REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 12 OF 2020

CAROL CONSTRUCTION ENGINEERS LIMITED

JEREMIAH MWEBI MAYIEKA..........PLAINTIFFS

VERSUS

NATIONAL BANK OF KENYA.........DEFENDANT

JUDGMENT

1. The elemental facts of the case, most of which are not contested by the parties, are found in a ruling for interlocutory injunction dated 11/06/2020. They are as follows.

2. The Plaintiffs are long term customers of the Defendant. The 2nd Plaintiff testified that he has banked with the Defendant for at least fourty (40) years. The Plaintiffs applied for, and were approved for an overdraft facility from the Defendant sometime in 2008.The facility was secured with land parcel Nakuru/Municipality Block 2/58 (the "Suit Property") as collateral.

3. The Plaintiffs defaulted in servicing the loan facility. In a letter dated 18/03/2013 (produced as Plaintiffs' Exhibit 4), the 1st Plaintiff acknowledged the default and proposed that it will service the loan by paying all the rents collected from a project it was near completing. The project was a complex of rental units. The 1st Plaintiff stated in the letter that it expected that the rents collected will be "in the region of Kshs. 600,000/- per month".

4. By a letter dated 21/03/2013 (produced as Plaintiffs' Exhibit 3), the Defendant stated that the amount then due was Kshs. 3,518,308.70 from the loan advanced to the 1st Plaintiff. This letter by the Defendant was in response to one by the 1st Plaintiff dated 18/03/2013 conceding that it had defaulted on the terms of the overdraft facility and proposing to service the loan after a grace period of 60 days to enable it to complete construction of the housing project.

5. In its response dated 21/03/2013, the Defendant agreed to accommodate the Plaintiffs in the following terms:

> ....[W]e have reconsidered your proposal to resume repayment of your overdraft after 60 days from the date of your letter and have exceptionally accepted it in order to give you time to complete construction of your buildings in Kenlands area which you claim are almost complete.
>
> You are hereby required, therefore, to make your first depost of Kshs. 600,000/- on or before 20th May, 2013 and by every 20th day of every subsequent month until your loan is fully cleared.
>
> Kindly note that any default in payment of the above amount shall leave the Bank with no other option but to commence the process of sale of the security property held through public auction at your costs and consequences in order to clear the debt in our books.

6. Upon receipt of the letter dated 21/03/2017, the 1st Plaintiff wrote a letter dated 30/03/2013. It was produced as Plaintiffs' Exhibit 5. It read as follows:

> We refer to your agreement letter ref. MJT/IGG/ADV/46/223 dated 21st March, 2013 and out telephone conversation and confirm that deposits to the Bank shall be all as per rent collections (sic) as agreed, until the above amount is fully paid. The Kshs. 600,000/- per month shall be when (sic) the 40 No. flats are fully let.

7. The parties are in agreement that the Plaintiffs, thereafter, proceeded to service the loan by paying all the amounts which had been

indicated as due in the letter by the Defendant dated 21/03/2013. Indeed, in October, 2017, a provisional statement dated 14/10/2017 issued by the Defendant and produced as Plaintiffs' Exhibit 6 showed the account had a credit of Kshs. 10,000/-.

8. The parties also agree that on 31/10/2017, the Defendant posted an item it described as "Main Interest" in the sum of Kshs. 3,112,045.87 into the account as a debit. It is this sum which is the basis of the dispute herein. The Plaintiff insists that this charge is fraudulent and illegal since the Defendant had promised both by word and conduct not to charge any more interests after it wrote its letter of "accommodation" dated 21/03/2013 provided that the Plaintiffs paid the full amount owed as at that date. The Plaintiffs say that since they paid the full amount owing as at 21/03/2013, the Defendant is estopped from claiming any further sums from them.

