



REPUBLIC OF KENYA



**Kumar v Transnational Bank (K) Ltd (Civil Suit 34 of 2020)
[2024] KEHC 16380 (KLR) (23 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16380 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 34 OF 2020
RN NYAKUNDI, J
DECEMBER 23, 2024**

BETWEEN

PATEL SUNIL KUMAR PLAINTIFF

AND

TRANSNATIONAL BANK (K) LTD DEFENDANT

JUDGMENT

1. This matter arises from a commercial banking dispute between Mr. Patel Sunil Kumar (the Plaintiff) and Transnational Bank (K) Ltd (the Defendant) concerning an alleged loan facility of Kshs. 37,959,065 advanced on November 29, 2018. The core of the dispute centers on the Plaintiff's contention that he has fully serviced and repaid the loan, with an independent audit suggesting an alleged overpayment of Kshs. 26,275,099. The Plaintiff seeks injunctive relief against the Defendant's intended exercise of its statutory power of sale over charged properties, including Land Reference numbers 7830/220 and 209/4539, along with several motor vehicles that were provided as security for the loan facility. The matter raises significant questions about loan documentation, banking practices, and the proper exercise of a lender's statutory powers under Kenyan law.
2. The gravamen of the Plaintiff's claim is set out in the plaint dated 14th September, 2020. The Plaintiff avers that on or about 29th November, 2018, the defendant advanced to the Plaintiff a loan facility of Kshs. 37,959,065 and the said facility was secured by charging all that land known as Land reference number: 7830/220, land reference number: 209/4539 and motor vehicles with registration numbers together with motor vehicles with registration numbers: KBR 567P, KBS 648K and KBU 179K. According to the Plaintiff, he has been faithfully servicing the loan on time and has never defaulted on payment of any instalments and has fully paid up the loan herein. He stated that he has repaid the loan facility in full and an independent audit reveals that he has overpaid the defendant by Kshs. 26,275,099/=



3. The Plaintiff further averred that on or about 27th August, 2020 he retained the services of an Auditor and an audit was conducted on the Plaintiff's loan account that unravelled gross violation on the part of the defendant. That the audit unravelled a scheme by the defendant to illegally defraud the Plaintiff by being involved in the following concerted acts perpetuated by the Defendant:
 - a. Not reflecting loan repaid by way of cheques totalling to Kshs. 26,275,099/=
 - b. Purporting to exercise statutory power of sale despite the same not arising.
4. That sometime in the year 2020, the Plaintiff allegedly defaulted on repaying the loan facility and therefore the defendant sought to recover its money by exercise of its statutory power of sale. The said exercise of statutory power was done arbitrarily, capriciously and unlawfully, it is being therefore inconsequential and a farce.
5. Despite the Plaintiff's explanation that the loan facility had been fully cleared the defendant insists on continuing with sale of the property, which conduct paints the lender with suspicion of having been a party to the fraud. The Plaintiff maintained that he has fully paid the loan facility as illustrated in the independent audit conducted on the Plaintiff's loan account with the defendant.
6. The Plaintiff therefore sought the following orders:
 - a. A permanent injunction against the defendant restraining it either by itself and or through its agents, servants and or employees from alienating, selling or advertising or offering for sale, transferring, laying claim to trespassing onto and or in any other manner dealing or interfering with the Plaintiff's peaceful occupation and use of land known as land reference number: 7830/220 and land reference number: 209/4539 in alleged enforcement of the charge dated 13/8/2015.
 - b. A refund of the sum overpaid by the Plaintiff as captured in the audit report dated 4th September, 2020.
7. The defendant in response filed a statement of defence dated 6th October, 2020 denying the averments of the Plaintiff. The defence outlines the details of a significant loan facility totalling Kshs. 37,999,065.00, which was structured across multiple components. This facility included an overdraft of Kshs. 3,500,000.00, along with three term loans: Term Loan 1 amounting to Kshs. 21,845,913.00, Term Loan 2 of Kshs. 8,411,285.00, and Term Loan 3 of Kshs. 3,500,000.00.
8. The defendant averred that the repayment terms were specifically structured for each loan component. Term Loan 1 was set up with monthly instalments of Kshs. 729,968.00 over 48 months, while Term Loan 2 required monthly payments of Kshs. 270,763.32 for the same duration. Term Loan 3 had a shorter term of 36 months with monthly instalments of Kshs. 117,999.00. The overdraft facility was subject to review after a 12-month period from the initial drawdown.
9. To secure these loans, several assets were provided as collateral. These included aggregate charges of Kshs. 2,000,000.00 over L.R. No.2830/320, two chattels mortgages valued at Kshs. 7,200,000.00 and Kshs. 6,640,000.00 respectively (referenced as KBR 5647k and KBU 1795k), and a legal charge of Kshs. 10,000,000.00 over an apartment identified as No. CT on L.R. No. 4539/209.
10. The loan facility carried an interest rate of 17% per annum, which effectively translated to a Central Bank Rate (CBR) of 13.5% per annum. According to the defence, the Plaintiff failed to make adequate efforts to address default amounts, and the account continued to accumulate interest while in default. On February 21st, 2020, a statutory notice was issued for the amount of Kshs. 21,313,432.48.



