



**John O. Olouch t/a Trapezoid Constructors v Equity Bank Limited (Civil Suit 2 of 2021) [2023] KEHC 20986 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20986 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL SUIT 2 OF 2021  
JK SERGON, J  
JULY 31, 2023**

**BETWEEN**

**JOHN O. OLOUCH T/A TRAPEZOID CONSTRUCTORS ..... PLAINTIFF**

**AND**

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

**JUDGMENT**

1. The plaintiff moved to this court via a plaint dated October 16, 2020 which was further amended on November 27, 2020 for the following orders;
  - a. A declaration that the defendant's action against the plaintiff and withdrawal of money from account his account and putting him on the CRB List was in total breach of contract, amounts to fraud and that the plaintiff was wrongfully listed and that he be removed.
  - b. Exemplary damages for wrongful, arrest, detention and malicious prosecution.
  - (ba) The defendant be compelled to release and/or refund money held and/or withdrawn from fixed deposit accounts no. 0xxxxxxxxx5 together with the agreed interest of 8% pa from November 30, 2012 to date, 0xxxxxxxxx5 together with the agreed interest of 7.5% pa from July 21, 2012 till date and the balance after set off of the loan on the fixed deposit account no. 0xxxxxxxxx7 plus interest agreed at 7.5% pa from 21<sup>st</sup> February, 2012 to date, 0xxxxxxxxx4 fixed deposit account from the date it was opened till date plus 7.5% to the plaintiff.
  - (bb) The defendant be compelled to release proceeds from sale of the plaintiff's motor vehicle REG. NO. KAH 005W Toyota Hilux Pick-up according to its valuation before sale done by Indomitable Auctioneers on the 18<sup>th</sup> October, 2013 and the log books for motor vehicles KBP 952L & KAM 487P be released back to the plaintiff.
  - (bc) Exemplary damages for wrongful listing in the Credit Reference Bureau (CRB)



- (bd) A refund of the money deducted to repay the loan account which was never reflected in the year 2012 amounting to Kshs. 5,344,530/= with compound interest from 31<sup>st</sup> December, 2012 till repayment in full
  - (be) A refund of the money deducted to repay the loan account which was never reflected in the year 2013 amounting to Kshs. 2,678,432/= with compound interest from 25<sup>th</sup> May, 2013 till repayment in full
  - (bf) A refund of the money transferred and/or withdrawn from the plaintiff's account by the defendant without his authority or consent and without any justifiable cause between the year 2012 and 2013 amounting to Kshs. 13, 193,008.14/= with compound interest from March 21, 2013 till repayment in full
  - (bg) A refund of the plaintiff's money from the fixed deposit accounts' A/C No. 0xxxxxxxxxx5, A/C No.0xxxxxxxxxx4 and A/C No. 08 amounting to Kshs. 7,840,092.85/= with compound interest from November 30, 2012 till repayment in full
  - c. Costs of the suit and interest on prayer a, b, (ba), (bb) (bc), (bd), (be), (bg) and © at court rates
  - d. Any other relief that this honorable court deems fit and just.
2. By a further amended defence and counter claim dated January 20, 2019 and filed on the even date, the defendant stated inter-alia that *vide* an offer letter dated February 22, 2012, the Plaintiff agreed that in case he defaults on the loan repayment, the Kshs. 4,000,000/= in the fixed deposit amount would be used as a set-off for his arrears, upon the plaintiff falling into default, the said sum was used as a set off for his arrears and the balance was withdrawn by the plaintiff. In the circumstance of the foregoing, the defendant put a counterclaim of the sum of Kshs. 2,952,738.69/= being the amount of outstanding debt, the plaintiff chose not to reply to the counter claim and the same remains uncontested and or undefended.
  3. At the hearing, the plaintiff called a total of 2 witnesses and gave evidence by adopting his witness statement and produced a total of 23 exhibits in support of his case whereas the defendant called one witness and produced 9 exhibits to support their case.
  4. The plaintiff herein John O. Oluoch (PW.1) adopted his executed witness statement dated August 23, 2018 as evidence in chief and produced his list and bundle of documents P.Exh. 1-23 dated July 9, 2021.
  5. On cross examination, he confirmed that he had been served with the defendants list of documents, the topmost being a bank statement which contains a summary of all transactions reflected in his accounts and money received, deposited and withdraw to wit four (4) million deposited in the fixed deposit and the loan disbursement of three (3) million on March 30, 2012. The plaintiff confirmed that he was listed with CRB as a defaulter. The plaintiff further confirmed that he added 3 vehicles as chattels mortgage after he deposited 4 million in a fixed deposit account as security for the loan advanced, the 4 million was not sufficient. The chattels mortgage was registered with the Ministry of Lands, the bank took the motor vehicle logbooks, the chattels mortgage was perfected and motor vehicles registered in joint names. He confirmed that he was servicing the loan up to October, 2013, consequently, the bank repossessed and sold one of his vehicles.
  6. PW.1 stated that it was not true that he took the motor vehicles registered in the chattels mortgage and hid them, he however confirmed that he was arrested and subsequently charged in court under section 291 (1) and (2) of the [Penal Code](#) for disposal of motor vehicle registration number KBP 952L



