



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL SUIT NUMBER 620 OF 2010**

**PETER MATHENGE GITONGA.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....DEFENDANT**

**JUDGEMENT**

**Plaintiff's Case**

1. The plaintiff, **Peter Mathenge Gitonga**, by a plaint dated 16<sup>th</sup> September, 2010 filed in Court the same day seeks the following orders:

- a) **A declaration that the defendant had illegally and irregularly overcharged the Plaintiffs mortgage account No. 315-092-751-010 (herein to be referred to as the 'mortgage') by a margin of Kshs 1,529,519 as at 29<sup>th</sup> February, 2008.**
- b) **An order that the Defendant do pay the Plaintiff the sum of Kshs 1,529,519 forthwith with interest accruing at commercial rates with effect from 29<sup>th</sup> February 2008 until payment in full.**
- c) **General damages for fraud and deceit.**
- d) **General damages for negligence.**
- e) **Costs.**
- f) **Any other order this honourable court may deem fit to grant.**

2. According to the plaint, the plaintiff was the holder of a mortgage account No. 315-092-751-010 having approached Savings & Loans Kenya Limited which was then a subsidiary of the Defendant with a request for mortgage finance on or about 1<sup>st</sup> August, 2000. The request resulted in a letter of offer dated 2<sup>nd</sup> March, 2000 drawn by the Defendant and accepted by the Plaintiff for the advance of Kshs 2,940,000.00 to finance the purchase of the property known as L.R No 209/12221/57 South C Nairobi (herein to be referred as the suit property).

3. It was pleaded that the said amount was advanced and was to accrue interest at a variable rate of 26% per annum calculated on daily balance and debited monthly by way of compound interest repayable by

monthly instalments of Kshs 65, 855.00 within 10 years with effect from 1<sup>st</sup> September, 2005 and that these terms were reduced into a form of a charge which was duly drawn and executed and secured by the said property.

4. According to the plaint, in November 2007, the Plaintiff received a call from the Defendant indicating that he was in arrears of 2 months and advising him to make a payment of Kshs 245,000.00 to cover for the period up to 31<sup>st</sup> December 2007. The Plaintiff then made a payment of Kshs 200,000.00 on 18<sup>th</sup> December, 2007 and a further Kshs 45, 000.00 in January 2008 to liquidate what was to him the noted errors.

5. It was further pleaded that on an unknown date between November and December in the year 2007, the Defendant without personal service of a statutory notice as required by law instructed M/s Baseline Auctioneers to sell the suit property by public auction. The said auctioneers similarly without service of the usual 45 days notification of sale advertised the suit property on 28<sup>th</sup> January, 2008 for sale on 15<sup>th</sup> February, 2008 contrary to the **Auctioneers Rules, 1997**. The Plaintiff pleaded that on 13<sup>th</sup> February, 2008, he visited the defendant to request for the cancellation of the auction in the view of the payment of the outstanding arrears but was informed by the plaintiff that the illegal auction would proceed unless he cleared the entire outstanding balance of the mortgage loan account and showed the source of his funds. Due to the apparent determination by the defendant to sell the suit property despite the acknowledgment of lack of statutory notice of sale and negligence, the plaintiff was constrained to find the outstanding balance on account of Kshs 1,450,000.00 which he paid on 14<sup>th</sup> February, 2008 in order to save the suit property from sale.

6. It was pleaded by the Plaintiff that the defendant's actions were deceitful, malicious, and fraudulent given that the mortgage was supposed to be paid for 10 years. The Plaintiff accused the Defendant of having:

- i) Failed to serve a statutory notice of intention to sell as required by law.
- ii) Failed to serve the Auctioneers 45 days notification of sale.
- iii) Called the plaintiff to demand payment of the mortgage debt without compliance with the requirement of law.
- iv) Refused to cancel the public auction even after the plaintiff had regularized the intended sale despite acknowledging that the plaintiff had not been served with the statutory notice.
- v) Insisted on payment of entire balance prior to expiry of the term of the mortgage.
- vii) Insisted that the plaintiff do prove his source of funds.
- vii) Continued to debit the plaintiffs account with interest on the balance of Kshs 42,685.57 while it retained the plaintiff's deposit of Kshs 158,000 intact

7. In light of what the plaintiff termed as callousness and high handedness by the Defendant, it was pleaded that the Plaintiff engaged the services of experts in bank loan and mortgage reconciliation at M/s Interest Rates Advisory Center Limited (herein referred to as IRAC) to re-calculate the said mortgage account from its inception to date applying the contractual rates of interests and penalties as advised by the defendant from time to time and applying the relevant provisions of law. Through IRAC, the Plaintiff established that:

- a) The defendant charged varying rates of interest penalty and ledger charges and never sought Central Bank of Kenya's approval thereof as per Section 44 of the **Banking Act**.
- b) As a consequence, the defendant illegally imposed various miscellaneous charges amounting to

Kshs 27,288.00 as at 29<sup>th</sup> February, 2008 which ought to be dropped or omitted from the Plaintiff's statement of account.

c) The defendant illegally charged interest at rates higher than the legal maximum rates stipulated in the **Central Bank of Kenya (Amendment) Act 2000** between 1<sup>st</sup> January, 2001 to 31<sup>st</sup> July, 2005. The Plaintiff went ahead and quoted section 39 of the said Act which provided that the maximum rate of interest applicable was Treasury Bill rate plus 4%.

d) Although the defendants claimed for an outstanding debit balance of Kshs 42, 685.60 as at 7<sup>th</sup> February, 2008, the re-calculated balance as at the said date was a credit balance of Kshs 1, 486, 833.64.

e) Consequently, the plaintiff's account had been overcharged by a margin of Kshs 1,529,919.30 as at 7<sup>th</sup> February, 2008.

