Westbuild General contractors Limited & another v NCBA Bank Kenya Plc; Auctioneers (Interested Party) (Civil Suit E016 of 2024) [2025] KEHC 11927 (KLR) (14 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11927 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL SUIT E016 OF 2024

BK NJOROGE, J

AUGUST 14, 2025

BETWEEN

WESTBUILD GENERAL CONTRACTORS LIMITED ..... 1ST APPLICANT

NJOWAMBU (K) LIMITED ..... 2ND APPLICANT

AND

NCBA BANK KENYA PLC ..... RESPONDENT

AND

PHILLIPS INTERNATIONAL AUCTIONEERS ..... INTERESTED PARTY

JUDGMENT

1. This judgment relates to the Plaintiffs' claim as set out in the Plaint dated 2nd July 2024, wherein they seek the following reliefs from this Honourable Court:

    a. A Permanent Injunction restraining the Defendant, their agents and/or their servants from offering for sale, advertising for sale and/or selling by way of public auction or private treaty the Plaintiffs properties being LR. No Kiambu/kilimambogo/666, Lr. No 4953/1923 Thika Municipality And Thika Municipality Block 11/480.

    b. An order for joint valuation of the suit properties.

    c. An order be made (as provided for under Section 104 (2)(b) of the *Land Act*, 2012) for extension of time to comply with the Statutory Notice served by the Defendant under Section 90 of the *Land Act*.

    d. Spent.

    e. An order for the recalculation of the loan accounts by an Independent Body.

f. Costs of the suit.

g. Any other order that this Honorable Court may deem fit to grant.

2. This matter came up for RRI, and pursuant to the directions issued by the Court, the Court has duly considered the written submissions filed on behalf of both parties. The Court commends Counsel for their diligence. Notably, the Plaintiffs'/Applicants' submissions dated the 26th November 2024, while the Defendant's/Respondent's submissions dated the 18th November 2024. The Court sincerely apologises for the delay in delivery of this Judgement and any inconveniences it may have caused the parties. The delay is attributed to unforeseen personal events that befell the Court as well as pressure of work and exigencies of time.

Background Facts

3. By a Plaint dated 2nd July 2024, the Plaintiffs—Westbuild General Contractors Ltd (1st Plaintiff) and Njowambu (K) Limited (2nd Plaintiff)—filed suit against NCBA Bank (the Defendant), arising from a long-standing credit relationship dating back to August 2015. The 1st Plaintiff, a contractor engaged in public infrastructure projects, had approached the Bank for a line of credit to support performance on road construction contracts awarded by the Principal Secretary, Ministry of Transport and Infrastructure. The Bank granted various facilities—overdrafts, invoice discounting, performance and advance payment guarantees, and hire purchase arrangements—amounting to approximately Kshs. 889,841,000. These were secured by several instruments, including debentures over the 1st Plaintiff's assets, corporate and personal guarantees from the 2nd Plaintiff and its directors, legal charges over land, and assignment of rental income.

4. The Plaintiffs assert that the facilities were properly serviced until around January 2021, when the Principal Secretary, Ministry of Transport and Infrastructure, acting unlawfully and in breach of a subsisting Court order, terminated the 1st Plaintiff's construction contracts and recalled the guarantees. Despite being aware of the High Court's injunctive order issued in West Build General Contractors Limited v Principal Secretary, State Department of Infrastructure & 2 Others (Commercial Civil Case No. E058 of 2020) [2021] KEHC 398 (KLR) (Commercial and Tax) (Ruling delivered on 22 December 2021), NCBA Bank honoured the recalled guarantees and paid KShs. 139 million to KeRRA, debiting the 1st Plaintiff's overdrawn account. This action, the Plaintiffs claim, unjustifiably escalated their indebtedness, causing monthly liabilities exceeding Kshs. 5 million and plunging the 1st Plaintiff into financial distress.

5. The dispute with the Principal Secretary, Ministry of Transport and Infrastructure was referred to arbitration. That by a final Award dated 29th July 2022, the Arbitral Tribunal found the termination of the contracts and the guarantee recalls to be unlawful and awarded the 1st Plaintiff compensation, including damages, interest, and penalties. The Plaintiffs have since filed (Milimani) HCCOMMARB/E054/2022 seeking recognition and adoption of the arbitral Award as a decree of the Court. The Ruling on that application is pending.

6. Despite full knowledge of the Tribunal's findings and the pending Court proceedings, NCBA Bank, through Philips International Auctioneers, advertised for sale the Plaintiffs' properties on 10th June 2024. These include LR No. KIAMBU/KILIMAMBOGO/666, LR No. 4953/1923, and THIKA MUNICIPALITY BLOCK 11/480—the last two of which are solely owned by the 2nd Plaintiff and were provided purely as security. The Plaintiffs contend that NCBA's actions are based on a grossly inflated and inaccurate claim of Kshs. 826,707,547.90 as of 12th April 2024, whereas their actual indebtedness is Kshs. 167,164,717.65, comprising an overdraft and one active guarantee.

7. The Plaintiffs challenge the inclusion of Kshs. 55,815,000 as a purported performance guarantee, claiming they have no knowledge of this amount. They also point out inconsistencies in NCBA's debt figures, noting that while the Bank's claim as at 31st August 2023 was Kshs. 877 million, the figure dropped to Kshs. 826 million by April 2024, despite no payments having been made—suggesting flawed or manipulated accounting. Moreover, the Plaintiffs argue that NCBA failed to first exhaust remedies against the 1st Plaintiff, the principal debtor, before targeting the 2nd Plaintiff's charged assets, contrary to established principles of guarantee law and fair commercial practice.

8. Further, the Plaintiffs allege that the Bank has deliberately undervalued the charged properties in a bid to facilitate a forced sale at below-market prices, and has acted in bad faith by disregarding lawful court and arbitral processes. They argue that these enforcement measures are premature, oppressive, and unlawful, and that NCBA's conduct seeks to unfairly extinguish their equity of redemption by demanding exaggerated and unrecoverable sums.

9. The Plaintiffs maintain that they made genuine attempts to restructure or settle the debt and that the 1st Plaintiff remains willing to meet its obligations, subject to the outcome of the arbitral enforcement proceedings. They therefore urge the Court to restrain the Defendant from proceeding with the auction and seek declaratory and injunctive relief to protect their rights and prevent irreparable loss.

10. In opposition to the Plaintiffs' application, NCBA Bank filed a Replying Affidavit sworn on 25th July 2024 by Christine T. Wahome, the Bank's Senior Legal Counsel. Ms. Wahome deposed that the Plaintiffs had, at their own request, been granted various banking facilities by the Defendant under multiple Facility Letters dated 26th August 2015, 30th August 2018, 24th July 2019, and 28th August 2019. These facilities, which included commercial loans and performance guarantees, were secured by numerous legal charges over the Plaintiffs' properties, including LR No. 4953/1923, THIKA MUNICIPALITY BLOCK 11/480, and KIAMBU/KILIMAMBOGO/666.

11. Despite the financial arrangements, the Plaintiffs allegedly defaulted on their repayment obligations. Ms. Christine Wahome stated that the Bank issued and served all the requisite statutory notices in accordance with the *Land Act*. These included a 30-day notice (dated 28th May 2021), a 90-day notice (dated 30th June 2021), and a 40-day redemption notice (dated 4th October 2021). The Plaintiffs did not dispute service of these notices and, in fact, acknowledged the debt in a letter dated 8th November 2021, wherein the 1st Plaintiff proposed a restructuring of the then-outstanding sum of approximately Kshs. 650 million.

