

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL CASE NO. 36 OF 2018

(Formerly ELDORET ENVIRONMENT & LAND COURT CASE NO. 290 OF 2014)

JOSEPH OCHIENG OMONDI.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....1ST DEFENDANT
VINCENT OLOO ODUOR.....2ND DEFENDANT
KEYSIAN AUCTIONEERS.....3RD DEFENDANT
IGARE AUCTIONEERS.....4TH DEFENDANT

JUDGMENT

1. This is one of those old matters that have inexplicably remained pending for a very long time having been filed in the year 2014 at the **Environment & Land Court** before it was transferred to this Court.
2. The suit was commenced by way of the Complaint dated 18/09/2014, filed through **Messrs Chepseba Lagat & Co. Advocates**, whereof the Plaintiff sought Judgment against the Defendants, as follows:
 - a) **An order of injunction restraining the 1st, 3rd and 4th Defendants, their agents, servants and/or any other person claiming or acting on behalf of the 1st, 3rd and 4th Defendants' instructions from selling, auctioning, disposing off or in any other manner interfering with the Plaintiff's property land parcel number Municipality/Block 20 (Kapyemit) 648.**
 - b) **A declaration that the Plaintiff is not entitled to pay any overdraft whatsoever granted by the 1st Defendant to the 2nd Defendant.**
 - c) **An order that the 1st Defendant do render the Plaintiff with the proper statements of the loan account.**
 - d) **Costs of this suit together with interest thereon.**
 - e) **Any other relief that this Honourable Court may deem fit to grant.**
3. In the body of the Complaint, it was pleaded that on or about 11/01/2012, the Plaintiff executed a guarantee on behalf of the 2nd Defendant who had applied for a loan of Kshs 720,000/- together with interest from the 1st Defendant, that the Plaintiff offered his title deed for the parcel of land **Eldoret Municipality/Block 20 (Kapyemit) 648 (hereinafter referred to as**

“*the property*”) as security for the loan, and which loan was so then advanced to the 2nd Defendant.

4. It was pleaded further that the 2nd Defendant continued to update the Plaintiff as far as servicing the loan account is concerned up to November 2013 when the loan balance was standing at Kshs 330,000/-, but the 1st Defendant failed to advise the Plaintiff when the 2nd Defendant defaulted in servicing the same. It was urged that on or about 5/09/2014, the 3rd Defendant’s agent visited the said property alleging that they had authority from the 1st Defendant to sell the land (security) as the 2nd Defendant had defaulted, that when the Plaintiff visited the 1st Defendant’s offices to make inquiries, he was handed a copy of a Notification of Sale issued in exercise of the 1st Defendant’s statutory power of sale, that despite the Plaintiff’s request to be supplied with more information thereon, the 1st Defendant was adamant and refused to supply the same. It was then urged that the Plaintiff is ready and willing to pay the loan balance, if any, provided the 1st Defendant avails statements of account, he is given sufficient notice as required by law, and is given sufficient time to pay. It was contended that the Plaintiff was however shocked when he learnt that the 1st Defendant, through the 3rd Defendant, had published in the newspaper the intended auction of the parcel of land as the Plaintiff has never been served with any statutory notice, and the intended auction was without regard to the amount already paid by the 2nd Defendant.
5. It was stated further that on 16/09/2014 when the Plaintiff made further inquiries, he was shocked to learn that the amount due was Kshs 250,000/- as the 2nd Defendant was (upon his request) granted an overdraft facility of Kshs 5000,000/-, and that therefore the balance on the overdraft was Kshs 550,000/- aggregating to a total balance due of Kshs 800,000/-. According to the Plaintiff therefore, the Defendants’ acts are tainted with illegality and malice whose particulars he listed, and that he stands to suffer irreparably if the property is sold as it his matrimonial home.
6. The 2nd Defendant, acting in person, filed the Defence dated 25/09/2014 in which he admitted receiving the loan from the 1st Defendant, and that the Plaintiff stood as his guarantor by offering the said property as security. He also admitted being in default with an outstanding balance of Kshs 334,136/- as at 1/11/2013, which default he attributed to loss of his business. He urged that he is willing and ready to discuss with the 1st Defendant on the way forward in clearing the balance

