

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
(CORAM: R. MWONGO, J.)
CIVIL CASE NO. E003 OF 2024 (OS)

I&M BANK LIMITED.....PLAINTIFF/APPLICANT

VERSUS

E-FARMS LIMITED.....1ST DEFENDANT/RESPONDENT

JOHN MUTURI NYAGA.....2ND DEFENDANT/RESPONDENT

R U L I N G

The Originating Summons (OS)

1. Through this OS dated 23rd August 2024, the plaintiff seeks the following orders:

- 1) Spent;
- 2) Spent;
- 3) A declaration do issue that informal charges were created by the Defendants by depositing with the Plaintiff the certificates of title to the properties known as Title Numbers Mbeere/Kirima/4456, Mbeere/Kirima/3932, Mbeere/Kirima/3718, Mbeere/Kirima 3953 and Mbeere/Kirima/4092 to guarantee the sums of United States Dollars (USD) 70,000 and United States Dollars (USD) 300,000 respectively in respect of the credit facilities advanced to Planes for Africa Limited that remained unpaid as at 15th May 2024;
- 4) Leave be granted to the Plaintiff as the chargee to exercise its statutory power of sale over the properties known as Title Numbers Mbeere/Kirima/4456, Mbeere/Kirima/ 3932, Mbeere/Kirima/3718, Mbeere/Kirima 3953 and Mbeere/Kirima/4092 by issuing the statutory notice to the Defendants pursuant to Section 90 of the Land Act, 2012 to recover the sums of United States Dollars (USD) 70,000 and United States Dollars (USD) 300,000 that the 1st and 2nd Defendants respectively agreed to pay following the default by Planes for Africa Limited in repaying the sum that remains unpaid as at 15th May 2024;
- 5) Costs of this Summons be awarded to the Plaintiff.

2. The OS was supported by facts appearing on its face and deposed in the affidavit sworn by Andrew Muchina. The plaintiff's case is that through a Letter of Offer (LOO) dated 15th December 2015 and amended through LOOs dated 02nd February 2016, 30th April 2020 and 03rd March 2021, it offered to advance a term loan facility of USD.1,037,621.44/= to Planes for Africa Limited (hereinafter, "the

principal borrower”). The LOOs were produced as evidence. The guarantors were named as John Muturi Nyaga (2nd Defendant) Lilian Mukui, and later, E Farms Ltd (1st Defendant)

3. According to the LOO dated 30th April 2020, the loan was to be secured through informal charges over land parcel number Mbeere/Kirima/4092 in the name of the 1st defendant and Mbeere/Kirima/4456, Mbeere/Kirima/ 3932, Mbeere/Kirima/3718, Mbeere/Kirima 3953 (hereinafter, “suit properties”) which are all in the name of the 2nd respondent. In this manner, the first legal charges were drawn and registered over the suit properties and as contemplated in LOO dated 03rd March 2021, the defendants deposited the certificates of title for these properties to the plaintiff for purposes of registration.
4. However, in breach of the LOO dated 15th December 2015 and amended through LOO dated 02nd February 2016, 30th April 2020 and 03rd March 2021, the defendants failed to avail to the plaintiff the Land Control Board consent to charge among other documents necessary for registration of the charges. The principal borrower also defaulted in repaying the loan advanced to it by the plaintiff and as at 27th July 2022, the amount had increased to Kshs.185,029,405.76/=
5. Consequently, the plaintiff proceeded to exercise its statutory power of sale over the principal borrower’s House No. 11 on LR No. 7336/45 (Original No. 7336/30). The proceeds from sale of the named house together with the money in the principal borrower’s account reduced the debt to Kshs.104,766,353.02/= as at 13th June 2024.
6. The plaintiff stated that on 22nd September 2024, it caused cautions to be registered over the suit properties to safeguard its interest as chargee. However, through a verdict reached on 20th February 2024, the Land Registrar Kiritiri was persuaded to remove the cautions on the suit land and the plaintiff was ordered to return the title documents to the principal borrower together with the aircraft documents held by the plaintiff as security for the loan facility. The minutes for the meeting culminating in the verdict were produced as evidence.
7. On this background, the plaintiff prays for the orders sought since it stands to be greatly disadvantaged given that through the LOOs dated 30th April 2020 and 03rd March 2021, the defendants committed the suit properties as security as guarantees for USD70,000/= and USD300,000/=. Once these orders are granted, the plaintiff indicates it will proceed to issue statutory notices of sale for the named amount.

