



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 374 OF 2011

RICHARD NG'ANG'A WAIRUTU.....PLAINTIFF

VERSUS

STANDARD CHARTERED BANK KENYA LIMITED.....DEFENDANT

JUDGMENT

[1] The Plaintiff herein, **Richard Ng'ang'a Wairutu**, is the sole registered proprietor of the two pieces of property that form the subject matter of this suit, namely **Title No. Dagoretti/Riruta/1913** and **Nairobi/Block 90/167**. It was pleaded by the Plaintiff in paragraphs 4 and 5 of the Complaint that **Title No. Dagoretti/Riruta/1913** (hereinafter **the Riruta Property**) comprises of rental houses from which the Plaintiff collects monthly rent, and has an estimated market value of about **Kshs. 15 million**, while **Title No. Nairobi/Block 90/167 (the Loresho Property)** is said to be situated in **Loresho Estate, Nairobi** and is comprised of a residential house with a market value then of **Kshs. 40 million**.

[2] The two properties were charged to the Defendant to secure a loan of **Kshs. 11,500,000/=** and the Charges were executed by the Plaintiff as follows:

[a] Charge over the Loresho Property to secure a sum of **Kshs. 9,350,000/=**, registered on **20 September 2005**;

[b] Charge over the Riruta Property to secure a sum of **Kshs. 2,240,000/=** which was registered on **5 September 2005**.

[3] Subsequently, the parties signed an agreement dated **25 February 2006**, setting out the terms of engagement, including the repayment period and the instalment. It was the contention of the Plaintiff that he complied strictly with those terms and had the loan repaid fully within the 4 years as agreed; but when he wrote to the Defendant with a request to have the titles discharged, the Defendant declined to do so, contending that there was an error in the said Agreement dated **25 February 2016** (the Agreement). Thereafter, the Plaintiff sent a Statutory Notice dated **7 June 2011** demanding a sum of **Kshs. 5,652,217.90**, allegedly being the principal sum outstanding as at **31 May 2011** under the Charge in respect of the **Riruta Property**. It was that notice that precipitated the filing of the present suit.

[4] This suit was accordingly filed on **30 August 2011** by the Plaintiff against **Standard Chartered Bank Kenya Limited** (the Defendant) for the following reliefs:

[a] A permanent Injunction to restrain the Defendant inter alia from selling and/or interfering with his property known as **Title No. Dagoretti/Riruta/1913**;

[b] An urgent Temporary Injunction to restrain the alienation of the said suit premises known as **Dagoretti/Riruta/1913** pending the hearing and determination of this suit;

[c] A Mandatory Injunction to compel the Defendant to release and discharge the Plaintiff's two properties known as **Nairobi/Block 90/167** and **Title No. Dagoretti/Riruta/1913**;

[d] A Declaration that:

[i] The Defendant is legally bound by the Agreement of **25 February 2006**;

[ii] The Plaintiff has overpaid the Defendant by a sum of **Kshs. 1,011,804.50** and that the same be refunded to the Plaintiff together with interest;

[iii] If there was any error/mistake in the aforesaid Agreement, the Defendant is solely responsible for it and is also responsible for the consequences thereof;

[e] Costs of this suit

[f] Such other and/or further relief as the Court may deem fit and just to grant in the unique circumstances of this matter.

[5] The claim was resisted by the Defendant and a Defence filed in that regard dated **2 November 2011**, wherein the Defendant contended that on account of a typographical error the following mistakes were made in the Letter of Offer dated **25 February 2006**:

[a] On **Limit No. 1**, the repayment was stated as 51 monthly instalments instead of 120 monthly instalments;

[b] On **Limit No. 2**, repayment was stated as equal monthly instalments of **Kshs. 16,667/=** instead of **Kshs. 46,667/=**.

[6] It was further averred by the Defendant that both Letters of Offer dated **10 May 2005** and **25 February 2006** specifically provided for interest on daily loan balances and payable monthly in arrears; and that at no point in time did it agree to forgo interest. Accordingly, the Defendant denied the Plaintiff's averment that the loan had been repaid in full; and therefore contended that it had the right to realize the securities, a process that it had commenced with the issuance of the 3 months' Statutory Notice.

[7] The Plaintiff filed a Reply to the Defence in which he joined issues with the Defence and reiterated his assertions in the Plaintiff. He reiterated his contention that the initial Agreement dated **10 May 2005** was overtaken by the 2nd Agreement dated **25 February 2006**, which expressly provided that the loan was to be repaid in **51** instalments and not **120** instalments as had been earlier agreed. Accordingly, the Plaintiff refuted the allegation that there was an error in relation to the number of instalments or the figure of **Kshs. 16,667/=** under **Limit No. 2**, adding that having failed to raise the issue during the 4 years during which he repaid the loan, the Defendant was estopped from introducing the issue of the so called "error/mistake".