7. The 1st and 3rd Defendants, on their part, through **Messrs D.I. Were & Were Co. Advocates**, filed the Statement of Defence dated 10/10/2014, in which it was stated that in view of the default in repayment by the 2nd Defendant, the 1st Defendant was within its right to recover the loan balance. A chronology of events from disbursement of the loan or about on 24/11/2012 up to default was given. It was then stated that on or about 22/10/2012, the 2nd Defendant had deposited a cheque for Kshs 500,064/- and the 1st Defendant, pursuant thereto, advanced to the 2nd Defendant cash equivalent to the cheque amount, but the cheque was later dishonoured leading to an overdrawn position, which the 2nd Defendant did not pay and that the outstanding balance which arose from the transaction was Kshs 537,816.48 as at 1/10/2014, and as at the time of filing the Defence, it was Kshs 894,894.42 which is a consolidation of the overdrawn cheque amount and loan. It was further pleaded that the 1st Defendant issued the demand letter dated 17/09/2013, and subsequently the 90 days' notice to sell dated 7/02/2014, to the 2nd Defendant and copied to the Plaintiff, but even after expiry of thereof, the 1st Defendant, in an act of good faith, allowed the Plaintiff and the 2nd Defendant more time to redeem the property but which they failed. It was pleaded that the 1st Defendant thus issued instructions to the 3rd Defendant to proceed with sale of the property.
8. Both the Plaintiff and the 1st Defendant also filed Witness Statements, which basically reiterated the positions advanced in the Plaint and the Defence as already set out. They also filed respective bundle of documents. The 2nd Defendant did not however file any Statement or bundle of documents.
9. Together with the Plaint, the Plaintiff also filed an Application seeking interlocutory orders of injunction to stop the public auction sale of the property pending hearing and determination of the suit. The Application was then determined by way of the Ruling delivered on 1/04/2016 by **A. Ombwayo J.** In the Ruling, the Judge found as a fact, that the statutory notice, the Notification of Sale, and the Redemption Notice, had all been properly served as the same were posted to the postal address provided by the Plaintiff. The Judge however found that ***“the allegation that the Plaintiff had no business in the overdraft offered by the 1st Defendant to the 2nd Defendant raises a prima facie case with a probability of success as the Plaintiff did not sign for the overdraft”***. On this basis, the Judge allowed the interlocutory Application.
10. I may also mention that there being no action in the file for a long time, the 1st Defendant, on 8/09/2023, applied for dismissal of the suit for want of prosecution. In my Ruling thereon rendered on 29/11/2024, I agreed that the Plaintiff was guilty of failing to prosecute the suit

without any justification but however, on the ground of “interest of justice”, I did not dismiss the suit but, instead, fixed it for hearing. Pursuant to the above, the matter came up for trial on 27/03/2025 in which the Plaintiff, on one part, and the 1st and 3rd Defendant, on the second part, each called 1 witness. The 2nd Defendant, acting in person, and although in attendance, chose not to cross-examine either of the witnesses, and also did not testify.

11. The Plaintiff, **Joseph Ochieng Omondi** testified as **PW1**. Led by his Counsel, **Ms. Khayo**, he adopted his Witness Statement, and produced his bundle of documents. He reiterated that he only guaranteed the initial loan advanced to the 2nd Defendant, and not the subsequent overdraft, which he was not even aware of. Under cross-examination by **Mr. Were**, Counsel for the 1st Defendant, he conceded that the 2nd Defendant is in arrears and stated that he is ready to repay the loan if it is found to be genuinely due, and that he had paid a sum of Kshs 50,000/- this year. He then prayed to be given a period of 1 year to complete the payment by instalments of Kshs 20,000/- per month. He maintained that he was never served with any statutory notice and only received the Auctioneer’s notice. He however agreed that the addresses he had supplied were P.O. Box 132 Butula and also P.O. Box 483 Eldoret. When shown the demand letter dated 17/12/2013 and the statutory notice dated 7/02/2014, he conceded that they bore both the said postal addresses, and are also supported by Certificates of Postage indicating that they were sent via Registered Post.

