit against the defendant K-Rep Bank Ltd.

2. It is averred in the amended plaint that Andrew Matindi Nyamu was a member of Mayford Co-operative Savings & Credit Society (Mayford), and that in March 2005 Mayford applied for and was granted certain financial facilities by the defendant namely a term loan of Kshs.1,500,000/- and an overdraft facility in the sum of Kshs.1,500,00/- over and above the existing liabilities, and Andrew Matindi Nyamu executed a first legal charge over the suit property (L.R. NO. 12495/84) – original No.12495/12/3- Karen Nairobi upon which was erected a residential house in favour of the defendant securing the repayment by Mayford of the overdraft and not exceeding Kshs.1,500,000/=, interest thereon and other charges, but did not execute any separate Deed of Transfer and indemnity in favour of the defendant.

3. It was further alleged that Mayford failed to service the loan and overdraft facilities and interest and other charges continued to escalate, and that though Andrew Matindi Nyamu as a registered Insurance Broker with Cannon Assurance Co., tried to redeem his indebtedness by mortgage upto Kshs.5,000,000/- with Cannon Assurance, the defendant wrongfully mixed up the existing indebtedness with other loan and overdraft facilities accounts of Mayford, that is Kshs.4,951,694/- allegedly for loan and Kshs.4,776,390/- allegedly for overdraft totaling Kshs.9,728,084/- together with interest and other charges. That despite protests and demands, the defendant failed to provide Andrew Matindi Nyamu with proper statements of accounts and that the defendant from 2005 tried to and later wrongly sold the property by auction in 2010 below the valuation market value of Kshs.28,000,000/- thus occasioning loss to the estate of Andrew Matindi Nyamu (the plaintiff). The plaintiff's has thus sought the following orders from the court-

a) A declaration that the intended sale by the defendant of the property known as L. R. No.12495/84 (Original No.12495/12/3) Karen Nairobi for 2nd August, 2006 was illegal, null and void for non-compliance with the law.

b) An injunction restraining the defendant, its servants, agents, assigns or otherwise however and in any way whatsoever from advertising for sale, putting up for sale, selling or otherwise in any manner whatsoever alienating or disposing the property known as L.R. No.12495/84 (Original No.12495/12/3) Karen Nairobi.

c) An account of what if any, was due from the plaintiff to the defendant under and by virtue of the legal charge dated 21st day of March 2005 and made between the plaintiff and the defendant.

d) An order that the said account may be taken upon footing, that upon the true construction of the said charge interest and other charges, if any, are only payable upon the true construction of the said charge interest and other charges, if any, are only payable by the plaintiff on the sum of kshs.1,500,000/- guaranteed by the plaintiff and not otherwise.

e) An order that upon payment by the plaintiff to the defendant of any sum found to be due on the taking of such account the plaintiff may be at liberty to redeem the suit property.

f) An order for payment by the defendant to the plaintiff for loss of the suit property kshs.28 million as at about the date of illegal sale of the property with interest at the contract rate of interest for the subject charge 13% per annum from the date of illegal sale.

g) Costs and interest thereon.

4. In response to the allegations in the plaint, the defendant through Oraro & Company Advocates filed an amended defence dated 22nd July 2019. It was admitted in the defence that the defendant granted Mayford financial facilities secured by a charge over LR 12495/84, Karen but denied that the facilities were restricted to the amounts stated in paragraph 5 of the plaint. It was averred that prior to the defendant granting Mayford the financial facilities in March 2005 as stated in the plaint, on 19th April 2004, the defendant had offered and did in fact grant Mayford a loan of Kshs.3,000,000/- per the letter of offer of same date, and obtained a letter of set off from the plaintiff for the same.

5. Further it was averred that by a deed of guarantee and indemnity dated 29th April 2004, the plaintiff and the Chief Officer's of Mayford guaranteed and bound themselves as primary obligors, for repayment to the defendant of all sums of money which might from time to time be due to it from Mayford, and that by reason of the default by Mayford, the defendant properly and lawfully served upon the plaintiff a statutory demand notice to pay the amount lawfully due and owing from Mayford as at 17th November 2005 as required by law, and the defendant thus became entitled in law to sell the property in exercise of its statutory power of sale.

