



REPUBLIC OF KENYA



**KENYA LAW**  
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**Koroit v M Oriental Bank & 2 others (Civil Case 10 of 2020)  
[2025] KEHC 3893 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3893 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL CASE 10 OF 2020  
JRA WANANDA, J  
MARCH 28, 2025**

**BETWEEN**

**SCOLASTICA KOROIT ..... PLAINTIFF**

**AND**

**M ORIENTAL BANK ..... 1<sup>ST</sup> DEFENDANT**

**JEREMIAH KOSGEI ..... 2<sup>ND</sup> DEFENDANT**

**JOHNSTONE FRANKLIN KIGEN ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. This case was initially filed as Eldoret Environment & Land Court Case No. 192 of 2016 vide the Complaint filed through Messrs Nyekwei & Co. Advocates, on 11/07/2016. By the said Complaint, the Plaintiff sought orders as follows:
  - a. An order holding that the loan/overdraft that the 1<sup>st</sup> Defendant advanced to the 2<sup>nd</sup> Defendant, pursuant to which the Charge over land parcel Uasin Gishu/Sugutek Settlement Scheme/19 was registered on 17<sup>th</sup> October 2011 has been paid in full.
  - b. Further and or in alternative, a declaratory order do issue holding that the Charge over parcel No. Uasin Gishu/Sugutek Settlement Scheme/19 is null and void for want of spousal consent as provided for under Sections 28 (a) and 93 (1), (2) (3) and (4) of the *Land Registration Act* 2012.
  - c. An order for revocation and or discharge of the Charge over land parcel Uasin Gishu/Sugutek Settlement Scheme/19.
  - d. An order of permanent injunction restraining the Defendants jointly and severally either by themselves their servants or agents from selling, further charging or making any other



disposition on land parcel Uasin Gishu/Sugutek Settlement Scheme/19 without the Plaintiff's consent.

- e. Costs.
2. In the Plaintiff, the Plaintiff pleaded that at all material times to the suit, she had been lawfully married to the 3<sup>rd</sup> Defendant since December 1983 and together, they acquired matrimonial properties, including the parcel of land known as Uasin Gishu/Sugutek Settlement Scheme/19 (hereinafter "the suit property"), which is registered in the name of the 3<sup>rd</sup> Defendant but who holds it in trust for himself, the Plaintiff and their children.
  3. She contended further that on 28/06/2016, she received information to the effect that the 1<sup>st</sup> Defendant's agent had advertised in the Daily Nation Newspaper of 27/06/2016, a notice of sale of the property by public auction scheduled for 15/07/2016, she conducted a search and established that on 17/10/2011, a Charge was registered in favour of the 1<sup>st</sup> Defendant over a Kshs 5,000,000/- loan overdraft that the bank advanced to the 2<sup>nd</sup> Defendant. She pleaded that upon inquiring, the 3<sup>rd</sup> Defendant informed her that he stood as a guarantor for the loan/overdraft, that the debt was fully repaid by 28/08/2012, and that the Notice of Sale issued was unlawful. It was further pleaded that a loan contract, if any, entered into after 28/08/2012 in which a parcel of land is offered as security must be in compliance with the provisions of Sections 28(a) and 93(1), (2), (3) and (4) of the Land Registration Act, 2012, which provide that spousal rights over matrimonial property overrides any other interest and that a disposition made without spousal consent shall be void at the instance of the spouse.
  4. It was also pleaded that any Charge over a parcel of land shall also comply with all relevant provisions of the same Act, including Sections 32, 36, 43, 44, 56, and 93 thereof which provide for registration, consent and mode of execution of such dispositions. It was averred further that if the contents of the Auction Notice dated 27/06/2016 are correct, and that the 2<sup>nd</sup> Defendant is in breach of contract to repay a loan that the 3<sup>rd</sup> Defendant guaranteed to the extent of Kshs 12,000,000/- then such contract, if any, is in breach of the mandatory provision of the requirement of spousal consent. Regarding particulars of loss, it was pleaded that the property hosts the Plaintiff's matrimonial home, she stands to be rendered destitute as she has no other home, all the improvements made in the farm in her entire marriage, including the buildings, structures, tree plantation and fodder crops will be lost, her children will be rendered homeless and that the Plaintiff and her children did not benefit in any way from the disposition.
  5. By the Notice of Appointment filed on 13/07/2016, the firm of Manani, Lilan, Mwetich & Co. Advocates came on record for the 1<sup>st</sup> Defendant (charge bank) while, by the Notice of Appointment filed on 14/07/2016, the firm of Magut & Sang & Associates Advocates came on record for the 3<sup>rd</sup> Defendant.
  6. An interlocutory Application for an interim injunction filed by the Plaintiff, together with the Plaintiff, was eventually determined vide the Ruling delivered by Ombwayo J, on 2/10/2017, whereof such injunction was granted pending the hearing and determination of the suit. Thereafter, the 1<sup>st</sup> Defendant filed its Statement of Defence on 26/02/2020.
  7. In its said Statement of Defence, the 1<sup>st</sup> Defendant pleaded that the property was used as security for the Charge and wherein the 3<sup>rd</sup> Defendant was the chargor, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have defaulted in settling the overdraft loan facility, and the amount due as at 30/06/2016 was Kshs 192,582,370/-. It was contended further that spousal consent was not a legal requirement in the year 2001 when the Charge was registered since the new laws requiring the spousal consent was entered in the year 2012. It



was also contended that the Plaintiff was not a party to the loan facility, the Charge is not void as alleged since it followed due process, the suit is made in bad faith as the Plaintiff's intention is to frustrate the bank's realization of the security and that the 1<sup>st</sup> Defendant is perfectly within its rights of statutory power. It was averred further that the 4<sup>th</sup> Defendant freely executed the Charge having understood the rights of the bank in the event of default by the borrower, namely, that the property would be sold in pursuance of the bank's power of sale.