9. The Plaintiffs' witness – Wilfred Abincha Onono -- a Certified Public Accountant and Co-founder of the Interest Rates Advisory Center (IRAC), a financial consultancy firm which undertakes objective analysis of borrowing interests rates recalculations – agreed with the interpretation of the Plaintiffs upon an analysis of all the documents related to the loan facility between the 1st Plaintiff and the Defendant. His expert opinion was that when the Defendant Bank stopped charging interests and reflecting them in its periodic statements to the Plaintiffs, it was clearly representing that its agreement with the Plaintiffs was that interests were no longer chargeable on the loan.

10. Mr. Onono testified as follows on this critical question:

> ….[H]ere what we have is that the bank just stopped charging interest on its own account….I analysed the account from when the client wrote to the Bank and agreed with the Bank. The bank stopped charging interests. This is because the client got an exceptional agreement from the bank.
>
> By July 2012, the loan was already in default. The question is whether the Borrower had information that the bank had only supposedly suspended but not stopped charging interests. For 5 years, the bank did not mention about accrual of interests….The reading of the letter talking of exceptionally accepting the proposal of the borrower was to suspend the interests. The statement NBK sent to the Borrower was a concession that they would not charge interests.
>
> The bank claims it had only suspended charges of credit not stopped and that it will only reflect once the account had become performing. This does not make sense.
>
> The borrower understood that he needed to pay the amount accepted in July 2012. The bank did not charge interests for 4 years due to this agreement. The bank gave him an impression that interests were not chargeable. The bank had an obligation to give him information that interests were accruing. I do not accept that interests were accruing.

11. Mr. Onono's conclusion was, therefore, categorical about the disputed amount:

> The introduction of the bulk interest of Ksh 3.1 million in October, 2017 was sinister because the bank had given the impression that it would not charge interests. This was against CBK rules on non-performing loans. This was also unfair. If a bank expects a borrower to pay, it has an obligation to tell the borrower.

12. The Defendant, on the other hand, disputes that it ever made any promise not to charge interests. Its position is that the disputed sum is the "legitimately charged accrued interest covering the period from 2012." Mr. Judah Kimutai, the Defendant's witness, explained in his affidavit and witness statement which he adopted as his evidence that "the bank's financial system computed the accrued interest which was not reflected on the daily bank statement as long as the account was in default as the 1st Plaintiff account was." The Defendant is adamant that the charge document clearly provided that the 1st Plaintiff was required to pay all the accrued interests (and penalties in the event of default).

13. When asked why the statements issued by the bank between March, 2013 and October, 2017 did not reflect the accrued interests and why the purported accrued interests were suddenly introduced in the statement issued after October, 2017, Mr. Judah Kimutai, the Bank's Credit Control Manager, explained as follows in his testimony:

> We never stopped charging interests on this account. Then when the account starts to perform the interests are brought forward. When it is brought forward, the system drops the accrued interest which were held in the back and so when the customer deposited Ksh 100,000/=, the interest are dropped on his account.
>
> This is usual and happens for all banks under CBK prudential guidelines.
>
> The interest is dropped when the account starts to perform.

14. Did this mean that the bank maintained two parallel accounting systems, Mr. Kimutai was asked. His response:

> The bank did not maintain two parallel accounting systems. My statement says that as soon as the customer cleared the sum of Ksh 1,331,358.70 on 17/10/2017 the system immediately recognized the account as one that had been normalized and automatically downloaded and reflected the inflected accumulated interest. Automatic means that the system will detect that the account is now performing and reflects the accrued interest. It only detects at the end of the performance.
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> The charge document provides that in the event of a dispute the bank statement is the correct figure. The correct figure is the one certified by Agnes Mutisya not the one by Tallam. This is because the customer must have asked for the interests. He must have requested for it.

15. Hence, while conceding that the Defendant issued a statement dated 14/10/2017 indicating that the 1st Plaintiff's loan account had a credit of Kshs. 10,000/- after all the re-payments indicated in the letter dated 21/03/2013 had been done, Mr. Kimutai insisted that the correct statement which indicated how much the Plaintiffs truly owed was that issued by Ms. Mutisya at the Bank headquarters later in October not the one (dated 14/10/2017) issued by Mrs. Tallam at the Nakuru Branch.