12. In April 2024, the Bank instructed Philips International Auctioneers to issue a 45-day redemption notice and a Notification of Sale, which the Plaintiffs also did not contest receiving. A professional valuation of the charged properties was conducted by Centenary Valuers Limited, which reported forced sale values of Kshs. 265 million (for LR 4953/1923), Kshs. 56.5 million (THIKA BLOCK 11/480), and Kshs. 45 million (KIAMBU/KILIMAMBOGO/666). Based on these valuations, the properties were advertised for public auction on 30th June 2024, with the auction scheduled for 5th July 2024.

13. Ms. Christine Wahome further confirmed that the Bank had issued performance guarantees at the Plaintiffs' request, and that these were irrevocable commitments to pay the Ministry on demand. On 20th February 2020, the Principal Secretary, Ministry of Transport and Infrastructure, called up four such guarantees, totaling Kshs. 124,319,846.70. That the Defendant honoured the demands on 13th March 2020, in accordance with the terms of the guarantees. She emphasized that the Bank was not a party to the arbitral proceedings between the Plaintiffs and the Ministry and could not be bound by those findings.

14. She also noted that the 1st Plaintiff had previously acknowledged and proposed separation of the outstanding debt into loan and guarantee components, but the Bank declined such proposals. Ms. Christine Wahome stated that the Defendant had extended multiple indulgences and accommodations to the Plaintiffs, including the renewal of guarantees, but the Plaintiffs had persistently failed to meet their obligations.

15. The Affidavit provided detailed loan balances as at 17th July 2024, showing total arrears of Kshs. 772,939,591.55, spread across six credit facilities, including three commercial loans, two overdraft accounts, an asset finance facility, and one performance bond. All facilities were said to be in default and accruing interest.

16. Ms. Christine Wahome concluded that the Plaintiffs' application was an abuse of the Court process intended to delay enforcement. She argued that the 1st Defendant had complied fully with statutory requirements under the *Land Act* and that the Plaintiffs had failed to justify the grant of equitable relief. The Defendant, she contended, was entitled to exercise its statutory power of sale, and should not be estopped from doing so due to a dispute in which it was not involved.

17. The Defendant's Senior Legal Counsel, Kenneth Mawira Murithi, deponed in the Further Affidavit dated 9th October 2024 that in a Ruling delivered on 22nd December 2021 in West Build General Contractors Limited v Principal Secretary, State Department of Infrastructure & 2 Others (Commercial Civil Case No. E058 of 2020) [2021] KEHC 398 (KLR) (Commercial and Tax) (Ruling delivered on 22 December 2021), the Honourable Mr. Justice David Majanja (now deceased) dismissed the 1st Plaintiff's Application which sought contempt of Court orders against the 1st Defendant for honouring guarantees called up by the Principal Secretary, State Department of Infrastructure.

18. In dismissing the Application, the Court found that there was no evidence to support the 1st Plaintiff's claim that the recall letters had been backdated. The Court further observed that the 1st Plaintiff had, in its own Application dated 25th February 2020, confirmed that the recall had been initiated on 20th February 2020, a date on which no Court order existed prohibiting the Principal Secretary from making such a recall. Consequently, the Court held that the Defendant could not be faulted for honouring the guarantees as no injunctive relief had been issued restraining it from doing so.

19. John Mburu Mwaura, the Managing Director of both Plaintiffs, filed a Supplementary Affidavit disputing the assertions made in the Replying Affidavit sworn by Christine T. Wahome on behalf of NCBA Bank. He maintained, upon legal advice, that the application was meritorious as it raised substantive legal and factual issues requiring resolution before the Bank could lawfully exercise its statutory power of sale. The Plaintiffs expressed apprehension that the Bank might proceed to sell or receive deposits for the charged properties through public auction or private treaty, thereby necessitating the current application to preserve the suit properties pending the main suit's determination.

20. Mr. Mwaura disputed the Bank's demand for Kshs. 826,707,547.90 as at 24th April 2024, which the Plaintiffs claimed was exaggerated. According to their position, the correct outstanding debt was only Kshs. 167,164,717, thus creating a material dispute as to the amount owed. He also stated that the Bank's list of facilities and securities was incomplete. In addition to those acknowledged, the Plaintiffs had offered numerous other forms of security, including an asset debenture for Kshs. 280 million, a corporate guarantee from the 2nd Plaintiff for Kshs. 205.8 million, and a deed of assignment over rental income from a seven-storey development known as "Marafique".

21. Further, the Plaintiffs had availed a fixed and floating debenture over all present and future assets worth Kshs. 789 million, another corporate guarantee of Kshs. 822 million, and personal guarantees from

their directors. They also maintained a cash margin account funded by 30% of the advance payments from performance guarantees. Mr. Mwaura contended that the Bank had failed to disclose or consider these securities and recovery avenues before initiating foreclosure on the charged properties, contrary to reasonable banking practice.

22. The Plaintiffs asserted that their default began around January 2021 and was directly linked to the Bank's decision to pay out the performance guarantees following what they deemed an unjustified and premature recall by their employer, the Ministry of Transport and Infrastructure. This, they argued, destabilized their operations and precipitated financial difficulties. The Bank, they said, was aware of the ongoing arbitral proceedings and the pending application to adopt the arbitral award, which was expected to settle the debt. Despite this, the Bank moved ahead with foreclosure through its agents, Phillips International Auctioneers, reinforcing the urgency for injunctive relief.

23. Mr. Mwaura emphasized that unless restrained, the Bank's actions would result in the unlawful deprivation of the Plaintiffs' equity of redemption. The Plaintiffs also claimed that the valuation by the Bank's appointed valuer, Centenary Valuers, grossly undervalued the suit properties. Their independent valuation by Gimco Limited, detailed in an earlier affidavit, presented higher figures, and they called for a Court-ordered joint valuation.

24. They challenged the procedural propriety of the Bank's actions, citing material inconsistencies between the sums demanded at different times. Notably, a demand for Kshs. 877,255,003 had been made on 21st August 2023, yet no payments had been made between then and the April 2024 demand. This discrepancy, they argued, justified injunctive relief and highlighted the need for judicial intervention to ascertain the true debt position.

25. The Plaintiffs also faulted the Bank for acting against the 2nd Plaintiff (the guarantor) before exhausting remedies against the 1st Plaintiff (the principal debtor), despite holding extensive securities over the 1st Plaintiff's assets. They reiterated that while the Bank was not a party to the arbitration, it had been kept fully informed, and the award had been annexed to the pleadings.

26. The Affidavit further argued that only one performance guarantee—relating to the Chiakariga–Marimanti Project—remained active, and it was due to expire in November 2024. The Plaintiffs thus rejected the 1st Defendant's claims that more sums were due under the guarantees. They also rebutted the suggestion that the current application was mischievous, stating instead that it was properly grounded on facts and evidence, including annexures.

27. Mr. Mwaura clarified that although a previous application had been dismissed by the late Hon. Justice Majanja, the dismissal was procedural and based on the finding that the matter had been overtaken by events, not a dismissal on the merits. Therefore, the current application still presented live and justiciable issues.