8. By the further orders made by Ombwayo J, on 27/02/2020, the suit was transferred to this High Court where upon receipt, it was assigned the instant case number.
9. I note that by the Notice of Change filed on 1/03/2016, the firm of Magut Kirigo & Co. Advocates took over the conduct of the 3<sup>rd</sup> Defendant's case.
10. On the same 1/03/2022, the 3<sup>rd</sup> Defendant also filed his Statement of Defence. In the Defence, he pleaded that he did not involve his spouse (Plaintiff) in charging the property as he was not advised by the 1<sup>st</sup> Defendants' Advocates to do so, the Charge executed was only for Kshs 5,000,000/- which loan was fully repaid on 27/08/2012, and that a new loan facility was granted to the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant without a guarantee and Charge being executed by the 3<sup>rd</sup> Defendant. He contended that in the year 2014, "spousal consent" had become a mandatory requirement for a Charge to be registered, the loan facility default whose payment was the cause of the intended sale is the one advanced by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant without a valid Charge being registered, the 3<sup>rd</sup> Defendant cannot therefore be liable to pay the loan and that as such, the 1<sup>st</sup> Defendant has no basis to exercise statutory power of sale over a non-existent Charge. It was also contended that the property forms part of "matrimonial property" and the 3<sup>rd</sup> Defendant holds it in trust for his spouse and children, the advancement of additional funds without a fresh Charge was in breach of his contract with the bank based on the initial Charge, and that his right to be notified of additional advances as a guarantor was breached hence he cannot be held liable for the 2<sup>nd</sup> Defendant's subsequent default. He pleaded that his liability strictly related to the initial registered Charge which was fully repaid hence the subsequent default over additional advances without his sanction cannot be visited upon him.
11. The 3<sup>rd</sup> Defendant also pleaded a cross-claim in which he reiterated the aforesaid matters, and added that the loan contract form dated 22/11/2014 was executed by several guarantors on diverse dates ranging from 1/12/2014 to 6/08/2015 thereby rendering it defective and unenforceable and that no independent legal advice was offered to him before executing it. He averred that nonetheless, according to the Letter of Offer, the 3<sup>rd</sup> Defendant's property was indicated in the Annexure on Securities as a Legal Charge over the suit property.
12. The 3<sup>rd</sup> Defendant then pleaded particulars of illegality, fraud and collusion on the part of the 1<sup>st</sup> Defendant as failing to release the 3<sup>rd</sup> Defendant's title despite full payment of the loan on 27<sup>th</sup> August 2012, illegally advancing an additional loan facility without a fresh Charge being created, attempting to tie the 3<sup>rd</sup> Defendant to a loan facility he was a stranger to and for which he offered no guarantee whatsoever, purporting to exercise statutory power of sale over the 3<sup>rd</sup> Defendant's property when none had arisen, colluding to defraud the 3<sup>rd</sup> Defendant by advancing loans to the 2<sup>nd</sup> Defendant without his knowledge and thereafter attempting to make him pay for it, and taking advantage of the fact that they had the 3<sup>rd</sup> Defendant's title in their custody to create a fictitious Charge and advance a loan facility to the 2<sup>nd</sup> Defendant.
13. Against the 2<sup>nd</sup> Defendant, the 3<sup>rd</sup> Defendant pleaded the particulars of fraud and illegality, fraud and collusion as failing to secure the release of the 3<sup>rd</sup> Defendants' title despite the full payment of the loan on 27<sup>th</sup> August 2012, illegally taking an additional loan without a fresh Charge being created,



attempting to tie the 3<sup>rd</sup> Defendant to a loan facility he was a stranger to and for which he offered no guarantee whatsoever, colluding with the 1<sup>st</sup> Defendants' officers to defraud the 3<sup>rd</sup> Defendant by taking additional loans without his knowledge and thereafter attempting to make him pay for it, taking advantage of the fact that they had the 3<sup>rd</sup> Defendants' title in custody of the 1<sup>st</sup> Defendant to take a fictitious Charge and obtaining an additional facility without any notice to the 3<sup>rd</sup> Defendant.

14. He then prayed for a declaration that the subsequent loan advanced to the 2<sup>nd</sup> Defendant in 2015 based on the Letter of Offer dated 22/11/2014 is irregular and unlawful hence null and void and further, that the 1<sup>st</sup> Defendant be directed to release the title to the suit property to the 3<sup>rd</sup> Defendant forthwith.
15. Although the firm of Magare Musundi & Co. Advocates seems to have come on record for the 2<sup>nd</sup> Defendant, no Statement of Defence on behalf of the 2<sup>nd</sup> Defendant seems to have been filed. Further, although upon the firm's repeated requests, I, on several occasions, granted it time to file an Application for leave to cease acting, no such Application was filed.
16. After a series of false starts, the trial eventually commenced. The Plaintiff, the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant, each called 1 witness. The 2<sup>nd</sup> Defendant did not participate.

### **Plaintiff's evidence**

17. PW1 was the Plaintiff, Scolastica Koroit. Led by her Counsel, Mr. Kipnyekwei, she adopted her Witness Statement and produced the documents contains in her List of Documents. She then stated that she is the spouse of the 3<sup>rd</sup> Defendant, she was not aware that the property had been Charged by the 3<sup>rd</sup> Defendant and when she asked him about it, the 3<sup>rd</sup> Defendant informed her that he had guaranteed the 2<sup>nd</sup> Defendant, Jeremiah Kosgei, for a loan of Kshs 5,000,000/- and that the loan had been cleared. She stated that the 3<sup>rd</sup> Defendant told her that the arrears had been Kshs 67,496,512.65 as at 24/08/12 and the account was closed as there were incoming funds from Consolidated Bank amounting to Kshs 69,216,512.65, and that after this, more money came and cleared the arrears, leaving behind a credit of Kshs 1,719,923.00. She testified further that the property was Charged without her consent which was among the terms and conditions, the property is their matrimonial property where they live with their children and grandchildren and which they cultivate and is their only source of income. She stated that she has not been shown any variation of the Charge for 2014, and she had only seen the search, not the Charge itself.
18. Under cross-examination by Ms. Jeruto, Counsel for the 1<sup>st</sup> Defendant, she reiterated that she learnt of the Charge from the land search, she purchased the land jointly with her husband although her name was not on the title, her consent was never obtained, and that the 2<sup>nd</sup> Defendant told the 3<sup>rd</sup> Defendant (her husband) that the entire loan had been bought by Consolidated Bank.
19. Under cross-examination by Mr. Magut, Counsel for the 3<sup>rd</sup> Defendant, she conceded that she has nothing to prove that she and her husband (3<sup>rd</sup> Defendant) acquired the property jointly. She also stated that she was not aware that the bank had disputed the statements she referred to on the issue of loan balances. Upon being shown the Letter of Offer dated 22/11/2014, she reiterated that it had the requirement to be signed within 10 days by the borrower but conceded that the borrower (2<sup>nd</sup> Defendant) signed it on 25/11/2014 within the said deadline. She however insisted that the 3<sup>rd</sup> Defendant, having signed it on 8/12/2014, did so outside the time limit. She also insisted that the property is their "matrimonial home".
20. In re-examination, she reiterated that the account was closed on 24/08/2012 after the loan was acquired by Consolidated Bank and who paid approximately Kshs 69 Million



