

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. E004 OF 2024

ROSE AKOTH OTIENO PLAINTIFF

- VERSUS -

PREMIER BANK KENYA LIMITED 1ST DEFENDANT

UGAMBE COMPANY LIMITED 2ND DEFENDANT

MUGANDA WASULWA T/A

KEYSIAN AUCTIONEERS 3RD DEFENDANT

J U D G M E N T

1. Vide an amended plaint dated **11/07/2024**, the plaintiff sought the following reliefs: -

- a) A declaration that the legal charge registered against the title Kisumu Municipality/Block 12/232 in favour of the 2nd defendant is illegal, null and void and the same be cancelled and the original title be released by the 1st defendant to the plaintiff.*
- b) A declaration be issued that the purported public auction by the 3rd defendant is illegal and unlawful.*

- c) An order of permanent injunction be issued restraining the defendants whether by themselves, their agents or servants from auctioning or otherwise interfering with the plaintiff's proprietary rights over the parcel of land number Kisumu Municipality/Block 12/232.*
- d) An order of immediate release of the title document Kisumu Municipality/12/232 to the plaintiff forthwith.*
- e) Costs and interests of this suit.*

2. It was the plaintiff's contention that in 2019, she offered her title, land parcel number **Kisumu Municipality/Block 12/232** (the suit property), as security for a loan facility with Spire Bank which loan she successfully paid off. That when she went to collect her title deed, she was informed that the title document had been collected by one **Eliud Ochieng Oswago** the 2nd defendant's sole director and one **Vincent Onyango Malowa**.
3. That subsequently, the 2nd defendant used the title to the suit property as security and fraudulently created a legal charge with the 1st defendant without her consent. That when she tried to follow up on the details of the charge, the 1st defendant declined to divulge any information on account of her not being an account holder with it.
4. That she learnt of the charge registered over the suit property from the replying affidavit filed by the 1st defendant on the **14/05/2024**.

5. That at the time the loan was being advanced to the 2nd defendant, she was bed ridden due to spinal complications that she had suffered since the year 2020 that that hampered her physical movement. Further, that she has throughout been unable to write and has been appending her thumb print on documents as signature.
6. That the suit property contains three residential houses which are the source of livelihood to the her and her family particularly as she is bedridden. That the 1st & 3rd defendant did not issue her with any notices notifying her to make good the default failure of which it would exercise its statutory power of sale.
7. In response to the amended plaint, the 1st defendant filed a statement of defence dated **3/10/2024** denying the averments by the plaintiff. It contended that the Legal Charge dated **4/02/2021** together with the Discharge of Charge and the Deed of Guarantee and Indemnity were lawful drawn, duly executed and properly registered.
8. That it advanced substantial financial facilities on the strength thereof as an innocent financier for value and without notice of any alleged defect. That it had a statutory right to realize the security following the 2nd Defendant's admitted default.

1. In support of her case, she testified as **Pw1**. She adopted her statements dated **3/4/2024** and **7/7/2024**, respectively as her evidence in chief which statements contained her averments in her amended plaint as set out above.
2. It was her testimony that from 2020 she sought treatment in Nightingale Hospital. She reiterated that she has no relationship with the 2nd defendant. That she found out about the missing title when Spire Bank was closing down from an unnamed individual who told her that the account was moved to Equity.
3. That she only took one loan with Spire Bank and which she used the suit property as security which she had repaid.
4. In cross-examination, she told the Court that she had charged the suit property to Spire Bank and upon discharge, she was supposed to collect the title. That she did not know who collected the title from Spire Bank. That she did not report the loss of the title to the police nor take any steps to protect the title.
5. She reiterated that she had no relationship with the 2nd defendant and that she could not travel to Nairobi to sign the documents. That she had not produced an expert evidence of her forged signature nor had she produced evidence from the advocate who allegedly attested to the said signature to deny the attestation. That she became aware of the charge in **May 2024** and not **February 2024** as stated in her plaint.

6. In re-examination, she stated that she did not have any evidence that the title had been discharged and charged. That the bank never supplied her with any documents and further that she never met with Advocate **Lilian Kamau** of Nairobi.
7. The 1st respondent called one witness in support of its case. **Mohamed Aden Mohamed** testified as **Dw1**. He adopted his witness statement dated **11/10/2024** as his evidence in chief and testified that the 2nd defendant was one of its customers who took various loan facilities with it.
8. That in the facility advanced on the **29/12/2020**, the bank received 3 securities including the suit property. That the defendant took a facility of **Kshs. 16 million** and the charge was properly executed and the firm of Mulondo & Co. Advocates prepared the charge.
9. That the bank received no complaint about the suit property when securing the charge. That the first objection received by the bank was when it sought to sell the same. That the loan was advanced to the 2nd defendant who failed to pay and the default had risen to **Kshs. 23,395,161.23** as at **17/08/2023**. That the bank took the relevant steps to recover the loan by giving the guarantor and borrower, 90 days, 40 days and 45 days' notices. That in the premises, the Court ought to dismiss the suit and allow the 1st defendant to sell the security and recover its outlay.