8. The plaintiff therefore contended that the defendant's actions were negligent and particularised what in his view constituted the said negligence.

9. In support of his pleadings, the Plaintiff made a statement which he relied upon in this suit as part of his examination in chief. The said statement was a reiteration of the pleadings in the plaint.

10. According to the plaintiff, an advocate of the High Court, the said facility was meant to enable him acquire a property in Five Star Estate. He confirmed that according to the contract there was a default clause of 3% p.a above the applicable rates. In his evidence he complied with all the conditions including the deposit of Kshs 138,344/- equivalent of two months instalment. Pursuant thereto a charge was duly prepared and registered and he regularly paid his monthly instalments though there were few instances when there was late payment which he would later regularise and this was in the year 2004 when he might have missed 2 or 3 instalments.

11. The plaintiff testified that in November and December, 2007 he was late in making payments due to the fact that he was running for a parliamentary seat and received 2 calls a **Mr James Odwako**, the Manager, Savings & Loans informing him that his account was in arrears and he deposited Kshs 200,000.00 and another Kshs 45,000.00.

12. The Plaintiff testified that he received a call from a friend informing him that the suit property was about to be sold by way of public auction. The said friend was approached by the Defendant's staff who informed him there was a sale of the suit property by private treaty. The Plaintiff was surprised at this as he had not received any demand letter indicating being in arrears or statutory notice from the Defendant. The plaintiff then wrote a letter protesting this move but was informed that there was an amount of Kshs 167,000/= in respect of January and February, yet according to him, even the month of February. Upon making a payment of the said Kshs 167,000.00 he was informed that the sale would be cancelled.

13. However on 1<sup>st</sup> February 2008, **Mr Odwako** informed him that the sale would not be cancelled as the matter was with the legal department unless he paid the entire amount which was Kshs 1,400,000/- which he had to pay to save his house from being sold and the auction was cancelled.

14. According to the plaintiff he was unhappy because the Bank exerted a lot of pressure and he had to look for money frantically to save his house. In his view the Bank's action was malicious and deceitful since he had by that time he had cleared the arrears and the Bank had not served him with the required notices. In his view the Bank's actions were meant to make it difficult to him to recover his property and to confer the benefit on someone else.

15. The Plaintiff then approached IRAC to ascertain that he had paid off the correct balance on account. However, the IRAC report showed that he had been overcharged and he wrote a letter to the Defendant to complain. Following the report by the IRAC, the plaintiff complained to the Bank and the Bank in a letter

dated 19<sup>th</sup> February, 2008 acknowledged the negligent and unprofessional manner in which the account was handled and apologized for the same and promised to take up the issue with the concerned staff. The plaintiff reiterated that the Bank was negligent in its dealings with him and asserted that the action was oppressive and contrary to law.

16. While conceding that there were instances when he was in default, the plaintiff however maintained that he would regularise his account. He however acknowledged that the only statutory notice that he received was on 17<sup>th</sup> March, 2005 to which he did respond and cleared the arrears outstanding and he was assured that the matter was sorted out. In his view it is incorrect that argue that this notice survived since an understanding was reached over the matter and he never received any correspondence indicating otherwise. He however contended that he never received the 45 days' notice of sale.

17. According to the Plaintiff although there was an outstanding sum of Kshs 42,000.00 his deposit was more than enough to cover this yet the Defendant still insisted in charging him interest.

18. The plaintiff therefore prayed the orders sought in the plaint.

19. In cross-examination by **Mr Ngugi**, learned counsel for the defendant, the plaintiff admitted that he was agreeable to the terms of offer and the legal charge signed them willingly. Referred to the letter of offer he admitted that it required that payments be made monthly and also provided that the facility was payable on demand. He admitted that the facility did not require that he pays within 7 days.

20. According to the plaintiff he was not receiving regular statements and his problem was that the principal sum was not reducing. He however admitted that between 2007 and 2008 he did not write to the Bank but stated that the draw down was in August, 2001 but he was not notified. While admitting that he defaulted in a few instances, the plaintiff denied that he defaulted severally and he said he would after default regularise his account. In his view, he was not in breach as the letter did not say when he was required to pay though he admitted receiving correspondences on a few occasions. Referred to the correspondences from the Defendant he said the Defendant claimed in a number of instances that he was in arrears and confirmed that any time he was in default the Defendant would send him a letter. He confirmed that there was penalty interest of 3%.

21. The plaintiff admitted that in 2005 he was served with two statutory notices but thereafter he paid the money and was assured that normal relationship would continue though this was not done in writing. In 2007 he said he was in Nyeri running for a parliamentary seat though his office and home remained open and the Defendant had his telephone contacts. He however admitted that in October and part of November, 2007 he was in arrears but made arrangements to pay.

22. However between October, 2007 and February, 2008 he was alerted by a friend called **Mburu** who had been approached that his property was advertised for sale. While disclosing that the property was registered under the Registration of Titles Act, the plaintiff said that he was not sure whether the said Act allowed sale by private treaty though he admitted there was a small advert. However there was no sale as he was forced to pay Kshs 1,400,000.00 leaving a balance of Kshs 42,000.00 that he was unaware of. He however admitted that he pleaded with the bank to waive some interest.

