



**Barclays Bank of Kenya v Agidza & 2 others (Commercial Case
3 of 2020) [2023] KEHC 26205 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE 3 OF 2020
RE ABURILI, J
NOVEMBER 27, 2023**

BETWEEN

BARCLAYS BANK OF KENYA PLAINTIFF

AND

ELIZABETH AGIDZA 1ST DEFENDANT

NATHAN ONDEGO MDEIZI 2ND DEFENDANT

ALFRED MDEIZI 3RD DEFENDANT

JUDGMENT

1. The plaintiff Barclays Bank Of Kenya instituted this suit vide a plaint dated 28th March 2012 and filed on the 5th April 2012 before the High Court at Nairobi vide HCC Milimani Law Courts Civil Case No. 206 of 2012. It emerged that the defendants herein had earlier on filed in this court a similar suit vide Kisumu High Court Civil Suit No. 61 of 2012. The Nairobi suit was struck out by Mabeya J for being sub judice on 28th September, 2012. Vide an application dated 15th November 2012, the plaintiff sought for setting aside of the order of striking out the suit and the reinstatement of the suit which application was dismissed but later, vide an order of 29/3/2017 the suit was reinstated and transferred to Kisumu High Court for hearing and determination hence these proceedings as opened on 17/6/2020 following an order of transfer made on 26th May, 2020.
2. The plaintiff prayed for judgment against the defendants jointly and severally and orders for:
 1. Kshs. 30,175,325.78;
 2. Interest on (1) above at 17.75% per annum from 30th September 2011 until payment in full; and
 3. Costs of the suits



3. It was the plaintiff's case that at all material times to this suit, the Plaintiff maintained a banker-customer relationship with Fanana Investments Limited (the 3rd Plaintiff in the counterclaim) (hereinafter "the Principal Borrower") and that the defendants herein are directors of the aforesaid Principal Borrower.
4. The plaintiff averred that by way of facility letters dated 24th April 2001 and 16th April 2002, the Plaintiff agreed to and did lend the sum of Kenya Shillings 7,362,000 and Kenya Shillings 9,272,700 respectively to the Principal Borrower Fanana Investments Limited.
5. The plaintiff further averred that it was a term of the said facility letters that the facilities advanced to the Principal Borrower would be secured inter alia by the Principal Borrower Directors' Guarantee and Indemnity for Kshs. 15,000,000 in respect of the Facility Letter dated 24th April 2001 and Kshs. 11,000,000 in respect of the Facility Letter dated 16th April 2002.
6. It was the plaintiff's case that under the terms of the said Guarantee and Indemnities, the Defendants as Guarantors unconditionally and irrevocably undertook to pay to the plaintiff, as primary obligor and not merely as surety, on demand, all monies due and discharge all obligations due or owing to the plaintiff by Fanana Investments Limited.
7. The plaintiff averred that it was also a term of the aforesaid facility letters that the financial facilities advanced to the Principal Borrower would be secured by legal charges over the properties known as Kanyamkago/Kawere II/1676, Suna East/Waswea 1/863 (owned by the Principal Borrower), Kisumu/Manyatta "A"/3085 Manyatta Estate (owned by the 2nd Defendant) and Kanyamkago/Kawere II/3080.
8. Additionally, the plaintiff averred that in line with terms of the aforesaid Letters of Offer dated 24th April 2001 and 16th April 2002, the Principal Borrower and the 2nd and 3rd Defendants duly executed legal charges over Kanyamkago/Kawere II/1676, Suna East/Waswea 1/863, Kisumu/Manyatta "A"/3085 Manyatta Estate and Kanyamkago/Kawere II/3080 as security for the facilities advanced to the Principal Borrower.
9. The plaintiff averred that as at 30th September 2011, Fanana Investments Limited was indebted to it to the sum of Kshs. 30,175,325.78, a sum that continued to accrue interest at the rate of 4% above the bank's variable base rate at the time and that despite demand, no payment was made by the defendants.
10. It was the plaintiff's case that through its Advocates on record, it duly served the Chargors of Kanyamkago/Kawere II/1676, Suna East/Waswea 1/863, Kisumu/Manyatta "A"/3085 Manyatta Estate and Kanyamkago/Kawere II/3080 with the 3 months' statutory notices, which notices were lawful and complied with all legal requirements and that the properties above mentioned were also duly valued prior to the sale.
11. The plaintiff further averred that it also served the Chargors of the above-mentioned properties with the 45 days' statutory notice and that subsequently, the auction on the sale of the suit properties was advertised leading up to the sale of the suit properties to third parties on the 26th November 2008.
12. The plaintiff averred that its power of sale having well and truly crystalized, it was entitled to sell the charged properties to recover the outstanding debt.
13. It was the plaintiff's case that out of the amount raised from the sale of the suit properties, of kshs 11,720,000, the sum of Kshs. 4,247,400.65 was used to offset the liabilities of Fanana Holdings Limited pursuant to the Corporate Guarantee issued by the Principal Borrower to Fanana Holdings Limited.
14. The plaintiff averred that the defendants expressed their willingness to be bound by the terms and conditions embodied in the Guarantees and Indemnities by duly executing the same.



15. The defendants filed a defence under protest dated... in which they denied all the averments and allegations levelled against them by the plaintiff and put the plaintiff to strict proof thereof.
16. In response, the defendants filed their amended defence and counterclaim dated 10th December 2022 and filed on the 13th January 2023.
17. In their defence, the defendants denied the allegations made by the plaintiff and went on to state that the sum total of all payments made by Fanana Investments Limited to the plaintiff were sufficient and exceeded any lawful liability arising from the legal charges or any lending agreement.
18. It was the defendants case that the claim as framed by the plaintiff was vague, imprecise and consisted of arbitrary math, unlawful and illegal levies, interest, charges and debit items included in the loan so as to render the claim unjustified and unconscionable in law.
19. In counterclaim against the plaintiff, the defendants admitted that they charged the suit properties to the plaintiff so as to secure the loan facility. It was their case that under terms contained in the plaintiff's letter to the second defendant dated 13th November 2003, the plaintiff varied the terms of the repayment of the aggregate applicable to the defendant's debt thereby allowing the defendants to make monthly payments of shillings hundred thousand per month with effect from 30th November 2003 in reduction of debt.
20. The defendants further averred that the second defendant duly paid the aforesaid installments from 30th November 2003 until January 2008 when civil unrest due to post election violence caused a severe disruption of the Business that was generating Fanana's income.
21. It was their case that in breach of section 39 of the *Banking Act*, and the contract of charge, the plaintiff arbitrarily increased interest applicable to the principal various facilities and further levied illegal penalties, charges, and debts items into the defendants' various accounts, thereby inflating and distorting the any of the defendants' liability to the Plaintiff.
22. The defendants averred that having paid to the plaintiff a total sum of Kshs. 14,030,860 as at 30th December 2007, they had actually paid over and above what was lawfully due and liable to the plaintiff under the law and had, prior to the sale of the charged property become entitled to the legal right of redemption of their respective rights, title and interest in the properties charged to the plaintiff while the plaintiff's right of sale had not arisen.
23. It was the defendants case that despite the 1st defendant's numerous demands for a detailed account explaining the total sums made available for use or paid on behalf of the defendants or any of them to the third parties, and the total sums of monies paid by the defendants or any of them into the credit of their respective accounts, as well as the total sum of debit items levied by the Bank by way of interest, lawful charges, and other items the plaintiff had to date not rendered such an account and that instead, and in breach of rights under the contract and the law, the plaintiff issued to the first and third plaintiffs a statement of account purporting that a sum of Kshs. 23,975,738.14 was due and payable from the defendants.
24. The 1st defendant averred that the plaintiff was in receipt of sums whose aggregate was far in excess of any and all liability that might have been due from any of the defendants as debtor or guarantor.
25. In response to the counterclaim vide a reply to amended defence and counterclaim dated 3rd February 2023 and filed on the 10th March 2023, the plaintiff averred that the same was ill-conceived, a non-starter, misplaced and a gross abuse of the court process as the same was statute barred.