[8] Contemporaneously with the filing of the Plaintiff, the Plaintiff filed the Notice of Motion dated **26 August 2011** under a Certificate of Urgency seeking the following orders:

[a] That the application be certified urgent and be heard ex parte in the first instance;

[b] That a Temporary Injunction be issued restraining the Defendant, its servants, agents and/or employees from alienating, selling and/or dealing in any manner whatsoever with the Plaintiff's

property known as **Title No. Dagoretti/Riruta/1913** pending the hearing and determination of this suit;

[c] That a Permanent Injunction be issued restraining the Defendant, its agents and/or employees from alienating, selling and/or dealing in any manner whatsoever with the Plaintiff's property known as **Title No. Dagoretti/Riruta/1913** pending the hearing and determination of this suit.

[d] That the Court be pleased to grant a Mandatory Injunction compelling the Defendant its servants, agents and/or employees to release to the Plaintiff documents of title in respect of the Plaintiff's properties known as **Title No. Dagoretti/Riruta/1913** and **Title No. Nairobi Block 90/167** pending the hearing and determination of this suit.

[e] That the costs of the application be provided for.

[f] That such other and/or further relief be granted as the Court may deem fit and just to grant in the unique circumstances of this case.

[9] The application was heard and determined by **Odunga, J** on **15 February 2012** as follows:

"At the outset, I must mention that the defendant by its written submissions has intimated its willingness to unconditionally discharge Title No. Dagoretti/Riruta/1913 since according to it it has no intention to "clog the Plaintiff's equity of redemption and considering the value of both securities and the amount outstanding and as a sign of utmost faith." I will therefore take advantage of the said good gesture coming from the defendant and forthwith order that the defendant do discharge land Title No. Dagoretti/Riruta/1913 and release the title documents therfor to the plaintiff ... therefore, prayer 5 of the Motion on Notice dated 26th August 2011 succeeds but only to the extent that a mandatory injunction is hereby granted compelling the Defendant/Respondent, its servants, agents and/or employees to release to the Plaintiff/Applicant documents of title in respect of the plaintiff's property known as Title No. Dagoretti/Riruta/1913. I further compel the defendant to unconditionally discharge the said title."

[10] In spite of the determination aforementioned, which finally settled the claim in respect of **the Riruta Property**, the Plaintiff and his Counsel found it necessary to demonstrate that the orders of the Court were hardly the result of the Defendant's magnanimity. According to the Plaintiff, both **Limit No. 1** and **Limit No. 2** of the loan was fully repaid on **18 May 2010** when he paid a lumpsum of **Kshs. 586,375.20** as shown by the Statement of Account at **Pages 70 to 72** of the Plaintiff's Bundle of Documents (marked **Plaintiff's Exhibit No. 1**). The Plaintiff added that even after the direction by the Court for the release of the title documents for **the Riruta Property**, the Defendant continued dithering for a further five months, thereby necessitating the correspondence whose copies were exhibited at **Pages 68 to 75** of the **Plaintiff's Exhibit 1**. Be that as it may, it is a fact that **the Riruta Property** has been discharged and is no longer the subject of this dispute, and therefore Prayers a) and b) of the Plaintiff are spent, as well as part of Prayer c) in so far as it concerns **the Riruta Property**.

[11] As for the **Loresho Property**, the Plaintiff gave his evidence herein on **13 October 2015** in support of his claim. He relied on his Witness Statement dated **10 July 2012** as well as the Supplementary Witness Statement dated **18 March 2015**, which was filed herein on **20 March 2015**. The Plaintiff also relied on the following Bundles of Documents filed by him herein:

[a] The Plaintiff's List and Bundle of Documents dated **26 August 2011** filed herein on **30 August 2011** (marked **PExh.1**)

[b] The Plaintiff's Supplementary Bundle of Documents filed on **10 July 2012** (marked **PExh.2**)

[c] The Plaintiff's Further Supplementary List and Bundle of Documents filed on **14 October 2013** (marked **PExh.3**)

[d] The Plaintiff's Second Further Supplementary List and Bundle of Documents filed on **28 May 2015** (marked **PEXh. 4**)

[12] The Plaintiff's testimony was that, sometimes in the year **2005**, being in need for some money, he approached the Defendant, Standard chartered Bank Limited, for a loan; and that by an Agreement dated **10 May 2005** made between him and the Defendant, the Defendant agreed to grant him a loan of **Kshs. 11,500,000/=**. That Agreement provided that he was to repay the loan by 120 equal monthly instalments of **Kshs. 182,029.80** each; and that although the said loan would be secured by a legal charge over **the Loresho property**, the Defendant prepared two Charge Documents in respect of the two suit properties that are the subject of this suit. The Charge over **the Loresho Property** was to secure the sum of **Kshs. 9,350,000/=** together with interest whereas the Charge over **the Riruta Property** was to secure the sum of **Kshs. 2,240,000/=**.