## 1<sup>st</sup> Defendants' evidence

21. DW1 was one Josephat Githegi, who stated that he is a banker at M-Oriental Bank (1<sup>st</sup> Defendant). Led by Ms. Jeruto, the 1<sup>st</sup> Defendant's Counsel, he, too, adopted his Witness Statement and produced the documents contained in the 1<sup>st</sup> Defendant's List of Documents. He stated that the original loan given to the 3<sup>rd</sup> Defendant was Kshs. 160,000,000/- in 2011 guaranteed by 7 securities, and that the amount guaranteed by the 3<sup>rd</sup> Defendant was Kshs 5,000,000/-. He testified that the 3<sup>rd</sup> Defendant never disclosed that the property was "matrimonial", as the title only had his name, and that spousal consent was not required in 2011. He stated further that the entry made on 24/08/2012 in the statement of account referred to by the Plaintiff meant that a different account was being closed, not the one in question in this case, that the loan account was number 0050000159 whereas the account that was being closed was a fixed deposit security account number 1005212050200. He however conceded that this is not stated in the statement. He insisted that the loan was never fully repaid. He denied that the loan referred to in the Letter of Offer dated 22/11/2014 was a new loan and insisted that it was a restructuring of the existing loan to enable the 3<sup>rd</sup> Defendant clear the arrears, and that for the restructuring to be effected, the 3<sup>rd</sup> Defendant was to inform the Guarantors as they needed to sign their consents and which they did on different dates on the bank's accommodation to sign outside the 10 days deadline. According to him, the outstanding amount as at June 2016 when the property was advertised for sale was over 160 Million, and that from the 3<sup>rd</sup> Defendant, the amount required to clear the security was Kshs 10,000,000/-. He insisted that the 3<sup>rd</sup> Defendant was informed of his rights before he signed, the other securities have been discharged as the guarantors have entered into agreements with the bank and it is only the one in this suit that is yet to be discharged.
22. Under cross-examination by Mr. Kipnyekwei, Counsel for the Plaintiff, he stated that he joined the Eldoret Branch of the 1<sup>st</sup> Defendant on 18/03/2014 after the Letter of Offer dated 22/11/2013 was already prepared, that he was therefore not the one who dealt with it, that the person who dealt with it (Ms. Jethwa) is now retired and the other one, the then Marketing Manager, one Modasia, has passed away. He stated that he is now an Assistant Branch Manager and as at 2014, he was a Credit Officer. Regarding the Letter of Offer, he stated that the same was signed by the borrower on 25/11/2014, the term was that it was to be signed within 10 days, which also applied to the guarantors, that the 1<sup>st</sup> guarantor, Wilson Koech, signed on 05/01/2015, the 3<sup>rd</sup> Defendant signed on 08/12/2014, the 3<sup>rd</sup> Guarantor, Henry Kirwa signed on 06/01/2015, Kipkosgei Ruto signed on 29/12/2014, and Christopher Kipkorir signed on 09/12/2014. He conceded that that the guarantors signed outside the 10-day period stipulated under Clause 5 of the Letter of Offer. When referred to Clause 5.5, he agreed that it required that a valuation should have been conducted within 3 years of signing the Letter of Offer and which requirement was not complied with. He referred to the schedule of securities at page 12 of the Letter of Offer and stated that clause 7 is the one relating to the suit property and which showed that he was guaranteeing Kshs 5,000,000/-. He then referred to the Valuation Report prepared by Acumen Valuers dated 15/03/2011 and agreed that the 3 years' time-limit lapsed on 15/03/2014 and that therefore it is true that this time period had long lapsed before the Letter of Offer was signed. He also agreed that under paragraph 12 of the same schedule, spousal consent was required but stated that he did not know whether the Plaintiff was the spouse to the 3<sup>rd</sup> Defendant. He stated that he never saw a spousal consent, and that the 3<sup>rd</sup> Defendant never disclosed that it was a "matrimonial property". He however conceded that paragraph 13 contained the requirement for a certificate to confirm that the property is not "matrimonial". It was also his testimony that the loan account held by the 2<sup>nd</sup> Defendant has the account number 0050000159 and that the statement of account was for the period running from 01/12/2011 to 30/09/2011, before the Letter of Offer, and shows an overdraft of Kshs 160,561,271.45 as at 31/07/12. He conceded that the statement showed that some deposits were made



and that by 24/08/12, the amount had reduced to Kshs. 69,216,512.65, that the account then went into a credit of Kshs 69,216,512.65 and that the source of money was Consolidated Bank courtesy of Lomson Enterprises Limited wherein the 3<sup>rd</sup> Defendant is a director.

23. Under cross-examination by Mr. Magut, Counsel for the 3<sup>rd</sup> Defendant, he stated that as at 2014, he was one of the 2 Credit Officers who handled the account. He testified that when Letters of Offer are executed out of time, the borrower may request for extension of time, that in this case, the documents were brought back in January 2015, and that the borrower verbally requested for an extension of time which the bank accepted but which was not put into writing. When referred to the Legal Charge referred to at paragraph 7 of the Letter of Offer, he insisted that the same was already existing and thus the loan was not a new facility. According to him, the borrower asked for the restructuring because the account was already non-performing, that this is apparent from paragraph 10 as it shows that there were existing facilities, and that the Letter of Offer is a standard document and that was why the letter for the restructuring did not state that there was an existing facility. He agreed that page 1 of the Letter of Offer contained the requirement for spousal consent because by then the law had introduced it. When referred to clause 14 thereof, he conceded that it refers to “variation of Charge” and conceded that there was no such variation in this case. He also conceded that the other Letter of Offer dated 13/03/2013 contained in the 3<sup>rd</sup> Defendant’s bundle of documents, was not produced in evidence. He stated further that the overdraft limit was Kshs 160 Million, that there was both a term loan and an overdraft, the borrower requested that the overdraft of Kshs 160 Million be converted into a term loan, that this was the basis for the Letter of Offer dated 22/11/2014 and that is why it contains the statement “referring to the discussions held”. He also conceded that he did not produce the “existing” Charge. Regarding the 2<sup>nd</sup> Defendant, he stated that he does not know where he is now, that before the bank followed up on the guarantors, it made efforts to recover from the 2<sup>nd</sup> Defendant, they recovered from him the parcel of land known as Kapsabet/Simet Block 3/22 but found that the rest of the properties were Charged to other banks. Regarding the signatures made by the guarantors on different dates, he stated that such different dates was because they signed in different places, and denied that it was because of fraud on the part of the bank. He reiterated that the other properties for the other guarantors were all discharged because they settled their guarantees.