26. It was the plaintiff's case that Fanana Investments Limited failed to repay the facilities advanced by it and as at 30th September 2011 was indebted to the plaintiff to a sum of Kshs. 30,175,325.78
27. The plaintiff further averred that the letter dated 13th November 2003 was issued on a without prejudice basis, was conditional and as such cannot be relied upon by the defendants as the terms therein were not met by the defendants.
28. In support of their case, the plaintiff called Joseph Muli who was the Corporate Recoveries Manager and who testified as PW1. PW1 adopted his witness statement filed on 17th May 2021 and the second on 18th April 2023 reiterating the plaintiff's case.
29. In cross-examination PW1 stated that Fanana Investment banked with the plaintiff from the 1990s and that the other 3 Defendants executed guarantees. He further stated that it was not contested that 4 charges were executed and 3 guarantees given which properties belonged to the Defendants. not produced a true account of the transaction between the bank and the defendants.
30. PW1 admitted that the plaintiff had not produced any evidence of it paying creditors of the 4th Defendant nor had they adduced any evidence of what the 4th Defendant repaid to the Bank.
31. PW1 further admitted that the plaintiff had not filed current statements showing the amount owed to it by the Defendants but however had evidence of loans advanced and interest accrued. He further stated that the liability in this court was created on 10th May 2001 for Kshs. 10,450,000 and further that Kshs 5 million was paid on behalf of Fanana Investment by Barclays Bank which sum was never repaid. PW1 testified that on 19/2/2001, the 4th Defendant paid Kshs. 138,900.
32. PW1 reiterated that there was consolidation of all outstanding loans into Kshs. 10,475,000 as per the offer letter and that no dispute had been raised over that consolidation. He further stated that applying the duplum rule, the plaintiff's claim would not be more than double the 10,475,000. PW1 stated that the plaintiff varied interest on many occasions as per Clause 5.3 of the offer letter and that the plaintiff gave notice of the same though it had not presented evidence of notification of variation of interest.
33. PW1 stated that the plaintiff sold one of the securities, a hotel of 100 beds, at 7.5 million on 26th November 2008. He further denied that the defendants paid 14 million before the security was sold. PW1 stated that the guarantee to Metro Cash & Carry was not a loan and further that they had presented no evidence but that they had paid to third parties on behalf of the 4th Defendant.
34. PW1 admitted that the plaintiff had not filed the instrument for transfer of the Kshs. 4,876,465.60 that moved the liability from Kshs. 4,837,102.55 to Kshs.10 million. He further stated that Fanana Investments Limited issued a corporate guarantee to Fanana Holdings Limited. PW1 further stated that they had not sued Fanana Holdings Limited and that the 2.930 million was meant to be for Fanana Investment Limited but mistakenly credited to Fanana Holdings Limited account.
35. In re-examination PW1 stated that the plaintiff did not file statements for prior to 10th May 2001 whereas the defendants filed the counterclaim on 10th December 2001 and amended on 27th July 2021. He further testified that the defendants were asking for documents/statements prior to the loan being advanced and over ten years prior to the filing of the counterclaim.
36. It was his testimony that the purpose of the facility was to refinance previous overdraft and loan facility which meant that the client had a prior loan which he was struggling to repay so they refinanced him to clear the loan with a term loan. He further testified that as at the time of filing this suit the outstanding amount owed by the defendants was Kshs. 30,175,325.78 as at 30th September 2011.



37. PW1 testified the interest rate charged was 4% above the base rate. He testified that it was an option to appoint the receiver but the plaintiff opted for the sale of securities.
38. In re-examination PW1 testified that as at 2nd December 2008, Fanana Holdings Limited owed Barclays Bank. He testified that the corporate Guarantee was by Fanana Investments undertaking to pay Barclays Bank debt owed by Fanana Holdings and that the proceeds of sale of property of Fanana Investments were applied to pay debt for Fanana Holdings.
39. PW1 testified that as at 2007, the effective principal amount was 18.2 million as the duplum rule was not in force. He testified that however, the facility principal amount as at 2001 was Kshs.10 million hence the duplum Rule had not been breached. He further testified that as at 30th September 2009 the debt was 20 million and in his new document, the debt due was 22 million. PW1 testified that there were entries which were missed out and the interest default rate had also not been included. He testified that the entry of 5th September 2009, the entry of 7.3 million was not relevant to the facility in issue and subject of this case.
40. PW2 Scholastica Wanjiru from Metrocosmo Limited Valuers adduced PEX12 being reports showing valuation of the suit properties as carried out by her firm.
41. In cross-examination PW2 stated that in their report there were no comparable or similar buildings but that they used cost and income approach. She stated that the report was done in 2008 but that she was not involved. It was her testimony that the reserved price was Kshs. 7.5 million whereas the insurable value was Kshs.12.5 million. PW2 stated that the hotel was sold at Kshs. 7.5 million. She stated that the report had no comparison for prior sale of similar property.
42. PW1 further stated that as at 30th September 2009, the amount owed to the plaintiff was shown in their exhibit No. 8 as Kshs. 20,357,103.04 whereas the principal sum was about 10 million. He stated that the duplum cap rule was not in force then. PW1 stated that between 15th December 2000 – 22nd January 2001 there were transactions on 8th January 2001 of Kshs. 4,876,465.60 and that as at 15th December 2000 the liability was Kshs. 4,837,102.55. He stated that the liability went up to 10 million.
43. In support of its case, the 2nd defendant testified as DW1. DW1 adopted his witness statement filed on 13th January 2023 as his evidence in chief as well as the bundle of documents filed on the same date. DW1 reiterated the averments in his amended defence and counterclaim dated 10th December 2022 and filed on the 13th January 2023.
44. DW1 further testified that the 1st Defendant Elizabeth was his wife while the 3rd defendant, Alfred Mdeizi was his younger brother and that Fanana Investment Limited is a family business. DW1 testified that he took an overdraft facility of Kshs.9, 916,244.050 and on 15th September 2000 they received loan on a loan account of 5 million. It was his testimony that on the 18th September 2000 the company paid Kshs. 5,093,375.20 and that the account was then closed but had credit of Kshs. 1,191,183.25.
45. DW1 reiterated that the loan disbursed to him was Kshs. 5 million. He testified that he paid Kshs. 14 million exclusive of the proceeds of sale of their properties and that the Plaintiff received another 11 million from sale of his property making it Kshs. 25 million against 5 million. He testified that he was claiming for wrongful sale of his property and wrongful overpayments to the plaintiff.
46. In cross-examination DW1 stated that he had brought his suit on behalf of Elizabeth and Alfred by way of counterclaim against the Bank. He further stated that the verifying affidavit must be on record. DW1 stated that he had informed the court that he was suing on behalf of Elizabeth and Alfred as he was the one who was running the business in which he was the principal debtor.



