



REPUBLIC OF KENYA



**Wainaina v Agrarian Credit Services Limited & another (Environment and Land Case 3 of 2018) [2023] KEELC 18621 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18621 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT AND LAND CASE 3 OF 2018**

**YM ANGIMA, J**

**JULY 6, 2023**

**BETWEEN**

**ABDUL NG'ANG'A WAINAINA ..... PLAINTIFF**

**AND**

**AGRARIAN CREDIT SERVICES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH KARIUKI T/A MUIBAI AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**A. The Plaintiff's Claim**

1. By a plaint dated 12.07.2018 and amended on 11.09.2019 the Plaintiff sought the following reliefs against the Defendants:
  - a. A permanent injunction be issued restraining the Defendants, their servants and/or agents from selling by auction or otherwise the Plaintiff's property being L.R. No. Nyandarua/Ol Kalou/6328.
  - b. A declaration that any agreement and or contract executed between the parties is void ab initio.
  - c. A declaration that any rate above the statutory 14% on the soft loan is illegal, unprecedented and contravenes the *Banking Act*.
  - d. That the register of the land parcel known as L.R. No. Nyandarua/Ol Kalou/6328 be rectified, so as to remove the entries in favour of any third party and cancel any title issued to a third party, and the title to revert back to the proprietorship of Abdul Ng'ang'a Wainaina.
  - e. General damages.
  - f. Costs of this suit.



2. The Plaintiff pleaded that on diverse dates between 2015 and 2016 he obtained a soft loan of Kshs. 1,062,500/= from the 1<sup>st</sup> Defendant which amount was to be repaid at the commercial rate of 14% p.a. He further pleaded that as security for repayment of the loan he deposited his title deed for Parcel No. Nyandarua/Ol-Kalou/6328 (the suit property) on which his matrimonial home stood. He further stated that no legal charge was ever created over the suit property.
3. It was the Plaintiff's contention that on 04.01.2018 the Defendants illegally advertised the suit property for sale purportedly to recover an outstanding loan without serving the requisite statutory notices under the law. The Plaintiff further contended that the 1<sup>st</sup> Defendant had refused or neglected to furnish him with a statement of the loan account despite request and that the interest charged on the soft loan was in contravention of the *Central Bank of Kenya Act* (Cap. 491) and the *Banking Act* (Cap. 488).

## **B. The Defendants' Response**

4. The Defendants filed a joint statement of defence dated 04.04.2019 in which the 1<sup>st</sup> Defendant admitted having granted the Plaintiff a loan but stated that the outstanding amount was Kshs. 2,208,360/= and not Kshs. 1,062,500/= as alleged by the Plaintiff. It was further stated that the agreed rate of interest was 20% per month and not 14% per annum as alleged by the Plaintiff. The Defendants denied that the Plaintiff's matrimonial home stood on the suit property and put him to strict proof thereof.
5. The 1<sup>st</sup> Defendant pleaded that on 03.08.2016 the Plaintiff and the 1<sup>st</sup> Defendant signed an agreement on the outstanding loan amount which was agreed at Kshs. 2,208,360/= and that despite issuance of a demand letter and various statutory notices, the Plaintiff had failed to repay the amount.
6. The 1<sup>st</sup> Defendant further pleaded that a charge was duly created over the suit property to secure repayment of the outstanding loan and that it was only upon the Plaintiff's failure to redeem the suit property that the relevant notices were issued for realization thereof. It was pleaded that the Plaintiff had not repaid even a penny out of the total amount advanced to him.
7. On the issue of interest charged on the loan, the 1<sup>st</sup> Defendant contended that the relevant loan agreements were entered into before the Banking (Amendment) Act, 2016 came into force hence it could not apply retrospectively. The court was consequently urged to dismiss the Plaintiff's suit for want of merit.
8. The 1<sup>st</sup> Defendant also filed a counter-claim dated 07.04.2022 which was introduced vide an amended defence and counterclaim. The 1<sup>st</sup> Defendant reiterated the contents of the defence and pleaded that the loan amount of Kshs. 2,208,360/= were advanced to the Plaintiff on diverse dates between 2014 and 2016 whereby the rate of interest was agreed at 20% per month with a penalty of 5% per month in the event of default.
9. The 1<sup>st</sup> Defendant pleaded that both parties held regular sittings whereby the outstanding balance including interest would be agreed upon and the last such meeting culminated in an agreement dated 03.08.2016 whereby the outstanding amount was agreed at Kshs. 2,208,360/=.
10. It was pleaded that the Plaintiff had willingly sworn an affidavit authorizing the registration of a charge over the suit property in consequence whereby a charge was created to secure re-payment of the loan. It was pleaded that as a result of the Plaintiff's default in repayment of the loan the 1<sup>st</sup> Defendant exercised its statutory power of sale in accordance with the law and sold the suit property for Kshs. 2,000,000/= thereby leaving an outstanding balance of Kshs. 208,360/= plus interest and auctioneers' fees.