### **3<sup>rd</sup> Defendant’s evidence**

24. DW2 was the 3<sup>rd</sup> Defendant, Johnstone Franklin Kigen. Led by Mr. Magut, he also adopted his witness statement and testified that the Plaintiff is his wife. He then stated that the loan herein was taken by the 2<sup>nd</sup> Defendant in 2011 and was fully repaid, and that this is as per some statements that he was given by the 2<sup>nd</sup> Defendant. He stated that the bank statements which were produced in evidence show that the account was closed for the reason that there were incoming funds from Consolidated Bank at Kshs 69,000,000/-, and that a sum of Kshs 1,719,000/- remained in the account. He stated that by 2014, it is indicated that the 2<sup>nd</sup> Defendant took another loan which the 3<sup>rd</sup> Defendant is not aware of as the 3<sup>rd</sup> Defendant only showed him the Letter of Offer dated 22/11/2014, the same was presented to him on 8/12/2014 which is the date that he signed it, and the 2<sup>nd</sup> Defendant signed it on 25/12/2014. He referred to the 10 days deadline for signing the Letter of Offer and also maintained that he never signed any legal Charge.
25. Under cross-examination by Ms. Jeruto, he stated that the 2<sup>nd</sup> Defendant was known to him as he would take his maize to the 2<sup>nd</sup> Defendant who was a trader. He agreed that his property herein was offered as security for the loan taken by the 2<sup>nd</sup> Defendant and confirmed that he was never coerced by the 2<sup>nd</sup> Defendant to guarantee the loan. He agreed that he guaranteed him Kshs 5,000,000/- and that he voluntarily signed the Letter of Offer dated 22/11/2014. He insisted that the land is “matrimonial



property” and is the only home he has, that he purchased it, and did not inherit any property from his parents. He insisted that he informed the bank that the property was “matrimonial”, he informed the Loans Officer, and that the bank assured him that the 2<sup>nd</sup> Defendant was their long customer and would repay the loan. He stated that his wife did not know of the loan, he never received any legal advice from anyone, he signed the Letter of Offer at a hotel during a seminar and he did not seek legal advice of his own. He conceded that he knew he was signing for a further loan, and that later when the bank raised the issue of recovery, the 2<sup>nd</sup> Defendant showed him statements indicating that the 2<sup>nd</sup> Defendant had been paying the loan. When shown page 10 of the Letter of Offer, he agreed that it indicated that there was a balance of Kshs 105 Million. He also agreed that when he signed the Letter of Offer, the title deed was still with the bank pursuant to the initial loan.

26. Under cross-examination by Mr. Kipnyekwei, the 3<sup>rd</sup> Defendant reiterated most of what he had already stated and added that he was married to the Plaintiff by the time that the loans were disbursed, the 1<sup>st</sup> loan advanced in 2011 with him as guarantor and the property Charged. He insisted that Kshs 69,201,112.65 was received from Consolidated Bank on 27/08/2012 which offset the outstanding balance of Kshs 67,496,589.65 and that the account therefore remained with a credit balance of Kshs 1,719,923/-. He was referred to page 17 of the Letter of Offer which he insisted, contained the requirement for “spousal consent” but which was never obtained from his wife. He also observed that between 2012 the year of the 1<sup>st</sup> Letter of Offer and 2014 the year of the 2<sup>nd</sup> Letter of Offer dated 22/11/2014, there seems to have been another Letter of Offer dated 13/03/2015 which he has only seen in the Plaintiff’s bundle of documents. In the end, he stated and that his wife (Plaintiff) is right in seeking nullification of the loan contract since she was not consulted.
27. In re-examination, he reiterated that the Letter of Offer recognized that the bank already held the property as security and it also appreciated that there would be a variation. He referred to clause 4 thereof and stated that however no variation documents were brought to him. Regarding the Letter of Offer dated 13/03/2013, he stated that he never signed it, and it is strange that it lists his said property as being one of the securities. He also pointed out that the same provides for the requirement for fresh guarantees but that he never gave any such fresh guarantee, and that the borrower seems to have received Kshs 68 Million as overdraft. According to him, his guarantee remained at Kshs 5 Million.

### **Directions upon close of trial**

28. The trial having closed, the parties filed written Submissions. The Plaintiff filed her Submissions dated 18/11/24, while the 1<sup>st</sup> Defendant filed the Submissions dated 15/11/24. By the time I concluded “writing” this Judgment, I had not come across any Submissions filed by the 2<sup>nd</sup> Defendant or the 3<sup>rd</sup> Defendant, respectively.

### **Plaintiff’s Submissions**

29. On the question whether the loan secured on 17/10/2011 was settled, Counsel for the Plaintiff recounted that the 3<sup>rd</sup> Defendant (DW2) testified that the loan was cleared in the year 2012, and that the 2<sup>nd</sup> Defendant gave him the bank statement for the period between December 2011 and December 2012, which confirmed that Consolidated Bank bought off the loan by depositing Kshs 69,216,512 in the 2<sup>nd</sup> Defendant’s loan account on 27/8/2012. He submitted that although the 1<sup>st</sup> Defendants’ witness purported that the loan was not settled, he could not explain the effect of the incoming funds from Consolidated Bank which reflected on the 2<sup>nd</sup> Defendant’s loan account on 27/8/2012. According to Counsel therefore, the funds in the sum of Kshs 69,216,512.65/- forwarded by Consolidated Bank to the 2<sup>nd</sup> Defendant’s loan account on 27/8/2012 cleared the loan arrears, leaving a credit balance in the sum of Kshs 1,719,923/-. In view thereof, he submitted that the loan



against which the suit land was Charged in October 2011, when the legal requirement for “spousal consent” had not come into operation, was settled in its entirety on 27/8/2012.

30. On the question whether “spousal consent” and a Further Charge for the subsequent loss were necessary, Counsel urged that it is not in contention that the 2<sup>nd</sup> Defendant signed a fresh loan contract on 22/11/2014 in which he was advanced a further loan in the sum of Kshs 160,000,000/-. He submitted that although the 1<sup>st</sup> Defendant's witness explained that the Kshs 160,000,000/- advanced to the 2<sup>nd</sup> Defendant was in addition to an existing loan, the 3<sup>rd</sup> Defendant explained that any loan advanced to the 2<sup>nd</sup> Defendant after 27/08/2012 was not with his knowledge. He observed further that the 1<sup>st</sup> Defendant admitted that the loan terms and conditions provided that there was need to further Charge the property for any subsequent loan. He submitted further that the Plaintiffs' case is simply that she did not give consent as a spouse for the loan contract dated 22/11/2014, and that the bank's witness DW1 admitted that the terms of the contract provided for “spousal consent”, which was not obtained. He cited Section 2 of the Matrimonial Properties Act on the definition of “matrimonial property”, Section 93(3) (b) of the *Land Registration Act*, the case of JKN VS JWN & 3 Others (2022) eKLR, and the case of Kienge vs Nyauntu & Another (ELC 55/2015) (2024) KEELC 1578 (KLR) (14/3/2024) (Judgment).

