Exon Investments Limited & another v ABC Bank Limited & 4 others (Civil Case E001 & 78 of 2019 (Consolidated)) [2025] KEHC 12118 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 12118 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE E001 & 78 OF 2019 (CONSOLIDATED)

F WANGARI, J

MARCH 6, 2025

BETWEEN

EXON INVESTMENTS LIMITED ..... PLAINTIFF

AND

ABC BANK LIMITED ..... DEFENDANT

AS CONSOLIDATED WITH

CIVIL CASE 78 OF 2019

BETWEEN

ABC BANK LIMITED ..... PLAINTIFF

AND

EXON INVESTMENTS LIMITED ..... 1ST DEFENDANT

EXON PLASTICS (K) LIMITED ..... 2ND DEFENDANT

ATEET DINESH JETHA ..... 3RD DEFENDANT

RITEET DINESH JETHA ..... 4TH DEFENDANT

JUDGMENT

Pleadings

1. In High Court Civil Suit No. 78 of 2019, the Plaintiff/Defendant (hereinafter referred to as the bank) has sought for judgment against the defendants jointly and severally for:

a. Kshs.74,246,457 plus interest as covenanted at the rate of 13% per annum with effect from 8.3.2019 till the date of payment in full.

b. Interest on (a) above at court rates with effect from date of filing of suit till the date of payment in full.

c. Costs of the suit.

d. Any other relief this honourable court may deem fit and just to grant.

2. It was averred as a result of a Letter of Offer dated 27/10/2014, upon the 1st Defendant's request, the bank agreed to avail to the 1st Defendant Kshs. 186,000,000 via facilities as listed in para. 6 of the Plaint.

3. The said facilities were secured by use of the securities as per para. 7 of the Plaint. There was also an express term in the letter of offer that the aforesaid facilities upon their acceptance by the 1st defendant were to be subjected to an annual review by the bank.

4. On 13/2/2015, there was a review of the facilities and a new Letter of Offer issued to the 1st defendant and which was executed. In the said new Letter of Offer, the facilities made available remained the same as per the original Letter of Offer dated 27/10/2014 but new securities as per para. 9 of the Plaint.

5. In August 2016, the 1st Defendant requested for an extension for the repayment of the resolving asset finance facility to a term of 40 months and which the Bank agreed to by issuing a Letter of Offer dated 9/8/2016 extending the repayment period by 12 months. There was a further review and further Letter of Offer dated 16/2/2017 with new securities.

6. 1st Defendant utilized the facilities by purchasing trucks and trailers Nos. KCA 683E and ZE 8083, KCA 684E and ZE 8084, KCA 686E and ZE 8081, KCA 687E and ZE 8080 and KCA 688E and ZE 8078 which were registered in joint names of 1st Defendant and the Bank. Unfortunately, 1st defendant defaulted in repayment of the facilities and a demand notice dated 6/8/2018 issued.

7. The outstanding balance stood at Kshs. 99,236,917 and the amount was to be paid within 14 days, failing which the Bank was to proceed and take legal steps which included but not limited to repossession of the vehicles held as security.

8. The 1st Defendant failed to repay the money leading to the bank instructing Regent Auctioneers to repossess the aforesaid vehicles. The 1st Defendant wrote a letter to the bank dated 25/8/2018 apologizing for the delay in the loan repayment and requested for the restructuring of the outstanding facilities.

9. This led to the Bank and 1st Defendant holding a meeting on 19/9/2018. The 1st Defendant continued with the default of payment. The Auctioneers then served 1st Defendant with a 14 days' Notice of Proclamation and Attachment dated 30/10/2018. The auctioneers went ahead to issue a Public Auction Notice in one of the local newspapers which was to be held on 15/1/2019.

10. The auction took place with the highest bidder being M/S Jolkarim Holding Limited with a bid of Kshs. 26,400,000. A Certificate of Sale was issued. However, the proceeds from the public auction sale were insufficient for the outstanding balance which was at Kshs. 74,246,457. The residual balance continued to incur interests and other charges until payment in full.

11. The bank issued notices to the 2nd, 3rd and 4th Defendants herein as per the Deeds of Guarantee and Indemnity as they were now liable to make good to the Bank, the amount secured under their respective guarantees. According to the Plaintiff, despite several demands being made to the Defendants, they

opted to ignore, neglect and/or refuse to settle the outstanding amounts leading to the institution of the present suit.

