Achieng v Co-operative Bank of Kenya (Commercial Case E001 of 2021)
[2022] KEHC 12115 (KLR) (17 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12115 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

COMMERCIAL CASE E001 OF 2021

RE ABURILI, J

AUGUST 17, 2022

BETWEEN

EUNICE RAHEL ACHIENG ..... PLAINTIFF

AND

CO-OPERATIVE BANK OF KENYA ..... DEFENDANT

JUDGMENT

1. The plaintiff is Eunice Rahel Achieng. Vide a plaint dated September 23, 2021, she seeks against the defendant Cooperative Bank of Kenya, the following reliefs:

    a. An order of permanent injunction do issue restraining the defendant whether by itself, its employees, servants and all such persons acting on its behalf from advertising for sale, selling whether by public auction or private treaty, transferring, letting, charging, alienating or otherwise howsoever interfering with the plaintiff's land parcel known as LR No South Sakwa/barkowino/6162 and her guarantor's land parcels known as LR No South Sakwa/barkowino/2668, LR No South Sakwa/barkowino/2674 and LR No South Sakwa/nyawita/3039.

    b. An order compelling the defendant to render accounts and give statements to the plaintiff showing how the sum claimed by the defendant in respect of the plaintiff's debt at the defendant's branch in Bondo has been accruing.

    c. An order do issue that an independent valuer to ascertain its current market value of land parcels known as LR No. South Sakwa/barkowino/6162, LR No South Sakwa/barkowino/2668, LR No South Sakwa/barkowino/2674 and LR No South Sakwa/nyawita/3039.

    d. Costs and interest of the suit.

2. The defendant filed its statement of defence dated January 17, 2022 and further adopted the contents of its affidavits sworn on the October 15, 2021 by Lillian Owino, all denying the plaintiff's claim.

3. The matter proceeded to hearing on the May 30, 2022 with each party calling one witness before closing their cases.

The Plaintiff's Case

4. The plaintiff adopted her witness statement as her testimony and admitted that she took a loan of Kshs 18,000,000 from the defendant which loan was secured by four properties. It was her testimony that one of the properties, LR No South Sakwa/barkowino/6162 belonged to her while the rest, LR No South Sakwa/barkowino/2668, LR No South Sakwa/barkowino/2674 and LR No South Sakwa/nyawita/3039 belonged to her deceased husband, Gerald Ndolo who was her guarantor. The plaintiff produced copies of the title deeds to the said properties as PEx 1.

5. It was the plaintiff's case that the loan was for a period of 3 years from October 7, 2016 when the loan was disbursed and that in February 2017, her distributorship contract with Equator Bottlers Limited, which she relied on to service the loan, was unfairly terminated and that she had since been making payments to service the loan from her earnings as well as with help from the guarantor which she stopped after the onset of the Covid pandemic which constrained her business as well as the death of her guarantor on the June 17, 2021.

6. The plaintiff testified that she wrote to the defendant seeking to have the loan restructured and extended but her letters were ignored and that the defendant proceeded to advertise the property charged as security for sell so as to offset the loan. She testified that she was also not served with a statutory notice according to the law.

7. The plaintiff testified that the loan facility had an interest rate of 14% but the same was not reflective in the loan statement that she was given which showed an interest rate higher than 14%.

8. In cross-examination, the plaintiff admitted that indeed she had a loan agreement with the defendant and that she read through the terms of the said agreement and understood the terms. She further testified that she was to repay the loan in 36 monthly instalments, 3 years after the loan had been disbursed to her on October 7, 2016. The plaintiff further admitted in cross-examination that as at 2022, the time for repayment had lapsed but stated that she was paying the installments until her distributorship contract was terminated on February 4, 2017 after which she informed the bank.

9. It was the plaintiff's case that on February 15, 2021, she wrote to the defendant to restructure her loan. She stated that after the termination of her distributorship contract, she could pay any amount that she got and that she also took the letter to the bank to show them that her main business contract was terminated. She admitted that she did not pay her loan as per the contract because of the challenges that she faced.

10. The plaintiff stated that she had told the court that she was not served with statutory Notices. She admitted that her registered postal address was 56, Bondo as provided in her loan agreement with the Bank. She further stated that she received a letter for sale dated March 5, 2021 from the Bank and that on the August 27, 2021, she received another letter for sale with the bank informing her that she was in arrears of Kshs 21,169,389.68.