23. According to the plaintiff between February, 2008 and August, 2010 he did not make any payment since he was not aware of the balance and the Defendant was still holding on to his deposit.

24. Asked about IRAC, the plaintiff stated that he was aware they were financial consultants though he was not aware whether they were regulated. According to the plaintiff the mortgage was for a fixed term and whereas the Bank did not say that it could not call for the amount, there was no demand.

25. **Mr. Wilfred Abincha Onono** who was the Plaintiffs second witness testified as PW2. According to him, he was the Managing Consultant of the Interest Rates Advisory Centre (IRAC). He disclosed that he was an accountant and a member of the Institute of Chartered Public Accountants of Kenya (ICPAK) specialising in interest recalculation and verification in respect of borrowing in Kenya.

26. According to him, he was instructed in February, 2008 by the plaintiff to look into the plaintiff's loan account No. 315-09275910 held with the Defendant's Savings & Loans. According to him, the plaintiff gave them all the plaintiff's loan statements for the period between 1<sup>st</sup> August, 2000 and February, 2008, an offer letter dated 2<sup>nd</sup> May, 2000 and the legal charge dated 26<sup>th</sup> June, 2000 over LR No. 209/12221/57/100 executed by the plaintiff in favour of the Defendant with instructions to re-check the interest charged whether the account was being properly managed.

27. According to the witness, he did that and issued a report dated 29<sup>th</sup> February, 2008 in which he found that the account had been overcharged interest and that the final result as a February, 2008 in which the Defendant had a debit balance of Kshs 42,685.66 when in fact the account had been overpaid and ought to have been in credit in the sum of Kshs 1,486,833.64. In his view the aggregate difference was therefore Kshs 1,529,519.30 in favour of the plaintiff.

28. According to the witness the main reason for the difference was that the loan was disbursed in August 2000 and in the charge document there was a provision for variation of interest subject to the maximum provided by law. In the witnesses' view, by the coming into effect of the **Central Bank of Kenya (Amendment) Act, 2000 (Donde Act)**, the rate of interest was to be subjected to a maximum which was Treasury Bill rates plus 4% which is what he applied from 1<sup>st</sup> January, 2001 to 31<sup>st</sup> July, 2005. According to him, the Defendant did not comply with the said law since it did not obtain approval from the Minister under section 44 of the **Banking Act**. Therefore the witness excluded the charges arising therefrom. The witness then proceeded to produce the said report as exhibit.

29. In cross-examination by **Mr Ngugi**, the witness said that he was an accountant with 30 years' experience. In his view, interest rate calculation is mathematical and the only difference is the application of the law. He testified that his evidence contained opinion of the interpretation of the law though he was an accountant.

30. According to the witness, the initial contract allowed variation of interest rate but could not exceed the maximum allowed by the law. Referred to the charge document, the witness stated that the said document permitted the Bank to vary the interest on notice. He however insisted that contracts are to be interpreted to comply with the law and he interpreted section 39(1) of the **Banking Act No. 4 of 2001**. The witness said that the charge dated June, 2000 was what he used in his recalculation when the law was in operation though he stated that the loan was advanced before the Act came into operation. He could not however tell when the loan was renewed.

31. According to the witness, if the section did not apply then the Bank's calculation of the interest would have been correct since he applied the Treasury Bill Rate plus 4%. The witness stated that he relied on the statements he got from the plaintiff for the period between 2001 and 2008 though some statements for the period April and June 2004 were missing. He however said that during that period he could only make inference though he could not state what was paid and what was charged but only what was credited. He however said that one could also rely on section 44 of the **Banking Act**.

32. Referred to section 52(1) of the said Act, the witness admitted that the said provision states that contravention of the Act does not invalidate the transaction though in his view, section 52(1) does not permit the Bank to recover interests in contravention of the Act. According to him section 52(1) places precedent on the charge while section 52(3) only bars the charging of interest above the prescribed maximum yet in this case there was no approved maximum during the said period. Referred to section 39 the witness stated that if the prescribed rate is contravened there is a penalty. The witness however testified that the provision was repealed in 2005.

33. In re-examination by **Mr Kyalo**, PW2 testified that during the period the **Banking Act** and the **Central Bank of Kenya (Amendment) Act** were in place. He therefore asserted that his recalculation was in accordance with the law.

34. It was submitted on behalf of the Plaintiff that there were three issues for determination in this suit and these were identified as:

- 1) Whether a statutory notice was served as required by the law.
- 2) Whether the Defendant loaded un-contractual interest rates on the plaintiff's account.
- 3) Whether there was an overcharge of the plaintiff's account by Kshs 1,529,919.30 as at 29<sup>th</sup> February, 2008.

35. Based on clause 7(b) of the charge document as read with sections 69A to 69G of the *Transfer of Property Act, 1882*, it was submitted that the power of sale cannot be exercised unless and until a notice requiring payment has been served and default is made in payment for three months after such service. In this case, it was contended that it was admitted by DW1 that the Plaintiff was never served with a statutory notice and relied on Samson Kiama Macharia vs. Co-operative Bank of Kenya Limited [2007] KLR. It was further submitted the notice of statutory sale was defective as it was not personally served but was served by registered post contrary to section 69A of the ITPA as interpreted in Trust Bank Limited vs. George O. Okoth Civil Appeal No. 177 of 1998 and Trust Bank Limited vs. Eros Chemists Ltd & Anor. [2000] 2 EA 550. It was therefore submitted that the intended sale of the suit property marked for 15<sup>th</sup> February, 2008 was premature null and void. In any event it was submitted that the said notice was invalid for failing to give a period of three months from the date of service to redeem the charged property.