12. In their joint Statement of Defence, the Defendants denied each and every averment in the Plaint and invited the Plaintiff to strict proof thereof. Further, the charges on interest and penalties against 1st Defendant were irregular and unreasonable and that the Bank (Plaintiff) had not exhausted other measures to resolve the dispute.

13. The 1st Defendant (now Plaintiff) had filed a suit against the Plaintiff in High Court Commercial Suit No. 1 of 2019 accused the Bank for breaching its fiduciary duty of care owed to the borrower by grossly undervaluing the subject securities during the public auction which was conducted without following due procedure.

14. The Plaintiff prayed to have the Bank to meet the difference between the true value of securities and the value fixed by the Bank before the auction, loss of earnings from the time of repossession of securities to the time of sale, loss of lifespan of the securities for the next 10 years and that the Plaintiff be discharged from their obligations under the loan agreement.

15. For purposes of the rest of the judgment, Exon Investments Limited shall now be referred to as the Plaintiff and ABC Bank Limited as the Defendant as per the citation in Mombasa High Court Commercial Suit No. 1 of 2019.

Plaintiff evidence

16. Ateet Dinesh Jetha (PW1) testified that he was the Director of Exon Investment Limited and Exon Plastics (K) Limited. Riteet Dinesh Jetha was his brother. He adopted his witness statement as his evidence-in-chief. He produced the documents in his List of Documents as his exhibits. He confirmed they borrowed a loan from the bank so as to buy 8 trucks and trailers which loan they repaid regularly.

17. However, all the 8 trucks and trailers were repossessed on allegations they had defaulted in repayment yet they were not served with any notices. He further confirmed that the loan facility given to them was for Kshs. 186,000,000/- for which they had repaid over 70% as at the time of repossession.

18. He denied that the auctioneers served them with the proclamation notice and that is why he called the Bank when he was informed that they were in arrears. Despite the engagement with the Bank, the auction proceeded. At the time they were coming to court, the interest rate was at 15% but the bank was charging them at 36%. The bank had agreed to supply them with the statement of accounts.

19. They lost a contract as their vehicles had been repossessed and which they were using for transporting services. He produced invoices from their various clients showing that each truck was giving them a profit of between Kshs. 800,000 and Kshs. 1,000,000. He didn't know how much the trucks were sold for but every year, they used to value the vehicles for insurance purposes for which he produced the valuation reports.

20. He denied they were served with any repossession notices via email and since the vehicles were sold at a very low price, he prayed for loss of value of the said vehicles, loss of business and contracts.

21. In cross examination, he confirmed that he knew of the consequences of non-repayment of loan facility. He further confirmed they received the Letter of Offer from the bank dated 27/10/2014 wherein Kshs. 186,000,000 was advanced to them, and which was inclusive of interest. He also stated that Exon Plastics (K) Limited, himself and his brother executed the guarantee and security and the interest rate was 36% per annum.

22. He signed the loan documents on his own volition and that he received another Letter of Offer from the bank which they signed together with the guarantee. He however denied taking any loan facility in the year 2019 but in the year 2017 when they got a loan facility of Kshs. 64,000,000. He confirmed they executed a guarantee and indemnity document for Kshs. 191,222,416.84 which had an interest rate of 8.25% per annum.

23. They were paying monthly instalments for the loan cumulatively on various dates over and above the monthly amount payable. Their last payment was of USD 178,221.73 on 14.2.2019. He denied being served with any notices. He alleged that the notices were served upon their drivers and not their office and he confirmed receipt of a letter from the bank dated 20/9/2018.

24. He confirmed attending a meeting with the Bank where they were to restructure the loan facility. He stated the penalties and deductions were illegal and the Bank was not privy to the contracts they alleged they lost.

25. He confirmed that as guarantors, they were to pay the money owed to the Bank and they were willing to pay the agreeable outstanding amount. In re-examination he stated that there was a ruling by Justice Otieno P. J. dated 23/1/2020 which stated that they had paid 65% of the loan amount.

26. The Plaintiff wrote to the bank on 25/8/2018, in respect to the proclamation notice dated 22/8/2018 though the bank was referring to a proclamation dated 30/10/2018 which they had not been served with.

Defence case

27. Deborah Muthoka (DW1) testified that she was a manager with ABC Bank. She adopted her recorded statement as her evidence-in-chief. She also produced the documents in their list as her exhibits. On cross examination, she said the Plaintiff (1st Defendant) took a loan with their Mombasa Branch. The second letter of offer was signed by one of the directors and every time there was a default, they would communicate the same to the borrower.