### 1<sup>st</sup> Defendants' Submissions

31. In respect to the question whether the suit property is “matrimonial property”, Counsel for the 1<sup>st</sup> Defendant submitted that the property is registered solely in the 3<sup>rd</sup> Defendant's name. She however appreciated that the same was registered on 24/04/1996 and the Plaintiff and the 3<sup>rd</sup> Defendant got married on 16/12/1995 as evidenced by the Certificate of Marriage produced. She insisted that the suit property is not “matrimonial property” and cited the definition contained in Section 6 of the *Matrimonial Property Act*, 2013. Counsel then urged that it was the duty of the Plaintiff to prove that she contributed to the purchase of the property, and that there is no evidence that they resided on the land or have constructed a “matrimonial home” therein. She cited the case of Esther Njeri Mwangi v Equity Bank Ltd & another [2017] eKLR and urged that without evidence of occupation of the property as “matrimonial property” the Court cannot assume that the property is “matrimonial” and that mere allegations have been made by the Plaintiff to save her husband's property. She submitted further that the Plaintiffs' contribution to the purchase could not also be ascertained as no agreement detailing purchase thereof for “matrimonial use” was adduced in evidence, and that “matrimonial property” can indeed be Charged as stated in the case of David Ngugi Ngaari v Kenya Commercial Bank Limited [2015] eKLR. Counsel submitted that as the 1<sup>st</sup> Defendant has established that the property is not “matrimonial property”, no “spousal consent” was required. She also urged that the Charge over the property was registered on 17/10/2011 when the requirement for “spousal consent” was not required as the *Land Registration Act* of 2012 and the *Land Act* of 2012 both came into effect on 02/05/2012 and the *Matrimonial Property Act* came into force on 16/01/2014 and the Charge was created in 2011. According to her therefore, these statutes cannot be applied retrospectively. He cited the case of Margaret Muthoni Njoroge v Housing Finance Company Limited & another [2020] eKLR.
32. Regarding the question whether the 2<sup>nd</sup> Defendant repaid the loan, Counsel submitted that the Plaintiff only alleges that the 2<sup>nd</sup> Defendant cleared the loan on 27/08/2012 and that she was so informed by the 2<sup>nd</sup> Defendant on the mere basis of a bank statement, that on its part, the 1<sup>st</sup> Defendant explained the transaction of 24<sup>th</sup> and 27<sup>th</sup> August 2012 as being a “restructuring” of the loan, and not repayment. She insisted that the loan is yet to be repaid, and that the 2<sup>nd</sup> Defendant defaulted in repayment and sought to restructure the loan to allow him have a longer period to make repayments which the 1<sup>st</sup> Defendant did vide the Letter of Offer letter of 22/11/2014. She insisted that the



restructuring did not amount to a new Charge but was a way for the bank to allow the 2<sup>nd</sup> Defendant to meet his repayments for the non-performing account and that for this reason, there is no evidence that a new Charge was registered against the property. According to her therefore, the restructuring of the loan never constituted a material change in the contract terms and conditions, nor did it alter the fact that the property remained as a security as initially agreed upon, as the same was to converge all the debts and make it easier for the 2<sup>nd</sup> Defendant to repay them. She argued that the 3<sup>rd</sup> Defendants' obligation under the Charge was never discharged as a legal Charge can only be extinguished by discharge, redemption or sale, and that the purpose of the facilities issued to the 2<sup>nd</sup> Defendant on 22/11/2014 was captured at page 10 of the letter which shows that the same was an amalgamation of existing loans and part of overdraft facility, thus in essence a restructuring. She urged that the 3<sup>rd</sup> Defendant, by signing on the acceptance form, bound himself to have the property be further used as security as he had an option of opting out of the Charge and to let the 2<sup>nd</sup> Defendant find a new security for the loan since he had started defaulting.

33. Regarding the 1<sup>st</sup> Defendant's right to exercise sale of the Charged property, Counsel urged that the 1<sup>st</sup> Defendant is within its right to exercise its right of sale of the Charged property to recover the loan amount, inclusive of the interest accrued therein and all penalties. She urged that there is no contention regarding the Statutory Notices issued by the 1<sup>st</sup> Defendant and it is therefore within its right to exercise the sale of the property for the secured amount of Kshs 5,000,000/-, and that while charging the property and offering the same as security, the 3<sup>rd</sup> Defendant was well aware that the same would be sold in the event that the 2<sup>nd</sup> Defendant defaulted in repayment. She cited the case of *Nancy Wacici Vs. Kenya Women Micro Finance Bank Ltd* [2017] eKLR. Counsel urged further that it was not the 1<sup>st</sup> Defendants' responsibility to inform the 3<sup>rd</sup> Defendant of the restructuring as the Charge was still in force and by signing on the Letter of Offer dated 22/11/2014, the 3<sup>rd</sup> Defendant was agreeing to continue with the Charge as it were and that any alterations could have been communicated if he had sought legal advice on the obligations he was engaging in. He however urged that in this case, there were no substantial or significant alterations to the facility that would necessitate consultation with the 3<sup>rd</sup> Defendant since the provided facilities remained within the scope of the security. She submitted further that the Letter of Offer signed by the borrower within the 10 days period allowed for the use of the property as a security as long as the guarantors gave their consent, which they did on various dates with the 3<sup>rd</sup> Defendant being the first to consent on 8/12/2014.

### **Determination**

34. It is not disputed that the 3<sup>rd</sup> Defendant is the sole registered owner of the suit property, Uasin Gishu/ Sugutek Settlement Scheme/19. There is also no dispute that on 17/10/2011, a Charge over the suit property for a guarantee sum of Kshs 5,000,000/- was registered in favour of the 1<sup>st</sup> Defendant to secure overdraft/loan facilities advanced to the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant and which facility was guaranteed by the 3<sup>rd</sup> Defendant. The 3<sup>rd</sup> Defendant also agrees that he knowingly and voluntarily came on board as such guarantor and freely executed the Charge.
35. There is also no serious dispute that about 22/11/2014, the 2<sup>nd</sup> Defendant was advanced a further loan/overdraft facility of Kshs 160,000.000/- in respect to which the 3<sup>rd</sup> Defendant signed the Letter of Offer dated 22/11/2024 as one of the 6 guarantors and in which the suit property was listed as one of the 8 securities. There is also no dispute that the 1<sup>st</sup> Defendant still retains possession of the title document for the property and that on 27/06/2016, it advertised the suit property for sale by public auction in exercise of its statutory power of sale.