11. The plaintiff further stated that the security for the loans was 4 parcels of land out of which only Parcel No South Sakwa/Barkowino/6162 was in her name with the other three being in the name of her guarantor, her late husband. It was her testimony that she filed suit because her husband had died and

there was no administrator of his estate. She stated that the letter dated August 27, 2021 was addressed to the administrator of the estate of the deceased guarantor of which she was a widow. She stated that to date, she had not taken out any grant of letters of administration of administration and that during the period, she had not been repaying the loan. It was her testimony in cross-examination that the bank was asking for higher interest than the one they agreed upon.

12. In re-examination, the plaintiff stated that the reason for her default was because of termination of contract for her main business. She admitted that from the documents she had produced in court as exhibits, it was clear that she received Notification of sale of her property. She further stated that she was aware that there was no administrator for the estate of her late husband.

The Defendant's Case

13. The defendant adopted the contents of its affidavit sworn on October 15, 2021 by Lilian Owino as its testimony. DW1 Lilian Owino testified that the plaintiff took a loan in 2016 in the sum of Kshs 18 million to be repaid in 36 months at Kshs 500,000 per month and that the current status of the loan account was that it was in default amounting to Kshs 21,418,884.64, the principal sum being Kshs 15,528,496.62.

14. She further testified that the plaintiff gave security of land parcels LR No South Sakwa/ Barkowino/6162 registered in the name of Eunice Achieng Ndolo and 3 other securities registered in the name of Gilbert Ndolo Owuor, the plaintiff's guarantor. It was her testimony that when the loanee defaulted, they issued her with a demand Notice on March 5, 2021 via postal address, then the second notice was issued on August 27, 2021 and picked by the loanee from their Bondo Branch of the Bank with the plaintiff signing the dispatch and collecting the letter.

15. DW1 testified that later, they issued notices for sale. It was her testimony that on the allegation of illegal interest charged, the interest was 14% per annum on reducing balance and that when the plaintiff defaulted, there were penalty interests charged on the loan account which had accrued from the date of default to the present date.

16. In cross-examination, DW1 stated that after September 15, 2021, they started initiating the process of realizing the security but that they served statutory notices from March 5, 2021. It was her testimony that as at September 15, 2021, the outstanding loan was Kshs 21,418,884.64. She further reiterated that the loan was disbursed on the November 7, 2016 and that it was to be settled in monthly repayment of Kshs 500,000 per month with the 1st installment being made in November 2016.

17. DW1 stated that the bank was to debit from the plaintiff's account into the loan repayment account whenever the money was found in her account. She stated that the customer started defaulting although the witness could not tell when the default began. She further stated that this was not the first loan that the bank had advanced to the Plaintiff and that the plaintiff had previously cleared a loan facility advanced to her.

18. DW1 stated in cross-examination that on the August 27, 2021, they gave the plaintiff two notices, one addressed to the administrator of the guarantor's estate and another to the plaintiff. She further stated that the loanee was called to the banks' branch to pick the 2 last notices of August 27, 2021 as the earlier notices were send to her via registered postal address.

19. DW1 further told the court that the plaintiff notified the bank of the death of the guarantor but that the bank had not received any document showing that the plaintiff was an administrator of the estate of the deceased guarantor. She stated that the Bank normally restructures the loans with loanees.

20. In re-examination, DW1 stated that the plaintiff was sent 2 letters, one dated March 5, 2021 by registered post and two on August 24, 2021. She further stated that the bank also sent her demand letters with the first two letters being statutory notices. It was her testimony that the plaintiff visited the bank and notified them that she was the wife to the guarantor who had died and she picked the 2 notices of August 27, 2022.

The Plaintiff's Submissions

21. It was submitted that the notice issued to the administrator of the estate of the guarantor by the defendant was invalid as there was no administrator to the deceased's estate and that the defendant ought to have issued the deceased's dependents with a citation to compel them take out letters of administration.

22. It was further submitted that the plaintiff was never served with the statutory notices as required by law and that this failure to comply with the law by the defendant was fatal to the defendant's exercise of its statutory power of sale. Reliance was placed on the cases of *Elizabeth Wambui Njuguna v Housing Finance Cooperative of Kenya Limited* [2006] eKLR and *Trust Bank Limited v Eros Chemist Limited and another* [2000] eKLR. It was further submitted that the plaintiff was not given her equity of redemption over her property.

