IN THE HIGH COURT OF KENYA AT NAIROBI

(COMMERCIAL & ADMIRALTY DIVISON)

CIVIL SUIT 414 OF 2004

FRANCIS JOSEPH KAMAU ICHATHA…….....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY

OF KENYA LIMITED.....DEFENDANT

JUDGEMENT

Plaintiff's Case

1. The plaintiff, **Francis Joseph Kamau Ichatha**, by a further amended plaint dated 3rd March, 2011 and filed in this Court on 4th March, 2011 seeks the following orders:

a. **A declaration that the defendant is not entitled to charge the plaintiff any penalties whether described as 'penalty interest', interest on arrears', default charges' or by whatever name called and such penalties, variously described herein as 'penalty interest', 'interest on arrears', 'default charges' together with the cumulative interest thereon that the defendant has charged the plaintiffs in the past is in breach of contract herein is unconscionable, illegal, null and void and that the same constitutes a fetter or clog on the plaintiff's equity of redemption.**
b. **A declaration that the defendant has acted in contravention of the Banking Act (Cap 488 Laws of Kenya) and that the Defendant has applied interest rates on the plaintiff's facility in breach of the specific terms of the contractual documents governing the facility.**
c. **In view of the mathematical nature and foundation of the dispute herein accounts be taken of the loan amount herein due by the Department of Mathematics of the University of Nairobi or such other expert as the court may deem appropriate in accordance with the banking facility contracts between the plaintiff and the defendant taking into account the proceeds of sale and the plaintiff's indebtedness, if any, be adjusted in accordance with the findings of such an expert opinion.**
d. **Refund of amount due to the plaintiff consequent upon the said accounts being taken.**
e. **Loss of user of the suit premises and value thereof as may be assessed by this Honourable Court.**
f. **Costs of this suit be provided for.**
g. **Any other or further relief that this Honourable Court may deem fit to grant.**

2. According to the plaint, the plaintiff the registered owner of LR No. 13689 situated at Langata, Karen, Nairobi (hereinafter referred to as the suit premises) applied for a mortgage facility in the sum of Kshs 1,300,000.00 in 1991 and a further Kshs 300,000.00 in 1992 from the defendant.

After evaluating the plaintiff's and his wife's financial capabilities the defendant accepted the said application on security of the suit premises at the monthly repayment of Kshs 26,273/= at the rate of 18% per annum for 15 years. It was a further term that the said rate of interest could only be varied with the concurrence and prior written approval of both parties and in any event not without at least 4 months' notice in advance.

3. Pursuant thereto a charge and further charge over the suit premises were executed and registered. However in breach of the said terms the Defendant unilaterally, recklessly, negligently and without regard to the plaintiff's interest varied the said interest to 26% per annum thereby making it impossible for the plaintiff to service the facility. Apart from that the Defendant employed the use of a faulty banking computer software system which led to errors in calculation of interest.
4. As a result of the foregoing the defendant negligently and fraudulently managed and/or operated the plaintiff's account by debiting thereto illegal, non-contractual and unconscionable charges thereby clogging the plaintiff's equity of redemption.
5. The plaintiff's case was that in June and July 2005 acting under the pretext of its exercise of its statutory powers of sale the Defendant sold the suit premises which sale was malicious, capricious, reckless, irregular and unlawful and was without factual and/or lawful justification as a result of which the plaintiff suffered loss.
6. In support of its case, the plaintiff, a customs officer by profession, testified that in his capacity as a Customs Officer he is well versed with accounts especially with respect to ta calculations.
7. According to him, in 1991 he took a loan of Kshs 1.2 million on the security of his property situated at Karen and started building but due to inadequacy of the said sum he took an additional sum of Kshs 300,000/= from the defendant to make a total of Kshs 1.5 million. It was his evidence that the defendant evaluated him and found that he could not pay more than Kshs 26,273/= per month and even though the cost of the building was more than the sum advanced, the defendant could not advance more than the sum advanced since the plaintiff would be unable to repay more than the said sum.
8. As a result the plaintiff was only able to do the foundation with the said amount and was forced to look for money else to complete his building. According to him, he sold the three houses he had in Nairobi's Zimmerman area, 4 houses in Umoja Area, a house in Kimathi, 3 houses in Nyeri. Further to that he mortgaged his 2 houses in Nakuru, his house in Limuru and his 8 acre land in Kirinyaga. All these he did to enable him secure the funding to complete his house. By the time he completed the house, the same had cost him Kshs 7.9 million yet the Defendant had only given him Kshs 1.5 million which was less than 25% of the cost of the construction yet in 1994 the Defendant wanted to sell the house even before it was completely.
9. According to the plaintiff, the first facility was to be paid by way of interest at the rate of 18% though the said rates could be varied by the Defendant giving the plaintiff 4 months' notice. However on additional advance the interest rate was 19%. To the plaintiff in case of the default, the Defendant would realise the charged property in which case he was not required to pay any money. According to the plaintiff however, instead of the said sum f Kshs 300,000.00 he only received Kshs 250,000.00.
10. In 1993, the Defendant demanded that the plaintiff pays the sum of Kshs 251,526.00 in form of arrears. In the Plaintiff's view, the Defendant ought to have exercised its option of selling the charged property at that time. However, in 1994, the Defendant issued another demand for 341,707.98. Instead of realising the security, the Defendant instead in 1994 commenced legal proceedings for the vacant possession of the property which action according to the plaintiff was meant to escalate the arrears and the Defendant's profits. In the Plaintiff's view, the Defendant charged him interest in the sum of Kshs 7,124,763.07 and penalties in the sum of Kshs 11,038,050.20 inclusive of other charges such as ledger fees, auctioneer's fees and insurance fees of Kshs 1,698,087.74. To the Plaintiff the Defendant was demanding Kshs 19,648,334.52 two years after he was advanced the money and he had paid a total of Kshs 4,241,322.85 hence making the total sum demanded to be in excess of Kshs 24 million. Apart from this in June 2005, the Defendant also received a sum of Kshs 10,930,253.90 from Baker's Corner in respect of the same account.
11. In the plaintiff's view the total overcharge in respect of the transaction was Kshs 23,889,657.37 which in his view meant the Defendant was charging him Kshs 15.93 for every one shilling he borrowed against the Defendant's projection of Kshs 4,335,045.00. In 1998 when the Plaintiff

became suspicious on the manner in which the account was being operated he raised issues with the Defendant on of which was the overcharge in e sum of Kshs 3.3 million but the Defendant did not respond thereto. Another issue of overcharge was raised on 14th July 2011 due to overcharge in the sum of Kshs 5,419,122.77. According to the plaintiff he raised a total of 8 red flags all of which were never responded to.

