REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 77 OF 2013

JUVENALIS PIUS OTTARO.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD.....1ST DEFENDANT

DUNCAN GITONGA KIBE.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff herein **JUVENALIS PIUS OTTARO** filed in Court the Plaint dated **6th March 2013** seeking the following orders:-

> **"(a) A declaration that the sale and transfer of Title No. 8285/406 Nairobi was illegal and contrary to the law and the cancellation of the same, and a declaration that the 1st Defendant mishandled the Plaintiffs mortgage account and thereby clogged the equity of redemption and that the sale was unlawful.**
>
> **(b) Damages**
>
> **(c) A refund of Kshs. 1,732,590.00.**
>
> **(d) Special Damages Kshs. 220,400/-.**
>
> **(e) Costs and interest."**

2. The 1st Defendant **HOUSING FINANCE COMPANY OF KENYA LTD ('HFCK')** filed a Defence dated **14th May 2018** praying that the Plaintiffs suit against the Bank be dismissed in its entirety with costs. Likewise the 2nd Defendant **DUNCAN GITONGA KIBE** filed his Statement of Defence dated **22nd July 2013** praying for the dismissal of the Plaintiffs suit against him with costs.

3. The hearing of the suit commenced before this Court on **1st July 2019**. The Plaintiff called three (3) witnesses in support of its case. The 1st Defendant called one (1) witness and the 2nd Defendant also called one (1) witness.

THE EVIDENCE

4. The Plaintiff told the Court that he is a former employee of the former **Nairobi City Council** who retired in the year **1997**. The Plaintiff relied entirely upon his Amended written Statement dated **3rd November 2014**. The Plaintiff stated that in the year **1997**, he was desirous of purchasing the property known as **Title LR No. 8285/406** (hereinafter "**the suit property**."). That the building was a five-storeyed residential property located in the **Kariobangi** area of **Nairobi**, with several units (rooms) for rental. The intention of the Plaintiff was to utilize the rental income earned from the suit property to service the loan facility.

5. The purchase price was agreed at **Kshs. 2,590,000/-.** The Plaintiff approached the 1st Defendant **HFCK** for financing in order to purchase the suit property. The Plaintiff states that the 1st Defendant advanced him a loan of **Kshs. 2,590,000/-** and that the said loan facility was secured by a charge over the suit property. The Plaintiff further stated that it was agreed between the parties that the loan facility was to be repayable within a period of **ten (10) years** at an interest of **29%** per annum by way of monthly payments of **Kshs. 67,739/-**

6. The Plaintiff states that upon being advanced the monies he immediately commenced servicing the facility upon the agreed terms.

However the Plaintiff alleges that 1st Defendant began to escalate the amount payable each month without any notification whatsoever to the Plaintiff. That the Bank arbitrarily revised the interest rates and that efforts by the Plaintiff to obtain information from the Bank were unsuccessful and thus his concerns were never addressed.

7. The Plaintiff goes on to state that following arbitrary revision of interest rates and heaping of unexplained charges onto his loan account the amount payable became huge and astronomical and the loan account fell into arrears. That the Bank on **25th June 2008** notified the tenants residing on the suit property that a Receiver / Manager **M/S CRYSTAL VALUERS LTD** had been appointed and would be collecting rents from the building. The Plaintiff therefore understood that all the rental income paid to the Receiver / Manager would be transmitted to the Bank to pay off his loan facility. The Plaintiff says that at the time the Receiver / Manager took over the building he was realizing an amount of **Kshs. 95,000/-** per month as rent. The Plaintiff states that he advised his tenants to co-operate with the Receiver / Manager.

8. To the Plaintiffs great surprise on **10th September 2011**, he was advised through a letter which had been delivered to the local Chief that the suit property had been sold to one **Duncan Gitonga Kibe** (the 2nd Defendant). That the purchaser (2nd Defendant) had vide a letter dated 1st September 2011 given a notice to all tenants asking them to vacate the premises to allow for renovations to be undertaken on the suit property. (Annexed at page **57** of the Plaintiffs List of Documents filed on 26th July 2019). The Plaintiff says that the said letter dated **8th September 2011** from one **Geoffrey Kimaita** a General Manager of the Bank notified him that the suit property had been sold by way of private treaty in **August 2011** for the sum of **Kshs. 4,500,000/-** but that there remained a shortfall of **Kshs. 19,302,601.65** as at **30th September 2011**. The Bank demanded that the said shortfall be settled failing which recovery proceedings would be instituted against him.

9. The Plaintiff then proceeded to the **Department of Lands** and conducted a Search which revealed that suit property had indeed been sold and transferred to the 2nd Defendant. He then instructed a firm of Valuers **M/S NJIHIA NJOROGE & ASSOCIATES** to conduct a valuation on the suit property. In their report dated **13th September 2011** the valuers returned an open market value of **Kshs. 18,000,000/-** for the suit property.

10. The Plaintiff was aggrieved by the sale of the suit property which he terms as illegal and unprocedural as he was not issued with the requisite notification of sale under **Section 90** of the **Land Act**. According to the Plaintiff no valuation was undertaken before the sale of the suit property, resulting in the sale of the property at a greatly undervalued price. The Plaintiff further alleges that the sale of the suit property was tainted with fraud and accuses the 2nd Defendant of having colluded with officers from the Bank to illegally acquire the suit property. The Plaintiff then filed the instant suit.