[13] It was further the evidence of the Plaintiff that, pursuant to the said Agreement of **10 May 2005**, he paid the Defendant monthly instalments of **Kshs. 182,029.80** for about 9 months together with a lump sum payment of **Kshs. 2,000,000/=** that was made on **11 November 2005**. Thereafter, on **25 February 2006** the parties entered into a further Agreement which superseded the earlier Agreement of **10 May 2005** and the two Charges aforementioned; and that it specifically provided that the Plaintiff would repay a sum of **Kshs. 9,254,563/=** in **51** monthly instalments of **Kshs. 182,029.80** inclusive of interest accruing thereon on monthly basis; and that the maturity date was **30 April, 2010**. On the other hand, **the Riruta Property** would be repaid in **120** equal monthly instalments of **Kshs. 16,667/=** inclusive of interest, commencing one month after draw down.

[14] According to the Plaintiff, the Agreement of **25 February 2006** (the 2nd Agreement) has never been amended and/or altered by the parties and was therefore in force and continued to be in force at all times material to this suit; and that in conformity with the said Agreement, he paid the Defendant the **51** monthly instalments of **Kshs. 182,029.80** totalling to **Kshs. 9,283,519.90** and 120 monthly instalments of **Kshs. 16,667/=**, totalling to **Kshs. 2,000,000/=** in repayment of the two facilities. He added that, in addition to the agreed instalments, he overpaid the Defendant by some **Kshs. 1,011,804.50** by reason of the fact that the Defendant illegally, and without his consent, debited his **Account No. [...]** with a monthly debit of **Kshs. 46,667** for a period of **51** months, thereby causing his said account to be overdrawn by a sum of **Kshs. 45,452.30**.

[15] It was further the evidence of the Plaintiff that, having fully repaid the **Limit No. 1** loan, he visited the offices of the Defendant on **15 May 2010** to inquire about the balance owing in respect of **Limit No. 2** (the **Kshs. 2,000,000** loan). That upon being informed by the Defendant that the outstanding sum was **Kshs. 586,375.80**, he made arrangements and cleared the said amount in lumpsum on **18 May 2010**. The Plaintiff testified that he thereafter instructing his Advocates on record, **M/s Machira & Co. Advocates**, to process the discharge of the charged titles, only for the Defendant to turn round and claim that there was a mistake or error in the Agreement dated **25 February 2006**, and that he had not paid two instalments. This posturing was communicated vide the Defendant's letter dated **8 July 2010** (at page **78 of the PEXh.1**). Thereafter on **7 June 2011**, the Defendant served him with the 3 months' Statutory Notice to pay a sum of **Kshs. 5,652,217.90**, failing which **the Riruta Property** would be sold. It was the testimony of the Plaintiff, which is supported by the court record, that he successfully challenged the Notice and obtained a Court Order for the release of the title for **the Riruta Property** as per the Ruling of **Odunga, J** dated **15 February 2012**.

[16] In his Supplementary Witness Statement dated **18 March 2015** and filed herein on **20 March 2015**, the Plaintiff stated that, on account of the refusal by the Defendant to release the title for **the Riruta Property** as had been ordered by the Court, he instructed his Advocates to pursue the matter on his behalf; and that it took about 5 months of communication to have the title released on **25 July 2012**. The Plaintiff reiterated his posturing that he had fully repaid the loan and that it was therefore spiteful for the Defendant to refuse to release the titles, especially the title for **the Loresho Property** which was not at all the subject of the Statutory Notice.

[17] In proof of the alleged ill-will on the part of the Defendant, the Plaintiff testified that on **10 October**

2012, the Defendant forwarded information pertaining to his loan account to two Credit Reference Bureaus, namely, **Credit Reference Bureau Africa Ltd** and **Metropol Credit Reference Bureau Ltd**, while knowing full well that he had repaid the loan and had filed this suit to compel the release of his title documents; and with the knowledge that the Court had made an order for the release of **the Riruta Property** in respect of which a Statutory Notice had been issued.