12. In 1999 when the plaintiff informed the Defendant that he and his wife had lost their jobs and was seeking for further financial assistance, the Defendant within a few days demanded for the repayment of the whole outstanding amount and before the end of the year the property was put up for sale by Watts Enterprises.
13. The plaintiff however got a job with the United Nations in Iraq and left the country on 25th January, 2000. Before he left, he drew a cheque in the sum of Kshs 100,000.00 which he left with his then lawyer **Kihara Muttu** which cheque was handed over to the Defendant in January, 2000. When the plaintiff came back in March 200 on leave he went to see the Defendant and met with the Defendant's Chief Valuer, a **Mr Kiberenge** who requested him to top up the Kshs 100,000.00 to Kshs 130,000.00 per month which the plaintiff obliged by handing over to his said lawyer cheques in the said sum which were handed over to the Defendant making a total sum of Kshs 1.3 million for the year 2000 alone. Despite this on 23rd November, 2000 the Defendant put up the plaintiff' property for sale. When the plaintiff came back December, 2000, he was informed by the Defendant that the Defendant had forgotten to bank his cheques and apologised and put off the sale of the property. However on 11th September, 2001, the Plaintiff was given 30 days to pay legal fees of Kshs 67,319.00.
14. According to the plaintiff between the year 2001 and 2002 he noticed that the Defendant had opened two accounts – capital account and arrears account and was charging interest on capital account while charging penalty on arrears account though the two accounts were not reflected in his statement. He then sought statements from the defendant and based on the statements supplied he was able to raise the red flag and formulate a schedule of both arrears and the capital.
15. In August 2001 the plaintiff's contract in Iraq expired and in May 2002 the Defendant handed over the matter to its lawyers for receiver. In 2003, the plaintiff approached Interest Rates Advisory Centre (IRAC) who recalculated the interest and he thereafter instated these proceedings. However, his application for injunction was dismissed and his subsequent application was similarly disallowed. According to him, although the application was disallowed on Friday 3rd June, 2005, the house was sold on Monday 6th June, 2005 on which date all transactions were completed and he was notified of the sale of the property by the defendant on 1st July, 2005 by way of two letters one informing him of the sale of the property and the other by the purchaser demanding vacant possession within 30 days. Both letters were however delivered by a **Mr Ndungu** from the Defendant. According to the plaintiff all the letters by the buyer were delivered to him by the Bank and were copied to **Mr G. Kimaita**. However even after the sale and even after the Plaintiff vacated the suit premises, the defendant charged him Kshs 220,289.85. Whereas the letter indicated that the house was sold at Kshs 10,500,000/= another document indicated that the same was sold at Kshs 11 million. The plaintiff testified that he vacated the premises on 7th September, 2005. In his evidence the Defendant wanted to bribe him with Kshs 8 million to forget the case but he declined the offer.
16. The plaintiff testified that he went back to IRAC who did a recalculation which they finalised on 28th July, 2006 and handed to him the report the same day in which they concluded that the plaintiff owed the Defendant no money.
17. It was the plaintiff's position that the Defendant was under a legal duty to keep, maintain and run his account in a proper manner and calculate interest due properly and accurately but from the onset the defendant messed up the same. In the plaintiff' view some of the mistakes were so glaring that a computer/calculator or an expert with naked eyes yet the Defendant never discovered and corrected these. According to him he listed down 34 examples in his documents out of 171. For example on 1stFebruary, 1992, the outstanding amount was Kshs 699,057.60 and the interest charged was Kshs 9,957.50 yet the following month March 1992 the outstanding balance was Kshs 694,633.30 and interest charged was Kshs 10,619.35 which clearly showed that there was a mistake. On 1st September 1998 the balance was Kshs 3,810,675.15 and interest charged was Kshs 81,433.60 yet the following month the balance was Kshs 882,023.31 and

interest of Kshs 18,374.73 charged. The plaintiff also pointed out what he considered to be other instances when such glaring mistakes were made without any attempt to correct the same year in year out for 21 years.

