



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 95 OF 2003

ALLAN GEORGE NJOGU KAMAU.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

J U D G M E N T

1. The Plaintiff herein Allan George Njogu Kamau instituted this suit by way of Plaint dated the 5th November, 2003 which was amended on 17th of December, 2011 pursuant to leave of court granted on 7th December, 2011.

2. In the said amended Plaint, the Plaintiff seeks inter alia the following reliefs;

- a. A declaration that the Plaintiff does not owe any money to the Defendant.*
- b. Refund of the overpaid sum of Kshs. 609,659/= together with interest thereon.*
- c. A declaration that the charge herein is incurably defective for non-disclosure of material facts and is thus null and void.*
- d. A declaration that upon the defendant releasing the guarantor Agnes Wambui Kamau from any or all liabilities on account of the Plaintiffs indebtedness it was disentitled from realizing the Plaintiffs securities.*
- e. An order directing the Defendant to register a discharge of charge and release the Plaintiffs title documents to him.*
- f. An order directing the Defendant to present to this Honorable Court an account.*

3. After close of pleadings, the suit was set down for hearing on diverse dates wherein the Plaintiff testified in support of his case while the Defendant called one witness.

Plaintiff's Case

4. The plaintiff testified on the 19th of September 2007 that he opened two accounts with the Defendant; that is a client account and an office account. The office account was No. 401-002-997 and it is against this account that he sought overdraft facility from the defendant in the early 1980. The Defendant acceded to the Plaintiff request for facility and asked for security upon which the plaintiff got a Guarantor whose property was Eldoret Municipality Block 6/111.

5. It was the plaintiff's testimony that a charge was registered against the property for a facility of Kshs. 300,000/=which was later increased with a similar amount and the charge up stamped at Kshs. 600,000/= later in 1980s.

6. The plaintiff testified that all was well until 1992 when the defendant started having liquidity problems with the interest rates going overboard and his account had started having abnormal balances.

7. The plaintiff thus made an appointment to discuss the accounts and have them rectified. In this regard, the plaintiff testified that on the 21/11/1998 after deliberations, it was agreed that a sum of Kshs. 3,757,249.30 being the balance of his account be converted to a term loan and he was required to give further security. He was given a letter of offer (P exhibit 1) and the interest rate to be applied was 31% p.a and a further 1% rescheduling fees.

8. The plaintiff thus testified that he gave the defendant his title for L.R Uasin Gishu/Kimumu/79 and the Bank charged the property which was valued at Kshs. 2,200,000/=. A copy of charge in respect of the same and registered on the 20th of April 2000 was produced as P exhibit 2.

9. It was the Plaintiffs evidence that the charge document at page 2 did not give the interest rate, instead it stated that the rate will be determined by the Bank (Defendant) in its absolute discretion.

10. At the time the Plaintiffs firm was handling the Defendant's legal matters and his income from the Defendant used to go to the office account and the balances were changing all the time. It was his evidence that the Defendant did not inform him the interest rate to be applied after the charge.

11. In a bid to know the actual state of his account, the Plaintiff testified that in August of 2000 he had a meeting with the Defendant's management and an agreement was reached as captured in the letter dated 4th August, 2000 addressed to the Plaintiff by Mr. Obaso (Eldoret Branch Manager) which was produced as P exhibit 3.

12. It was agreed that the principal amount in his account was Kshs. 960,000/=. At the time the Plaintiff testified that he had requested the bank for Kshs. 500,000/ = to bring the total to Kshs. 1,460,000/ = which he was allowed to pay for within 36 months at Kshs. 72,200/ = per month. He also gave two more securities to the Defendant to wit Eldoret Municipality Block 6/354 and 308 because of the further advance and he started paying the instalments. He testified that the two securities were not charged as evidenced in P exhibit 4 a letter from M/S Nyairo & Co. Advocates and the Kshs. 500,000/ = he had applied for was not availed.

13. In the meantime, the plaintiff testified that the defendant started demanding payment from the Plaintiff's guarantor one Agnes Wambui Kamau culminating into issuing of Statutory Notice of intention for sale of her property (P exhibit 5). In the said Notice the Defendant was asking the Guarantor to pay on the Plaintiffs account Kshs. 9,588,933/ = and the interest by then according to the defendant was 26%.

