



REPUBLIC OF KENYA



**KENYA LAW**  
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**Pandhal v Endeavour Credit Limited (Commercial Case  
E002A of 2021) [2023] KEHC 3836 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3836 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
COMMERCIAL CASE E002A OF 2021**

**RE ABURILI, J**

**APRIL 26, 2023**

**BETWEEN**

**SURJIT SINGH PANDHAL ..... PLAINTIFF**

**AND**

**ENDEAVOUR CREDIT LIMITED ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. Vide a plaint dated October 14, 2021 and filed in court on the same date, the plaintiff herein Surjit Singh Pandhal sought the following reliefs against the defendant:
  - a. A permanent injunctive order restraining the defendant/respondent, its officers, servants, agents including auctioneers, employees or any other person acting through or under its instructions from advertising for sale the plaintiff's charged property, selling, disposing off, transferring, alienating, auctioning, or in any other way interfering with or dealing with the plaintiff's ownership, title and possession of land parcel title number Kisumu Municipality Block 4/67.
  - b. A declaration that the defendant has levied illegal and uncontractual rates of interest on the plaintiff and borrower's account and levied illegal and uncontractual charges unknown to the plaintiff and borrower.
  - c. A declaration that the charge over the property, Kisumu/Municipality/Block 4/67 is null and void for lack of spousal consent or affidavit confirming death of the 2nd chargor, Malkit Singh Pandhal.
  - d. A declaration that the defendant's power of sale has not arisen and the defendant has failed to comply with the provisions of the law and as such the



defendant's actions of issuing the 45-day notification of sale without service of the statutory notice and 40-day notice on the chargor's and their spouses is wrongful and tainted with illegality.

- e. An order directing that accounts be taken relating to the plaintiff and borrower's account.
  - f. Damages for defamation, loss of reputation and embarrassment occasioned by the unlawful and wrongful newspaper advertisement.
  - g. Costs of this suit and interest thereon.
  - h. Any other relief that this Honourable Court will deem fit and just to grant.
2. The plaintiff pleaded that on or about 18<sup>th</sup> March 2020 he and one Malkit Singh Pandhal (deceased) charged their jointly owned property, Kisumu Municipality Block 4/67 as security for a sum of Kshs 20 million even though the defendant only disbursed Kshs 18 million and further that in addition to the charge, the defendant demanded deposit and joint registration of 3 log books for motor vehicles KCJ 710E – FAW – CA4322 – Prime Mover, ZE 2654 – Trailer (Local Made), ZE 2652 – Trailer (Local made) as additional security for the facilities.
  3. The plaintiff further pleaded that the charge did not contain a spousal consent by Malkit Singh Pandhal or affidavit confirming death of his spouse or a death certificate. It was his case that no statutory notice pursuant to Section 90 of the Land Act no 40-day notice was served upon him hence the service of the notification of sale was null and void ab initio and further that no such notices were served upon the estate of the co-owner of the charged property, Malkit Singh Pandhal.
  4. The plaintiff further pleaded that no valuation of the charged property had been conducted as required by the Land Act prior to issuance of the irregular notification of sale and unlawful and irregular advertisement in the newspaper of the public auction of the charged property on the October 15, 2021.
  5. It is the plaintiff's case that the defendant's unlawful action cause and continue to cause the plaintiff extreme loss, damage, detriment and embarrassment. In his testimony the plaintiff adopted his witness statement filed on the October 21, 2022.
  6. In cross-examination the plaintiff stated that they made payments of Kshs 822,250 per month initially but due to some issues were unable to pay as before and since then have been repaying Kshs 400,000 monthly. He further stated that they only paid the monthly instalment of Kshs 822,250, 7 times and Kshs 700,000 thereafter.
  7. The plaintiff further stated in cross-examination that he had paid more than 8.3 million. He stated that the property was irregularly advertised as no notice was served on them. He further admitted receiving the Kshs 20 million loan.
  8. In re-examination, the plaintiff stated that Aldai Bakeries was a sole proprietorship and that it was a business name. He stated that they did not receive all notices as required by law and that they disagreed on the interest so they had not fully repaid the loan. The plaintiff requested the court to recalculate their statement due to the illegal levies and interest charged by the bank.
  9. In response, the defendant's filed a statement of defence dated March 3, 2022 and filed in court on the March 23, 2022 in which it averred that the loan was to be secured by Motor vehicles registration numbers KCJ 710E – FAW – CA4322 – Prime Mover, ZE 2654 – Trailer, ZE 2652 – Trailer, comprehensive insurance to be taken through the defendant's insurance brokers to ensure that interest on the defendant was noted, personal guarantee of Mr. Sukhbir Singh Pandal for Kshs 20 million,