18. The plaintiff averred that the Defendant admitted that it lost 40 computer software required to run the account and listed 27 entries where the Defendant admitted that as a result of the foregoing there were many errors, corrections, adjustments, debits and credit corrections, double charging and omissions totalling to 27. Apart from that the plaintiff claimed that the Defendant fraudulently manipulated his account as a result of which he lost Kshs 5,419,122.77. These manipulations the plaintiff claimed included debits in respect of interest on advance for sums which had not been advanced and other debits which were unjustified. There was another debit for refund of overpayment which according to him, ought to have been a credit rather than a debit. There was also a debit in respect of legal fees which according to the plaintiff was incurred as a result of Defendant's fault which fault the Defendant accepted and even after selling the house the Defendant continued debiting the account with Kshs 220,289.89 resorting to miscalculation of penalties. On various dates between 1993 and June, 2005 the defendant erroneously debited the same account with Kshs 3,792,115.43 and a further sum of Kshs 1,035,865.70. As a result of the wrong addition and subtraction the Defendant also debited the account with Kshs 140,019.14.
19. The plaintiff therefore asked the Court to order the Defendant to refund the sum of Kshs 5,419.122.77 at the same rate the Defendant charged the Plaintiff which the Plaintiff put at Kshs 15.93 for each Shilling borrowed.
20. It was further stated by the plaintiff that with respect to interest in February, 2000 the opening balance was Kshs 5,449,478.31 which balanced comprised arrears and capital. However the interest was calculated at the rate of 24% which was Kshs 2,495,103.05 and the Defendant charged him Kshs 115,673.59 instead of Kshs 49,902.06. Therefore out of a single entry the Defendant defrauded him Kshs 65,771.53. The plaintiff also identified other similar entries on interests and penalties. With respect to the latter, for example, the arrears were Kshs 4,298,604.30 and the penalty charged was 1% which ought to have been Kshs 42,986.04. However, the Defendant charged Kshs 130,128.10 hence overcharging by Kshs 88,917.04. He similarly pointed out other entries with similar charges. In his view the total interest wrong charged was Kshs 1,068,302.46 while the wrongly charged penalties amounted to Kshs 3,810,229.40 making a total of Kshs 4,878,531.86.
21. According to the charge document the Defendant could only vary interest upon giving a full month's notice failing which such variation was illegal. Despite this the Defendant varied the rate of interest 17 times without complying with this contractual requirement as a result of which the plaintiff lost Kshs 4,637,538.07. In his view it was a term of the agreement that in the event of his defaulting in repayment the Defendant would exercise his statutory power of sale and sell the property. As a result of the failure by the Defendant to exercise this option, the plaintiff contended that he lost Kshs 11,038,000.50.
22. The plaintiff therefore claimed that at the time his house was sold in June 2005 the outstanding balance according to the Defendant's statement was Kshs 17, 094, 668.80 and this was less Kshs 11,,638,050.20 being penalties wrongly charged, less Kshs 4,637,538.07 being the amount charged by the Defendant as a result of variation in interest rate, less Kshs 96/= debited as penalties, less Kshs 2,130/= debited on 15th December, 1994 as investigations fees, less Kshs 73, 193.50 debited in 1998 as Auctioneers fess, less Kshs 695,111.45 being legal fees debited without the plaintiff's consent or approval, less 201,257.90 being auctioneers fees debited without consent or approval, less Kshs 220,289.85 wrongly debited by the Defendant after the sale of the house, less Kshs 37,990/= debited into the plaintiff's account instead of being credited as overpayment in 1998 less Kshs 45,000/= debited in 2005 as arrears of deposit less Kshs 49,200/= non-existent disbursement in 1994, less Kshs 4,827,980.13 amount of erroneous debit as interests and penalties and less 140,019.40 being erroneous figures in form of wrong addition and wrong subtraction. When the final accounts are taken, the plaintiff contended that the Defendant owes him Kshs 4,873,987.44 plus the house which is currently valued in the sum of Kshs 80,000,000/= making a total of Kshs 84,873,987.44 since the house was not built by the funds from the Defendant who only contributed 25%. In the plaintiff's belief someone from the Defendant Bank bought the property by proxy since there is no way someone could invest Kshs 12,000,000/= towards the purchase of a property he had not seen hence the reason the Defendant offered the plaintiff Kshs

7,641,231.40.

23. In cross-examination by **Mr Muchoki**, learned counsel for the Defendant the plaintiff admitted that though he was not trained in accounts he had acquired experience though not on the Bank. He admitted that he did not understand the banking rules. He said that he approached the Defendant and made his proposal and sought Kshs 1.5 million and offered his house and the purpose for which he sought the facility was for construction of the house. He admitted that he understood the terms. After the valuation the Bank found he could only pay Kshs 26,376.00 per month which according to him, he was expected to pay for 15 years. He admitted that if there was to be any variation, the same was to be made upwards and that would interfere with the repayment since he could not repay anything beyond Kshs 26,000/=. He admitted that he was only advanced Kshs 1.5 due to his financial ability.
24. In 1994 the Bank wanted to sell his property due to arrears of Kshs 297,785.05. He however maintained that the Bank was under obligation to notify him of the variation of interest and that he never received any. However referred to certain letters from the Defendant, he admitted having received the same though he was adamant that they were not four months notices. The plaintiff however insisted that all the Bank could do was to exercise its statutory power of sale. Referred to the documents, he conceded that the Bank could opt for all the options referred to since they used the word "may".
25. The plaintiff admitted that he did seek indulgence from the Bank many times and when he was indulged he did not complain since he was happy with the indulgence since he was unable to service the loan because the money he was receiving he was pumping into the construction of the house. He however asserted that the whole amount was never advanced.
26. Asked whether he knew when the property was sold he denied such knowledge though he was told it was sold in June 2005 by which time he had engaged an advocate. Although he received a letter demanding that he pays Kshs 11,763,533.00 he did not pay the same and the property was sold in 2005, two tears after the notice meaning that he was given a window of two years. He however insisted that the Bank tried to bribe him. He denied the meetings of 22nd and 27th July 2005 so the money was never paid to him. According to him as at the time of the selling of the property he had been overcharged Kshs 4,878,531.86. He said that by the time of the sale the balance was Kshs 17,000,000.00 yet what was due was Kshs 12 million excluding Kshs 11 million in penalties.
27. In the plaintiff's view, he did not agree with the Defendant because the Defendant was using a defective computer software. He however admitted that though it is not unusual to make mistakes and correct the same though in his view the mistakes in this case were just too many. He however confirmed that the house had bee sold to a third party though he complained it was sold by private treaty and that there was no proper notification of sale. In his view proper sale meant proper figures and since the house was his even if it was to be sold by private treaty he ought to have been informed since he could have gotten someone with more money to buy the same. In his view the statements he got always had wrong balances.
28. According to him, he was asking for the nullification of the sale and retransfer in his favour as well as loss of user and suffering as well as costs of the suit and other reliefs.