14. The plaintiff testified that the Guarantor approached the Defendant and they agreed the sum of Kshs. 1,363,659.60 was to be paid which was done and evidence thereof attached as cheque marked M.F.I 1& 2. The plaintiff thus testified that the defendant thereafter discharged the Guarantor's title (Eldoret Municipality Block 6/111). By then, the Plaintiff had paid three monthly instalments of Kshs. 72,200/ = bringing the total paid by the Plaintiff and his Guarantor to Kshs. 1,569,659/ = as against a loan of Kshs. 960,000. The plaintiff thus testified that it followed therefore that Kshs. 609,659/ = had been paid over and above the loan.

15. Afterwards, the plaintiff testified that the defendant issued Statutory Notice to sell the plaintiff's land namely Uasin Gishu/Kimumu/79 but he sought an injunction which the court granted.

16. It was the plaintiff's evidence that while all this was going on, he filed his bills and they were fully settled by the defendant as evidenced in P Exhibit 6(a) & (b), 7 (a) & (b) and 8(a) & (b). In this regard, it is the plaintiff's evidence that the defendant could not have paid his fees before deducting their money and was categorical that he did not owe the defendant any money and there was no counterclaim from the defendant.

17. On cross-examination by Mr. Mutei for the defendant, the plaintiff indicated that he had over paid the loan facility by Kshs 600,000/= and that the defendant had indicated that it would consider waiving interest as it had done for other customers. Further, the plaintiff testified that although the defendant did not write to indicate that the debt had been settled upon receipt of payment from the guarantor, they settled the plaintiff's fees as it fell due. It was the plaintiff's evidence that he had no liabilities and the defendant had no right to realize the security.

18. On re-examination, the plaintiff reiterated that he had settled the loan and the amount had been agreed on and his guarantor paid over a million and that the only thing remaining was for the defendant to give account.

Defendant's Case

19. The defendant on its part relied on one witness namely Paul Chelanga, the defendant's debt recovery manager. The witness testified that the plaintiff indeed had an account with the defendant and testified that as of 21st November 1998, the outstanding facility in the plaintiff's account was Kshs 3,757,249.30 which had been secured against Eldoret Municipality Block 6/354 where the charge was Kshs 600,000 and Kshs 2,000,000 over title number Uasin Gishu/kimumu/79. He also testified that a third title in respect of the parcel of land known as Eldoret Municipality Block 6/308 was not charged.

20. It was his evidence that after meetings with the plaintiff, the defendant offered the plaintiff a proposal and he paid Kshs.216,600 in three instalments of Kshs 72,200 between august and December 2001. Later, it was testified that the guarantor redeemed her guarantee by paying Kshs 1,353,659.60 and her security discharged.

21. At the time, that is 8th April 2003, the loan balance was Kshs 10,528,480.90 upon which the defendant attempted to exercise their right of sale on the plaintiff's parcel but an injunction was issued.

22. On cross-examination, Mr. Chelanga confirmed that indeed the plaintiff's parcel of land was valued at Kshs 2,200,000 and the overdraft facility could not exceed that. He also testified that the defendant did not advance any facility to the plaintiff after the 20th of April 2000 and that the rate of interest was not mentioned but it was at the defendant's discretion.

23. He further testified that as of 4th August 2000, the principal amount was Kshs 960,000 although the plaintiff had requested for Kshs 500,000 and that there is no evidence that the same had been advanced or disbursed to the plaintiff. Mr. Chelanga conceded that the letter dated the 18th of July 2001 was an acknowledgement of debt of Kshs 7,581,092.50 and that no counterclaim for the same amount has ever

been filed.

24. Finally, the witness conceded that the defendant never gave the plaintiff a written breakdown of how they arrived at the amount and that there was no statement from 2001.

Plaintiff's Submissions

25. The plaintiff in his submissions dated the 13th of July 2021 submitted that there are 7 issues for determination which are highlighted hereunder.

26. The first issue is whether the plaintiff had an overdraft facility with the defendant and if so for how much. The plaintiff submitted that he indeed had an overdraft facility with the defendant in respect of account No.401-002-997 which was secured by the plaintiff guarantor with the parcel of land known as Eldoret Municipality Block 6/11. The plaintiff thus testified that the principal amount owed was Kshs 960,000/- plus an additional Kshs 500,000/- which was never advanced. The same he submitted had been confirmed by the defendant's debt recovery manager. Further, the plaintiff submitted that not an iota of evidence has been adduced to indicate that any monies were ever advanced to him and it follows therefore that the facility stood at Kshs.960, 000/- as of 4th August 2000.