11. **PW2 MICHAEL MURIMI GATHUKU** told the Court that he is a registered Valuer and a member of the Institute of Surveyors of Kenya. **PW2** told the Court that he was an Associate Partner in the firm of **NJEHIA, NJOROGE & COMPANY**. He identified the Valuation Report dated **13th September 2011** which was prepared by one **MR. SAMUEL NJEHIA NJOROGE** who is his colleague. **PW2** told the Court that the said **Mr. Njoroge** was very ill and thus was not in a position to come to Court. The witness produced a Doctor's letter dated **20th June 2019** as evidence of this **PExh 2**. **PW2** went on to testify that **Mr. Njoroge** upon instructions from the Plaintiff undertook a valuation of the suit property and vide his report dated **13th September 2011** returned an open market value of **Kshs. 18,000,000/-** for the suit property.

12. **PW3 WILFRED ABINCHA ONONO** told the court that he has been a member of the **Institute of Certified Public Accounts of Kenya (ICPAK)** since **1978** and is currently the Managing Consultant of the **Interest Rates Advisory Centre Ltd** (hereinafter **'IRAC'**). **PW2** relied on his written statement dated **14th June 2019**.

13. **PW3** told the Court that he had been engaged by the Plaintiff to prepare an Interest Recalculation Report and was supplied with all relevant documentation to facilitate the same. That he prepared his report dated **14th June 2019**. In said report **PW3** concluded that the 1st Defendant Bank had overcharged the Plaintiffs account to the tune of **Kshs. 21,035,192.16**. Upon adjusting the overcharge **PW3** stated that as at **30th September 2011** the recalculated outstanding balance is a credit which the Bank owes the Plaintiff of **Kshs. 1,732,590.51**. **PW3** advised the Plaintiff to demand this amount from the 1st Defendant Bank.

14. **DW1 ALICE WERU** is a Debt Management Officer with the **HFCK** (the 1st Defendant herein). The witness relied entirely upon her witness statement dated **19th March 2019**. **PW1** told the Court that though she was not working at the Bank when the Plaintiff transacted business with **HFCK**, she was able to craft her statements and evidence from documents held in the Bank.

15. **PW1** confirms that on **22nd October 1997** the Plaintiff applied for a loan facility of **Kshs. 2,590,000/-** to enable him purchase the property known as **L.R. No. 8285/406** (the suit property herein). That the 1st Defendant approved the said loan application and advanced to the Plaintiff this amount of **Kshs. 2,590,000/-** which sum was to be repaid together with interest at the rate of **29%** per annum within a period of **ten (10) years**. **DW1** pointed out that their Agreement provided that the interest charged on the facility would be subject to variation on terms upon which the Bank saw fit to represent the rate of interest commonly chargeable in Kenya.

16. **DW1** told the Court that the Plaintiff later defaulted in payment and became indebted to the 1st Defendant in the sum of **Kshs. 8,413,981.65**. Accordingly on **25th June 2008** the Bank called in the loan and issued a statutory notice to the chargor. That the Borrower (Plaintiff) failed to settle the amounts due on the loan and in **June 2008** the 1st Defendant appointed **Timothy Njehia T/A CRYSTAL VALUERS LTD** as Receiver / Managers of the suit property, to collect rent and apply the same towards servicing the Plaintiffs loan facility. However **DW1** states that the Plaintiff interfered with the collection of rents by demanding that the tenants pay their rent directly to him. As a result the Receiver / Manager was unable to carry out his mandate and was unable to collect any rent at all from the tenants. The Receiver / Managers appointment was therefore revoked vide the letter dated **18th July 2008** and the Bank issued the Plaintiff with yet another statutory notice of sale in **July 2008**. The Plaintiff still did not redeem the property.

17. Upon expiry of the statutory notice the Bank instructed an Auctioneer to issue the relevant notices and proceed to sell the suit property by way of public auction. However the property did not attract suitable bids. The 1st Defendant then instructed the firm of **ARK CONSULTANTS** to value the property who vide their Valuation Report dated **21st September 2010** gave a reserve price of **Kshs. 4,000,000/-.** In **March 2011** the suit property was sold to the 2nd Defendant by way of private treaty for the price of **Kshs. 4,500,000/-.** Thereafter the property was transferred to the 2nd Defendant who took over possession of the same.

18. **DW1** asserts that the 1st Defendant sold the suit property lawfully in exercise of its statutory right of sale. She denies that the sale was unprocedural and denies that the suit property was sold at a gross under value. **DW1** further denies that there was any collusion between the Banks officers and the 2nd Defendant to clog the Plaintiffs right of redemption. Accordingly **DW1** prays that the Plaintiff's suit against the 1st Defendant be dismissed with costs.

19. **DW2 DUNCAN GITONGA KIBE** is the 2nd Defendant who purchased the suit property and is now the legal proprietor of **Title No. 8285/406** (the suit property). **DW2** relied entirely upon his written statement dated **20th November 2014. DW2** told the Court that sometime in **March 2011** he was approached by one **Mr. Maingi** of **Trend Villa's** and informed that the suit property was available for purchase. **DW2** was interested and made an offer to the Bank of **Kshs. 4,200,000/-**. The Bank however declined this first offer and made to **DW2** a counter-offer of **Kshs. 4,500,000/-. DW2** accepted the counter-offer and engaged a lawyer to represent him in the sale transaction. **DW 2** paid the purchase price for the suit property as well as stamp duty of **Kshs. 56,000/-.** Thereafter the suit property was transferred and was registered in his name. Vide a letter dated **1st September 2011 DW1** informed all the tenants residing in the suit property of the change in ownership which letter was also copied to the Plaintiff. **DW1** categorically denies having been involved in any collusion and/or fraud. He states that he purchased the property in good faith and notified all relevant Government Agencies of the change of ownership of the suit property. **DW2** states that the Plaintiffs suit against him is misconceived bad in law and is only aimed at harassing him and subjecting him to unnecessary costs. He prays that the Plaintiffs suit against him be dismissed with costs.