11. The defendant challenges various aspects of the case, including allegations about legal conduct and documentation. The defendant ultimately sought dismissal of the suit with costs. The case appears to center around loan repayment obligations and the power to recover monies owed, with the defense maintaining their position against the claims presented.

The defendant's evidence.

12. The Defendant filed witness statements. The witness statement by Terence Elegwa dated 25/04/2023 is on record. The witness is the branch manager to the defendant in Nandi Hills. He stated that upon request by the Plaintiff, and vide a Letter of Offer dated 29th November, 2018 the Defendant offered various loan facilities to the Plaintiff. These were in the nature of Term Loan and Overdraft to the tune of Kshs. 37,959,065.00. The said loan facility was to be categorised as follows: -
- i. Overdraft Kshs. 3,500,000.00
 - ii. Term loan 1 Kshs. 21,845, 913.00
 - iii. Term loan 2 Kshs. 8,411,285.00
 - iv. Term loan 3 Kshs. 3,500,000.00
- TOTAL Kshs. 37,959,065.00
13. It was his testimony that it was an express term of the loan agreement that the aforementioned loan facilities would be repaid as hereunder; -
- i. Term Loan 1 to be repaid within 48 months at monthly instalments of Kshs.739,968.00/=;
 - ii. Term Loan 2 to be repaid within 48 months at monthly instalments of Kshs. 270,763,23/=;
 - iii. Term Loan 3 to be repaid within 36 months at monthly instalments of Kshs. 117,999.00/=; and
 - iv. Overdraft of Kshs. 3,500,000.00 to be renewed after 12 months from date of drawdown.
14. According to the witness, the loan facility was advanced for the following purposes: -
- i. Overdraft: To provide working capital needs;
 - ii. Term Loan 1; Liquidation and amalgamation of existing term loans into one facility;
 - iii. Term Loan 2: To be used to purchase a 3-bedroom apartment No. CI Located Parklands Square L.R No. 209/4539; and
 - iv. Term Loan 3: Conversion of Bank Guarantee to Term Loan.
15. He further stated that the said loan facility was advanced on the strength of the following: -
- i. Aggregate charges of Kshs. 24,000,000.00 over L.R No.7830/220 (IR No. 65296) Nandi Hills in the name of Patel Sunil;
 - ii. Chattels mortgage of Kshs. 7,200,000.00 over motor vehicle registration number KBR 567P;
 - iii. Chattels mortgage of Kshs. 6,640,000.00 over motor vehicle registration number KBU 179K; and
 - iv. Legal charge of Kshs. 10,000,000.00 over Apartment No. CI on LR. No. 209/4539 located at Parklands within Nairobi County.



16. It was an express term in the letter of offer that the said loan facility would attract an interest rate of 4% p.a over the Central Bank Rate (CBR) (then at 9.5% p.a) giving an effective rate of 13.5% p.a. The Plaintiff voluntarily consented to the charging of the suit property as security for the loan facility advanced to the Plaintiff and the same. Having noted a lack of progress with regard to repayment of the sums due, the Bank issued the Ninety Days' statutory Demand Notice pursuant to Section 90(1) (2) (3) (e) of the Land Act No. 6 Laws of Kenya dated 21st February, 2020 demanding immediate repayment of the sum due being Kshs. 21,313,432.48. This Statutory Notice issued elicited no response and expired without rectification by the Plaintiff, and the Defendant proceeded to issue the Forty (40) Days⁷ Statutory Notice to Sell under Section 96(2) of the Land Act on or about 20th July, 2020. The same was addressed to the Chargor being the Plaintiff.
17. The witness stated that the Defendant is a financial institution of high repute and has not at any point participated in fraud and concealment of facts as alleged by the Plaintiff. Further, that noting the nature of the claims by the Plaintiff the 1st Defendant caused an audit of the Plaintiffs subject loan accounts as well as the overdraft facilities to be done. The Audit report by Umuro Wario & Associates clearly indicates that even without factoring two overdraft facilities of Kshs. 8,000,000.00 and Kshs. 15,700,000.00, the Plaintiffs loan account is in arrears and the total outstanding loan balance is Kshs. 35,311,700.47 and another outstanding overdraft of Kshs. 5,161,175 as at 31st December, 2019.
18. He stated that as exhibited by the Bank Account statements, Plaintiff owes the Bank a total of Kshs. 39,876,001.25 as at 11th December, 2020. That it is misleading for the Plaintiff to allege to have fully repaid the loan amount and even made any overpayment when in reality they are indebted to the Bank. He maintained that the Defendant has duly issued the Statutory Notices as required under the Land Act, 2012 and has acted in compliance with the law.

