



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL CASE NO 552 OF 2003

FRANCIS NJOROGE MWANGI.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED..... DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a plaint dated 4th September 2003, amended on 7th February 2005 and further amended on 17th March 2009, seeking for judgement against the Defendant for:

- a. A declaration that the charges set out in paragraphs 4,9,11,14 and 15, are invalid, illegal and null and void;
- b. That an account be taken in respect to all the sums advanced by the defendant to the plaintiff; all payments effected by the plaintiff to the defendant and the defendant produce all records pertaining to the sums advanced and repayments thereof;
- c. A declaration that all unlawful debits charges, commission, levies and interest levied by the defendant on the plaintiff's account be reversed or refunded;
- d. That the defendant be restrained by itself servant and/or agents or whomsoever from alienating or in any manner interfering with the plaintiff's proprietorship of all these parcels of land compromised in; Title Number Loc 7/ Gakoigo/3077, 3078, 3079, 3080, 2773 and Loc 3/Mukuria/ 880, pending determination of this suit;
- e. Costs and interest of the suit.

2. The Plaintiff avers that, he is the registered proprietor of all that parcels of land namely; Loc 7/Gakoigo/3077, 3078, 3079, 3080, and 2773; Loc 3/Mukuria/580 and Nginda/Samar Block 2/274 (herein "the suit properties"). That, at all material time to this suit, he was the Defendant's customer at the Murang'a branch.

By a letter of offer dated 19th August 1992, he applied for and was granted by the Defendant an overdraft facility in the sum of; Kshs 300,000. The facility was subject to review on 31st August 1993.

3. That, save for a reduction of; Kshs 5,000, upon the first review of the facility, the facility was further enhanced by letters of offer dated; 5th October 1993, 16th August 1994, 1st and 12th September 1995 and by a letter of offer dated 22nd October 1996, it was enhanced to; Kshs 1, 800, 000 and lastly by a letter of offer dated, 26th August 1997, to; Kshs 2,300,000 with a provision for review on 30th September 1998.

4. The Plaintiff in consideration of the aforesaid facilities, charged the subject properties; Loc 7/ Gakoigo/3077 to 3080 and 2773 in favour of the Defendant on 13th August 1992 and by a further charges thereon (save for the property 2773) dated 4th September 1995). Further, on 12th September 1995, he charged title number; Nginda/Sumar/Block 2/274 and Loc 7/Gakoigo/2773 in favour of the Defendant and finally on 12th November 1996 and 21st August 1997, he charged title number; Loc 3/Mukuria/580 in favour of the Defendant.

5. However, the Plaintiff avers that the charges created over the suit properties are invalid, illegal, null and void for the following reasons:-

- a. They were created without the consent of the Land Control Board and therefore contrary to the provisions of; section 6 at the

Land Control Act (cap 302), Laws of Kenya;

b. They are not supported by any or any valuable consideration;

c. They do not comply with the mandatory provisions of Section 65(5) of the Registered Land Act (cap 300), Laws of Kenya;

d. They were not properly attested.

6. That, the Defendant in further breach of the terms and conditions of the letter of offers and statutory provisions; levied illegal penalties and interest on his account and/or debited other unlawful sums; thereby causing the overdraft facility to escalate beyond the sanctioned limit. Further, in the year 2000, property number; Nginda/Samar/Block 2/274 was sold at; Kshs 1,500,000, but the proceeds were not applied to reduce his indebtedness.

7. The Plaintiff avers that, due to the aforesaid; he was placed in great economic hardship, compelled to shut down his business, thus losing the source of his livelihood. That despite the aforesaid, the Defendant now demands that he pays the sums of;

a. Kshs 2,011,011.30, as at 7.6.2004, plus 18% interest per annum as from December; 1999, as per the statutory notice from Macharia Njeru Advocates;

b. Kshs 3,493,269 as at 31st July 2003; from 1st August 1999, at interest rate of 9% per annum, as per the demand by Mathenge and Muchemi Advocates;

c. Kshs 2,002,495, as per the defendant's bank manager letter dated, 7th January 2004.