28. He concluded that the Bank failed to act diligently despite receiving multiple requests not to act on the guarantees and moved prematurely, even before the contract was lawfully terminated. He argued that it remained illogical that the recall of the performance guarantees occurred more than a year before the termination of the contract between the 1st Plaintiff/Applicant and its employer, and therefore before any lawful basis for such recall had arisen. The recall and subsequent payment of the guarantees was unlawful, as the dispute had already been referred to arbitration. A preliminary meeting had been held on 25th October 2019, and the terms of reference had been signed between the 1st Plaintiff/Applicant and its employer by 14th December 2020.

Issues For Determination

29. The Court has carefully considered the pleadings and submissions by both parties. In the Court's view, the following issues arise for determination:

    a. Whether the issue of the Defendant's invocation of the performance guarantees is res judicata;

    b. Whether the Defendant's statutory power of sale has validly crystallized in the circumstances of this case;

    c. Whether an order should issue directing a joint valuation of the suit properties prior to any sale being conducted.

Analysis

30. The Court proceeds to consider the three issues arising in seriatim.

a. Whether The Issue of The Defendant's Invocation of The Performance Guarantees Is Res Judicata.

31. Section 7 of the *Civil Procedure Act* codifies the doctrine of res judicata. The Court of Appeal in John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] KECA 472 (KLR) comprehensively considered the doctrine and observed as follows:

> "Res judicata ensures the economic use of the court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability, which is one of the essential ingredients in maintaining respect for justice and the rule of law.... Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application... The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata... Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged."

32. Without unnecessary repetition, this Court finds that the earlier suit—West Build General Contractors Limited v Principal Secretary, State Department of Infrastructure & 2 Others (Commercial Civil Case No. E058 of 2020) [2021] KEHC 398 (KLR) (Commercial and Tax) (Ruling delivered on 22 December 2021)—was limited in scope to injunctive relief, specifically aimed at restraining the Principal Secretary from recalling the performance guarantees. It is important to underscore the clear and material distinction between the recall (or demand) stage and the payment stage under a performance guarantee. A careful, line-by-line analysis of that decision reveals that the present suit is materially different. The primary issue is the legality of the recall by the Principal Secretary and, consequently, the justification for the Bank's subsequent payment made on 13th March 2020, notwithstanding the pendency of earlier proceedings and the Plaintiff's express objections. Ultimately, it also concerns the 1st Plaintiff's indebtedness in these circumstances. These are not the same causes of action. While both suits may arise from the same factual background, the legal issues raised, the nature of the relief sought, and the timing of the events giving rise to the claims are materially different. Accordingly, the doctrine of res judicata is inapplicable.

33. Upon review of the pleadings before this Court, it emerges that the Plaintiffs' objections disclose a prima facie case of fraud—namely, that the demand by the Principal Secretary was made fraudulently and, in the circumstances, the Bank's act of honouring that demand was wrongful. Nonetheless, it is apparent that fraud was not specifically pleaded by either party. The Court aligns itself with the holding of the Court of Appeal in Habib Bank A.G. Zurich v Rajnikant Khetshi Shah [2018] KECA 774 (KLR), which reaffirmed that in civil litigation, a case must be determined based on the issues as pleaded. Nonetheless, there are exceptional circumstances where issues, though not expressly pleaded, arise from the pleadings and evidence and become central to the dispute. In such instances, and in the interest of justice, the Court is duty-bound to address them.

34. It is this foundational issue—whether fraud tainted the demand and consequent payment—that this Court must first determine. Only thereafter can the Court properly address the question whether the Plaintiffs may lawfully be compelled to satisfy the amounts paid under the guarantees. The resolution of that question is central to determining the Plaintiffs' liability, if any, to the 1st Defendant in order to resolve the underlying dispute and bring finality to the contentious issues between the parties in a manner that meets the ends of justice.

35. While the autonomy of demand guarantees is jealously guarded, it is subject to a narrow exception —fraud. Courts have consistently held that fraud of an egregious nature, known to the guarantor or bank at the time of invocation, may justify non-payment. This principle is firmly reiterated in Geminia Insurance Company Limited v Gulf African Bank Limited & another [2021] KEHC 4824 (KLR) held as follows

> "...This Court cannot rewrite terms of contract by parties in the absence of proof of fraud, illegality and misrepresentation that vitiate a valid contract.... Fraud would amount to presentation of an invalid claim as the basis of freezing accounts or misrepresentation that the bank invoked the Guarantee when the 2nd Defendant paid the facility or the 1st Defendant's action is illegal as it is contrary to law...."

36. Courts, also, have consistently resisted attempts to injunct enforcement of bank or performance guarantees, except where there is clear fraud. As noted in Similarly, In Sinohydro Corporation Ltd vs GC Retail Ltd & Anor [2016] eKLR again held:

> "It is important to state that courts will not enjoin payment of a demand bond or bank guarantee unless the party seeking the injunction can show that the demand on the bond or guarantee is fraudulent and that the bank knew it to be fraudulent. So what then, constitutes fraud when a beneficiary calls for a performance bond? In my opinion, 'Fraud' essentially means presenting a claim which the beneficiary or in this case the 1st Defendant, knows to be an invalid claim."

37. Fraud, in order to constitute a valid exception to the enforcement of a demand guarantee, must be clearly established and must be of such gravity as to vitiate the underlying transaction. It encompasses scenarios where the beneficiary knowingly makes a demand for payment without any lawful entitlement thereto.

38. In Paramount Bank Limited v First National Bank Limited & 2 others (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR) (24 November 2023), the Court of Appeal addressed the application of the fraud exception in the context of bank guarantees, reaffirming the principle that the bank's obligation

to honour a demand is only displaced where clear evidence of fraud, known to the bank at the time of the demand, is established. It held as follows:

> " 39. In Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 Q.B. 159, Lord Denning, M.R. laid the foundations for virtually all performance bond law. Called the "locus classicus" of performance bond law, Edward Owen established the strict application of the fraud rule to performance bond cases, a rule which has been followed with little variance to date. Lord Denning, M.R., called the performance bond "a new creature" and compared it to the irrevocable letter of credit, citing the United States letter of credit case, Sztejn v J. Henry Schroder Banking Corporation, 177 Misc. 719, 31 N.Y.S.2d 631 (N.Y. Sup. Ct. 1941) for the proposition that "the bank ought not to pay under the credit if it knows that the documents are forged or that the request for payment is made fraudulently in circumstances where there is no right to payment. Lord Denning, M.R., stated that:"A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice."
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> 40. In Loomcraft Fabrics CC v Nedbank Ltd and Another (Loomcraft) [1996] 1 All SA 51 (A); 1996 (1) SA 812 (A) at 815GJ, the Supreme Court of Appeal of South Africa held that demand guarantee is akin to an irrevocable letter of credit, which establishes a contractual obligation on the part of the bank to pay the beneficiary on the occurrence of a specified event, and is wholly independent of the underlying contract of sale between the buyer and the seller. The bank will escape liability only upon proof of fraud on the part of the beneficiary.
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> 41. [...]
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> 42. The Supreme Court of India in a catena of judgements has held that a bank guarantee is an independent and distinct contract between the bank and beneficiary and does not depend on the results of the decision in the dispute between the parties in case of breach. In Ansal Energy Projects Limited v Tehri Hydro Development Corporation Limited and Anor [1996] 5 SCC 450], the Supreme Court of India observed as under:"4.....Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof...."
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> 43. [...]
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> 44. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable Bank Guarantee. The liability of the bank is absolute and unequivocal. The bank has to only verify whether the amount

claimed is within the terms of the Bank guarantee or letter of credit. The courts should not interfere with invocation and encashment of bank guarantee unless there is fraud of egregious nature of which the beneficiary seeks to take advantage and which vitiates the entire underlying transaction or a case where irretrievable injustice is likely to be caused to either of the parties. Since in most cases payment of money under a Bank Guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee. There has to be glaring circumstances of deception or fraud warranting interference."