Ronald Rotich's Witness statement

19. The witness was an Auditor at the Defendant Bank. In his witness statement dated 25/04/2023, he stated that upon perusal of the Audit Report on the Plaintiff's suit account prepared by Messrs. Mutune & Associates and receipt of instructions by the Defendant's Chief Managing Director, he commenced an internal audit review of the Plaintiff's suit account to ascertain the total loan exposure to the Defendant. he reviewed all the loan facilities advanced to the Plaintiff being: -
 - i. Overdraft Kshs. 3,500,000.00
 - ii. Term loan 1 Kshs. 21,845, 913.00
 - iii. Term loan 2 Kshs. 8,411,285.00
 - iv. Term loan 3 Kshs. 3,500,000.00
 - v. TOTAL Kshs. 37,959,065.00
20. He stated that the loan facilities were advanced through the Plaintiff's company known as Nandi Hills Distributors of Account Number 90820/ TCA00/1 and the Plaintiff's personal Account Number 90059/200ODA00/ 9 held under the name Patel Sunil. The Plaintiff voluntarily requested and was granted more than Fourteen (14) loan facilities, various Overdrafts and Temporary Overdrafts to which the Plaintiff defaulted and fell in arrears.
21. The defaulted loan amounts occasioned by the Plaintiff exposed the Defendant in the following manner: -



Loan Account No.	Number of Instalments	Account Limit (Kshs.)	Sanctioned Date	Limit outstanding as at 11 th December 2022
90059/220HPC00148		3,726,000.00	30 th September 2010	Nil-cleared- 15 th October, 2014
90059/220HPC005	49	6,800,000.00	2 nd September 2011	Nil Cleared – 7 th December, 2015
90059/220HPC0048		7,200,000.00	13 th March 2011	Nil Cleared – 11 th April 2016
90059/220HPC0048		9,994,000.00	20 th March 2013	Nil Cleared – 20 th December, 2017
90059/220HPC0020	48	6,600,000.00	13 th July 2012	Nil-cleared- 8 th September, 2016
90059/210TLN0036		1,100,000.00	19 th October 2011	Paid off on 17 th December, 2012
90059/210TLN0030		3,000,000.00	17 th December 2012	Paid off on 30 th May, 2015
90059/210TLN00301		5,000,000.00	10 th September 2014	Cleared on 30 th December, 2016
90059/210TLN00302		3,500,000.00	30 th May 2015	Cleared on 30 th July, 2018
90059/210TLN00303		8,000,000.00	26 th March 2016	Balance of Kshs. 6,352,876.00 was paid off using a restructured amalgamated facility on 24 th July, 2017
90059/210TLN00304		15,700,000.00	1 st January 2017	Balance of Kshs.



				15,363,892.00 was paid off using a restructured amalgamated facility on 24 th July, 2017
90059/210TLN00/507		27,328,996.00	24 th July 2017	Balance of Kshs. 23,710,715.25
90059/210TLN00/508			20 th December 2017	Balance of Kshs. 10,696,160.00
90059/210TLN00/509			30 th January 2019	Balance of Kshs. 4,993,483.00. The facility was a crystallized Bank Guarantee and no repayment has been made
90059/200ODA00/70D			Accommodations	Balance of Kshs. 4,067,066.00 was paid off using a restructured amalgamated facility on 24 th July to bring the original sanction limit of Kshs. 3,500,000.00
90059/200ODA00/82			31 st July 2018	Balance of Kshs. 5,469,126.00
TOTAL		84,696,032.00		44,869,484.25

22. He stated that the findings of the foregoing are that the Plaintiff together with his company being Nandi Hills Distributors was advanced loan facilities and overdraw the said accounts in excess of Kenya Shillings Eighty-Four Million Six Hundred and Ninety-Six and Thirty-Two (Kshs. 84,696,032.00) in principle exclusive of interests and other charges. A principal amount of Kenya Shillings Forty-Four Thousand Eight Hundred and Sixty-Nine Thousand Four Hundred and Eighty-Four and Twenty-Five Cents (Kshs. 44,869,484.25) remains outstanding and which amounts continues to accrue interest.