36. The marriage certificate produced in evidence, indicating that the 3<sup>rd</sup> Defendant and the Plaintiff were at all material times, a legally married couple having wedded on 16/12/1995, is also not challenged or controverted.
37. In the circumstances, and upon studying the pleadings and the arguments preferred herein, I find the issues that arise for determination to be the following:
- i. Whether there was a requirement for spousal consent for the suit property to be validly registered as security (Charge) for the facility advanced in 2011, and also for the additional facility advanced in 2014.
  - ii. Whether the omission to obtain spousal consent voided the application of the Charge as a valid security over the facilities advanced by the bank.
  - iii. Whether the additional facility advanced to the 2<sup>nd</sup> Defendant in 2014 was lawfully covered under the existing security (2011 Charge) of the suit property, or whether it required the registration of a fresh Charge or a Further Charge.
  - iv. What was the effect, if any, of the signing of the Letter of Offer by the Guarantors outside 10 days?
  - v. What was the effect of the failure to procure a valuation of the property within the 3 years' timeline stipulated in the 2014 Letter of Offer?
  - vi. Whether the loan was settled in full so as to justify discharge of the Charge.
38. I now proceed to determine the said issues.
- i. Whether there was a requirement for spousal consent for the suit property to be validly registered as security (Charge) for the facility advanced in 2011, and also for the additional facility advanced in 2014
39. There are various statutory provisions which require that a “spousal consent” be obtained when a “matrimonial home” is intended to be utilized as security for a loan.
40. For instance, Section 79(3) of the *Land Act* provides as follows:
- “A Charge of a matrimonial home, shall be valid only if any document or form used in applying for such a Charge, or used to grant the Charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.”
41. Similarly, Section 12(5) of the *Matrimonial Property Act* provides that:
- “(5) The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.”
42. Further, Section 93(3) and (4) of the *Land Registration Act* provides as follows:
- (3) Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house—
    - (a) the lender shall, if that disposition is a Charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that Charge; or



- (b) the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.
- (4) If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made in accordance with subsection (3)(a) or (3)(b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition.”
43. Although the Plaintiff seems to have initially taken the firm position that the entire loan contract(s) entered into, whether in 2011 when it was initially procured, or in 2014 when the additional facility was advanced, required “spousal consent” for the suit property to be registered as security for the loan, a look at the Plaintiff’s post-trial written Submissions reveals that the Plaintiff has relaxed that position. It is clear that the Plaintiff now advances the above position only as pertains to the additional facility advanced in 2014.
44. The above apparent “change of heart” by the Plaintiff is the correct move since the Charge was registered on 17/10/2011 when there was no stipulation of the requirement of “spousal consent” as aforesaid as a mandatory matter of law. I say so because the statutory requirement for “spousal consent” was introduced in Kenya by the *Land Registration Act*, 2012 and the *Land Act*, 2012, both which came into effect on 2/05/2012. On its part, the *Matrimonial Property Act* came into force even much later on 16/01/2014. There being no indication that these statutes were to apply retrospectively, there would therefore be no basis for arguing that they would apply to the Charge registered in 2011.
45. Accordingly, I find that even if it was proved that the suit property was a “matrimonial home”, such proof would be immaterial since no “spousal consent” was mandatorily required in Kenya by 17/10/2011 as a matter of law, when the initial loan facility was advanced, and/or the Charge was registered on that date.
46. What about the additional facility advanced to the 2<sup>nd</sup> Defendant in 2014?
47. Regarding the additional facility advanced to the 2<sup>nd</sup> Defendant in 2014, the 1<sup>st</sup> Defendant argues that the same did not require the registration of a fresh Charge or Further Charge as the transaction was not a new arrangement but was simply a restructuring of the initial loan, and that therefore the suit property continued in force as security.
48. In answering the above question, my reading of the Letter of Offer dated 22/1/2014 does not reveal any express statement that the arrangement was a restructuring of the loan. I however note that in the Schedule appearing at page 10 thereof, there is reference to the existing overdraft and term loan facilities. The purpose of the overdraft was then stated to be “to meet working capital” and for the Term Loan, it was stated to be “amalgamation of the existing loan facilities and part of the overdraft facility”. The above is particularized as follows:



Details of the Facilities	
Borrower:	Jeremiah Koskei Bowen
Existing facilities	
Overdraft Facility	Kshs 105,000,000/=
Term Loan 1	Kshs 30,000,000/= (Extant bal. Kes 14,977,496.15)
Term Loan 2	Kshs 25,000,000/= (Extant bal. Kes 20,999,647.35)
Total	Kshs 160,000,000/=

New Facilities	
Overdraft Facility	Kshs 60,000,000/=
Term Loan	Kshs 100,000,000/=
Total	Kshs 160,000,000/=

Purpose	
Overdraft	To meet the working capital
Term Loan	Amalgamation of the existing loans facilities and part of the overdraft facility

49. For the above reasons, I am persuaded that the 1<sup>st</sup> Defendant's argument that the new facilities being offered under the Letter of Offer dated 22/11/2014, and which it was not denied, were in fact advanced to the 2<sup>nd</sup> Defendant, was a restructuring of the initial loan.
50. Having held as above however, I also note that the Annexure appearing at page 12 of the Letter of Offer lists the items required to actualize the new facility. At number 1-8 are the 8 properties intended to be used as securities, and out of this, at number 7 is the suit property herein, described as follows:
- “7) Legal Charge RSC Kshs, 5.0 M over Uasin Gishu/Sugutek/19 ino Johnstone F. Kigen with CMV Kshs 7.6 M as per Acumen Valuers Limited on 15.03.2011.”



51. The 8 securities are then described as being “subject to” the requirements listed at number 9-15. Among these, at number 12 and 13, are the items described as follows:
- “ 12) Spousal consents from all the property owners that the property may continue being held as security for the facilities.
  - 13) Spousal certificates that the property is not matrimonial property.”
52. Further, at number 14 is the following requirement:
- “ 14) Variation of Charge on all Charged properties.”
53. It is therefore clear that the restructuring of the existing facility and the reliance on the said 8 properties as securities was “subject to” the obtaining of “spousal consents” from each one of the respective guarantors, including the 3<sup>rd</sup> Defendant, and also to variation of the existing Charge. This is, no doubt, the literal meaning of the Annexure at page 12 of the Letter of Offer.
54. The 1<sup>st</sup> Defendant’s witness attempted to escape from the above interpretation by claiming that the Letter of Offer was a standard contract and thus did not necessarily mean that every one of its provisions applied to the transaction herein. I reject that line of submission since first, no evidence to support that argument was presented, and secondly, the 1<sup>st</sup> Defendant being the author of the Letter of Offer, the argument is extinguished by the contra proferentem rule of contract drafting.
55. The contra proferentem rule, also known as “interpretation against the draftsman”, is a doctrine of contractual interpretation which provides that, where a promise, agreement or term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provided the wording or drafted the document the subject of the interpretation. The reasoning behind this rule is to encourage the drafter of a contract to be as clear and explicit as possible and to take into account as many foreseeable situations as it can. The rule therefore grants the benefit of doubt in favour of the party upon whom the contract was imposed. In this case therefore, in the absence of any proof to support the bank’s arguments to the contrary, the Court cannot rely on insinuations to impose an unsubstantiated intention on the parties.
56. Regarding the “spousal consent”, it is also clear that the bank envisioned its procurement by including it at page 12 of the Letter of Offer as one of the requirements for the restructuring as aforesaid. The 1<sup>st</sup> Defendant wishes that the Court turns “a blind eye” to terms of the contract that are not in its favour but, on the other hand, to enforce those in the same contract that are in its favour. This amounts to “approbating and reprobating” at the same time, conduct which Courts frown upon.
57. Further, the Letter of Offer being dated 22/11/2014, as already held above, by that date, the mandatory statutory requirement for “spousal consent” had already been introduced in Kenya by the [Land Registration Act](#), 2012 and the [Land Act](#), 2012, both which came into effect earlier on 2/05/2012 and the [Matrimonial Property Act](#) which came into force on 16/01/2014.
58. Although therefore the initial loan facility advanced in 2011, and the registration of the Charge against the suit property as security on 17/10/2011 did not require a “spousal consent” as a mandatory matter of law, for the Charge to be extended to the subsequent restructuring of the facility advanced in 2014, the same would, no doubt, be subject to the requirement to obtain a “spousal consent” as long as it was proved that the suit property was a “matrimonial home”.