Defendant's Case

29. In its defence the defendant while admitting the existence of the charge averred hat the terms of the contract were contained in the contractual documents and there were no other terms outside the said documents hence there were no representations made to the plaintiff by the Defendant.
30. According to the Defendant it acted within the contractual terms and varied the interests in terms of the charge contract taking into account the rate of interest commonly chargeable in Kenya having regard to such circumstances as it considers relevant.
31. However the Plaintiff started to default in paying the monthly instalments immediately the loan was disbursed and the Plaintiff variously admitted default and blamed the same on harsh economic conditions and high construction cost and pleaded for indulgence. The Defendant however denied that the charges levied were penal in nature.
32. According to the defendant the plaintiff's equity of redemption was extinguished by operation of the law and the plaintiff's suit is overtaken by irreversible events and that it has not been clogged

by the Defendant hence the property cannot be redeemed. To the Defendant, it exercised its statutory power of sale properly and sold the mortgaged property in accordance with the provisions of the law and the contracts between the parties hence the plaintiff did not suffer any loss.

33. According to the Defendant the plaintiff concealed the existence of HCCC No. 3831 of 1994.
34. In support of its case the Defendant called two witnesses. The first witness was **Patrick Mwangi Wainaina**, its assistant manager in the legal department as its first witness and he testified as DW1.
35. According to DW1 by the time of his testimony he had been with the Bank for 6 months. Having studied the documents in respect of the facility given to the plaintiff, he testified that the plaintiff was the Defendant's customer and approached the Defendant in 1991 for a mortgage facility for Kshs 1.2 million which was granted to him. In 1992 he borrowed a further sum of Kshs 300,000/= and that all these facilities were secured by a charge over his property on LR No. 13689 at Karen in Langata. The charge was created and registered on 8th August 1991 and he was required to repay the same with interest at the rate of 18% p.a. which could be varied for 15 years. The said sum was to be disbursed in instalments since it was a construction loan. There was a letter of offer which was accepted by the plaintiff and the monthly instalment for the first amount was Kshs 19,332/= as well as monthly insurance premiums of Kshs 475/= and Kshs 1,239/= for lie and fire respectively totalling Kshs 21,046/=.
36. However there was a provision not only for payment of the principal sum but interests as well and interest on arrears. Interest was to be calculated on the whole amount advanced and that any payment made was not to be treated as part of the principal until the accrued interest was paid. The rate of interest was 18% subject to notification of not less than 4 months. According to him the interest rate was varied severally both upwards and downwards and the plaintiff was notified of his arrears. He however testified that the notices were one month's notices though he was not aware of any complaint from the Plaintiff with respect to the notification period.
37. According to him the plaintiff defaulted almost immediately after the disbursement of the loan and was informed of the default and the arrears were demanded which default was admitted by the plaintiff who sought for time. According to the witness the increase in interest rates were in accordance with the charge which was accepted by the plaintiff.
38. According to him the Bank was not under any obligation to re-finance the plaintiff though he was given sufficient accommodation on the plaintiff's own plea. A statutory notice was therefore issued dated 24th March 1994 for 3 months. There was however another notice issued on 31st December, 2003. It was therefore contended that it was not true that the plaintiff was never given accommodation to redeem the property as he was accommodated several times though the plaintiff admitted being in default. Although the plaintiff made several repayment proposals, he did not honour the same and where he made payments the same were insufficient despite admitting that he had disposed of some of his properties.
39. According to the witness several intended sale of the property were shelved after the plaintiff made payments and promises to settle the arrears which promises were however not honoured. According to him the charge secured penalties as well. He however insisted that it was the Bank's mandate to vary the interest. According to him a statutory notice of sale was issued and the Defendant was entitled to exercise its statutory power of sale. According to the witness the sale was done by private treaty pursuant to the provisions of the ***Transfer of Property Act*** under which the charge fell. After the sale the plaintiff was informed of the sale, the purchase price and the arrears. According to him there was a valuation done on the property dated 9th June, 2005 by **Tysons Ltd** which gave the open market value as Kshs 10 million and the property was sold at Kshs 10.5 million.
40. According to DW1 since the property had been sold it can nolonger be recovered. Since the plaintiff was in arrears he cannot recover loss of user. In his evidence there was no overcharge since all the charges were provided for in the charge and he was unaware of any contravention of the provisions of the ***Banking Act*** hence it would be unnecessary for the University of Nairobi to be called into the matter hence the plaintiff ought not to be granted the orders sought in the plaint since the shortfall has not been paid by the plaintiff todate and continue to accrue arrears.
41. In cross-examination by the plaintiff, DW1 stated that the plaintiff was assessed and approved and relevant documents prepared which were binding. He said that payments were monthly and in

default the Bank was entitled to exercise its power of sale and sell the property. According to him, under the ***Transfer of Property Act*** there were other options such as suing for recovery but no other option. He confirmed that the facility was a construction loan and was disbursed in instalments though the whole amount was disbursed.