39. Apart from fraud, the second recognized exception to enforcement of demand guarantees is special equities—where allowing the guarantee to be called would result in irretrievable injustice. This exception is strictly limited to cases involving exceptional and irreparable harm.

40. In the case of Geonet Communications Limited v Safaricom Plc [2021] KEHC 4174 (KLR), it was held that:

> " 23. ...., I am alive to the fact that in light of the stringent law governing Bank Gurantees, there are only two narrow exceptions where a gurantee can be challenged. One is in the event of fraud of an egregious nature as to vitiate the entire underlying transaction, of which the bank has notice. The only exception to the rule that the guarantor is bound to pay without demur, is where fraud on the part of the beneficiary has been established. The party alleging fraud has to establish it clearly on a balance of probabilities.[13] Lord Denning MR in Edward Owen Engineering Ltd v Barclays Bank International Ltd[14] where he said: -
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> > "A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice."
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> 24. The second exception relates to special equities in the form of preventing irretrievable injustice between the parties. This second exception relates to the cases where in allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. The harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature that it would override the terms of the guarantee and the adverse effect of declining to accept such a guarantee."

41. As a matter of commercial prudence and legal duty, a beneficiary must call in the guarantee promptly upon default, unless the default is disputed. Calling in a guarantee absent an actual default could amount to fraudulent invocation. This is particularly important when courts assess whether the demand itself is legitimate or tainted.

42. In considering the fraud exception to the enforcement of a bank guarantee, the burden of proof rests squarely on the principal. As observed by Grace Longwa Kayembe in The Fraud Exception in Bank Guarantee (UCT LLM Thesis, 2014) at page 43:

> " Obviously, the principal must establish the facts that he alleges and demonstrate the legal consequences from these facts. For instance, in a case of perfect completion of the contract the principal must prove that he performed his obligation under the contract and that the beneficiary is therefore not entitled to damages or again if the contract was suspended by a case of force majeure the principal should prove the occurrence of the force majeure. In the case of forgery in documents, proof that the documents are not genuine must be furnished. It appears thus that the burden of proof is upon the principal and not the beneficiary."

43. There can be no doubt that, for the fraud exception to apply, the beneficiary must have been aware of the fraud at the time of making the demand for payment; absent such knowledge, the beneficiary cannot be said to be complicit in the fraud. However, it is arguable that the bank itself need not have had evidence of the fraud at the time of presentation. Consider a scenario in which, at the time payment is due, the bank holds only a suspicion of fraud in the underlying transaction but is confident that it will be able to obtain clear and compelling evidence shortly thereafter. Is the bank entitled to withhold payment in anticipation of producing such evidence at the hearing of the beneficiary's application for summary judgment, despite lacking proof at the time of the demand?

44. Alternatively, if the bank initially rejects the demand on grounds of non-conformity, but subsequently, prior to the hearing, discovers that the beneficiary acted fraudulently at the time of making the demand, may the bank invoke the fraud exception at that stage?

45. Put differently, should the bank's reliance on the fraud exception fail merely because it lacked evidence of fraud at the time of presentation, even though the fraud is conclusively established by the time of the hearing?

46. The true rationale for allowing a bank to rely on evidence of fraud obtained after the demand for payment lies in the fundamental principle that the Court should not lend its process to assist in the perpetration of a fraud. As has often been stated, fraud unravels all. It would be illogical and contrary to public policy to preclude a bank from invoking the fraud exception merely because the evidence establishing the fraud became available only after the demand, but before trial. Given that the fraud exception exists to uphold the integrity of judicial and commercial processes, it would be irrational to deny its application in circumstances where the fraud is clearly established at the time of adjudication, even if such evidence did not exist at the time the demand was made. See United City Merchants V Royal Bank of Canada [1983] AC 168 in which the Learned Lord Diplock stated:

> " The exception for fraud on the part of the beneficiary seeking to avail himself of the credit is a clear application of the maxim 'ex turpi causa non oritur actio' or if plain English is to be preferred, "fraud unravels all". The courts will not allow their process to be used by a dishonest person to carry out a fraud."

47. For a bank to incur liability for wrongful payment under a demand guarantee on grounds of fraud, it must have had actual knowledge of the beneficiary's fraud at the time of payment. Constructive knowledge is insufficient unless the principal presents clear, convincing, and unequivocal evidence of fraud before the bank honours the demand. The fraud must be so obvious and unambiguous that a reasonably prudent and diligent bank, exercising ordinary commercial judgment, would have appreciated—based on the material placed before it—that the beneficiary's call was fraudulent. As has

been observed, the principal must leave the bank with no doubt whatsoever as to the impropriety of the demand. This is an exacting standard, and Courts consistently affirm that it imposes a heavy burden on the principal, leaving no room for speculation, ambiguity, or laxness.

48. The bank's duty in this context is confined to acting in good faith, which is a subjective standard. If, upon considering the information presented, the bank determines that the evidence of fraud is insufficient, it is entitled—within the scope of its relationship with the principal—to proceed with payment. Accordingly, the fact that the Bank made payment does not ipso facto exonerate the Beneficiary where the call was in fact fraudulent. However, whether the Bank itself may be held liable or not depends on whether it had clear and unequivocal evidence of fraud at the time of payment, and whether it acted in good faith in its assessment of the circumstances then prevailing.

49. Importantly, the rule that the bank must not pay when fraud is evident does not impose a duty on the bank to investigate the veracity of allegations or assess the propriety of the beneficiary's call. The responsibility lies with the principal to furnish the bank with clear and irrefutable evidence of fraud. As was stated in TurKiye Is Bankasi v. Bank of China [1999] 2 Lloyd's Rep. 611:

> " It is simply not for the bank to make enquiries about the allegations that are being made by one side against the other. If one side wishes to establish that a demand is fraudulent it must put the irrefutable evidence in front of the bank. It must not simply make allegations and expect the bank to check whether those allegations are founded or not."

50. The Court now turns to consider the legal consequences arising from the fact that the Beneficiary has already received payment under the guarantee from the Bank. At pages 58 to 59 of Grace Longwa Kayembe, The Fraud Exception in Bank Guarantee (UCT LLM Thesis, 2014), the distinction between pre-payment and post-payment cases is drawn with clarity. In pre-payment scenarios, where evidence of fraud is apparent to the bank prior to honouring the demand, the bank must refrain from making payment. In such cases, the appropriate remedy for the principal is to seek an injunction restraining the bank from paying the beneficiary. The significance of proceedings in such context is thus preventative. However, in post-payment cases, where the bank has already paid the beneficiary, the legal inquiry shifts to whether the bank acted wrongfully in effecting payment in the face of evident fraud. The principle is that the bank may be held liable if it proceeds to payment despite the fraud being clear and apparent to it. This often arises in situations where the bank subsequently seeks reimbursement from the principal, who then resists repayment on the ground that the bank ought not to have honoured a fraudulent demand.