8. Finally, he avers that, he utilized the overdraft facilities granted within the sanctioned limits at all times and complied with the all the other terms and conditions set out in the letter of offer; hence he should be granted the prayers sought for herein.

9. However, the Defendants filed a statement of defence dated 11th October 2003, and averred that, the charges meet all the requirements of the law and were dully witnessed and attested as per law required, That, prior to the creation and registration of the subject charges, the requisite Land Control Board consents were obtained. Similarly, the letters of offer executed by the parties before the charges were created, are evidence of an agreement to borrow and/or lend monies. Finally, the Plaintiff having admitted the sale of the property; Nginda/Sama/Block 2/274, then the plea of the charges being null and void; is spurious, unfounded, superfluous, inconsequential, frivolous, vexatious.

10. The Defendant denied the alleged deduction of the facility by a sum of; Kshs 5,000, but admitted the variations of interest rates. It also denied the allegations that, the Plaintiff at all times, maintained his account within the sanctioned limits and/or complied with all terms and conditions of the facility. That, he breached the conditions and terms of the letter of offer and the charge documents, fell in arrears and/or failed to regularise his account, thus compelling the Defendant to demand payment of the entire debt with interest, bank charges and other costs.

11. That, the Plaintiff sold one property with the consent of the Defendant and the proceeds thereof of; Kshs 1, 500,000 was dully credited into his account, in the instalments of, Kshs 150,000, 450,000 and 900,000 as received on diverse dates. Further, the Plaintiff has on numerous occasions, formally and by implication admitted that, the facility was not serviced and/or admitted the indebtedness.

12. The Defendant averred that it is a stranger to all the allegations of the Plaintiff's economic hardships and of the shutting down of his business. Similarly, it is unaware and unable to plead to the demands of the sums stated under paragraphs 22 of the further amended plaint.

13. The case proceeded to a full hearing. The Plaintiff's case was supported by his evidence, whereupon, he relied on his witness statement; dated 6th March 2012, and a bundle of documents filed in court on 4th August 2005 and supplementary documents filed on; 24th February 2006. He reiterated the averments that he applied for an overdraft facility of; Kshs 300,000 and was granted the same in the year 1992. It was subsequently renewed to, Kshs 2,3000,000 by the year 1997. That, in order to secure the facilities, he created various charges over the suit properties, though the charges were null and void, for the reasons already stated herein and for non-disclosure of material facts, amounting to fraud.

14. He also testified that, the bank charged different rates of interest on both the authorized limit of the overdraft and default rates on amount beyond limit. That by a letter dated 18th December 2002, the Defendant has admitted charging various interest rates; ranging between 22% to 53% per annum. Further, the Defendant did not notify him in advance over the changes or variation in the interest rate. In addition, the unlawful interest rates were also in contravention of; section 39 of; the Central Bank Act, (cap 491) Laws of Kenya, (repealed by Act No. 8 of 2004).

15. That, although the interest rate was re- introduced with effect from 1st January 2001 and remained in force until 31st July 2005, the Defendant failed, refused and/or neglected to comply with the "Donde Act" till the repeal on 31st July 2005. The Plaintiff stated that, as a result of these un-contractual interest rates and other charges, the facility became a hindrance to the exercise of his equity of redemption.

16. That, as a further consequence thereof, the Defendant on 7th June 2004, served him with a statutory notice under section 65 of the Registered Land Act (cap 300) Laws of Kenya, (repealed), demanding payment of a sum of; Kshs 2,011,011.30, as at December 1997, with interest at 18.0% per annum. A further statutory demand notice was served on 6th October 2004; under section 74 of the Registered Land Act.

17. On 12th April 2006, a notification of sale was served through Megabyte Auctioneers demanding a payment of; Kshs 2,002,494.55. On 5th January 2009, M/s Baseline Auctioneers served him with a further notification of sale and the property advertised for sale. The Plaintiff testified that, the notification was null and void, as no proper statutory notice was served.