11. As a result, the 1<sup>st</sup> Defendant sought the following reliefs against the Plaintiff in its counterclaim:
  - a. The loan balance of Kshs. 1,055,816.00 as at 28.03.2022.
  - b. Auctioneers fees at Kshs. 280,220.00 plus interest from the date of accrual.
  - c. Interest on (a) and (b) above at the prevailing commercial rates until payment in full.

### **C. The Plaintiff's Reply to Defence and Defence to Counterclaim**

12. By a reply to defence dated 13.05.2019 the Plaintiff denied the registration of a charge over the suit property and pleaded that if there was such a charge then it was illegally registered. He further stated that statutory notices were not properly served hence the sale of the suit property was a nullity.
13. In his reply to amended defence and defence to counter-claim, the Plaintiff stated that at all material times he was willing to redeem the suit property and had obtained an interim injunction on 26.09.2018 stopping the sale of the suit property but the Defendants nevertheless sold it on 28.02.2019 to Daniel Karita.
14. By his defence to counterclaim, the Plaintiff denied that the agreed or applicable rate of interest on the loan was 20% per month and put the 1<sup>st</sup> Defendant to strict proof thereof. He reiterated that the sale of the suit property was unlawful. The Plaintiff denied liability for the Defendants' counterclaim including the particulars of outstanding amounts pleaded in the counterclaim. He, therefore, prayed for dismissal of the counterclaim with costs.

### **D. Summary of Evidence at the Trial**

#### **a. The Plaintiff's Evidence**

15. At the hearing hereof, the Plaintiff testified on his own behalf as the sole witness. He adopted the contents of his initial witness statement and his further statement as his evidence in-chief. He also produced the documents contained in his list of documents and supplementary list as exhibits save for the valuation report for the suit property which was not produced.
16. The gist of the Plaintiff's evidence was that the suit property was unlawfully sold by the Defendants without issuing the requisite statutory notices. It was his evidence that the auction was conducted in violation of a court order made on 19.09.2018 and without a recent valuation of the suit property since the last valuation was conducted in 2017. He contended that he was never furnished with a statement of account despite request.

#### **b. The 1<sup>st</sup> Defendant's Evidence**

17. The 1<sup>st</sup> Defendant called one witness, Teresia Wanjiku Mwangi, who testified as the sole witness for the defence. She similarly adopted her witness statement dated 07.04.2022 as her evidence in-chief and produced the documents in the Defendants' list of documents dated 13.05.2019 as exhibits. The gist of the defence evidence was that the outstanding loan (principal and interest) due from the Plaintiff as at 03.08.2016 was Kshs. 2,208,360/= which was captured in the loan application form at page 39 of the Defendant's trial bundle after the parties mutually agreed on the balance.
18. It was the 1<sup>st</sup> Defendant's evidence that the Plaintiff had never repaid a single cent prior to filing suit and that the only amount he ever paid was Kshs. 300,000/= on the basis of the court order dated 19.09.2018. It was also the Defendants' case that the Plaintiff had never paid any other sums since



2018. The Defendants contended that all statutory notices were duly issued prior to the sale of the suit property hence the sale was lawful.

### **E. Directions on Submissions**

19. Upon conclusion of the trial the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff's submissions were filed on 24.05.2023 whereas the Defendants' submissions were filed on 26.05.2023.