36. Based on Sharok Kher Mohaed Ali & Anor. vs. Southern Credit Banking Corporation Limited [2008] KLR it was submitted that since the advertisement and intended sale was meant to harass and exert pressure and influence the plaintiff to settle the entire facility contrary to the terms of the contract, a Court of equity cannot allow a party to retain the benefit of a transaction unfairly acquired hence the plaintiff is entitled to the judgement as sought.

37. It was further submitted that as the approval of the Central Bank was not sought the charges levied by the Defendant were illegal and contrary to section 44 of the *Banking Act* and reliance was placed on the case of Prof. David Musyimi Ndeti vs. Daima Bank Ltd HCCC No. 2198 of 2000. With respect to IRAC's report, the plaintiff relied on Paul Hudson Kamau vs. Housing Finance (K) Ltd HCCC No. 563 of 2016 in which it was held that:

**“The report by IRAC was prepared by an accountant who is skilled in that area which skill can be helpful to the court in the determination of questions of fact and in this instance, the issue whether the Defendant imposed the correct interest rate on the Plaintiff's account.”**

38. Since the Plaintiff by its admission in the letter dated 19<sup>th</sup> February, 2008 admitted that it negligently managed the plaintiff's account contrary to the provisions of the mortgage instrument, the plaintiff relied on *Charlesworth & Percy on Negligence*, 9<sup>th</sup> Edition, London, Sweet & Maxwell {1997} at page 535 para 8-01 that:

**“Where special skill is required for a task reasonable man would not be expected to attempt it, unless he is possessed of the skill in question. In the event that he undertakes the work, he is bound to exercise the skill and competence of an ordinary competent practitioner in that calling.”**

39. Similarly the plaintiff relied on Bolam vs. Friern Hospital Management Committee [1957] 1 WLR 582 at 586 by McNair, J held that:

**“Where you get to a situation which involves the use of some skill or competence, then the test as to whether there has been negligence or not is the test of the man on top of a Clapham omnibus, because he has not got this skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill... A man need not possess the highest expert skill, it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.”**

40. The plaintiff also relied on **Canson Enterprises Ltd vs. Boughton & Co. [1991] 3 SCR 534** at 543 and **Commonwealth vs. Amann Aviation Pty Ltd (1991) 174 CLR 64.**

41. As to the quantum of damages the plaintiff cited **Bank of Baroda (Kenya) Limited vs. Timwoods Products Limited (2008) KLR** in which the Court of Appeal upheld an award of Kshs 3,000,000.00 for wrongful dishonour of cheques drawn by a trading company amounting to Kshs 646,258/85. A similar award was given in similar circumstances to **C. Mehta & Company Limited vs. Standard Chartered Bank Limited [2014] eKLR** for loss of reputation.

42. In this case, it was submitted that the strong arm tactics of the Defendant which necessitated an apology from the Managing Director of Savings & Loans, a subsidiary of the Defendant financially embarrassed the plaintiff and forced the plaintiff to go out of his way to save his property. The plaintiff therefore was of the view that an award of Kshs 3,000,000.00 would be reasonable and he urged the Court to make such an award.

### **Defendant's Case**

43. In support of its case, the Defendant called **James Erick Opondo Odwako**, who testified as DW1. According to him, he was the Defendant's Salama Branch mortgage administrator with the role of ensuring that all loans advanced are repaid. According to the terms of the contract. According to him, he handled the plaintiff's account and on 20<sup>th</sup> February, 2012 he made a witness statement in these proceedings which he sought to rely on as part of his evidence in chief.

44. According to his statement, on or about 1<sup>st</sup> August, 2000 the plaintiff approached **Savings and Loans Limited**, a subsidiary of the defendant and requested for a mortgage finance in the sum of Kshs 2,940,000/= for the purchase of the suit property. The said sum was to accrue interest at the rate of 26% per annum calculated on daily balances and debited monthly by way of compound interest repayable by monthly instalments of Kshs 65,855/= within 10 years with effect from 1<sup>st</sup> September 2000. The witness confirmed that the said terms were reduced into a charge.

45. According to him payments were regular till 2004 when the plaintiff failed to remit the monthly instalments as agreed occasioning the account to become non-performing. As a result the defendant wrote several demand letters to the plaintiff requesting for the settlement of the outstanding amounts. On 17<sup>th</sup> March, 2005, the Defendant sent to the Plaintiff a statutory notice demanding the payment of Kshs 3,008,130.82 as at February, 2008 and threatened to sell the plaintiff's property by public auction if the payment was not made.

46. It was stated that in December, 2007 the plaintiff deposited Kshs 200,000/- which was not sufficient to offset the outstanding amount hence his account still remained in arrears which he failed to pay despite several demand letters sent to him. This, according to the statement prompted the defendant on 11<sup>th</sup> December, 2007 to instruct Baseline Auctioneers to auction the plaintiff's property in exercise of the Defendant's statutory power of sale and the plaintiff was issued with the statutory notification of sale and the 45 days redemption notice informing him of the intention to sell the property. The property was then advertised for sale on 18<sup>th</sup> January, 2008 in the Daily Nation newspaper with the proposed date for sale being 15<sup>th</sup> February, 2008. However the plaintiff by way of Banker's Cheque paid the amount of Kshs 1,400,000/= in reduction of the mortgage debt and the proposed auction was cancelled.