6. The defendant further denied being privy to arrangements between the plaintiff and Cannon Assurance Company, and denied also that it failed to furnish the plaintiff with a true and proper statement of account. The defendant admitted instructing auctioneers to advertise and sell the property, but denied that the notice was defective, null and void. The defendant lastly averred that it was entitled in law to sell the property in exercise of its statutory power of sale and denied that the plaintiff suffered any loss, irreparable or otherwise, and contended that in any case the suit had abated following the lawful and procedural sale of the property in 2010.

7. At the hearing of the case, the plaintiff called two (2) witnesses. PW1 was Linda Waceru Matindi the 1st administrator of the estate of Andrew Matindi Nyamu the deceased plaintiff and a daughter. It was her evidence that she knew that her late father Andrew Matindi Nyamu was only personally indebted in the sum of Kshs.1.5 million for which he charged LR 12495/84 as security. However, auctioneers claimed an amount of Kshs.17,020,784/31 as owing and sold the property for only Kshs.14,250,000/- while the property had been valued at Kshs.28,500,000/-. It was her evidence that though her father made efforts to redeem the property through Cannon Assurance Company Limited financing, the defendant refused to provide particulars of the indebtedness of the plaintiff and instead sold the property.

8. In cross-examination, she admitted that her late father was an official of Mayford. She was aware that some money was repaid to K-Rep Bank by people like Geoffrey Wachira Mahinda, but stated that the said Geoffrey Mahinda would not be called by the plaintiff to testify. Though she was aware of an indebtedness of Mayford to the defendant for Kshs.3,000,000/- she maintained that her father's security was limited to only Kshs.1.5 million. She admitted and was aware her father was given notices for debts of Kshs.4.9 million and Kshs.4.7 million and that though at the time her father approached Cannon Assurance Company in that regard, his attempt to block the sale was declined by the court.

9. In re-examination she stated that she was not aware of other charges to secure the indebtedness of Mayford signed by her father. According to her, it was only No.LR12495/84 Karen Nairobi that her father Andrew Matindi Nyamu (the plaintiff) charged as guarantor.

10. PW2 was Duncan Mwangi Gichangi a licensed valuer who did a valuation on Plot No.LR12495/84 Karen Nairobi on 28/4/2010 and who visited the property and prepared a report, which he produced in court. According to his valuation, the market value of the property was Kshs.28,000,000/-, mortgage value Kshs.23,000,000/-, forced sale value was Kshs.17,000,000/-, insurance value was Kshs.18,000,000/-, and rented value Kshs.130,000/- per month.

11. In cross-examination, he stated that he was instructed to do the valuation by PW1 through a lawyer. He stated also that the valuation was for loan purposes and though the report contained a clause that it was limited to the client KCB, he maintained that there was no clause that it be not used in court. He stated that the house was complete but not fully constructed. He confirmed that he was approached by KCB to do the valuation.

12. In re-examination, he reiterated that the valuation was for loan purposes, and that he visited the site to do the valuation. That was the plaintiff's evidence.

13. The defendant called one witness DW1 James Karanja Mwangi, an Assistant Bank Manager Recoveries at Sidian Bank. He stated that Sidian Bank was formerly K-Rep Bank. He relied on his witness statements and defendant's documents. It was his evidence that in April 2004 Mayford approached the bank for Kshs.3,000,000/- financing and the officials of Mayford and the plaintiff executed guarantee and indemnity and agreed to a set off in favour of the bank. The bank thus had a lien over the guarantors property. He stated that the letter of set off dated 22/4/2004, in addition, provided that the defendant bank could go to the amounts in the bank accounts of the guarantors to recover outstanding amounts.

14. It was his further evidence that in 2005, Mayford again approached the defendant for further financial facility of Kshs.4,000,000/- the security being a legal charge on LR 12495/84 Karen Nairobi and LR. Ruguru/Gachika/1250 – Nyeri and also a lien on current accounts, and the relevant documents were executed by the plaintiff. He stated that Mayford defaulted in payments resulting in a letter dated 17/11/2005 addressed to the plaintiff, which was a statutory notice given for Kshs.4,776,390/- overdraft and Kshs.4,957,694/- loan. Following issuance of the statutory notice, a letter from the plaintiff was received by the defendant to disclose the indebtedness of the plaintiff to Cannon Assurance Co., and by letter of 10/1/2006 Oraro & Company Advocate wrote to Cannon Assurance Company disclosing the amount of Kshs.4,951,694/- loan and Kshs.4,776,390/- overdraft owed by the plaintiff.