- without consent of the mortgagee. The case terminated for lack of witnesses and he was subsequently discharged under section 87 of the *Criminal Procedure Code*.
7. PW. 1 confirmed that he had received a letter dated October 9, 2018 demanding Kshs. 2,953,738.69/=, however, he was adamant that he did not owe Equity Bank any money, even after being referred to the counter claim for the said amount, he reiterated that he did not owe the defendant bank any money.
  8. On re-examination, PW.1 stated that fixed deposit account no. 0xxxxxxxxx7 was used as a set off amounting to Kshs. 4 million and further that there is no where it was indicated that the proceeds of the sale of motor vehicle registration no. KAH 065W were used to repay the loan. PW.1 stated he was charged with disposing motor vehicle registration number KBP 952L, there was no evidence that he sold the vehicle, the vehicle was at his home and the time he was charged with disposing the vehicle, he was still servicing the loan. PW. 1 confirmed that the statement of accounts filed by the defendants, the one in his statement was the same and he took the same to his accountant. PW.1 confirmed that he was listed with CRB and further that he gave his 3 motor vehicles to the bank as security as part of the loan agreement. He maintained that the counter-claim was not true.
  9. Caroline Akinyi (PW.2) works at Mukholi Khauka John & Co as an accountant, her duties include book keeping, record keeping, accounting, auditing, filing of returns, income tax and VAT. She testified, that she prepared the audit report stamped on October 12, 2020 alongside her colleague John Mukholi a registered auditor. Their client was Trapezoid Contractors, the plaintiff herein and they audited the following account nos. 0xxxxxxxxx3, 0xxxxxxxxx5 and 0xxxxxxxxx7 from March 29, 2012 to November 16, 2013. She stated that she was given the loan agreement dated February 22, 2012 and statements for fixed deposit account no. 0xxxxxxxxx5. She confirmed that the audit was done in accordance with international standards. She summarized some of the findings in the audit report PExh-9 and concluded that there were copious amounts not captured in the loan statements, these amounts were deducted from the current accounts but not deducted from the loan statements. She stated that according to the findings in her report it shows that the plaintiff herein received five (5) loans from March 30, 2012 to August 29, 2012 all amounting to Kshs. 8,687,354/= and this was not possible.
  10. PW. 2 further summarized additional findings as follows; on April 24, 2012 there was a transfer of 1 million but it was not indicated where the money was transferred to, there were several withdrawals by cheque, which numbers were not indicated, the client herein did not benefit from the fixed accounts upon maturation and further that there were anomalies some of the accounts were not client accounts, some of the digits were less. PW.2 stated that according to the loan agreement the client was supposed to repay Kshs. 175,000/= for 2 years amounting to Kshs. 4,200,000/= but according to the accounts audited, the amounts were deducted from the client's current accounts.
  11. On cross examination, PW. 2 confirmed that she is not an auditor, she is an accountant working at an audit firm. She stated that in her audit report she relied on the statements supplied by their client, John O. Olouch, the owner of Trapezoid Contractors and further that she did not verify or seek explanations from Equity the defendant bank herein, yet the statements were prepared by Equity Bank. She confirmed that it was true that their client was listed on CRB. She stated that the firm prepared the audit report by reconciling the statement of accounts in both current accounts and loan accounts and further that the amounts deducted to repay the loans did not reflect in the loan amount. She confirmed that their client had informed them of the 4 million in the fixed account to be used as security to secure the loan facility but did not mention about the 3 vehicles registered as chattel mortgages.



