



**Paddy Kenya v Equity Bank Kenya Limited & 3 others (Commercial Suit E079 of 2022)
[2025] KEHC 9042 (KLR) (Commercial and Tax) (27 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9042 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E079 OF 2022
BM MUSYOKI, J
JUNE 27, 2025**

BETWEEN

KENYA PLAINTIFF

AND

EQUITY BANK KENYA LIMITED 1ST DEFENDANT

GEORGE MBAGU 2ND DEFENDANT

PATRICK NTHIGA MVUNGU 3RD DEFENDANT

JOYCE WANGUI WACHIRA 4TH DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the 1st and 2nd defendants seeking to restrain the said defendants from selling or disposing his motor vehicles and trailers registration numbers KCD 8X0A, ZF 4XX0, ZF 4XX1, KBD 5X5F, ZC 8XX7, KAR 4X1P, KAR 2X4P, KAL 5X1K, KAQ 0X7R, KAQ 2X2U, KAQ 2X5G, KAQ 2X9P, KAR 0X4B, KAR 4X2P, KAR 4X3P, KAR 4X4P, KAS 0X8M, KAS 1X1M, KAS 1X4Q, KAT 0X5H, KBB 5X7Z, KBD 5X3F, KBD 5X2F, KBE 6X4M, ZC 7XX1, ZC 8XX6, ZC 8XX5, ZC 8XX6, KCF 0X1A and KCF 0X2A (hereinafter referred to as ‘the vehicles’).
2. The motor vehicles were mortgaged to the 1st defendant as security for credit facilities advanced to the plaintiff. In addition to the chattel mortgage, the plaintiff charged his property known as L.R Number 9042/942 (IR number 148591) (hereinafter referred to as ‘the property’) to the 1st defendant. The defendants filed defence and counterclaim in which they joined the 3rd and 4th defendants and claimed a sum of Kshs 378,464,993.00 with interest at a rate of 13% per annum from the plaintiff and the 3rd and 4th defendants. The rest of the details of the suit are contained in the evidence of the parties reproduced below.



3. PW1 was the 3rd defendant. He told the court that he was the director of the plaintiff. According to the witness statement which he adopted in his evidence in chief, in August 2017 the plaintiff was advanced a loan of Kshs 120,000,000.00 by the 1st defendant for which he offered the suit property which is situated along north airport road in Nairobi which was charged to the 1st defendant.
4. The witness added that sometime in 2020, he found himself straining to pay due to the corona virus which ravaged the world. The plaintiff was as a result forced to approach the 1st defendant who gave it two options, either they auction the property or sale it by private treaty. The plaintiff and the 3rd defendant chose to go by private treaty on understanding that the sale would be sufficient to offset all the outstanding loan. The witness claimed that the 1st defendant was aware that the property was at the time worth in excess of Kshs 250,000,000.00.
5. The 3rd defendant added that he sought and got a buyer of the property at Kshs 100 million which the 1st defendant approved and the sale was concluded but in 2022, the bank still came after them despite they having agreed that the sale of the property at the said price would be in full settlement of the loan. The plaintiff was surprised when the 1st defendant sought to go for the motor vehicles belonging to the guarantors claiming Kshs 378,464,992.00. According to the witness, there would not have been need to sell the property at a loss if the same was not clearing the loan in full.
6. In cross-examination, the witness told the court that in 2018, he signed a restructuring agreement with the 1st defendant. He denied that he signed agreement as guarantor but in his capacity as a director of the plaintiff. He insisted that if he signed a guarantee, the bank did not tell him so. He conceded that when he approached the bank, there was a pending balance of the loan. He also recalled that he wrote a letter asking to be paying Kshs 2 million and 1.5 million per month which he did for a year. He also admitted that after the property was sold, he continued repayments for a year. He stated that the property was worth 250 million though he did not have valuation report to that effect and conceded that the property was in 2017 valued at Kshs 120,000,000.00 while valuation done in 2020 put the property at Kshs 90,000,000.00.

The 3rd defendant produced the following documents;

- a. Charge over the property dated 16-08-2017.
 - b. Proclamation by the 2nd appellant done on 8-03-2022.
 - c. Assorted emails exchanged between the plaintiff and the 1st defendant.
 - d. Valuation report by Accurate valuers Limited dated 16th March 2017.
7. The 1st and 2nd defendants called one Joel Mulumi Musyoka who described himself as a relationship manager at Equity Bank community supreme branch. He adopted his statement dated 7-07-2022 in which he stated that the 1st defendant advanced various credit facilities to the plaintiff including asset finance loans, a term loan, guarantee loans and an overdraft facility. He added that by a facility letter dated 16th November 2018, the 1st defendant agreed to amalgamate all existing facilities advanced to the plaintiff into a revolving unsecured effects facility, revolving bank guarantees facility and a term loan facility all totaling to Kshs 395,000,000.00.
 8. The witness added that the above facilities were to be secured by various securities which were; charge over the property, chattels mortgage on the motor vehicles and personal guarantees and indemnities by the 3rd and 4th defendants. The plaintiff failed to pay and on 27-06-2019, it wrote to the 1st defendant making a proposal to pay Kshs 2,000,000.00 immediately and Kshs 1,500,000.00 per month going forward due to the challenges in its business. The letter was countered with a proposal of Kshs