Replying Affidavit

8. The respondents opposed the OS stating that the same was not accompanied by an application seeking interim orders granted by the court, and they wished to challenge that position. They stated that the loan claimed to have been disbursed to the borrower was never advanced and thus the charges were never registered. This is the reason why there was no basis for the plaintiff placing cautions on the suit properties and that the Land Registrar was right in removing the cautions on the properties.
9. They stated that the verdict of the Land Registrar can only be challenged before the Environment and Land Court. That the plaintiff had already realised the full loan amount but refuses to give a full account, yet it sold the 2nd respondent's family home for that purpose. Moreover, that the respondents have already moved to dispose the suit properties because when the 2nd respondent's home was sold to recover the loan amount, he was forced to sell the suit properties to obtain a new home for his family.
10. That there is a different suit involving the parties herein and the same is *sub judice*, hence the facts therein cannot be used in this case. They argued that the plaintiff is using this court to create an overriding interest which does not exist. The respondents stated that the court had no legal basis for granting the interim orders without being moved. They urged the court to strike out the suit herein because the same constitutes the substratum of another court case.

Supplementary Affidavit

11. The plaintiff filed a supplementary affidavit in which it asserted that the loan amount was disbursed. It produced copies of the statements of account indicating that the loan was in fact disbursed. It reiterated that it is before the court as a chargee and it does not intend to overturn the verdict of the Land Registrar in any way. It also stated that the argument that the respondents no longer had control over the suit properties is moot.

Parties' Submissions

12. The parties filed their written submissions in support of and against the OS.
13. The plaintiff submitted that the OS is not an appeal against the finding of the Land Registrar but rather, its subject is the informal charges under section 79 of the Land Act. It relied on the meaning of informal charge under section 2 of the Land Act. It argued that the condition precedent for the loan as detailed in the LOOs was that informal charges be created. One first legal charge was over

properties Mbeere/Kirima/4456, Mbeere/Kirima/ 3932, Mbeere/Kirima/3718, Mbeere/Kirima 3953 all in the name of the 2nd defendant, for the sum of USD.300,000/=. The other was a first legal charge over Mbeere/Kirima/4092 in the name of the 1st defendant for the sum of USD.70,000/=.

14. For both charges, it was required under the contractual arrangement in the LOOs that the chargors provide the original title deeds together with all the relevant security documents relating to the transaction. The 2nd defendant signed the LOOs in his capacity as a director of the principal borrower and as director of the 1st defendant. The plaintiff argued that by virtue of the defendants signing the LOOs, they offered to commit the title documents as security for the loan facilities through informal charges. On these points, it relied on the cases of **Kingdom Bank Limited v Okotsi [2022] KEHC 12771 (KLR)** and **Rufus & another v African Banking Corporation Limited; Athman (Interested Party) [2024] KECA 935 (KLR)**.

15. It urged the court to consider that the defendants in fact deposited the original title deeds at the bank which action indicates that informal charges were created. Further reliance was placed on the cases of **Tassia Coffee Estate Limited & another v Milele Ventures Limited [2014] KEHC 7928 (KLR)** and **Khadar Development Limited v Diamond Trust Bank Limited [2021] KEHC 8747 (KLR)** where the courts held that failure to perfect the securities does not deny the bank the right to hold onto title documents until full settlement of a loan.

16. On this basis, the plaintiff prayed that it be granted leave to exercise its statutory power of sale as provided under section 79(7) of the Land Act. It also relied on the cases of **John Nduati Kariuki t/a Johester Merchants v National Bank of Kenya Ltd [2006] KECA 219 (KLR)** and **I&M Bank Limited v Omolo [2023] KEHC 3149 (KLR)**.