23. He stated that even though the Audit Report as prepared by Messrs. Mutune & Associates covered for the period July, 2011 to January, 2019, there were various loan and overdraft facilities that were not factored in their assessment.
24. To put all the foregoing into perspective, the witness stated : -
- i. The Audit report indicates that a sum of Kenya Shillings Thirty-Three Million Five Hundred and Thirty-Seven Thousand and Fifty-Seven (Kshs. 33,537,057.00) was drawn from the Plaintiffs accounts for the period 19th July, 2011 to 29th January, 2019.
 - ii. The report further alleges that payment of Kenya Shillings Seven Million Two Hundred and Sixty-One Thousand Nine Hundred and Fifty-Eight (Kshs. 7,261,958.00) the above stated amount was made.
 - iii. The conclusion to the foregoing is that a sum of Kenya Shillings Twenty-Six Million Two Hundred and Seventy-Five Thousand and Ninety-Nine (Kshs. 26,275,099.00) was uncaptured.
 - iv. The aforementioned sum of Kenya Shillings Twenty-Six Million Two Hundred and Seventy-Five Thousand and Ninety-Nine (Kshs. 26,275,099.00) conspicuously reflects on the Plaintiffs loan statement account and that Messrs. Mutune & Associates failed to take the same into account.
25. It was his testimony that the allegation by the Plaintiff on overpayment of the suit loan facilities and reliance on his statement of accounts which gives an unfactual statement of affairs is a clear attempt to subvert the clear terms of all the loan facilities advanced by the Defendant.
26. He stated that he wished to clarify that the Audit Report conducted by Mutune Associates was conducted on 29th January, 2019, the Audit Report prepared by Umuro Wario & Associates was prepared on 19th April, 2023 and the Defendant's independent Audit Report conducted on (provide the Bank's Audit report) hence the variance in the total amounts owed by the Plaintiff. That notwithstanding, there is an outstanding principal amount of Kenya Shillings Forty-Four Million Eight Hundred and Sixty-Nine Thousand Four Hundred and Eighty-Four and Twenty-Five Cents (Kshs. 44,869,484.251 as at 11th December, 2020 and the same continues to accrue interest until repayment in full. Further, that the Audit Report prepared by Messrs. Mutune & Associates did not take into account all sanction facilities advanced to the Plaintiff rendering the said report inaccurate and unreliable.

Peter Muthoria's Witness statement

27. Peter Muthoria, an accountant with Umuro Wario & Associates stated that he was contracted by the Defendant to conduct an audit on the Plaintiff's suit loan account. He stated that they have reviewed the documents relating to the suit loan accounts pertaining the suit herein to wit loan statements, Overdraft Account Statements, Current Account Statements, Loan Approval Letters of Offer and Charge Instruments referencing securities considered in financing the advanced loans. Upon review of the loan accounts they prepared an Audit Report as at 31st December, 2019.
28. He stated that in conducting the report, five accounts were scrutinized and the following findings were arrived at: -
1. Account Number 90059/210TLN00/507



- i. A loan facility to the tune of Kenya Shillings Twenty-Seven Million Three Hundred and Twenty-Eight Thousand Nine Hundred and Sixty-Six (Kshs, 27,328,966.00) advanced in July 2017 payable within Forty-Eight (48) months at an annual rate of 13%.
 - ii. The audit revealed that the total loan principal and interest payable as at 31st December, 2019 ought to be to the tune of Kenya Shillings Twenty-One Million Six Hundred and Fifty-Seven Thousand Three Hundred and Sixteen (Kshs. 21,657,316.00) representing Twenty-Nine (29) months of loan repayment.
 - iii. The foregoing denotes a sum of Kenya Shillings Eight Million One Hundred and Forty-Two Thousand Five Hundred and Twenty-Nine (Kshs. 8,142,529.00) of interest and a sum of Kenya Shillings Thirteen Million Five Hundred and Fifteen Thousand Seven Hundred and Eighty-Seven (Kshs. 13,514,787.00).
 - iv. This leaves an outstanding balance of Kenya Shillings Thirteen Million Eight Hundred and Fourteen Thousand One Hundred and Seventy-Nine (Kshs. 13,814,179.001).
 - v. That of noteworthy, there is no evidence of loan repayment between the period of April 2019 to December, 2019. This was preceded by a repayment of Kenya Shillings Thirteen Million Five Hundred and Ninety-Six Thousand Six Hundred and Thirty-Nine and Fifty-Two Cents (Kshs. 13,569,639.52) indicating an underpayment of the same by a sum of Kenya Shillings Eight Million Sixty Thousand Six Hundred and Seventy-Six and Forty-Eight Cents (Kshs. 8,060,676.48) during the period August 2017 to December 2019.
 - vi. The upshot of the analysis is that this account posted a loan balance of Kenya Shillings Twenty-Two Million Two Hundred and Seventy-Four Thousand Four Hundred and Seventy-Four and Forty-Eight Cents (Kshs. 22,274,474.48).
2. Account Number 90059/210TLN00/508
- i. A loan facility to the tune of Kenya Shillings Ten Million (Kshs. 10,000,000.00) advanced in 21st December, 2017 payable within Forty-Eight (48) months at an annual rate of 13%.
 - ii. A perusal of the loan Letter of Offer revealed that the said loan facility was to be repaid on a monthly sum of Kenya Shillings Two Hundred and Seventy Thousand Seven Hundred and Sixty-Three (Kshs. 270,763.00) at a rate of 13.5% as opposed to 13% as applied herein.
 - iii. For the period between January, 2018 to December, 2019. there is evidence of receipts totalling to Kenya Shillings Three Million Five Hundred and Forty-Eight Thousand Five Hundred and Forty-Four (Kshs. 3,548,544.00) as opposed to Kenya Shillings Six Million Four Hundred and Ninety-Eight Thousand Three Hundred and Twelve (Kshs. 6,498,312.00).
 - iv. The foregoing shows a default variance of Kenya Shillings Three Million Forty-Nine Thousand One Hundred and Fifty-Nine (Kshs. 3,049,159.00) which translates to an outstanding balance of Kenya Shillings Nine Million Eighty-Nine Thousand Six Hundred and Eleven (Kshs. 9,089,611.00) as at 31st December, 2019.
3. Account Number 90059/210TLN00/509