42. He confirmed that the interest rate could be varied on 4 months' notice. Referred to certain notices, he confirmed that they were one month's notices though according to him he was unaware that statutory notice based on wrong figures in invalid.
43. In re-examination by **Miss Kimani** for the Defendant, DW1 asserted that the Defendant reserved the right to vary interest and after disbursement repayments were never made. He however said that he was unaware of the alleged 17 variation of interest. He said that the Plaintiff was in arrears during the one month's notice and there was no complaint with respect to the said one months notice.
44. In his view the effect of the plaintiff's letters was an acknowledgement of default. To him there was no breach of the terms and there was nothing illegal.
45. In answer to a clarification from the Court DW1 stated that there was no instance in which four months notice was given because the first notice was the statutory notice.
46. After DW1, the Defendant called **Moses Ndungu**, the Defendant's Assistant Manager Debt Management who testified as DW2. According to him, he had worked with the Defendant for 13 years.
47. He testified that the plaintiff borrowed Kshs 1.2 million in 1991 and was further advanced Kshs 200,000/= in 1992. According to him during the tenure of the loan the account was poorly serviced. According to him, this was an instalment facility which was to be disbursed as the construction progressed. However there were instances when interest was not paid and the account attracted charges on interest on arrears and was described in the statement as interest on arrears, default charges, late fees or penalty interest. According to him if the account is in arrears, it attracts charges and if not it attracts interest on capital. According to him the first disbursement instalment of Kshs 100,000.00 was made on 2nd October 1991. According to him, the moment an advance is made interest is payable on the advance which is debited on the account. If the customer pays there is an entry on credit side. This interest was however not paid which was a default on the first day and hence would attract penalty interest at the rate of 1.5% higher than interest on capital meaning the interest rate would be 19.5%.
48. According to DW2 monthly interest is calculated based on running balance loaded on the first day of the month. As no interest was paid the plaintiff's account went into arrears. As a result of the conduct of the account due to non-payment the borrower was given a notice and the loan demanded. According to him the auctioneers went through the process of engaging a process server to serve the borrower and the latter's charges were Kshs 2,130/=. Every time there was a threat of exercise of statutory power of sale the plaintiff would make proposals and the auction would be stopped hence the account would incur auctioneers charges and advocates charges. Although the narration for the advocate's fees was not indicated the witness insisted that Kshs 37,990/- was in respect of advocate's fees.
49. He testified that the property was eventually sold in June 2005 by transfer by chargee for Kshs 10.5 million leaving a shortfall of Kshs 6.6 million. According to him the normal banking procedure is that insurance is paid at the beginning of the year and recovered monthly from the borrower. According to him the sale proceeds were not sufficient to cover the amount and therefore the account remained active and attracted ledger fees till the end of the year. In his view there were no fraudulent penalties and charges. According to DW2, the interest rates applied on the balances kept changing from time to time and since the account was not well serviced it reflected charges and the balance escalated. To him there was no wrong calculation and that the Defendant's employees were qualified to deal with the accounts. To him every customer is entitled to statements twice a year.
50. In cross-examination by the plaintiff, DW2 admitted that he was under a duty to properly maintain the account which was to ne operated by computer software. Referred to page 111 of the plaintiff's bundle, the witness said that the figure he was getting was Kshs 53,250/= and not Kshs 55,025.35 indicated therein though according to him the difference was slight. Asked about the next amount he admitted that same ought to have been Kshs 42,986.04 and not Kshs 130,128.10 though according to him the figure would depend on the time of calculation. He however insisted

the figure was correct because he did not have sufficient information to enable him arrive at how the figure of Kshs 130,128.10 was arrived at since his calculation came to Kshs 42,986.04. Referred to the statement for February, 2000 the witness agreed with the plaintiff that the figure ought to have been Kshs 29,543.75 and not the amount the Defendant charged of Kshs 193,752.08. He however disagreed with the plaintiff that if they did not dispute the plaintiff's calculation within 14 days it meant they agreed with the plaintiff's calculations. He further disagreed with the report of IRAC that there was an inbuilt overcharging. He however said that he needed to check certain things before he could confirm whether the plaintiff's calculations were correct or not.

51. DW2 explained that at one point the plaintiff's account was zero rated hence the amount of interest was less. He however contended that as at 2005, the plaintiff owed the Defendant Kshs 6.6 million. He said that the house was sold because the Plaintiff owed them Kshs 17,141,291.40 though as a good gesture the Defendant offered the plaintiff Kshs 700,000/= in order to vacate the suit property but insisted that this had nothing to do with the case but at the plaintiff's request.
52. Referred to the documents on record, he said that the Defendant does not work on Sundays and that the house was not auctioned on weekend. He however confirmed that the cheque was paid on 6th June 2005. The witness could not however recall delivering the letters to the Plaintiff.
53. With respect to the sale he confirmed that the house was sold for 10.5 million in 2005. According to him the date of sale was not in the agreement and what was there was the Power of Attorney number. H however denied knowing that a **Mr Charles Kamau** was a director of Baker's Corner.
54. While saying that he could not tell how much money was required to complete the house he asserted that with the money the Defendant was given the house was built to completion. He said that as time progresses the principal sum reduces while the arrears increase. According to him the amount demanded was Kshs 19,648,334.52 while the plaintiff paid Kshs 4,241,322.85 bringing the total to Kshs 23 million. He admitted that if this is divided by Kshs 1.45 million it would come to Kshs 15.93 per shilling.
55. According to the witness since some amounts such as insurance to go to the Capital Account it was not correct that the Capital account would be limited to Kshs 1.5 million. The witness stated that the only cheques the Defendant did not bank were those which the Defendant gave instructions not to be banked. He said that the withdrawal of the auction was on the instructions of the Plaintiff. According to the witness the premium was not constant because the value of the property was changing. While admitting that the Defendant was only entitled to charge what was in the letter of offer and in case of other charges the plaintiff's consent was to be sought, he however contended that the legal fees were provided for under administrative costs. He however confirmed that according to the judgement of **Kasango, J** legal charges should have been with the plaintiff's consent.
56. In Re-examination by **Miss Kimani**, DW2 explained the discrepancies in the figures which the plaintiff contended were incorrect. He stated that in the last year after the sale the interest was less because it was for the few days at the beginning of the month after which there was no interest. After the receipt of the purchase price the account was zero rated and stopped accumulating interest though it was still active and there is still an outstanding sum of Kshs 7,293,813.00 which was demanded vide a letter sent by registered post.
57. He denied that the property was sold on a weekend. In his view the Directors of Baker's Corner are **Mr Martin Kimeu** and his wife **Flora Kimeu** who have never been employed by the Defendant. According to him the total sum which was disbursed in instalments was Kshs 1.5 million.
58. The witness however admitted that if there are any errors they would go by the findings of the Court.

Determination

59. I have considered the pleadings herein, the evidence given by and on behalf of the parties herein as well as the submissions filed herein.
60. I agree that broadly the issues arising therefrom are as follows:

i. **Whether the penalty interest and/or default charges levied by the defendant is contrary to**

the terms of the Charge document and/or unlawful and whether it constituted a fetter or clog on the plaintiff's equity of redemption.

ii. **Whether the failure to give notice constituted a breach of contract and**

whether the plaintiff can be awarded damages for breach of contract.

iii. **Whether the Defendant's calculations were free from error.**

iv. **Whether the Defendant's only option was to realise the security.**

v. **Whether the defendant breached any of the provisions of the Banking Act.**

vi. **Whether the plaintiff is entitled to the prayers sought.**

61. Were the penalty interest and/or default charges levied by the defendant contrary to the terms of the Charge document and/or unlawful and did they constitute a fetter or clog on the plaintiff's equity of redemption?