Issue for Determination

17. The issues for determination are the following:

- 1) Whether the defendants' act of signing the LOOs accepting to deposit the original title documents for Title Numbers Mbeere/Kirima/4456, Mbeere/Kirima/ 3932, Mbeere/Kirima/3718, Mbeere/Kirima 3953 and Mbeere/Kirima/4092 amounted to or can be interpreted to mean that informal charges were created to secure the loan facilities advanced to Planes for Africa Limited; and

- 2) Whether the plaintiff should be granted leave to exercise its statutory power of sale over the Mbeere/Kirima/4456, Mbeere/Kirima/ 3932, Mbeere/Kirima/3718, Mbeere/Kirima 3953 and Mbeere/Kirima/4092.

Analysis and Determination

18. The plaintiff stated that it disbursed the loan amounts to the principal borrower following the signing of LOOs which had a condition that the loans would be secured by the said properties. The first LOO is dated 15th December 2015 (although the annexed LOO is dated 14th December 2015) and amended through LOOs dated 02nd February 2016, 30th April 2020 and 03rd March 2021. Through the LOO dated 14th December 2015, the plaintiff offered USD.2,000,000/= to the principal borrower for the purchase of Aircraft 2.
19. The LOO contained a schedule in which the conditions precedent were stated to include, among other securities, *“Variation of First Legal Charge created by the Borrower in favour of the Bank over the property known as L.R No. 209/18309, Nairobi (herein after referred to as the "Property") to secure Facility granted to the Borrower up to the maximum principal amount of Kshs.17,000,000/- so that the Legal Charge now secures facilities granted to John Muturi Nyaga and the Borrower up to the maximum principal amount of Kshs.17,000,000/ -. (In Process)”*.
20. Through the Second LOO dated 02nd February 2016, the conditions precedent in the schedule in the First LOO dated 14th December 2015 is amended to read thus: *“First Legal Charge for an amount of Kshs.90,500,000/- over House No. 11; situated on property known as L.R No. 7336/45, Karen. (Herein after referred to as "Property 2") registered in the name of John Muturi Nyaga (herein after referred to as the "Chargor") together with the original title Deed and all other related documents, so that the legal Charge now secures facilities granted to John Muturi Nvaga and the Borrower.”*
21. The third LOO dated 03rd April 2020 clarified to all the parties in the transaction that if any inconsistencies arise from the previous offers, the terms and conditions found in that LOO dated 3rd April 2020 would take precedence. Through this LOO, the plaintiff offered an advance of USD955,359/= to be disbursed as follows: Kshs.2,000,000/= of the amount would go towards purchase of Property 2 while the rest of the money would go towards restructuring of existing overdraft facilities to the borrower. In the same LOO, the condition precedent at clause 4 of schedule 2 was, among others, that the loan would be disbursed upon provision of security documents to the bank. The clause provides:

(a) The Bank shall not be obliged to make any disbursement of the Facility(ies) until it has received as a condition precedent, in each case, in a form and substance satisfactory to it all of the documents, items and evidence required herein (including but not limited to the documents, items and evidence specified in the Schedule 3) such documents, items and evidence herein after collectively referred to as the "Security Documents") (or the Bank having waived any one or more of the Security Documents in its absolute discretion and subject to any condition(s) it may think fit).

(b) No indulgence by the Bank of its rights under this Letter, the Schedule, any of the Security Documents will operate as a waiver of its rights and/or remedies.

(c) The Bank's obligation to make any disbursement of the Facility(ies) is also conditional upon the Borrower's compliance at the relevant time with the terms and conditions of, and there being no breach of or default under the Letter.

22. This third LOO seemingly rehashed the provisions of the 2 previous LOOs and clarified that the security documents intended were as detailed in Part III of the schedule 3 thereof as follows:

10. The Bank continues to hold the following Security Documents;

a. Joint and Several Personal Guarantees and Indemnities for an amount of USD. 735,000.00 each, executed by the John Muturi Nyaga and Lilian Mukui Mutinda.

b. Further Legal Charge for an amount of USD. 200,000.00 over House No. 11 situated on property known as L.R No. 7336/45, Karen (herein after referred to as the "Property 1") to make an aggregate Charge of Kshs.67,000,000.00 and USD.200,000.00 over the Property registered in the name of John Muturi Nyaga (herein after referred to as the "Chargor 1") together with the original Title Deed and all other related documents, so that the Legal Charge shall now secure facilities granted to John Muturi Nyaga and the Borrower.

c. Fixed and Floating Debenture for an amount of USD. 400,000.00 (herein after referred to as the "Debenture 1") over all the assets of the Borrower.