16. Asked whether the Bank had an obligation to inform the Plaintiffs, as customers, that the amount was still accruing interests even though the statements periodically issued by the bank did not reflect the accrued interests, Mr. Kimutai had the following to say:

> Interests never appeared anywhere from the month of July, 2012. No interest was charged because the account was not performing. Interest accrued. The information on accrued interests is not given to the customer except on request.
>
> The bank maintains that it is entitled to the interests. His letter of offer indicated that an interest had to be charged. At no time did the bank indicate that it will not charge interests.

17. In short, the Defendant insists that it never promised expressly or by conduct that it will stop charging interests on the account; and that it only stopped reflecting accrued interests on the account when the loan became non-performing in July, 2012. The Defendant further insists that this was not a concession that it would not charge further interests; that it was only a reflection of how its accounting system works. The Defendant further says that the accounting system is designed that way in compliance with the Central Bank of Kenya Prudential Guidelines on Loans Classification. ("CBK Prudential Guidelines").

18. The Defendant argues that even if there was an implicit agreement that it would not charge interests, that was only based on the expectation that the Plaintiffs were to clear the outstanding loan by liquidating it at the rate of Kshs. 600,000/- per month as the Defendant explicitly allowed in its letter dated 21/03/2013. The Defendant argues that once the Plaintiffs failed to keep their side of the bargain by paying the loan at that rate (which would have completed the owed amounts in six months or less), the Plaintiffs lost any expectation they might have had that the bank would not charge interests. This was because they ended up paying the loan for more than four years instead of the expected six months. It would be unreasonable, the Defendant insists, for the Plaintiffs to have expected the bank not to charge interests over that period of time.

19. This is, in essence, the evidence that emerged at trial. There is not much contestation about the evidence. Where the parties differ is the implications of the evidence. On its part, the Defendant makes the following arguments in its submissions:

a. That it is indubitable that the Plaintiffs took out an overdraft facility;

b. That the overdraft facility was rated "substandard" or "doubtful" by July, 2012 due to non-performance;

c. That faced with the default, the Defendant followed the dictates of the Central Bank of Kenya Prudential Guidelines on Loans Classification, and in particular Clause 3.6 of Part III. That clause reads as follows:

> When a loan is classified as non-performing category, an institution should either cease the accrual of interest or continue to accrue interest suspended in accordance with the criteria set out in the guidelines and should not be treated as income. Interest in suspense shall be taken into account in the computation of provisions for non-performing loan.

d. That the Defendant was acting in compliance with these Guidelines when it suspended debiting of interests in July, 2012 but that it never stopped charging the interests.

e. That the suspension of interest from July, 2012 was not due to the operation of the *in duplum* Rule or Section 44A of the Banking (Amendment) Act, 2015 (as the Plaintiffs pleaded) but in compliance of the Central Bank of Kenya Prudential Guidelines.

f. That when all the principal and interest captured as at 21/03/2013 (in the amount of Kshs. 3,518,308.70) was cleared on 17/10/2017, that paved way for the suspended interest to be uploaded on the Plaintiffs' statement.

g. That in uploading the suspended interest after 17/10/2017, the Defendant was acting in compliance of Clause 3.4.1 of the CBK Prudential Guidelines which provides as follows:

> A facility in the substandard category will normally continue to be classified substandard unless all past due principal and interest is repaid in full, in which case it may be upgraded to watch.

h. That it was, therefore, a mistake for the Plaintiffs to assume that accrual of interests on their account had stopped merely because it was no longer being loaded into their account from July, 2013.

i. That, in any event, the Plaintiffs had not demonstrated any detriment suffered due to the alleged promise or representation by the Defendant. It would, therefore, not be unconscionable to insist on the terms of the contract between the parties.

j. Finally, the Defendant insists that the Plaintiffs are wrongly using estoppel as a sword and not as a shield.