51. Where a bank honours a demand under a guarantee, and it is subsequently established that the demand was fraudulent, the legal consequences vary depending on whether the bank had notice of the fraud at the time of payment. If the bank had no notice of the fraud—whether actual or constructive —it remains entitled to debit the principal's account in accordance with the terms of the facility or indemnity. However, if the bank had been put on notice by the principal that the demand was fraudulent, and it nonetheless proceeded to make payment, liability may attach to the bank and be precluded from recovering the amount from the principal. This distinction is commercially practical and equitable, as it balances the need for finality and autonomy in banking transactions with the imperative to prevent abuse. The bank's duty to withhold payment arises only where fraud is clearly established before payment. In the absence of such proof, the bank may exercise its discretion, provided it acts in good faith.

52. Notwithstanding, Courts are generally reluctant to impose liability on banks in such contexts, recognising that banks are not in a position to investigate or adjudicate allegations of fraud between contracting parties. In the matter of West Build General Contractors Limited v Principal Secretary,

State Department of Infrastructure & 2 others (Commercial Civil Case E058 of 2020) [2021] KEHC 398 (KLR) (Commercial and Tax) (22 December 2021) (Ruling), the late Justice David Majanja exemplifies this judicial caution as he declined to issue payment orders based on certified works, holding that such issues were more appropriately left to the arbitral tribunal. He stated:

> " 21. In Prayer No. 9, the Plaintiff seeks an order for payment of all money due and owing to it by the 1st and 2nd Defendants as per the Certificates of work done and certified forthwith. I do not propose to belabor this aspect of the case as the matter is now under arbitration and any dispute relating to payment is a matter to be dealt with by the arbitral tribunal.
>
> 22. I am in agreement with the Defendants that determining and issuing this order will amount to usurping the jurisdiction of the arbitral tribunal where the issue of payment is a live one."

53. Grace Longwa Kayembe, in The Fraud Exception in Bank Guarantee (UCT LLM Thesis, 2014) at page 47, observes that a principal may successfully invoke the fraud exception where non-performance of the underlying contract is attributable to a supervening force majeure event. She states:

> " The principal may have a valuable plea in case of non-completion of the underlying contract: When there is occurrence of a force majeure. Consequently, when there is a situation of force majeure, any demand made by the beneficiary will be considered fraudulent. Here, the principal will have to establish that the supervening events have occurred and that these events made the performance of the contract impossible. Impossibility must be established not just mere difficulties in the performance. Consequently, if the principal could have prevented non completion of the contract by adopting other means than those planned at the beginning of the contract, his plea will not be effective. A case decided on the basis of force majeure is Dynamics Corp. of America v. Citizens & Southern Nat'l Bank. The facts of the case were that Dynamics the plaintiff contracted a contract of sale with the Indian government for defense-related equipments. In accordance with the terms of the contract, Dynamics requested his bank to issue a standby letter of credit in favor of the Indian government. A short time after, war broke out between India and Pakistan rendering the execution of the contract impossible because of an embargo on military supplies to the region. The Indian government presented a draft in order to obtain payment under the letter of credit; subsequently the plaintiff filed a complaint for a stop- payment injunction alleging that he had perfectly performed the contract. The court acknowledged the fact that the demand of payment was indeed fraudulent because the occurrence of force majeure, in this case the U.S embargo, discharges the principal from liabilities under the contract."

54. Still within the context of the fraud exception, a demand under a performance guarantee may also be considered fraudulent where the principal's ability to perform the contract has been rendered impossible, principally due to the beneficiary's own failure to discharge its obligations under the underlying contract. In such cases, the beneficiary cannot in good faith call upon the guarantee, having themselves contributed materially to the non-performance.

55. It is not in dispute that the contract between the principal and the beneficiary herein contained an arbitration clause. In circumstances closely analogous to the present case, the Court in Njuca Consolidated Company v Athi Water Works Development Agency; Equity Bank Limited (Interested Party) (Commercial Suit E859 of 2021) [2022] KEHC 15994 (KLR) (Commercial and Tax) (2 December 2022) (Ruling), addressed the question of whether a call on performance and advance

payment guarantees was justifiable when the contract itself was still in dispute and subject to arbitration. The Court held:

> "38. On the second consideration, the defendant demanded payment of the Advance Payment Guarantee and Performance Guarantee sums claiming breach of contract on the part of the plaintiff.
>
> 39. In this case, both parties accuse each other of being in breach of the contract. The plaintiff intends to submit its claims against the defendant to an arbitral tribunal while the defendant pursued the option to redeem the guaranteed sums from the interested party.
>
> 40. The interested party further argued that the Performance Guarantee Agreement and the Advance Payment guarantee were independent contracts between it and the defendant and could therefore be implemented separately.
>
> 41. The contract between the plaintiff and the defendant provided that the guarantee sums are payable in the event of breach. It is yet to be determined which party is in breach of the contract.
>
> 42. Clause 20.6.1 of the contract provides that any dispute between the parties arising out of or in connection with the contract shall be finally settled by arbitration.
>
> 43. I am of the opinion that, the bond and the guarantee cannot be said to be independent of the contract between the plaintiff and the defendant. The same are but intricately connected to the contract as they find their validity and existence on that contract.
>
> 44. In this regard, before the sums guaranteed therein are released by the interested party, the Arbitral Tribunal ought to resolve the dispute between the parties."

56. Where the principal has fully performed its contractual obligations, a demand for payment under a performance guarantee by the beneficiary may, depending on the surrounding circumstances, amount to fraud. In such instances, the burden rests with the principal to establish that it has duly and completely discharged its obligations under the contract. In the context of construction contracts, the principal may support such a claim by producing engineers' certificates or other contemporaneous documentation issued during the course of the project.

57. A demand under a performance guarantee may also be rendered fraudulent where it is motivated by improper or malicious intent. Where a beneficiary invokes a guarantee not for purposes of securing performance or compensation for default, but rather to inflict harm or exert undue pressure on the principal, such conduct constitutes a manifest abuse of legal process. In such circumstances, the bank is not entitled to honour the demand, as doing so would facilitate what amounts to an "abuse of law."

58. By a letter dated 20th February 2020, the Principal Secretary, Ministry of Transport and Infrastructure, invoked four performance guarantees and demanded payment of a cumulative sum of Kshs. 124,319,846.70. The amounts demanded under each guarantee were as follows: Guarantee No. MD1824600201 – Kshs. 11,578,528.55; Guarantee No. MD1523097491 – Kshs. 26,863,204.35; Guarantee No. MD1524470487 – Kshs. 26,618,008.27; and Guarantee No. MD1534126144 – Kshs. 59,260,105.50. The Bank's obligation to honour the demand by the Principal Secretary, State Department of Infrastructure, would only be vitiated upon proof of fraud on the part of the beneficiary.

59. To answer the issue of whether the Principal Secretary, State Department of Infrastructure, acted fraudulently in invoking the subject guarantees, as well as the related issue concerning the extent of liability, if any, attributable to West Build General Contractors Limited in respect of the sums claimed under the said guarantees, this Court has considered the correspondence exchanged between the Principal and the Beneficiary, and more specifically, the conduct of the Beneficiary following the invocation of the guarantee. Notably, after calling in the guarantee, the Beneficiary expressly directed the Principal to withdraw proceedings in West Build General Contractors Limited v Principal Secretary, State Department of Infrastructure & 2 others [Commercial Civil Case E058 of 2020] [2021] KEHC 398 (KLR) (Commercial and Tax) (22 December 2021) (Ruling), as well as similar proceedings pending before an arbitral tribunal.