(The Bank holds a First Legal Charge for an amount of Kshs.67,000,000.00 to secure facilities granted by the Bank to John Muturi Nyaga).

11. The following Security Document(s) to be duly executed, witnessed by an advocate where required, dated, registered in accordance with Applicable Laws and to be delivered to the Bank:

(a) Corporate Guarantee and Indemnity of Great Cribs Limited for USD.956,000.00

(b) Corporate Guarantee and Indemnity of E-Farms Limited for USD.956,000.00

(c) Second Further Legal Charge for an amount of USD. 535,000.00 over Property 1, to make an aggregate Charge of USD.735,000.00 and Kshs.67,000,000.00. (In Progress)

(d) Further Debenture for an amount of USD.335,000.00 to make an aggregate Debenture of USD.735,000.00 over all the assets of the Borrower. (In Progress)

(e) Third Further Legal Charge over Property 1 for an amount of USD. 65,000.00 to make an aggregate Charge of USD.800,000.00 and Kshs.67,000,000.00 over the Property 1.

(f) First Legal Charge for an amount of USD.150,000.00 over Unit 807 on the 8th floor on property known as I.R 1870/V/271, Nairobi (herein after referred to as the "Property2") to be registered in the name of GreatCrib Limited, (herein after referred to as "Chargor 2") together with the original Title Deed and all other related documents.

(g) Specific Debenture for USD.956,000.00 over aircraft described as 5Y-PFA (herein after referred to as the "Aircraft"). (herein after referred to as "Debenture 2") drawn and registered in the Bank's favour.

(h) Undated letters from the Borrower to the Kenya Civil Aviation Authority requesting/consenting to the de-registration of the Aircraft.

(i) Informal Charge over the original Title document in respect of the properties known as Title No. Mbeere/Kirima/4092 registered in the name of E- Farms Limited (herein after referred to as "Chargor 3"), Mbeere/Kirima/4456, registered in the name of the John Muturi Nyaga, Mbeere/Kirima/3932, registered in the name of the John Muturi Nyaga, Mbeere/Kirima/3718, registered in the name of the John Muturi Nyaga (together herein referred to as "Property 3")

(Property 1 and Property 2 are together herein after referred to as the "Properties")

(Debenture 1 and Debenture 2 are together herein after referred to as the "Debentures")

(Chargor 1, Chargor 2 and Chargor 3 are together herein after referred to as the "Chargors")

(j) Undated forms of registration/re-registration for the Aircraft duly executed by the Borrower.

(k) A de-registration power of attorney from the Borrower (under its common seal) in favour of the Bank.

(l) Evidence that the Aircraft is the beneficial property of the Borrower free and clear of all encumbrances

23. The properties which are subject of this suit are also appearing as part of the security documents named in the third LOO. According to the LOOs, it was the parties' intention that the bank would not be obliged to release the loan amount unless the security documents had been received at the bank in a satisfactory form.

24. The Fourth LOO dated 03rd March 2021 stated that the outstanding loan amount was USD.1,037,621.44/=. The conditions precedent were similar to those in the other LOOs but the security documents were listed as follows:

8. The Bank continues to hold the following Security Documents;

(a) Joint and Several Personal Guarantees and Indemnities for an amount of USD. 735,000.00 each, executed by the John Muturi Nyaga and Lilian Mukui Mutinda.

(b) Corporate Guarantee and Indemnity of E-Farms Limited for USD.956,000.00

(c) Further Legal Charge for an amount of USD.200,000 00 over House No. 11 situated on property known as L.R No. 7336/45 (Original No. 7336/30/1) (herein after referred to as the "Property 1") to make an aggregate Charge of Kshs.67,000,000.00 and USD. 200,000.00 over the Property registered in the name of John Mururi Nyaga (herein after

referred to as the "Chargor 1") together with the original Title Deed and all other related documents, so that the Legal Charge shall now secure facilities granted to John Muturi Nyaga and the Borrower.

