



**Gathumbi & another v Equity Bank Limited (Civil Suit 198 of 2017)  
[2024] KEHC 15148 (KLR) (Commercial and Tax) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15148 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 198 OF 2017  
FG MUGAMBI, J  
NOVEMBER 29, 2024**

**BETWEEN**

**DAVID KARIUKI GATHUMBI ..... 1<sup>ST</sup> PLAINTIFF**

**ARLINGTON CONSTRUCTION LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**EQUITY BANK LIMITED ..... DEFENDANT**

**JUDGMENT**

**Background and introduction**

1. The 1<sup>st</sup> plaintiff is the registered owner of Title Number Kiambaa/Karuri/T.380 ("the suit property") which he offered as security for a charge and further charge of Kshs. 2,644,228/= advanced by the defendant (the Bank) to the 2<sup>nd</sup> plaintiff. The 1<sup>st</sup> plaintiff decries that despite repaying over Kshs. 20,000,000/= over time, the loan remains unsettled. He takes issue with the Bank for threatening to sell the suit property, even though the sale was eventually rescinded.
2. The 1<sup>st</sup> plaintiff contends that the loan became unserviceable due to the excessive and unjustified interest charges imposed by the Bank. He regrets that attempts at a joint account reconciliation have been futile, as the defendant has remained uncooperative. He contends that the outstanding loan amount has ballooned to Kshs. 20,931,804.95 within ten years, despite repayments exceeding Kshs. 20,000,000/= having been made, rendering the loan non-performing.
3. As a result, the 1<sup>st</sup> plaintiff filed this suit seeking a permanent injunction against the Bank, a declaration that the Bank breached Section 44A of the *Banking Act*, an order for account reconciliation to determine the actual outstanding loan balance (if any), and an order for the refund of any excess payments made. The plaintiff also seeks general damages, costs, and interest.



4. At the hearing, the 1<sup>st</sup> plaintiff testified as PW1, adopting his witness statement dated May 8, 2017. He stated that, although he was aware the defendant would charge interest on the loan, the interest applied was excessive and unwarranted. The plaintiff explained that he filed the suit because the defendant refused to reconcile the loan accounts despite his repeated requests and continued to issue persistent threats to auction his property.
5. Wilfred Abincha Onono, a certified public accountant and Managing Consultant at Interest Rates Advisory Centre Limited (IRAC) testified as PW2. He conducted a financial review at the 1<sup>st</sup> plaintiff's request. His analysis focused on the Current Account No. 170290955883 and Loan Account No. 170593320981, using documents provided, including bank facility letters, charge documents, and account statements.
6. His report confirms the existence of 2 facilities; the first confirmed through a letter of offer dated 26<sup>th</sup> April 2007 for Kshs. 2,000,000/=, repayable by 9<sup>th</sup> August 2007 at 18% per annum interest, with a 6% default penalty. In 2008, a restructuring facility of Kshs. 2,644,228/= was granted repayable over 36 months at similar rates. Both loans were secured by the suit property.
7. The report identified errors in the loan account, including unjustified charges for valuation, legal, and auctioneer fees totaling Kshs. 518,729/=. After excluding these charges, IRAC recalculated a credit balance of Kshs. 397,826.75 as of 20th July 2011, which was transferred to the current account.
8. With respect to the current account, IRAC excluded illegal charges amounting to Kshs. 1,464,927/= and a disputed Kshs. 780,000/= transfer from another entity. As of 2<sup>nd</sup> August 2014, the recalculated balance was Kshs. 3,929,942.73, significantly lower than the defendant's reported debit of Kshs. 9,843,908.65. This created a discrepancy of Kshs. 5,913,965.92 in the 1<sup>st</sup> plaintiff's favour. The loan was classified as non-performing on 18<sup>th</sup> June 2013, with an outstanding principal of Kshs. 2,978,091.30 as at the time. The total recoverable amount was assessed at Kshs. 5,956,182.60.
9. During cross-examination, Mr. Onono conceded that he was unaware that the bank had begun the process of realising the security in 2011. He acknowledged that charges for valuation, legal, and auctioneer fees would be justified if this process had commenced but confirmed that the charges and fees demanded were on the higher side.
10. The Bank opposed the suit through a statement of defence dated 26<sup>th</sup> May 2017. Peter Njuguna Karume, the defendant's Credit Manager, testified as DW1 and adopted his witness statement. He confirmed that the plaintiffs were advanced two facilities; one for Kshs. 2,000,000/= and the other for Kshs. 2,644,228/= as per the respective letters of offer.
11. DW1 testified that the 1<sup>st</sup> plaintiff's loan became non-performing in 2011 and confirmed that at the time the principle amount outstanding was 2.6million. He justified the bank's demand for Kshs. 28 million, which included valuation costs, legal fees, auctioneer fees, costs associated with rescinding the sale, and accrued interest. DW1 also confirmed that he is not able to tell the exact amount that is due, and noted that there was need for taking of accounts.