18. However, on a without prejudice basis, the Plaintiff stated that, he has re-calculated the amount payable since inception of the account and established from the Interest Rates Advisory Centre (IRAC), it is clear that; the Defendant has levied Kshs 334,070.90 as illegal charges and as at 31st December 2000, he only owed Kshs 342,891.00 and not Kshs 2,011,011.30 as claimed. Further there is an overcharge of; Kshs 1,659,603.55, as at 31st December 2000.

19. In cross examination, the Plaintiff confirmed that he signed all the letters of offer and that several overdraft facilities were granted to him. Similarly, he admitted that; the Land Control Board consents were obtained. In re-examination, he stated that, the first letter of offer was signed under duress. That, it indicated interest rate of 19.5% for the facility and penalty fees at 22.5% but the other charge documents showed interest rate of 18.5%. That, even then, the Defendant wrote to him showing the interest rate charged was 53%.

20. The Plaintiff's second witness was one, Wilfred Abincha Onono a Certified Public Accountant, CPA (K) and the Managing Consultant of; Interest Rates Advisory Centre Ltd (IRAC). He relied on his witness statement dated 2nd December 2011 and stated that he was instructed by the Plaintiff to calculate interest charged on account No. 272-687-990/040273681570.

21. In carrying out the exercise he relied on the documents availed by the Plaintiff being;

a. Plaintiff's statement of bank account for the period 30th November 1992 to 2nd January 2001;

b. Letters of offer dated 19th August 1992, 5th October 1993, 16th August 1994, 1st September 1995, 22nd October 1996 and 26th August 1998;

c. Legal charges over L.R No Loc 7/Gakoigo/2773, 3077, 3078, 3079 and 3080, dated 4th September 1995 and Loc 3/Mukuria/580, dated 12th November 1996;

d. Further charges over; L.R Loc/Gakoigo/2773 and Loc3/Mukuria/580 dated 21st August 1997;

e. Correspondences;

f. Pleadings in; HCC No 552 of 2003.

22. The witness stated that, he established there was no documentary evidence that the Defendant complied with section 44 of the Banking Act, with reference to the various charges and fees as levied or varied over the period in question, and that the various charges debited in breach of that section amounts to Kshs 334,070.90. Further, the outstanding cleared balance as at 31st December 2000, as recalculated is; Kshs 1,659,603 in favour of the Plaintiff.

23. In cross examination, he stated that he went through the letters of offer in relation to various interest rates chargeable. However, he could not tell how much was granted and repaid. That, there were missing bank statements. He admitted that he did not consult the Defendant for the same.

24. The Defendant's case was supported by the evidence of; its Credit Administrator Murang'a Branch, Gibson Mwai. He relied on his witness statement dated 12th October, 2015 and a bundle of documents dated 13th September, 2007. He reiterated the averments in the Defendant's pleadings and stated that, the Plaintiff maintained a bank account number; 273681570, with the Defendant. He was advanced sums herein secured by various charges as aforesaid. That, before the charges were registered, the Defendant made an application to; Kigumo Division Land Control Board for the prerequisite consent and received approval as evidenced by the copies produced.

25. That, the terms and conditions of the facilities were stated in the letters of offers, to the effect that the interest rate chargeable was calculated on daily balances and debited monthly by way of compound interest. Further, the Defendant reserved the right to change the interest rate, without notice to the borrower.

26. That, in the year 1998, the Plaintiff defaulted in repayment of the facility and fell into arrears resulting in numerous correspondence exchanged by the parties, during the period of 30th December 2000 and 31st March 2001, and produced herein. That after the default the Defendant invoked its rights and covenant reserved in the charge documents, with a view of selling the security property.

27. The Defendant sent out the requisite statutory notices, but the Plaintiff did not heed the same, whereupon the Defendant instructed Baseline auctioneers to issue a forty-five (45) days redemption notice and notification of sale. The plaintiff did not make good the payments. Upon expiry of the period given, the property was advertised in the daily nation of; 26th January 2009 for sale on 19th February 2009. However, the Plaintiff approached the court for injunctive orders.