62. The plaintiff's case was that these charges were not justifiable on the contract and that the same ought not to have been levied without his consent. The Defendant has not cited any particular provision in the contractual documents which entitled it to levy charges other than those expressly provided for. I have gone through the charge documents and I have been unable to find any provision entitling the Defendant to charge what the Defendant termed 'penalty interest', interest on arrears' or 'default charges'. The defendant ought to have expressly provided for such charges in the charge documents in order to entitle it to levy the same. Without any express provision it is my view and I so hold that any levies could only be made with the consent of the Plaintiff. The Defendant has sought to rely on clause 2 of the charge document as the provision which entitled it to the aforesaid charges. My reading of the said clause however does not seem to expressly provide for such charges. 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."

63. However as was held in **The National Bank of Commerce Ltd vs. Nabro Ltd & Another [2008] 1 EA 432** in which ***Principles of Banking Law*** **(Oxford) [1977] at page 154, 155** was cited :

"Therefore with regard to interest payment, while an overdraft facility attracts a compound interest, interests on a term loan only accrue on outstanding balance of the principal sum. These and other terms of the lending agreement might vary from one to another, but they are all subject to the rules of construction of contracts generally, particularly, mercantile contracts. Even if clauses are found to have been incorporated in a contract, they may be construed against the bank. The "*contra profentem*" rule is applied in cases of ambiguity or where other rules of construction fail. If it is applicable, it results in a contract being construed against its maker. Clauses imposing bank charges, for example, must be very clear about the obligations of the customer to pay."

64. I have considered the decisions relied upon by the Defendants herein. I have considered the decision in **Orion East Africa Ltd vs. Housing Finance Co. of Kenya Ltd Nairobi HCCC No. 914 of 2001** where the learned Judge expressed himself as follows:

"When any loan account goes into arrears, penalty interest is normally chargeable and in this case, even going by the letter of 27th May,1998, I have referred to hereinabove, this

account went into arrears and cannot be said to have been properly serviced. Penalty interest was therefore called for and I cannot see any valid complaint on that. As to charging of interest rate that were not part of the agreement, the Applicant did sign the charge through its Director and Director/Secretary on 18th March, 1997."

65. In that case however the charge document gave the Bank the discretion to change the interest rate any time without informing the Applicant. In the instant case as we shall see hereinbelow there was no such blanket and unfettered discretion reserved to the Defendant. In my view the Bank ought to stipulate all the conditions for the grant of facilities and ought not to hide some from the customer only later on for the Bank to resort thereon under the guise of customary practice. Whereas the Court appreciates that in certain cases trade usage may be implied in a contract as was held in **Harilal & Co. & Another vs. The Standard Bank Ltd. Civil Appeal No. 41 of 1966 [1967] EA 512**:

"A trade usage may be described as a particular course of dealing between parties who are in a business relationship, which course of dealing is so generally known to all persons who normally enter into that relationship that they must have been presumed to have intended to adopt that course of dealing and to have incorporated into it their contractual relationship unless by agreement it is so expressly or impliedly excluded. Before a course of dealing can acquire a character of a trade usage it must, first, be so well known to the persons who would be affected by it that any such person when entering into a contract of a nature affected by the usage must be taken to have intended to be bound by it; secondly, be certain in the sense that the position of each of the parties affected by it is capable of ascertainment and does not depend on the whim of the other party; thirdly, be reasonable, that is, that the course of dealing is such that reasonable men would adopt it in the circumstances of the case; and finally, be such as is not contrary to legislation or to some fundamental principle of law. A trade usage may be proved by calling witnesses, whose evidence must be clear, convincing and consistent, that the usage exists as a fact and is well-known and has been acted on generally by persons affected by it. A usage is not proved merely by the evidence of persons who benefited from it unsupported by other evidence. Where a particular usage has acquired sufficient general or local notoriety judicial notice may be taken of it under section 60 of the Evidence Act. Where a trade usage is proved to exist then, unless expressly or impliedly excluded, it is presumed to have been incorporated into the contract between the parties and this is so even though one of the parties may in fact be unaware of the usage so long as the circumstances are such that he ought to have been aware of it." [Underlining mine].

66. Can it therefore be said that a practice in which the Banks unilaterally decide to load the customer's account with penalties at their own discretion whose rates are only known to the Bank is such a certain practice that it can be said to amount to trade usage? In my view that would amount to stretching the word "certain" too far. For one to say that the penalty is certain not only ought there be certainty as to the levy of the interest but since the rate is not contained in any contractual document, the rate also must be certain and must be known in the market otherwise such levying of interest would violate the provisions of Article 46(1)(b) of the Constitution. To argue otherwise would in my view open an avenue in which the right of redemption may easily be clogged or fettered. I would apply the same reasoning to the case of **Maithya vs. Housing Finance Co. of Kenya and Another [2003] 1 EA 133** and the other decisions which in any case are not binding on this Court.