- i. The variables involving this account included the loan amount advanced, the interest rate set, the agreed monthly instalment payable and the repayment period set.
 - ii. The Defendant acceded to the Plaintiffs request and advanced a sum of Kenya Shillings Three Million Five Thousand (Kshs. 3,500,000.00) to be repaid by monthly instalments of Kenya Shillings One Hundred and Seventeen Thousand Nine Hundred and Twenty-Nine (Kshs. 117,929.00) over a period of Thirty-Six (36) months at an interest rate of 11 %.
 - iii. Even though tire interest rate of 11 % was applied, our audit reveals that the rate of 13% ought to have been applied.
 - iv. The professional interpretation is that this loan account has a balance of Kenya Shillings Three Million Nine Hundred and Forty-Seven Thousand Six Hundred and Fifteen (Kshs. 3,947,615.00) as at 1st December, 2019.
4. Overdraft Account Number 90059/200QDA00/9
- i. Being an overdraft account, the Plaintiff incurred extra costs when overdrawing from the account. The audit of this account was for the period between 1st January, 2016 to 30th November, 2020.
 - ii. That upon scrutiny, the Plaintiffs account was involved in the following activities to wit - Withdrawals, deposits into the account in form Cheques, Cash and Loan Disbursed, Uncleared cheques and Bank Charges.
 - iii. The audit of the said loan account revealed an Overdraft balance of Kenya Shillings Five Million Fur Hundred and Sixty-Nine Thousand One Hundred and Twenty-Six (Kshs. 5,469,126.001 as at 30th November, 2020.
29. He stated that there is an outstanding principle amount of Kenya Shillings Thirty-Five Million Three Hundred and Eleven Thousand Seven Hundred and Forty-Seven Cents (Kshs. 35,311,700.47) as at 31st December, 2019 relating to loan accounts 90059/210TLN00/507, 90059/210TLN00/508 and 90059/210TLN00/509. In addition, the aforestated loan accounts had an overdraft balance of Kenya Shillings Five Million One Hundred and Sixty-One Thousand One Hundred and Seventy-Five (Kshs. 5,161,175.00).
30. He stated that at the time of conducting the Audit Report, there were records of Two (2) Overdraft facilities of Kenya Shillings Eight Million (Kshs. 8,000,000.00) and Kenya Shillings Fifteen Million Seven Hundred Thousand (Kshs. 15,700,000.00) which were unaudited owing to the unavailability of records on when the same were advanced.
31. He stated that the audit exercise revealed several other loan accounts which were fully settled whose subject facilities were advanced prior to the year 2016. The said loan accounts are account numbers 90059/220HPCOO/1, 90059/220HPCOO/5, 90059/220HPCOO/15, 90059/220HPCOO/18, 90059/220HPCOO/20 and 90059/220HPCOO/1.
32. He stated that the loan accounts were not overpaid by the sum of Kenya Shillings Twenty-Nine Million One Hundred and Twenty-Nine Thousand Five Hundred and Eighty (Kshs. 29,129,580.00). Further, they reviewed the Audit Report prepared by Messrs. Mutune & Associates and prepared a Report on the same which Report he produced as evidence. That even though there is a time lapse from when Messrs. Umuro Wario & Associates conducted its audit reported vis-a-vis when Messrs. Mutune & Associates conducted their Audit, the latter does not capture the true events pertaining the Plaintiffs



subject loan accounts, as explained in our Report following the review of the Audit Report by Messrs. Mutune & Associates.

33. The resolution of this dispute requires careful consideration of several fundamental legal principles. Article 40 of *the Constitution* of Kenya 2010 protects the right to property, while Article 46 enshrines consumer rights, including the right to information necessary for consumers to gain full benefit from goods and services. The *Banking Act*, Cap 488 of the Laws of Kenya, particularly Section 44A, imposes specific obligations on financial institutions regarding disclosure and transparency in their dealings with customers.
34. The exercise of statutory power of sale, as governed by Sections 90-103 of the *Land Act* 2012, requires strict adherence not only to procedural requirements but also to substantive fairness. Section 103(1) specifically imposes a duty of care on any person exercising a power of sale to take reasonable care to obtain the true market value of the charged land at the time of sale. These provisions must be read alongside Section 33(4) of the *Banking Act*, which regulates interest rates and charges that banks may impose on facilities.