28. The witness stated that, the Defendant has always been willing to provide statement of accounts. That, the report from IRAC is misleading, firstly, because Mr. Onono notes therein that, in compiling the report, he did not have access to all the Plaintiff's statements of accounts. Therefore, the report is no doubt erroneous. Further, the report is not independent as the Defendant was not consulted during the preparation thereof. Finally, the rate of interest herein was expressly agreed on by the parties, therefore the desire to cap it at 19% is of no contractual basis.

29. In cross examination, he stated that the rate of interest charged in each of the letter of offer was different, as they relate to different facilities. He was aware that, there was a controlled regime of interest rate in the years; 1992 to 1997, but he could not confirm the rate of interest applicable. He also testified that, the Defendant did not seek for specific approval for the Plaintiff's account from the Central Bank of Kenya's approval but for a general approval. He also did not know if the Defendant had authority to prepare the charge documents.

30. He admitted that the Plaintiff wrote complaints over interest rate charged. Further, there were monies received whose source was not known to the Defendant but was credited to the Plaintiff's account. In re- examination, he stated that, the primary document as far as interest rate is concerned, is the letter of offer.

31. At the close of the case, the parties filed their final submissions which I have considered alongside the evidence adduced and I find that, from the issues filed by the parties, the following condensed issues have arisen for determination: -

- a. Whether the defendant granted the plaintiff the various overdraft facilities as stated;
- b. Whether the overdraft facilities were secured by the suit properties and charged as per the respective charges;
- c. Whether the charges referred to herein are valid or null and void;
- d. Whether the court should grant the orders sought; and
- e. Who should bear the costs of the suit?

32. On the issue as to whether the overdraft facilities were granted, I note that, the Plaintiff admits at, paragraphs 7,8,13 and 17 of the further amended plaint that, he was granted an overdraft facility of; Kshs 300,000, in the year 1992 and the same was enhanced to Kshs 2,300,000 by the year 1997. The Defendant confirms the same in its statement of defence. Similarly, the Defendant's main witnesses confirmed that, the overdraft facilities were granted as stated. Therefore, the issue of the advances is not in dispute. In the same vein, there is no dispute that, the suit properties were charged as stated, in the pleadings and/or evidence of both parties.

33. However, what is basically in dispute is whether; the subject charges created herein and registered are; valid. In that regard, the Plaintiff raised basically four issues which I shall now address. The first issue, relates to lack of the Land Control Board Consents. I have considered the evidence on this issue and I find that, the Defendant has produced in its bundle of documents copies of the application for consent at pages; on 3,10, 16, 22 28 and the consents pages 4,11, ,17, 23, and 29 respectively. Therefore, any averments to the contrary is not factually correct.

34. The next issue raised is that, there was no valuable consideration given. However, the Plaintiff having conceded that, the overdraft facility was applied for and advanced. The issue of consideration does not arise. The other issue relates to execution of the charges. The Plaintiff argues that, other than the further charges dated; 12th September 1995, 12th November 1996, and two others both dated 21st August 1997, which were drawn by a qualified Advocates, all other (ten) 10 charge instruments at pages; 5,12,18,24,30,49,51,53 and 55, were drawn by Kenya Commercial Bank Limited, Murang'a

35. That sections 34(1) (e) and 35 of the Advocates Act (cap 16) Laws of Kenya outlaws, the preparation and drawing of conveyancing documents by an unqualified person. The Plaintiff relied on the case of; *National Bank of Kenya Limited v Anaj Warehousing Limited (2015) eKLR*, where the court held, that "documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes". The Plaintiff therefore argues that if the subject charges are invalid, as aforesaid, the statutory notices and the redemption notices herein are of no legal effect.

36. The Defendant conceded that, certain charge documents were drawn by the Defendant in its individual capacity. However, the issue in the case referred to by the Plaintiff was whether documents prepared by an Advocate without a practicing certificate should be struck out and the court held that, they should not. That, in the instant case, the charge documents are contractual documents between the parties; as such the issue of the Defendant being unqualified; is totally misplaced in that; the Defendant is a direct party to the contract.