47. DW1 stated that a letter of offer was an intention to offer and that it did not demand that what was offered must be taken but that there must be evidence that the offer was utilized and further that statements from the Bank must prove that the money was advanced.
48. DW1 stated that in his counterclaim he sought for a true account of the transactions between us and the Plaintiff and that the Bank sent him the Bank Statement as was evident at page 101 of his bundle of documents. He further stated that he wanted the Plaintiff to show him an account showing the advancement of Kshs. 10,475,000.
49. DW1 stated that after signing the letter of offer, he protested by visiting the bank and speaking to them and that he subsequently filed suit in court in 2012. He further stated that he signed another letter of offer for a facility guarantee to cover cheques drawn in favour of Metro Cash and Carry Limited on 16th April 2002.
50. DW1 stated that he received the letter a demand letter dated 28th October 2003 demanding for Kshs. 9.2 million and responded saying that only Kshs. 2 million was owing, which he paid from the documents on record.
51. DW1 further stated that he did not know where the Bank took his credit balance of Kshs.1.191 million after closure of Account No. 792 but when shown page 102 of the spreadsheet showing a credit of Kshs. 1.191 million in the Account No. 4040, he stated that the spreadsheet was made up.
52. In re-examination DW1 testified that in respect of his counterclaim, he had filed a witness statement. He further stated that in all the correspondences from the Bank, they never addressed his wife or brother. It was his testimony that his first complaint was the excessive interest debited to increase the loan but not credited to the loan Account No. 351. He further testified that he was complaining about wrong entries in the spreadsheet and not its form.
53. DW2 Wilfred Abincha Onono testified that he filed a recalculation Report dated 11th May 2023, a second recalculation report and an interest comparison report which he produced as D. Exhibit No. 2, 3 and 4 respectively.
54. It was his testimony that he was querying the interest charges levied on the loan account for Fanana Investments from 10th May 2001 to 30th September 2022 on A/C No. 0091118351. He testified that his data sources were the statements of accounts by Barclays Bank. He further testified that he was querying the origin of Kshs. 10,474,000.
55. DW2 testified that on the 15th December 2000, the closing balance was Kshs. 4,846,210.55 which moved to Kshs. 10,028,175.05 on the 22nd January 2001, a period of 38 days. He testified that he discussed with the account holder who denied taking the over 5 million and as such there was an unexplained difference hence his conclusion.
56. On the question of interest, DW2 testified that he did interest recalculation applying the interest rates agreed and concluded that the interest charged was not accurate thus leading to his conclusion that there was an overcharge on the account.
57. On Account Management, DW2 testified that when the Bank transferred Kshs. 10,475,000 on 10th May 2001 from current account, the account ran to 8th April 2003 where the Bank credited Kshs. 218,230. He testified that the Bank only received the principal sum and debited but received interest and debited it directly to the current account instead of the interest showing in the loan account. He further testified that his ultimate conclusion was that the account was not managed properly and interest of Kshs. 40,060,958.71 was overcharged compared to the claim of Kshs. 30,175,325.78 as



at 30th September 2011 against the credit balance of Kshs. 9,885,632.93 and as such it followed that Barclays Bank owed Fanana Investments Kshs. 9,885,632.93.

58. DW2 testified that it was his opinion that as at the time Barclays Bank sold the security, the account balance was only Kshs. 891,787.73 as at 31st January 2009. He testified that Barclays Bank did not manage this account properly.
59. In cross-examination DW2 stated that there was no supporting document for Kshs.10,475,000 and that the party who signed the letter of offer did not get the money but rather that there was only a conversion of an overdraft facility to a loan account and no money disbursed to the customer as a loan.
60. DW2 stated that as at 10th May 2001 the account was overdrawn by Kshs.10,650,852.25. He reiterated that the Bank converted the monies already advanced to the customer over the years but no loan was advanced on 24th April 2001. He further stated that there was no evidence supporting the debits of Kshs. 5.8 million.
61. DW2 admitted that he created an entry for Kshs. 2,930,000 and that if the same was not included in his report, his accounts would have been different. He stated that the rate of interest was agreed and was being charged. He admitted further that he did not include default interest charged even though there was provision for default interest. DW2 admitted that if he had included default interest, his figures would have changed.
62. In re-examination DW2 stated that his data sources included statements supplied by BBK. He reiterated that the letter of offer was a conversion of an overdraft into a term loan. He further testified that in a normal case, they debit one's loan account and that he did not find any evidence of disbursement of the loan to the customer.
63. The parties filed submissions to augment their respective positions.

The Plaintiff's Submissions

64. It was submitted that that the Defendants filed a counterclaim against the Plaintiff but that the said counterclaim was not accompanied by a verifying Affidavit as required under Order 7 Rule 5(a) of the Civil Procedure Rules 2010 and that notwithstanding, no leave was sought to file a Verifying Affidavit to the counterclaim even after the parties closed their cases.
65. The plaintiff submitted that failure by the Defendant to file a verifying affidavit to the counterclaim vitiates the propriety of the counterclaim and is fatal and as such the counterclaim ought to be struck out with costs for violation of Order 4 Rule (1) (2) and Order 7 Rule 5(a) of the Civil Procedure Rules.
66. It was further submitted that none of the Defendants executed a verifying affidavit to confirm the correctness of the averments in the counterclaim and further that they did not give authority to any of them to swear a verifying affidavit as required under Order 1 rule 13 (2) of the Civil Procedure Rules 2010 as was held by the Court of Appeal in the case of Research International East Africa Limited v Julius Arisi & 213 Others [2007] eKLR.
67. The plaintiff submitted that in this matter, no authority was signed by either of the Defendants and the Principal borrower authorizing either of them to file the counterclaim on their behalf and as such the Defendants' counterclaim was fatally incompetent and required to be struck out with costs. Reliance was placed on the case of Savala & another v Ndanyi (Environment and Land Case Civil Suit 248 of 2021) [2022]