fixed floating debenture for an amount of Kshs 20 million over all assets of the borrower, 36 PDC Cheques of Kshs 822,250, 1 current cheque for Kshs 63,000 which was to cater for bank charges of Kshs 18,000(3 years), documentation charges Kshs 15,000. Option money Kshs 15,000, transfer charges of Kshs 15,000 and commitment fees of Kshs 1,200,000 for 3 years.

10. It was the defendant's case that the total sum advanced to the plaintiff was Kshs 20,000,000 which the plaintiff acknowledged and has never complained of being issued with a lesser sum. It was the defendant's case that a spousal consent by the wife of the co-owner/chargor of the suit property was not necessary as the suit property was not matrimonial property as defined under Section 6 (1) of the Matrimonial Property Act, 2013.
11. The defendant further averred that they instructed auctioneers to issue the plaintiff with a 45 day notification of sale for the charged property after the plaintiff failed to rectify the default after being issued with a 90 day statutory notice and a 40 day notification of sale as provided under Section 90 of the Land Act.
12. Further to the above, the defendant pleaded that it was the plaintiff's son, Mr. Rumi Pandhal of mobile No 0743144489 who received the notification of sale and that the auctioneer took a step further and sent the notification of sale to the owner of the suit property through registered post.
13. It was the defendant's case that they engaged the services of a valuer, Njihia Njoroge and Company to conduct a valuation of the suit property and a report was issued to that extent.
14. The defendant through one Kennedy Mbithi Mutinda testified and adopted his witness statement signed on the March 22, 2023 as well as all the accompanying documents. Mr. Mutinda testified that at the close of the year 2020, the Plaintiff had cumulatively paid a total sum of Kshs 5,642,260 and the closing balance was Kshs 21,243,450 as the plaintiff had occasionally defaulted in repaying the loan further evidenced by the fact that the following year the closing balance for the year 2021 was 20,164,695.35, further evidence of the plaintiff's default.
15. He further testified that given the fact that the Plaintiff was a constant defaulter and despite several notices served upon him to rectify the fault which he failed to do so, the Defendant decided to exercise their right of sale and engaged the services of valuer that is Njihia Njoroge and Company to conduct a valuation of the property known as Kisumu Municipality /Block/4/67.
16. The defendant further testified that having failed to remedy the default after being served with the 90 days statutory notice, the Defendant appointed auctioneers to serve the Plaintiff with a 40-day notice of Sale as provided for under Section 90 of the Land Act, to which the Plaintiff took no action.
17. He further testified that the Plaintiff failed to redeem the suit property after the lapse of the 45 days and thus the Defendant scheduled a public auction sale for October 15, 2021 and caused the same to be advertised in the Newspaper.
18. DW1 testified that the Plaintiff was supplied with a detailed statement of account documenting how figure of Kshs 31,988,999.00 was arrived at and if the Plaintiff had any grievances as to how the amount had been arrived at, the proper thing was to communicate the same to the Defendant or visit the Defendant's office to seek clarification on the same.
19. It was the defendant's testimony that the Plaintiff had not denied being in default of repayment of the loan advanced to him and as such the Defendant ought to be allowed to proceed and auction for sale the suit property to realize the amount due and owing to it and that the Plaintiff was a perpetual defaulter who failed to remit the installments as and when they were due thus accruing of penalties and



thus leading into the falling into arrears and as such it was the Defendant who was greatly prejudiced and who would suffer irreparable loss.

