

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
COMMERCIAL CASE NO. E516 OF 2024

VICTORIA COMMERCIAL BANK LIMITED.....
PLAINTIFF

VERSUS

ADM CONSULTING LIMITED.....1ST
DEFENDANT

ASHVINDER MANN DHARIWAL.....2ND
DEFENDANT

MOHAN SINGH DHARIWAL.....3RD
DEFENDANT

RULING

1. This Ruling is in respect of the 3rd Defendant’s application by way of a Notice of Motion dated 8th November, 2024. The Applicant seeks the following prayers;

1) THAT the Plaintiff’s suit against the 3rd Defendant be struck out for being premature and an abuse of the Court process.

2) THAT the costs of this application and the 3rd Defendants costs of this application be borne by the Plaintiff.

Background Facts

2. The Plaintiff, a bank, advanced four loan facilities totalling Kshs. 325,000,000 to the 1st Defendant for property development on LR No. 2327/330, Karen, Nairobi, secured through successive legal charges. In addition, the 2nd and 3rd Defendants executed continuing Deeds of Guarantee and Indemnity covering all the facilities. The 1st Defendant defaulted on repayment due by 30th April 2019, leading the Plaintiff to demand settlement from the guarantors. Despite notices and demands, the debt remained unpaid, accruing to Kshs. 497,467,929.96 by August 2024. The Plaintiff therefore filed this suit against the Defendants jointly and severally, with the 2nd and 3rd Defendants sued in their personal capacity as guarantors.
3. The Applicant filed the notice of Motion dated 8th November 2024 seeking orders that the Plaintiff's suit against the 3rd Defendant be struck out for being premature and an abuse of the court process and the costs of the Application.
4. The Application was supported by the Affidavit of **Mohan Singh Dhariwal**. He stated that the 3rd Defendant was a mere guarantor of the loans advanced to the 1st Defendant,

hence was improperly enjoined to this suit. That this action is premature and an abuse of the Court process.

5. Further, that the Plaintiff holds security via a charge dated 26th August 2015, further charge 22nd July 2016, Second Further charge dated 3rd July 2017 and third further charge dated 5th September 2018 over the property known as land reference number 2327/330 Karen Nairobi. That this security would clear the outstanding debt.
6. In Response, the Plaintiff vide the Replying Affidavit sworn on 20th April 2025, stated that the 3rd Defendant's argument that the existence of security precludes the present suit is legally untenable. The existence of a registered charge does not bar a chargee from pursuing a personal remedy against the guarantor. A secured creditor may pursue any and all remedies concurrently.

Issues for determination

7. The Court has carefully considered the written submissions by the parties alongside the Application and the response therewith and the only issue for determination is as follows;

a) Whether the suit against the 3rd Defendant should be dismissed.

Analysis and determination

8. The application is hinged on the provisions of Order 2 Rule 15 which states as follows;

15. Striking out pleadings [Order 2, rule 15.]

(1) At any stage of the proceedings the court may order to be struck out or amended

any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this r. shall apply to an originating summons and a petition.

9. The Applicant argued that the Plaintiff is simultaneously exercising its statutory power of sale pursuant to **Section 90(3) of the Land Act** and is suing for the outstanding amount hence subjecting the 3rd Defendant to double jeopardy and is seeking unjust enrichment.

10. Further to the above, that the Plaintiff issued a Statutory Notice dated 30th September 2024 pursuant to **Section 90(1) of the Land Act**. Hence it is precluded by the doctrine of election from pursuing both a claim for the outstanding loan and further exercising its statutory power of sale. That this is subjecting the 3rd Defendant to double jeopardy and is thus seeking unjust enrichment.

11. In contrast, the Plaintiff submitted that it is lawfully entitled to pursue both the statutory remedy of sale against the charged property and the contractual claims against the

guarantors concurrently. These remedies are legally distinct, compatible, and not mutually exclusive.