12. On re-examination, PW. 2 stated that the statements audited were from Equity Bank, the defendant herein and were stamped by the said bank. She maintained that she was an accountant by profession but would go for fieldwork assignments to conduct audits.
13. Sydney Were (DW.1) a credit manager of Equity Bank Kericho Branch adopted his executed witness statement dated May 8, 2023 as evidence in chief and produced his list and bundle of documents P.Exh. 1-9 dated December 17, 2018.
14. On cross examination, DW.1 confirmed that Equity Bank gave the plaintiff a sum of Kshs.3 million and a fixed deposit account of Kshs.4 million used to secure the loan. He stated that the plaintiff defaulted and that there was a partial set off and the plaintiff withdrew balance of the money in fixed deposit account after the set off, however, DW.1 stated that he was not aware of the exact figure used to set off.
15. DW.1 stated that the fixed deposit account was liquidated against a loan of Kshs. 3,000,000/= on November 30, 2012 and another fixed deposit account opened. He further stated that 3 motor vehicles were given as security for other loans, the motor vehicles were in respect to the new and second loan of Kshs. 3.3 million. He stated that there was default on the part of the plaintiff, however, he could not tell the exact amounts. DW.1 stated KAH 005W was attached after notice was issued, the motor vehicles were valued, however, he did not produce the valuation report. DW. 1 confirmed that in an attempt to trace and repossess the cars registered in the chattels mortgage, the defendant bank made a complaint, the police acted on it, arrested and charged the plaintiff, the plaintiff was subsequently discharged. He maintained that the plaintiff applied for several loans, some being short term loans and he was granted the loans. DW. 1 conceded that the bank withdrew money from the plaintiffs account to the loan account and also from the fixed deposit account. He also stated that it was possible to be given another loan while another loan is outstanding so long as payments are ongoing. He also confirmed that the bank did not file a report in response to the plaintiff's auditor report.
16. On re-examination, DW.1 confirmed that the plaintiff was given 5 loans and that he was a building contractor and further that the bank continued to advance money since the plaintiff continued to repay and refused to advance further monies upon default. He confirmed that Indomitable Auctioneers advertised sale of motor vehicle and that the proclamation ran for seven (7) days before the sale of the said motor vehicle.
17. At the close of the hearing, this court called upon the parties this court gave directions to have the suit disposed of by written submissions.
18. The plaintiff conceded that he was listed as a defaulter by the defendant bank and the same was confirmed through the credit reference bureau report produced as PExh-11, in the said report the plaintiff was listed for having defaulted payment of 2 loans namely:
  - i. Loan account number 0xxxxxxxxxx7 opened on March 29, 2012 whose original amount was Kshs. 3,000,000 and
  - ii. (ii) Loan account number 0xxxxxxxxxx5 opened on August 29, 2012 whose original amount was Kshs. 3,300,000.
19. The plaintiff in his submissions maintained that he applied and received one loan of Kshs. 3,000,000/= being loan account number 0xxxxxxxxxx7, the loan was secured. He applied for the loan on February 22, 2012 but the same was never disbursed so he reapplied on March 9, 2012 upon which he signed a loan agreement dated March 27, 2012. He gave evidence that both the letter of offer dated February 22, 2012 and that of March 27, 2012 were in respect of the same loan, it being the only loan he applied