20. In cross-examination DW1 reiterated his statement and further stated that they notified the guarantors Malkit Singh and Surjit Singh of the plaintiff's constant default. In re-examination DW1 reiterated his testimony in chief and further stated that when they were registering the charge there was no encumbrance due to spousal consent and that Malkit Singh never produced any marriage certificate. He reiterated that the interest they charged was 16% p.a. and default interest which was 5% which was in the letter of offer before the disbursement was done and which the plaintiff was aware of.
21. The parties filed written submissions.

### **The plaintiff's submissions**

22. The plaintiff submitted that the Defendant's power of sale had not arisen as the obligations and duties charged in issue, dated and executed March 19, 2019 were not followed by the Defendant. He further submitted that there was no evidence whatsoever that the 90 days' Statutory Notice, 40 days' Notice to Sell and 45 days' Notification of Sale were served on the estate and/or administrator of the estate of the co-owner of the charged property (Malkit Singh Pandhal – Deceased) in violation of the provisions of the *Land Act*, 2012 and that what was tendered in evidence was proof of registered service of the 90 days' Notice and physical delivery 45 Days' Redemption Notice & Notification of Sale to the Plaintiff's son, Rumi Pandhal.
23. The plaintiff submitted that that the estate or the Administrator of the estate of the late Malkit Singh Pandhal ought to have been served with all requisite Statutory Notices and as this had not been done by the Defendant, it was clear that its statutory power of sale was being improperly exercised and was premature. The plaintiff further submitted that that failure by the Defendant to issue a proper Statutory Notice Under Section 90 of the *Land Act* nor the Notice to Sell the charged property under Section 96(2) of the *Land Act* prior to advertising the suit property for sale vitiated the process of enforcing the statutory power of sale undertaken by the Defendant.
24. It was submitted that the Defendant's account statements did not provide a believable accounts record to form the basis of calculating the amounts due to the Bank pursuant to the provisions of Section 44A of the *Banking Act* and further that the defendant neither supplied the Plaintiff with a statement of accounts documenting how the figure of Kshs 31,988,999 was arrived at nor issued the 30 days' variation notice on interests as stipulated in Clause 2 (a) of the Charge dated March 18, 2018.
25. The plaintiff submitted that the Notification of Sale dated April 27, 2021 issued to the Plaintiff stipulated an increase of the rates of interest to rates over and above the contracted and agreed rate of 16% per annum and indicated that the outstanding amount continues to attract interest at the rate of 5% per month until full payment in full which was oppressive, capricious, unconscionable and against the dictates of the Letter of offer and Charge document.
26. The plaintiff submitted that that the Defendant had hidden the application of interest on the loan amount from scrutiny by the Court as the same was not reflected in the statements of accounts which the Defendant provided to the Plaintiff and in the bundle relied upon by the Defendant. It was submitted and impressed by the plaintiff that the court ought to find that the interest rate charged on the loan was varied without contractual notice to the Plaintiff and that the variation was manifestly unjust and/or excessive for having been effected without proper notice to the Plaintiff. Reliance was placed on the case of *Kenya Commercial Bank Finance Company Ltd v Ngeny & Another* [2002] 1 KLR 106 where the Court held inter alia that it would not interfere where parties have contracted on arms-length basis but that it would set aside any bargain which was harsh, unconscionable and oppressive



or where having agreed to certain terms and conditions, thereafter imposes additional term upon the other party.

27. It was submitted that the Defendant did not file a Counterclaim for the sum it alleged were due to it as provided under Order 7 rule 3 of the *Civil Procedure Rules* and thus it was not properly ascertained in its impugned statements of accounts that the sum of Kshs 31,988,999.00 was the amount properly due to the Bank as the Bank had not disclosed whether the loan account was non-performing or not.
28. As regards costs, it was submitted that if the court were to find in favour of the plaintiff then he should be awarded costs as costs follow the event as provided in section 27 of the *Civil Procedure Act*.