12. **Section 90(3) of the Land Act** provides for remedies under the charge as follows:

(3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may—

- (a) sue the chargor for any money due and owing under the charge;***
- (b) appoint a receiver of the income of the charged land;***
- (c) lease the charged land, or if the charge is of a lease, sublease the land;***
- (d) enter into possession of the charged land; or***
- (e) sell the charged land***

13. The Plaintiff submits that it is not proceeding against the chargor who is the borrower but against the Guarantors under separate guarantees entered into between the Plaintiff and the Guarantors. It is these guarantees that are sought to be enforced.

14. The Court has been referred to what is said to be two conflicting positions on the application of the doctrine of

election as relates to recoveries of secured loans and realisation of securities by Chargees.

15. For the 3rd Defendant/Applicant they maintain the position that the Chargee has to elect and cannot proceed to issue a statutory notice to realise the securities, as well as sue for the amount. It cites the cases below.

16. The Court in **David Karanja Kamau v Harrison Wambugu Gaita & another [2020] eKLR** held:

“A proper reading of section 90(3), therefore, shows that the 2nd defendant, as chargee, was required to make an election on which of the remedies to go for. The subsection uses the word or which means the remedies are disjunctive and not conjunctive, distinct and not cumulative. The 2nd defendant could only choose one remedy and not more.”

17. In addition, in **Clesoi Holdings Limited v Prime Bank Limited [2016] eKLR** the Court held:

“In this matter, the applicant has chosen the remedy of realisation of the security vide the sale of the charged property. Under section 90 (3) of the Land Act 2012, the remedies available to the chargee cannot be exercised simultaneously. The

chargee who sues for money secured will have to realise the security first, and if the security is rendered insufficient, then can it resort to the other alternatives remedies which includes, suing of the chargor on the personal covenant under the charge document.”

18. For the Plaintiff it relies upon the cases of **Barclays Bank of Kenya Ltd v Kepha Nyabera & 191 others & another [2013] KECA 349 (KLR)**, **South Sea Bank Ltd v Tan Soon Gin (alias George Tan) [1990] 1 AC 536 at 545** a decision of the Privy Council and **Ram Kishun v State of Uttar Pradesh & Ors, Civil Appeal No. 7377 of 2004** a decision from the Supreme Court of India. It is submitted that the Lender has a right to proceed as against the separate contracts one for borrowing and the other a guarantee.
19. This Court has reviewed several decisions by our Courts on this issue.
20. In **Spire Bank Limited v Obora & 2 others (Civil Suit E640 of 2021) [2022] KEHC 13791 (KLR)**

(Commercial and Tax) (14 October 2022) (Ruling) Hon Justice A.Mabeya stated as follows;

“I say no more on the meaning of section 90(3) of the Land Act. The remedies are in the alternative and not concurrent. It would be gravely prejudicial to a chargor if more than one remedy is exercised by the charge simultaneously.

28. *Just like in **Clesoi Holdings (Supra)**, it would be in the interest of justice for the plaintiff to realise its security in the Kisumu property first and if the returns prove to be insufficient, the plaintiff may continue with the present suit to recover any outstanding figure.*

29. *The upshot of the above is that the application dated December 21, 2021 lacks merit and is dismissed.*

30. *The court further orders the stay of these proceedings pending the sale of the Kisumu property by the plaintiff in exercise of its statutory power of sale.”*

21. In **Njer v Kenya Commercial Bank Limited & another (Civil Case**

24 of 2018) [2025] KEHC 8705 (KLR) (20 June 2025) (Judgment) Wananda J has followed this well beaten path and stated as follows;

“Although Section 90(3) above could have been better drafted and the language made express to avoid confusion and differing interpretations, it is clear that the remedies available to the chargee under Section 90(3) cannot be exercised simultaneously and the chargee must therefore make an election on which one of the various available remedies he wishes to pursue at any one time. This is obviously the spirit advanced in that provision.