15. He testified further that thereafter the defendant handed over the matter to auctioneers who served an auction notification, and though plaintiff moved to court to stop the auction, the court gave the defendant authority to sell, and another notice of sale was issued. It was his evidence that the amount intended to be recovered at the auction sale was Kshs.17,020,784/31 which was the debt not paid for five (5) years. According to him the auction sale took place in 2010 and was based on a foreclosure valuation done by Crystal Valuers where upon the market value was determined Kshs.15,000,000/-, and forced sale value Kshs.10.5 million. He stated that the property was sold in the auction at Kshs.14,250,000/= which was above forced sale value.

16. In cross-examination, he stated that he had worked with Sidian Bank since 2016- slightly over 3 years and confirmed that the defendant herein was K-Rep Bank, and that no documents of K-Rep Bank were filed. He said that Sidian Bank was registered as a change of name in 2016, and that from the documents in the supplementary bundle, the first entry in the statement on 1st January 2006 was by Sidian Bank which was registered 10 years later. He agreed that the letter of offer of loan in the first bundle was to be utilized according to plans, but no plans were submitted, and there was no statement of account in court to confirm compliance with clause 9 of that Letter of Offer. He agreed that the document filed in court only recaps the terms of offer amount for Kshs.3,000,000/-, with no other information.

17. With regard to the charge of 21/3/2005, he agreed that it was executed on the same date, and that no documents were filed to give the particulars of the amounts in the demand letters, though according to him actual bank statements must be there. Though he agreed that the letter from the auctioneer dated 29/5/2006 did not indicate the amount owing, he maintained that the amount of Kshs.17,000,000/- contained in the auctioneers letter must have been based on particulars showing how the amount claimed was arrived at from Sidian Bank. He also said that the amount of Kshs.14,250,000/- realized in the auction sale must have been based on the indebtedness particulars provided by Sidian Bank. He admitted that no auctioneers certificate of sale and accounts of proceeds of sale were provided in court.

18. He admitted that though other officials of Mayford provided guarantees, Sidian Bank only realized the loan from two people the plaintiff and Geoffrey Mahinda, and the latter actually redeemed his property Nyeri Ruguru/Gachika/1250 through a loan he took of Kshs.5,000,000/-. He agreed that the majority shareholder of Sidian Bank was Centum Investments Ltd, and that for a charge to qualify as security to a bank it had to be registered and that the only charge registered against LR.12495/84 Karen Property of the Plaintiff was for Kshs.1.5 million.

19. In re-examination, he confirmed that Sidian Bank was a change of name through a Gazette Notice. He said that the position of Mayford indebtedness as at 29/5/2010 was Kshs.17,485,822/-, and that the plaintiff did not at any time write to say that he did not recognize the debt demanded. He reiterated that the loan and overdraft facilities were, from the records, granted to Mayford. That was the defendant's evidence. Parties counsel then agreed to file written submissions which they did not highlight.

20. In the written submissions, the plaintiff's counsel gave a background to the case and stated that the plaintiff only charged his property LR No.12495/84 (IR95579) Karen in a charge dated 21st March 2005 to secure a loan facility to the borrower, Mayford, to an aggregate amount not exceeding kshs.1,500,000/- exclusive of interest and other charges. Counsel contended that the plaintiff was a stranger to all the other financial facilities offered to Mayford such as the letter of offer dated 21/1/2005 for overdraft facility of Kshs.4,000,000/- as same was not signed by the Plaintiff but by Geoffrey Wachira Mahinda, Peter Ciira Wabera and John Karungai Nyamu who had no interest in the deceased's property LR 12495/84 Karen, Instead the defendant charged property LR No. Ruguru/Gachika/1250 Nyeri owned by Skill Plus Kenya Ltd, one of whose signatories was Geoffrey Wachira Mahinda. Counsel relied on the provisions of section 65 of the Registered Land Act (now repealed) on the importance of registration of charges and the consequences thereof.

21. With regard to the guarantee and indemnity dated 29th April 2004 for a loan facility of Kshs.3,000,000/- to Mayford mentioned in paragraph 6 of the amended defence, counsel reiterated that the liability of the plaintiff was limited to the kshs.1,500,000/- in the indemnity and guarantee of 21st March 2005. In addition, counsel contended that the facility for Kshs.3,000,000 was conditional on approved plans to be submitted to K-Rep Bank and there was a requirement for security to be availed under clause 9 thereof, which was not fulfilled. Counsel pointed out that this was a facility to lend to cooperative members, and since there were no approved plans and loan applications submitted to K-Rep Bank, the plaintiff could not be liable for the same.