20. At the close of oral evidence parties were invited to file and exchange written submissions. The Plaintiff filed his written submissions dated **28th September 2020**. The 1st Defendant filed its written submissions dated **16th November 2020** whilst the 2nd Defendant filed his written submissions dated **3rd November 2020.**

ANALYSIS AND DETERMINATION

21. I have carefully considered all the material placed before me in this matter. The **Evidence Act**, places the burden of proof of any fact on the person who wishes to rely on the same. **Section 107** of the **Evidence Act** provides as follows:-

> **"Burden of proof**
>
> **(1) Whoever desires any Court to give Judgment as to any legal or liability dependent on the existence of facts which he assets 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."**

22. The following are the issues which arise for determination in this suit.

> (i) Whether the 1st Defendant unlawfully increased the applicable interest rate thereby contravening **Section 39** of the **Central Bank Act** and **Section 44** of the **Banking Act**.
>
> (ii) Whether the sale of the suit property to the 2nd Defendant was fraudulent.
>
> (iii) Whether the suit property was sold at a gross under-value.
>
> (iv) Whether the Plaintiff is entitled to the prayers sought in this suit.

i. INTEREST

23. It is common ground that sometime in the year **1997** the Plaintiff approached the 1st Defendant Bank seeking a loan facility in the amount of **Kshs. 2,590,000/-**. The Bank acquiesced to this request vide the letter of offer dated **1st September 1997**. It is further not in dispute that upon the Plaintiffs acceptance of said offer a legal charge was created in favour of the 1st Defendant over the suit property securing the sum of **Kshs. 2,590,000/-**. A copy of the charge dated **22nd October 1997** is annexed to the Plaintiffs Bundle of documents filed on **7th March 2013**. **Clause 2** of the charge provided that the principal sum was to be repaid together with interest thereon together with other costs, rates and charges in instalments of **Kshs. 66,369.00** monthly. **Clause 4(1)** of the charge provided that the rate of interest payable on the loan would be "**twenty nine per centum 29% per annum**."

24. The Plaintiff claims that he regularly and faithfully serviced the loan facility as required by the charge document, but alleges that the Bank varied the rate of interest from **29%** to **35%** and levied on his loan amount penalties charges which were not provided for in the charge Document. This the Plaintiff claims was done without his consent, knowledge and/or involvement. In this manner the Plaintiff says the Bank hindered his efforts to pay off the loan within the time period agreed upon. That this imposition of illegal and uncontractual penalties, interest and default charges created a huge balance on the Plaintiffs loan account making it impossible for the Plaintiff to redeem the account. The Plaintiff contends that the 1st Defendant flouted both **Section 39** of the **Central Bank of Kenya Amendment Act 2000** and **Section 44**

of the **Banking Act, Cap 488 Laws of Kenya**, which provisions of law forbade any increase of interest without first obtaining the approval of the Minister for Finance.

25. **PW3 Mr. Abincha Onono** a Consultant with the **Interest Rates Advisory Centre** (**'IRAC'**) was called by the Plaintiff as a witness to testify in this regard. **PW3** told the Court that he undertook a scrutiny and a recalculation of interest of the Plaintiffs loan account. In his report (Annexture at **page 39** of the Plaintiffs Bundle of Documents filed on **4th December 2014**). **PW3** concluded as follows:-

> **"9.9 Housing Finance's outstanding amount on 30th September 2011 as per the demand letter dated 19th June 2012 is a debit of Kshs. 19,302,601.65 an increase of the debit by Kshs. 10,844,319.45 between 31st of August 2010 and 30th August 2011 which has not been explained. The recalculated outstanding balance is a credit of Kshs. 1,732,590.51. This means that the account has been overcharged by an amount of Kshs. 21,035,192.16.**
>
> **9.10 Under this scenario, amount owed to the borrower by Housing Finance on 30th September 2011 as per IRAC re-calculation is Kshs. 1,732,590.51 after adjusting the overcharge."**

26. On this issue of interest the Defendant contended that it was a term of the charge that the interest rate of **29% per annum** was subject to variation on terms upon which the Bank saw fit to fairly represent the rate of interest commonly chargeable in Kenya. The 1st Defendant also asserted that the mortgage facility issued to the Plaintiff was for **Kshs. 2,950,000/-** repayable in **ten years** in monthly installments of **Kshs. 67,739/-.** It was the 1st Defendant's contention that the Plaintiff did not adhere to the loan terms. The 1st Defendant pointed out that this fact was admitted in the **IRAC** statement produced by **Mr. Onono** and the Bank account statements produced by both the Plaintiff and the 1st Defendant. These statements showed that for several months the Plaintiff failed to make any payment towards offsetting the loan. Furthermore, the 1st Defendant submitted that it did not charge any penalty interest and that the Plaintiff was charged interest at the rate of **29%** or less as agreed between the parties. The 1st Defendant contended that there was no evidence tendered by the Plaintiff on the alleged increase of interest rates. The 1st Defendant submitted that it complied with the **'in duplum rule'** and did not recover any such sums that would be over two times the initial amount to be repaid by the Plaintiff.