**Whether the omission to obtain the spousal consent voided the application of the Charge as a valid security to cover the facilities advanced by the bank**

59. As already stated, the failure to obtain the spousal consent would only adversely affect the operation of the Charge as a security if it is demonstrated that the suit property was a “matrimonial home”. However, the Plaintiff and the 3<sup>rd</sup> Defendant have argued that the 2011 Charge did not even cover the additional facility advanced in 2014 in the first place. If this argument is upheld, then the question of obtaining the “spousal consent” for the 2014 loan or whether the suit property was a “matrimonial home” would not even have a major bearing or relevance, if any, on the final outcome of this case.
60. For this reason, I will first determine the issue whether the 2011 Charge applied to the subsequent or additional facility advanced in 2014.

**Whether the additional facility advanced to the 2<sup>nd</sup> Defendant in 2014 was lawfully covered under the existing security (Charge) of the suit property, or whether it required the registration of a fresh Charge or a Further Charge.**

61. I have already found that the Annexure at page 12 of the Letter of Offer dated 22/11/2014 appearing at number 14 of the list of the 15 requirements, expressly included and described the following as being one of such requirements:
- “ 14) Variation of Charge on all Charged properties.”
62. For the above reason, and having already found that the 1<sup>st</sup> Defendant cannot run away from its own document, it follows that the 1<sup>st</sup> Defendant was fully aware that the additional facility advanced in 2014 could only be covered under the existing security upon registration of a Further Charge which would then have contained any anticipated variations.
63. On the need for registration of a Further Charge upon giving further advances on the existing security, Section 82 of the Land Act provides that:
- (1) Subject to the provisions of this Act, a chargor may make provision in the Charge instrument to give further advances or credit to the chargor on a current or continuing account.
  - (2) A further advance referred to in subsection (1) shall not rank in priority to any subsequent Charge unless -
    - (a) the provision for further advances is noted in the register in which the Charge is registered; or
    - (b) the subsequent chargor has consented in writing to the priority of the further advance.
64. It is also relevant to observe that the Charge registered on 17/10/2011 was only demonstrated vide a Search Report produced by the Plaintiff. The Charge itself was never produced. In the circumstances, the Court has no material before it to determine whether the Charge provided for any further advances to be included as recoverable under the existing Charge. It follows therefore that the 1<sup>st</sup> Defendant has failed to demonstrate that the existing Charge covered the additional advances made in 2014.
65. For the above reasons, I find that the 1<sup>st</sup> Defendant cannot lawfully use the Legal Charge registered on 17/10/2011 to recover the additional facility that it advanced vide the Letter of Offer dated 22/11/2014 as no Further Charge or Variation of the 2011 Charge was registered in respect to the 2014 facility.



66. Having therefore held that the suit property could only have lawfully secured the additional facility advanced in 2014 if a Further Charge were registered, which was not, the issue of obtaining the “spousal consent” or failure to do so, and by extension, the debate whether the suit property was a “matrimonial home” or not, would only be academic as it would no longer have any meaningful relevant.

**What was the effect, if any, of the signing of the Letter of Offer dated 22/11/2014 by the Guarantors outside the 10 days deadline stipulated**

67. This issue arises from the provisions of Clause 13 appearing at page 7 of the Letter of Offer dated 22/11/2014 and which stipulates as follows:

“ 13. OFFER PERIOD

The offer contained in this letter is available to the borrower for acceptance for a period of 10 days from the date of this letter after which date the offer will lapse unless extended in writing to the bank.”

68. It is evident, and this was conceded by the bank’s witness (DW1) that the guarantors signed the Letter of Offer on different dates. This is because Wilson Koech is indicated to have signed on 05/01/2015, the 3<sup>rd</sup> Defendant- Johnstone Kigen, on 08/12/14, Henry Kirwa on 06/01/2015, Kipkosgei Ruto on 29/12/2014, Noah Kipchumba on 25/11/2014, and Christopher Kipkorir on 09/12/2014. On his part, the borrower (2<sup>nd</sup> Defendant) signed on 1/12/2014.
69. The Clause however only mentions the borrower, and does not make any reference to the guarantors. Further, the Letter of Offer is silent on the time period within which the guarantors were required to sign it. As the borrower signed the letter on 25/11/2024, three days after it was issued and thus within the 10 days deadline, it cannot be said that the signing by the guarantors outside 10 days in any way affected the validity of the acceptance, by the borrower, of the offer. In my view, there is nothing to support the argument that the acceptance by the borrower had anything to do with the acceptance by the guarantors.

**What was the effect of the failure to procure a valuation of the property within the timelines stipulated?**

70. An argument was also raised that the transaction of 2014 required that a valuation should have been conducted within 3 years of signing the Letter of Offer but which was not done. In respect thereto, Clause 5.5 appearing at page 4 of the Letter of Offer dated 22/11/2014 provides as follows:

“ 5. 5. You will be required to provide a valuation report(s) over the assets pledged as security under the security clause every three years for as long as the assets pledged continue to be part of our security. A bank approved valuer will be mutually agreed upon beforehand and instructed by the bank. All valuation reports which must be addressed Oriental Commercial Bank Limited will be at your cost. The bank reserves the right to revalue.”

71. The bank’s witness (DW1) acknowledged this provision in the Letter of Offer and admitted that the suit property, which was referred to in the Schedule of securities at Clause 7, was valued by Messrs Acumen Valuers who submitted the Valuation Report dated 15/03/2011. The Letter of Offer being dated 22/11/2014, he admitted that the Valuation was outside the 3-years limit prescribed in the Letter of Offer. This, then, is another ground why the additional facilities advanced in 2014 cannot be subsumed into the protection covered under the existing 2011 charge.