22. Counsel also challenged the statement dated 29/8/2019 in the defendant's supplementary list of documents arguing that it was introduced in an irregular manner, and asked that it be expunged from the documents filed. Besides, the document was drawn by Sidian Bank a stranger to the proceedings before the court. Counsel further pointed out that the first entry in that document on 1st January 2006 showed a nil balance, which meant that by the time the plaintiff filed suit on 24th July 2006 there was no indebtedness by the borrower Mayford, though interestingly a letter dated 17th November 2005 from advocates for K-Rep Bank had claimed an amount of Kshs.9,728,084/- being loan account of Kshs.4,951,694/- and overdraft of kshs.4,776,390/-. Counsel further argued that the document could not be genuine as Sidian Bank was registered in 2016 as a subsidiary of Centum Investment Company Limited, and though the document was made after K-Rep Bank ceased to exist, it was stamped as a true copy from K-Rep Bank and was signed as a true copy by an unidentified person. The document itself has a lot of content contradictions thus it is not a valid or genuine statement.

23. Counsel lastly suggested that the issues for determination were whether a loan was advanced, how much was advanced, what remedies are by law conferred to charge, what was the effect of failure to serve 90 days mandatory notice, the legality of the auction sale herein, and what reliefs can be granted to the plaintiff. Several authorities were relied upon.

24. In response, the defendant's counsel filed written submissions giving a summary of the case, its background and relevant facts. Counsel submitted that on 19th April 2004 the defendant and Mayford entered into a loan agreement in the sum of Kshs.3,000,000/- secured by a cash deposit of Kshs.60,000/=. In that regard, Geoffrey Wachira Mahinda, Benedict Kariuki Nderitu, Peter Ciira Wabere and John Karungai Nyamu undertook to be guarantors for the repayment to the defendant of all sums of money which may from time to time be due by Mayford to the defendant vide a guarantee and indemnity agreement dated 27th April 2004. In addition, the defendant received a letter of set off dated 22nd April 2004 from the plaintiff and the above others duly executed by the plaintiff. Following this, the defendant offered Mayford further financial facilities, that is an overdraft facility of Kshs.4,000,000/- by letter of offer for overdraft dated 21st January 2005. According to counsel, these were two financial facilities which were not pleaded in the amended plaint. In March 2005, the Chief Officers of Mayford

applied and were granted a term loan of Kshs.1,500,000/- and a charge was registered against L.R. No.12495/84 (Original Number 12495/12/3) Karen belonging to the plaintiff as security for the loan. Thereafter, Mayford defaulted in payment thus resulting in the issuance of a statutory notice which was forwarded to the plaintiff by registered post by Oraro and Company Advocates and, because there was failure by the plaintiff to comply with the notice, auctioneers were instructed to conduct an auction, and though an attempt was made by the plaintiff for injunctive orders the same was declined by Justice F. Azangalala on 12th March 2008 and auctioneers thereafter sent another letter to the plaintiff and conducted a public auction in 2010 realizing a sum of Kshs.14,250,000/-. Counsel maintained that the plaintiff was indebted to the defendant, and that the defendant acted lawfully.

25. Counsel felt that the issues for determination, were whether the plaintiff was liable for being a guarantor, whether the defendant lawfully and procedurally exercised their statutory right to sell, and whether the plaintiff was entitled to the reliefs sought. Counsel relied upon a number of authorities.

26. In response to the defendant's counsel written submissions, the plaintiff's counsel filed a rejoinder, and stated that the valuation by Crystal Valuers Limited whom the defendant did not call as a witness, was not produced and was expunged from the record of admitted documents. Counsel pointed out that the defendant's counsel admitted in submissions that the plaintiff was not a guarantor to the indemnity agreement dated 27/4/2004, and added that the plaintiff had no bank accounts with the defendant and that, since the defendant did not produce statements of accounts for the plaintiff and the borrower (Mayford), they could not claim a right to set off, combine or consolidate such accounts. Counsel reiterated that the legal charge of the plaintiff was only in respect of Kshs.1,500,000/- and was not for prior indebtedness of Mayford, and further stated that no evidence of sale by auction was produced by the defendant in court.