27. The second issue is whether the plaintiff fully settled his liabilities with the defendant. The plaintiff submitted in the affirmative and further stated that he had actually paid in excess of Kshs 600,000/-. In particular, the plaintiff submitted that as of 4th August 2000, the outstanding debt was Kshs 960,000/- of which he paid Kshs 216,000 while the guarantor paid Kshs 1,363,659.60 bringing the total paid to Kshs 1,579,659.60.

28. The third issue is whether the intended disposal of Uasin Gishu/Kimumu/79 is lawful. The plaintiff submitted in the negative and stated that there is no evidence that any money was advanced to him after registration of the charge and the same had been confirmed by the defendant through the debt recovery manager. Consequently, the plaintiff submitted that without proof of money advanced on the charge as admitted by the defendant witness on oath, there is no basis for recovery or disposal of the suit property and it follows that the intended sale of L.R Uasin Gishu is unlawful and illegal and the court should hold as such. Reliance was placed in the case of ***Nahashon Njage vs Savings & Loan Kenya Limited & another [2017] eKLR***.

29. The 4th issue is whether the contract, if any, and the interest charged by the bank was in good faith or unconscionable, the plaintiff submitted that from the start, it was important to note that there was an existing overdraft facility between the Plaintiff and the Defendant which was secured against the parcel of land known as Eldoret Municipality Block 6/111 owned by one Agnes Wambui Kamau. Further, the plaintiff submitted that from the letter dated 4th August, 2000 the principal sum stood at Kshs. 960,000/ = and even though, an additional security was offered vide L R Uasin Gishu/Kimumu/79 there is no iota of evidence that was produced to show that any money was ever advanced after creation of the said charge, a fact admitted by the defence witness.

30. Further, the plaintiff submitted that no shred of evidence has been availed as to show what the interest rate charged from time to time was but rather it is clear that instead the Defendant came up with figures purporting that was the outstanding balance. That the Defendant could vary or charge interest as it deemed fit without informing the Plaintiff the percentage of interest applied thereof, is a sign of bad faith and is unconscionable. Reliance was placed on the case of ***Margaret Njeri Muiruri vs Bank of Baroda K Ltd [2014] eKLR and Pius Kimaiyo Langat vs Co-operative Bank of Kenya Limited [2017] eKLR***.

31. On the issue as to whether the defendant was in breach of the Banking Act, the plaintiff submitted that the same is in the affirmative placing reliance on Section 44 of the Banking Act to the extent that the defendant increased its rate of banking and other charges without prior approval of the minister. The plaintiff thus submitted that whereas failure to comply with Section 44 of the Banking Act would not, in and of itself, render the contract between the parties' void, Section 52 (3) of the Act prohibits financial institutions from recovering interest or other charges which exceed the maximum permitted under the provisions of the Act. In this regard, the plaintiff observed that from the evidence tendered by the defence, there is no shred of evidence that the Defendant acted within the underpinned law and submitted further that on cross examination, the defence witness admitted that the rate of interest is not mentioned in the charge document or the percentage thereof and as such there was no legal or factual basis for the exorbitant sums the defendant is claiming. Reliance was placed in the decision of ***Margaret Njeri Muiruri vs Bank of Baroda [supra]***.

32. On the issue as to whether the doctrine of estoppel is applicable in this case, the plaintiff submitted that indeed it is. It was submitted that estoppel is the judicial device where a court may prevent or estop a person from making assertions of going back on his or her word. In this regard, the plaintiff submitted that it should be noted that the contents of paragraph 8 of the amended plaint are admitted at paragraph 7 of the defence and the letter dated 4th August, 2000 which was tantamount to a new contract which the Plaintiff relied on. The plaintiff thus submitted that parties are bound by their pleadings and any evidence that is not in tandem with the pleadings goes to no issue. The plaintiff thus relied on the case of ***Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others [2014] eKLR*** and ***Hughes vs Metropolitan Railway Co [1877] UKHL 1*** submitting that the defence witness admitted that the Kshs. 500,000 requested for as per the said letter was never advanced and this left Kshs. 960,000/ = as the amount owing which was fully settled by the Plaintiff and his Guarantor as submitted above and the Defendant therefore is estopped from denying this state of affairs. Thus, the plaintiff submitted that the amount owed had been fully paid and what remains is for the bank to refund the plaintiff the excess paid and relied on the case of ***David Wafula Nyongesa vs National Bank of Kenya [2020] eKLR***.