### **F. Issues for Determination**

20. The court has noted from the record that the parties did not file an agreed statement of issues for determination. The record shows that the parties framed 4 separate issues in their respective submissions. Consequently, the court shall frame the issues for determination in accordance with the law.
21. Under Order 15 rule 2 of the Civil Procedure Rules, 2010, the court may frame issues from any of the following:
- a. The allegations contained in the pleadings or in answers to interrogatories.
  - b. The allegations contained in sworn statement made by or on behalf of the parties.
  - c. The contents of documents produced by the parties.
22. The court has considered the pleadings, evidence and documents on record and is of the opinion that the following questions arise for determination herein:
- a. Whether there was an agreed rate of interest for the loan advanced to the Plaintiff and whether such rate was lawful.
  - b. Whether there was a valid charge over the suit property.
  - c. Whether the suit property was matrimonial property and, if so, whether spousal consent was obtained for the charge.
  - d. Whether the sale of the suit property was irregular and unlawful.
  - e. Whether the Plaintiff is entitled to the relief sought in the suit.
  - f. Whether the 1<sup>st</sup> Defendant is entitled to the reliefs sought in the counter-claim.
  - g. Who shall bear costs of the suit and the counter-claim.

### **G. Analysis and Determination**

#### **a. Whether there was an agreed rate of interest for the loan advanced to the Plaintiff and whether such rate was lawful**

23. The court has considered the material and submissions on record on this issue. The Plaintiff contended in his amended plaint and at the trial that the agreed rate of interest for the loan was 14% p.a. and contended that the higher rate applied by the 1<sup>st</sup> Defendant was illegal and in contravention of the Banking (Amendment) Act 2016 which capped interest at 14% p.a. The 1<sup>st</sup> Defendant, on the other hand, stated that the contractually agreed rate was 20% per month with a penalty of 5% per month for all outstanding amounts. It was contended that the loan was advanced to the Plaintiff between 2014



and 2016 before the Banking (Amendment) Act 2016 came into force hence the same could not apply retrospectively. The court was consequently urged to uphold the contractual rate of interest.

24. It is evident from the Plaintiff's submissions that the Plaintiff did not comprehensively deal with the issue of the rate of interest and its legality. The Plaintiff simply mentioned the issue of interest in passing without making reference to the evidence on record and the applicable legal provisions. The court was not addressed on how the said Act applied to an entity such as the 1<sup>st</sup> Defendant.
25. The 1<sup>st</sup> Defendant, on the other hand, submitted that the Banking (Amendment) Act 2016 came into force on 14.09.2016 hence it was not applicable to the transactions undertaken prior to its commencement. It was submitted that the parties had signed a comprehensive agreement on 03.08.2016 whereby it was agreed that the outstanding loan stood at Kshs. 2,208,360/= on the basis of the contractual interest rate of 20% per month and a penalty of 5% per month.
26. The court has examined the loan agreement dated 03.08.2016 on page 39 of the Defendants' trial bundle. It is evident on the face of it that the application form stipulated the rate of 20% interest per month and not 14% per annum as contended by the Plaintiff. The court is aware that at the trial hereof the Plaintiff disowned the said loan application form and claimed that he did not sign it and that the signature thereon was a forgery. The court is, however, unable to agree with the Plaintiff on that issue for at least two reasons. First, there is on record a copy of a commitment to pay the amount of Kshs. 2,028,000/= dated 02.05.2016 on page 35 of the Defendants' bundle as well as an affidavit sworn on 03.08.2016 (on page 64 of the Defendants' bundle) by which the Plaintiff conceded owing the 1<sup>st</sup> Defendant Kshs. 2,208,360/=. It is noteworthy that the latter amount is the same amount contained in the loan application form dated 03.08.2016.
27. The second reason is that there is no evidence on record to demonstrate that the Plaintiff ever reported the alleged forgery of his signature to any law enforcement or investigative agency in Kenya despite the Defendants' trial bundle having been served long before the hearing date. In fact, the Defendants' list of documents containing their supporting documents were filed way back on 13.05.2019 about 3 years before the trial of the action. There is equally no evidence that the Plaintiff sought the services of a document examiner, handwriting expert, or other forensic expert to give an opinion on the alleged forgery of his signature. The court is thus satisfied on a balance of probabilities that the Plaintiff was a signatory to the loan application form dated 03.08.2016. It is also noteworthy that all the loan application forms dated prior to 2016 bear the same rate of interest of 20% as the one dated 03.08.2016.
28. The next issue is the legality of the agreed rate of 20% interest on the loan transaction. As indicated before, apart from pleading in his plaint that the said rate was unlawful and in violation of the Banking (Amendment) Act, 2016, there was no evidence to demonstrate the alleged illegality. A perusal of the said Act indicates that it was enacted on 24.08.2016 and came into force on 14.09.2016. The court, therefore, agrees with the 1<sup>st</sup> Defendant's submissions that, prima facie, the said Act was not applicable to the transactions which took place prior to its commencement. As a result, the court finds and holds that the contractual rate of interest between the Plaintiff and the 1<sup>st</sup> Defendant was not unlawful or in contravention of the said Act.
29. The court shall not venture into an inquiry of whether or not the said rate of interest was unconscionable under common law since that aspect was not pleaded and pursued by the Plaintiff in his pleadings and at the trial. The court shall hold the Plaintiff to his bargain as per the loan application forms produced at the trial.