27. It is trite law that Court will not re-write contracts entered into by parties. In **NATIONAL BANK OF KENYA LTD –VS- PIPE PLASTIC SAMKOLIT (K) LTD [2022]E.A. 503** it was held:-

> **"A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud of undue influence are pleaded and proved."**

28. Similarly Courts will not interfere in the rate of interest that has been agreed upon by the parties unless the interest rate is found to be illegal, unconscionable or fraudulent. In **SHAH –VS- GUILDERS INTERNATIONAL BANK LTD [2002]E.A**. the Court held:-

> **"Where the parties to a dispute had not agreed on the rate of interest payable, Section 26(1) of the Civil Procedure Act, conferred on the Court the discretion to award and fix interest rates with regard to decrees for the payment of money. Where the rate of interest has been agreed, the Court was obliged to enforce the agreed rate unless it was illegal, unconscionable or fraudulent. [own emphasis]**

29. **Clause 4** of the charge dated **22nd October 1997** dealt with the question of interest. **Clause 4** provided:-

> **"It is hereby further agreed that the rate of interest payable on all money hereby secured shall be determined as follows:-**
>
> **(i) Until the service of such a notice as is hereinafter referred to interest shall be at the rate of twenty nine per centum (29%) per annum.**
>
> **(ii) The Company may from time to time serve on the Borrower not less than one month's notice requiring payment of interest at such increased or reduced rate as shall in the decision of the Directors of the Company fairly represent the rate of interest commonly chargeable in Kenya having regard to the value for the time being of the premises the amount then owing to the Company and to any other circumstances which they consider to be relevant and the decision of the Directors of the Company in this behalf shall not be questioned on any account whatsoever.**
>
> **(iii) In the event of the Company requiring an increase in the rate of interest under the provisions of Sub-Clause (ii) of this Clause and requiring an increase in the money instalments payable the Company will notify the Borrower of the amount of the resulting increased monthly instalments payable under the provisions of Clause 2 hereof and the first of such increased monthly instalments shall become due and payable on the first day of the month next after notification of the amount thereof to the Borrower.**
>
> **(iv) All the covenants and provisions contained herein relating to the payment of interest shall be construed and have effect as referring to interest as fixed or altered by the provisions of this Clause."**

30. By virtue of the above Clause the 1st Defendant reserved to itself the right to increase interest rates from time to time provided that they gave the Plaintiff not less than one month's notice of any proposed variation of interest. The 1st Defendant denies that they varied the interest rate from **29%** to **35%** without notice to the Plaintiff. It is noteworthy that the Plaintiff did not avail any evidence of this alleged increase in the rate of interest. Indeed the Plaintiff appears to have kept very poor if any records of his loan account. He appeared not to be aware when or how much he had paid towards off-setting the loan amount. Under cross-examination the Plaintiff says:-

> **"I do not know how much I paid in the year 1998. I do not know if I only paid Kshs. 430,000/- in 1998. I am not aware that I was supposed to pay a total of Kshs. 792,000/- in the year 1998 …"**

The Plaintiff goes on to admit that-

> **"Some of the monies I paid were to pay penalties and devolved charges …"**

31. From the evidence it appears that the Plaintiff made sporadic payments and on occasion went for several months without making any payments at all. The Plaintiff under further cross-examination admits:-

> **"I did not calculate how much I paid towards my loan in each year. I was the owner of the plot. I did not bother to calculate how much I was to pay towards my loan each year …."**

In any event it is manifest that the Plaintiff had no idea at all how much he had paid towards his loan. How then could he effectively challenge the Banks records.

32. The Plaintiff claimed that he had made the following payments towards his loan account which were not credited by the Bank-

- **Kshs. 45,000/-** on **23rd April 2008**
- **Kshs. 45,000/-** on **12th June 2008**
- **Kshs. 35,000/-** on **11th June 2011**

The Plaintiff states that he did not receive receipts for the above payments as one **Mr. Kimaita** a bank official promised him that the payments would be receipted once his file was traced. Why would the Plaintiff make payments to a bank without insisting on receipts for the same? In the absence of receipts there is no proof that the Plaintiff actually made the above payments as alleged.

33. The Recalculation Report which the Plaintiff seeks to rely upon has several problems. **PW2** stated that he applied a flat rate of interest of **29%** and did not take into account variations by the Bank of the interest rate. Secondly **PW3** did not take into accounts the periods when the Plaintiff failed to make payments on the loan account and the bank did not charge interest. Thirdly **PW3** admitted that he had credited to the Plaintiffs loan account rental income of **Kshs. 95,000/-** during the period when the property was under a Receiver / Manager. It has been shown that the Receiver /Manager did not collect any rent at all during this period. In this regard the 1st Defendant wrote to the Plaintiff a letter dated **18th July 2008** (see **page 1** of the 1st Defendants Bundle of Documents filed on **20th September 2018)**. In that letter the Bank complained that the Plaintiff had actively hindered the work of the Receiver rendering it difficult for him to collect rent and accordingly notified the Plaintiff that the appointment of the Receiver had been revoked. The Plaintiff himself admits under cross-examination that he does not know if the Receiver Manager collected any rents at all. **PW3** told the Court that he was never given the letter revoking the appointment of the Reciever-Manager and goes on to state under cross-examination that:-

> **"… In my report for 36 months I have credited Kshs. 95,000/- to the Plaintiffs loan account. If the receivership was revoked I would remove the credits of Kshs. 95,000/- per month – this comes to about 3.0 million. This would reduce the amount due to the Plaintiff …"**

PW3 also admitted that he was unaware that the Plaintiffs claim for **Kshs. 105,000/-** was in respect of un-receipted monies allegedly paid.

34. It is clear therefore that **PW3** ought **not** to have credited the rental income for this period into the Plaintiffs loan account. **DW1** told the Court that for several months at a time no payments were made by the Plaintiff From **31st March 2005**, **PW3** zero-rated interest until the end of the recalculation period. **PW3** also failed to apply penalty interest, default charges and interest on arrears on the basis that the same were not provided for in the charge.