12. The 1st Defendant’s witness, **DW1**, was one **Victor Wakhungu Ongono**, who introduced himself as a Credit Manager thereat. He, too, adopted his Statement and produced the 1st Defendant’s bundle of documents. He testified that the 1st Defendant supplies Bank Statements to account holders upon request, and that when this suit was filed, the 1st Defendant included such Statements in its bundle of documents filed herein. He was not however aware whether the Plaintiff had at any time requested for the statements, but stated that the 1st Defendant does not disclose bank account details to third parties although they could have supplied the Plaintiff with the same had he obtained the 2nd Defendant’s consent, as the account holder. He reiterated that as at the time that the suit was filed, the outstanding loan balance was Kshs 357,078/-, and the overdraft was Kshs 537,816.48, and thus the aggregate balance aggregated to Kshs 894,894.42. He then testified that as at the date he was testifying, the balance was at Kshs 416,568/-, and stated that the 1st Defendant stopped charging interest thereon as from 23/11/2015 when the loan was written-off, and that at the time the 1st Defendant stopped charging interest on the loan, the amount due was Kshs 640,368.78, and on the overdraft, it was Kshs 776,199/-. He denied that realization of the security was on the basis of the overdraft, and insisted that it was based only on the initial

loan. Regarding the notices, he insisted that they were all served via the two postal addresses supplied by the Plaintiff.

13. Under cross-examination by **Ms. Khayo**, he agreed that in both the demand letters and the statutory notices, no breakdown of the loan balance and the overdraft balance were given. He also agreed that although the Plaintiff was not involved in the overdraft, the amount quoted in the Auctioneer's notice was a consolidated figure for both the loan and the overdraft, which was not the right thing to have done. He also agreed that the 1st Defendant never advanced the overdraft on the basis of the property offered as security for the loan, but claimed that they only made a demand for repayment of both liabilities. He also agreed that the 1st Defendant had not filed an updated Statement. He denied that the 1st Defendant would have sold the property to recover both the loan balance and the overdraft balance had the Auctioneer proceeded with the sale. He justified the inclusion of both the loan and overdraft balances in the same notice because, in his view, the notice is supposed to demand all amounts owing.
14. At the close of the trial, the parties filed written Submissions. The Plaintiff's Submissions is dated 27/05/2025, while the 1st Defendant's is dated 16/05/2025.

Plaintiff's Submissions

15. Counsel for the Plaintiff, in his brief Submissions, urged that a bank is under obligation to always exercise reasonable care and skill in the discharge of its duties. She then submitted that there is enough evidence to confirm that the 1st Defendant lumped all debts owed by the 2nd Defendant without his knowledge, and that therefore the 1st Defendant acted without care. On the grant of injunction, she cited the case of **Nguruman Limited v. Jan Bonde Nielsen & 2 Others, C.A. No. 77 of 2012**, and urged that the Plaintiff fulfilled all the principles required for grant thereof. She submitted further that the Plaintiff had no business in the overdraft advanced to the 2nd Defendant as he did not even sign it, and that the amount sought had been exaggerated. She also contended that the Plaintiff will suffer irreparable loss if the property is sold as it his matrimonial home, and termed the statutory notice of sale as not proper because of lumping both debts in one demand, thus exaggerated.

1st Defendants' Submissions

16. Counsel for the 1st Defendant, in his equally brief Submissions, urged that it is not in dispute that as at 1/10/2014, the total outstanding liability owed to the 1st Defendant was Kshs 894,894.42, which is a consolidation of the overdrawn cheque amount and the loan of Kshs 357,078/- that was outstanding as at 29/09/2014, and Kshs 537,816.48 being the total **Eldoret High Court Civil Case No. 36 of 2018**

overdrawn amount as at 1/10/2014. He urged that the 1st Defendant witness, **DW1**, was categorical in his testimony that the 1st Defendant did not intend to recover the overdraft of Kshs 537,816/- through sale of the property (security) but only the loan balance of Kshs 357,078/-. He contended further that the 1st Defendant had disclosed the outstanding loan balance through its Affidavits and Defence filed herein, and also exhibited the loan statements. Counsel pointed out that in the Plaint, the Plaintiff stated that is willing and ready to pay the loan, and that he would pay once the 1st Defendant avails a statement of account, but despite the same being supplied, the Plaintiff has not cleared the balance.