37. That, the contract is binding as the Plaintiff executed the charge documents fully and directly benefitted from the overdraft facilities advanced. The Defendant relied on the case of; *Bakshish Singh & brothers vs Pan Afric Hotels Limited (1986)KLR* where the Court of Appeal stated that "for there to be a good contract there must be a concluded bargain and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties".

38. I have considered the arguments advanced by the respective parties and I find that, there is no dispute that, indeed there were several charges that were drawn by; Kenya Commercial Bank Limited, Murang'a Branch. The question is whether these charges are valid under the law. In that regard, section 34(1) (a) the Advocates Act, states that;

"No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—

(a) relating to the conveyancing of property".

39. For clarity and understanding; section 2 of the Act defines an unqualified person, as "a person not qualified under section 9, to act as an advocate" In that respect, section 9 stipulates that;

"No person shall be qualified to act as an advocate unless—

- (a) he has been admitted as an advocate; and
- (b) his name is for the time being on the Roll; and
- (c) he has in force a practicing certificate.”

40. From the above provisions, it is clear the Defendant herein is not a qualified person to have drawn the subject charges and therefore, the charges herein at pages 5, 12,18,24, 30, 49, 51, 53 and 55, drawn by Defendant have not been drawn by a qualified person. The provisions of sections 34(1)(a) of the Advocates Act, are couched in mandatory terms, by use of the word “shall”. Therefore, compliance thereof is mandatory.

41. In fact, the Act criminalizes the act of drawing conveyancing documents by unqualified person and states that, if the a body corporate, violates the subject provisions of; section 43 of the Act states that, it shall be guilty of an offence and liable to; a fine not exceeding fifty thousand shillings (Kshs 50, 000) for each such offence.

42. In view of the aforesaid I find that the arguments by the Defendant that, being a party to the contract, then charges are properly drawn is untenable. Additionally, statutory provisions cannot be negated by contractual arrangements between the parties. Further, it is puzzling as to why the Defendant chose, to have some charges drawn by a law firm and others by itself. The key question however remains, as to whether these subject charges are null and void in view of the fact that, the Plaintiff has benefitted from the monies advanced, in consideration of the same. I shall revert back to this issue later.

43. The next key issue is whether; the Plaintiff owes the Defendant any money and/or whether the Defendant has levied and is claiming unauthorized and/or unlawful or illegal charges and/or interest rates. The Plaintiff avers that, under the banker/customer relationship the Defendant is under a duty to exercise reasonable care and skill in carrying out its contractual obligations including handling his accounts towards him. The Plaintiff relied on the cases of; *Karak Rubber & company Ltd vs Burden & others (No 2) 1972 Vol 1 All ER 1210*, *Shah & another vs HSVC Private Bank (UK) Ltd (2012)EWHC 1283 (QBD)* and *Fidelity Commercial Bank Ltd vs Italian Market Kenya Ltd (2017) eKLR*.

44. The Plaintiff stated that, he wrote several letters to the Defendant complaining about the unlawful charges but in vain. Further, the application for consent of the Land Control Board, the letters of offer and the charge documents, will confirm that, there is totally no consistence in the interest rate charged by the Defendant.

45. Similarly, the Defendant has not filed a counter claim, which basically confirms that; the Plaintiff is not indebted to it. Further, the Plaintiff has filed a report from; IRAC which shows that, the Defendant levied default charges, mobilization fees, in the sum of Kshs 334.000.70, without prior ministerial approval. The Plaintiff relied on the case of; *Samuel Biba Kihara & another vs Housing Finance Company Kenya & 2 others (2018) eKLR*.

46. However, the Defendant reiterated that, the IRAC report is was no reliable due to the reasons already stated and that Mr Onono as an expert witness, is not authorized to make conclusion on whether or not the Defendant charged unlawful interest, as by doing that, he has ventured into territory within which a Certified Public Accountant has no authority. The court was invited to disregard the report. Finally, it was argued that, the interest rates applied were guided by letters of offer signed by both parties.