35. The Plaintiff contended that the 1st Defendant flouted **Section 39** of the **Central Bank of Kenya Act**. **Section 39(1)** of the said **Act** as amended by **Amendment Act No. 4 of 2001** provides as follows:-

> **"The maximum rate of interest which specified banks or specified financial institutions may charge on loans or advances shall be the 91 – day Treasury Bill rate published by the Bank on the last Friday of each month, or the latest published all-day Treasury Bill rate, plus four *per-centum*:**
>
> **Provided that the maximum interest chargeable under this section shall not exceed the principal sum loaned or advanced and provided further that this section shall only apply to contracts for loans or advances made or renewed after the commencement of this section". [own emphasis]**

36. However the above provision was **not** applicable to the transaction between the Plaintiff and the 1st Defendant Bank because the charge (contract) in question was entered into between the parties **before** the commencement of **Section 39**. It is pertinent to note that in the case of **KENYA BANKERS ASSOCIATION & OTHERS –VS- MINISTER FOR FINANCE & ANOTHER [2002]KLR** vide a decision rendered on **24th January 2002** a three Judge Bench of the High Court declared the **Amendment** to the **Central Bank Act** void in so far as the same criminalized transactions were **not** offences at the time when they were entered into. In that case the Bench held:-

"This enactment with retrospective operation is not sanctioned by Section 46(6) of the Constitution of Kenya because it creates offence out of acts or omissions which did not constitute offences at the time they took place before the Act's date of commencement and the overriding section 77 (4) expressly states that such criminalization of formerly lawful and innocent acts or omissions is not permitted."

Furthermore, Section 52 of the Banking Act provides as follows:-

> **"(1) For the avoidance of doubt, no contravention of the provisions of this Act or the Central Bank of Kenya Act (Cap 491) shall affect or invalidate in any way any contractual obligation between an institution and any other person.**
>
> **(2)The provisions of subsection (1) shall apply with retrospective effect to the Banking Act (now repealed) and the Central Bank of Kenya Act (Cap 491)**
>
> **(3)This section shall not permit any institution to recover in any court of law interest and other charges which exceed the maximum permitted under the provisions of this Act or the Central Bank of Kenya Act."**

37. The Plaintiff also complained that the Bank flouted **Section 44 Banking Act** in that they failed to obtain the consent from the Ministry of Finance as required by law before effecting a variation of the interest rates. However as discussed earlier the Plaintiff did not prove on a balance of probability that there was any variation of the contractually agreed interest rate. In the premises I find that **Section 44** was not applicable at all.

IN DUPLUM RULE

38. The Plaintiff further alleges that the Plaintiff flouted the **In Duplum Rule** as set out in **Section 44A** of the **Banking Act. Section 44A** which deals with **'Limit of Interest recovered on defaulted loans'** provides as follows:-

> ***"(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) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes nonperforming; and***
> >
> > ***(c) expenses incurred in the recovery of any amounts owed by the debtor.***
>
> ***(3) If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing.***
>
> ***(4) This section shall not apply to limit any interest under a Court order accruing after the order is made."***

39. The Plaintiff cites the facts that vide the demand letter dated **8th September 2011** the Bank claimed a sum of **Kshs. 19,302,601.65** as still due and owing on the Plaintiffs loan account even after crediting the sale proceeds of **Kshs. 4,500,000/-.**

40. The 1st Defendant counters by asserting that it did comply with the '**in duplum rule**'. The Bank stated that it stopped levying interest on the Plaintiffs loan account from the year **2005** in compliance with **Section 44A**. The 1st Defendant pointed out that the Plaintiff made payments totaling **Kshs. 3,638,031.86** (page **3** of the **IRAC** Report). The sale of the suit property realized a sum of **Kshs. 4,500,000/-.** The 1st Defendant therefore insisted that it did **not** recover two times of the initial amount to be repaid by the Plaintiff.

41. However the 1st Defendant does not deny having made a demand of **Kshs. 19,302,601.65** even after the proceeds of the sale of the suit property amounting to **Kshs. 4,500,000/-** had been factored in. This amount is not reflected in the Plaintiffs Statement of Account for the years **1997** to **2011** (see 1st Defendant's Supplementary Bundle of Documents filed on **24th June 2019**).

42. In the case of **JAMES MUNIU MUCHERU –VS- NATIONAL BANK OF KENYA LIMITED [2019]eKLR** the Court of Appeal held:-

> **" Finally, regarding Section 44A of the Banking Act that imports the in duplum rule, the same came into force on 1st May, 2007. The suit that gave rise to this appeal was filed on 22nd February 2002, long before Section 44A came into operation. Section 44(1) and (2) states as follows:**
>
> ***"(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) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes nonperforming; and

(c) expenses incurred in the recovery of any amounts owed by the debtor."

Subsection (6) has a retrospective effect in that it covers even loans that were advanced before the section came into operation. It states as follows:

"(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 became non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following-

(a) the principal and interest owing on the day this section comes into operation; and

(b) 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 interest owing on the day this section comes into operation; and

(c) expenses incurred in the recovery of any amounts owed by the debtor."

It is therefore evident that in computing the actual amount that is due and payable by the appellant to the respondent, the provisions of Section 44A of the Banking Act must be borne in mind and factored in the computation. It is not for this Court to do the calculation. The respondent must adjust the sum payable in accordance with the law. To that extent only this appeal succeeds." [own emphasis]

43. Accordingly I find that **Section 44A** of the **Banking Act** is applicable and ought to have been a factor in computing of the outstanding amount due and owing by the Plaintiff. Therefore, I direct that the 1st Defendant must adjust the outstanding amount still due and payable to conform with **Section 44A**.