## **b. Whether there was a valid charge over the suit property**

30. The court has considered the material and evidence on record on this issue. It is evident from the pleadings and other material on record that the Plaintiff challenged the existence and validity of the charge over the suit property on at least two grounds. First, it was contended that no charge was ever created or registered over the suit property and if there was such a charge then it was void. Second, that any such charge was null and void for lack of spousal consent since his wife had not consented to it.
31. At the trial hereof, the Plaintiff did not seriously contest that he had charged the suit property as security for repayment of the loan advanced by the 1<sup>st</sup> Defendant. The record shows that the Defendants filed their trial bundle on 13.05.2019 and they exhibited among other documents a notification of charges on the suit property dated 03.08.2016 registered on 25.05.2017 by the Land Registrar and a certificate of official search indicating that the suit property was charged to the 1<sup>st</sup> Defendant. Despite the Plaintiff filing an amended plaint on 03.10.2019 a reply to amended defence and a reply to amended defence and defence to counterclaim on or about 02.06.2022 he did not plead any particulars of fraud or forgery against the 1<sup>st</sup> Defendant or the Land Registrar, Nyandarua County.
32. There is no indication on record to demonstrate that the Plaintiff ever reported the alleged fraud and forgery to any law enforcement agencies for investigation. The Plaintiff did not also take any steps to engage a document examiner or forensic expert to render an opinion on the alleged forgery of his signature in relation to the creation of the charge. In the end, the Plaintiff did not pursue the issue of the creation of the charge in his written submissions. Consequently, he is deemed to have abandoned the issue.
33. The second reason why the Plaintiff challenged the validity of the sale was that there was no spousal consent to the creation of the charge. It would appear that the Plaintiff was really blowing hot and cold at the same time. If the Plaintiff's contention was that no charge was even created or registered in the first place how can they contend that such a charge was invalid because there was no spousal consent? And how is a spouse of a borrower supposed to grant consent to a non-existent charge?
34. The Plaintiff submitted that under Section 36 of the *Land Registration Act*, 2012 a spouse had an overriding interest over matrimonial property and that under Section 79(3) of the said Act a changeover matrimonial property was invalid in the absence of the consent of the concerned spouse. The Plaintiff cited the case of *Mugo Muiru Investments Ltd - v- E.W.B & 2 Others* [2017] eKLR in support of his submissions. The Defendants, on the other hand, submitted that there was no evidence on record to show that the suit property was matrimonial property and that the Plaintiff himself had informed the 1<sup>st</sup> Defendant that he had long separated with his wife.

## **c. Whether the suit property was matrimonial property and, if so, whether spousal consent was obtained for the charge**

35. The court has considered the evidence on record on this issue. Although the Plaintiff stated in his pleadings and evidence that his matrimonial home was located on the suit property, the 1<sup>st</sup> Defendant disputed the assertion in its pleadings and at the trial. The 1<sup>st</sup> Defendant contended that Plaintiff's home was located on a plot adjacent to the suit property. The Plaintiff, on his part, did not tender any evidence or expert report to demonstrate where his home was actually located. The valuation report he intended to produce at the trial was disallowed by the court for legal reasons. The only valuation report on record is the one by Artex Realtors Ltd dated 12.10.2017 which was produced by the 1<sup>st</sup> Defendant. The said report indicated that the suit property was vacant with no structural improvements.