10. In cross-examination, **Dw1** told the Court that the bank had no knowledge that the title was irregular or how it was procured. He admitted that the bank has a mechanism of verifying the documents. That in regard to the discharge, there were no names at the execution parts where the signatures were attested. That the name of the people signing the said documents have not been disclosed as directors. That the advocate who attested the signatures failed to indicate how he identified the signatories nor did he date the signatures.
11. That on the execution page of the Charge from First Community Bank dated **5/02/2021** for **Kshs. 16 million**, the advocate had not indicated how he identified the person signing the document. That the ID on **23/1/2021** is **ID No. 0423174**. That the stamp has no signature but shows that it was from Ruiru, Nairobi.
12. That on the guarantee dated **29/1/2021**, the stamp was not dated. That the 3 documents were executed in Nairobi and Ruiru, respectively. That the 1st defendant came to know about the dispute when it was served with the order. That both the suit property and bank account were in Kisumu whereas the transactions over the same were being done in the head office, Nairobi. That the bank had not presented the advocate who acted for it in the said transactions as a witness.

13. In re-examination, **Mr. Mohahmed** testified that the bank did not proceed with the sale after the court order. That the owner of a title must be present in front of a lawyer when signing. That the discharge was from another bank and that the absence of the date on the stamp had no effect.
14. When questioned by Court, **Dw1** stated testified that at the time of the facility was being advanced to the 2nd defendant, the value of the property was as per the valuation in the 1st defendant's bundle. However, he later stated that stated that the bank did not have any valuation for the property.
15. The 2nd & 3rd defendant did not enter appearance or file any pleadings. Consequently, the plaintiff and the 1st defendant filed submissions in support of their cases.
16. The plaintiff submitted that the disputed legal instruments, to wit; the Discharge of Charge dated **29/01/2021**, the Charge dated **4/02/2021** and the Deed of Guarantee dated **29/01/2021**, were riddled with glaring inconsistencies that raise serious doubts as to their authenticity.
17. That the plaintiff's purported signature on the impugned documents is at variance with her signature on her Identity Card. The Charge is purported to have been executed in Ruiru whilst the plaintiff resides in Kisumu and was incapacitated at the time thus could not have travelled to execute it. That a valuation was never undertaken prior to registering the charge to ascertain the

suit property's value and that the advocate who purportedly attested the bank's execution of the charge failed to indicate the date the person executing the document appeared before her thereby rendering the attestation irregular.

18. That the 1st defendant made no effort to call any attesting advocates and verify whether the plaintiff actually appeared before them to execute the Charge instrument.

19. That having established that the plaintiff never appeared before the various advocates purporting to attest her signatures on the impugned instruments then the burden of proof shifted to the 1st defendant to rebut the said evidence. Reliance was placed on the cases of **Nesco Services Limited v CM Construction [EA] Limited [2021] KEHC 12810 (KLR)**, **Dhillon (Suing as the Representative of the Estate of Sukhinder Singh Dhillon- Deceased v Pusikushu (Civil Appeal 21 of 2019) (2023) KEHC 22339 (KLR) (21 September 2023) (Judgement)**, **Kienge v Nyauntu & Another (Environment & Land Case 55 of 2015) [2024] KEELC 1578 (KLR) (14 March 2024) (Judgement) & Sambayon Ole Semera v Kalka Flowers Limited & Another [2021] KEHC 1035 (KLR)**.

20. That the 1st defendant cannot absolve itself from liability by merely citing the attestation of the impugned documents before an advocate as the duty

imposed upon it as a financial institution extends to verifying that the plaintiff appeared before the attesting advocate and executed the instrument voluntarily.

21. That the 1st defendant flagrantly breached the statutory duty imposed by section **97 of the Land Act** by failing to undertake a proper valuation of the suit property prior to the purported sale and further the 3rd defendant equally failed in its statutory obligation under **Rule 11 (b) (x) of the Auctioneers Rules 1997** to ensure that the sale was conducted upon a valid charge and on the basis of a current and proper valuation. Reliance was placed on the case of **Margaret Muthoni Njoroge v Housing Finance Company Limited & Another 2020 KEELC 2312 (KLR)**.