(ii) Was the sale of the suit property fraudulent

44. The Plaintiff faults the Bank for exercising its statutory power of sale in respect of the suit property through a sale by private treaty. The Plaintiff claims that the Bank rushed to effect a sale by private treaty without making any attempt to sell the suit property through a public auction and cites this as evidence of fraud and collision with the 2nd Defendant (buyer). The Plaintiff further alleges that the Bank in selling the suit property failed to comply with the provisions of **Section 90** of the **Land Act 2012**. The Plaintiff denies having been served with the requisite statutory notices and claims that there was no evidence that of any advertisement for a public auction. The Plaintiff therefore disputes the Banks claim that efforts to sell the suit property by public auction bore no fruit as no offers were realized at the auction.

45. The Plaintiff further submitted that the sale of the suit property by way of private treaty to the 2nd Defendant as well as the subsequent transfer to the 2nd Defendant was done in a clandestine manner and was both irregular and unlawful. That said sale was premature and was calculated to clog the Plaintiffs right of equity of redemption. The Plaintiff contends that this sale being unlawful could not be deemed to have conferred good title upon the 2nd Defendant.

46. On its part the 1st Defendant categorically denies having conducted the sale of the suit property in a clandestine and/or unlawful manner. The 1st Defendant states that as at **25th June 2008** the Plaintiff was indebted to the Bank in the sum of **Kshs. 8,413,981.65**. That the Bank then appointed a Receiver / Manager for the suit property to collect rent from the tenants and transmit the rents collected to the Bank in order to offset this debt. At **page 3** of the Defendants Bundle of Documents filed on **26th June 2018** is the letter dated **2nd July 2008** written by **Crystal Valuers Ltd** (the appointed Receiver / Manager) notifying all the tenants of their appointment, and advising the tenants to henceforth pay rents to the offices of the Receiver / Manager before the **5th day** of each month.

47. However the Bank states that the Receiver / Manger was unable to carry out his mandate due to interference by the Plaintiff who sabotaged the Receiver / Manager by demanding that the tenants pay the rents to him directly. At **page 13** of the Defendant's Bundle of Documents in the copy of a letter dated **2nd July 2008** written by the Receiver / Manager informing the Bank that despite instructions issued to the tenants to pay their rents to the Receiver / Manager the Plaintiffs caretaker was still collecting rents directly from each tenant.

48. As a result the Receiver / Manager was unable to collect even a single cent in rental income from the suit property. The Bank was left with no option but to revoke the appointment of the Receiver / Manager. Thereafter in **July 2008** the Bank issued the Plaintiff with a statutory notice of sale. The Plaintiff failed to redeem the suit property and upon the expiry of the statutory Notice the 1st Defendant instructed an auctioneer to sell the suit property by way of public auction. The relevant statutory notice is the one dated **20th August 2010**

annexed at **page 102** of the 1st Defendant's Bundle of Documents filed on **20th September 2018**. At **page 103** is the **Certificate of Posting** by Registered Mail. Due to the failure of the public auction to attract reasonable and acceptable offers the Bank opted to sell the suit property by way of private treaty. At **page 7** of the Defendants Bundle of Documents is a letter dated **27th September 1999** written by **Cheri Kenya Ltd** auctioneer informing the Bank that an attempt to auction the suit property realized a bid of only **Kshs. 2,500,000/-** which was rejected as being too low.

49. On his part the 2nd Defendant pleads that he is a buyer for value without notice. He denies having colluded with the Bank or its officers and denies that he sale of the suit property to himself was in any way fraudulent. It is not enough to merely allege fraud. The onus lies on the Plaintiff to prove that the sale to the 2nd Defendant was infact fraudulent. Further it has been held that the standard of proof required to prove fraud is much higher than on a balance of probability. In **VIJAY MORJARIA –VS- NANSINGH MADHUSINGH DARBAR & ANOTHER (2000)eKLR** quoted with approval in the case of **EURO BANK LIMITED (In Liquidation) –VS- TWICTOR INVESTMENTS LIMITED & 2 OTHERS [2020]eKLR** (available at **page 19** of these submissions) the Court held:-

> **"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."**

50. Likewise in **CENTRAL BANK OF KENYA LIMITED –VS- TRUST BANK LIMITED & 4 OTHERS [1996]eKLR** the Court of Appeal held thus:-

> **"The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary case …. <u>In this case, to succeed on the claim for fraud the Appellant needed to not only plead and particularize it, but also lay a basis by way of evidence upon which the Court would make a finding</u>." [own emphasis]**

51. In my view the Plaintiff has failed to adduce evidence sufficient to meet the threshold to prove his allegations of fraud. It is common ground that the suit property was sold to the 2nd Defendant for **Kshs. 4,500,000/-.** A copy of the Agreement of Sale between **HFCK** and **DUNCAN GITONGA KIBE** dated **13th April 2011** is annexed at **page 36** of the 2nd Defendants Bundle of Documents filed on **23rd July 2013**. It is also a fact that the suit property was duly transferred to the 2nd Defendant vide the Transfer by Chargee dated **12th July 2011** (**page 48** of 2nd Defendants Bundle of Documents).

52. Although the Plaintiff denies receipt of any statutory notices in respect of the exercise by the Bank of its statutory right of sale, the Plaintiff did admit that all correspondence from the Bank was received by him through Registered Mail at his given Postal Address being Box **74747-00200, NAIROBI**. The 1st Defendant has annexed a copy of a letter written to the Plaintiff by way of Registered Mail. (see pages **100-107** of 1st Defendant's Bundle of Documents filed on **20th September 2018**). Amongst the said letters and notices are statutory notices dated **20th August 2010** and **2nd February 2005**. It is clear from there that the Bank did serve Plaintiff with statutory notices in compliance with the law. More tellingly the Plaintiff himself admitted that he did personally attend an auction of the suit property proving that indeed an attempt to sell the suit property by Public Auction did take place. Under cross-examination the Plaintiff contradicts himself when he says:-

> **"I was not informed of the auction at all …"**

In the same breath the Plaintiff goes on to state that:-

> **"I went to the auction and was chased away I left crying …"**

The fact that the Plaintiff attended the Public Auction proves that he had been notified of the same. It is clear that the Plaintiff is being economical with the truth when he alleges that he received no notice of the auctions.