Analysis and Determination

35. The dispute before this court exposes the intricate complexities that can arise when modern banking practices meet the fundamental principles of equity and fairness. At its heart lies a financial relationship that began with promise but descended into a labyrinth of competing claims, where even professional auditors are unable to agree on the arithmetic of indebtedness.
36. When Mr. Kumar first approached Transnational Bank, the relationship was structured around a consolidated facility of Kshs. 37,959,065, a substantial but comprehensible sum. Yet what unfolds in the evidence before this court is a story of increasing complexity, where this initial facility proliferated into fourteen distinct loans, multiple overdrafts, and a web of financial arrangements that eventually exceeded Kshs. 84,696,032 in principle advances.
37. The magnitude of this growth alone demands judicial scrutiny. How does a lending relationship more than double in exposure without corresponding clarity in documentation? The bank's internal records, while voluminous, fail to provide the transparent narrative one would expect from a financial institution holding security worth Kshs. 47,840,000 against their advances. This security package, comprising both commercial and residential properties, represents not merely collateral but the very foundation of Mr. Kumar's business and family life.
38. The evidence before this court presents three distinct audit reports, each telling a markedly different story of the same financial relationship. The Mutune & Associates report, examining transactions from July 2011 to January 2019, identifies Kshs. 26,275,099 as unaccounted for in the bank's records. This claim, if substantiated, would fundamentally alter our understanding of the parties' obligations. Yet the bank, through their internal auditor Ronald Rotich, presents a starkly different narrative, one where this exact sum is fully accounted for but was simply overlooked in the initial audit.
39. The contradiction is troubling. Modern banking systems, with their capacity for precise record-keeping, should not generate such fundamental disagreements about basic financial facts. When Umuro Wario & Associates conducted their independent examination, they not only failed to resolve this discrepancy but uncovered additional complexities, two previously unaudited overdraft facilities totalling Kshs. 23,700,000. The existence of such substantial facilities, outside the scope of the original audit, raises profound questions about the completeness of the bank's records.



40. As it was established in *Stars and Garters Restaurant & Another v National Bank of Kenya Ltd* [2019] eKLR:
- “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.”
41. Further, as held in *Mrao Ltd v First American Bank of Kenya and 2 others* [2003] KLR 125,
- “The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgage has begun 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.”
42. What emerges from a careful examination of the evidence is a pattern of increasing opacity in the financial relationship. The bank’s internal audit reveals that Mr. Kumar’s borrowing grew through a series of facilities, restructurings, and consolidations. While such arrangements are common in commercial banking, they demand meticulous documentation and clear communication with the borrower. The evidence before this court suggests these standards were not consistently met.
43. As held in *Isiye & 2 others v African Banking Corporation Ltd* [2024] KEHC 158 (KLR):
- ‘If a Bank seeks to impose certain charges or interest, then it must make that intention clear in the contract it enters into with the customer. There must be clarity on what the charges and interest are and how they are to be imposed.’
44. The position in law with regard to the binding nature of a contract executed willingly by the parties is now well settled. As emphasized in *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & another* [2011] eKLR,
- “save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.”
45. Take, for instance, Account Number 90059/210TLN00/507, which held a loan facility of Kshs. 27,328,966. The independent audit revealed a complete absence of payment records between April and December 2019, following a substantial payment of Kshs. 13,569,639.52. This gap in documentation cannot be dismissed as mere administrative oversight, it speaks to a fundamental breakdown in the bank’s record-keeping obligations.
46. The statutory powers that banks hold over secured assets are not mere commercial rights but profound legal privileges that must be exercised with corresponding responsibility. When Transnational Bank issued its ninety-day demand notice in February 2020, followed by the forty-day notice to sell in July 2020, it did so based on its assertion of a default amounting to Kshs. 44,869,484.25. Yet this figure itself emerges from a complex web of transactions where even the Bank’s own records show varying calculations and interpretations.



47. I agree with the principles in the case of *Downsview Nominees Ltd v First City Corp Ltd* (1993) AC 295, the Privy Council stated (at p. 311) that:

“A mortgage, whether legal or equitable, is security for repayment of a debt. The security may be constituted by a conveyance, assignment for demise or by a charge on any interest in real or personal property. An equitable mortgage is a contract which creates a charge on property but does not pass a legal estate to the creditor. Its operation is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court. All this is well settled law and is to be found in more detail in the textbooks on the subject and also in Halsbury’s Laws of England

... The owner of property entering into a mortgage does not by entering into that mortgage cease to be the owner of that property any further than is necessary to give effect to the security he has created. The mortgagor can mortgage the property again and again. A second or subsequent mortgage is a complete security on the mortgagor’s interests subject only to the rights of prior encumbrances. If a first mortgagee commits a breach of his duties to the mortgagor, the damage inflicted by that breach of duty will be suffered by the second mortgagee, subsequent encumbrancers and the mortgagor, depending on the extent of the damage and the amount of each security.”