47. It was averred that the plaintiff then demanded a refund of Kshs 1,556,774.30 alleging that the Defendant had mishandled his account, overcharged him and contravened section 44 of the **Banking Act** and section 39 of the **Central Bank of Kenya (Amendment) Act, 2000** based on a report by Interest Rates Advisory Centre (IRAC).

48. DW1 however contended that there was no refund due to the plaintiff as there was no interest overcharge on the account from the onset and that section 39 of the **Central Bank of Kenya (Amendment) Act** is retrospective and was repealed by Act 8 of 2004. It was therefore his view that the

report from IRAC was baseless as the provisions of the *Banking Act* and the *Central Bank of Kenya Act* were fully complied with, in regard to the administration of the plaintiff's account and further that IRAC is not an authority in the computation of interest charged on loans.

49. According to him the plaintiff then instituted this matter demanding a refund of Kshs 3,754,019.30.

50. In his oral evidence the witness produced the defendant's bundle of documents which were marked as DEx 1 to DEx 3.

51. According to him the Defendant reserved the right to change the rate of interest in its sole discretion. According to him, the plaintiff did not satisfactorily conduct his account as e was perpetually in default despite service of several demand letters. He confirmed that the Defendant did not sell the property as sale was called off after the Plaintiff paid the arrears and reduced the principal sum.

52. According to DW1, the auctioneers had given 45 days redemption notice. He testified that the interest charged was contractual as per the letter of offer which gave the Bank the right to vary the same. He stated at the Defendant charged 3% default charge according to the contractual document and denied that the account was fraudulently and deceitfully operated.

53. The witness testified that the Defendant outsourced the process of realisation of the security and to the best of his knowledge the notice was served as well as the 45 days notification. It was his evidence that according to the contractual documents, the Defendant was entitled to call for the entire sum in even of even a single default. He however denied that the Defendant demanded to know the Plaintiff's source of funds since this is usually provided at the initial stages. To him interests accrue as long as the debt remains unpaid.

54. The witness denied that the Defendant was negligent and asserted that there was a contract between the Bank and the Customer which depended on the customer paying the sum and the Defendant had the right to call for the debt in event of default.

55. In cross-examination by **Mr Kyalo**, learned counsel for the Plaintiff, DW1 confirmed that the Plaintiff did regularise the default and paid Kshs 1.45 million in full and final settlement on 15<sup>th</sup> February, 2008 after which date no interest was charged. He however confirmed that as at that date, the Defendant had a deposit in favour of the Plaintiff in the sum of Kshs 150,000.00 which was sufficient to cover the balance due. He however said that the sum in question was security and was not meant to offset the arrears. He however said that he did not know where the plaintiff sourced the said Kshs 1.4 million.

56. It was stated by the witness that as at the time of the payment of the said Kshs 1.4 million, there was a balance of Kshs 42,000. To him the statements exhibited did not include the accrued interest and the plaintiff had a statement at the time he went to make the said payment. Referred to his statement on the issue of service of the statutory statement, the witness said that by the time of service thereof the plaintiff had not settled the arrears and subsequent to the said service, he paid Kshs 200,000/= though the sum demanded in the statutory notice was Kshs 3,008,113.82.

57. Upon payment of the said sum of Kshs 200,000.00 the witness said that the Defendant did not accept the repayment proposal put forward by the plaintiff. He however confirmed that between 17<sup>th</sup> March, 2005 and 15<sup>th</sup> February, 2008 when the property was put up for sale was a period of three years and though the sale had been suspended in between the Defendant did not waive the same.

58. Asked about service of the statutory notice, DW1 stated that the same was undertaken by the auctioneers hence he did not have the return of service as his documents were from the Bank. In his view the proper person to testify on the service was the auctioneer though he insisted that service was effected. He however confirmed that whereas the statutory notice comes from the Bank, the redemption notice comes from the auctioneers. He clarified that the auctioneers do serve the notification of sale while the lawyers are the ones who serve the statutory notices.

59. Referred to the statement, the witness stated that between 17<sup>th</sup> March, 2005 and December, 2005 the plaintiff was making repayment and what was being claimed were the arrears though he was unable to state the figures. He however admitted that had the Bank offset the sum of Kshs 145,000.00 that it was demanding from the Plaintiff's deposit of Kshs 158,000, the Bank would have owed the plaintiff money.

60. The plaintiff however denied any knowledge of arrangements to sell the plaintiff's property by way of private treaty. Referred to a letter dated 7<sup>th</sup> February, 2008, the witness confirmed that the same was signed by the Managing Director, Savings & Loans who was his boss and in the said letter it was conceded that the plaintiff's account had been unprofessionally handled though the witness contended that the account was under his management and care. He however insisted that the allegation of lack of professionalism did not emanate from him. He however confirmed that the Bank admitted that the account was unprofessionally handled.

61. The witness admitted that after the first statutory notice no other statutory notice was served and in his view that was a matter for the legal department. While admitting that he was aware of the interest regime under section 37 of the **Central Bank of Kenya (Amendment) Act**, the witness insisted that there was no interest charged in contravention of the said provisions. He also denied the allegation of non-compliance with section 44 of the **Banking Act** since in his view it was not necessary to seek the ministerial approval.