- 2,500,000.00 immediately and Kshs 1,500,000.00 every 5th day of the month starting from 5th July 2019.
9. Further testimony of the witness was that by a letter dated 3-09-2019, the plaintiff proposed to settle the outstanding loan by among other actions, selling the property and it was not true that the 1st defendant agreed that the amount recovered from the sale of the property would be deemed to be in full settlement of the debt. The 1st defendant consented to the proposal to sell the property on condition that all the proceeds of sale would be applied towards reducing the indebtedness to it. The witness also denied that the property was valued at Kshs 250,000,000.00 and put the value of the same at Kshs 90,000,000.00 as per a valuation report by Accurate Valuers Limited dated 14-12-2020.
 10. The witness added that since the sale of the property, the plaintiff did not pay money or make a proposal on how to pay the balance which forced the 1st defendant to instruct its advocates to recover the amount due together with interest. He produced the following documents;
 - a. Facility letter dated 16th November 2018.
 - b. Guarantee and indemnity dated 16-08-2017.
 - c. Letter dated 27-06-2019 from the plaintiff to the 1st defendant.
 - d. Letter dated 3-09-2019 from the plaintiff to the 1st defendant.
 - e. Valuation report by Accurate Valuers Limited dated 14-12-2020.
 - f. Letter dated 1-03-2022 from the 1st defendant's advocates to the plaintiff.
 - g. Letter dated 13-05-20022 from the defendant's advocates to the 3rd defendant.
 - h. Letter dated 13-05-20022 from the defendant's advocates to the 4th defendant.
 - i. Statement of account for account number 180XXXXXX19 for the period 1-01-2018 to 17-05-2024.
 11. I cross-examination by Mr. Asiyu, the witness stated that the principal amount owed was Kshs 78,464,993.00 and admitted that the amount paid by the plaintiff in total was not in the statement. He also admitted that the amount paid was not in dispute but the balance. He admitted that the plaintiff approached the bank to sell the security and that the sale price of 100 million shillings went to repayment of the loan which reduced the amount owing to Kshs 378,164,993.00.
 12. In further cross-examination. The witness added that the initial loan was Kshs 395,000,000.00 which was not going down due to defaults. He added that they gave accounts to the plaintiff after the sale of the property but they did not file the accounts in court because there was no dispute on the same. He added that the statement of account for the period from 1-01-2018 to 17-05-2024 shows all the transactions including interest.
 13. I have gone through and considered the testimony of the parties' witnesses and exhibits produced in this matter. In my considered view and judging from the evidence on record, the issues for determination in this matter are;
 - a. Whether there was an agreement that the sale of the property would be considered as in full settlement of the outstanding loan.
 - b. Whether the 1st defendant had a legal right to attach and sale the motor vehicles.
 - c. If answer to 'a' above is in the negative, how much is owed to the 1st defendant.



- d. What orders are appropriate in this matter.
14. In coming up with the above issues, I had in mind the fact that there is no reasonable dispute on how much was advanced and how much has been repaid. Although the plaintiff alleged that the amount advanced was Kshs 120,000,000.00, it is my finding that the basis of the matter is the letter of restructuring dated 16-11-2018 which the plaintiff has not contested. The plaintiff had various facilities and I find it evasive for the plaintiff to lead the court to concentrate on the one for Kshs 120,000,000.00 only. The plaintiff has not told or demonstrated to the court that there are any payments which it made and were not reflected in the statement of account. I have also considered that there is no dispute that the property and the vehicles were charged and mortgaged to the 1st defendant.
 15. The plaintiff has argued that the sale of the suit property by private treaty was meant to offset all the loans due. It has not denied that the sale of the property reduced the loan to 378,164,993.00 and it has not disputed the statement of account produced by the 1st defendant. I do not see anything in the correspondences leading to the sale of the property that would suggest that there was an agreement that the sale would be deemed to be in full and final settlement of the debt.
 16. The plaintiff has argued that the property was valued at Kshs 250,000,000.00 which was not supported by evidence. In proof of the value, the plaintiff produced a valuation report dated 16-03-2017 which gave an open market value of Kshs 120,000,000.00, mortgage value of Kshs 100,000,000.00 and forced sale value of Kshs 90,000,000.00. The defendant produced valuation report dated 14-12-2020 which returned a value of Kshs 90,000,000.00 as market value and forced sale value of Kshs 67,500,000.00. One may not tell why the value went down unlike the general trend of landed property where only appreciation is expected. However, I do not think that this is a relevant point for considerations as there was no contest on the sale.
 17. The plaintiff is the one who sought and secured the buyer of the property and in my view, he must have sought the best it could get in the market noting that it was in its best interest to get the highest price possible. The property was in its possession and ownership and nothing would have stopped it from carrying out a valuation of its own at the time it sold the property.
 18. Even if the property was to be valued at Kshs 250,000,000.00 or the value were to be applied to offset the debt, there would still remain an outstanding sum of Kshs 128,164,993.00 going by the accounts given by the 1st defendant and not disputed by the plaintiff. Where a borrower confirms that the loan was advanced, the security cannot be discharged until the debt is paid in full. In *Geoffrey Wahome Muotia v National Bank of Kenya* (2019) KEHC 12285 (KLR) it was held that;