[18] In his Supplementary Statement, the Plaintiff pitched a case for the refund by the Defendant of a sum of **Kshs. 1,011,804.50** being the total amount of overpayment that he made in respect of **Limit No. 2**, worked out as follows:

As agreed on Contract	16,667 x 120	=	Kshs. 2,000,000.00
Actual Payment	46,667 x 51	=	Kshs. 2,380,017.00
Add Lumpsum Payment			Kshs. 586,375.20
Total			Kshs. 2,966,392.20
Add amount withdrawn from account			
by Bank after full repayment			Kshs. 45,452.30
Total Amount Paid			Kshs. 3,011,844.50
Less Amount agreed on Contract			Kshs. 2,000,000.00
Total Amount Overpaid			Kshs. 1,011,804.50

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In view of the foregoing, the Plaintiff prayed that he be allowed to correct his Plaintiff at **Paragraph 15(b)** on page 6 and **Paragraph 18** at page 4 of his Witness Statement dated **10 July 2010** to read **Kshs. 1,011,804.50** in place of **Kshs. 379,977/=**; which amendment was granted on **13 October 2015**. Thus, the Plaintiff concluded his evidence by urging the Court to grant him the prayers sought herein together with costs.

[19] The Defendant relied on the evidence of its Manager, Consumer Credit Risk Department, **Mr. Boniface Machuki (DW1)** and the two Bundles of Documents produced herein and marked **DExh.1** and **DExh.2**). He was the replacement witness, called in place of the initial witness, **Josephine Ngunjiri**, whose statement was filed herein on **11 July 2012**. He adopted his Witness Statement dated **9 October 2015** filed herein on **12 October 2015** and the Supplementary Witness Statement of dated **12 October 2015**, filed on even date. According to **DW1**, the Defendant granted the Plaintiff a loan of **Kshs. 11,500,000/=** by a facility letter dated **10 May 2005**. The loan was repayable by 120 equal monthly instalments of **Kshs. 182,029.80** inclusive of interest. The interest was to be charged at a fixed rate of 14.5% per annum, calculated on daily loan balances and payable monthly in arrears. The facility's maturity date was therefore agreed to be 120 months after the date of drawdown.

[20] It was further the evidence of **DW1** that the loan of **Kshs. 11,500,000/=** was secured by a Legal Charge over **Title No. Nairobi/Block 90/167** (the **Loresho Property**) for **Kshs. 9,350,000/=** and a Legal Charge over **Title No. Dagoretti/Riruta/1913** (the **Riruta Property**) for **Kshs. 2,240,000/=**. The Charges, both dated **12 August 2005**, were duly prepared, executed and registered; whereupon the funds were disbursed accordingly.

[21] **DW1** further testified that the Plaintiff thereafter approached the Defendant for a further mortgage facility for **Kshs. 2,000,000/=** for which the Agreement dated **25 February 2006** (the **2nd Agreement**) was made. That Agreement not only incorporated the terms of the Initial Agreement dated **10 May 2005**

as **Limit No. 1**, but also provided for the new facility of **Kshs. 2,000,000/=** as **Limit No. 2**. According to the Defendant, it was never the intention of the parties to do away with the terms of the Initial Agreement, including the 14.5% interest charged thereunder. **DW1** explained that, since by **25 February 2006** the Plaintiff had reduced the initial loan under **Limit No. 1**, the sum provided for in the 2nd Facility was **Kshs. 9,254,563/=** only; and added that the said sum was to continue being paid as per the terms of the Initial Agreement, namely, by monthly instalments of **Kshs. 182,029.80** over a period of 180 months.

[22] It was therefore the contention of **DW1** that, due to a typographical error or mistake, the Agreement of **25 February 2006** provided for a repayment period of **51** instead of **120** months, thereby inadvertently removing the interest component in respect of the **Limit No. 1** facility. He thus asserted that the Plaintiff is out to take advantage of this typographical error after having benefitted from the loan funds to deny the Defendant the interest that is justly due and owing to it on account of the borrowing. Similarly, **DW1** testified that the instalment amount for **Limit No. 2** was erroneously stated as **Kshs. 16,667/=** instead of **Kshs. 46,667/=**; and so, according to the Defendant, it would be incorrect for the Plaintiff to claim overpayment on the basis of that error. Thus, the Defendant posited that the Plaintiff was truly indebted to it in the total amount of **Kshs. 5,767,816.60** as at **1 September 2011** as demonstrated by the Statements of Account produced herein as part of the Defendant's List and Bundle of Documents by **DW1** and marked **DExh.1**; and that the issuance and service of the Statutory Notice was done in accordance with the law. The Defendant also drew the Court's attention to the Plaintiff's letter dated **12 February 2009** by which the Plaintiff asked the Bank to reinstate the repayment terms as agreed in the 1st Agreement dated **10 May 2005**. That letter is exhibited at **Page 3** of the Defendant's Supplementary List and Bundle of Documents (**DExh.2**).