23. The plaintiff's counsel submitted that the defendant failed to discharge its duty of care under section 97 (1) of the *Land Act* that mandated it to obtain the best price at the time of sale and further that the defendant never carried out valuation as required by law under section 97 (2).

24. It was submitted that there were a lot of discrepancies as to how the loan interest was being calculated and that as a result of the discrepancies, the accounts ought to be taken afresh. It was further submitted on behalf of the plaintiff that a party ought not to mutate or alter the terms of a contract unilaterally to the detriment of the other party to the contract as was held in the case of *Francis Joseph Kamau v Housing Finance Company of Kenya Limited* [2014] eKLR.

25. The plaintiff further submitted that the court had powers under order 21 rule 17 of the *Civil Procedure Rules 2010* to provide for taking of accounts.

The Defendant's Submissions

26. On behalf of the defendant, it was submitted that it had demonstrated by evidence that evidence before court that the first notice which was the 3 months' notice was served on the plaintiff vide the defendant's letter dated March 5, 2021 and as required by section 90 of the *Land Act, 2012* and through the plaintiff's postal address.

27. The defendant further submitted that it was trite that parties are bound by their contracts and thus a court of law could not rewrite said contract as was held by the Court of Appeal in the case of *Kenya Bureau of Standards v Geo Chem Middle East* [2019] eKLR.

28. It was submitted that the 2nd statutory notice of forty days as per sections 96(2) of the *Land Act* was served upon the plaintiff and that she received the same as was indicated by her signature thereon and thus there was no contention and therefore the plaintiff could not ask for a permanent injunction restraining the defendant bank from exercising its power of sale over her property No South Sakwa/barkowino/6162. The defendant further submitted that the plaintiff's actions were obviously calculated to frustrate the defendant from exercising its power of sale. The defendant submitted that the court could not issue a permanent injunction restraining the defendant from exercising its power of sale on the plaintiff's guarantor indefinitely.

29. As to whether the defendant levied unlawful and excessive interest in computing the amount to be paid by the plaintiff, it was submitted that the plaintiff had not adduced any evidence to prove this allegation. The defendant submitted that the courts had a duty to interpret the contracts as the parties were bound by the terms of the contract. Reliance was placed on the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR*.

30. The defendant submitted that as to whether the court could issue an independent valuer to ascertain the current market value of the suit parcels of land, the plaintiff could only seek for valuation on her own property, ie LR No South Sakwa/barkowino/6162.

Analysis and Determination

31. I have considered the pleadings by both parties, their oral testimonies, the submissions filed before this court as well as the issues for determination framed by both parties' counsel and find the following issues falling for determination:

    i. Whether the defendant issued notices for sale of the securities to the plaintiff;

    ii. Whether the court should issue and order the defendant to render accounts as to how the claimed sum accrued;

    iii. Whether the court should order for an independent valuation of the said securities to ascertain their current market value;

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

    v. What orders should this court make?

    vi. Who should bear the costs of the suit?

    Whether the defendants issued notices for sale of the securities to the Plaintiff

32. Section 90(1) of the *Land Act, 2012* provides that:

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

33. On the other hand, section 96(1) of the same *Act* provides that:

> " Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land."

34. In this case, there was no question as to the plaintiff's default as she conceded in her testimony that she was in default of the loan agreement entered into between her and the defendant and that consequently, she was served with the first notice which was the 3 months' notice vide the defendant's letter dated 5/3/2021 as required by section 90 of the *Land Act* 2012. The defendants further contended in evidence and this was not controverted by the plaintiff that the second notice of sale was issued on 27/8/2021 and picked by the loanee from their Bondo Branch with the plaintiff signing the dispatch and collecting the letter.

35. Accordingly, I find and hold that the defendant complied with the provisions of section 90 of the *Land Act* in regard to the property owned by the plaintiff, this being, LR No South Sakwa/barkowino/6162 by issuing a valid statutory notice following the default by the plaintiff.

36. The question is whether the defendant complied with section 90 in regard to the other securities provided by the plaintiff that belonged to her guarantor, Gilbert Ndolo Owuor, who has since passed on, and there is no dispute about his demise. It is evident from the pleadings that the plaintiff was the deceased's wife and she admitted that she had not taken out letters of administration in respect of her husband/guarantor's estate.