60. In the present case, the existence of Certificates of Work Done, duly certified, together with the findings of the arbitral tribunal rendered in favour of the Westbuild General Contractors Limited, strongly support the position that the underlying contractual obligations were fully performed. It is further noted that the parties previously litigated issues arising from the arbitral proceedings in Principal Secretary, State Department of Infrastructure v Westbuild General Contractors Limited & Another (Civil Case No. E560 of 2021) [2022] KEHC 44 (KLR) (Commercial and Tax) (31 January 2022) (Ruling), wherein the application by the Beneficiary was dismissed, and the matter was remitted to the Arbitral Tribunal for final determination. The ArbitralTtribunal subsequently rendered its findings, which were adopted as a judgment of the High Court in Westbuild General Contractors Ltd v The Principal Secretary, State Department, Ministry of Transport & Infrastructure, Housing, Urban Development & Public Works [HCCOMMARB/E054/2022], culminating in final orders being granted in favour of the Principal by Hon. Justice Prof. Nixon Sifuna on 28th May 2025.

61. In the opinion of this Court, such conduct by the Beneficiary constitutes a manifest abuse of law. The attempt to pressure Westbuild General Contractors Limited into withdrawing legitimate claims, by invoking the guarantee as a coercive tool, demonstrates that the demand was not made in good faith, but rather with the intent to obstruct and undermine the Principal's legal rights. This Court finds that the Beneficiary was fully aware, at the time of the demand, that the call on the guarantee was devoid of a lawful basis and was therefore a fraudulent invocation. The Court cannot and should not lend its process to support conduct that undermines public policy. To do so would not only offend equitable principles.

62. Accordingly, the call made by the beneficiary under the performance guarantees in these circumstances was not only lacking in factual justification but also amounted to a fraudulent demand ab initio. A demand made in the face of such clear findings of completion and compliance by the Principal cannot be allowed to stand. In such a case, the Principal ought not to suffer any liability under the guarantee.

63. As evidenced on the record, on 13th March 2020, the Bank honoured its obligations under the performance guarantees and remitted the guaranteed sums to the Principal Secretary, Ministry of Transport and Infrastructure. This Court finds that the Bank did so in the face of express notice from the Principal objecting to the call, and despite the ongoing proceedings that challenged the bona fides of the demand. In doing so, the Bank acted in bad faith by disregarding credible and clearly articulated allegations that, on their face, pointed to a potentially fraudulent call by the Principal Secretary.

64. This Court reiterates, based on the numerous authorities cited above, that fraud is a well-established exception to the enforcement of demand guarantees. The Court is wholly unpersuaded by the position advanced in the Replying Affidavit sworn on 25th July 2024 by Ms. Christine T. Wahome, Senior Legal Counsel of the Defendant Bank, wherein it was asserted that the performance guarantees constituted binding contracts exclusively between the Bank and the Principal Secretary, to the exclusion of

the Plaintiff, and that the Bank was obligated to strictly comply with the terms of the guarantees, irrespective of any objections raised by the Plaintiff.

65. This Court finds that the Bank owed a duty of good faith to its customer, the Plaintiff, and was under an obligation to give due consideration to the Plaintiff's objections—particularly where, as in this case, the Plaintiff alleged bad faith on the part of the Principal Secretary. The Bank was aware of a protracted and ongoing dispute between the parties and of the significant sums involved, which, if paid out under a fraudulent call, could result in substantial injustice to the Plaintiff.

66. It is antithetical to commercial good practice for a bank to disregard serious allegations of fraud from its own customer. Indeed, it is widely recognised that banks frequently exercise discretion in similar situations by postponing payment, engaging with both parties, or acting as intermediaries to facilitate resolution of contested claims. Where plausible evidence of fraud is presented, the Bank is expected—at the very least—to consider such objections seriously and not proceed to payment in a perfunctory manner. This Court finds that its position cannot be justified by mere reference to the strict terms of the performance guarantees. The duty to act in good faith is not displaced by formality when the underlying transaction has been tainted by illegality.

67. Whether through fraud or lack of evidentiary foundation, a financial claim predicated upon a guarantee or analogous instrument must rest on verified and lawful grounds. Where that foundation collapses, the law shields the obligor—whether a guarantor or principal debtor—from enforcement or unjust retention. This position was underscored in Rupa Kenya Limited & 2 others v Kenya Commercial Bank Limited (Civil Appeal 330 of 2014) [2024] KECA 1140 (KLR) (20 September 2024) (Judgment) where the Court of Appeal held:

> " 38. Once it can be deduced the alleged claim of Kshs.770,000.00 was unproven, then it could never form a proper anchor upon which the debt to the Bank, if any, could be worked. Indeed, before accepting the Kshs.770,000.00 as a basis for working the recalculation, the trial court lamented:"In this regard, I take the view that the court must determine the date when the amount herein could be determined by some sense of accountability, even if but acceptance (sic) from all parties."
>
> 39. Once the mainstay of the decision is in doubt then the decision itself is on shaky ground. The conclusion we draw is that the Bank failed to provide specific proof of the amount it had claimed or any lesser sum and unable to uphold the finding of the trial court.
>
> 40. If, however, we had come to a different conclusion, we would have no difficulty in affirming the trial court's decision that the 2nd and 3rd appellants were liable for their guarantees. It is true as submitted by counsel for the appellants that a guarantor's liability only accrues when the primary borrower is in default. We have little doubt that had the Bank proved that a debt from the 1st appellant was due, then it would also have proved that the principal debtor had failed to pay the due debt as demand had not only been made for its payment but also a suit commenced for its recovery."

68. The corollary of this principle is that, where fraud is subsequently established, the beneficiary is under an obligation to refund the sums received and as such must be compelled to make restitution of the amounts improperly obtained pursuant to the fraudulent demand. A party who procures payment under a guarantee through fraud cannot be permitted to retain the proceeds. Equity and public policy

demand that such funds be restored to prevent unjust enrichment. The Bank, having paid under reliance on a fraudulent demand, remains at liberty to pursue appropriate legal remedies against the beneficiary for acting in bad faith in violation of its duty.

b. Whether The Defendant's Statutory Power of Sale Has Validly Crystallized in the Circumstances of This Case.

69. The Plaintiffs contend that the Defendant's statutory power of sale has not crystallized, primarily on the basis that they have repaid more than two-thirds of the loan amount. They argue that, in the circumstances, the 1st Defendant ought to have sought leave of the Court before proceeding with foreclosure. Additionally, they assert that the Defendant breached its duty of care to both the Chargor and the Guarantor, as outlined in earlier pleadings, thereby rendering the intended exercise of the statutory power of sale premature and unlawful. On that basis, they urge the Court to allow the application and award costs.

70. In response, the Defendant submits that the Plaintiffs' argument is premised on a misapprehension of the nature of a third-party charge. It maintains that it was under no obligation to exhaust alternative recovery options, such as resorting to debentures or receivables, before proceeding against the charged property. The Defendant emphasizes that, under the terms of the charge, the 2nd Plaintiff—having offered the suit property as security—is deemed the principal debtor, and thus subject to direct enforcement upon default. The Defendant further argues that the Plaintiffs' default triggered its statutory right to realize the security, and that its actions were consistent with the terms of the charge and applicable legal requirements. In support, the Defendant cites Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR and Nguruman Ltd v Jan Bonde Nielsen & 2 Others [2014] eKLR.