68. The Plaintiff's counsel submitted that as the Defendants' counterclaim was filed 6 years outside the timeline prescribed in law, this court could not grant the remedies or reliefs sought therein. Reliance was placed on Section 4 (1) of the *Limitation of Actions Act* that provided that causes of action based on contracts cannot be brought after the lapse of 6 years as was held by the Court of Appeal Gathoni v Kenya Co-Operative Creameries Ltd [1982] KLR 104, Potter, JA
69. It was submitted that in this matter, only the 2nd Defendant testified in support of their counterclaim and in defence of the suit filed by the Plaintiff and that during cross-examination, DW1 conceded that he had no authority to testify or bring the counterclaim on behalf of the 1st and 3rd Defendant or the principal debtor and further that no authority was filed by the Defendants in this regard therefore the failure by the 1st, 2nd Defendants and the Principal debtor to testify was fatal and rendered the evidence against them uncontroverted and therefore unchallenged and similarly the counterclaim, if any, failed on that basis.
70. The plaintiff relied on the cases of Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 and Shaneebal Limited v County Government of Machakos [2018] eKLR where it was held inter alia that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.
71. The plaintiff submitted that in the counterclaim filed by the Defendants, the Defendants sought that the Plaintiff renders a just and true account of the transactions between the Plaintiff and the Defendants from inception of any banking relationship to date however that amongst the Defendants, only the principal borrower was a customer of the Plaintiff and having failed to demonstrate that they were customers of the Plaintiff, the said relief was capable of performance and could not be granted as the said relief was only applicable to the principal borrower who was a customer of the Plaintiff and not to all the Defendants.
72. Further to the above, it was submitted that the relief could not apply to transaction prior to the execution of the Letter of Offer dated 24th April 2001 which was the substratum of the suit as the dispute finds its roots in the Letter of offer dated 24th April 2001 and the court cannot extrapolate the said dispute to period prior to the 24th April 2001 as the said transactions would fall outside the scope of the transaction documents subject of this suit and cannot therefore be the subject of disclosure by the Plaintiff.
73. It was submitted that with respect to payments of the aforesaid facility, the Defendants in their own documents produced statement of account number 1119404 which at 10th May 2001 showed a credit of Kshs. 10,475,000 which amount corresponded to the loan advanced to the principal borrower vide the letter of offer dated 24th April 2001 and further that in the revised statement of account produced by the Plaintiff as PExhibit 15, the Plaintiff duly took account of credits that had been omitted in the loan account 009/1118351 and thus despite the Defendants' prayer being statute barred, the same had been satisfied in full vide the documents presented by the Parties herein.
74. The plaintiff submitted that that this Court ought to disagree with the finding of the Defendant's Expert witness as the said expert admitted that he prepared his report based on incomplete statement of accounts and further that he admitted that he did not make any efforts to obtain the said sheet from the Bank to have a complete statement of accounts. It was submitted that an expert report prepared on incomplete statements was pure guesswork and the same ought to be disregarded. The Plaintiff relied on the decision of this court in Kenya Commercial Bank Limited v Rupa (K) Limited & 2 others



- [2014] eKLR where it was held inter alia that a person who comes to court to testify as an expert witness must be prepared to go to the full length to get evidence to prove that expertise.
75. It was further submitted that the inference to be drawn from the conduct of the expert herein was that he was biased and was being used as a gun for hire to assist the Defendants escape their obligations to the Plaintiff as was evident in his actions in admitting to inserting a credit of Kshs. 2,930,000 in account number 1119404 on 1st April 2009 without any basis whatsoever and further by his actions in zeroing the interest payment from May 2001 to July 2003 without any basis during which period the principal debtor failed to fund the account 1119404 from 30th January 2003 to 29th April 2003.
76. The plaintiff submitted that its right to exercise its statutory power of sale on 28th November 2008 had truly and lawfully accrued as fortified by the fact that the Defendants failed to tender any evidence that they were not indebted to the Plaintiff as at 28th November 2008.
77. It was submitted that having signed the Letter of offer dated 24th April 2001, the principal borrower was bound by the terms thereof. Reliance was placed on the cases of *Curtis v Chemical Cleaning & Dyeing Co. Ltd* [1951] ALL ER 631 and the Court of Appeal decision in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR where it was held inter alia that “where a party signs a contract, that signature is evidence of his assent to the whole contract, including exception clauses, unless the signature is shown to be obtained by fraud or misrepresentation.”
78. The plaintiff submitted that the belated attempt by the Defendants to query the origin of the loan of Kshs. 10,475,000 was further defeated by the fact that on 16th April 2002, the principal borrower executed a further letter of offer where it accepted a facility of Kshs. 8,472,000 to refinance previous overdraft and loan facilities and thus by the doctrine of contractual estoppel, the defendants were barred from questioning the existence of the debt of Kshs. 10,475,000 having signed the Letter of Offer dated 24th April 2001. Reliance was placed on the case of *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386.
79. It was submitted that the allegations by the defendants had paid the Plaintiff Kshs. 14,000,000 was not supported by any evidence and that at any rate, the sum of Kshs. 14,000,000 alleged to have been paid as at 30th December 2007, if at all paid, was incapable of fully settling a loan facility of Kshs. 10,475,000 issued in April 2001 plus interest where the principal borrower admitted having failed to service the loan and further that the same was inconsistent with the pleadings of the Defendants claiming that they are entitled to Kshs. 40,060,958.71 as alleged in the expert report when they admit having only paid Kshs. 14,000,000 as at 30th December 2007.
80. It was submitted that there has been no proof offered that the plaintiff breached section 39 or 44 of the *Banking Act* and in particular, the Defendants have not pointed out the outstanding balance due at the time the loan became non-performing or demonstrated that what the Plaintiff is now claiming from them was more than two times the amounts due when the loan became non-performing.
81. The plaintiff submitted that the Defendants have not demonstrated in any way that the sums claimed in the Plaintiff as clarified in the witness statement of Joseph Muli signed on 26th September 2023 are not due or that the debt claimed from the principal borrower has been paid in full

The Defendants’ Submissions

82. It was submitted that Under terms contained in the Plaintiff’s letter to the second Defendant dated the 13th November 2003, the plaintiff varied the terms of repayment of the aggregate applicable to the 4th defendants’ debt, thereby allowing the defendants to make monthly payments of shillings hundred thousand per month with effect from 30th November 2003 in reduction of debt which the second