37. The Court of Appeal was confronted with the question of whether the bank could issue a notice on a person who was not an administrator of the estate of a deceased loanee and had this to say in the recent case of *Marteve Guest House Limited v Daniel Muiruri Njenga, Paul Kagunda Njenga, Standard Chartered Bank of Kenya Ltd and Joseph Wachira Njuguna Njenga* Civil Appeal No 400 of 2018 decided on April 28, 2022:

> " In the case of Kenya Commercial Bank Limited v Pamela Akinyi Ochieng Civil Appeal No 114 of 1991 and Obel Omuom v Kenya Commercial Bank Limited [1996] eKLR this Court was explicit, *inter alia*, that compliance with the prerequisites with regard to service of the notice on to the "chargor" is mandatory and noncompliance with this prerequisite renders the entire process undertaken by the chargee to realize the security invalid.
>
> It is a common position on record that the bank did not move to exercise its statutory power of sale during the lifetime of the deceased. That is why documents informing the said process were served on the "estate of the deceased", represented by the 1st and 2nd respondents before they were appointed administrators of the estate of the deceased on August 2, 2011.
>
> I have construed section 74(3) & (4) of the Registered Land Act (now repealed) pursuant to which the bank exercised its statutory power of sale. I find nothing therein to suggest that the bank was not obligated to comply with the provisions of the *Law of Succession Act* cap 160 laws of Kenya (LSA) in circumstances where the exercise of that power is undertaken after the death of the chargor. The thread of argument running cumulatively through the bank's defence of the 1st and 2nd respondents claim against it is that the suit property having been charged to the bank and not discharged by the deceased as at the time of her death, the same was not free property subject to the *Law of Succession Act* procedures.
>
> By free property as defined in the LSA is meant the property of which the deceased person was legally and competent to freely dispose of the same during his/her lifetime and in respect of which his/her interest has not been terminated by his/her death. I have once more construed section
>
> 77(3) and (4) of the RLA and find nothing therein to suggest that the right of redemption became extinct upon the death of the deceased. The above being my view, I find and hold that the deceased's right of redemption in the circumstances of this appeal did not become extinct upon the death of the deceased. It therefore devolved to the personal representatives. That is why the LSA does not donate power to the "estate of a deceased person" to deal with property forming that deceased person's estate, and instead donates that power to an administrator with a will or a personal representative to the intestate estate of a deceased person to deal with a deceased person's property after the death of such a deceased person.
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> Section 45(1) of the *Law of Succession Act* is explicit that dealings with a deceased person's property is only permissible to the extend provided for by the provisions of the said *Act*.

Among these is provision that only persons holding a grant of representation to a deceased person's estate have mandate to transact any business with regard to such property and to the extend provided for in section 82 of the *Act* on powers donated to a personal representative.

I am alive to the fact that the bank has however taken refuge in the invocation and application of the doctrine of estoppel arguing that since the 1st and 2nd respondents held themselves out to the bank as duly authorized administrators of the estate of the deceased and obtained a waiver of interest on the amount outstanding to the tune of Kshs2,000,000.00 and, secondly, having the auction then scheduled for July 14, 2011 rescheduled, they are estopped from challenging the manner in which the bank exercised its statutory power of sale of the suit property.

In the case of 748 Air Services Limited v Theuri Munyi [2017] eKLR this court when similarly confronted, reviewed both local and foreign jurisprudence on instances in which the doctrine of estoppel applies and set out guidelines which I find prudent to distill, *inter alia*, as follows: estoppel usually goes hand in hand with waiver. The commonest of these are estoppel by conduct and estoppel by election or waiver; waiver is intentionally relinquishing of a right or privilege; the primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. It is either express or implied from the conduct.

In the case of Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Ltd [2007] eKLR, this court stated thus:

> "A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right." In Seascapes Limited v Development Finance Company of Kenya Limited [2009] eKLR, this court was explicit that:
>
> > "The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same right having known of its existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what was implied by a previous action or statement of that person or by a previous pertinent judicial determination." See also Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR in which this Court expressed itself thus: "The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence."
>
> The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. …."