20. The Defendant cited a number of decisions including:

Westhoughton UDC v Wigan Coal and Iron [1919] 1Ch; DL Koisgat Tea Estates Limited v Eritrea Orthodox Tewhdo Church Limited [2015] eKLR; Customs & Excise Commissioner v Hesborn [1953] 2 Lloyds Report; Maclaines v Gatty [1921] AC 376; and Scandinavian Trading Tanker Co. v Flota Petrolera [1983] QB 529. I have read and considered them.

21. On the other hand, the Plaintiffs argue that when the Defendant accepted their offer on how to liquidate the overdraft facility, there was no discussion or agreement on the payment or even accrual of interests. The Plaintiffs argue that by its letter dated 21/03/2013, the Defendant represented that it will not charge any accrued interests and that once the Plaintiffs liquidated the amounts due as at that date, they would be discharged of the debt. Once the Plaintiffs accepted the offer, *vide* their letter dated 30/03/2013, the Plaintiffs say that the Defendant became estopped from insisting on payment of the accrued interests. This is so, the Plaintiffs argue, because they relied on the representation of the Defendant to their detriment and liquidated the agreed debt. The Plaintiffs argue that they acted on the Defendant's representation that the payment of Kshs. 3.5 Million was in full and final settlement of the debt owed.

22. The Plaintiffs relied on section 120 of the Evidence Act. It provides as follows:

> When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

23. The Plaintiffs also cited the famous decision by Lord Denman CJ in the English case, ***Pickard v Sears 112 E.R. 179*** thus:

> The rule of law is clear that where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the time..

24. They also relied on the Court of Appeal's decision in ***Serah Njeri Mwobi v John Kimani Njoroge (2013) eKLR***, where the Court held that:

> 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.

25. The Plaintiffs also cited the Court of Appeal's decision in ***First Assurance Company Limited v Seascapes Limited (2008) eKLR*** where the Court gave the elements which must be established for estopped to operate as representation which is acted upon by the opposite side to its detriment.

26. The central legal question presented in this case is whether the Defendant is debarred by the doctrine of estoppel from insisting on charging interests that accrued on the overdraft facility advanced to the Plaintiffs between March, 2013 and October, 2017.

27. As the Defendant correctly points out, the doctrine of estoppel cannot be used as a "sword" in Kenya. However, as I pointed out in the interlocutory ruling dated 24/06/2020, the doctrine of equitable or promissory estoppel can be used to support a cause of action which would otherwise not prevail without the deployment of the doctrine to prevent the other party from resiling from their representation. This is how the Plaintiffs have deployed it in the present case. This is what I had to say on the question:

> It might be arguable that indeed the law has inched closer to the American position where a promissory estoppel can found a cause of action – but at worst – the doctrine of equitable estoppel prevents a party from acting inconsistently with a promise the party has made if that promise or representation had the effect of inducing another party to reasonably rely on it to that other party's detriment.
>
> In the present case, the Applicants' case sounds in fraud and breach of contract: they insist that they have discharged their side of the bargain the contract they had with the Respondent; and that, given that position, it would be a fundamental breach of contract and fraudulent for the Respondent to refuse to discharge the Charge over the Suit Property and to purport to exercise statutory power of sale over it. They aim to call in aid equitable estoppel to estop the Respondent from denying that it represented, through its agents, that it will not charge accrued interests on the remaining balances; and by its conduct backed up such representation and that, consequently, the Respondent is precluded to claim otherwise. If so prevented from claiming otherwise, the Respondent will, then, be unable to rely on the literal terms of the Charge to insist on payment of accrued interest. If so prevented, it follows that the Applicants would prevail in their cause of action to demonstrate that the Respondent would be in fundamental breach of contract to refuse to discharge the Charge over the Suit Property and to insist on exercising statutory power of sale over it.
>
> In this regard, then, the Applicants are not really using equitable estoppel to found a cause of action – but deploying it to support another cause of action by preventing the Respondent from resiling from its purported representation. It seems to me, then, that the answer to the first issue presented by the facts of this case is that in an appropriate case the doctrine of equitable or promissory estoppel can operate to validly preclude a chargee in a bank-customer relationship from insisting on charging interests which would otherwise be owed under the strict terms of the charge.