62. According to him, he was unaware that had the recalculation been done it would have shown that the plaintiff's account was in credit. He however admitted that the Defendant's defence stated that there were implied terms.

63. In re-examination by **Mr Ngugi**, learned counsel for the Defendant, DW1 reiterated that the plaintiff's account was perpetually in arrears hence the Bank was within its rights to demand the balance. He confirmed that he was the one who issued the letter cancelling the auction. At that time there was a balance of Kshs 42,000.00 which was eventually paid.

64. The second defence witness who testified as DW2 was **Richard Nyanumo Nyarike Nyaribo** who also relied on his statement dated 19<sup>th</sup> March, 2012.

65. According to him, he served the 45 days' notice and not the three months statutory notice. In his evidence the notice were posted on 11<sup>th</sup> December, 2007 and on 13<sup>th</sup> December, 2007 he served another one by registered post. However the auction did not take place as he was informed that the debt had been settled. In support of his evidence he produced the said notices.

66. In cross-examination by **Mr Kyalo**, DW2 stated that he pinned the notice on the gate of House No. 100 Five Star Estate and also dispatched the same by post.

67. It was submitted on behalf of the Defendant that the issues for determination were:

- 1) Whether there was a mortgage facility that was operated satisfactorily and contractually.
- 2) Whether the Defendant exercised its statutory power of sale legally, contractually and without malice, deceit or fraud.
- 3) Whether the defendant charged interest at a rate and other rates higher than allowed by the law, with the result that his account was overcharged to the tune of Kshs 1,529,919.30 and whether he is entitled to the same.

68. According to the defendant the mortgage facility was not operated satisfactorily as the plaintiff did not adhere to the terms thereof. To the defendant the plaintiff was perpetually in arrears. It was therefore contended that the plaintiff came to this Court with dirty hands hence underserving of this Court's discretion.

69. It was further submitted that the statutory power of sale was exercised legally and contractually, without negligence, malice, deceit or breach of fiduciary duty. To the defendant, despite default, the statutory power was not fully exercised since the property was not sold and the plaintiff was allowed its right of redemption.

70. In the defendant's view the provisions of section 69A(1)(a) and section 69A(1)(b) of the ITPA are alternatives hence whereas notice is required for three months a mortgagee can move to exercise the power of sale where interest is outstanding for more than three months. In this case, it was submitted that both scenarios had arisen.

71. It was the defendant's case that having served the statutory notice in March, 2005 there was no requirement to serve another statutory notice. In this case it was submitted that the plaintiff failed to adhere to the terms of the contract and based on **Husamuddin Gulamhussein Pothiwalla vs. Kidogo Basi Housing co-operative Society Ltd & Ors. Civ. Appeal No. 330 of 2003**, it was submitted that a court of law cannot re-write a contract between the parties.

72. It was the Defendant's case that though it was entitled to charge interest at the rate of 26% with a default rate of 3%, the defendant charged interest at lower rates of 12.5% in March, 2005 and 14% in December, 2007.

73. It was the Defendant's case that the ***Central Bank of Kenya (Amendment) Act, 2000*** was clear that it did not apply to contracts entered into before it came into effect and according to the Defendant, it received presidential assent on 1<sup>st</sup> August, 2001 with retroactive effect from 1<sup>st</sup> January, 2001.

74. It was therefore submitted that PW2's miscalculations are based on a provision of the law that did not bind the parties hence the parties herein were bound by the terms of their contract as appreciated in **Pelican Investment Ltd. vs. National Bank of Kenya Ltd [2002] 2 EA 488, Fina Bank vs. Ronak [2001] 1 EA 54, National Bank of Kenya Ltd vs. Pipeplastic Samoti Ltd Another [2001] KLR 112 and National Bank of Kenya vs. Cadon Investments Ltd HCCC No. 2105 of 2000.**

75. Nevertheless the Defendant submitted that the calculations of PW2 should be disregarded for failure by the plaintiff to plead and prove the Treasury Bill that was used as a basis of the calculations. Therefore the Court was urged to go by the terms of the contract pursuant to section 52(1) of the ***Banking Act*** as interpreted in **Ramji H. Devani Limited vs. KCB HCCC No. 482 of 2005, David Ndeti vs. Daima Bank Ltd HCC No. 2198 of 2000 and Givan Okallo & Another vs. Housing Finance Co. (K) Ltd HCCC No. 79 of 2007 [2007] 2 KLR 232.**

76. The Defendant therefore urged this Court to dismiss the plaintiff's suit with costs.

### **Determination**

77. I have considered the pleadings herein, the evidence given by and on behalf of the parties herein as well as the submissions filed herein.

78. From the issues as drawn by the parties, it is clear that the issues for determination are broadly as follows:

- 1) Whether there was a mortgage facility that was operated satisfactorily and contractually.**
- 2) Whether the Defendant exercised its statutory power of sale legally, contractually and without malice, deceit or fraud.**
- 3) Whether the defendant charged interest at a rate higher than allowed by the law. In other words did the Defendant load un-contractual interest rates on the plaintiff's account?**
- 4) Whether there was an overcharge of the plaintiff's account by Kshs 1,529,919.30 as at 29<sup>th</sup>**

**February, 2008 and whether he is entitled to the same.**

**5) Is the Plaintiff entitled to general damages?**

**6) Who should bear the costs of this suit?**

79. With respect to the issue whether there was a mortgage facility that was operated satisfactorily and contractually, it is admitted by the plaintiff that on various occasions, there were defaults on his part. The plaintiff however contends that since he made good the said defaults and since he was promised that no action would be taken in respect of the same, the Defendant ought not to have relied on the same as a basis for demanding for the payment. The plaintiff however admitted that there was no such assurance in writing. Without such evidence I am not prepared to believe that the defendant waived its rights to demand payment simply by extending indulgence to the plaintiff.