I have applied the above threshold to the bank's assertion that the doctrine of estoppel operates in its favour to defeat the 1st and 2nd respondents claim against it. It is my position that in the absence of the bank demonstrating that the chargor's right of redemption became extinct upon her death, nor existence of any other provision of law other than the LSA Procedures under which the bank could have moved to exercise its statutory power of sale

> after the death of the deceased who was the chargor coupled with lack of explanation on the part of the bank as to why it directed Leakeys Auctioneers to serve the "estate of the deceased" leaves no doubt in my mind that in this appeal the bank was obligated in law to invoke the process for the exercise of its statutory power of sale within the remit of the procedures provided for in the LSA.
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> Secondly, I find nothing in the guiding principles distilled above on invocation and application of both the doctrine of estoppel and waiver to suggest that these override clear provisions of law. It therefore mattered not that the 1st and 2nd respondents held themselves out to the bank as duly authorized administrators with mandate to act on behalf of the estate of the deceased when they were not. That conduct on their part cannot be sanctioned to oust the operation of clear provisions of law with a view to sanitizing the flawed process vitiated by the trial judge."

38. I have cited the above Court of Appeal decision at length because of its relevance to the instant suit with regard to the question under consideration. It is also worth repeating here some of the findings in the above case that there is nothing in section 90 of the *Land Act* to suggest that the defendant Bank in the instant case was not obligated to comply with the provisions of the *Law of Succession Act* cap 160 laws of Kenya (LSA) in circumstances where the exercise of that power is undertaken after the death of the loanee's guarantor.

39. The deceased's suit property was charged to the bank and had not been discharged by the plaintiff or the deceased as at the time of his death. For that reason, that property or properties were not free property subject to the *Law of Succession Act* and processes. Free property as defined in the *Law of Succession Act* means the property of which the deceased person was legally and competently free to dispose of the same during his/her lifetime and in respect of which his/her interest has not been terminated by his/her death.

40. I further note that there is nothing in the *Land Act* to suggest that the right of redemption became extinct upon the death of the deceased guarantor. However, that right of redemption devolved to the personal representatives of the estate of the deceased of which the plaintiff was one. However, the *Law of Succession Act* does not donate power to the "estate of a deceased person" to deal with property forming that deceased person's estate, and instead donates that power to an administrator with a will or a personal representative to the intestate estate of a deceased person to deal with a deceased person's property after the death of such a deceased person."

41. Section 45(1) of the *Law of Succession Act* is clear that dealings with a deceased person's property is only permissible to the extend provided for by the provisions of the said Act. Among these is the provision that only persons holding a grant of representation to a deceased person's estate have the mandate to transact any business with regard to such property and to the extend provided for in section 82 of the *Act* on powers donated to a personal representative.

42. As observed above, the plaintiff who was the deceased's widow had not as at the time of the hearing of this case taken out letters of administration over the deceased's estate and as such she could not act as a personal representative of the deceased in regard to the defendant's act of complying with section 90 of the *Land Act* in terms of service of the statutory notice of sale. This is despite the defendant's argument that the plaintiff had failed to take out letters of administration so as to frustrate the defendant's exercise of the right to recover their debt.

43. Rule 22(1) of the *Probate and Administration Rules, 1980* provides that:

> " A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto."

44. In this case, I find that the defendant ought to have filed a citation to compel the plaintiff to take out letters of administration over the deceased's estate so as to enable the defendant serve proper notice on the deceased's estate in relation to the property provided as security specifically LR No South Sakwa/ Barkowino/2668, LR No South Sakwa/barkowino/2674 and LR No South Sakwa/Nyawita/3039.

45. I therefore find that in regard to the aforementioned properties, the defendant Bank was obligated in law to invoke the process for the exercise of its statutory power of sale within the premises of the procedures provided for under the *Law of Succession Act*.

46. Accordingly, I find and hold that only the notice of sale regarding LR No South Sakwa/ barkowino/6162 was valid and in accordance with the law.

Whether The Court Should Issue And Order For The Defendant To Render Accounts As To How The Claimed Sum Accrued

47. It was the plaintiff's case and assertion that the court ought to order the defendant to render an account as to how the claimed sum accrued as the defendant imposed excessive, unreasonable, punitive and unconscionable and unjustified interest rates that they had not agreed upon.

48. On their part, the defendants contended that the interest rates applied to the loan balances were contractual having been expressly agreed upon in writing between the parties in the loan agreement.

49. The defendant further relied on clause 6.5 of the terms and conditions of the letter of offer and acceptance executed by the parties in which they expressly agreed that in the event of any dispute on the nature of statement of accounts, the statement by the defendant shall be deemed conclusive unless the plaintiff shows evidence of any manifest error in the same and that in this case, the plaintiff had shown no error.