[23] In his Supplementary Witness Statement dated **12 October 2015**, **DW1** explained that, since the Agreement dated **25 February 2006** was kept in safe custody together with the Plaintiff's title documents, the error aforementioned was only discovered when the Plaintiff demanded for his title documents. According to him, since the Plaintiff was regular in his repayments, there was no need to scrutinize the Agreement. He further explained that the delay in releasing the title for the **Riruta Property** was occasioned, not by spite or ill-will on the part of the Defendant, but was on account of the meticulous process involved in releasing title, especially where, as in this case, the loan is still outstanding.

[24] As for the listing of the Plaintiff with the Credit Reference Bureaus, **DW1** stated that this is a legal requirement under the **Credit Reference Bureau Regulations, 2013** for all loans that are overdue by 4 months. He added that since there was no court order restraining compliance with the Central Bank of Kenya Guidelines on non-performing loans, the Defendant was under obligation to make the report as it did. On the basis of the evidence adduced by **DW1**, the Court was urged to dismiss the Plaintiff's suit with costs.

[25] At the close of the hearing, Learned Counsel filed and exchanged written submissions pursuant to the directions of the Court given on **30 January 2017**. The Plaintiff's written submissions dated **15 March 2017** were filed herein on **16 March 2017**. Counsel for the Plaintiff, laid emphasis on two of the clauses in the Agreement dated **25 February 2006**; firstly, that the Agreement was to supersede the previous Agreement vide the Facility Letter dated **10 May 2005**; and secondly, that the 2nd Agreement would remain in full force throughout the life of the facilities provided for therein and was to be in effect until terminated or otherwise renewed. Counsel urged the Court to note that the 2nd Agreement was signed on behalf of the Bank by one **Charles Magara** who was still working for the Defendant, as at **30 January 2017** when **DW1** last testified, and to draw an adverse inference from the fact that the Defendant opted not to call him as a witness to explain the alleged typographical error.

[26] Counsel further submitted that, whereas the Plaintiff had pleaded in his Complaint and given evidence at the hearing of having paid specific sums of money in respect of **Limit No. 1** and **Limit No. 2**, the Defendant had simply found it convenient to make general denials in its Defence without raising any specific issues as to the amounts said to be owing from the Plaintiff or pleading a Counterclaim. In this connection, Counsel relied on **Order 2 Rule 11(3)** of the **Civil Procedure Rules** which requires that:

"...every allegation of fact made in a complaint or counterclaim which the party on whom it is

served does not intend to admit shall be specifically traversed by him in his defence or defence to counterclaim; and a general denial of such allegations, or a general statement of non-admission of them, shall not be sufficient traverse of them."

[27] Accordingly, it was the contention of Counsel that the doctrine of estoppel would apply in this matter to prevent the Defendant from challenging or in any manner faulting the Agreement dated **25 February 2006**; and that not even the Plaintiff's letter dated **12 February 2009** could unilaterally vary the terms of the 2nd Facility Letter as purported by the Defendant. It was the submission of Counsel for the Plaintiff that the 2nd Agreement having been signed by both parties before Advocates and duly stamped as required by law, was binding on the parties; and that the Defendant had failed to prove the mistake alleged as required by **Section 109 of the Evidence Act, Chapter 80 of the Laws of Kenya**. In addition, the Plaintiff relied on the List and Bundle of Authorities dated **20 March 2017**, filed herein on **21 March 2017**.

[28] The Defendant's written submissions dated **20 June 2017** were filed herein on **21 June 2017**. The submissions consist, in the main, of a reiteration, at pages 3 to 6 thereof, of the evidence of **DW1** as set out in his Written Statement dated **9 October 2015** and the Supplementary Written Statement dated **12 October 2015**. In addition thereto, the Defendant submitted that the Plaintiff failed, in his pleadings and evidence, to disclose the following material documents:

[a] The Defendant's letter dated **4 November 2008** addressed to the Plaintiff in respect of Agreement No. 10300050348895;

[b] The Defendant's letter dated **4 November 2008** addressed to the Plaintiff in respect of Agreement No. 10300050341486;

[c] The Plaintiff's letter dated **12 February 2009** addressed to the Defendant.