27. Having considered the pleadings and evidence on record, and submissions by counsel for the plaintiff and counsel for the defendant, in my view the issues for my determination are as follows-

- a) Whether the defendant offered financial facilities to Mayford Co-operative Ltd?**
- b) Whether the plaintiff guaranteed the said financial facilities, and to what extent.**
- c) What was the indebtedness of Mayford Cooperative at the time of auction sale?**
- d) Whether the defendant followed the law in selling the property of the plaintiff by auction**
- e) What was the Indebtness of the Plaintiff at the time of Auction Sale?**
- f) What was the value of the Karen property at the time of sale.**
- g) What amount was realized at the sale?**
- h) Whether the plaintiff is entitled to the reliefs sought.**

a) Whether the defendant offered financial facilities to Mayford Co-operative Ltd.

28. With regard to the first issue as to whether the defendant offered financial and overdraft facilities to Mayford, the pleadings of the parties, filed, especially documents such as the letter of offer dated 19th April 2004, letter of set off dated 22nd April 2004, letter of overdraft dated 21st January 2005, and the evidence of witnesses who testified on both sides, the fact of the defendant offering Mayford financial facilities, has not been disputed. Both contesting sides agree that such financial facilities were offered. I find that indeed the defendant offered financial facilities and overdraft facilities to Mayford Cooperative.

b) Whether the plaintiff guaranteed the said financial facilities, and to what extent.

29. The plaintiff (now deceased) states that he only charged his property LR 12495/84 Karen Nairobi for Kshs.1,500,000/- by a charge dated 21st March 2005. That is the evidence of PW1 Linda Waceru Matindi. The defendant does not deny this charge to the property but insists that this was only part of the story, as the plaintiff earlier on had committed himself as a guarantor to all amounts owing from the Mayford, and also to a set off in favour of the defendant.

30. Having perused and considered the documents relied upon by both the parties on the financial and the overdraft facilities from the defendant to the Mayford, I find that the plaintiff Andrew Matindi Nyamu did not commit himself in the letter of offer of loan of Kshs.3,000,000/= dated 19th April 2004. The said letter clearly stated that authorized officials would have to initial the first two pages of the letter and the said two pages were neither initialled by Andrew Matindi Nyamu or anybody else. The authorized signatories were also required to sign on the last page of the offer, which they did not. The letter of offer was also only valid for 15 days. The plaintiff thus did not make any commitment to this financial facility.

31. With regard to the guarantee and indemnity document dated 27th April 2004 in my view, Andrew Matindi Nyamu (plaintiff) signed this document and committed himself to those terms. It is clearly stated in the first page of the document that the names and addresses of the guarantors would be in Part 1 of the schedule and the name Andrew Matindi Nyamu is there together with his signature. Though I would expect that the defendant should have made the signatories to initial all the pages, before the schedule to agree on the terms, I will leave it there. This guarantee acknowledges a principal sum of Kshs.3,000,000/= to Mayford (the principal) and was signed. Therefore the plaintiff guaranteed an amount of Kshs.3,000,000/=, if that amount was advanced to Mayford by the defendant.

32. With regard to the letter of set off dated 22nd April 2004, it seems to be a naked short note and neither describes the status of the signatories, nor does it contain their names and addresses. I can however see a signature that appears to be that of Andrew Matindi Nyamu (similar to the signature in the above guarantee) as the last signature. Since the signature has not been alleged by the plaintiff to be a forgery in such a serious financial commitment, in my view, on the balance of probabilities, it has been established that the plaintiff Andrew M. Nyamu signed the letter of set off.

33. With regard to the letter of offer of 21st January 2005 for financial facilities of Kshs.4,000,000/- to Mayford in which a legal charge was to be executed on the Karen land of the Plaintiff as well as L.R. No. Ruguru/Gachika/1250, Nyeri Municipality, it was not initialled, and signed by the plaintiff. The plaintiff did not thus commit himself to this credit facility.

34. It is abundantly clear that the plaintiff committed himself to an overdraft facility of Kshs.1,500,000/= and his property LR 12495/84 Karen Nairobi was charged.

35. Thus though the plaintiff did not have a bank account with K-Rep Bank (the defendant) and though he did not commit himself to all the liabilities of Mayford, it is not true that he committed himself only to the extent of Kshs.1,500,000/= overdraft facility extended to Mayford by the defendant. He committed himself above that figure as shown in the analysis above. The plaintiff committed himself to the Kshs.1,500,000/= overdraft facility and charged his property LR 12495/84 Karen, and also guaranteed indebtedness of Mayford to up to Kshs.3,000,000/=.

c) What was the indebtedness of Mayford Cooperative as at the time of sale of the plaintiffs property?