- defendant duly paid from 30th November 2003 until January 2008 when civil unrest due to post election violence caused a severe disruption of the Business that was generating the 4th defendant's income.
83. The defendants submitted that in breach of section 39 of the *Banking Act*, and the contract of charge, the plaintiff arbitrarily increased interest applicable to the principal various facilities, the plaintiff's levied illegal penalties, charges, and debts items into the defendants' various accounts, thereby inflating and distorting the any of the defendants' liability to the Plaintiff.
 84. It was submitted that the item of Kshs. 800,000 was never a loan disbursed by BBK to FIL but an overdraft facility that enabled FIL to issue cheques to Metro Cash & Carry for discounting by its Bankers BBK and that any liability that arose in those transactions was settled by banking into the account of the defendant in the normal Business period. The defendants thus submitted that Barclays Bank owed the defendants a special claim of Kshs. 13,052,737.50 plus an amount to be added upon hearing together with damages calculated in the Court's discretion.
 85. The defendants submitted that having paid to the plaintiff a total sum of Kshs. 14,030,860 as at 30th December 2007 the defendants had actually paid over and above what was lawfully due and liable to the plaintiff under the law and had, prior to the sale of the charged property become entitled to the legal right of redemption of their respective rights title and interest in the properties charged to the plaintiff while the plaintiff's right of sale had not arisen.
 86. It was submitted that the charged properties were advertised for sale to take place on Wednesday 28th November 2008 during which time the Fanana Investment Limited (FIL) account with the bank stood at Ksh. 1,332,757.50 in credit and despite this, the bank went ahead and sold the debtors charged property for Kshs, 11,720, 000.00 therefore increasing the credit of the debtor to 13,052,737.50. It was submitted that the bank had no right to sell the charged properties of the debtors since the loan was fully paid
 87. The defendants submitted that the Bank Statements of account produced by the Plaintiff were unreliable, not cogent and were contradictory in respect of the principal sum disbursed by BBK to FIL, the effect of which was to render the accounts produced by the plaintiff inconsistent with the pleadings filed in court.
 88. The defendants submitted that from a Letter by Antique Auctioneers dated 19th September 2008, the plaintiff sought payment by the defendants of Kshs. 11,215,804 by FIL and its guarantors whereas the Banks Statements and Reconciliation Report clearly show that FIL had as at the 19th September 2008 paid an aggregate sum of shillings 14,000,000 to BBK prior to the sale of the charged properties and thus there was no basis why the plaintiff claimed anything from any of the defendants over and above Kshs. 11,215,804 when it had received an aggregate payment of Kshs. 14,000,000. It was further submitted that there was no basis for selling off and retaining for itself Kshs. 11,720,000 on 26th November 2008.
 89. The defendants submitted that the in duplum rule contained in Section 44A of the *Banking Act* was designed to apply in two situations; interest on non-performing loans from the date of the amendment of section 44 of the *Banking Act* and in respect of loans made before the introduction of section 44A, including loans that had become non-performing before that section came into operation and thus applied retrospectively.
 90. The defendant thus submitted that Court ought to find that the plaintiff's suit be dismissed and the defendants' counterclaim be allowed.



Analysis and Determination

91. I have carefully considered the pleadings and submissions filed herein by each party and I find the issues that arises for determination being: -
- a. Whether the Defendants' counterclaim was statute barred.
 - b. Whether the amended defence dated 10th December 2022 and filed on the 13th January 2023 was proper and in compliance with the provisions of Order 1 Rule 13 of the Civil Procedure Rule 2010.
 - c. Whether the defendants' counterclaim ought to be struck off.
 - d. Whether the plaintiff's case has merits.
92. On whether the defendants' counterclaim was statute barred, the plaintiff submitted that the Defendants' counterclaim was filed 6 years outside the timeline prescribed in law and as such this court could not grant the remedies or reliefs sought therein.
93. In the case of *Isaak Aliaza v Samuel Kisiavuki* (2021) eKLR, Court of Appeal, Nambuye J.A held that: -
- “I wish to reiterate that the position in law is therefore that a jurisdictional issue is a fundamental issue whether it is raised either by parties themselves or the Court suo motu, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter.”
94. The issue of limitation is a preliminary point which needs to be addressed first to determine whether or not the trial court had the requisite jurisdiction to hear and dispose of a suit.
95. In addition, the issue of jurisdiction can be raised at any stage by any party or even by the court suo moto. In this instance, the plaintiff did not raise the issue of limitation of time through a formal notice of preliminary objection but through its submissions, and this court is thus obliged to consider the objection raised.
96. Section 4 (1) (a) of the *Limitation of Actions Act* provides as follows in relation to actions based on contracts, tort and certain other actions: -
- “The following actions may not be brought after the end of six years from the date on which the cause of action accrued – actions founded on contract...”
97. As provided by Statute, actions relating to contracts can only be brought to court before the lapse of six years from the time which the cause of action accrued.
98. According to Black's Law Dictionary (10th Edition) the word “accrue” means “to come into existence as an enforceable claim or right.” Therefore, in interpreting the word accrued as per the Statute, the cause of action on breach of contract can only be brought at the time the actual breach occurred. This is when it can be said the time started running.



99. Courts have defined the period when the alleged breach is said to have occurred and/or accrued. In the case of *South Nyanza Sugar Company Limited v Dickson Aoro Owuor* (2019) eKLR the court held that;
- “...It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period.”
100. From the evidence herein, the Defendants in the counterclaim seek to recover sums alleged to have been unlawfully charged as interest and charges by the Plaintiff between 2001 and 2011 and further they also challenged the sale of their properties by the Plaintiff in the exercise of its statutory power of sale on 26th November 2008.
101. The interest and charges levied on the principal borrower’s account was regulated by the Letters of Offer dated 24th April 2001, Letter of Offer dated 16th April 2002 and the legal charges over the suit properties. It is thus ascertainable that the claims by the defendant were contractual in nature.
102. Accordingly, the defendants were by law required to file their claim within 6 years from 2008 and 2011 respectively when their causes of actions arose which period lapsed in 2014 and 2017 respectively. The defence which was under protest was first filed on 14th May, 2012 in Nairobi vide HCCCOM 206 of 2012. It was not until 16th August 2021 that the above defence was amended to include the counterclaim and the latter was further amended and filed in court on 13th January, 2023.
103. Obviously by 16th August 2021, six years had already lapsed since the defendants’ cause of action arose. Even assuming that the cause of action arose in 2008, the claim became stale by 2014. It follows that this court was deprived of the jurisdiction to hear and determine the counterclaim as filed.
104. In the Owners of the Motor Vessel “Lilian s” v Caltex Oil (K) Ltd (1989) KLR, Nyarangi J held:-
- “Where the court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given... Jurisdiction is everything. Without it, a court has no power to make one more step. Where the court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
105. Having found that the counterclaim was filed outside the limitation period, this court is devoid of jurisdiction and ought to down its tools in regards to the claims therein. The counterclaim is accordingly struck out for being statute barred.
106. The plaintiff also contended that none of the Defendants executed a verifying affidavit to confirm the correctness of the averments in the amended defence and counterclaim and further that they did not give authority to the 2nd defendant of them to swear a verifying affidavit as required by Order 1 Rule 13 of the Civil Procedure Rules.
107. The amended defence and counterclaim filed by and/or on behalf of the 1st and 3rd defendants herein relates to the three defendants. In this regard, it was expected that the amended defence under reference shall be verified by 3 Verifying Affidavits, each sworn by every individual defendant in accordance with Order 4 Rule 1(3) of the Civil Procedure Rules 2010. On the other hand, it was also possible to have the Verifying Affidavit sworn by one defendant, provided however that such defendant was duly authorized by the rest of the defendants in the matter.