[29] In particular, the Defendant relied on the Plaintiff's letter dated **12 February 2009** to support its submission that, upon receipt of the said letter, the Defendant complied by effecting the repayment terms at **Kshs. 182,029.80** over a period of **120** as opposed to **51** months as was provided for in the Agreement dated **25 February 2006**, as shown in the Statements of Account exhibited at **Pages 24 to 153 of DExh.2**. It was therefore the submission of the Defendant that, the Plaintiff, being guilty of material non-disclosure, is not entitled to the equitable remedies sought by him herein. The Defendant relied on **Halsbury's Laws of England, Vol. 32, Paragraph 725** to support its argument that it was entitled, in the circumstances, to exercise its statutory power of sale as the Plaintiff is yet to fully repay the loan.

[30] The foregoing being a summary of the evidence, the parties agreed on a List of Issues for determination by the Court, namely:

[a] Whether or not the Plaintiff had cleared the loan in accordance with the Agreement between the parties;

[b] Whether or not the Plaintiff had been served with a valid Statutory Notice in respect of the suit premises;

[c] Whether or not the Plaintiff's properties should be released by the Defendant;

[d] Whether or not the Defendant's Defence of typographical error/mistake is available to the Defendant; and,

[e] Who pays the costs of this suit.

[31] Having perused the pleadings and the proceedings herein and carefully considered the written statements and Bundles of Documents filed herein by Learned Counsel for the respective parties, as well as the written submissions on record, it is manifest that the parties are in agreement as to most of the facts

herein. They are in agreement that, by a banking facility letter dated **10 May 2005**, the Defendant agreed to grant and did grant the Plaintiff a loan of **Kshs. 11,500,000/=** on the understanding that the same would be repaid in monthly instalments of **Kshs. 182,029.80**, inclusive of interest at 14.5%, over a period of 120 months. The loan was secured by a Legal Charge over the titles to **the Loresho Property** and **the Riruta Property**. The Agreement and the Charges were exhibited at **Pages 1 to 58** of the Plaintiff's Bundle of Documents marked **PEXh.1** and **Pages 3 to 12** of the Defendant's Bundle of Document (**DEXh.1**).

[32] There is further no dispute that the Plaintiff thereafter approached the Defendant for a further mortgage facility of **Kshs. 2,000,000/=**, which was similarly granted by the Defendant, thereby precipitating the signing of the 2nd Facility Agreement dated **12 February 2006**, by which the terms of the Initial Agreement were consolidated with the terms of the new facility and referred to respectively as **Limit No. 1** and **Limit No. 2**, respectively. The uncontested evidence adduced herein shows that by that time, the Plaintiff had reduced the initial loan of **Kshs. 11,500,000/=** to **Kshs. 9,254,563/=**. It was the contention of the Plaintiff, which was conceded to by the Defendant, that he dutifully repaid the loans upto **21 May 2010** when, according to him, he completed the repayment and asked the Defendant to discharge and release his title documents vide his letter of even date (at **Page 73** of his Bundle of Documents marked **PEXh.1**). However, the Defendant disputed this and accordingly issued a Statutory Notice dated **30 November 2010**, evincing its intention to realize the securities.

[33] Accordingly, the only issue for determination in my view is whether or not there was a **typographical error** in the 2nd Agreement dated **25 February 2006**; for if there was, then it would follow that the Plaintiff may not have cleared the loan and therefore that the Defendant was within its rights in serving the Statutory Notice dated **30 November 2010**; in which event, it would be premature for the Plaintiff to call for the discharge of **the Loresho Property**. The converse would also hold true.

[34] A careful perusal of the Agreement dated **25 February 2006** does show that it was made with the Initial Agreement dated **10 May 2005** in view, for it incorporated the terms of the Initial Agreement and designated the same as **Limit No. 1** and provided for the additional facility as **Limit No. 2**. Under **Limit No. 1**, the sum in issue was stated as **Kshs.9,254,563/=**, and the type indicated as "**Existing Mortgage Loan Facility**" and the purpose was to assist in financing purchase of residential house for own occupation. There is no dispute that instalment sum of **Kshs. 182,029.80** is the very amount that was provided for in the Initial Agreement and that the Plaintiff continued to pay the instalments as agreed. The Defendant now contends that the reduction of the period of payment from 120 months as provided for in the Initial Agreement to 51 months in the 2nd Agreement had the unintended effect of obliterating the interest component of the loan.

[35] However, having given due consideration to the evidence adduced herein, it is manifest that the parties were in no doubt that the 2nd Agreement would supersede the Initial Agreement. This is evident in **Clause 23(a)** of the 2nd Agreement, whereby the parties covenanted as follows:

"...On acceptance, this Banking Facilities Letter will supersede any previous Banking Facilities letter which the Bank has issued to the Borrower and shall be in force until otherwise replaced or the contract terminated by the Bank and the facilities repaid."