### **The defendant's submissions**

29. It was submitted that that the Plaintiff and the beneficiary Aldai Bakeries were indebted to the Defendant as the Plaintiff orally used to request the Defendant to give them ample time to be allowed to pay the loan paid and further that neither the Plaintiff nor the beneficiary Aldai Bakeries ever called any evidence to controvert the statement provided by the Defendant on the amount outstanding prior to the sale of the suit property.
30. Further to the above The defendant submitted that it's statement of account was uncontroverted as the Plaintiff did not call any expert witness to controvert the interest charged by the Defendant as unconscionable and further that the Plaintiff did not call any expert witness to controvert the amount owing by the Borrower and Beneficiary Aldai Bakeries to the Defendant but instead during the cross examination of the Plaintiff's witness by counsel of the Defendant confirmed that they had not completed to pay the loan inclusive of the interest yet the loan term period had already expired in 2021.
31. The defendant submitted that the charge instrument executed between them and the Plaintiff complied with Section 80(3) of the *Land Act 2012* regarding its ingredients. The defendant further submitted that the Plaintiff was served with all the requisite notices. He submitted that the 90 days statutory Notice dated September 25, 2020 was served vide the registered post of Postal Box Address 967 Kisumu which address was also in the registered charge instrument as the plaintiff's and further confirmed by the plaintiff on cross examination. He further submitted that the 40 days' notification of sale was also served through the Registered Mail by the Defendant through the defendant's Auctioneer, Garam Investments Auctioneers.
32. The defendant submitted that its Auctioneers, Garam Investments Auctioneers, complied with Rule 15 (d) of the *Auctioneers Act* and issued the Plaintiff with the 45 days Redemption Notice which notice was also served upon the Plaintiff through registered mail vide the Postal Address 967 Kisumu.
33. It was submitted that in respect to service on the estate or administrator of estate of Malkit Singh Pandhal, no death certificate had been adduced to confirm if and when the said Malkit Singh Pandhal died. The defendant further submitted that the Plaintiff produced a special power of attorney stating that the Plaintiff and Malkit Singh Pandhal (deceased) had given a special power of attorney to Sukhbir Singh Sawan Singh to represent them in the Kisumu High Court Commercial Case No E002 of 2021 which special power of attorney was registered on October 18, 2022 whereas the special power of attorney was not valid as a dead person could not give authority.
34. The defendant further submitted that the Plaintiff had described that the suit property was jointly owned by him and Malkit Singh Pandhal (deceased) whereas the Certificate of Lease adduced by the plaintiff was evident that the suit property was jointly owned by Surjit Singh Pandhal and Malkit Singh Pandhal. It was submitted that under the principle of joint ownership of property, the law provided that upon the death of a joint owner, the principle of survivorship of the remainder owner applied and



thus the Plaintiff could not allege that the purported spouse or estate of administrator of Malkit Singh Pandhal was never served with notices.

35. On the allegation that the Defendant unlawfully and irregularly advertised the suit property for sale by public auction on 15<sup>th</sup> October, 2022 through Garam Investments Auctioneers, the law under Section 98 (2) of the [Land Act 2012](#) provided that if a sale was to proceed by public auction, it was the duty of the chargee to ensure that the sale was publicly advertised in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the charged land and that the provisions relating to the auctions and tenders for land are, as near as may be, followed in respect of that sale and that in this case Auctioneers Garam Investments Auctioneers publicly advertised through the Nation Newspaper dated Monday September 27, 2021.
36. The defendant submitted that the Plaintiff had not demonstrated how the Defendant through its auctioneers Garam Investments Auctioneers had unlawfully and irregularly advertised the suit property for sale by public auction on October 15, 2021 whereas it was trite law that once an advertisement is placed in a newspaper of wide circulation, it matters not that the chargor failed to see the advertisement.
37. It was further submitted that the Defendant conducted a valuation of the suit property through the firm of Njihia Njoroge & Company on the November 26, 2020 and a valuation report was prepared.
38. As to whether the absence of spousal consent by the late Malkit Singh Pandhal's purported wife vitiated the charge instrument registered in favour of the Defendant it was submitted that the charge instrument complied with Section 80(3) of the [Land Act](#). The defendant further submitted that the Defendant conducted due diligence before the suit property was charged and that in fact it was the evidence of the Plaintiff's witness during cross examination that the charge instrument was a clean instrument registered in the land's office without any difficulty or encumbrances.
39. The defendant submitted that that the prayers sought by the Plaintiff in the Plaint were not available as the Defendant had complied with the procedures provided by law under the [Land Act 2012](#) for its right for power of sale. It was further submitted that there was no irregular exercise by the Defendant, hence no damages were available to the Plaintiff and that the Plaintiff never called any evidence in support of the prayers sought in his Plaint thus contravening section 107 of the [Evidence Act](#).