47. I have considered the arguments advanced and I find that, the interest rate agreed on by the parties was stated in the letters of offer and the charge documents. The Plaintiff has captured the same clearly in summary of the supplementary list of documents filed 24th February 2006 at page 231. I have considered the same and I find that the lowest interest rate as per the letter of offer is 19.5% and as per the charge documents 21.5% and the penal rate at 15%. The highest is 31.25%, 46.25% and 48,5% respectively.

By a further letter dated, 30th November 1996, the Plaintiff complains that, the Defendant had not responded to the issues raised in the previous letters. He states inter alia that; the Defendant had reduced his overdraft facility by; Kshs 5,000, in the year 1994, without his consent and raised interest rates to; 31% vide a letter dated 6th August 1994. He called upon the Defendant to look into all the issue pertaining to its unilateral decision to change the interest rates.

48. The Plaintiff further raised the issue vide letters written on 31st October 2000, 4th December 2000 and 12th December 2000, 15th April 2002, wherein he sought for re-calculation of interest rates applied on his account and/or be accorded an opportunity to know how the interest was calculated and increased from; 16.5% to 75% per annum. The Defendant responded to these letters, vide letters dated; 22nd November and 9th December 2000, 23rd January, 2001 and 17th April 2002, basically insisting that, the Plaintiff owed the money claimed and promised to recalculate the interest rate and notify the Plaintiff.

49. However, it is not clear though whether the interest rate was recalculated, as the Plaintiff followed up with a further appeal for re-calculation of interest rate in the letter dated; 3rd February 2003. Apparently, the Plaintiff also raised the issue with the Central Bank of Kenya, vide a letter dated 11th August 2004, which was responded to by a letter dated 17 August 2004, and informed that; sections 44 and 52(3) of the Banking Act, were still valid provisions of the statute.

50. The subject provisions states that: -

“44 No institution shall increase its rate of banking or other charges except with the prior approval of the Minister”

52 (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”.

51. The Plaintiff avers that, the Defendant violated these provisions and instead of correcting the unlawful debits, it resorted to issuing numerous demands. That, by a letter dated 23rd January 2001, the Defendant informed him that, it was unable to concede to his request for additional funds and that, it was in his interest to fully repay the outstanding amount without further delay. By letters dated 7th June 2004, and 6th October 2004 the Defendant served him with a statutory notice demanding payment of the outstanding sum. Hence the need to take accounts.

52. Be that as it may, the question remains as to whether the Defendant charged unlawful interest rates. To answer this question, I have considered the documents produced and note that, on 13th September 2007; the Defendant filed Plaintiff's statements of account for the years; 1995, 1996, 1997, 1998, 2000 and three (3) months for the year, 2001. However, most of these statements especially for the years 1995 to 1998, 2001 and 2002 January to April are illegible, as evidenced by pages; 265-285; 288-290; 293-306; 307-311; 313-316; 318-322; 326-328 thereof.

53. Further, the Defendant's witness did not attest to the same nor explained them in depth. Instead, he simply stated in his statement that “I wish to reiterate the contents of the statutory notice dated 6th October 2004, that the Plaintiff is indebted to the Defendant in the tune of; Kshs 2,011,011.30 and which amount continues to accrue interest from December 1999” Due to the aforesaid, these statements were not reliable and/or conclusive. In the same vein, the IRAC Report reveals that, all the Bank statements were not availed to the maker thereof. In that regard, none report produced is conclusive. In view of the fact the Plaintiff's call along complained of unauthorized interest rates, then there is definitely a need to interrogate the matter further.

54. In that regard, a perusal of the statutory demand letters sent to the Plaintiff reveals that, the Defendant demanded interest rates not indicated either in the letter of offer and/or the charge documents. By a letter dated 18th December 2002, the Defendant informed the Plaintiff that the outstanding debit balance on his account was; Kshs 2,002,494.55 and that the prevailing interest rates between the years; 1997 to 2000, ranged from 22% to 53%.