48. From the perspective of the Plaintiff’s case, there is no evidence that the defendant in realizing the mortgaged property by sale it conducted itself in bad faith or in offering it for sale at a proportionately low value. It is an interesting characteristic of this case in which the Plaintiff invited the court to scrutinize the transactions carefully as provided in the audit report and also his own evidence which indicate that the entire loan amount was fully paid. It is not disputed that both parties placed before this court two expert forensic reports on the financial trail going way back during the letters of offer and acceptance on the borrowings undertaken during the period under review. It is on record that the Plaintiff has vehemently insisted that he owes no money to the defendant bank but his evidence falls short in demonstrating by way of cogent and credible evidence that he has discharged his obligations in the repayment of the loan amount. Therefore, the main issue is whether indeed he has taken reasonable care to ensure that all the loans and overdrafts issued by the defendant have been paid within the framework of the mortgage contract. In my view, the loan and overdrafts accounts are irreconcilable from the audit reports. However, that is not the case from the audit report prepared and admitted in evidence by the defendant together with the hardening summary of the specifics of the loan or overdraft borrowed by the Plaintiff, the amount settled this far and the outstanding balances. Unfortunately, the mortgagor’s allegations in detail appears not to controvert or contradict the defendant’s audit report and the executive summary of the amount due and owing by the Plaintiff. We are also not told by the Plaintiff that the defendant has not taken reasonable steps to ensure that at the time of sale, he is getting the best price then available for the mortgage property or reasonable steps to obtain the best price as premised in the *Land Act* of 2012.
49. Nonetheless, under Section 92 of the *Land Act* 2012, before exercising the power of sale, a chargee must serve notice on the chargor specifying the nature and extent of the default. This is not merely a procedural requirement, it embodies the fundamental principle that a borrower must be given clear information about their alleged default and a genuine opportunity to remedy it.
50. The law never intended for statutory power of sale to be exercised in circumstances clouded by such fundamental uncertainties. While the Bank meticulously followed the procedural requirements under the *Land Act* in issuing its notices, procedure alone cannot cure substantive defects. A financial



institution seeking to exercise such a drastic remedy must demonstrate with clarity not just the fact of default, but its precise extent.

51. The evidence reveals troubling inconsistencies in interest calculations and payment allocations. The bank applied different interest rates across various facilities, from 11% to 17% per annum, yet the documentation fails to provide clear justification for these variations or transparent explanations of how payments were allocated across multiple facilities. When Umuro Wario & Associates examined Account Number 90059/210TLN00/508, they found that the actual interest rate applied differed from that stated in the loan documentation, creating a variance of Kshs. 472,609.59 in interest charges alone.
52. More concerning is the bank's handling of the disputed Kshs. 26,275,099. The fact that this exact sum appears both as an alleged overpayment and as purportedly documented but overlooked payments suggests a systemic failure in the bank's record-keeping practices. A financial institution holding security over a family home and business assets must maintain records that can withstand professional scrutiny. Here, three separate audits produced materially different conclusions about basic financial facts.
53. The relationship between financial institutions and their customers is built not merely on contractual obligations but on the foundational principles of transparency and accountability. When a bank holds security over a family home and business assets, its duties extend beyond mere procedural compliance to encompass substantive fairness in its dealings. The evidence before this court reveals a troubling pattern where the complexity of financial arrangements appears to have overshadowed these fundamental obligations.
54. The bank's comprehensive audit report indeed provides clarity about many disputed transactions. It demonstrates that the Kshs. 26,275,099 claimed as unaccounted for by Mutune & Associates was, in fact, reflected in the bank's records. Yet this very finding illustrates the heart of the problem, when financial arrangements become so intricate that even professional auditors initially fail to trace documented transactions, we must question whether the banking relationship has maintained the transparency the law demands.
55. The growth of Mr. Kumar's borrowing from an initial facility of Kshs. 37,959,065 to total advances exceeding Kshs. 84,696,032 occurred through a series of restructurings and new facilities. While each individual transaction may have been properly documented in the bank's internal records, the cumulative effect created a landscape of such complexity that it obscured rather than illuminated the true state of indebtedness. This outcome runs counter to the bank's duty to maintain clarity in its dealings with customers.
56. In *Flowers and others Ltd v. Citizen Bank Limited (1997)* JLR in the comparative dicta, the court held as follows:

“That the general rule that the court will not interfere to deprive the mortgagee the benefit of his security except where the sum stated to be due is paid into court.”
57. The definition of a simple mortgage is to be found in S.58(b) TPA, as follows:

“where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract the mortgagee shall have the right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may



be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.”

An English Mortgage is defined in Section 58(e) as follows:

“Where the mortgagor binds himself to repay the mortgage – money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re transfer it to the mortgagor upon payment of the mortgage – money as agreed, the transaction is called an English mortgage.”

58. The facts of this case, are purely hinged on a question of law as to the obligations of a mortgagor to the mortgagee on terms of the loan agreement. This is what is emphasized by the learned authors Halsbury laws of England, 4th edition, who defined a mortgage as follows:

“A mortgage is a disposition of property as security for a debt. It may be effected by a demise or sub-demise of land, by a transfer of a chattel, by an assignment of a chose in action, by a charge on any interest in real or personal property or by an agreement to create a charge, for securing money or money’s worth, the security being redeemable on repayment or discharge of the debt or other obligation. Generally, whenever a disposition of an estate or interest is originally intended as a security for money, whether this intention appears from the deed itself or from any other instrument or from oral evidence, it is considered as a mortgage and redeemable.”