36. Section 6(1) of the *Matrimonial Property Act*, 2013 defines matrimonial property as follows:

“For the purposes of this Act, matrimonial property means:-

- a. The matrimonial home or homes;
- b. Household goods and effects in the matrimonial goods and effects in the matrimonial home or homes; or
- c. Any other immovable and movable property jointly owned and acquired during the substance of the marriage.”

37. The court is not satisfied on the basis of the material on record that the suit property falls within any of the 3 categories of matrimonial property stated above. There was no evidence at the trial to demonstrate how the suit property was acquired by the Plaintiff. There was no evidence to demonstrate that the suit property was jointly owned by the Plaintiff and his spouse. It is noteworthy that the Plaintiff’s spouse did not testify at the trial and she did not seek to assert any spousal rights over the suit property. In the premises, the court is not satisfied that the Plaintiff has demonstrated that the suit property constituted matrimonial property.

38. It is evident from the material on record that the suit property was charged by the Plaintiff as borrower hence the overriding interest contemplated under Section 36 and 79 of the *Land Registration Act* could only inure to the benefit of the spouse as opposed to the borrower or the chargor. The Plaintiff could not be the “spouse” contemplated to be protected under the law since he was the borrower. The Plaintiff cannot simply be his own “spouse” for the purpose of seeking enforcement of the overriding interest contemplated under *Land Registration Act*. The Plaintiff testified at the trial that his wife had left the country for the USA and had not returned to Kenya since 2018. It is evident from the material on record that she did lay any claim over the suit property.

#### **d. Whether the sale of the suit property was irregular and unlawful**

39. The Plaintiff submitted that the auction of the suit property on 28.02.2019 was irregular and unlawful because the requisite statutory notices under Sections 96(2) of the *Land Act* and rule 15 of the Auctioneers Rules were not issued before the sale. It was contended that the Plaintiff was denied a chance to redeem the suit property by paying the balance of the loan. It was the Plaintiff’s submission that there was no evidence of service of the notices which were produced as part of the Defendants’ trial bundle. The Plaintiff cited the case of *David Ngugi Ngaari – v- Kenya Commercial Bank Ltd* [2015] eKLR in support of his submission.

40. The Defendants on their part submitted that they duly complied by issuing the relevant statutory notices which were served by post using the Plaintiff’s postal address of P. O. Box 2, Manyatta which he indicated in his loan application forms and payment vouchers. The Defendants further submitted that the issue of service of the statutory notices was canvassed before Hon. Justice M.C. Oundo who delivered a ruling dated 05.02.2019 affirming proper issuance and service.

41. The Defendants also pointed out that in the Plaintiff’s trial bundle dated 17.03.2022 the Plaintiff attached one statutory notice at page 104 thereof indicating that it was received and signed for on 20.08.2018. It was further pointed out that the said notice was mischievously omitted in the second trial bundle which the Plaintiff filed on 10.06.2022. The Defendants further stated that although the said statutory notice gave the Plaintiff 45 days to redeem the loan, there was in fact passage of 6 months between the date of service and the date of auction hence the Plaintiff had more than sufficient time