53. The 2nd Defendant narrated to the Court how he was alerted by an agent of the availability of the suit property for sale. The 2nd Defendant who was interested in purchasing the property made an initial offer of **Kshs. 4,200,000/-** for the property. The Bank rejected his offer and made a counter offer of **Kshs. 4,500,000/-.** The 2nd Defendant accepted this counter offer and purchased the property for **Kshs. 4,500,000/-.** The amount paid by the 2nd Defendant was above the reserve price of **Kshs. 4,000,000/-** in the Valuation Report of **Ark Consultants** dated **21st September 2010**.

54. I find no evidence of any collusion between the 2nd Respondent and the Bank or any of its officers. The 2nd Defendant paid the full purchase price as evidenced by the Receipts annexed at **page 44-46** Defendant's Bundle. The 2nd Defendant paid all outstanding utilities rates. He paid the requisite stamp duty of **Kshs. 180,040/-** as per the receipt dated **24th June 2011** issued by the Kenya Revenue Authority at **page 55** and Banker's cheque dated **28th June 2011** at **page 57** of the 2nd Defendants Bundle. After the Government Valuer returned a value of **Kshs. 5,900,000/-** for the suit property the 2nd Defendant paid an additional amount of **Kshs. 56,000/-** towards the stamp duty. At **page 57** – **page 59** of the 2nd Defendants Bundle is the Valuation of the Government Valuer as well as a receipt for **Kshs. 56,000/-** received by the **Kenya Revenue Authority**.

55. The 2nd Plaintiff there after wrote to the then **Nairobi City Council** to inform them of the change of ownership of the suit property. At

page 68 of the 2nd Defendants Bundle is a copy of the letter dated **16th November 2011** to the City Council seeking transfer of Account for **LR No. 8285/406** to the 2nd Defendant.

56. The mere fact that the sale was conducted by way of private treaty does not make said sale unlawful. **Section 69(1)** of the **INDIAN TRANSFER OF PROPERTY ACT ('ITPA'**) empowers a Bank to realize its security through public auction or by private treaty. **Section 69(1)** provides as follows:-

> **"A mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the Court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby." [own emphasis]**

57. The Court of Appeal in the case of **JOSE ESTATES LIMITED –VS- MUTHUMU FARM LIMITED & 2 OTHERS [2019]eKLR** held:-

> **"The 3rd respondent was not obliged to sell by public auction. Sale by private treaty was an option also as long as the 3rd respondent acted in good faith. From the record before us, the 3rd respondent acted in good faith as it involved the 1st and 2nd respondents in the process of finding a suitable purchaser. The 3rd respondent gave due allowance to the 1st and 2nd respondent to exercise their equity of redemption by calling off several public auctions at their behest and also allowing them to bring on board suitable purchasers …."**

58. It is clear that the 2nd Defendant at all times acted with transparency and in good faith. He followed all the legal channels in the purchase of the suit property. The sale to the 2nd Defendant cannot be said to be clandestine as was it transacted in full compliance of the law. The 2nd Defendant took steps to notify all relevant authorities of the purchase and transfer of the suit property to himself. I find no evidence of fraud and/or collision on the part of the 2nd Defendant.

59. I find and hold that the 2nd Defendant is what is known in law as an innocent purchaser for value without notice.

60. The **Black's Law Dictionary, 9th Edition** has defined an Innocent Purchaser for Value Without Notice as:-

> **"… one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects inn or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable considerations for property without notice of prior adverse claims …"**

61. In **KATENDE –VS- HARIDAR & COMPANY LIMITED [2008]2 E.A.173** (available at **page 44** of these submissions), whereby the Court of Appeal in Uganda held that:-

> **"… for the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, … (he) must prove that:-**
>
> **(a) he holds a Certificate of Title;**
>
> **(b) he purchased the property in good faith;**
>
> **(c) he had no knowledge of the fraud;**
>
> **(d) he purchased for valuable consideration;**
>
> **(e) the vendors had apparent valid Title;**
>
> **(f) he purchased without notice of any fraud;**
>
> **(g) he was not party to any fraud …"**

62. I find that the 2nd Defendant is now the legally recognized proprietor of the suit properties having acquired the same through the Bank's lawful exercise of its statutory power of sale.

(iii) Whether the suit property was undervalued

63. The Plaintiff claimed that the suit property was sold by the 1st Defendant at a gross undervalue. Thus the Plaintiff claims that the sale by

the 1st Defendant violated **Section 97(1)** of the **Land Act 2012** which provides as follows:-

> ***"97. (1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.***
>
> ***(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer." [own emphasis]***

64. The suit property was sold to the 2nd Defendant by way of private treaty for **Kshs. 4,500,000/-**. In support of his claim that this amounted to a gross undervalue the Plaintiff relied on the evidence of **PW2** an Associate Partner with the firm of Valuers known as **Njihia Njoroge & Company** who the Plaintiff instructed to value the suit property. **PW2** produced as an exhibit a Valuation Report dated **13th September 2011** which gave the open market value of the suit property as **Kshs. 18,000,000/-.** A copy of the said Valuation Report is annexed at **pages 58-62** of the Plaintiffs Bundle of Documents filed on **26th July 2019**.