28. To succeed in their claims, the Plaintiffs will have to establish, by preponderance of evidence, the following five elements:

> a. Representation: The Plaintiffs must demonstrate that the Defendant made a representation words or by acts or conduct that it will not charge any more interests after March, 2013;
>
> b. Reasonableness: The Plaintiffs must satisfy the Court that it was reasonable for them to rely on the representation made by the Defendant that it would not charge accrued interests after March, 2013;

c. Reliance: the Plaintiffs must demonstrate that they were induced by the representation by the Defendant that it will not charge any further interests after March, 2013 and, in such reliance, acted on it;

d. Detriment: the Plaintiffs must show that in acting in reliance of the representation by the Defendant they suffered some detriment or changed their position; and

e. Unconscionability: the Plaintiffs must demonstrate that it would be unconscionable to permit the Defendant to resile from the representation.

29. If the Plaintiffs succeed in demonstrating each of these five elements, they will be permitted to raise an estoppel to prevent the Defendant from going back on its word and establishing by evidence that it had a contractual entitlement to demand the accrued interests since such an insistence would be substantially at variance with its former representation to the Plaintiffs that it would not insist on the accrued interests. As stated in the interlocutory ruling, the most critical question to ask in this regard is whether the Defendant's letter dated 21/03/2013 coupled with the conduct of the Respondent thereafter (of not reflecting accrued interests in its periodic statements to the Plaintiffs) amounts to a representation capable of being reasonably relied on by the Plaintiffs.

30. The Defendant argues that there was no representation capable of being reasonably relied on for four reasons:

a. First, the Defendant argues that the letter dated 21/03/2013 contained no express promise that it will stop charging interests if the Plaintiffs paid all the amounts stated as owing in that letter.

b. Second, the Defendant argues that the express terms of the Overdraft facility (contract) are clear that the loan advanced would continue attracting interests until paid in full.

c. Third, the Defendant argues that even if the letter dated 21/03/2013 could be interpreted as a promise not to charge further interests, it was predicated on the premise that the Plaintiffs were to repay the full amounts due in less than 6 months by paying Kshs. 600,000/- per month. Since this did not happen, any representation made must be taken to have been discharged. In contract law, one would say that the repayment of the loan at the rate of Kshs. 600,000/- per month was a condition subsequent to the representation and once the condition subsequent failed, so did the intended bargain.

d. Fourth, the Defendant argues that the failure to reflect the accrued interests in its periodic statements to the Plaintiffs was not a reflection of any promise not to charge accrued interests but a consequence of the bank's accounting systems which was designed in compliance with the CBK Prudential Guidelines. As such, no intention to defraud or mislead the Plaintiffs can be inferred from this.

31. The Plaintiffs are equally adamant that its dealings with the Defendant and the Defendant's conduct read together with the letters exchanged by the parties in March, 2013 created the unmistakable impression that the Defendant would not charge interests until the full loan amount was paid. The 2nd Plaintiff, who testified as PW1 both on his own behalf and as a director of the 1st Plaintiff told the Court that he understood that the effects of the three letters exchanged between the Plaintiffs and the Defendant bank was to suspend the accrual and payment of all and any interests on the amount that was owing as at 21/03/2013. The 2nd Plaintiff pointed to three pieces of evidence which he says offers sufficient proof that the understanding between the Plaintiffs and the Defendant Bank was that there would be no further accrual of interests as follows:

a. First, he says that none of the three letters exchanged between the Plaintiffs and the Defendant Bank which varied the original loan repayment terms spoke of any payment of interests. In particular, the 2nd Plaintiff pointed out in his testimony that the Bank's letter dated 21/03/2013 spoke of a global figure of Kshs. 3,518,308.70 which was to be repaid but made no mention whatsoever of any interests.

b. Second, the 2nd Plaintiff said in his testimony that he confirmed that this was the position when the Defendant Bank would periodically send him statements on the amounts owed which did not reflect any interest accruals.

c. Third, the 2nd Plaintiff testified that the final statement, which the 2nd Plaintiff testified was the most emphatic proof that that the understanding between the Plaintiffs and the Defendant was that no interests would accrue clearly indicated that he had completed paying the owed amounts and, indeed, that his account had a credit of Kshs. 10,000/-. This, the 2nd Plaintiff emphasized, was clear proof that the Defendant also understood that no further interests would be paid.