- to redeem the suit property. The Defendants cited the case of *Euro Bank Limited (in Liquidation) – v- Twictor Investments Limited & 2 Others* [2020] eKLR in support the validity of the said notice.
42. The Defendants further submitted that the auctioneers had issued several notices of redemption under rule 15(d) of the Auctioneers Rules, 1997 copies whereof were produced as part of the Defendants’ trial bundle. The Defendants pointed out that the Plaintiff had in fact exhibited one such notice at page 32 of his trial bundle.
43. The Defendants submitted that vide its ruling of 05.02.2019 this court had resolved the issue of service of the statutory notice in the Defendants’ favour and that the Plaintiff did not appeal against those findings. In the said ruling Hon. Justice M.C. Oundo held as follows:
13. The statutory notice in the present case, in my humble view was in accordance with the stipulated provisions under Section 90(2) and 96(2) of the *Land Act* and therefore the costs of the 1<sup>st</sup> respondent in seeking to exercise its chargee’s statutory power of sale were lawful in the circumstances.
14. I also find that there was proper service of the statutory notice effected upon the applicant, the first being on the 5<sup>th</sup> of May, 2018 through his Postal Address 2, Manyatta, another dated on 8<sup>th</sup> May, 2018 posted in the same manner...”
44. It is evident from the material on record that the Plaintiff was duly served with a statutory notice of redemption under Section 96 (2) of the *Land Act* and that the same was duly received and signed for by the Plaintiff. It is also evident that prior to that the Plaintiff had been served through his postal address. It is noteworthy that the Plaintiff did not deny at the trial that his postal address was P. O. Box 2, Manyatta. It is evident from the material on record that it was the same address appearing on the various loan application forms and payment vouchers in relation to the loan transaction. It is evident that the auctioneers also used the same postal address as one of the modes of service and the Plaintiff actually exhibited a copy of one such notice in his trial bundle. The Plaintiff did not demonstrate that he received the notice from another source other than the auctioneers.
45. The court has further noted that the issue of service of statutory notices was determined by Hon. Justice M.C. Oundo vide her ruling dated 05.02.2019 and there is no indication on record to show that the Plaintiff ever challenged that determination on appeal. In the premises, the court is satisfied that the Plaintiff was duly served with the requisite statutory notices hence the sale of the suit property was lawful.
46. The Plaintiff contended that there was a violation of rule 11(b) of the *Auctioneers Rules* which require that the reserve price should have been based on a valuation report which was not more than 12 months old. It was contended that the valuation report which the Defendants utilized was prepared in 2017 whereas the sale took place in 2019. The court is of the opinion that the age of the valuation report at the time of sale can only constitute an irregularity and cannot be a ground for invalidating a sale. The court is further of the opinion that the Plaintiff’s remedy for such an irregularity can only lie in damages for any financial loss or damage suffered thereby. See – *Euro Bank Limited (in Liquidation) – v- Twictor Investments Ltd & 2 Others* (supra); and *Jose Estates Limited – v- Muthumu Farm Limited & 2 Others* [2019] eKLR.
47. In the latter case, it was held, *inter alia*, that:
- “From the foregoing, there is every reason to interfere with the learned Judge’s finding that the sale and transfer was null and void. The 1<sup>st</sup> and 2<sup>nd</sup> respondents’ remedy for an invalid



statutory sale as already stated was in damages. This court in *Nancy Kaboya Amadiva – v- Expert Credit Limited & Another* (supra), stated:

“we find it necessary to consider the remedies available for a sale arising out of a non-valid statutory notice. We restate that a mortgagor who has been prejudiced by a defective auction can only be remedied in damages. This is both under RLA and ITPA. Ringera J in *David Ngugi Mbutia – v- Kenya Commercial Bank and Another* (HCCC No. 304 of 2001) unreported set the principle thus: a person damnified by a transfer of property by mortgagee to an auction purchase pursuant to any irregular or improper exercise of statutory power of sale is entitled to recover any damages directly suffered by him from the auctioneer. The same judge restated the position in *Hilton Walter Osinya and Saving and Loan (K) Ltd and Another* (HCCC No. 274 of 2001)” unreported.”

48. The court has noted that the Plaintiff did not plead with particularity the financial loss he may have suffered as a result of the said irregularity. It was upon the Plaintiff to plead such loss with particularity and prove it at the trial. It is evident that although the Plaintiff intended to produce a valuation report at the trial he was unable to do so for reasons which were recorded by the court. In the premises, the court finds that there is no evidence on record to demonstrate what loss, if any, the Plaintiff may have suffered as a result of the said irregularity. Consequently, the Plaintiff shall not be entitled to any damages in that regard.

**e. Whether the Plaintiff is entitled to the reliefs sought in the suit**

49. The court has already found and held that there was an agreed contractual rate of interest for the loan transaction which was lawful. The court has found that there was a valid charge over the suit property to secure the repayment of the loan advanced to the Plaintiff. The court has further found that there was no evidence that the suit property was matrimonial property and that the Plaintiff could not assert any overriding interest thereon as a spouse. The court has also found that the sale of the suit property was not irregular or unlawful. It would, therefore, follow that the Plaintiff is not entitled to the reliefs sought, or any one of them.