71. The exercise of a chargee's statutory power of sale is governed by the *Land Act*, 2012. Specifically, a statutory notice issued pursuant to Section 90(2) of the *Land Act*, 2012 initiates the process of realizing a charge, ultimately enabling the chargee to exercise its enforcement remedies under Section 90(3) of the Act, following the chargor's default or breach of any covenant under the charge instrument. The law mandates that such power can only be exercised after the sequential issuance of specific notices, namely: a ninety (90) days' statutory notice of default under Section 90(1) and (2) of the *Land Act*; a forty (40) days' notice of intention to sell under Section 96(2) of the Act; a forty-five (45) days' redemption notice under Rule 15(d) of the Auctioneers' Rules, 1997; and a fourteen (14) days' notification of sale under Rule 25(e) of the same Rules. The material before the Court confirms that there was compliance, at least with respect to the issuance of the statutory notice under Section 90.

72. The principle that offering property as security entails the risk of its sale upon default is well established. In Andrew Muriuki Wanjohi v Equity Building Society Ltd [2006] eKLR, the Court held that:

> "Whenever the Applicant offered the suit property as security, he was conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the chargee, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had the property evaluated in monetary terms. He had then told the chargee that he knew the property to be capable of providing the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable even if the borrower did not pay it."

73. It was aptly stated by the Court Heshimart Enterprises v Rafiki Microfinance Bank & another (Civil Case 59 of 2018) [2023] KEHC 27070 (KLR) (20 December 2023) (Judgment) that:

> " 19. It is not in doubt that the Plaintiff is a guarantor to the borrower. The guarantee was in a form of a charge over the suit property. In my understanding, the law is that a guarantee is a separate and distinct contract from the borrower's contract. The guarantee is, therefore, enforceable as such. Except, however, the guarantor who has given its land as guarantee and a charge has been registered also enjoys the protections offered to a chargor under the *Land Act*. The principal debtor should be served with the requisite statutory notice to remedy any default within 90 days, and he should be fully informed of the acts needed to remedy the default and his right to apply for relief. The notice must fully comply with section 90(1) of the *Land Act*."

74. Thus, the legal position is that by offering the suit property as security for a loan, the chargor effectively treats it as a commercial asset or commodity, capable of being disposed of by the chargee in the event of default, for the purpose of recovering the loan amount together with accrued interest. As such, should the chargee proceed to sell the secured property in exercise of its statutory power of sale, any resulting loss to the chargor is deemed compensable in monetary terms, and is to be assessed based on the property's real market value at the time of sale.

75. Nonetheless, the statutory notice must strictly reflect the amounts secured by the charge. In Professional Consultants Limited v SBM Bank (Kenya) Limited [2020] eKLR, Majanja J held that:

> " 12. I agree with the plaintiff, the statutory notice dated March 4, 2020 is defective as it includes an amount not secured by the charge. In other words, it impedes the plaintiff's right to redeem the suit property by including an amount that is outside the confines of the charge. The charge only secured the overdraft and term loan granted by Fidelity Bank."

76. This principle was echoed by Sewe J in Isabella Nyambura Gitau v Consolidated Bank Of Kenya Limited & another [2017] KEHC 9901 (KLR) where the judge held:

> " ...I would entirely agree with the position taken in the case of Elizabeth Wambui Njunguna v Housing Finance Co. of Kenya Ltd [2006] eKLR that:
>
> " ...the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of the statute, which derogates from the chargor's equity of redemption."

77. The requirement that statutory notices must reflect accurate figures is reinforced in Onyango v SBM (Kenya) Limited & another (Civil Case E021 of 2021) [2022] KEHC 13179 (KLR) (26 September 2022) (Ruling)

> " 73. Whereas the plaintiff is under legal obligation to perform obligations under the terms of contract, these anomalies are pending clarification before enforcement of the defendant's right of sale to recover outstanding debt by the plaintiff through issuance of statutory notices with correct figures regarding the legal charge(s)."

78. In the end, the Court finds that the 1st Plaintiff's indebtedness to the Defendant in respect of other commercial loans, facilities, and guarantees—excluding the guarantee upon which the Principal Secretary made a fraudulent demand—is admitted and not in dispute. In view of the earlier finding, it is imperative that an audit be conducted to ascertain the true extent of the outstanding debt. Such an audit must take into account the charge instruments and the respective letters of offer governing the facilities, in order to arrive at accurate calculations, particularly in relation to the applicable contractual interest and default interest provisions. This Court finds notable anomalies in the total sums claimed by the 1st Defendant for the reasons already outlined.

79. Consequently, the Court finds that the statutory notices issued were based on erroneous or unverified figures and are thus invalid for non-compliance with the legal requirement to state the correct amount due under the charge. The Court is inclined to grant an interlocutory order restraining the chargee from exercising its statutory power of sale, solely on the ground that it failed to issue a valid statutory notice. This order shall remain in force only until such time as the chargee issues a fresh statutory notice in strict compliance with the law and in accordance with the directions set out in this judgment. In National Bank Of Kenya Limited V Shimmers Plaza Limited [2009] KECA 250 (KLR) , the Court of Appeal held as follows:

> "... An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law...."

Permanent injunction

80. On the question of whether the Plaintiffs are entitled to a permanent injunction restraining the Defendant or its agents from selling the suit property, this Court fully adopts the reasoning in Isiye & 2 others v African Banking Corporation Ltd (Commercial Case 2 of 2018) [2024] KEHC 158 (KLR) (16 January 2024), which emphasized that a permanent injunction determines the parties' rights with finality and is issued to perpetually restrain the commission of an act by the Defendant for the protection of the Plaintiff's rights. This Court is empowered under Sections 1A, 3, and 3A of the *Civil Procedure Act* to grant such relief where it is satisfied that a party's rights have been infringed or are under threat.

81. In line with the principles articulated in Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] KEHC 5027 (KLR) and Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR), the conditions for granting a permanent injunction require the applicant to demonstrate:

    a. That the applicant has suffered an irreparable harm or injury.

    b. That the remedies available at law such as monetary damages are inadequate to compensate for the injury.

    c. That the remedy in equity is warranted upon consideration of the balance of hardships between the applicant and the respondent.

d. That the permanent injunction being sought would not hurt public interest.

82. Unlike temporary injunctions, which are interim and time-bound, a permanent injunction is granted upon final determination of the suit and operates perpetually. In the present case, the Plaintiffs seek a permanent injunction to restrain the Defendant from exercising its statutory power of sale over the charged property.

83. In Stars and Garters Restaurant & Another v National Bank of Kenya Ltd [2019] eKLR, W. Korir J. (as he then was in the High Court) observed that:

> " The applicants also gave the impression that the amount owed to the respondent is in dispute. That is not a ground for stopping a sale. This was stated long ago in Lalvuna & Others V Civil Servant Housing Co. Ltd [1995] LLR 336 (CAK) as quoted in James Juma Muchemi &Partners Ltd Vs Barclays Bank Ltd 2011 eKLR where Kwach JA stated:
>
> "A court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage.""

84. Similarly, in Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125, the Court held that:

> " The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgage has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive." There is no dispute in this case that Mrao Ltd, (the appellant) borrowed more than Kshs 50m from First American Bank of Kenya Ltd, the first respondent, (First American) on the security of a legal charge over Plot No.714 Section IV Mainland North, Mombasa (the suit land) and a debenture dated 27th July, 1999 over its assets to cover the debt which at the time demand for repayment was stood at Kshs88m, but was by mutual consent reduced to Kshs 68m. Under a timetable agreed between the appellant and First American the sum of Shs 5m was to be paid within 4 weeks after the execution and registration of the security thus reducing the ceiling under the debenture to Shs 63m."