50. The issue as to whether the concept of levying default/penalty interest is part of the bank's trade usage and custom in Kenya is a fairly well beaten path. There are two schools of thought. One holds that it is and the case of *National Bank of Kenya Limited v Beth Ngonyo Ngengi & another* [2012] eKLR is relevant where the court stated that:

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

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

> " Can it therefore be said that a practice in which the banks unilaterally decide to load the customer's account with penalties at their own discretion whose rates are only known to the

bank is such a certain practice that it can be said to amount to trade usage? In my view that would amount to stretching the word "certain" too far. For one to say that the penalty is certain not only ought there be certainty as to the levy of the interest but since the rate is not contained in any contractual document, the rate also must be certain and must be known in the market otherwise such levying of interest would violate the provisions of article 46(1) (b) of the *Constitution*. To argue otherwise would in my view open an avenue in which the right of redemption may easily be clogged or fettered. I would apply the same reasoning to the case of *Maithya v Housing Finance Co of Kenya and another* [2003] 1 EA 133 and the other decisions which in any case are not binding on this court".

52. I am in agreement with Odunga, J in the case of *Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Ltd* (*supra*) where the learned judge opined at paragraph 66 that:

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

53. From the above decision, it is clear that if a bank seeks to impose certain charges or interest, then it must make that intention clear in the contract it enters with the customer. There must be clarity on what the charges and interest are and how they are to be imposed.

54. That being said, it is an established principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the courts to rewrite such contracts. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* (2002) 2 EA 503, [2001] eKLR the Court of Appeal at page 507 stated as follows:

> " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

55. In *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017) eKLR the Court of Appeal further stated that:

> " We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."

56. Similarly, in this case, the court cannot be called upon by one party to vary the terms of the contract specifically clause 6.5 of the terms and conditions of the letter of offer and acceptance which stipulates in clear terms that in the event of any dispute on the nature of statement of accounts, the statement by the defendant shall be deemed conclusive unless the plaintiff shows evidence of any manifest error in the same. The plaintiff must show such error. In this case, the plaintiff has not shown any such error on the part of the defendant other than to allege that the calculations are wrong. The law is clear

that he who alleges must prove the allegation. In the absence of proof that the defendant made errors in its calculation of interest and penalties accruing on the outstanding loan which was defaulted by the plaintiff, I find that the plaintiff's allegation is unfounded. It is not lost to this court that where there is default in the loan repayment, the defendant charges penalties. If the plaintiff believed that the calculations by the defendant were wrong, nothing prevented her from engaging an accountant to carry out a reconciliation of her accounts and compare the same with the statement given to her by the defendant.

57. I therefore decline the plaintiff's prayer to order the defendant to render an account and give statements showing how the accrued sum was arrived at.

> Whether the court should issue an order for an independent valuer to ascertain the current market value of the suit parcels of land give as security for the outstanding loan facility

58. Under section 97(2) of the *Land Act*, the Act obliges a chargee to have ensured that a forced sale valuation is undertaken by a valuer before exercising the right of sale. The said provision provides that:

> "A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer."

59. Dealing with the said section Gikonyo, J in *Koileken Ole Kipolonka Orumoi v Mellech Engineering & Construction Limited & 2 others* [2018] eKLR held that:

> "...the forced sale valuation is not only for purposes of carrying through the public auction or solely for recovering the debt, but reinforces the rights of the charger to have reasonable value for his property. That is why the duty under section 97(2) of the *Land Act* is statutory and obligatory. It is not left to the whims of the charge and its agents especially the auctioneers."

60. In the instant case, the defendant has not reached the point at which it is required to have the said properties valued which stage occurs after issuing notices of sale and prior to instruction of the auctioneers to advertise the sale of the said properties.

61. In the circumstances, I find that the plaintiff jumped the gun in seeking an order that an independent valuer do value the suit properties. For that reason, the order sought is not merited.

Whether The Court Should Grant A Permanent Injunction In Favour Of The Plaintiff

62. To resolve this issue, it is significant to appreciate the significant distinction between the prohibitory injunction as envisaged in the "locus classicus" case of *Giella v Cassman Brown*, 1973 EA page 358 and a mandatory injunction. In *Shepard Homes v Sandham* (1970) 3 WLR pg 356 case" Megarry, J stated follows:

> "Whereas a prohibitory injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials. If it is ultimately established that the defendant was entitled to retain the erection".