[36] Accordingly, from a plain reading of the Clause aforesaid, it must be taken that the Bank consciously and intentionally reduced the initial payment period in respect of **Limit No. 1** to 51 months from 120 months. It is also instructive that by **25 February 2006**, the initial loan had been reduced by about **Kshs. 1,800,000** and therefore the 120 months was no longer applicable, as some months had already been taken care of. Secondly, the repayment provision in the 2nd Agreement was explicit thus in respect of the monthly repayment of the Initial Facility:

"To continue being repaid in 51 monthly instalments of Kshs. 182,029.80 inclusive of interest accruing thereon on monthly basis." (emphasis supplied)

Accordingly, the contention by the Defendant that the interest component of the loan was not taken into

account is, in my view, not reconcilable with the evidence, and in particular, with this important clause.

[37] The Defendant also made heavy weather of the contents of the Plaintiff's letter dated **12 February 2009** contending that, on the basis thereof, the parties reverted to the terms set out in the Initial Agreement dated **10 May 2005**. That letter was exhibited at page 3 of the Defendant's Supplementary Bundle of Documents marked **DExh.2**, and simply reads thus:

"Please revert my loan Payment Instalment to the original terms of Kshs. 182,029.80 as per our agreement Dated 10th May 2005."

Quite apart from the fact that the particulars of the loan account was not provided therein, it is manifest that the letter was specific to the instalments and made no reference to the payment period. Secondly, the Plaintiff adduced cogent evidence herein to show that what was in issue then was an overcharge by the Defendant of **Kshs. 39,766.15** and which was corrected and a refund made on **14 March 2009** as shown on page 2 of the Plaintiff's Supplementary Bundle of Documents (marked **PExh.2**) under the entry "**REFUND OF INTEREST CHARGED.**" Moreover, the parties were in agreement, at **Clause 23(b)** of the 2nd Agreement that:

"...All renewals and amendments shall be advised by a banking facilities letter supplemental to this Banking Facilities Letter. This Banking Facilities Letter once accepted otherwise remains in full force and effect, subject to termination as aforesaid, throughout the life of the facilities enumerated herein provided the facilities or any part thereof are renewed."

[38] It is noteworthy that no evidence was adduced by the Defendant to show that, pursuant to the Plaintiff's letter dated **12 February 2009**, it prepared and caused to be signed a supplemental Facilities Letter reverting the terms of **Limit No. 1** loan to the terms set out in the Initial Letter. Similarly, no evidence was adduced to controvert the Plaintiff's contention that the letter of **12 February 2009** aforesaid was specific to the overcharge which was duly corrected. The Defendant had the opportunity of calling as its witness, **Ms. Habiba**, to whose attention the letter was drawn to explain its purport and why the Bank made the refund, but opted not to do so. Accordingly, I take the view that no such variation could have occurred in the absence of clear evidence of a meeting of minds thereon, duly documented in superseding letter of variation as contemplated by the parties in the 2nd Agreement.

[39] This is significant in view of the discrepancies that the Plaintiff's Counsel drew the Court's attention to at **Pages 15 to 18** of their written submissions, notably, at Page 2 of the Plaintiff's Supplementary List and Bundle of Documents (**PExh.2**), in which there is a copy of the Statement of Account for the period from **20 February 2009** to **19 May 2009**. It is disconcerting to note that the Defendant's version of the same document containing similar entries for **14 March 2009** shows that the Statement is for the period **8 July 2008** to **31 July 2009** (see page **54** of the **DExh.1**), which appears to suggest that the document was backdated. No explanation was forthcoming from the Defendant to explain these apparent anomalies.

[40] Accordingly, I would find and hold that the letter aforementioned did not in any way revert the party's relationship to the **10 May 2005** terms as is now purported by the Defendant; and that it merely underscored the prevailing monthly instalment amount of **Kshs. 182,029.80** which had remained constant from the Initial Agreement to the 2nd Agreement and that the letter was to be understood within the context of the overcharge aforementioned. In the premises, the evidence adduced herein does point to the indisputable fact that there was no mistake in the 2nd Agreement with particular reference to **Limit No. 1**; and the same would be the case in respect of **Limit No. 2**.

[41] And, even if, *arguendo*, I were to find that there was indeed a mistake on the part of the Defendant, it is now trite that a party cannot rely on his own mistake to the disadvantage of the other party. In **Solle vs. Butcher [1949] 2 AllER 1107**, Lord Denning had the following to say in this respect:

"...once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for

breach of some condition expressed or implied in it, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake. A *fortiori* if the other did not know of the mistake, but shared it..."