(d) Second Further Legal Charge for an amount of USD.535,000.00 over Property 1, to make an aggregate Charge of USD. 735,000.00 and Kshs.67,000,000.00 over Property 1. (The Bank holds a First legal Charge for an amount of Kshs.67,000,000.00 to secure facilities granted by the Bank to John Muturi Nyaga)

(e) Fixed and Floating Debenture for an amount of USD. 400,000.00 (herein after referred to as the "Debenture 1") over all the assets of the Borrower.

(f) Further Debenture for an amount of USD.335,000.00 to make an aggregate Debenture of USD.735,000.00 over all the assets of the Borrower.

9. The following Security Document(s) to be duly executed, witnessed by an advocate where required, dated, registered in accordance with Applicable Laws and to be delivered to the Bank:

(a) Joint and Several Personal Guarantees and Indemnities for an amount of USD. 1,039,359.66 each, executed by the John Muturi Nyaga and Lilian Mukui Mutinda. (This security document shall replace security document 8(a) above)

(b) Corporate Guarantee and Indemnity of E-Farms Limited for USD.1,039,359.66 (This security document shall replace security document 8 (b) above)

(c) Third Further Legal Charge over Property I for an amount of USD.65,000.00 to make an aggregate Charge of USD. 800,000.00 and Kshs.67,000,000.00 over the Property 1.

(d) Specific Debenture for USD.956,000.00 over aircraft described as 5Y'-PFA (herein after referred to as the "Aircraft"), (herein after referred to as "Debenture 2") drawn and registered in the Bank's favour.

(e) Undated letters from the Borrower to the Kenya Civil Aviation Authority requesting/consenting to the de-registration of the Aircraft.

(f) Undated forms of registration/re-registration for the Aircraft duly executed by the Borrower.

(g) A de-registration power of attorney from the Borrower (under its common seal) in favour of the Bank.

(h) Evidence that the Aircraft is the beneficial property of the Borrower free and clear of all encumbrances

(h) Evidence that the Aircraft is the beneficial property of the Borrower free and clear of all encumbrances

(i) First Legal Charge for an amount of USD. 300,000.00 over properties known as Title No

Mbeere/Kirima/4456, Title No Mbeere/Kirima/3932, Title No. Mbeere/Kirima/3718 and Title No. Mbeere/Kirima/3953 (together herein referred to as "Property 2") registered in the name of John Muturi Nyaga together with the original Title Deeds and all other related documents.

(j) First Legal Charge for an amount of USD. 70,000 00 over property known as Title No.

Mbeere/Kirima/4092 (herein referred to as "Property 3") registered in the name of E-Farms Limited (herein after referred to as "Chargor 2") together with the original Title Deeds and all other related documents.

25. In all the LOOs, the bank reserved the right to demand for settlement of the loan amounts disbursed to the borrower at any time. The LOOs also stated that the terms and conditions remained the same unless a subsequent LOO was executed. In essence, the Fourth LOO, dated 03rd March 2021, was the latest in time and so its provisions are very pertinent to this case.
26. The first question is whether in fact the defendants surrendered the original title documents to the plaintiff as security, and whether this amounted to creation of informal charges. An informal charge may be created under section 79(6) of the Land Act as follows:

"An informal charge may be created where—

(a) a chargee accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor's land or interest in land, with the repayment of money or money's worth, obtained from the chargee plus interest as agreed by the chargor and the chargee;

(b) the chargor deposits any of the following—

(i) a certificate of title to the land;

(ii) a document of lease of land;

(iii) any other document which it is agreed evidences ownership of land or a right to interest in land."

(7) A chargee holding an informal charge may only take possession of or sell the land which is the subject of an informal charge, on obtaining an order of the court to that effect.

(8) An arrangement contemplated in subsection (6)(a) may be referred to as an "informal charge" and a deposit of documents contemplated in subsection (6)(b) shall be known and referred to as a "lien by deposit of documents."