**f. Whether the 1<sup>st</sup> Defendant is entitled to the reliefs sought in the counterclaim**

50. The court has found already found against the Plaintiff on the 5 preceding issues. The court has found that the contractual rate of interest charged was lawful and that the same was not in violation of the Banking (Amendment) Act or the *Central Bank of Kenya Act, 2016* as contended by the Plaintiff. The court has found that the Plaintiff conceded being indebted to the 1<sup>st</sup> Defendant in various documents tendered at the trial. Such documents include:
- a. The loan application form dated 03.08.2016 (on page 39 of the Defendants’ bundle) and accompanying payment voucher acknowledging receipt of Kshs. 2,208,360/= (page 40 of the same bundle).
  - b. A written commitment dated 02.05.2016 to pay an outstanding amount of Kshs. 2,028,000/= (on page 35 of the Defendants’ bundle).
  - c. An affidavit sworn by the Plaintiff on 03.08.2016 acknowledging owing the 1<sup>st</sup> Defendant an outstanding loan of Kshs. 2,208,360/= (on page 64 of the Defendants’ bundle).
51. There is no evidence on record to demonstrate that the Plaintiff ever disputed or questioned the computation of the outstanding balance as at 03.08.2016. There is not even a single letter from the



Plaintiff or his advocates to the 1<sup>st</sup> Defendant disputing the said amount or offering an alternative computation prior to the institution of the suit. In the premises, the court is satisfied that the 1<sup>st</sup> Defendant has demonstrated on a balance of probabilities that the Plaintiff is indebted to it.

52. The court is further satisfied that the 1<sup>st</sup> Defendant incurred auctioneers' fees on the sale which was stayed by the court in 2018 in the sum of Kshs. 121,300/= and the actual auction which took place in 2019 in the sum of Kshs. 158,920/= for which the Plaintiff is liable to pay. The material on record shows that the Plaintiff has never made attempts to liquidate the loan since he took the loan. The material on record shows that the only payment he ever made was in 2018 on the basis of a court order which granted him a conditional interim injunction staying the auction scheduled for 28.09.2018. Since then, the Plaintiff has never paid any sum towards liquidation of the loan. He has never paid even the amount of Kshs. 1,062,500/= he admitted in his plaint to be owing.
53. In the premises, the court is satisfied on the basis of the material on record that the 1<sup>st</sup> Defendant is entitled to payment of the outstanding loan balance of Kshs. 1,055,816.00, the auctioneers' fees as well as interest at 14% p.a. from the date of judgment until payment in full. However, the court is not satisfied that the 1<sup>st</sup> Defendant is entitled to general damages for breach of contract. The court is of the opinion that since the transaction between the parties was that of a lender and borrower the only loss which the 1<sup>st</sup> Defendant could suffer was financial in nature. It is a loss which was capable of quantification to a cent and which ought to have been pleaded and particularized as such. The 1<sup>st</sup> Defendant is, therefore, entitled only to the financial claim which it has particularized in the counterclaim.

#### **g. Who shall bear costs of the suit and the counterclaim**

54. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons – v- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. Consequently, the court is of the opinion that the Defendants as the successful parties should be awarded costs of the suit as well as costs of the counterclaim.

#### **H. Conclusion and Disposal Orders**

55. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to prove his claim against the Defendants to the required standard. The court further finds that the 1<sup>st</sup> Defendant has proved its counterclaim against the Plaintiff to the required standard. As a result, the court makes the following orders for disposal of the suit and counterclaim:
- a. The Plaintiff's suit be and is hereby dismissed in its entirety.
  - b. Judgment be and is hereby entered in favour of the 1<sup>st</sup> Defendant in its counterclaim in the following terms only:
    - i. The Plaintiff shall pay the 1<sup>st</sup> Defendant the outstanding loan balance in the sum of Kshs. 1,055,816/= with interest thereon at 14% p.a. with effect from 28.03.2022 until payment in full.
    - ii. The Plaintiff shall pay auctioneers fees in the sum of Kshs. 280,220/= together with interest thereon at court rates from the date of filing the counterclaim until payment in full.
    - iii. The 1<sup>st</sup> Defendant's prayer for general damages for breach of contract is hereby declined.



- c. The Defendants are hereby awarded costs of the suit and the counterclaim to be borne by the Plaintiff.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 6<sup>TH</sup> DAY OF JULY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mr. Warutumo holding brief for Mr. Kinyanjui for the Plaintiff

Ms. Wangui Mwangi holding brief for Mr. Ndegwa Wahome for the Defendant

C/A - Carol

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**Y. M. ANGIMA**

**JUDGE**