17. He cited **DW1's** testimony that the aggregate amount owing as at the date of his testifying was Kshs 1,416,568.47, being Kshs 640,368.78 for the loan balance, and Kshs 776,199.92 being the overdrawn amount balance. He submitted further that the 2nd Defendant, having provided the suit property for the loan facility, whose repayment has been outstanding since 2014 (10 years ago), it is fair and within the law for the 1st Defendant to sell the property to recover the same. He cited the case of **Mohammed Khaled Khashoggi vs Equity Bank Limited [2013] eKLR**. Counsel contended further that the terms of the letter of offer were clear on the repayment schedule, and the Court is not the appropriate forum to negotiate the terms. He also cited the case of **National Bank of Kenya Ltd vs Pipe Plastic Samkolit Kenya Ltd, Civil Appeal No. 95 of 1999**, and urged that a Court of law cannot re-write a contract between parties. In conclusion, he submitted that the letter of offer and the Charge documents provide the conditions for default and the rights that would accrue, and that therefore, the Plaintiff cannot contend that the actions taken by the 1st and 3rd Defendants are unlawful or illegal.

Determination

18. The one broad issue that arises for determination in this case is “*whether the 1st Defendant is entitled to exercise its statutory power of sale, by selling the suit property lodged as security, by public action to recover the amounts alleged to be outstanding*”.

19. Fortunately, from the witness testimonies presented by the parties during the trial, it is clear that most of the sub-issues that arose initially in this suit, have now been agreed upon.

20. The first issue that has never been in contention is that the 1st Defendant, on the basis of the Letter of Offer dated 10/11/2011, advanced a loan of Kshs 720,000/- to the 2nd Defendant, which loan was secured by the Guarantee & Indemnity dated 31/12/2011 executed by the Plaintiff, and secured by the Charge instrument dated 31/12/2011, executed by the Plaintiff

as Chargor, and registered in favour of the 1st Defendant on 11/01/2012 against, or over the Plaintiff's parcel of land **Eldoret Municipality/Block 20 (Kapyemit) 648**.

21. It is also not in dispute that by a subsequent arrangement entered into between the 1st Defendant and the 2nd Defendant, which arrangement the Plaintiff was never party to, the 2nd Defendant, on or about 22/10/2012, overdrawed the loan account, and thus increased his liability to the 1st Defendant. According to the 1st Defendant, the amount overdrawn by the 2nd Defendant was Kshs 500,064/-, which figure neither the Plaintiff nor the 2nd Defendant has challenged, and which I therefore deem as correct and accurate.
22. The parties also agree that due to default in repayment by the 2nd Defendant, the 1st Defendant commenced steps to recover the outstanding balances, and that in doing so, its Auctioneers issued the Notification of Sale served on 5/09/2014, in which the amount demanded as owing was stated to be Kshs 862,877.27, which figure was a consolidated lumpsum of both the balance owing from the initial loan of Kshs 720,000/-, as well as the balance owing from the subsequent overdrawing of the account by the 2nd Defendant. According to the 1st Defendant, by the time of filing its defence, this consolidated figure had escalated to Kshs 894,894.42, as at or about 1/10/2014.
23. The parties also now agree that the Plaintiff, not having been a party to the account overdrawing arrangement, the 1st Defendant cannot purport to recover that portion of the liability from the Plaintiff, and that therefore the 1st Defendant's act of lumping both the balance owing from the initial loan of Kshs 720,000/-, as well as the balance owing from the separate overdrawing of the account by the 2nd Defendant, and claiming the same from the Plaintiff as one consolidated outstanding figure was erroneous.
24. The Plaintiff has also stated that he "**willing and ready to pay the loan balance**" if the amount genuinely due is ascertained, and he is given time to do so.
25. Another issue that has now been laid to rest, courtesy of the Ruling rendered earlier herein by **Ombwayo J** on 1/04/2016 is that the Plaintiff, as Chargor, was indeed served with demand letters, the 90 days statutory notice dated 7/02/2014, and also the 45 days Redemption Notice dated 30/07/2014, as the same were sent via Registered Post to the postal addresses supplied by the Plaintiff, namely, **P.O. Box 132 Butula** and **P.O. Box 483-30100 Eldoret**. Although made at an interlocutory stage, these were conclusive findings made by

the Judge. Receipt of the Auctioneer's Notification of Sale served on 6/08/2014, was also not seriously contested.