### **Analysis and determination**

12. I have considered the pleadings, evidence, submissions and authorities cited by the parties. The cardinal issue for determination is whether the plaintiff is entitled to the prayers claimed in the plaint. On the preliminary issue raised by the Bank that the suit is res judicata, the Bank proceeds to confirm that the two other suits previously filed by the plaintiffs were struck out on account of non-prosecution. Having not been determined on merits, the issues herein cannot therefore be res judicata.



13. The evidence presented confirms that a charge was registered between the 1<sup>st</sup> plaintiff and the defendant in relation to a facility of Kshs. 2,000,000/=. The charge is dated 14<sup>th</sup> June 2007. The evidence on record also establishes a subsequent facility of Kshs. 2,664,228/= through the offer letter of 25<sup>th</sup> September 2008. It is clear from the offer letter that the amount was to be utilized by the plaintiff for loan restructure.
14. From the evidence presented before this Court, it is clear that the primary point of contention between the parties is not the application of the in duplum rule but the correct amount due after its application. DW1, in his testimony, stated that the loan became non-performing in 2011, although he admitted he could not confirm this with certainty. This is in contrast to the report dated 13<sup>th</sup> May 2019 by IRAC, which, on page 5, indicates that the loan became non-performing on 18<sup>th</sup> June 2013.
15. The Bank acknowledges in its written submissions that “According to the re-calculation report, the account became non-performing on 18<sup>th</sup> June 2013 and the principle owing as at 26<sup>th</sup> July 2018 was Kshs. 4,581,931,.49... The letter stated that the total amount payable and owing to Equity Bank should not exceed Kshs. 9,411,526.98. ... the defendant submits that the sum of Kshs. 9,411,526.98 is the in duplum sum which should be paid by the plaintiff in settlement of its loan arrears with the defendant. (emphasis added)
16. From these submissions, it is evident that the parties agree on several key issues. First, that the facilities were extended to the plaintiff, with the second being a restructuring loan. Second, that there was a default in the repayment of the facility. Third, that the in duplum rule applies in determining the amount outstanding and due to the Bank.
17. Even in the worst-case scenario, assuming the entire principal amount remained unpaid, which is not supported by the evidence presented before me, the Bank’s demand for Kshs. 28,000,000/= is clearly untenable, unconscionable, and unrealistic. While the Bank argued that the sum was attributable to valuation costs, legal fees, auctioneer fees, costs associated with rescinding a sale and accrued interest, no evidence was presented to substantiate these claims. Furthermore, the amounts were not broken down into their respective categories.
18. This brings us to the question of the amount due to the Bank. The Bank does not dispute that the loan became non-performing on June 18, 2013. However, the Bank takes issue with two reports presented by IRAC, each reflecting different figures. One report, dated 24<sup>th</sup> July 2018, places the recalculated amount at 4,581,931.49, while another report, dated 13<sup>th</sup> May 2019 places the amount due and repayable to the Bank at 5,956,182.60 but in any event not more than Kshs.9,411,526.98. Then there is the 1<sup>st</sup> plaintiff who claims to have paid over Kshs. 20 million toward the loan but failed to substantiate this assertion.
19. As noted earlier, DW1 also acknowledged the need for account reconciliation, admitting that he was not aware of the exact amount outstanding.

## **Disposition**

20. Accordingly, I am satisfied that this is an appropriate case for the reconciliation of accounts, within the parameters of the Court’s determination, to ascertain the amount (if any) due to the Bank. The reconciliation shall be carried out jointly by all parties within the next 30 days. Any amounts found due shall be settled within a further 60 days. An injunction is hereby issued over the suit property pending the carrying out of this exercise.



21. I decline to grant general damages, noting that the plaintiffs have acknowledged that amounts remain due from them. While it is clear that the Bank's actions, such as imposing excessive and unsubstantiated charges, failing to provide a clear breakdown of the amounts owed, and threatening the auction of the suit property have caused undue hardship to the plaintiffs, the plaintiffs are not without fault. Their failure to meet their repayment obligations demonstrates contributory negligence on their part.
22. As such, the plaintiffs' conduct does not warrant an award of general damages, as the hardship they have experienced cannot be attributed solely to the Bank. However, in light of the circumstances, the plaintiffs are awarded the costs of the suit, as they have successfully established the need for account reconciliation and the unreasonableness of the Bank's demands.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER 2024.**

**F. MUGAMBI**

**JUDGE**