108. Nevertheless, before a single defendant is authorized and/or mandated to swear the Verifying Affidavit on behalf of the other defendants, it is incumbent upon the remaining defendant, on whose behalf the Verifying Affidavit is being sworn to execute an authority, which must be in writing and duly signed. On the other hand, the written authority, executed by the rest of the defendants, in terms of the preceding paragraphs must be duly filed and/or lodged alongside the pleadings as per Order 1 Rule 13 (2) of the Civil Procedure Rule 2010.
109. It is necessary to reproduce the provisions of Order 1 Rule 13 (2) of the Civil Procedure Rule 2010, to appreciate and to understand the import and tenor thereof. For clarity, the provisions of Order 1 Rule 13 (2) of the Civil Procedure Rules 2010, are as hereunder: -
13. Appearance of one of several plaintiffs or defendants for others (Order 1, rule 13.)
- (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
 - (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.
110. Despite the clear provisions of the law, which have been alluded to herein before, the 1st and 3rd defendants did not execute and/or sign any authority to mandate the 2nd defendant to swear the Verifying Affidavit and/or otherwise act on their behalf. In my humble view, the failure to generate, execute and/or sign any such authority, either as required under the law or at all renders the amended defence and counterclaim herein, fatally incompetent. For clarity purposes, only the counterclaim is a suit within a suit requiring such verifying affidavit or authority to institute on behalf of the other defendants/ claimants. The defence and amendments to it in so far as it does not relate with the counterclaim is sustained.
111. The Honorable Court wishes to adopt and reiterate the decision in the case of Andrew Ileri Njeru - Embu Nyangi Ndiiri Proposed Society Chairman & others v Daniel Nganga Kangi & another [2015] eKLR, where the court observed as hereunder;
- “The Plaintiffs herein sue in their capacity as the representative of the proposed Nyangi Ndiiri Society members. The authority to sue signed by the members has not been annexed to the plaint as required by the law.”
112. To fortify the foregoing observation, I would reiterate and adopt the statement of the law as espoused in the decision in the case Research International Supra, where the Court of Appeal observed as hereunder: -
- “In our view, the true construction of rule 1 (2) of Order VII Civil Procedure Rules is that even in cases where there are numerous plaintiffs, each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them in writing, and, files such authority in the case, to file a verifying affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule.”



113. While in the case of *Abdulla Abshir & 38 Others v Yasmin Farah Mohamed* [2015] eKLR, the learned judge Mabeya J. when he was confronted with similar situation as is in the instant case he delivered himself at length, at paras 9 to 17, as follows;

“9. Before considering the application on merit, I think it is important to deal with the issue of lack of authority in filing the current suit is capable of disposing off the matter. Mr. Muragara, Learned Counsel for the Respondent submitted that the 1st Applicant having no authority of the other 38 Applicants to bring the current suit in the suit and the application are incompetent and the application should be dismissed on that ground alone. Ms Asli submitted that although no authority had been executed by the other Applicants, the 1st Applicant had sworn in the Verifying Affidavit that he had the authority of the other 38 Applicants to swear the Verifying Affidavit on their behalf.

10. Order 1 Rule 13 of the Civil Procedure Rules provides:-

“13. Where there are more Plaintiffs than one, any one
(1) or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more Defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.(2)The authority shall be in writing signed by the party giving it and shall be filed in the case.” (Emphasize added)

11. In *Chalicha Farmers Co-operative Society Limited – Versus - George Odhiambo & 9 others* (1987) eKLR, the Court of Appeal observed on representative suit thus:-

“This suit raises some points to be considered in law. The first is that when the summonses were served, only four entered appearances and filed defences. At the time of the hearing two of those who filed joint defences attended and participated in the hearing. One of those who neither entered appearance nor filed defence attended and participated in cross-examining the Plaintiff’s witnesses. Others never entered appearances or filed defences or attended the hearing. Their claim is that they had appointed the first Respondent, George Odhiambo, as their spokesman. The question is, is that the proper procedure? If George Odhiambo was to represent them then, either Order 1 Rule 8 or Rule 12 of the Civil Procedure Rules should have been followed. It was not proper in that respect and the trial judge should not have allowed George Odhiambo to represent and proceed with the suit as he did. The Trial judge in allowing the suit to proceed as a representative suit caused miscarriage of justice in that the suit should have proceeded on formal proof and judgment entered for the Plaintiff against those who did not enter appearance and/or filed defences, and against those who did not attend at the trial. George Odhiambo could not have been



allowed to represent other defendants without written authority.
This caused miscarriage of justice.”

12. From the foregoing, it is quite clear that a party in a proceeding cannot purport to appear, plead and act on behalf of others until and unless he is so authorized to do so in writing and the authority is filed in such a proceeding. To my mind therefore, a statement in an affidavit that one has the authority of the co-plaintiffs or co-defendants is not enough. Such an authority, properly signed by the party giving the authority, must be filed in the proceeding.
13. From the Chalicha Farmers case it would seem that lack of such an authority does not necessarily void the proceedings, what it does is to incapacitate the person purporting to represent his co-parties from so doing. The case by his co-parties remain unprosecuted. They have to appear themselves and prosecute the matter.
14. In the present case, it is not in dispute that the 1st Applicant did not get any authority from the 2nd to the 38th Applicant to represent, appear, act or plead on their behalf. There is no written authority signed by them and filed in court. Order 1 Rule 1(2) and (3) of the Civil Procedure Rules provides that:-(2)The Plaint shall be accompanied by an Affidavit sworn by the Plaintiff verifying the correctness of the averments contained in Rule 1(1) (f) above. (3)Where there are several plaintiffs, one of them, with written authority filed with the Verifying Affidavit, may swear the Verifying Affidavit on behalf of the others” (Emphasis mine)
15. From the foregoing, it is quite clear that a Plaint must or should be accompanied by a Verifying Affidavit. In this regard, the Plaint in this case as relates to the 2nd to the 39th Applicants is incompetent having been filed without authority. The Plaint in respect to their claim was never accompanied with any Verifying Affidavit. That incompetence however is not fatal. (Agricultural Finance Corporation & another – Versus - Drive-In Estate Development Limited (2006) eKLR.) The lack of a proper, valid or any Verifying Affidavit does not render a Plaint void, it only renders it voidable. This is so by virtue of Rule 1 (6) of Order 4 which provides that a Plaint that does not comply with, inter alia, sub-rules (3) and (4) may be struck out by the Court on its own motion or on application by any party. Since the 2nd to 39th Plaintiff can regularize the position by filing compliant Verifying Affidavits, and there being no application before me to strike out the Plaint, I will leave it intact and make no comment on it as regards the affected Plaintiffs.
16. Does the defectiveness of the Plaint as aforesaid, make the application incurably defective or incompetent. I do not think so while it may well be that the application as related the 38 affected Applicants is defective. It does not affect the position of the 1st and 5th Applicants. To that extent, I hold that the application as relates the 1st and 5th applicants competent as they properly swore the Affidavit in support thereof. The two are hereinafter referred to as “the applicants”.
17. On the other hand in paragraph 1 of the Supporting Affidavit the 1st Applicant states that he is authorized by the rest of the Applicants to swear the