26. The only one major issue remaining for determination, in my view, is therefore “***what amount of the outstanding loan balance is the 1st Defendant entitled to exercise its statutory power of sale upon, by selling the suit property (security), by public action***”.

27. As the parties now agree, the simple answer to the above issue is that the Plaintiff, not having been a party to the account overdrawing arrangement, the 1st Defendant cannot purport to recover that portion of the liability from the Plaintiff. I therefore agree that the 1st Defendant's act of lumping both the balance owing from the initial loan of Kshs 720,000/-, as well as the balance owing from the separate overdrawing of the account by the 2nd Defendant, and claiming such consolidated sum from the Plaintiff as one consolidated outstanding figure was unlawful. Clearly, the 1st Defendant's right to exercise its statutory power of sale cannot therefore extend to also recovering the balance owing from the separate overdrawing of the account by the 2nd Defendant. The Plaintiff cannot be held liable for that portion of the debt.

Final Orders

28. In view of the above findings, I make final declarations and/or orders, in terms of a Judgment, as follows:

- i) The 1st Defendant, having served the notices stipulated under **Sections 90(1) and (2) and 96(2) of the Land Act, 2012**, and also **Rule 15(d) and 25(e) of the Auctioneers' Rules, 1997**, is within its rights, and entitled, to recover, by selling off, in exercise of its statutory power of sale, the parcel of land **Eldoret Municipality/Block 20(Kapyemit)/648**, the balance outstanding in respect to the loan of Kshs 720,000/- advanced to the 2nd Defendant by the 1st Defendant under the Letter of Offer dated 10/11/2011, and secured by way of the Charge instrument dated 31/12/2011 registered on 11/01/2012 over the said parcel of land.
- ii) However, the 1st Defendant's right to exercise its statutory power of sale in respect to the said parcel of land as aforesaid, does not and cannot extend to, nor does it include any right to recover any debt in respect to, or arising from the 2nd Defendant's subsequent overdrawing of the account balance on or about 22/10/2012, as the Plaintiff was never a party to these subsequent account overdrawing arrangement entered into between the 1st Defendant and the 2nd Defendant. The said parcel of land

nor the Charge registered thereon never therefore secured any liability under the 2nd Defendant's subsequent overdrawing of the account balance on or about 22/10/2012.

- iii) To enable the Court give conclusive orders and/or directions on the amount that the 1st Defendant is entitled to recover from threatened or intended sale of the said parcel of land, the 1st Defendant shall, within a period of 21 days, file and/or present before this Court for scrutiny, by way of an Affidavit to be also served upon the Plaintiff and the 2nd Defendant, two separate statements of account, one giving a breakdown of the balance outstanding under only the initial loan balance, and the second, giving a breakdown of the balance outstanding only under the account overdrawing arrangement.
- iv) For avoidance of doubt, it is directed that 1st Defendant, having properly served the notices stipulated under **Sections 90(1) and (2) and 96(2) of the Land Act, 2012**, it will not be required to again serve these notices. However, since the figures demanded as owing will now change, regarding only the requirements under **Rule 15(d) and 25(e) of the Auctioneers' Rules, 1997**, the 1st Defendant will have to repeat service thereof afresh.
- v) Until all the directions and/ or orders given hereinabove are fully complied with, an order of injunction is hereby issued restraining the 1st, 3rd and 4th Defendants, their agents, servants and/or any other person claiming or acting on their behalf or instructions from selling, auctioning, disposing off or in any other manner interfering with the Plaintiff's said parcel of land **Eldoret Municipality/Block 20 (Kapyemit) 648**.
- vi) As the 1st Defendant substantially contributed to the Plaintiff's filing of this suit by its ill-advised action of demanding from the Plaintiff a consolidated lump sum for outstanding balances arising both from the initial loan advancement of Kshs 720,000/-, and the separate balance arising from 2nd Defendant's overdrawing of the account, each party shall bear its own costs of this suit.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF OCTOBER 2025

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WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Mr. Khayo for the Plaintiff

Mr. Were for the 1st and 2nd Defendants

N/A for the 2nd Defendant

Court Assistant: Brian Kimathi