[42] Similarly, in Hassanali Holdings vs. Citizen Corporation Limited HCCC No. 35 of 1995, Mwera, J. was of the view, which I entirely agree with, that a mistake must be common to both parties to an agreement. He expressed this view thus:

"...That mistake should however be common to both parties to a pact. It is the element of mutuality that says that the parties were not acting with the meeting of minds i.e. *ad idem*. But in this case it is not shown that the parties acted under a mistake and common to both at that, regarding the effect of LN N. 111 of 2003. The Plaintiff denies it and the defendant has not established which common mistake before and up to signing the letter on 1st September 2004..."

[43] The Plaintiff herein has denied there having been a mistake, contending that it was the Defendant who drew the pertinent agreements. He added that although the Defendant had the powers to withdraw the offer pursuant to **Clause 23(a)** of the 2nd Agreement, it did not do so. In fact, it did not raise the issue of error until **11 August 2010**, long after the Plaintiff asked for the release of the his titles. Moreover, the Defendant did not deem it necessary to put in a counterclaim herein for rescission or the sum of **Kshs. 5,652,217.90** for which the Statutory Notice dated **7 June 2011** was issued. In this regard, I find instructive Indian case of Janardan Govind Mahale vs. Venkatesh Waman Shevji [1939] 41 BOMLR 191, wherein the following viewpoint was expressed:

"...if a defendant is contesting a claim against him based on a written document and challenges the document on the ground that it was based on fraud or mistake, it is ... necessary for him to counter-claim either for rescission or rectification, and unless he adopts that course, the document would take effect according to its terms.

[44] Accordingly, I would agree with the submissions of the Plaintiff's Counsel that, in the circumstances, the doctrine of equitable estoppel would come into play to prevent the Defendant from disowning the express terms of their 2nd Agreement with the Plaintiff. For over 4 years, the Defendant made the Plaintiff believe that his obligation under **Limit No. 1** of the 2nd Agreement was to pay **Kshs. 9,254,563/=** only by monthly instalments of **Kshs. 182,029.80** for **51** months; and in that belief and conviction the Plaintiff paid the aforesaid sum dutifully to completion. I accordingly take the view that it would be inequitable for the Defendant to plead mistake at the tail end of the transaction. This was held to be the case in Nurdin Bandali vs. Lom Bank [1963] EA 304, in which the Court stated thus:

"The precise limits of an equitable estoppel are however by no means clear. It is clear however that before it can arise one party may have made to another party a clear and unequivocal representation, which may relate to the enforcement of legal rights, with the intention that it be acted upon and the other party in the belief of the truth of the representation acted upon it."

[45] In respect of **Limit No. 2**, the Plaintiff claimed a refund of **Kshs. 1,011,804.50** contending that the Defendant debited a monthly sum of **Kshs. 46,667/=** instead of the contractual sum of **Kshs. 15,667/=**. Although it was the contention of the Defendant that the Plaintiff gave explicit instructions to the Defendant to debit the sum of **Kshs. 46,667/=**, by way of standing order, towards the repayment in respect of **Limit No. 2**. It is noted that the Defendant, no such instructions were availed before the Court in proof of that contention. Thus the evidence of the Plaintiff, based on the Agreement Letter dated **25 February 2006** and the Statements of Accounts is that he overpaid the loan under **Limit No. 2** by **Kshs. 1,011,804.50**. He worked out that sum as follows:

As agreed on Contract 16,667 x 120 = Kshs. 2,000,000.00

Actual Payment	46,667 x 51	=	Kshs. 2,380,017.00
Add Lump sum Payment			Kshs. 586,375.20
Total			Kshs. 2,966,392.20
Add amount withdrawn from account			
by Bank after full repayment			Kshs. 45,452.30
Total Amount Paid			Kshs. 3,011,844.50
Less Amount agreed on Contract			Kshs. 2,000,000.00
Total Amount Overpaid			Kshs. 1,011,804.50

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[46] In the result, I am satisfied that the Plaintiff has proved his case against the Defendant on a balance of probabilities, and that he is entitled to the prayers sought. Thus, Judgment is hereby entered in the Plaintiff's favour against the Defendant for:

- [a]** A Declaration that the Defendant is legally bound by the Agreement dated **25 February 2006**;
- [b]** A Declaration that the Plaintiff had overpaid the Defendant in respect of **Limit No. 2** loan by a sum of Kshs. **Kshs. 1,011,804.50** together with interest thereon at court rates;
- [c]** A Mandatory Injunction to compel the Defendant to release and discharge the title in respect of the Plaintiff's property known as **Nairobi/Block 90/167**;
- [d]** Costs of this suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH OCTOBER, 2017

OLGA SEWE

JUDGE