22. That the unscrupulous individual who executed the Charge instruments and subsequently led to the registration of the Charge in favour of the 1st defendant had no proprietary interest over the suit and could not convey a legal interest in the same. Reliance was placed on the case of **Kibiro Wagoro Makumi v Francis Nduati Macharia & Another [2018] KEELC 4102 (KLR)**.

23. That having proved her case on a balance of probabilities, the plaintiff was deserving of the reliefs sought as well as the costs of the suit.

24. On its part, the 1st respondent submitted that the Charge instrument was executed by the plaintiff, properly attested, executed by the 1st defendant's authorized officials and returned to its advocates for registration. That the

plaintiff executed a Deed of Guarantee and Indemnity thereby undertaking to personally answer for and indemnify the 1st defendant against any loss arising from the 2nd defendant's default.

25. That the guarantee was expressly framed as a continuing security and remains enforceable until full payment of the outstanding amount owing to the 1st Defendant as affirmed in the case of **Hosea Mundrri Kiplagat v Kenya Commercial Bank Limited [2012] eKLR**, which was cited with approval in **Amandari Limited & 2 others v NIC Bank Limited [2020] KEHC 7586 (KLR)**, where the Court held that a guarantee constitutes a continuing security and remains in force until the secured debt is fully satisfied.

26. That the Deed of Guarantee and Indemnity dated **29/01/2021** duly entered into by the plaintiff is a separate valid and binding contact which is enforceable and creating a separate legal obligation as affirmed in the case of **KCB Bank Kenya Limited v Charingcross Communication Agency & Another (2025) KEHC 12291 (KLR)**.

27. That the plaintiff had a burden to prove her claim for fraud and negligence, to a standard of proof higher than the classical standard of balance of probabilities applicable in civil cases, but beyond that of reasonable doubt as held in a myriad of cases including **Kariuki v Kawa & 2 others (Civil Suit 325 of 201L\ [2024] KEHC 9056 (KLR) (Civ) (23 July 2024) (Judgment)** and

Sawe v Barclays Bank of Kenya Limited & another (Civil Case 28 of 2019)

[2024] KEHC 16125 (KLR) (20 December 2024) (Judgment).

28. That the plaintiff had failed to tender evidence to prove that she did not sign the Discharge of Charge as she neither presented documentation of any formal steps taken to protect her property nor present any witness to corroborate her allegations and further that that she failed to prove fraudulent conduct on the part of the 1st defendant.
29. Further, that the plaintiff failed to present any evidence from the Advocates who attested her signature (or others) to support her claim that she never appeared before them when executing the documents. That therefore, for to ask the Court to accept that several practicing Advocates of the High Court of Kenya could have forged her signature on multiple legal documents without any expert opinion such as a document examiner or handwriting expert was entirely unsubstantiated and speculative. Reliance was placed in the case of **Hellen Njeri Nderitu vs Co-operative Bank of Kenya Limited & 2 others [2020] eKLR.**
30. That under *section 112 of the Evidence Act, Cap 80 Laws of Kenya*, the plaintiff alleging forgery of her signatures was required to provide evidence of any documents properly executed that contained the alleged correct signature for

comparison since the plaintiff's correct signature was squarely within her knowledge.

31. That the 1st defendant conducted all requisite due diligence prior to accepting the suit property as security and advanced substantial sums of money on the strength of the registered title.
32. That the plaintiff sought to rely on her own oral testimony to challenge the validity, contents and execution of the Charge, the Deed of Guarantee and the Discharge of Charge. However, such reliance was barred by the Parole Evidence Rule, which is firmly established under **sections 97 and 98 of the Evidence Act** and prevents oral evidence from contradicting, varying and/or adding to the terms of a written instrument as held in the case of ***Hellen Njeri (supra)***.
33. That Equity does not aid the indolent, nor does it protect parties who seek to escape clear contractual obligations through afterthought allegations of fraud. That the plaintiff willingly allowed her property to be used as security for commercial lending and must bear the legal consequences. That she was not a credible witness giving contradicting accounts on how she came to know about the registration of the various securities over the suit properties. That therefore, her allegations of fraud, illegality and lack of consent were entirely unsupported by credible evidence and fell well short of the strict standard required to prove fraud.