### **Analysis and determination**

40. I have considered the pleadings by both parties, their oral testimonies as well as the submissions filed. The issues for determination before this court are as follows;
  - i. Whether the charge created on the plaintiff's properties was valid, whether the levies charged were legal, whether lack of spousal consent or affidavit confirming death of the 2nd chargor, Malkit Singh Pandhal was fatal and therefore whether the defendant's right of sale had accrued,
    - i. Whether the court should order the defendant to produce the accounts for examination by court and parties
    - ii. Whether the court should grant a permanent injunction in favour of the plaintiff.
    - iii. Are damages for defamation available to the plaintiff?



- iv. What orders should the Court make; and
- v. Who should bear the costs of this suit

On the issue of whether the charge registered against the plaintiff's properties was valid, whether the levies charged were legal, whether lack of spousal consent or affidavit confirming death of the 2nd chargor, Malkit Singh Pandhal was fatal and therefore whether the defendant's right of sale of the charged property had crystalized

- 41. The plaintiff sought orders by way of declaration that the charge created over his properties by the defendant was null and void. He gave evidence to the effect that the properties were charged but that no statutory notices were issued before advertising the said properties for sale by the defendant which advertisement he considers to be defamatory of him. The evidence adduced before this court showed clearly that the Plaintiff enjoyed a bank facility from the defendant of which he has continued to be in default prompting the Defendant to issue demand notices for payment as well as statutory notices as required under the [Land Act 2012](#). The Plaintiff pleaded and submitted that he was not served with a statutory notice as required by section 90 of the [Land Act](#).
- 42. A statutory notice issued under section 90(2) of the [Land Act](#), triggers the security realization process, which leads to the chargee ultimately exercising its remedies outlined under section 90(3). The notice is issued where there is default or breach of any covenant under the charge.
- 43. Section 90 of the said [Land Act](#) cap 280 (Laws of Kenya) provides as follows: -

If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

The notice required by subsection (1) shall adequately inform the recipient of the following matters—

- a. the nature and extent of the default by the chargor;
- b. if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
- c. if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so at to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;
- d. the consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
- e. the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.



44. My reading of the Statutory Notice dated September 25, 2020 against the provisions of Section 90 of the Land Act, it was evident that the said notice did indicate the nature and extent of default, it did indicate the amount the Plaintiff was required to pay to rectify the default and it did also include the notification that the Defendant would proceed to exercise any of the remedies referred to in the said section in accordance with the procedures provided for in that sub-part. The said Notice in my view was fully compliant with the provisions of Section 90 of the Land Act.
45. Despite the assertions by the plaintiff that service of the statutory notices was not effected upon him or the estate of the deceased Malkit Singh Pandhal, I note that the statutory notice dated September 25, 2020 was issued by the defendant and served via registered postal address, 967, Kisumu. This mail address was the address provided by the plaintiff as well as the borrower in the charge document executed between both parties. Accordingly, I find that service of the Statutory Notice was duly effected upon the plaintiff.
46. The plaintiff also argued that the absence of spousal consent by the late Malkit Singh Pandhal's purported wife vitiated the charge instrument registered in favour of the Defendant. The defendant countered this assertion by stating that the charge instrument complied with Section 80(3) of the Land Act. There is no requirement that the statutory notice under section 90 be served upon either the principal debtor or a spouse as was claimed by the plaintiff. Any spouse who gave her/his consent to the charge being created is however to be served with a notice of intention to sell pursuant to the provisions of section 96(3) of the Land Act which also dictates that any tenants or lessees be also served with such a notification. This notice is issued after the expiry of the ninety days stated in the statutory notice.
47. Further, I observe that PW1 testified in cross examination that the loan agreement as well as the charge instrument were not defective. The evidence adduced by the plaintiff does not reveal patent non-compliance with the statutory provisions. There is indeed substantial compliance in so far as the statutory notice is concerned. There is also apparent evidence of default on the part of the Plaintiff. Despite denying the statutory notice, the evidence before court is that the same was served and the plaintiff was aware of the same.
48. In my view the plaintiff's challenge to the statutory notice has no merit. In addition, it is not enough to simply state that a statutory notice is defective. Rather, a party needs to do more. He has to show the defect and exhibit the prejudice occasioned or likely to be occasioned by the defect.
49. I further note that the 40 days' notification of sale dated April 27, 2021 was also served on the plaintiff and the co-owner of the suit property through registered mail via the mail address issued in the charge instrument, by the Defendant through the defendant's Auctioneer, Garam Investments Auctioneers.
50. The Plaintiff freely and voluntarily charged the suit properties and was clearly aware that in the event of default in servicing the debt, the properties would be liable to be sold. The Plaintiff in this case is therefore bound by the agreement it entered into with the Defendant on the interest that was to be paid on the loan amount that was advanced to him by the Defendant.
51. In case of Andrew Muriuki Wanjohi v Equity Building Society Ltd (2006) eKLR the court held as follows:

“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.”

52. By offering the suit properties as security, the chargor was equating them to a commodity which the chargee may dispose of, so as to recover the loan together with interest thereon. Therefore, if the chargee were to sell off the suit properties, the chargor’s loss could be calculable on the basis of the real market value of the said property.
53. Still on this first issue, the Plaintiff asserted that the Defendants had unilaterally charged illegal and unconscionable interest, against the dictates of the Letter of offer and Charge document. I have perused the Letter of Offer dated February 12, 2019 at clause 7 where it provides that interest is charged at 16% p.a and clause 8 that provides that default interest will be charged at a percentage rate of 5% over and above the interest rate chargeable on the loan.
54. The position in law with regard to the binding nature of a contract executed willingly by the parties has now followed a well beaten path. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & another* [2011] eKLR, the Court was categorical that:
- “it is clear beyond para adventure, that save for those special cases where equity might be prepared to re-leave 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.”
55. In *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR, after reviewing case law on the subject, the Court reiterated as follows:
- “We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”
56. The plaintiff having agreed to the terms of the Letter of Offer dated February 12, 2019 and the subsequent charge document, he is bound to honour them. The plaintiff has not adduced any evidence of coercion, fraud or undue influence by the defendant to warrant this court interfering with the aforementioned contracts. The Plaintiff in this case is therefore bound by the agreement it entered into with the Defendant and on the interest that was to be charged on the loan amount advanced to him by the Defendant.
57. I also note that that the Defendant conducted a valuation of the suit property through the firm of Njihia Njoroge & Company on the November 26, 2020 and a valuation report dated 30<sup>th</sup> November was prepared in compliance with Section 97 (2) of the *Land Act* which provides that:
- “A chargee shall before exercising the right of sale ensure that a forced sale valuation is undertaken by a valuer.”
58. The upshot of all the above is that I find and hold that the charge created on the plaintiff’s properties was valid and that the defendant’s right of sale did accrue.
- As to whether the court should order the defendant to produce the accounts for examination by court and the parties
59. It was the plaintiff’s case that the court ought to order the defendant to render an account as to how the claimed sum accrued and further order that accounts be taken relating to the plaintiff’s and borrower’s



account as the defendant imposed illegal and uncontractual rates of interest contrary to the agreement they had.

60. On their part the defendants stated that the interest rates applied to the loan balances were contractual having been expressly agreed upon in writing between the parties in the loan offer.
61. The question of whether the concept of levying default/penalty interest is part of Bank trade usage and custom in Kenya is a fairly well beaten path. There are two schools of thought. One holds that it is and the case of *National Bank of Kenya Limited v Beth Ngonyo Ngengi & Another* [2012] eKLR in which the Judge stated that:

“I have my own doubts on application of penalty interest for breach of commercial contracts. However, I am aware that it is a known trade usages and custom within the banking industry to charge penalty when a borrower defaults. In this case I need not rely on the implied terms as it was expressly provided for. In my understanding whether or not a charge applied is a ‘penalty’ in a Commercial Contract is a determination of the court notwithstanding the fact that the charge applied is styled penalty interest”.