My understanding of the above provision is that as long as the chargor remains indebted to the chargee, the monies must be paid failing which the latter is entitled to exercise its statutory power of sale.’
 19. The motor vehicles were mortgaged to the 1st defendant and as such there having been an outstanding loan balance, the 1st defendant was within its rights to attach and sale the vehicles. In view of what I have stated above and the position in law as expounded in the cited authority, it is my holding that the 1st defendant had a right to go for the mortgaged motor vehicles and the plaintiff has failed to prove its case against the 1st and 2nd defendants and the same is dismissed with costs. This settles the first issue as framed above.
 20. On the second issue, I have considered the evidence and found that the 3rd and the 4th defendants signed the guarantee and indemnity dated 16th August 2017 despite the plaintiff’s witness alleging that they signed as directors and not as guarantors. The guarantee and indemnity are drawn in english, a language



the witness fluently used in his testimony and which he did not say that he did not understand. I do not buy the argument that the 3rd and 4th defendants did not know that they were signing a guarantee.

21. I now turn to the 3rd issue which is relevant to the 1st defendant's counterclaim. The 1st and 2nd defendants have claimed that the outstanding loan balance as at the time of filing counterclaim was Kshs 378,464,993.00. The counterclaim was filed on 8-07-2022. In proof of the said debt, the said defendants produced a statement of the plaintiff's account which was said to be for the period running from 1-01-2018 to 26-01-2024 but a look at the same begins on 1-12-2018. It would seem that there were no transactions in the said account for the rest of the year.
22. The 1st defendant produced the running statement for account number 0180XXXXX19. I note the letter dated 16-11-2018 restructured and amalgamated a total of ten accounts and probably that is why the statement of account begins from 1-12-2018. There was no contest on the statement of account and it would therefore be right for the court to take the statement as the reflection of the plaintiff's owed the 1st defendant.
23. The statement of account shows that even though the account stood at a negative 378,464,993.00 as at the time of filing the counterclaim, there were subsequent credits therein resulting to an outstanding debit of Kshs 302,273,321.35 as at 26-01-2024 where the statement ends. Where it is shown that some payments were done after the suit was filed, it is only just that the amounts so far paid be credited. I am persuaded by the holding of Honourable Justice W.A. Okwany in *I & M Bank Limited v Shani Active Limited & 2 others* (2022) KEHC 11962 (KLR) in where she stated that;

This is to say that should the court find that part of the debt was paid after the filing of the suit, then the plaintiff will only be entitled to the actual amount due.'

24. I consequently hold that the latter amount is in my judgment what the plaintiff owes the 1st defendant. The interest rate prayed for was contractual as it is clearly indicated in the letter of offer dated 16-11-2018 and therefore justified.
25. The 3rd and 4th defendants guaranteed repayment of the said facilities and are bound to pay the same. I have already held elsewhere hereinabove that the 3rd and 4th defendants properly signed the guarantee and indemnity dated 16th August 2017 and they remain so bound. A guarantor remains bound to a debt they guarantee until the amount guaranteed is fully paid and settled. In *Equip Agencies Limited v I & M Limited* (2017) (KEHC 10051 (KLR) Honourable Lady Justice G.L. Nzioka while dealing with a guarantee clause held that;

The continuing guarantee clause is a continuing obligation of the guarantor despite completion of payment of the sum guaranteed, the guarantee remains in full force and effect for so long as the Borrower has any liability or obligation to the creditor under the charge and until all of those liabilities and obligations have been fully discharged thus this clause is inserted with the sole intention of enabling the security to cover all future advances and thus overcome the rule in *Clayton's Case (Devaynes vs Noble (1816))*. Without this clause any future credits to the account would reduce the amount secured/guaranteed and any further advances (or debits) would be new debts and not covered. Therefore, in the instant case, the Applicant can only be released upon settlement of all liabilities to which the guarantee relates.'

26. The conclusion of the above analysis is that the plaintiff's case fails and the 1st defendant's counterclaim succeeds to the extent indicated. I therefore make the following final orders;
 - a. The plaintiff's suit against the 1st and 2nd defendants is hereby dismissed with costs.



- b. Judgment is entered for the 1st defendant against the plaintiff, 3rd defendant and 4th defendant jointly and severally for Kshs 302,273,321.35 together with interest at 13 per cent per annum from the date of filing this suit until payment in full.
- c. The plaintiff, the 3rd defendant and the 4th defendant shall pay the costs of the counterclaim.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JUNE 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgement delivered in presence of Mr. Asiyu holding brief for Mr. Nzavi for the plaintiff, the 3rd defendant and the 4th defendant and Mr. Muriithi holding brief for Mr. Ondieki for the appellant.