33. On the last issue as to the reliefs sought, it was submitted that the facility advanced to the plaintiff was shrouded in secrecy orchestrated by the defendant and the plaintiff should be relieved from any obligation arising therefrom. The plaintiff thus submitted that has demonstrated that he paid Kshs. 960,000/ = which was the outstanding balance as per letter from the Defendant dated 4th August, 2000 (exhibit 3) and in light of the Defendant's admission that no money was ever advanced afterwards, the Plaintiff is entitled to all the reliefs sought for in the Plaintiff.

Defendant submissions

34. The defendant through its submissions dated the 30th of July 2021 submitted that there are 6 issues for determination which are highlighted below.

35. The first issue that is whether the plaintiff owes the defendant any money. The defendant submitted that no evidence was adduced to prove the fact that the plaintiff does not owe the defendant any money. The defendant thus submitted that the plaintiff admitted during cross-examination owing the defendant Kshs 3,757,249.30 which it was submitted continues to accrue interest and currently stands at Kshs 12,453,599 upon deduction of Kshs 216,000 paid by the plaintiff in three installments and Kshs 1,335,659.60 that was paid by Agnes Wambui, the plaintiff's guarantor. It was further submitted that the plaintiff has on several occasions admitted to his indebtedness and at no point did he write to the defendant to the effect that he had paid his outstanding amount. Reliance was placed in the case of ***Telkom Kenya Limited vs Kenya Railways Corporation [2018] eKLR, Nairobi Flour Mills Ltd vs Johnson Kithete t/a Farmers General Stores [2005] eKLR and Section 107 of the Evidence Act.***

36. The second issue is whether the defendant should refund the allegedly overpaid sum of Kshs 609,659/=. The defendant submitted that the basis of a refund could only be premised on proof of over payment by the plaintiff which has not been established and thus the prayer for a refund is unfounded.

37. The third issue is whether the charge is incurably defective for non-disclosure of material facts. It was submitted that though the charge instrument did not disclose the rate of interest applicable on the facilities advanced to him, the charge dated the 14th of April 2000 met all the necessary requirements to be considered valid in line with law at the time and in particular Section 65 of the repealed Registered Land Act. Furthermore, the defendant submitted that the plaintiff despite being fully aware that the charge did not provide a specific rate of interest proceeded to accept the terms as it was, executed the charge and received facilities. In the circumstances, the defendant submitted that it is absurd and unconscionable for the defendant to turn back and deny the same. The defendant thus relied on the case of ***Astute Africa Investments & Holding vs Spire Bank Kenya Ltd and another [2018] eKLR, Al-Jalal Enterprises Limited vs Gulf African Bank Limited as adopted in Equip Agencies Limited v I & M Bank Limited [2017] eKLR and Coast Brick & Tiles vs Premchand.***

38. The fourth issue is whether the defendant's act of clearing the guarantor of all liabilities on account of the Plaintiff's indebtedness it is disentitled from realizing the plaintiff's securities. The defendant submitted that the guarantor had only guaranteed the plaintiff up to Kshs 600,000 which at the time of discharge had accrued interest and that there still remains outstanding arrears that must be settled thus the defendant can sell the plaintiff's properties.

39. The 5th issue is whether the intended disposal of Uasin Gishu/Kimumu/79 is unlawful. The defendant submitted that it is not. In particular, the defendant submitted that the intended sale is legal as the plaintiff failed to repay the facilities advanced to him which had been charged to the property. Further, the defendant submitted that it followed due process prior to the advertisement as per the provisions of Section 74(1) and (2), and 77 of the Registered Land Act and relied on the case of ***William Kanyi Hezekiah vs Equity Bank Ltd & another [2017] eKLR.***

40. Finally, on the issue of whether the defendant was in breach of the Banking Act, the defendant submitted that it is not since it was under no obligation to seek approval from the minister before levying interest on the facilities, and relied on the case of ***Co-operative Bank of Kenya Ltd vs Pius Kimaiyo Langat [2012] eKLR.*** Further, the defendant submitted that for this court to indeed find that the defendant charged interest that exceeded the maximum permitted, the plaintiff must demonstrate that the defendant charged interest over and above the maximum provided which the defendant contends the plaintiff has not done, and relied on the case of ***Francis Kaimuru Gitu vs Minister for Finance & another [2008] eKLR*** inviting court to find that the plaintiff has not proved a case against the defendant.