Affidavit on their behalf. Whilst there is no requirement in applications that authority to swear Affidavits be in writing or be filed, I think that there having been no original authority signed and filed as relates the suit, that averment is not adequate and is of no consequence. It cannot save the position of the rest of the 37 Applicants who never swore any Affidavit in support of the application. Accordingly, their application is hereby struck out.”

114. Based on the foregoing authorities, it is my view that the defence and counterclaim alleged to have been filed by both the 1st and 3rd defendants vide their authority to the 2nd defendant are thus struck out. This does not mean that the entire defence and counterclaim pleaded is struck off as the 2nd defendant is still properly on record and put forth the said defence and counterclaim.

115. The plaintiff’s other contention was that the defendants amended defence and counterclaim are defective for being non-compliant with Order 4 Rule (1) (2) and Order 7 Rule 5 (a) of the Civil Procedure Rules of the Civil Procedure that is mandatory in nature and requires a Counter Claim to be accompanied by a verifying affidavit.

116. Order 4 Rule (1) (2) of the Civil Procedure Rules provides that: -

- “... The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying
- (2) the correctness of the averments contained in rule 1(1) (f) above.
- (6) the court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule”

117. Order 7 rule 5(a) of the Civil Procedure Rules provides as follows:

- “5. The defence and counter-claim filed under rule 1 and 2 shall be accompanied by –
- a) An affidavit under order 4 rule 1 (2) where there is a counter-claim.”

118. Therefore, the filing of the amended defence and counterclaim without a verifying affidavit renders them as being defective. However, it is my view, that the said defect is not fatal.

119. I agree with the finding in the case of *Jefitha Muchai Mwai v Peter Wangio Thuku* [2015] eKLR, where Justice Limo held: -

“...If a party inadvertently leaves out a verifying affidavit or any other document like a statement, he/she could be given a chance to file one and the matter can proceed for determination on merit. If the other party is affected by the attendant delay appropriate costs should adequately address the problem...”

120. While the rules of procedure are to be adhered to, the courts are encouraged not to be slaves to the said rules when faced with inadvertent transgressions and unintentional omissions by the parties. In the case of *Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani)* HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460, Ringera J (as he then was) stated that:

“...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair, orderly



and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue....”

121. As evidenced from the record herein, the suit before the trial court was already at an advanced stage, where parties have already given their respective evidence and judgement is pending. At this stage, the defendants cannot be granted leave to file the missing verifying affidavit as the same is an issue for determination in this judgement.
122. Further to the above, the plaintiff herein has not shown any prejudice that it has suffered or stands to suffer which cannot be remedied by an award of costs. I note that I have already struck off the counterclaim as the same as filed is statute barred. What remains for consideration is the amended defence.
123. In view of the above arguments it is evident that the ends of justice will be met if this court proceeds to consider the amended defence dated 10th December 2022 and filed on the 13th January 2023.
124. Turning to the plaintiff's claim, the plaintiff's suit against the defendants was for the amount outstanding from the Principal Borrower, Fanana Investment Limited and which was claimed from each of the Defendants jointly and severally as primary obligor totaling upto a sum of Kenya Shillings 30, 175, 325.78 as at 30th September 2011.
125. PW1 in his testimony before courts stated that as per his supplementary witness statement dated 26th September 2023, the debt due was Kshs. 22,237,798.50.
126. From the record, it is evident that by way of facility letters dated 24th April 2001 and 16th April 2002, the Plaintiff agreed to and did lend the sum of Kenya Shillings 7,362,000 and Kenya Shillings 9,272,700 respectively to Fanana Investment Limited, the Principal Borrower and that it a term of the said facility letters that the facilities advanced to the Principal Borrower would be secured inter alia by the Principal Borrower Directors' Guarantee and Indemnity for Kshs. 15,000,000 in respect of the Facility Letter dated 24th April 2001 and Kshs. 11,000,000 in respect of the Facility Letter dated 16th April 2002.
127. Under the terms of the said Guarantee and Indemnities, the Defendants as Guarantors unconditionally and irrevocably undertook to pay to the plaintiff, as primary obligor and further that the financial facilities advanced to the Principal Borrower would be secured by legal charges over the properties known as Kanyamkago/Kawere II/1676, Suna East/Waswea 1/863 (owned by the Principal Borrower), Kisumu/Manyatta "A"/3085 Manyatta Estate (owned by the 2nd Defendant) and Kanyamkago/Kawere II/3080.
128. In his defence, the 2nd defendant denied the allegations made by the plaintiff and went to state that the sum total of all payments made by Fanana Investments Limited to Barclays Bank Limited in the life of any overdraft or loan facility that might have been given was sufficient and exceeded any lawful liability under the contract.
129. In his testimony the 2nd defendant who testified as DW1 denied receiving any loan and stated that despite the Letter of Offer dated 24th April 2001 and 16th April 2002 he had not received any money or loan from the plaintiff. The same was corroborated by DW2, the expert witness called in support of the defendants' case.