(9) A chargor shall not possess or sell land whose title documents have been deposited by a charge under an informal charge without an order of the court; [Emphasis added]

27. On the strength of these LOOs, the defendants agreed to deposit their original title documents with the plaintiff, considering that the bank intended to use the

same as security documents for the loans advanced to the borrower. Section 2 of the Land Act provides that

“charge” means an interest in land securing the payment of money or money’s worth or the fulfilment of any condition, and includes a sub charge and the instrument creating a charge, including an informal charge, which is a written and witnessed undertaking, the clear intention of which is to charge the chargor’s land with the repayment of money or money’s worth obtained from the chargee;

28. The LOOs contained terms and conditions to the effect that the security documents were to be deposited to the bank before the loans were disbursed. The plaintiff stated that it disbursed the loan to the defendants and it produced bank account statements to prove the disbursements. On the other hand, the respondents denied receiving any such funds or even depositing the original title documents to the plaintiff.

29. In **Tassia Coffee Estate Limited & another v Milele Ventures Limited (supra)**, the court inferred an informal charge from the circumstances of the case where a title had been deposited, and stated as follows:

“By depositing the title deed with the Plaintiff, the Defendant created an informal charge in favour of the Plaintiff over the suit property as security for payment of the balance of purchase of purchase price and other parcels of land. The Plaintiffs became chargees of an informal charge over the suit property and enjoyed a lien by deposit of the documents.” [Emphasis added]

30. On the other hand, for an informal charge to be created, there must be an agreement that the borrower/charger will be loaned money by the financier in exchange for the original title documents as security, whether or not the security will be perfected. In the present case, the deposit of the original title documents was included as a pre-condition before disbursement of the loan to the borrower. In **Rufus & another v African Banking Corporation Limited; Athman (Interested Party) (supra)** the Court of Appeal stated thus:

“In the face of the foregoing unchallenged evidence disclosing the parties’ clear intention to have the charge registered in favour of the respondent, coupled with absence of evidence to the contrary, we find that an informal charge was created in favour of the respondent. The collapse of the agreement between the interested party and the appellants could not affect the respondents’ already accrued rights.

The High Court in Kingdom Bank Limited vs. Okotsi [2022] KEHC 12771 (KLR) held that a clause in a letter of offer that showed that a loan facility would not be availed until and unless all security documentation would have been finalized and pledged in favour of the bank created an informal charge.

Section 79 of the Land Act provides the requirements for the creation of both formal and informal charges. For informal charges, a duly signed letter of offer was held in the above case as the clearest indication of the chargor's intent to offer the title to be held as security by the bank in order to release the monies. It was also held that the letter of offer was the only document that showed the parties' agreement. A reading of the letter of offer and the act of depositing the title with the bank demonstrates the parties intent to create an informal charge under section 79 (6), (7), (8), and (9) of the Land Act. The Court also held that the intention had to be that the chargor and the chargee agreed that the document deposited with them was to secure the payment of the debt.

31. In *Kingdom Bank Limited v Okotsi(supra)*, the court found that the Chargee had indeed deposited the original title document to the bank and the bank had, on that strength, disbursed the loan to the borrower. It also found that these were the conditions agreed upon by all the parties in their letter of offer. In that case, the court declared that an informal charge had been created and it granted leave to the bank to exercise its statutory power of sale. The court, in that case, held:

“10. I discern and consider the provision to create prerequisites for the creation of both formal and informal charges. For informal charges what is required is writing to disclose clear intent to offer the title out laid or an interest in land to secure the payment of a debt whether existing, contingent or future, which instrument is then accepted by the chargee as a written commitment and the deposit of any document agreed to evidence the ownership of the land by the chargor.

11. In this matter, the only document exhibited to demonstrate the agreement between the parties is the letter of offer dated November 13, 2018 and duly signed and witnessed by the advocate on the November 30, 2018. To establish if the parties did intend to create an

informal charge one must peruse that document and establish if the requirements of section 79 (6 – 9) Land Act have been established.