Analysis & Determination

41. I have perused the pleadings and the submissions of the parties together with the annexures and it is my view that there are only two issues for determination and that is whether the plaintiff owes the defendant any amount and if so, if the intended sale of the Plaintiff's property is lawful.

42. The elephant in the room seems to be whether the plaintiff owes the defendant any monies and it is the gravamen upon which all other issues flow. The main contention is that the plaintiff argues that he does not owe any amount to the defendant and in fact submitted that the defendant owes him Kshs 619,659.60 which he notes should be refunded.

43. On the other hand, the defendant submitted that the plaintiff owes it Kshs 12,453,599.40 that is due and thus, they should be allowed to exercise their statutory power of sale in order to recover the debt owed to them

44. There is no dispute that the plaintiff and the defendant had a business relationship that dates back to 1980s. It is also not in dispute that the plaintiff herein was advanced bank overdraft facility by the defendant which was guaranteed by Agnes Wambui Kamau using her property namely Eldoret Municipality Block 6/111. It is also not in dispute that the security furnished was in regard to Kshs 300,000 which rose to Kshs 600,000 after the plaintiff sought a further Kshs 300,000 that was granted on the same security.

45. The dispute gets murkier from this point. This is because, on the 21st of November 1998, the defendant and the plaintiff agreed that the outstanding loan was Kshs 3,757,249.30 which they both confirmed was to be converted to a term loan with interest to be applied at 31% and a further 1% as rescheduling fees. In this regard, the plaintiff gave the defendant his title for L.R Uasin Gishu/kimumu/79 where the bank charged the property which was valued at Kshs 2,200,000/=. Indeed, a copy of the charge in respect of the same was produced as PEXH 2. Afterwards in 2000, the plaintiff submitted that he had a meeting with the defendant and an agreement was reached as captured in the letter dated the 4th of August 2000 and produced as PEXH 3 that the outstanding amount was Kshs 960,000/=.

46. The plaintiff sought a further Kshs 500,000 but the same was never advanced since the properties that were used as security had unpaid land rates amounting to Kshs 783,711.50. At this point, the defendant threatened to sell the guarantor's property unless she paid a sum of Kshs 1,363,659.60. It is not in dispute that in fact the guarantor paid the sum of Kshs 1,353,659.60 as evidenced in the annexed banker's cheque which was also admitted by the defendant. At this point, the charge over the guarantor's parcel of land namely Eldoret Municipality Block 6/111 was discharged.

47. There is also no doubt that the plaintiff paid a total of Kshs 216,600 in installments of Kshs 72,200. The same has been confirmed by the defendant.

48. The plaintiff thus submitted that he paid a total of Kshs 1,569,659/= against a loan of Kshs 960,000 and thus that he over paid by Kshs 609,659/= which the bank disputes.

49. I note from the evidence on record that as of the 8th of April 2003, the defendant considered the loan balance as Kshs 10,528,480.90 upon which the bank attempted to sell of the plaintiff's land namely Kimumu/79 necessitating him to seek an injunction that was granted.

50. I note from the records that the bank on the 4th of August 2000 wrote to AGN advocates informing them that the outstanding loan was Kshs 960,000 which would come to Kshs 1,460,000 if the Kshs 500,000 that was requested had been granted. The same was however never granted and the defendant in his testimony confirmed the same. This means that as of the 4th of August 2000, the outstanding principal figure was Kshs 960,000/=. In order to make a quick decision on the interest waiver, the defendant advised the plaintiff to complete charges as regards two properties namely Eldoret Municipality/Block 6/354 valued at Kshs 600,000 and Eldoret Municipality Block6/308 valued at Kshs 2,400,000.

51. In a separate letter addressed to the guarantor and dated the 16th of September and marked as PEXH 5, the defendant, informs the guarantor that the plaintiff owes it Kshs 9,588,933/=. It is this anomaly that begs the question how the amount of Kshs 960,000 could morphed into Kshs 9,588,933 within 2 years? Furthermore, I beg to ask if indeed the defendant believed that the amount owed to it by plaintiff was Kshs 9,588,933, why did it discharge the guarantor's charge after she paid Kshs 1,353,659.00/? Thirdly, I dare ask, how and why the bank paid the plaintiff his legal fees including Kshs 419,244 as evidenced in PEXH 6(b) and a further Kshs 1,081,341 as captured in bankers Cheque Number 007563 dated the 21st of September 2005 and confirmed via a letter addressed to plaintiff dated 21/09/2005 signed by the manager Ojiambo G.O (PEXH 7a) and further Kshs 288,166 as captured in PEXH 8a, if in deed the defendant believed that the plaintiff owed it monies running to millions?