55. By a letter dated 21st October 1998, the Defendant demanded a sum of; Kshs 2,718,753.35, as at 19th October 1998, with interest at a rate of “52%” per annum. Further, by a letter dated 6th April 1999 from; Mathenge Muchemi Advocates, the Defendant was demanding a sum of; Kshs 3,204,389.15, plus the interest at a rate of 37% per annum. Finally, by a letter dated 18th December 2002 the Defendant states that the prevailing interest rates between 1997 and 2000 ranged from 22% to 53%. Obviously these different interest rates ought to be explained and justified.

56. The Plaintiff has sought that an order be given for accounts to be taken. The court cannot descend into the arena of ascertaining the same. The parties have the responsibility of the same. The exercise of the same will help ascertain whether, the Plaintiff fully repaid the overdraft facility granted or not.

57. The other issue raised herein concerns the statutory notices served. I will not delve into the same as the interrogation thereof would have been necessary had the properties been sold. The only property sold was by the consent of the parties.

58. Finally, the last issue is whether; the court should grant the orders sought. In that regard, the plaintiff seeks for an order declaring the charges under paragraphs 4, 9, 11, 14 and 15 null and void. I have considered the evidence and find and order that, the charges set out under paragraph 4, and 9 were not properly drawn by a qualified person and are null and void. However, the charges under paragraph 11, being the charge dated 12th September 1995, over Loc 7/ Gakoigo/2773, was properly drawn by the law firm of; Mathenge & Muchemi Advocates. Further, the other property Nginda/ Samar/Block2/274, has already been sold, as per sale agreement dated 23rd May 2000.

59. The charge under paragraph 14, dated 12th November 1996, was properly drawn by the law firm of; Maina Muiruri & Co, Advocates and so is the charge under paragraph 15, dated 21st August 1997, which was drawn by the same firm. Therefore, the only invalid charges are those under paragraphs 4 and 9.

60. However, the charges that were unlawfully and/or improperly drawn are not valid in so far as the Defendant may exercise its statutory power of sale. However, by virtue of the fact that, the titles relating to the same were, deposited with the Defendant as security for the overdraft, they created “equitable charges” in favour of the Defendant. Therefore, the Defendant can only enforce them by a court order, unlike if they were a legal charge, where the Defendant would have had an automatic self-help remedy to exercise a statutory power of sale. Similarly, the fact that, some charges were not properly drawn, does not release the Plaintiff from liability to pay the money that was extended to him. Therefore, any sum established to be owing is recoverable.

61. The other prayer under prayer (b) of paragraph 24, is for accounts be taken. In view of the reasons stated herein, I allow that prayer and order that, the exercise shall be undertaken by an independent professional party, appointed by both parties and in the absence of consensus, the relevant professional body shall appoint one. It is important that, in conducting the exercise, the interest rate regime applicable under the law must be considered. The fees payable for the exercise shall be borne in equal amounts by both parties and the exercise shall be carried out within the next thirty (30) days from the date of this order.

62. Upon conclusion of the exercise aforesaid, any sums established to be due and payable, shall be paid by the party liable to pay. If the accounts are in favour of the Defendant, it shall recover it in accordance with its rights under the valid charges. If there will be further sums outstanding, it shall be recovered as unsecured sum with interest at commercial rates (not the rates in the impugned charges), prevailing at that time (which can be established from the Central Bank of Kenya).

63. In the same vein, any sum found to have been improperly debited on the Plaintiff's account shall be refunded accordingly and so the

prayer for the same is allowed if there will be evidence of unlawful debits after the account taking. However, the prayer seeking for restraint in sale of the suit properties was sought for “pending determination of the suit”. Therefore, it is overtaken by events. But the disposal of any suit property charged shall await the outcome of the exercise of taking accounts.

64. Finally, the costs of the suit shall abide the outcome of who owes what. Any party is at liberty to apply.

It is so ordered.

Dated, delivered and signed on this 21st day of October 2020

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms Akong’a for the Plaintiff

Ms Kamau for Mr Kyengo for the Defendant

Robert the Court Assistant