65. The 1st Defendant on their part had commissioned a valuation of the suit property in compliance with **Section 97(2)** of the **Land Act**. The Bank engaged **ARK CONSULTANTS LTD** to value the suit property. Vide their Valuation Report dated **21st September 2010**. **Ark Consultants** returned an open market value of the suit property of **Kshs. 5,850,000/-** with a forced sale value of **Kshs. 4,000,000/-.** (A copy of the Report is annexed at **pages 108** to **page 717** of the 1st Defendant Bundle of Documents filed on **20th September 2018**). **PW2** was at pains to explain the great disparity between the valuation in the report he produced in Court and the Report prepared by **Ark Consultants**. It is pertinent to note that **PW2's** report was prepared **six (6) months after** the sale of the suit property. The 2nd Defendant told the Court that upon taking possession of the suit property he embarked on a massive renovation of the same. The valuation of a property after extensive renovations had been undertaken would obviously return a higher value.

66. I also note that a valuation conducted by the **Chief Government Valuer** shortly after the sale of the suit property returned a valuation of **Kshs. 5,900,000/-** (see copy of Valuation Report by **Chief Government Valuer** dated **12th July 2011** at **page 58** of 2nd Defendants Bundle filed on **23rd July 2013**). The valuation of the **Chief Government Valuer** who is a neutral Valuer not commissioned by either party to the dispute was closer to the Valuation returned by **Ark Consultants**. In any event the mere fact that the valuation commissioned by the Plaintiff returned a different value to that returned by the Banks Valuer does not amount to proof that the suit property was sold at an undervalue. In **ZUM ZUM INVESTMENT LTD –VS- HABIB BANK LIMITED [2014]eKLR** it was held thus:-

> **"Once the Defendant has undertaken a forced sale valuation, the burden shifts to the Plaintiff to prove that the value arrived at by the Defendant's valuer was not the best price reasonably obtainable at the time. … It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time …. The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time. The Plaintiff needs to show, for instance, that the Defendant's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done way before the time of the intended sale"**

67. The sale of the suit property at **Kshs. 4,500,000/-** means that it was sold **above** the reserve price as stated in the report of **Ark Consultants**. I find no evidence to support the Plaintiffs contention that the suit property as sold at a gross undervalue. On the contrary the evidence shows that the 1st Defendant made efforts to obtain a reasonable price. The auction sale which attracted a bid of **Kshs. 2,500,000/-** was rejected as it was too low. The Bank also rejected the 1st offer of **Kshs. 4,200,000/-** by the 2nd Defendant and made a counter offer of **Kshs. 4,500,000/-.** Clearly the Bank was determined not to sell the property at a throw away price.

68. Therefore I am satisfied that the 1st Defendant complied with **Section 97(2)** by obtaining a recent valuation of the suit property. I further find that the 1st Defendant equally complied with **Section 97(1)** by securing the best price obtainable at the time. The fact that the property was sold at a price which did not satisfy the Plaintiff does not mean that the same was sold at an undervalue.

(iv) Is the Plaintiff entitled to the prayers sought in the Plaint

69. The Plaintiff has made prayer for damages. An award of damages is only made where there has been a breach of contract and where liability or wrongdoing has been proved. In this case the Plaintiff has failed to prove any breach of contract or wrongful and/or unlawful act on the part of the 1st or 2nd Defendant in the management of his loan account. As such he is not entitled to an award of damages.

70. The Plaintiff has by prayer (c) made a claim for **Kshs. 1,732,590.05**. This claim is based on the refund which the Plaintiff claims is due to him on the basis of the interest recalculation report prepared by **PW3**. As demonstrated earlier this Report had several fundamental problems. **PW3** in preparing his report factored in an amount of **Kshs. 95,000/-** supposedly collected each month by the Receiver / Manager for a period of **36 months (95,000x36= 3,420,000/-)**. As has been shown the Receiver / Manger did not infact collect any rent at all during this period. Therefore the Report of **PW3** is fundamentally flawed and cannot be relied on as proof of amounts due and owing to the Plaintiff. In **DHALAY –VS- REPUBLIC 1997 KLR**, the Court of Appeal held as follows:-

> **" It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so."**

Accordingly I dismiss the Plaintiffs claim for **Kshs. 1,732,590.05**.

71. By prayer (d) the Plaintiff has made a claim for special damages in the amount of **Kshs. 220,440/-** being the costs of procuring the advisory Report from **IRAC**, the Valuation Report prepared by **Njihia Njoroge and Company** and money paid to one **Geoffrey Kimaita** a Bank Manager. In the case of **CAPITAL FISH KENYA LIMTIED –VS- THE KENYA POWER & LIGHTING COMPANY**, it was held;

> **"It is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit."**

72. The Plaintiff has filed to prove each of these claims as required. The Bank Manager whom he allegedly paid was never called to testify. Payments made without receipts cannot be proved. No receipts were annexed for payments made to **IRAC** or to the firm of **Njihia Njoroge & Company**. I find that none of these claims for special damages have been proved to the required standard and accordingly I dismiss the Plaintiffs claim for special damages of **Kshs. 200,400/-**.

CONCLUSION

73. Finally and in conclusion the Plaintiffs suit against the 1st Defendant is only partially successful. The Court therefore makes orders as follows:-

(a) The 1st Defendant to review the amount still due and owing by the Plaintiff taking into account the *'In Duplum Rule.'*

(b) The Court dismisses Prayers (a), (b) (c) and (d) of the Plaint dated 6th March 2013.

(c) The Plaintiffs suit against the 2nd Defendant is dismissed in its entirety.

(d) The Plaintiff to pay the 1st and 2nd Defendants costs for this suit.

Dated in Nairobi this 26th day of February, 2021.

……..

MAUREEN A. ODERO

JUDGE