52. The above questions lead me to one conclusion and that is that the plaintiff did not owe the stated monies to the defendant. Otherwise the bank would have deducted the owed monies from the plaintiff's bills rather than pay him.

53. Moreover, even if as argued by the defendant, the figures are as a result of interest accrued due to non-payment, I find that the same would be excessive as it resulted in more than double the original loan which would be a breach of the in duplum rule which forbids the same.

54. The Court of Appeal in *Kenya Hotels Ltd v Oriental Commercial Bank Ltd (Formerly known as Delphis Bank Limited) [2019] eKLR* while discussing the in duplum rule held that:

“In duplum” is a Latin phrase derived from the word “in duplo” which loosely translates to “in double”. Simply stated, the rule is to the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced. Since the introduction of this principle on 1st May, 2007 it has been applied by the courts with reasonable degree of consistency. See Lee G. Muthoga V. Habib Zurich Finance (K) Limited & another [2016] eKLR, Mwambeja Ranching Company Limited & another V. Kenya National Capital Corporation [2019] eKLR, along a host of many others where it has been invoked. The rationale for this rule was elucidated in the latter decision by this Court in the following passage.

“The In duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides”. See also Mwambeja Ranching Company Limited & another vs Kenya National Capital Corporation [2019] eKLR.

55. The rule was recently reiterated by the Court of Appeal in *Housing Finance Company of Kenya Limited v Scholarstica Nyaguthii Muturi & Another [2020] eKLR* in the following terms:

“As we have shown section 44A of the Banking Act came into force on the 1st May, 2007. That provision of law sets up the maximum amount of money a banking institution that grants a loan to a borrower may recover on the original loan. The banking institution is limited in what it may recover from a debtor with respect to a non performing loan and the maximum recoverable amount is defined as follows in section 44A(2):

“The maximum amount referred 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 non- performing; and

c) Expenses incurred in the recovery of any amounts owed by the debtor.”

By that provision if a loan becomes non-performing and the debtor resumes payment on the loan and then the loan becomes non performing again the limitation under the said paragraphs shall be determined with respect to the time the loan last became non performing. In addition, by section 44A (6) it is provided:

“This section shall apply with respect to loans made before this section comes into operation, including loans that have become nonperforming before this section comes into operation.”

That is to say that the provision applies to loans and has retrospective effect”

56. Furthermore, in *James Muniu Mucheru vs National Bank of Kenya Limited Civil Appeal No. 365 of 2017* the court observed that Section 44A has retrospective effect. In this regard, it does not matter that the plaintiff signed and executed charge which placed absolute discretion on the defendant to set the interest. What matters most is that the bank ought to have exercised this discretion fairly so as not to amount to an act of ‘extortionism’. There is therefore no explanation as to how a loan of Kshs 600,000/- did multiply to an amount that is more than Kshs 12,000,000/-. Moreover, the defendant has also not tendered statement of accounts on how it arrived at the figure of Kshs 12,453,599/-. I thus find the same simply unconscionable.

57. The plaintiff has shown that indeed it paid its debt and in fact paid it in excess by Kshs 609,659/ =.

58. In the circumstances, I find the case in favour of the plaintiff and make the following orders;

1. *A declaration is hereby issued that Plaintiff does not owe any money to the Defendant.*
2. *The defendant is hereby directed to forthwith refund the plaintiff the overpaid sum of Kshs. 609,659/ = together with interest accrued from the date of filing of this suit and until payment in full.*
3. *The defendant is hereby directed to forthwith register a discharge of charge and release the Plaintiff’s title documents to him.*

.....

S.M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH DAY OF SEPTEMBER, 2021.

IN THE PRESENCE OF:-

MR KINYANJUI HOLDING BRIEF FOR MR. KIMANI FOR THE PLAINTIFF.

MISS ADUKE HOLDING BRIEF FOR MR MWANGI FOR THE DEFENDANT

MS GLADYS - COURT ASSISTANT

MISS ADUKE; -WE PRAY FOR 30 DAYS STAY OF EXECUTION.

COURT; -30 DAYS STAY IS GRANTED.

.....

S.M GITHINJI

JUDGE

27/9/2021