62. The other school of thought is that the imposition of penalty interest/default rate is a contractual matter which must be expressly provided in a contract before it can be implemented. See Odunga J in *Francis Joseph Kamau Ichacha v Housing Finance Company Limited* [2014] eKLR where he expressed himself as follows:

“Can it therefore be said that a practice in which the Banks unilaterally decide to load the customer’s account with penalties at their own discretion whose rates are only known to the Bank is such a certain practice that it can be said to amount to trade usage? In my view that would amount to stretching the word “certain” too far. For one to say that the penalty is certain not only ought there be certainty as to the levy of the interest but since the rate is not contained in any contractual document, the rate also must be certain and must be known in the market otherwise such levying of interest would violate the provisions of Article 46(1) (b) of *the Constitution*. To argue otherwise would in my view open an avenue in which the right of redemption may easily be clogged or fettered. I would apply the same reasoning to the case of *Maithya v Housing Finance Co of Kenya and Another* [2003] 1 EA 133 and the other decisions which in any case are not binding on this Court”.

63. I am in agreement with Odunga J’s pronouncement in the case of *Francis Joseph Kamau Ichacha v Housing Finance Company of Kenya Ltd* [2014] eKLR that:

“66: Can it therefore be said that a practice in which the Banks unilaterally decide to load the customer’s account with penalties at their own discretion whose rates are only known to the Bank is such a certain practice that it can be said to amount to trade usage? In my view that would amount to stretching the word “certain” too far. For one to say that the penalty is certain not only ought there be certainty as to the levy of the interest but since the rate is not contained in any contractual document, the rate also must be certain and must be known in the market otherwise such levying of interest would violate the provisions of Article 46(1) (b) of *the Constitution*. To argue otherwise would in my view open an avenue in which the right of redemption may easily be clogged or fettered. I would apply the same reasoning to the case of *Maithya v Housing Finance Co of Kenya and Another* [2003] 1 EA 133 and the other decisions which in any case are not binding on this Court.



64. It follows therefore that if a Bank seeks to impose certain charges or interest, then it must make that intention clear in the contract that it enters into with the customer. There must be clarity on what the charges and interest are and how they are to be imposed.
65. That being said, it is an established principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit* supra, the Court of Appeal at page 507 stated that a court of law cannot rewrite a contract between the parties as the parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.
66. In this case, it is clear that the interest charged is stated in the charge instruments and so is the penalty interest in the event of default. This is what Clause 7 of the charge instrument provides that interest is charged at 16% per annum and clause 8 that provides that default interest will be charged at a percentage rate of 5% over and above the interest rate chargeable on the loan.
67. For the above reason, this Court cannot be called to vary the terms of the Letter of Offer dated February 12, 2019 at clause 7 where it provided that interest is charged at 16% p.a and clause 8 that provided that default interest will be charged at a percentage rate of 5% over and above the interest rate chargeable on the loan, in the absence of any evidence by the plaintiff manifest error on the part of the defendant, as there was no proof that the defendant charged illegal and uncontractual rates of interest contrary to the agreement they had.
68. I therefore find and hold that the plaintiff's claim and prayer for an order that the defendant do render an account and give statements showing how the accrued sum was arrived at was not proved on a balance of probabilities and therefore the same is not available. It is declined and dismissed.

Whether the court should grant a permanent injunction in favour of the plaintiff.

69. The plaintiff also sought A permanent injunctive order restraining the defendant/respondent, its officers, servants, agents including auctioneers, employees or any other person acting through or under its instructions from advertising for sale the plaintiff's charged property, selling, disposing off, transferring, alienating, auctioning, or in any other way interfering with or dealing with the plaintiff's ownership, title and possession of land parcel title number Kisumu Municipality Block 4/67.
70. An injunction is an equitable remedy and whoever seeks for this remedy must come to court with clean hands. It follows that where the plaintiff is shown to be guilty of conduct which does not meet the approval of the court of equity, then the Court will decline to grant the injunctive orders sought. This principle was restated by Odunga J in the case of *Jane Wambui Weru v Overseas Private Investment Corporation & 3 others* [2012] eKLR. In *Showind Industries v Guardian Bank Limited & another* [2002] 1 EA 284, Ringera J stated as follows:

“An injunction is granted very sparingly and only in exceptional circumstances such as where the applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the applicant's conduct does not meet the approval of court of equity or his equity has been defeated by laches”

71. A permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the *Civil Procedure Code, 2010* if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.