67. For my part, I am inclined to associate myself with the position taken by **Warsame, J** (as he then was) in **Givan Okallo Ingari & Another vs. Housing Finance Co. (K) Ltd Nairobi HCCC No. 79 of 2007 [2007] 2 KLR 232** where the learned Judge expressed himself as follows:

"The primary complaint is that the defendant has unilaterally and in breach of the express provisions of the charge instrument levied unsanctioned interest rates, penalty charges and default charges on the loan account, which have erroneously increased the plaintiffs' indebtedness thereby frustrating and/or clogging the efforts of the plaintiffs to redeem the

charge property. Such grave accusation needs and/or requires rebuttal from the defendant. However the defendant says that the charges were levied in accordance with the implied terms of the charge document, prevailing customs and trade usage in the banking and financial industry… There is no dispute that the defendant varied the rate of interest without the consent, knowledge and permission of the plaintiffs. There is no evidence that each time there was variation, the plaintiffs were informed. In my view any rate of interest to be charged on a loan account must be provided by the contractual document and must be in accordance with the parties' agreement. I have gone through the charge document and there is no provision that allowed the defendant to levy or vary the rate of interest or to charge the rate of interest it so charged on the account of the plaintiffs. In my view if the defendant applied default charges on the plaintiffs account but which was not permitted or provided by the charge document then that is *prima facie* uncontractual or illegal. There is nothing as prevailing customs or trade usages, which can allow the defendant to commit acts of fundamental breach to the contractual document… The charges debited in the plaintiff's account were done without any legal basis and in my humble view made the account irredeemable. It is my position such debits could only have been made with the consent of the plaintiffs or being a provision in the charge document that allowed the defendant to do so. By engaging in acts outside the contractual document, the defendant made it difficult for the plaintiffs to perform their part of the bargain. The acts of the defendant, in my view amount to muddling the waters that were for the benefit of all parties. This Court cannot force the plaintiffs to drink from a well muddled by the hands and legs of the defendant. To do so would be inequitable…When parties to an instrument of charge have a clear agreement on the interest and charges to be charged on the facility, parties must be guided by the terms and conditions as set out in the charge document. In my humble opinion, a party in breach of the contractual document cannot be allowed to benefit from his own transgression… The contention of the plaintiffs which is particularly admitted by the defendant is all the charges levied to the account of the plaintiffs is contrary to the express provisions of the charge document. And in my view that is why the loan has grown to astronomical figures which can be said to be beyond the redemption powers of the plaintiffs. It would be difficult to redeem a loan which is loaded with figures at the discretion of one party. The other party interested in the redemption exercise would definitely find impossible to measure to the discretionary powers or decisions of the party interested in the beneficial result. It is in the benefit of the plaintiffs for the defendant to load figures only provided by the contractual document…Equally it is not in the interest of the defendant to milk the plaintiffs dry and drain all blood from them. The Court exists for the sole purpose of determining as who is entitled to what. In my view the defendant cannot be allowed to engage in acts or omissions, which are in contravention of the law. Equally the defendant cannot be allowed to breach the terms and conditions of the contractual document and at the same time use the statutory power of sale that emanates from the statute to defeat the rights of the plaintiffs…The charge document in its entirety does not provide for default charges that were levied on the account of the applicants. The consequence of such a conduct is that it is an act outside the contractual agreement, hence there is no legal basis for doing so. The imposition of penal interest or default charges without the permission or knowledge of the applicants greatly impedes or inhibits the redemption rights of the applicants. I think it is pertinent to give a chance to the parties to contest their dispute at a full hearing, where evidence will assist the Court to reach a proper verdict as to the rival positions…To my mind the equity of redemption has been clogged by the acts or omissions of the defendant by engaging in acts contrary to the terms and conditions of the charge agreement. *Prima facie* the loan account would become irredeemable if charges outside the contractual agreement are loaded into the account. I am therefore satisfied that there is ample and uncontroverted evidence to show that the defendant was involved in activities that would make it difficult for the applicants to honour their obligations in the charge agreement."

68. In my view a party ought not to mutate the terms of a contract unilaterally to the detriment of the other party to the contract. This in my view is what the people of this Republic realised when they enacted unto themselves Article 46(1)(b) and (c) of the Constitution which provides for the rights

to the information necessary for consumers of goods and services to gain full benefit from goods and services and to the protection of their health, safety, and economic interests.

69. After considering the evidence on record I have no hesitation in coming to the conclusion that in the circumstances of this case the Defendant was not entitled to 'penalty interest', interest on arrears' or 'default charges'.

70. The next issue for determination is whether the failure to give notice constituted a breach of contract and whether the plaintiff can be awarded damages for breach of contract. From the documentary evidence produced in this suit it is clear that though the Defendant was entitled to vary the rate of interest it could only do so on serving the plaintiff with not less than four months' notice to that effect. In my view the necessity for giving the notice is meant to give the borrower a chance to decide whether to keep the facility alive based on the new terms or to bring the contract to an end by either paying the amount due or instructing the Bank to realize the security if in his view he would not be in a position to service the facility based on the intended variations. In this case, it is clear that the requirement for 4 months notice was never complied with by the Defendant. In **Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999**, it was held:

"Parties only bind themselves by the terms contracted and executed and not anything else e.g. charging interest rates not in accord with what was covenanted cannot make a total figure a chargee considered having fallen in default and therefore entitling it to exercise its statutory power of sale... Courts are not foras where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say *no* to the enforcement of such contract."

71. In **Spares & Services & 2 Others vs. Trans-National Bank Kisumu HCCC NO. 439 of 1994**, the Court pronounced itself as follows:

"Having considered the documents filed, the Court is of the firm view that the contract between the parties is the charge: It is the one which spelled out the terms and conditions which the parties were obliged to adhere to during the existence of their relationship. In the said contract the rate of interest was certainly agreed to be 18%; but there was a rider that that rate of interest could be varied (either increased or reduced) at the sole discretion of the lender. The expressed factor which was to precipitate the agreed variation of the rate of interest by the lender, was the desire by the lender to conform to the prevailing economic trend in regard to the "rate of interest commonly chargeable in Kenya having regard to the circumstances as the lender considers to be relevant from time to time... First the borrower had to be served with one months notice by the lender to the effect that the rate of interest would be changed. A natural construction of the clause in question makes it clear that the borrower was certainly to be served with at least one months notice before the rate of interest could be varied. Any other interpretation to that clause would defeat the purpose for which it was entrenched in the contract between the parties... The parties herein had expressly agreed that a notice of not less than one month must be sent to the borrower before a new rate of interest is applied to the loan. The bank has failed to manifest real proof that the requisite notices were sent to the plaintiff... Consequently the rates of interest other than that of 18% were not lawfully applied to the loan."