59. The bank has indeed demonstrated, through its recent audit, that substantial sums remain outstanding. Yet the path to this default, through multiple facilities with varying interest rates and overlapping payment obligations, raises serious questions about whether the bank adequately fulfilled its duty to ensure customer understanding of these increasingly complex arrangements. This consideration becomes particularly acute when the bank seeks to exercise its power of sale over properties that include a family home.

60. In these circumstances, a careful balancing of rights and obligations becomes essential. While the bank has established through its comprehensive audit that significant sums remain outstanding, this finding alone does not automatically justify the immediate exercise of statutory power of sale. The law grants financial institutions powerful remedies, but these must be exercised in a manner consistent with both the letter and spirit of banking regulations.

61. The evidence presents a stark reality: there is indeed a default, with the bank’s detailed audit demonstrating an outstanding principal amount of Kshs. 44,869,484.25 as of December 2020. This figure, supported by meticulous documentation, cannot be dismissed. However, the path to this default, through a maze of fourteen different loan facilities, multiple restructurings, and varying interest rates, suggests a banking relationship that grew beyond the bounds of reasonable complexity.

62. This court must consider whether the remedy sought, the sale of both business assets and a family home, is proportionate not just to the default itself but to the circumstances that led to it. The bank’s recent audit, while resolving questions about specific transactions, also reveals a pattern of lending that arguably contributed to the very confusion that brought these parties before this court.

63. Of particular significance is the contrast between the bank’s internal record-keeping capabilities and its external communication practices. While the bank maintained detailed records that eventually allowed for a comprehensive audit, the initial inability of external auditors to reconcile these same records



suggests a troubling gap between the bank's administrative sophistication and its transparency with customers.

64. In light of these considerations, this court finds that while the bank has established the fact of default, the exercise of its statutory power of sale must be temporarily stayed to allow for a more structured resolution of this matter. The complexity of the banking relationship demands a more measured approach to enforcement, one that recognizes both the bank's legitimate claims and the need for enhanced transparency in customer dealings.
65. The claim that the loan has been fully repaid cannot be sustained in light of the comprehensive audit evidence. The bank has demonstrated with clarity that substantial sums remain outstanding, and this court accepts the figure of Kshs. 44,869,484.25 as accurately reflecting the principal amount due as of December 2020. This finding is based not merely on the bank's assertions but on detailed documentary evidence that withstands careful scrutiny.
66. However, the manner in which this indebtedness arose and the complexity of the banking arrangements demand judicial intervention to ensure an equitable resolution. The statutory power of sale, while available to the bank in principle, must be exercised in a manner that reflects not only the bank's rights but also its responsibilities as a financial institution holding security over both commercial and residential property.
67. Therefore, balancing these complex considerations and recognizing both the bank's established rights and its corresponding obligations, this court makes the following determinations, I make the following orders:
 - a. The bank's statutory notices issued pursuant to the *Land Act* are hereby suspended for a period of one hundred and twenty days. During this period, the following steps shall be taken:
 - i. The bank shall, within thirty days, provide Mr. Kumar with a comprehensive statement of his indebtedness, clearly showing how each payment was allocated across the various facilities. This statement must include a detailed breakdown of principal, interest, and other charges for each facility.
 - ii. The parties shall, within fourteen days, jointly appoint an independent auditor from a panel of three names to be proposed by the Institute of Certified Public Accountants of Kenya (ICPAK). This auditor shall:
 1. Conduct a comprehensive reconciliation of all fourteen loan facilities advanced to the Plaintiff;
 2. Provide a detailed analysis of interest calculations and their application across multiple facilities;
 3. Present a clear chronological breakdown of how the initial facility of Kshs. 37,959,065 grew to encompass advances exceeding Kshs. 84,696,032;
 4. verify the allocation of all payments made against specific facilities.
 - b. The independent auditor shall submit their report to this court within ninety (90) days, with copies to both parties. The parties shall have fourteen days to file any objections to the findings.
 - c. The bank shall establish a dedicated point of contact for Mr. Kumar to address any queries arising from the reconciliation process. This arrangement shall ensure that communication regarding the outstanding facilities is clear, consistent, and properly documented.



- d. Mr. Kumar shall, pending the completion of this process, continue to make monthly payments based on the most recent loan restructuring agreement. These payments shall be held in an interest-earning escrow account to be established by mutual agreement between the parties.
- e. Upon completion of the reconciliation process, but no later than ninety days from this judgment, the parties shall present to this court a joint report detailing:
 - i. The agreed outstanding amount
 - ii. A structured repayment plan that takes into account both the bank's right to recover its funds and Mr. Kumar's ability to maintain his business operations
- f. The costs of the reconciliation process and the independent audit shall be borne equally by both parties, reflecting their shared responsibility for the complexity that has characterized this banking relationship.
 - i. The bank shall provide monthly statements to both the Plaintiff and the independent auditor showing how these payments are being applied.
- g. The costs of this suit shall be borne by each party.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY VIA CTS AT ELDORET THIS 23RD DECEMBER 2024

.....

R. NYAKUNDI

JUDGE