80. To accept the plaintiff's contention would amount to a variation of the terms of the contract as contained in the letter of offer and the charge document. That cannot be done for two reasons. First, it would amount to a variation of a written document by way of oral stipulations. Secondly, there is no consideration with respect to the said oral stipulation. This Court as rightly submitted by the Defendant has no powers to vary the terms of the contract agreed between the parties herein. I agree with the decision of the Court of Appeal in **Husamuddin Gulamhussein Pothiwalla Administrator, Trustee and Executor of The Estate of Gulamhussein Ebrahim Pothiwalla vs. Kidogo Basi Housing Corporative Society Limited and 31 Others Civil Appeal No. 330 of 2003** that:

**“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 or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.”**

81. It follows that this Court cannot based on the material placed before me find that the various defaults by the plaintiff were waived by the Defendant. Accordingly, issue no. 1 is in the negative.

82. The second issue is whether the Defendant exercised its statutory power of sale legally, contractually and without malice, deceit or fraud. That the Defendant did issue a statutory notice in March, 2005 is not in doubt. Its validity is of course another matter altogether. The plaintiff's case is that the plaintiff having made good the default that led to the issuance of the said notice, the Defendant was bound to give a fresh notice in the event that it subsequently sought to exercise its statutory power of sale. In **Nathakal Monji Rai vs. Standard Chartered (K) Ltd. & Another Nairobi (Milimani) HCCC No. 830 of 1999** it was held that the chargee is not required to give another notice under section 74 of the ***Registered Land Act*** every time a sale is suspended to accommodate the chargor. In other words an indulgence extended to a chargor does not bar the chargee from exercising its power of sale subsequently, where there is a default unless the chargee withdraws the earlier statutory notice.

83. That now leads me to the validity of the said notice. In **Trust Bank Ltd vs. Okoth [2001] 1 EA 274, Gicheru, JA** (as he then was) stated that the mortgagee's statutory power of sale under section 69(1) of the ***Transfer of Property Act of 1882***, of India, as applied in Kenya:

**“cannot be exercised unless and until: notice requiring payment of the mortgage-money has been served on the mortgagor or one or two or more mortgagors, and default has been made in payment of the mortgage-money, or part thereof, for three months after such service”.**

84. In **Trust Bank Ltd. vs. Eros Chemists Ltd. & Another Civil Appeal No. 133 of 1999 [2000] 2 EA 550** the Court of Appeal held *inter alia* that:

**“The starting point of any discussion...is to consider what the object of a notice is. The notice**

is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor's equity of redemption would be extinguished and this would be a serious matter. The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue the statute provided for a three months' period to lapse after service of notice. A notice seeking to sell the charged property must expressly state that the sale shall take place after the three months period. To omit to say so or to state a period of less than three months for sale (as was in Russell's Case) is to deny the mortgagor a right conferred upon him by statute and that must clearly render the notice invalid...There is a mandatory requirement that a statutory right to sell will not arise unless and until three months' notice is given. The provision as to the length of the notice is a positive and obligatory one; failing obedience to it a notice is not valid. That being so, in failing to have the notice to say so, the Bank failed to give a valid notice. The earlier decision in Russell's Case is erroneous and the court is not bound to perpetuate an error. It is a recent one and has not acquired the respect and following attributable to age. Moreover, it is unlikely that property rights have been acquired on the basis of the earlier decision and indeed it is the duty of the court to rectify an erroneous decision. Therefore the court should declare, as it hereby does, that the decision of the court in Russell's Case is wrong and the notice in the instant case did not entitle the mortgagee to exercise a power of sale".

85. My understanding, of the said decisions is that the notice must be expressed so as to give the mortgagor three months or more after service and therefore notice that requires that payment be made **within three months** according to the said decisions would, *prima facie*, be an invalid statutory notice. In the case of **Gimalu Estates Ltd & 4 Others vs. International Finance Corporation & Another Nairobi (Milimani) HCCC No. 606 of 2003** the phrase "*The Bank as Chargee shall, after the expiry of THREE (3) MONTHS from the date of service of this notice, sell the mortgaged property*", was, in my view, correctly upheld.

86. In this case, the said statutory notice dated 1<sup>st</sup> March, 2005 stated inter alia as follows:

***TAKE NOTICE that unless the aforesaid amount together with further interest that will accrue as aforesaid is paid to the Bank within THREE (3) MONTHS from the date of service of this notice the Bank shall after expiry of this notice commence sale of the charged property for the recovery of the amount outstanding and remaining unpaid together with interests thereon..***

87. It is clear that the Plaintiff was required to pay the sum due **within three (3) months** from the date of service of the said notice. Whereas the Defendant contended that sections 69A(1)(a) and 69A(1)(b) of the ITPA are alternatives, it is my view that once the chargee opts for one remedy, it must comply with all the relevant legal provisions relating to that remedy. It cannot unless it expressly abandons that remedy, jump midstream as it were to the alternative remedy. In this case since the Defendant had chosen the path of notification, the notice had to comply with the relevant statute. It is however clear that there was no such compliance.