- for and gave his motor vehicles and fixed deposit account as security. The loan was then disbursed on the March 30, 2012.
20. The plaintiff contended that a loan can only be given to a client upon express instructions from the customer by way of application, upon which a letter of offer is given and then accepted. He reiterated that he only applied for one loan worth Kshs. 3,000,000/= which was disbursed on March 30, 2012, he produced PExh-1 & 2 as proof of the same.
  21. The plaintiff pointed out that the Auditors Report PExh-10 indicated that the plaintiff had received a total of 5 loans between March 30, 2012 and August 29, 2012 totaling to Kshs. 8,687,354/=. DW.1 also gave evidence that prior to March 30, 2012 the plaintiff was advanced a loan of Kshs. 3,000,000/=.
  22. The plaintiff was adamant that he only applied for one loan, that the defendant could not contend to offer any other loan to the plaintiff without him requesting for a facility, furthermore, no records of loan applications were availed.
  23. The plaintiff further contended that if he was defaulter as alleged by the defendant bank why he was given subsequent loan facilities. The plaintiff cited the case of *National Bank of Kenya Ltd v Isaac A. Ogettab* [1999] eKLR.
  24. The plaintiff submitted that save for the loan disbursed on March 30, 2012, there is no evidence that the subsequent loans advanced were done so at the behest of the plaintiff and furthermore he did not benefit from the said loans, they were either transferred to strange accounts and/or purported to have settled other loans or withdrawn with no evidence of a cheque number.
  25. The plaintiff contended that the defendant did not file any records or statement of account of the loan of Kshs. 3,300,000/= purported to have been issued on the August 29, 2012 for which the plaintiff is listed to have defaulted, nor did they avail any loan agreement on the terms and conditions of the loan and therefore the plaintiff urged the court in the absence of any records showing that the plaintiff had applied for any other subsequent facility other than the one for Kshs. 3,000,000/= disbursed on March 30, 2012 the court finds that he was only entitled to repay the loan disbursed on March 30, 2012.
  26. The plaintiff submitted that the defendant alleged that they used fixed account 0xxxxxxxxxx7 used to secure the loan listed February 22, 2012 PExh-1 and the balance of the same was withdrawn by the plaintiff, however, the plaintiff contended that the dates when this was done was not indicated, the amount used to set off not indicated and did not reflect on the loan amount.
  27. The plaintiff submitted that fixed deposit account no. 0xxxxxxxxxx7 was used as security as per the current account and matured on August 22, 2012, part of the money Kshs. 175,000/= used in repayment of a loan and Kshs. 4,000,000/= sent to a vacuum on the same date.
  28. The plaintiff contended that his motor vehicle was sold by the defendant but there is no record of where the monies were taken to, there was no valuation of the vehicle to determine the forced sale value or advertisement prior to sale of the same which made the whole auction unprocedural.
  29. The plaintiff contended that vide a letter dated October 9, 2018 PExh-15, the defendants admitted that they had used proceeds from fixed deposit account no. 0xxxxxxxxxx5 and 0xxxxxxxxxx5 to pay outstanding liabilities, the plaintiff contended that these accounts were never part of any securities against the loan borrowed by the plaintiff, the accounts held Kshs. 3,000,000/= and Kshs. 1,000,000 respectively.
  30. The plaintiff contended that the amounts claimed in the counter claim against the plaintiff were absurd after the defendant bank admitted to having deducted Kshs. 4,000,000/=, selling the plaintiff's motor vehicle and provided no proof of any other existing liabilities.