34. That the 1st defendant fully complied with all statutory prerequisites prior to exercising its statutory power of sale. That given the finality and drastic nature of a permanent injunction, the Court can only grant the same upon satisfaction of settled legal principles governing injunctive relief.
35. That the plaintiff had failed to prove her case to the required standard and therefore the same ought to be dismissed with costs to the 1st and 3rd defendant.
36. I have considered the pleadings, the evidence and submissions by parties. I have also perused the exhibits and considered the authorities relied on. The plaintiff's case is that the defendants used the suit property as security thereby fraudulently created a legal charge thereon without her consent. That the 1st defendant subsequently attempted to exercise its statutory right of sale over the suit property following the 2nd defendant's default in servicing the facility advanced.
37. On its part, the 1st defendant contended that the registration of the securities over the suit property were done with the plaintiff's consent. That her allegations of fraud remain unproven and therefore she does not deserve the reliefs sought.
38. From the foregoing, the following issues crystalize for determination: -

- a) *Whether the plaintiff proved her allegations of fraud against the defendants in the creation of the Discharge of Charge, Charge & Deed of Guarantee and Indemnity;*
- b) *Whether the 1st defendant properly & lawfully exercised its statutory power of sale;*
- c) *Whether the plaintiff merits the grant of the reliefs sought;*
- d) *Who should bear the costs of the suit?*

39. The plaintiff's claim is hinged on fraud. Fraud is described by the **Black's Law Dictionary** as: -

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”

40. Further, **Black's Law Dictionary Ninth Edition at Page 731** also defines 'fraud' as: -

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment”

41. Allegations of fraud are serious. They must not only be pleaded but must be proved to the required standard. In **John Mbugua Gitau v Simon Parkoyiet Mokare & 4 others (2017) eKLR**, the court reiterated the sentiments in **Emfil Ltd v Registrar of Titles**, and held that;

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities.”

42. That is the law and there can be no exception. In the present case, the plaintiff did plead the particulars of fraud. That being the case, what evidence did she proffer in support thereof?

43. In her testimony, the plaintiff testified that the disputed legal instruments were riddled with glaring inconsistencies that raise serious doubts as to their authenticity. That her purported signature was at variance with her signature on her Identity Card. More importantly, that she never appeared before the various advocates who purported to attest her signatures on the impugned instruments as she was bedridden due to spinal complications that she had suffered since the year 2020 which had hampered her physical movement.

44. That she did not and could not have travelled to Nairobi and Ruiru to sign the impugned documents. In support of these allegations, she produced several treatment notes as evidence of the same. This allegation and evidence was never challenged or controverted by the defendants.

45. ***Section 107 of the Evidence Act (Cap 80) (“the Act”)*** provides that whoever desires the court to give judgment on the basis of existence of certain facts, he must prove that such facts exist. Further, ***section 108*** thereof provides

that the burden of proof in a suit or civil proceedings lies on the person who would fail if no evidence is led at all by either party.

46. In this regard, the plaintiff bore the burden to prove her case against the 1st & 2nd defendant on this issue. The law placed the burden of proof on the plaintiff to prove her case beyond a balance of probability and just below beyond reasonable doubt. With her explanation, the evidentiary burden of proof shifted to the 1st defendant and its officials to prove that the plaintiff actually executed and signed the impugned documents before the advocates who allegedly attested her signature. It also shifted to the 2nd defendant to explain how it obtained the securities and offer them to the 1st defendant.

47. ***Section 109 of the Act*** provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. In this case, the 1st defendant wanted the Court to believe that the plaintiff signed the impugned documents before its advocates. The burden of proof, therefore, shifted to the 1st defendant to establish this fact since the plaintiff had offered sufficient evidence of her inability and her failure to do so.

48. Evidential burden of proof shifts depending on the circumstances of the case. Once a party proves an aspect of the case, the evidential burden shifts to the other party to rebut the same and if he fails, the burden rests on him. In

Raila Amolo Odinga & Another v Independent Electoral and Boundaries

Commission & 2 Others [2017] eKLR, the Supreme Court of Kenya stated thus: -

“[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”

49. The burden having shifted to the defendants to show that the plaintiff had actually willingly surrendered her title to be used as security. It was for the 1st defendant to call evidence to prove that indeed the plaintiff appeared before its advocates and signed the impugned documents and thereby disprove the plaintiff’s claim that she did not.
50. The 1st defendant did not call evidence to support its claim that the plaintiff voluntarily executed the impugned documents as contended in the defence. Instead, it sought to shift the burden to the plaintiff to call its own advocates who allegedly attested the said documents. Those advocates were or should have been the 1st defendant’s witnesses and not of the plaintiff.
51. **Section 112 of the Evidence Act** provides that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings,

the burden of proving or disproving that fact is upon him. In this regard, where a party fails or refuses to adduce evidence to prove or disprove a fact which is in its own special knowledge, the court is entitled to make an adverse inference that if such evidence was called it would have been adverse to that party.