32. The Plaintiffs argue that the Defendant had an obligation to inform them if interests were still accruing and the fact that it did not do so should estop them from suddenly springing a huge interest bill on them. They argue that it would be unfair for a bank to be permitted to lead a customer to believe that it would not charge interests on a loan for a period of four years; and then suddenly charge a lump sum as accrued interests for that period.

33. Having considered all the evidence in its totality, I have come to the conclusion that the Defendant made a legally consequential representation by a combination of words and deeds that it would not insist on charging accrued interests if the Plaintiffs repaid the full amount owed as at 21/03/2013. I say so for the following four cumulative reasons:

a. First, as the Plaintiffs rightly point out, the letter dated 21/03/2013 does not mention any interests. It explicitly mentions that it has "exceptionally" accepted the proposal by the Plaintiffs to resume repayment of the overdrawn balance of Kshs. 3,518,308.70. The letter requires the Plaintiffs to continue paying at the agreed rate until the loan is fully cleared.

b. Second, it was not denied that subsequent to the letter dated 21/03/2013, the 2nd Plaintiff had a phone conversation with the Defendant's branch Manager in Nakuru for further negotiations whereupon he wrote his letter dated 30/03/2013 clarifying that "deposits to the Bank shall be all as per rent collections as agreed, until the above amount is fully paid. The Kshs. 600,000/- per month shall be when the 40 No. flats are fully let." The Bank did not deny that the 2nd Plaintiff had the alleged phone conversation with the Defendant's Manager and neither did it deny receiving the letter. The Bank did not respond to the letter. The inference, then, is that the Bank's position stated in its letter dated 21/03/2013 are deemed modified by the 2nd Plaintiff's letter dated 30/03/2013.

c. Third, thereafter, the Plaintiffs paid down the loan amount and received periodic statements showing how much was owing. The periodic statements did not reflect any accrued interests. This further cemented the Plaintiffs' understanding that they had a bargain with the Defendant that interest would not be charged. The Defendant claims that the assumption drawn by the Plaintiffs in this regard was unfounded since the non-reflection of interests was only a function of its banking system as designed to comply with the CBK Prudential Guidelines. However, the CBK Prudential Guidelines are guidelines to Banks to guide on how to prudentially assess and report on non-performing loans so as to credibly assess the risk quotient of banks. It is not an instruction to banks to stop reflecting true amounts due to customers once an account is deemed sub-standard or at risk. The Defendant had an obligation to periodically inform the Plaintiffs as its clients the true amounts it owed. By issuing periodic statements omitting the accrued interests it knew it intended to charge at the back end of the transaction, the Defendant either acted inequitably or was simply acting in accord with its representation to the Plaintiffs that it would not charge interests and then resiled from its position later. Either way, the periodic statements issued by the Bank provide further evidence that there was a representation by the Defendant that it will not charge further interests; and that it was reasonable for the Plaintiffs to rely on that representation.

d. Fourth, further, on 18/10/2017, after the Plaintiffs had paid down all the amounts due to it in accordance with the periodic statements they were receiving from the Defendant and in accordance with the letter dated 21/03/2013, the Defendant, through its Nakuru Branch Manager, printed out a statement – stamped as a true copy of the original – indicating that the account then had a credit of Kshs. 10,000/-. It was only later that a new statement was issued lumping together all the accrued interests.

34. In the Court's view, these cumulative reasons establish adequate evidence to draw the conclusion that the Defendant did, through a combination of words, documents and conduct make a representation to the Plaintiffs that it would not insist on charging all the interests accrued as long as the Plaintiff paid all the amounts owed as at 21/03/2013. They further show that it was reasonable for the Plaintiffs to rely on the representation and that they, in fact, so relied. The Plaintiffs suffered detriment because they were led to believe that no further interests would be payable on the account. They, therefore, proceeded to repay all the amounts they believed due on the account. It would be plainly unconscionable for the Defendant to turn around and say that it had been "secretly" charging interests all along but could not disclose them to the Plaintiffs because of CBK Prudential Guidelines. I am confident that this is not the intent or objective of the CBK Prudential Guidelines.