72. Therefore in the absence of any evidence that the Plaintiff was given the contractual notice I have no hesitation in finding that the variations of the rates of interest to the plaintiff's detriment were unlawful. It follows that any application of interest rate with respect to the first charge in excess of 18% per annum was unlawful. Similarly variation of interest rate with respect to the second charge in excess of 19% was unlawful.

73. That brings me to the issue whether the Defendant's calculations were free from error. Apart from

what I have held hereinabove, it was clear from the evidence of DW2 that he was unable to properly explain how certain sums levied on the plaintiff's accounts were arrived at. In fact according to him from the information available he was unable to explain how certain figures were arrived at. In my view since the calculations were peculiarly within the knowledge of the Defendant the onus shifted to it to explain the basis upon which these figures were arrived at. In fact in at least one instance DW1 conceded that the figure in the statement was incorrect though in his view that was a minor error. However taking into account the fact that the plaintiff's position was that the errors pointed out by him were but just a sample one cannot state with certainty how many "minor errors" were committed by the Defendant and their cumulative effect on the loan repayment. I am therefore satisfied that the Defendant's calculations were not free from error.

74. The next issue for determination is whether the Defendant's only option was to realise the security. Having considered the charge document it is clear that the Defendant was not bound to only realize the charged property. I do not see anything wrong with the Defendant granting the plaintiff indulgence as happened in this case. The indulgence having been extended to the plaintiff based on the plaintiff's request, the plaintiff cannot now be heard to complain that the Defendant ought to have proceeded to realize the security. The plaintiff also complained that having sold the property the Defendant was not entitled to charge interests. In my view as long as the loan remained unpaid the Defendant was properly entitled to any lawfully due charges based on the contractual documents. As was held in **Housing Finance of Kenya Limited vs. Ann Njoki Kuria Nairobi (Milimani) HCCC No. 187 of 2002:**

"The Defendant appended to the Mortgage Agreement in the presence of Counsel and as provided under the Mortgage, the Defendant covenanted "to pay to the Lender…and discharge all moneys and liabilities…due and owing to the Mortgagee". It is clear as day that the Defendant's liability to the Plaintiff was not capable of being discharged after the sale of Mortgaged (suit) property in the exercise of the Mortgagee's statutory power of sale. The Defendant's argument that she had not entered into a "personal guarantee" over the Mortgage loan, and that the Plaintiff should have recovered all the debt due from the sale proceeds, was foreign to their clearly worded contract. The Plaintiff was entitled to recover the entire Mortgage debt together with all charges, interests, costs and incidentals arising therefrom, from the defendant. As the Mortgage debt was not fully recovered from the proceeds of the suit property, the plaintiff was entitled to recover the short fall of the debt from the Defendant's and it was therefore the Plaintiff's right to sue the Defendant to recover the debt."

75. On the issue whether the defendant breached any of the provisions of the ***Banking Act***, I agree with the Defendant that this issue was not pursued sufficiently in order to enable the Court make a finding in favour of the plaintiff. As was held by **Visram, J** (as he then was) in **Mbura and Others vs. Castle Brewing Kenya Limited and Another [2006] 1 EA 185,** *the Evidence Act* provides that an act is not proved when it is neither proved nor disproved. Similarly, **Ringera, J** (as he then was) in **Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001** held that a fact is not proved if it is neither proved nor disproved. It is therefore not proved.

76. It is therefore my view and I so hold that the breach of the provisions of the ***Banking Act*** have not been proved to the required standards.

77. That now leaves the issue whether the plaintiff is entitled to the prayers sought. Taking into account the Court's finding with respect to the uncontractual charges, variation of interest rates and the errors in calculation, it is my view that this is a matter in which the proper order would be that accounts be taken between the parties herein taking into account the finding of this Court in this Judgement. However as was held by the Court of Appeal in **National Bank of Kenya Ltd vs. Pipeplastic Samkoti (K) Ltd & Another [2001] KLR 112**:

"The learned judge erred not only in substituting what he thought ought to have been the proper rate of interest in place of what was agreed between the parties but he also erred in assuming jurisdiction to hear arguments, and rule thereon, on taking and settlement of accounts when such a relief was not part of the plaintiff's claim. Taking and settlement of

accounts is not done, normally by judges. Order 19 rule 1 of the Civil Procedure Rules provides that if a plaint prays for an account or where the relief sought or the plaint involves taking of an account an order for proper accounts with all necessary inquiries and directions in similar cases shall be made. It must be noted that, as pointed out earlier, there was no issue in the plaint, for taking of accounts. We reiterate that it is not for a Judge to take accounts. The reason is clear. It is not the job of a judge to be an accountant. That is why Order 20 rule 16 of the Civil Procedure Rules gives special directions as to taking accounts. Elaborate provisions have been made therein. The ad hoc method in which the learned judge proceeded to take and settle accounts was not only unprocedural but erroneous and without jurisdiction".

78. Order 21 rule 17 of the ***Civil Procedure Rules***, 2010 provides:

The court may, either by the decree directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched, and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as prima facie evidence of the truth of the matter therein contained with liberty to the parties interested to take such objection thereto as they may be advised.

79. Accordingly, I direct that the parties herein agree on and appoint an independent accountant to take accounts between the parties herein and file his report within 45 days from the date of his appointment. In default of such agreement each party to appoint an accountant and the two appointed accountants to appoint an umpire and the three to go through the documents in possession of the parties and prepare a report for filing in this matter within 45 days of the appointment of the umpire. Where the parties agree on one accountant his costs will be shared equally by the parties. However where three accountants are appointed each party will bear the costs of his accountant while the costs of the umpire will be shared equally by the parties. In taking the said accounts the books of account in which the accounts in question have been kept shall, subject to this judgement, be taken as prima facie evidence of the truth of the matter therein contained with liberty to the parties interested to take such objection thereto as they may be advised.
80. Further orders of the Court to await the filing of the said report.
81. Liberty to apply granted.

Dated at Nairobi this 4th August, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Plaintiff in person

Cc Kevin