31. The plaintiff faulted the defendant bank for failing to adduce evidence showing where the monies held as security for the loan went and whether the same had been paid to the plaintiff.
32. The plaintiff contended that he cannot be said to be owing any balance to the defendant bank and that having held monies in the fixed deposit account as security and used two other fixed deposit accounts, they wrongly listed him as a defaulter and should therefore be compelled to release the logbooks held for the 2 remaining vehicles under chattels mortgage.
33. The plaintiff submitted that he suffered loss as a result of the CRB listing as a defaulter, he produced evidence that he lost business since he could not access any facility as a contractor he produced PExh. 19 & 20 as evidence of lost business, therefore, he submitted that he was entitled to general and exemplary damages for the loss he suffered as a result of the listing and proposed a global sum of Kshs. 6,000,000/= he cited the case of *Otieno-Omuga & Ouma Advocates v CFC Stanbic Bank Limited* [2015] eKLR.
34. The plaintiff submitted that he suffered wrongful arrest, detention and malicious prosecution on account of the defendant. The plaintiff submitted that he was arrested after the defendant reported that the plaintiff had disposed one of the vehicles under the chattels mortgage. The plaintiff was adamant that the complaint was made out of malice as it was not possible for the plaintiff to dispose the same since it was jointly registered and that the defendant held the logbook of the said vehicle. The plaintiff stated that when the criminal case came up for hearing the defendant did not show up to tender evidence hence the case was dismissed.
35. The plaintiff argued that since there was no evidence tendered to substantiate the complaint made by the defendant, the same remain a mere allegation, therefore, the plaintiff sought to be awarded Kshs. 3,000,000/= as general damages for malicious prosecution and detention and cited the case of *Daniel Mungai Karanja v Attorney General & Ano* [2018] eKLR
36. The plaintiff contended that he had the following fixed accounts with the defendant bank; 0xxxxxxxxxx5, 0xxxxxxxxxx5, 0xxxxxxxxxx5, 0xxxxxxxxxx4, 0xxxxxxxxxx8 and did not benefit from the said accounts after they matured, the monies in these accounts were used to settle outstanding liabilities and/or transferred to a vacuum, yet these accounts were not held as securities for the loan secured by the plaintiff, the plaintiff relied on P.Exh. 1, 15 & 10 in its submissions.
37. The plaintiff submitted that monies held in fixed deposit account no. 0xxxxxxxxxx7 as per P.Exh.- 4, used to secure the loan advanced were similarly transferred in a vacuum upon maturing on August 22, 2012. The plaintiff therefore reiterated that the defendant bank dealt with the plaintiff's account and monies in a manner that did not meet his legitimate expectation, the plaintiff therefore urged the court to issue a refund of the monies plus compound interest and cited the case of *Feroz Nuralji Hirji v Housing Finance of Jebya Ltd & Anor* [2015] eKLR
38. The plaintiff submitted that he did not withdraw monies in the fixed deposit account held as security for the loan borrowed, the fixed deposit account no. 0xxxxxxxxxx7 used as security as per the current account PExh-4 matured on August 22, 2012 part of the money Kshs. 175,000/= was used in repayment of a loan and Kshs. 4,000,000/= was transferred into a vacuum on the same date.
39. The plaintiff contended that it cannot be said to be owing the defendant bank any monies and as admitted by DW-1 a set off was done and balance withdrawn by the plaintiff. The defendant's counter-claim was therefore unmerited and ought to be dismissed with costs.
40. The plaintiff urged this court to allow the prayers in the 2<sup>nd</sup> further amended plaint with costs.



41. The defendant in its submissions conceded that the plaintiff was indeed listed in the Credit Referencing Bureau as a defaulter and submitted that the plaintiff was advanced with 5 loan facilities at his request as follows;
  - i. Kshs 3,000,000/= granted to the Pursuant to Letter of offer dated February 22, 2012;
  - ii. Kshs 3,000,000/= disbursed to the plaintiff A/C No.0xxxxxxxxxx7 on March 30, 2012;
  - iii. Kshs 1,500,000/= disbursed to the plaintiff A/C No.0xxxxxxxxxx3 on April 14, 2012;
  - iv. Kshs 630,000/= disbursed to the plaintiff A/C No.0xxxxxxxxxx3 on August 17, 2012 and
  - v. Kshs 3,300,000/= disbursed to the plaintiff A/C No.0xxxxxxxxxx3 on August 29, 2012.
42. The defendants stated that the plaintiff gave a fixed deposit sum of Kshs 4,000,000/= and logbooks of the three motor vehicles registration nos. KAH 005W, KBP 952L and KAM 487P to be used as security for the said loans.
43. The defendants submitted that along the way the plaintiff was behind the loan payment schedule and defaulted in his loan repayment for over 90 days and as result the defendant bank was entitled to refer the plaintiff to the Credit Reference Bureau (CRB) for listing on August 31, 2013.
44. The defendants in support of the above assertions produced bank statement of A/C Nos. 0xxxxxxxxxx5, 0xxxxxxxxxx7 and 0xxxxxxxxxx3 as defendant's exhibits No.1 which contains a summary of all the transactions as reflected in the plaintiff's accounts, loan amount disbursed, money received, deposited and withdrawn by the defendant and all the loan deductions.
45. The defendants contended that in light of the foregoing and the fact that their evidence was neither contradicted and/or controverted by the plaintiff, the defendant was justified in referring the plaintiff to Credit Reference Bureau for negative listing as loan defaulter.
46. The defendants contended that it is not in dispute that the plaintiff had given 3 motor vehicles, motor vehicles registration nos. KAH 005W, KBP 952L and KAM 487P as chattels mortgage to secure loan of Kshs. 3,000,000/=.
47. The defendants submitted that the plaintiff defaulted in the repayment of the said sum and this forced the defendant to give instructions to the Auctioneer to recover the said motor vehicles and as the efforts to trace them did not bear fruits, one vehicle KAH 005W was attached and auctioned recovering Kshs. 90,000/= but the two other vehicles which were in possession of the plaintiff could not be traced, the defendants reported the matter to the police, the police investigated the matter and made their independent decision to arrest the plaintiff. The defendant was merely a complainant.
48. The defendant argued that they should not be victimized for exercising their civic duty to report the infringement of proprietary rights to the police and cited the following authorities *Douglas Odhiambo Apel & Another v Telkom Kenya Limited* Civil Appeal No. 115 of 2006, *Catherine Wanjiku Kariuki v Attorney General and Another* [2011] eKLR in support of their assertions.
49. The defendant contended that there were several paragraphs in the plaintiff's counsel submissions which were made but were not based on evidence, the defendants identified paragraphs Nos. 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 32, 33, 34, 39, 40, 41, 42, 43, and 44. The defendant was of the considered view that the paragraphs highlighted were not based on any evidence and in the circumstances therefore urged the court to disregard them. The defendant cited the following authorities to fortify their case *Joseph Murangi & Another vs Beatrice Kainda Kaibiria* Civil Appeal No. 175 of 1996, in this case the