36. Though there are unclear areas on the actual date of sale, it is agreed that the sale occurred towards the end of 2010.

37. With regard to the amount of indebtedness of Mayford to the defendant at the time of the auction sale, the defendant relied on the letter from their lawyers, Oraro & Company Advocates and additionally a bank statement, which was filed late in these proceedings. That bank statement in my view is not admissible. Firstly, that statement should have been supplied to the plaintiff long time ago because he asked for same in writing many years ago, before he commenced this case, and before auction. It also appears to have been prepared by Sidian Bank which is not a party in these proceedings. If we go by the defendant's evidence, by the time Sidian Bank was said to have been incorporated by change of name from K Rep Bank in 2016, this case had already been commenced in 2006 and the property sold in 2010. In my view therefore the statement is an attempt to bring an ambush on the plaintiff through the back door. It has to be disallowed, and I do so and will not rely on the same.

38. With regard to the advocate's notice letter, it has two figures of indebtedness, Kshs.4,951,694/= term loan and Kshs.4,776,390/= overdraft facility totaling Kshs.9,728,040/=. Again that letter is not evidence as it is merely a communication from a lawyer which has to have an originating source, other than Oraro & Company advocates, who is merely a special agent, who could not be called as a witness. In addition, it came out in evidence that one of the guarantors to Mayford, Geoffrey Mahinda redeemed his property with a loan of Kshs.5,000,000/- which means that the indebtedness of Mayford was reduced by that amount.

39. Only the defendant could conclusively establish to this court the indebtedness of Mayford to the defendant at the time of the sale in 2010 on the balance of probabilities. They did not do so. I find that the indebtedness of Mayford at the time of sale by public auction in 2010 of the plaintiff's Karen property was not established.

d) Whether the defendant followed the law in selling the property of the plaintiff by auction.

40. On whether the defendant followed the law in selling the property of the plaintiff by auction, my findings are that the plaintiff was given proper notice. He tried to stop the sale through court process and was not successful. The fact that the court allowed the sale to go on, and that court decision has not been challenged closed that chapter. The auction sale was lawful, and complied with the law.

e) What was the indebtedness of the plaintiff at the time of sale of his property in 2010?

41. As I have stated above the plaintiff signed on 27th April 2004 a guarantee and indemnity of Kshs.3,000,000/= in favour of the defendant, for the liability of Mayford either current or future. Under clause 1 it was stated that "The total amount recoverable under this deed shall be limited to the principal sum stated in part III of the schedule to this deed which shall be added all interest, fees, commission, costs, charges and expenses above". The description of these charges are in the first paragraph of the same document. What is in part III is an amount of Kshs.3,000,000/=. Therefore on this document the plaintiff only guaranteed Kshs.3,000,000/=. together with other charges mentioned in that document, nothing more. The plaintiff also committed himself on the Kshs.1,500,000/= overdraft facility to Mayford, which is not disputed as it is what constitutes the charge to his Karen property. The letter of set off was not a guarantee or indemnity to any facility granted to Mayford, but created a right to the defendant to use funds in the plaintiff's accounts, if any to satisfy amounts owing from Mayford. It was a stale or impotent commitment as the plaintiff did not have any bank accounts with the defendant. Therefore in my view, the indebtedness of the plaintiff to the defendant at the time of the sale of his property by auction in 2010 was the amount of Kshs.3,000,000/= plus Kshs.1,500,000/=. total Kshs.4,500,000 with interest and charges per the respective documents, if such amount was still owing from Mayford to the defendant.

f) What was the value of the plaintiff's Karen property LR 12495/84 at the time of Auction sale in 2010.