72. The plaintiff in his testimony conceded that there was default in the loan repayment and since this suit was filed, there is no evidence that the plaintiff has paid off the amount owing which is not in dispute from his side, less what he describes to be illegal and uncontractual interest.
73. It is an established principle of fact and law that whoever borrows money from another must be prepared to repay it. There is no justifiable ground for not repaying the loan advanced to the plaintiff by the defendant herein. It follows that granting a permanent injunction against the defendant would amount to cancelling the charge instrument and barring the defendant from recovering what is owed to it yet there is default by the plaintiff in the repayment.
74. In *Muhani & another v National Bank of Kenya Limited*, Civil case No 2280 of 1988 the Court held that:
- “An injunction will not issue to restrain a mortgagee from exercising his statutory power of sale merely because the amount is in dispute”, which principle was relied on in *Joseph Okoth Waudi v National Bank of Kenya*, Civil Application No 77 of 2004, where the court of appeal in dismissing an appeal quoted from *Halsbury’s Laws of England Vol. 32, 4th Edition page 752*, stated 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”
75. The plaintiff was under a duty to service the loan advanced to him in accordance with the loan instrument. In *Francis JK Icattha v Holding Finance Co Ltd*. Kenya 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”
76. Further the Court of appeal in the case of *Jay Super Power Cash and Carry Ltd v Nairobi City Council and 20 others* CA 111/200 held 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”.
77. In the instant case it is admitted by the plaintiff that he has defaulted on the loan advanced to him by the defendant it is common knowledge and sense that when one borrows money from another, that money will be paid back at a certain agreed time and terms.



78. In *Joseph Okoth Waudi v National Bank of Kenya*, Civil Application No 77 of 2004, the court of appeal in dismissing an appeal quoted from Halsbury's Laws of England Vol. 32, 4<sup>th</sup> Edition page 752, stated 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”

79. In the case of *Francis JK Icatba v Holding Finance Co Ltd*. Kenya HCCC No 414 of 2004 the honourable 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”

80. Therefore, on whether a permanent injunction can be granted in this case, restraining the defendant or its agents from selling the suit charged property, I find that the plaintiff has not demonstrated that he warrants the grant of an order of permanent injunction by this Court against the defendant. The prayer for permanent injunction therefore dismissed for want of merit.

81. On the issue of whether damages for defamation of character, loss of reputation and embarrassment are available to the plaintiff, the plaintiff asserted that the unlawful and wrongful newspaper advertisement of sale of his properties by the defendant through the auctioneers occasioned him loss of reputation and embarrassment. I have already found that the defendant's power of sale of the charged property had crystallised and I have given reasons for that finding. That being the case, the claim for damages for defamation is devoid of any merit and is hereby dismissed.

82. On what orders this court should make, I find that the plaintiff had not proved his case against the defendant on a balance of probabilities to warrant the grant of the orders sought. Accordingly, he is not entitled to any of the orders sought. The suit herein is therefore dismissed for want of merit.

On who should bear costs of the suit,

83. The issue of costs is in the discretion of the Court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party. This position was adopted by the court in *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* [2016] eKLR. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exist some other good reasons and or cause for not awarding costs to the successful party.

84. In this case, the plaintiff defaulted in the repayment of the facility advanced to him and instead of negotiating with the defendant on how to restructure and settle the same, he came to court to stop the defendant from realising the security offered. This suit has no doubt cost the defendant money and delayed its realization of the security. It is for this reason that I order that the suit herein is dismissed with costs to the defendant to be borne by the plaintiff.

85. I so order and save for the costs, this file is accordingly closed.



**DATED, SIGNED AND DELIVERED AT KISUMU THIS 26<sup>TH</sup> DAY OF APRIL, 2023**

**R.E. ABURILI**

**JUDGE**