Judges of the Appeal comprised of Kwach, Pall and Owour, JJA on dealing with the issue delivered themselves as follows:

“Submissions cannot be substituted for evidence and submissions can only be based on evidence. And evidence must be adduced in accordance with section 107 of the *Evidence Act* (Cap 80).”

Similarly, in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* (2014) eKLR the Court of Appeal Judges comprising of Mwera, Musinga & Ouko JJA held as follows:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented...”

50. The defendant maintained that considering the contents of the bank statement produced together with the CRB Report plaintiff’s exhibit 3, the plaintiff was behind his loan repayment schedule to the tune of Kshs 2,952,738/= and further that the loan arrears afore-stated is the same amount the defendants demanded vide their letter dated October 9, 2018 which the defendant’s witness produced as defendant’s exhibit 4.
51. In the circumstances the defendant was adamant that they were justified in claiming the said sum of Kshs 2,952,738/= in the counter-claim, which has not been contested by the plaintiff. The defendant therefore urged the court to enter judgement for the defendant in terms of the counter-claim as provided under Order 7 Rule 14 of the *Civil Procedure Rules*, which provided as follows:-
- “where in any suit a set-off or counterclaim is established as a defence against the plaintiff’s claim, the court may, if the balance is in favour of the defendant give judgement for the defendant for such balance, or may otherwise adjudged to the defendant such relief as he may be entitled to upon the merits of the case”
52. The defendant maintained that it presented a more credible case than that of the plaintiff on a balance of probabilities and therefore urged the court to dismiss the plaintiff’s suit with costs and enter judgment in favour of the defendant as prayed in the counter-claim.
53. I have re-evaluated the arguments presented before this court. I have also considered the rival written submissions. The issues for determination put forward by both parties revolve around the following issues;
- i. Whether the plaintiff has proven its case against the defendant on a balance of probabilities
  - ii. Whether or not defendant was entitled to list the plaintiff with Credit Reference bureau (CRB) as a loan defaulter
  - iii. Whether prosecution of the plaintiff in *civil case no. 254 of 2016* was perpetuated by malice on the part of the defendant
  - iv. Reliefs
  - v. Whether the defendant is entitled to the Counter-claim of Kshs. 2,952,738.69/=.