42. There is a contest on the value of this property. The defendant said it sold it at Kshs.14,250,000/=. and said they had valued it at Kshs.15,000,000/= market price. The plaintiff said they valued it at Kshs.28,000,000/= as market price. There is a contest as to whether the valuations are valid or admissible, with plaintiff saying that the defendant's valuation was not admitted in evidence, and nobody came to testify on it. The defendant on the other hand said that the valuation of the plaintiff was not admissible as it was only for use by Kenya Commercial Bank and was for loan purposes. The property has already been sold. In my view, if the property was sold at the price alleged

and the defendant, and their market valuation was Kshs.15,000,000/= and no evidence was tendered on this, and the plaintiff through evidence produced a valuation report with market valuation of Kshs.28,000,000/=, and insurance valuation was Kshs.18,000,000/=; in my view that insurance value of Kshs.18,000,000/=; being a neutral figure, is a reasonable value of the property. The fact that the valuation report of the plaintiff restricts the use for KCB, only means that no other mortgage company can validly rely on the report. It does not mean that it cannot be used in this court by one of the parties to this dispute. I thus find that the market value of the subject Karen property of the plaintiff herein was Kshs.18,000,000/= in 2010 when it was sold by public auction.

g) What amount was realised in the auction.

43. As to what amount was realized at the auction sale, only the defendant or its agent the auctioneer, could give the details. It is clear to me that other than a general statement from the defendant that the auctioneer realized Kshs.14,250,000/- at the auction sale, there is no statement of account as required under the Auctioneers Act and Rules tendered by the defendant in this court. They also did not call the auctioneer to testify in court on what they realized in the sale and give an account of same. The evidence of the defendant on the amount realized in the auction sale is thus secondary evidence and hearsay. It is not admissible and cannot be relied upon. It fails the statutory test of evidence under the Evidence Act (Cap.80). I thus find that the actual amount realized in the auction sale in 2010 has not been established.

h) Whether the plaintiff is entitled to the reliefs sought.

44. Is the plaintiff entitled to the reliefs sought? The first prayer (a) is for a declaration that the sale scheduled for 2nd August 2006 was null and void for non-compliance with the law. This prayer cannot be granted as it has been overtaken by events since the sale was conducted in 2010, in accordance with an order of court allowing the said auction sale.

45. The second prayer (b) is for an injunction restraining the defendant from advertising or selling the property. Again this prayer has been overtaken by events and cannot be granted, as the property has already been sold in 2010.

46. Prayer (c) is for an account on the basis of what is payable by the plaintiff by virtue of the legal charge dated 21/3/2005. This prayer in my view is grantable, as such account has not been given to the plaintiff so far.

47. I will grant this prayer not limited to the charge dated 21/3/2005, but based on my findings on the commitments of the plaintiff.

48. Prayer (d) is for an order that an the said account may be taken upon the footing that the charge and interest payable are only in regard to the said charge on the sum of Kshs.1,500,000/- guaranteed by the plaintiff not otherwise. This prayer cannot be granted as requested, since I have found that the plaintiff committed himself to more than the Kshs.1,500,000/-. The order will cover the Kshs.3,000,000/= guarantee and indemnity.

49. Prayer (e) is for an order that upon payment by the plaintiff to the defendant of amounts found due, the plaintiff be at liberty to redeem the suit property. This prayer cannot be granted as the suit property has already been sold in 2010.

50. Prayer (f) is for an order for payment by the defendant to the plaintiff for loss of the suit property at Kshs.28,000,000/- as at about the date of illegal sale with interest. This prayer cannot be granted as requested, since I have market value of the property is Kshs.18,000,000/=. The prayer will be granted on the basis of the market price of Kshs.18,000,000/=

51. Prayer (g) is for costs and interest, which in my view, follow the event.

52. Considering all my above findings, I order as follows –

a) Prayer (a) and (b) and (e) are hereby disallowed and dismissed.

b) I order that an account on what if any is due as at 1st December 2010 by the plaintiff by virtue of the legal charge dated 21st March 2005 and the guarantee and indemnity dated 27th April 2004 for Kshs.1,500,000/= and Kshs.3,000,000/= be made between the plaintiff and the defendant.

c) I order that the said account be taken upon the footing that upon the true construction the commitment of the parties, the interest and other charges if any are only payable by the plaintiff on the sum of Kshs.1,500,000/= and Kshs.3,000,000/= guaranteed by the plaintiff and not otherwise.

d) I order that payment be made to the plaintiff by the defendant for loss of the suit property, that is Kshs.18,000,000/= minus the amount payable by the plaintiff per order (b) and (c) above, as at 1st December 2010, with interest at the rate of 13% per annum from 1st December 2010.

e) I award the plaintiff the costs of suit against the defendant.

Dated and delivered at Nairobi this 6th February 2020.

GEORGE DULU

JUDGE

In the presence of -

Court Assistant

For the plaintiff.....

For the defendant.....