35. The conclusion, then, is that the Plaintiffs have successfully established that they are entitled to rely on the doctrine of promissory or equitable estoppel. The effect of the equitable estoppel is to debar the Defendant from insisting on the accrued interests. Having been estopped from demanding the accrued interests and making any other claims inconsistent with the periodic statements it had issued to the Plaintiffs between March, 2013 and October, 2017, the Court must reach the conclusion that the Plaintiffs have fully paid the amounts owed to the Defendant. They are, therefore, entitled to a permanent injunction restraining the Defendant or its servants or agents from selling the Subject Property through its purported exercise of statutory power of sale. They are, also, entitled to an order directing the Defendant to discharge the charge registered in favour of the Defendant.

36. The Plaintiffs have also prayed for a refund of Kshs. 180,651.30. No evidence was adduced that demonstrates that there was this overpayment. Indeed, the Plaintiffs' own expert witness denied that there was such overpayment. The only overpayment demonstrated was Kshs. 10,000/-. This is the only amount owed to the Plaintiffs according to the evidence adduced in Court.

37. As for general damages for fraud and/or deceit and aggravated and/or exemplary damages, no case was made out that the Defendant acted with fraudulent intent to deceive the Plaintiffs. While there are questions whether it is ethical or moral for a bank to consistently send periodic statements to a customer while it believes that the statement is not reflective of the true sums owing, the conduct of the Defendant does not rise to the level of fraud. It, however, points to a need for the Bank to change its business practices when it comes to sub-standard or doubtful loans. The accounting system which allows the bank to send periodic statements to customers indicating only principal sums owed without indicating that accrued interests are not reflected is, most charitably described, unethical. It could potentially expose the bank to the risk of future lawsuits.

38. However, in the present case, Plaintiffs cannot succeed in an action for fraud. This is because the Plaintiffs have not been able to establish all the elements of fraud. Under the Common Law generally, a Plaintiff must prove at least nine elements to establish fraud:

i. A representation of fact;

ii. Its falsity;

iii. Its materiality;

iv. The Defendant's knowledge of its falsity or ignorance of its truth;

v. The Defendant's intent that it should be acted upon by the Plaintiff in the manner reasonably contemplated;

vi. The Plaintiff's ignorance of its falsity;

vii. The Plaintiff's reliance on its truth;

viii. The Plaintiff's right to rely thereon; and

ix. The Plaintiff's consequent and proximate injury.

39. In the present case, as established above, there was no representation of facts whose falsity can be established by evidence. Instead, the kernel of the case is that there was a promissory representation. A promissory representation is not a representation of fact. Consequently, the first two elements of fraud cannot be established in the case. Indeed, that is precisely why the Plaintiffs approached the Court under the doctrine of promissory or equitable estoppel.

40. The disposition, then, is as follows:

a. A permanent injunction shall issue to restrain the Defendant, its agents and/or servants from advertising for sale, selling or interfering, alienating or otherwise howsoever dealing with the security namely Title No. *Nakuru/Municipality/Block 2/58* in any way which is inconsistent with the ownership of the Plaintiffs herein.

b. An order shall issue directing the Defendant to, within thirty (30) days of the date hereof, discharge the charge registered in respect of Title No. Nakuru/Municipality/Block 2/58 failing which the discharge of charge to be executed by the Deputy Registrar of this Court.

c. The Defendant shall pay liquidated damages in the sum of Kshs. 10,000/- to the Plaintiffs.

d. All other claims are declined and are hereby dismissed.

e. The Defendant shall pay the costs of this suit.

41. Orders accordingly.

Dated in Nairobi this 21st day of January, 2021

………………..………

JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.