54. I have considered the pleadings, oral and documentary evidence and submissions of both parties on the issue as to whether the plaintiff has proven its case against the defendant on a balance of probabilities, I find that the answer is in the negative. The plaintiff conceded to holding several current and loan accounts with the defendant bank herein. The plaintiff vide a letter of offer dated February 22, 2012 was granted with a loan facility of Kshs. 3,000,000/=, the purpose of the loan facility being construction of Nangina Hospital (Funyula), the said amount was to be repaid directly from the plaintiff's ordinary/current accounts within six (6) months, this facility was secured with Kshs. 4,000,000/= held in fixed deposit account no. 0xxxxxxxxx7. Subsequently, the plaintiff vide a loan agreement dated March 27, 2012 was granted another loan facility of Kshs. 3,000,000/=, the purpose of the said credit facility being working capital and liquidation of existing facility, the said amount was to be repaid directly through the plaintiff savings/current accounts by twentyfour (24) monthly installments comprising of both the principal amount and interest in the sum of Kshs. 175,000/=, the facility was secured through joint registration and chattels mortgage over motor vehicle registration nos. KAH 005W, KBP 952L and KAM 487P and chattels mortgage over household chattels and business assets to be executed in favour of the defendant bank. Further the proceeds for this loan were to be used to repay outstanding loan account no. 0xxxxxxxxx1.
55. It appears that the plaintiff went into default and as a result the defendant bank sought to exercise statutory remedies to recover the said amounts. DW 1 during examination in chief testified on the various attempts by the defendant bank to recover the sums advanced to the plaintiff. DW 1 testified that the defendant bank had at one point used some of the funds in the fixed deposit account no. 02xxxxxxxxx7 which was used to secure one of the loan facilities in question to set off the loan arrears and soon after the plaintiff withdrew the balance from the said fixed account.
56. After having established the plaintiff's indebtedness, I find that answer as to whether the defendant was entitled to list the plaintiff in Credit Referencing Bureau (CRB), the answer is in the affirmative, the plaintiff was listed as a defaulter in respect of two non performing accounts no. 0xxxxxxxxx7 and 0xxxxxxxxx5. Therefore, the plaintiff herein does not qualify for an award of exemplary damages in respect to the listing on the Credit Referencing Bureau.
57. I find that the defendant bank has also provided sufficient documentation on the attempts it made to recover the sums advanced to the plaintiff. The defendant bank vide a letter of instruction to Indomitable Auctioneers dated September 10, 2013 instructed the said auctioneers to repossess the three motor vehicles that were subject of the chattels mortgage as at the time the plaintiff was in default of Kshs. 4,100,000/=. The Auctioneers were able to repossess motor vehicle registration number KAH 005W which was subsequently sold off via public auction, the said vehicle fetched Kshs. 90,000/= and the auctioneers documented the events leading to the sale by public auction.
58. DW. 1 also testified that following the unsuccessful efforts by the defendant bank to repossess the other vehicles registered under the chattels mortgage, the defendant bank lodged a a complaint with the police. Therefore on the issue as to whether the arrest and subsequent arraignment of the plaintiff in court for charges under section 291 (1) and (2) of *Penal Code* CAP 63 for disposition of mortgaged property was malicious on the part of the defendant, I find that the answer is in the negative, the arrest and subsequent arraignment of the plaintiff were all in an effort to trace the vehicles registered under the chattels mortgage, I find that the defendants merely lodged a complaint with the police who investigated the matter and elected to charge the plaintiff. Therefore, the defendants cannot be faulted for prosecution in *civil suit no 256 of 2016* in which event the plaintiff was discharged under section 87 (a) of the *CPC*, in the circumstances I find that the plaintiff is therefore not entitled to damages for malicious prosecution.



59. The plaintiff instituted the instant suit, however, the plaintiff herein has not proven its case against the defendant on a balance of probability and/or proven that it is deserving of the reliefs sought. I find that the defendant bank has a plausible case. I have therefore considered the defendants counter-claim dated January 20, 2019, which was not contested. The plaintiff herein on cross examination conceded that he received the demand letter dated October 9, 2018 from the defendant bank claiming Kshs. 2,952,738.69/= which continues to attract interest and failed to defend the counter – claim dated January 20, 2019.
60. Accordingly, I find that the 2<sup>nd</sup> further amended plaint dated November 27, 2020 is without merit. It is hereby dismissed with costs to the Defendant.
61. The counter claim dated January 20, 2019 is allowed giving rise to issuance of the following award and or Orders:-
- i. The plaintiff is hereby ordered to pay a sum of Kshs. 2,952,738.69/= being the amount of outstanding debt in the counter claim dated January 20, 2019 with interest at court rates from the date of filing counter-claim.
  - ii. The Plaintiff to pay the Defendant costs of the Counter-Claim.

**DATED, SIGNED AND DELIVERED THIS 31ST DAY OF JULY, 2023**

.....

**J.K. SERGON**

**JUDGE**

In the presence of:

C/Assistant - Rutoh

Migiro for the Plaintiff

No Appearance for the Defendant