63. A permanent injunction fully determines the right of the parties before the court and is normally meant to perpetually restrain the doing of an act by the defendant in order for the rights of the plaintiff to be protected. This court has the powers to grant the permanent injunction under sections 1A, 3 & 3 A

of the *Civil Procedure Act* if it is satisfied that the right of a party has been infringed, violated and/or threatened to be violated as the court cannot just seat, wait and watch under the given circumstances.

64. The circumstances under which the court would grant a mandatory injunction was well stated out by the Court of Appeal in the case of *Malier Unissa Karim v Edward Oluoch Odumbe* [2015] eKLR as follows:

> " The test for granting a mandatory injunction is different from that enunciated in the "Giella v Cassman Brown case which is the locus classicus case of prohibitory Injunctions. The threshold in mandatory is higher than the case of prohibitory Injunction and the Court of Appeal in the case of Kenya Breweries Ltd Washington Okeyo (2002) EA 109 had the occasion to discuss and consider the principles that govern the grant of a mandatory Injunction was correctly stated in Vol 24 Halsbury Laws of England 4th edition paragraph 948 which states as follows:
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> > "A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, it the case is clear and one which the court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application".

65. Further the same Court of Appeal in the case of *Jay Super Power Cash and Carry Ltd v Nairobi City Council and 20 others* CA 111/200 held that:

> " This court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it".

66. In the instant case, it is admitted by the plaintiff that she has defaulted on the loan advanced to her by the defendant and from her own testimony, although she requests the court to intervene and urge the defendant to vary the terms of the said loan, this court, as earlier stated, cannot delve into a contract agreed upon by two parties and vary it at the instance of one party, in the absence of any evidence of fraud, mistake, misrepresentationetc. It is common knowledge and sense that when one borrows money from another, that money will be paid back at a certain agreed time and on terms as agreed between the parties. This court did implore the parties hereto to attempt a negotiated settlement and the defendant even testified that they normally reschedule loans where there is a default. That opportunity is still available to the plaintiff to approach the defendant Bank for rescheduling of the loan as defaulted. However, the court cannot compel the defendant to give the plaintiff any favourable terms that are not mutually agreed between the two parties.

67. In *Joseph Okoth Waudi v National Bank of Kenya*, Civil Application No 77 of 2004, the court of appeal in dismissing an appeal cited Halsbury's Laws of England Vol 32, 4th Edition page 752 and stated that:

> " It is trite law that the court will not restrain a mortgagee from exercising its power of sale merely because the amount due is in dispute or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained however, if the mortgagor pays the amount claimed in court,

that is, the amount which the mortgagee claims to be due to it unless on the terms of the mortgage, the claim is excessive"

68. In the case of *Francis JK Icatha v Holding Finance Co Ltd* Kenya HCCC No 414 of 2004 the honourable court held that

> " A plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his own wrong, for the plaintiff seeks this court to protect him from the consequences of his own default. He who seeks equity must do equity. The plaintiff should not be protected or given advantage by virtue of his own refusal to make payments to the defendant/respondent a debt which he expressly undertook to pay"

69. The plaintiff herein having defaulted to repay the loan and her reasons for the default not being attributed to the fault of the defendant, this court cannot grant her a permanent injunction to restrain the defendant from realizing the security for the loan advanced to the plaintiff. In the circumstances, I am not persuaded that the plaintiff warrants a grant of the orders sought of permanent injunction. The prayer for a permanent injunction is accordingly declined.

70. In the end, other than the subsidiary issue touching on securities whose proprietor is dead and there being no administrator of his estate, therefore the notices issued in respect of the said titles are found to be invalid, I find and hold that the plaintiff has not established her case on a balance of probabilities that she was not served with a valid statutory notice; or that she is deserving of an order for an independent valuation of the properties given as security for the loan facility; or that the defendant should be ordered to render accounts on how the loan balance was arrived at; or that she is entitled to a permanent injunction. Her claim in respect of all these prayers is hereby declined and dismissed.

71. On costs, as the substantial part of the security for the loan advanced is part of an unadministered estate of a deceased guarantor and for which no valid notice can issue until an administrator is appointed to receive such notice, I order that each party bear their own costs of this suit. Decree to issue forthwith.

72. This file is closed. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 17TH DAY OF AUGUST, 2022

RE ABURILI

JUDGE