52. The fact of who executed the impugned documents shifted to the 1st defendant. The 1st defendant did not call evidence to disprove the plaintiff's contention that she did not sign the impugned documents; that she did not know the advocate and did not appear before the advocate. The evidence of who signed the impugned documents was on the 1st defendant's officials who failed to call evidence to prove that fact.

53. In the instant case, the plaintiff affirmed that she did not sign the impugned documents, that she was unwell and thus could not travel to Nairobi and Ruiru where the impugned documents were said to have been signed and attested. Having established as such, it was for the defendants to call evidence and explain how the plaintiff's title was obtained, how it was surrendered to the defendants and how she appeared before the attesting advocates to execute the impugned documents. This they did not do.

54. From the foregoing, and in the absence of any evidence to the contrary, I find and hold that the plaintiff did not sign the Discharge of Charge dated

29/01/2021, the Charge dated **4/02/2021** and the Deed of Guarantee dated **29/01/2021**.

55. In any event, the 1st defendant does not seem to have acted with diligence. Was there any valuation undertaken on the property before charging the same? If so, who did the Valuer found on the property? Was there no issue raised by the person who was in occupation the (the plaintiff in this case as she testified that she was sickly lying at home)? Had proper due diligence undertaken, no security would have been created on the suit property.
56. Accordingly, the plaintiff proved that the alleged execution of the said documents was fraudulent and a forgery and therefore, null and void.
57. Having found as so, the second issue for consideration is ***whether the 1st defendant properly & lawfully exercised its statutory power of sale***
58. The evidence before Court is that the plaintiff's title was fraudulently presented as security. That the plaintiff did not execute the security documents. That means that no right whatsoever inured to the 1st defendant. The 2nd defendant could not convey interest in the suit land to the 1st defendant as it did not own the suit property. In other words, he could not give that which he did not have.
59. Accordingly, no statutory right of sale could arise leave along be exercised in the circumstances. That issue is answered in the negative.

60. In any event, the 1st defendant seems to have been in a hurry to exercise a power it did not have. **Dw1** admitted that the 1st defendant did not undertake a valuation prior to the purported public auction by the 3rd defendant. **Section 97 (2) of the Lands Act** provides that *a chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.*

61. Accordingly, the purported public auction of the suit property was illegal and unlawful.

62. *As to whether the plaintiff merits grant of the reliefs sought*, the Plaintiff has as a result of the fraudulent transaction prayed for declarations, permanent injunction, interests and costs.

63. On permanent injunction, it was held in the case of **Mburu v Kibara & 2 others (Environment & Land Case 237 of 2021) [2022] KEELC 3226 (KLR) (28 July 2022) (Ruling)** that: -

“... permanent injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under sections 1A, 3 & 3 A of the Civil Procedure Code if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances ...”

64. Further, in the case of **Malier Unissa Karim v Edward Oluoch Odumbe (2015) eKLR**, the court set out circumstances under which mandatory injunction can be granted as follows: -

“The test for granting a Mandatory Injunction is different from that enunciated in the Giella v Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of ‘Kenya Breweries Ltd v Washington Okeyo (2002) EA 109’ had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows: -

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

65. In the present case, it is the Court's view that the plaintiff has established a strong case for the grant of the reliefs sought. On costs, the Court has discretion and **section 27 (1) of the Civil Procedure Act** provides that costs follow the event.

66. Accordingly, the plaintiff has proved her case to the required standard and the Court makes the following orders: -

- a) ***A declaration that the legal charge registered against the title Kisumu Municipality/Block 12/232 in favour of the 1st defendant is illegal, null and void and the entries made in the title in respect thereof should forthwith be cancelled.***
- b) ***A declaration that the purported public auction by the 3rd defendant is illegal and unlawful.***
- c) ***A permanent injunction restraining the defendants whether by themselves, their agents or servants from auctioning or otherwise interfering with the plaintiff's proprietary rights over the parcel of land number Kisumu Municipality/Block 12/232.***
- d) ***An order directing the 1st defendant to forthwith release to the plaintiff the title document for Kisumu Municipality/12/232.***
- e) ***The plaintiff will have the costs of the suit together with interest at court rate.***

It is so decreed.

DATED and **DELIVERED** at Kisumu this **6th** day of **March, 2026**.

A. MABEYA, FCI Arb

JUDGE