51. In my view, the adoption of the word “or” in Section 90(3) is not merely accidental or cosmetic, but rather, it is a deliberate choice of word to mean that the remedies available under Section 90(3) are disjunctive and not conjunctive, they are in the alternative, and not concurrent. In other words, the remedies are not cumulative, but

distinct against or from each other. The basic reasoning is that it will be evidently prejudicial to a chargor if the chargee is allowed to invoke and commence more than one remedy simultaneously in recovery of the security. To this extent, I agree with the Plaintiff's Counsel that the 1st Defendant's Counterclaim is untenable.

*52. Although the Plaintiff did not cite any authority while arguing the above point, I may say that my view above has previously been upheld in various cases. I have in mind for instance, the holding of **G.Nzioka J** in the case of **Clesoi Holdings Limited v Prime Bank Limited [2016] eKLR**, the holding of **E. Mwita J** in the case **David Karanja Kamau v Harrison Wambugu Gaita & another [2020] eKLR**, the holding of **M. Muigai J** in the case of **Logitac Global Logistics Limited v Stanbic Bank Kenya Limited; Osman***

Abdullahi Osman & another (Interested Parties) [2021] eKLR, and also the holding of A. Mabeya J in the case of Spire Bank Limited v Obora & 2 others (Civil Suit E640 of 2021) [2022] KEHC 13791 (KLR) (Commercial and Tax) (14 October 2022) (Ruling), among others.

53. In view of the fore going, the 1st Defendant will have to first conclude its already ongoing quest to realise the security by exercise of its statutory power of sale, and only in the event that it fails to fully recover its debt from it sexercise of that remedy, can it then at that point fall back to the remedy of filling a suit to recover the balance. The 1st Defendant’s other option, if it wishes to file a suit, is to first abandon its current efforts to realize the security by way of the exercise of its statutory power of sale.”

22. In light of the above, it would be in the interest of justice for the Plaintiff to first realise its security in the

property known as land reference number 2327/330 Karen, Nairobi, and if the returns prove to be insufficient, the Plaintiff may then continue with the suit against the Applicant to recover any outstanding balance.

23. Having elected to first proceed by way of exercise of statutory power of sale, to realise the security pledged, the Guarantor, though by separate contracts is entitled to insist that the Plaintiff first concludes that process. The Plaintiff would then only be able to proceed against the 3rd Defendant as a Guarantor for any balances. That may necessitate amending the suit to reflect the balances then due and claimed.

24. So, what happens to the Plaintiff's suit as against the 3rd Defendant? Court finds the position taken by **A. Mabeya J in Spire Bank Limited v Obora & 2 others (Civil Suit E640 of 2021) [2022] KEHC 13791 (KLR) (Commercial and Tax) (14 October 2022) (Ruling)** quite practical and one that makes the most economic business sense. This Court is minded to stay the suit against the 3rd Defendant pending the realisation of the security held by the Bank.

25. The Application fails in that the Court declines to strike out the suit for being premature. Having stated so the Court having found that the Plaintiff cannot proceed to exercise its statutory power of sale as well as file a suit for recovery, proceeds to stay this suit. As to costs, they be in the cause.

Determination

26. The 3rd Defendant's Application by way of a Notice of Motion dated 8th November, 2024 is dismissed for lack of merits.

27. The costs of the application be in the cause.

28. The Plaintiff's suit is stayed pending the Plaintiff's sale of the property known as land reference number 2327/330 Karen Nairobi. The Plaintiff is at liberty to pursue for any balance that may be outstanding thereafter.

29. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS
09TH DAY OF OCTOBER, 2025.**

**NJOROGE BENJAMIN K.
JUDGE**

In the presence of;

Miss Maina holding brief for Mr Wandati for the Plaintiff/Respondent.

N/A for the 1st Defendant

Mr. Kisinga for the 2nd and 3rd Defendants/Respondents.

Mr. Peter Wabwire -Court Assistant