85. The Court of Appeal in Jay Super Power Cash and Carry Ltd v Nairobi City Council & 20 others CA 111/2000 affirmed that:

> " This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it".

86. In the present matter, there is no evidence before this Court that the entire loan amount, inclusive of contractual and default interest, has been cleared. The dispute appears to center on the quantum rather than the existence of the debt. The Court must therefore consider whether it can grant such relief in these circumstances. It is trite that a borrower who has received funds is under an obligation to repay in accordance with agreed terms. The Court cannot bar such remedies merely to shield a borrower who has failed to meet their obligations. However, lenders are expected to comply strictly with the legal requirements governing recovery, including the procedure for exercising the statutory power of sale.

87. The Court of Appeal in Joseph Okoth Waudi v National Bank of Kenya, Civil Application No. 77 of 2004, citing Halsbury's Laws of England (4th Ed., Vol. 32 at p. 752), held that:

> "It is trite law that the court will not restrain a mortgagee from exercising its power of sale merely because the amount due is in dispute or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained however, if the mortgagor pays the amount claimed in court, that is, the amount which the mortgagee claims to be due to it unless on the terms of the mortgage, the claim is excessive."

88. In Francis J. K. Ichatha v Housing Finance Co. of Kenya Ltd, HCCC No. 414 of 2004, the Court held that:

> "A Plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his own wrong, for the plaintiff seeks this court to protect him from the consequences of his own default. He who seeks equity must do equity. The plaintiff should not be protected or given advantage by virtue of his own refusal to make payments to the defendant/respondent a debt which he expressly undertook to pay."

89. Accordingly, this Court is not persuaded that the Plaintiffs are entitled to a permanent injunction and declines to restrain the Defendant from exercising its statutory power of sale over the charged suit properties known as LR. NO. KIAMBU/KILIMAMBOGO/666, LR. NO. 4953/1923 THIKA MUNICIPALITY and THIKA MUNICIPALITY BLOCK 11/480, it being evident that a portion of the loan remains outstanding and unpaid. The Defendant shall, however, be at liberty to proceed with the sale strictly in accordance with the law, which includes obtaining a current joint valuation of the property at the time of sale and issuing all requisite statutory notices as prescribed.

90. Lastly, with respect to whether an order should issue under Section 104(2)(b) of the *Land Act*, 2012, this Court finds that the 1st Plaintiff has not demonstrated entitlement to the reliefs contemplated under the said provision, having defaulted on multiple occasions, including in respect of the portion of the loan that remains outstanding. In any event, given the absence of valid statutory notices, the Court finds it unnecessary to delve further into this issue.

c. Whether An Order Should Issue Directing a Joint Valuation of the Suit Properties Prior to Any Sale Being Conducted

91. The Defendant/Respondent avers that, in compliance with Section 97(2) of the *Land Act*, it instructed Centenary Valuers Limited—a firm of qualified and competent professional valuers—to conduct a valuation of the charged properties. Conversely, the Plaintiffs/Applicants assert that they commissioned an independent valuation of the same properties through their appointed valuers, Messrs. GIMCO Limited. That exercise produced substantially higher valuations. The disparity in market valuations between the Defendant's and Plaintiffs' respective valuers is substantial.

92. In respect of LR No. KIAMBU/KILIMAMBOGO/666, the Defendant's valuer, Centenary Valuers Ltd, assessed the market value at Kshs. 60,000,000, whereas the Plaintiffs' valuer, Messrs. GIMCO Limited, placed it significantly higher at Kshs. 170,000,000, reflecting a difference of Kshs. 110,000,000. For LR No. 4953/1923 (Thika Municipality), the Defendant's valuation was Kshs. 350,000,000, compared to the Plaintiffs' valuation of Kshs. 405,000,000, yielding a difference of Kshs. 55,000,000. Similarly, in relation to Thika Municipality Block 11/480, the Defendant valued the

property at Kshs. 75,000,000, while the Plaintiffs' valuer assessed it at Kshs. 95,000,000, resulting in a difference of Kshs. 20,000,000. Cumulatively, these variances amount to a total difference of Kshs. 185,000,000, which the Plaintiffs argue constitutes a gross undervaluation aimed at facilitating an oppressive and unlawful foreclosure.

93. The Court in International Limited & another v National Bank of Kenya Limited & another (Civil Appeal E050 of 2020) [2021] KEHC 68 (KLR) (Commercial and Tax) (23 September 2021) (Ruling) emphasized that under Section 97(1) and (2) of the *Land Act*, 2012, a chargee exercising the statutory power of sale owes a legal duty of care to the chargor to obtain the best price reasonably obtainable at the time of sale, and must undertake a proper valuation prior to such sale. This duty of care obligates the lender to ensure the property is not sold at an undervalue and that a proper forced sale valuation must be conducted by a qualified valuer. It is central to the protection of property rights under Article 40 of *the Constitution*. There is, therefore, no doubt that there exists a real risk that the charged property may be sold at a gross undervalue, to the detriment of the Plaintiff, which would occasion prejudice and offend the ends of justice.

94. The Court is persuaded to allow the application in part and in the terms set out herein below. While doing so, the Court is minded of the fact that this suit is still at the interlocutory stage and the Court refrains from making any final determinations that may prejudge and prejudice the position of the parties in the resulting trial. The parties will after all have to present evidence in support of all issues arising out of their pleadings that have to be determined at a full trial.

95. On costs the same ordinarily follow the event. However, this Court is clothed with discretion to make orders on costs that are fair and just in the circumstances of the case. In this case it is only fair that each party does bear its own costs.

Determination

96. Accordingly, the Court partially allows the Plaintiffs' application by way of a Notice of Motion dated 2nd July, 2024 and makes the following orders:

    a. A temporary injunction is hereby granted for a period of ninety (90) days from the date of this Ruling, within which the Defendant shall reconcile the accounts with the Plaintiffs to ascertain the amount lawfully due under the legal charge(s).

    b. The Defendant shall provide the Plaintiffs with a detailed statement of account in respect of each facility extended by the Defendant and/or its predecessor(s) within a period of Thirty (30) days from the date of this Ruling.

    c. An independent valuation of the Plaintiffs' properties, namely LR No. Kiambu/ kilimambogo/666, Lr No. 4953/1923 Thika Municipality, And Thika Municipality Block 11/480, shall be conducted to establish their proper market value before the Defendant may proceed with any sale.

    d. The parties shall, within thirty (30) days from the date of this Ruling, agree on the appointment of an independent and qualified valuer to undertake the valuation exercise. In default of agreement, the Court shall appoint the valuer upon application by either party.

    e. The costs of the valuation shall be shared equally by both parties.

    f. Upon compliance with the foregoing orders, the Defendant shall issue fresh statutory notices based on the reconciled and correct outstanding debt.

    g. Each party shall bear their own costs of this application.

97. It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 14TH DAY OF AUGUST 2025.

NJOROGE BENJAMIN K.

JUDGE

In the presence of;

Mr. Mugambi for the Plaintiffs/Applicants

Mr. Musya for the Defendant/Respondent and also for the Interested Party.

Ms. Susan Nzioka - Court Assistant