12. The intention must be that the chargor and the chargee agreed that the document deposited with them was to secure the payment of the debt. While there has not been exhibited any document to show what document of title was pledged or deposited, the letter of offer at the clause headed “principal covenants” show that the facility would not be availed until and unless all security documentation would have been finalized and pledged in favour of the bank. In addition, the respondent has unequivocal and on oath sworn of paragraph 3 of the replying affidavit that he ‘deposited his title deed with the plaintiff bank to serve (sic) the repayment of a loan borrowed from it’. I do find, on the documents filed, that there was a demonstration in the letter of offer to clearly show the intention to charge the property, informally, to secure the payment of any amount that would be availed to the defendant in the form and nature of a temporary overdraft facility.

13. That being the case, I find it satisfactorily proved, within a balance of preponderance, that there was created an informal charge. That being the finding of the court and it being shown by the bank statement exhibited, and agreed between the parties in the clause headed, “evidence of debt” in the letter of offer to be evidence of indebtedness, i do find that a case is made out for the court to grant the leave sought. it is the default to pay that founds the right for leave to sell or possess.”

32. The LOOs are valid contracts in law and undoubtedly their terms were agreed between the parties who intended to enter into them for the purpose written therein. The contract contained conditions precedent which were that the loan would be disbursed after the title documents were deposited with it by the chargor. After execution of the four LOOs at the different points in time, the applicant, seemingly disbursed loans to the respondents or restructured the advances having formally secured some of the security documents.

33. However, in all these instances of the LOOs, it is unclear whether or not the defendants deposited the original documents for LR Nos Mbeere/Kirima/4092; 4456;3932;3718 and 3953 (the suit properties) with the plaintiff. The plaintiff claims that it disbursed the loan on the strength of informal charges thereon. The

defendants dispute this and state that the loan amount was in fact never disbursed, neither were the title documents deposited with the plaintiff. Indeed, the defendants produced sale agreements to prove that the title documents were in their possession and that they had already sold the properties to third party buyers for value.

34. A reading of section 79 of the Land Act in its totality prompts diverse interpretation, and in the mind of this court, two scenarios are clear. On informal charges, courts have seemingly interpreted and applied section 79(6) (a) and (b) of the Land Act conjunctively, separated by a semi-colon (without any joining words like “and” or “or”). This interpretation is seen in the cases of **I & M Bank Limited v Omolo [2023] KEHC 25859 (KLR)**, **Ibrahim Seikei T/A Masco Enterprises v Delphis Bank 2004 eKLR**, **William Muthee Muthami vs. Bank of Baroda [2014] eKLR** and **Commercial International Bank (CIB) Kenya Ltd v Azofco General Merchants Limited [2025] KEHC 640 (KLR)**.

35. However, given the manner of drafting of the entire section and considered wholistically, the provisions, should or can, be read and applied disjunctively. This position is qualified by Section 79(8) of the Land Act which provides that:

“An arrangement contemplated in subsection (6)(a) may be referred to as an “informal charge” and a deposit of documents contemplated in subsection (6)(b) shall be known and referred to as a “lien by deposit of documents.””

36. From this provision, it is also clear that Sec 79 (6) (a) and (b) are disjunctive provisions from which it can be discerned that two distinct legally enforceable instruments, namely: an informal charge and a lien by deposit of documents, are created. In essence, the law through those provisions contemplates that Sec 79 (6) (a) and (b) should be applied disjunctively.

37. First, an informal charge according to section 79(6)(a) of the Land Act is created when a chargee accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor’s land or interest in land, with the repayment of money or money’s worth, obtained from the chargee plus interest as agreed by the chargor and the chargee. In this case, the Chargee, who is the applicant bank and a party to an informal charge may enjoy the recourse provided for under section 79(7) of the Land Act which states

“A chargee holding an informal charge may only take possession of or sell the land which is the subject of an informal charge, on obtaining an order of the court to that effect.”

38. Second by dint of Section 79(8) of the Land Act, an informal charge may be created in terms of Section 79(6)(b) of the Land Act where the chargor in exchange for money or monies worth, deposits any of the following-(i) a certificate of title to the land; (ii) a document of lease of land; (iii) any other document which it is agreed evidences ownership of land or a right to interest in land. In this case these title documents may be held by a chargee as a “*lien* by deposit of documents.”