### **Whether the loan was settled in full so as to justify discharge of the Charge**

72. The Plaintiff and the 3<sup>rd</sup> Defendant contended that the initial loan secured by the Charge registered on 17/10/2011 was settled in full vide the incoming funds from Consolidated Bank on 27/08/2012.
73. I have perused the bank statements produced and which the 1<sup>st</sup> Defendant's witness (DW1) acknowledged as genuine. There is indeed indication in the statement that a sum of Kshs 69,216,512.65 was credited to the loan account number 0050000159 which according to the Plaintiff and the 3<sup>rd</sup> Defendant, reduced the outstanding balance to Kshs 1,719,923.00. Although DW1 conceded that there was only one loan facility that resulted in the Charge registered on 17/10/2011, regarding the bank statement entry of 24/08/2012, he claimed that it related to a different account that was being closed, namely, account number 1005212050300, a fixed deposit account. Further, despite DW1 disputing that the loan was fully paid, he could not clearly explain the crediting of the Kshs 69,216,512.65 on 27/08/2012 by Consolidated Bank apparently for or on behalf of, or in respect to Messrs Lomson Enterprises. He claimed that the allegation of full settlement of the loan arose because of a misunderstanding on the part of the Plaintiff on what an overdraft is. He however failed to clearly explain why the bank statement reflected this transaction under the same account number 0050000159 in the name of the 2<sup>nd</sup> Defendant. His explanation does not seem to tally with his assertion that the account being closed was a separate fixed deposit account.
74. Be that as it may, in view of the two rival contentions above, this Court finds itself in a situation where it is unable to conclusively determine which of the two versions is the truth. The 2<sup>nd</sup> Defendant, the person who could have shed light or given authoritative explanation for the payment received from Consolidated Bank and on whether the loan was fully settled, having chosen not to participate at the trial, this Court finds itself with no material before it to make conclusive findings on the issue. The Plaintiff was not a party to the loan transaction between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant and cannot therefore purport to testify on whether the loan was fully paid or not. Whatever she purports to say about the loan payment is what she was told by a third party and thus pure hearsay. Similarly, the 3<sup>rd</sup> Defendant was only a party to the guarantee contract, not the loan contract. He, too, is a stranger to the loan contract, which is separate from the guarantee contract. Whether or not the loan was paid, neither the Plaintiff nor the 3<sup>rd</sup> Defendant cannot purport to make representations thereon.
75. In is considered view therefore, that the Plaintiff and the 3<sup>rd</sup> Defendant have failed to demonstrate or prove that the loan/overdraft advanced by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant and in respect to which the said Charge was registered on 17/10/2011 over the suit property in favour of the 1<sup>st</sup> Defendant and secured by the amount of Kshs 5,000,000/- guaranteed by the 3<sup>rd</sup> Defendant was fully settled.
76. It is also important to observe that this suit was filed by the Plaintiff. On the issue whether the loan was settled in full, the 3<sup>rd</sup> Defendant cannot ride on the Plaintiff's suit to advance his case against the bank. If aggrieved, he ought to have filed his own case against the bank and advance his case. What he is trying to do lends credence to the bank's assertion that this claim is a collusion between the 3<sup>rd</sup> Defendant and the Plaintiff (a couple).
77. To the above extent, I have serious reservations whether it was even competent or proper for the 3<sup>rd</sup> Defendant to file a cross-claim, not against the Plaintiff who is the one who brought him into the suit, but against a fellow co-Defendant. Had that issue been raised, I could have very well struck out the cross-claim.



## Final Orders

78. The consequence of my findings above is that I declare, rule and order as follows:

- i. The Charge registered on 17/10/2011 over the parcel of land known as Uasin Gishu/Sugutek/19 in favour of the 1<sup>st</sup> Defendant did not require to be supported by a spousal consent as the law prevailing as at that date did not stipulate a spousal consent as being a mandatory requirement for registration of a Charge.
- ii. The said Charge registered on 17/10/2011 over the parcel of land known as Uasin Gishu/Sugutek/19 in favour of the 1<sup>st</sup> Defendant was therefore valid and lawful.
- iii. The said Charge registered on 17/10/2011 over the parcel of land known as Uasin Gishu/Sugutek/19 in favour of the 1<sup>st</sup> Defendant only secured the amount of Kshs 5,000,000/- guaranteed by the 3<sup>rd</sup> Defendant as noted against the title to the property, and did not extend its application to the subsequent or additional loan/overdraft facility advanced by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant vide the Letter of Offer dated 22/11/2014.
- iv. The Plaintiff and the 3<sup>rd</sup> Defendant have failed to demonstrate or prove that the loan/overdraft advanced by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant and in respect to which the said Charge was registered on 17/10/2011 over the parcel of land known as Uasin Gishu/Sugutek/19 in favour of the 1<sup>st</sup> Defendant was fully settled.
- v. The 1<sup>st</sup> Defendant is therefore at liberty to exercise its statutory power of sale over the parcel of land known as Uasin Gishu/Sugutek/19 but only in respect, or limited to, the loan/overdraft advanced by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant in the year 2011, if that initial loan is still outstanding.
- vi. The 1<sup>st</sup> Defendant cannot therefore purport to use the Charge registered on 17/10/2011 against the title to the parcel of land known as Uasin Gishu/Sugutek/19 to exercise any statutory power of sale to recover amounts owing, if any, in respect to the subsequent or additional loan/overdraft facility advanced by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant vide the Letter of Offer dated 22/11/2014.
  - i. Accordingly, an order of permanent injunction is hereby issued restraining the 1<sup>st</sup> Defendant from using the Charge registered on 17/10/2011 against the parcel of land known as Uasin Gishu/Sugutek/19, to exercise any statutory power of sale rights to recover amounts owing, if any, in respect to the subsequent or additional loan/overdraft facility advanced by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant vide the Letter of Offer dated 22/11/2014, or to dispose of or sell the said parcel of land under that Charge.
  - ii. Since the Plaintiff has only partially succeeded, each party shall bear his/her/its own costs of this suit.
  - iii. For avoidance of doubt therefore, save for prayer (d) of the Plaint which is only allowed to the limited extent expressly set out, the rest of the prayers made in the Plaint are dismissed.
  - iv. The 3<sup>rd</sup> Defendant's purported cross-claim is also dismissed.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 28<sup>TH</sup> DAY OF MARCH 2025**

.....

**WANANDA J.R. ANURO**



## **JUDGE**

Delivered in the presence of:

Mr. Kipnyekwei for the Plaintiff

Ms. Jeruto for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Court Assistant: Brian Kimathi

Eldoret High Court Civil Case No. 10 of 2020