88. It follows that the whole process of realisation of the charged property was unlawful and by insisting on the recovery thereof the Defendant acted with due disregard to the law hence improperly compelled the Plaintiff to pay the outstanding amount. The answer to this issue is therefore that the Defendant did not exercise its statutory power of sale lawfully.

89. The third issue is whether the defendant charged interest at a rate and other rates higher than allowed by the law. In other words did the Defendant load un-contractual interest rates on the plaintiff's account? The issue herein depends on the applicability of section 39 of the ***Central Bank of Kenya (Amendment) Act, 2000***. That section provides as follows:

***The maximum rate of interest which specified banks or financial institutions may charge on loans or advances shall be the 91-day Treasury Bill rate plus four per centum; provided that the maximum interest chargeable under this subsection shall not exceed the principal sum loaned or advanced and provided further that this subsection shall only apply to contracts for loans or***

***advances made or renewed after the commencement of this section.***

90. It is therefore clear that the said provision was only applicable to contracts for loans or advances made or renewed after the commencement of the said section. It is not dispute that the effective date of the said section was 1<sup>st</sup> January, 2001. From the report prepared on behalf of the plaintiff by PW2, the provisions of section 39 of the ***Central Bank of Kenya (Amendment) Act, 2000*** applied from 1<sup>st</sup> January, 2001 up to 31<sup>st</sup> July, 2005. According to the charge document, it is dated 26<sup>th</sup> June, 2000. According to the statement, the money was credited on 23<sup>rd</sup> August, 2000. Either way, it is clear that the contract was entered into before 1<sup>st</sup> January, 2001. According to the evidence of PW2, if the section did not apply then the Bank's calculation of the interest would have been correct since he applied the Treasury Bill Rate plus 4%.

91. It is my view that section 39 of the ***Central Bank of Kenya (Amendment) Act, 2000*** was not applicable to this transaction. Accordingly, based on the plaintiff's own evidence, I am unable to find that the defendant charged interest at a rate higher than the rates allowed by the law. Consequently, I do not find that the Defendant loaded un-contractual interest rates on the plaintiff's account.

92. From the foregoing finding, it must also follow that the next issue must be in the negative. In other words, I am unable to find that there was an overcharge of the plaintiff's account by Kshs 1,529,919.30 as claimed and I find that the plaintiff is not entitled to the same.

93. The next issue is whether the plaintiff is entitled to general damages. I agree with **Mclachlin, J's** opinion in **Canson Enterprises Ltd vs. Boughton & Co. [1991] 3 SCR 534** at 543 that:

**“The essence of a fiduciary relationship, is that one party pledges itself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core and when breach occurs, the balance favours the person wronged.”**

94. I also associate myself with the decision in **Commonwealth vs. Amann Aviation Pty Ltd (1991) 174 CLR 64** at 116 in which **Deane, J** held that:

**“The general principle governing the assessment of compensatory damages in both contract and tort is that the plaintiff should receive monetary sum which, so far as money can, represents fair and adequate compensation for the loss or injury sustained by reason of the defendant's wrongful conduct.”**

95. In this case, it is clear that the Defendant arm-twisted the Plaintiff into settling the sum in question by threatening the plaintiff with the unlawful exercise of statutory power. That action was clearly unlawful. Whereas the Plaintiff has failed to prove that he is entitled to Kshs 1,529,919.30, as was held in **Maroa Wambura Gatimwa vs. Sabina Nyanokwe Gatimwa Civil Appeal No. 331 of 2003**, the only question is the remedy to which the plaintiff is entitled, but a remedy there must be, because equity does not suffer a wrong to be without remedy. In this case, there is a clear admission from the Defendant vide the letter dated 19<sup>th</sup> February, 2008 that the Defendant's subsidiary company, Savings and Loans acted in an unprofessional manner vis-à-vis the operation of the plaintiff's account. The law is that there cannot be a wrong without a remedy unless there is an express prohibition by statute or otherwise.

96. As to the quantum of damages the plaintiff has relied on **Bank of Baroda (Kenya) Limited vs. Timwoods Products Limited (2008) KLR** and **C. Mehta & Company Limited vs. Standard Chartered Bank Limited [2014] eKLR** and claimed Kshs 3,000,000.00. In this case, it was submitted that the strong arm tactics of the Defendant which necessitated an apology from the Managing Director of Savings & Loans, a subsidiary of the Defendant financially embarrassed the plaintiff and forced the plaintiff to go out of his way to save his property. There was however no evidence of such embarrassment though the Plaintiff must have been placed in agony as to how to secure the said sum and save his property. It is also clear that the Defendant acted in a high handed manner and placed the plaintiff in jeopardy by its unlawful conduct.

97. Taking into consideration all the factors in this suit and doing the best in the circumstances of this case, I hereby award the Plaintiff Kshs 1,500,000.00 as general damages. The said sum will attract interests at Court rates from the date of this judgement till payment in full. The plaintiff will also have the costs of this suit.

**Dated at Nairobi this 31<sup>st</sup> day of January, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Oduor for Mr Kyalo for the Plaintiff**

**Mr Simiyu Wabuge for Mr Ngugi for the Defendant**

**CA Mwangi**