39. According to the 9th Edition Black’s Law Dictionary, “*lien*” means ***“A legal right or interest that a creditor has in another’s property, lasting usually until a debt or duty that it secures is satisfied. Typically, the creditor does not take possession of the property on which the lien has been obtained.”***

The remedy for such a lien-holder as chargee under section 79(6)(b) is found at section 79(9) of the Act which provides:

“A chargor shall not possess or sell land whose title documents have been deposited by a chargee under an informal charge without an order of the court;”

40. In present case, in the first LOO of 14/12/2015, the suit properties had not been mentioned, but an existing liability was acknowledged by both parties.

41. In the second LOO of 02/02/2016 the suit properties were again not mentioned.

42. In the third LOO of 30/4/2020 the advanced facility was restructured and parties acknowledged that, as at 29/4/2020 there was an “existing liability” of a term loan of USD925,982.69, Insurance Premium of USD 29,376.05 and a Business Account Transaction which was in Debit. The Security documentation which was offered by the 1st defendant as borrower and the 2nd Defendant as guarantor (with others) included at Paragraph 11 (i) informal charge over original Title Documents including those for the suit properties.

43. In the fourth LOO dated 03/03/2021, a term loan of USD 1,037,621.44 was to be availed for the purpose of “purchasing property” as well as “restructuring overdraft, temporary overdraft and Insurance facilities extended” to the borrower. It was agreed at Paragraph 7 therein that the existing liability of the borrower and Guarantor as at 2nd March 2021 was: Term Loan of USD 1,037,621.44 and Business Transaction Account of USD 1,738.22. The

securities to be provided for the facility under the schedule Paragraph 9 (i) and (j) included first legal charges over the suit properties.

44. Based on the foregoing, it is evident that informal charges were created under section 79(6)(a) of the Land Act by virtue of the LOOs written and witnessed as undertakings. That, in itself, and the contents of the LOOs, is sufficient proof that the parties indeed entered into the LOOs for the purpose named and under the terms therein.

45. In **National Bank of Kenya Ltd vs. Pipeplastic Samkolit & another (2001) KLR 112**, the court held that parties are bound by their contract, and so are the parties herein. The LOOs must be upheld by the court as valid contracts. It is also evident from the materials adduced that both parties breached their own contracts whereby the applicant disbursed or restructured facilities and the loans without an assurance that the condition precedent had been fulfilled, and the respondents did not physically deposit the security documents for the suit properties. In his own replying affidavit, the 2nd respondent deposed that he retained the titles which he has since, in fact disposed of to a 3rd party for value. He availed evidence of executed sale agreements thereof.

Conclusions and Disposition

46. In conclusion, therefore valid informal charges were created under Section 79(6)(a) of the Land Act in respect of the suit properties, whilst the titles thereto were not availed and did not result in crystallisation of a lien by deposit of title documents pursuant to Section 79(6)(b) as read with Section 79(8) of the Land Act.

47. In the result, whilst the Court is prepared to issue a declaration that there were informal charges over the suit properties, the Court is not prepared to issue an order that the chargor is entitled to possess and sell the said properties under Section 79 (a) of the Land Act. The obvious reason is that, in breach of the LOOs the titles to be secured were not deposited and have since evidently been sold to a third party who is not a party to this suit.

48. Further, any such order to possess and sell the suit properties cannot lie as that would require this Court to enter into and determine questions of disposition, purchase and ownership of the said properties, which is a matter under the jurisdiction of the Environment and Land Court.

49. Accordingly, the Court hereby determines that:

- 1) A declaration may issue that informal charges were created by virtue of the Letters of Offer signed between the plaintiff and defendants under

Section 79(6)(a) of the Land Act in respect of the suit properties namely Mbeere/Kirima/4456; 3932; 3718; 3953 and 4092.

- 2) Leave is declined in respect of Prayer 4 for the plaintiff applicant to exercise its statutory power of sale in respect of the said suit properties.
- 3) The costs of the suit are awarded to the plaintiff.

50. Orders accordingly.

Delivered, dated and signed at Embu High Court this 15th day of April, 2026.

**R. MWONGO
JUDGE**

Delivered in the presence of:

1. Ms. Mutonyi holding brief for Gecaga for Plaintiff
2. No Representation for Mukele for Defendants
3. Stella Kithinji - Court Assistant