130. On the issue of interest, the 2nd defendant testified that interest levied was haphazard, irregular and illegal and faulted the interest rates charged by the plaintiff whereas the plaintiff stated that the same were duly provided for in the contract between them as per Clause 5.3 of the offer letter and as such the defendants were bound by them and estopped from alleging otherwise.
131. The 2nd defendant also testified that the sums claimed by the plaintiffs were in breach of the in duplum rule. In response, the plaintiff submitted that there had been no proof offered that the plaintiff breached section 39 or 44 of the *Banking Act* and further that the defendants had not pointed out the outstanding balance due at the time the loan became non-performing nor had they demonstrated that what the Plaintiff was now claiming from them was more than two times the amounts due when the loan became non-performing.
132. I have considered the evidence laid before the court, it is clear that an overdraft of Kshs. 10,475,000 was advanced to the Principal borrower vide the letter of offer dated 24th April 2001 which the directors of the principal borrower admitted having signed willingly. The same was corroborated by the 2nd defendant who admitted signing the Letters of Offer as well as his own witness, DW2 who stated that as at 10th May 2001 the account was overdrawn by Kshs. 10,650,852.25 and that the plaintiff Bank converted the monies already advanced to the customer over the years to a loan.
133. 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 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.”
134. The Court in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR, after reviewing case law on the subject 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.”
135. The defendants herein willingly entered into contract with the plaintiff vide the Letters of Offer dated 24th April 2001 and 16th April 2002 which they duly signed contrary to the testimony by DW1 that the said letters were mere offers.
136. The defendants alleged that the interest charged by the plaintiff were haphazard, irregular and illegal and faulted, however, the interest rates applicable in the contract were duly provided for in the contract between them as per Clause 5.3 of the offer letter which even went further to prescribe the interest rates in case of default.
137. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the *Evidence Act* provide as follows:

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- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
138. The defendants failed to adduce any evidence to prove their contentions that the interest charged were irregular and illegal but to the contrary, evidence adduced by the plaintiff showed that the interest rates applicable in the contract were aptly provided therein.
139. Turning to the expert testimony of DW2, he testified that the defendants’ account was managed poorly, and further queried the interest charges levied on the loan account stating that he did interest recalculation applying the interest rates agreed and concluded that the interest charged was not accurate thus leading to his conclusion that there was an overcharge on the account.
140. The plaintiff faulted DW2’s testimony saying that he was biased and thus the court ought to disregard any evidence adduced by him.
141. An expert witness though invited by a party, owes a duty to the court to present expert evidence in a professional, an independent, objective and non - biased beyond reproach manner. The expert witness is expected by court to provide a well - informed and balanced opinion on his area of expertise and not become an advocate or take sides with the opposing parties in the matter, but rather state the facts and assumptions upon which his opinion is based. (see the case of Saadiya Sheikh Muhiddin & another v Nessen Salim Karama & another [2022] eKLR)
142. Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence and the circumstances of the case including the real likelihood of the expert witness having been compromised or the real possibility of such witnesses using their expertise to mislead the court by placing undue advantage to the party in whose favour they offer the evidence. The court must be alert to such realities and act with caution while analyzing such evidence.
143. In the case of Christopher Ndaru Kagina v Esther Mbandi Kagina & another [2016] eKLR, Mativo J, as he then was, discussed the factors which the court may take into account in determining the reliability of expert opinion, include:-
- a. the extent and quality of the data on which the expert’s opinion is based, and the validity of the methods by which they were obtained;
 - b. if the expert’s opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);
 - c. if the expert’s opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;
 - d. the extent to which any material upon which the expert’s opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material;



- e. the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise;
 - f. the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);
 - g. if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained; and
 - h. whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.
144. Mativo J went on to state that in addition, in considering reliability, and especially the reliability of expert evidence, the court should be astute to identify potential flaws in such opinion which detract from its reliability, such as:-
- a. being based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing), or which has failed to stand up to scrutiny;
 - b. being based on an unjustifiable assumption;
 - c. being based on flawed data;
 - d. relying on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case; or
 - e. relying on an inference or conclusion which has not been properly reached.
145. I have considered the evidence tendered by DW2 and the report prepared by the said witness and I am persuaded that the said evidence is not build on a sub-strum of facts which are proved to the satisfaction of the court according to the appropriate standard of proof. DW2 in his own testimony testified and admitted that he created his own entry for Kshs. 2,930,000 and that if the same was not included in his report, his accounts would have been different. He stated that the rate of interest agreed between the parties was being charged but still went on to find that a wrong interest had been charged. He admitted further that he did not include default interest charged even though there was provision for default interest and that if he had included default interest, his figures would have changed.
146. Accordingly, I find that evidence adduced by DW2 had no evidential or probative value.
147. Finally turning to the question of whether the plaintiff's claim against the defendants was in violation of the in duplum rule, the plaintiff's case against the defendants was for recovery of Kshs. 30,175,325.78. PW1 testified and clarified that as at 30th September 2009, Fanana Investment Limited owed it Kshs. 22,237,798.50.
148. The plaintiff averred that by way of facility letters dated 24th April 2001 and 16th April 2002, the Plaintiff agreed to and did lend the sum of Kenya Shillings 7,362,000 and Kenya Shillings 9,272,700 respectively to the Principal Borrower and PW1 testified that there was consolidation of all outstanding loans into Kshs. 10,475,000 as per the offer letter and that no dispute had been raised over that consolidation which amount continued to attract interest as per Clause 5.3 of the Letter of Offer.
149. Section 44 A of the *Banking Act* Cap 488 of the Laws of Kenya necessarily comes into play to limit the amount that the Plaintiff can recover with respect to a non-performing loan. Section 44 A states: -



- (1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under Subsection 2.
 - (2) The maximum amount referred to in subsection (1) is the sum of the following: -
 - a. the principal owing when the loan becomes non-performing.
 - b. interests in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and
 - c. expenses incurred in the recovery of any amount owed by the debtor.
 - (6) This Section shall apply with respect to loans made before this Section comes into operation, including loans that have become non-performing before this Section comes into operation:-
 Provided that where loans become non-performing before this Section comes into operation, the maximum amount referred to in subsection (1) shall be the following: -
 - d. the principal and interest owing on the day the Section comes into operation; and
 - e. interest in accordance with the contract between the debtor and the institution, accruing after the day this Section comes into operation, not exceeding the principal and interests owing on the day, this Section comes into operation.
 - f. expenses incurred in the recovery of any amount owed by the debtor
150. In the instant case, if all outstanding loans due from the defendants were consolidated to amount to Kshs. 10,475,000 meaning that the interest accrued of Kshs. 11,762,798.50 amounted to 52% of all the monies owed which did not exceed the principal and interests owing on the day, this Section comes into operation and thus the debt pursued by the plaintiff complied with Section 44A of the Banking Act.
151. In the end, I find and hold that the plaintiff has established its case against the defendants on a balance of probabilities. I enter judgment for the plaintiff against the defendants jointly and severally for a sum of Kshs. 22,237,798.50 together with costs of the suit. Interest is at 13.75% of the facility amount plus 4.0% above the Bank's variable base rate making it 17.75% on the awarded sum, to accrue from date of filing suit until payment in full at court rates.
152. The plaintiff shall have costs of the suit. I make no order as to costs of the counterclaim which was filed outside the statutory limitation period thereby depriving this court of jurisdiction to hear and determine it on merit.
153. I so order

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF NOVEMBER, 2023

R.E. ABURILI

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JUDGE