28. She denied that the interest charged in USD was different from the Kenya shillings one but that the interest was as per the different Letters of Offer. She however had not calculated the amount of money the Plaintiff had paid before the proclamation but she admitted that in HCCC No. 1 of 2019 the court in its ruling stated that the 1st Defendant (Plaintiff)had repaid 65% of the loan.

29. She confirmed that the certificate of sale was undated though there was a date of 15/1/2019 for Kshs. 26,400,000 which was paid during the auction. That the asset finance loan statement was in USD and the money borrowed was Kshs. 186,000,000. She had no invoice from the auctioneer as to how much he was paid and she added that the vehicles were repossessed on the road though the notices had been issued at the business premises. She also confirmed that the auctioneer was not a witness in this case and they did not involve the Plaintiff in the valuation.

30. In re-examination she stated that the notice they issued the plaintiff was dated 30.10.2018 after which the plaintiff wrote a letter to the bank acknowledging receipt of the repossession notice for which they gave a proposal of how to make the repayment.

Parties' submissions

31. In its submissions, Exon Investments Limited stated that it had entered into various credit agreements ABC Bank Limited wherein it loaned them Kshs. 186,000,000 for purchase of trucks for conducting transport business. However, the Bank abused its strong bargaining power and discretion on charging

interest arbitrarily without giving notice, thus demanding unlawful penalty of Kshs. 99,236,917 with the defendant refusing to reconcile plaintiff's account and opted to repossess the trucks and sold them.

32. Despite having repaid 65% of the loan, the Bank went ahead to sell the trucks, without serving the statutory notices, through public auction for Kshs. 26,400,000 yet they had been valued at Kshs. 62,110,000. Therefore, it was the Bank that violated its customer rights and its right to redeem security thus causing it to suffer.

33. It went on to give chronological events of what transpired between the parties herein and it was due to the threats from the Bank that caused it to engage the services of AA Kenya which conducted valuations of the trucks, for the bank had every intention to repossess them having failed to reconcile its accounts.

34. The Plaintiff admitted receiving the letter from the bank dated 6/8/2018 demanding Kshs. 99,236,917 which amount it disputed vide a letter dated 25/8/2018 requesting the restructuring of the loan. This led to a meeting held on 19/9/2018, but they failed to reach an agreement since the bank insisted on the payment of the above disputed amount.

35. The trucks were impounded on 30/10/2018 with a proclamation notice which was not stamped as received, no certificate of postage and no photographs affixing the premises was produced. The Plaintiff denied ever being served with the alleged proclamation notice and the Bank failed to call the auctioneer who allegedly served the proclamation notice upon it.

36. It wondered how the proclamation notice could be served the same day the trucks were repossessed contrary to the 7 days' statutory notice. On 23/1/2020 Lady Justice Chepkwony issued injunctive orders against the bank and its agents from alienating, transferring or in any way disposing the vehicles herein which had been given as security. In the ruling, the Honourable court noted that 65% of the entire loan amount was already paid a fact which was not disputed. Further, on 3/3/2023, the Bank's appeal against the said ruling was dismissed with the court upholding the Honourable court's ruling.

37. It stated that clause 5 of the loan agreement authorized the bank to charge an additional 36% and 15% over and above the normal interest which was not to be exercised dishonestly. Further, the bank had the duty to serve it with written notices of reduction or increase in the interest rate while indicating the new rates and the date of commence of the new rates which the bank did not do.

38. For this it referred the court to the cases of Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited [2014] eKLR and Pius Kimaiyo Langat v Cooperative Bank of Kenya Limited [2017] eKLR. It was due to the bank not serving it with the said notices that it could not know the monthly repayment installments payable.

39. The bank further failed to disclose its loan statement and the information that it had no sufficient funds to satisfy the amount required to cover the accrued interests. It relied on Section 66 (1) of the *Consumer Protection Act*. It further made reliance on the following cases as proof of it having proved its case on a balance of probabilities: Patrick Peter Kithini v Kamau Kimanzi [2020] eKLR and Givan Okallo Ingari & Another v Housing Finance Co. (K) Ltd, Nairobi 2007.

40. That no party ought to benefit from an illegal clause that violates the law or is against public policy. It urged the court to find that the bank had a duty to give notice to it and failure to give such notice constituted a breach of contract thus making the entire process void ab initio.

41. Further, that the demanded amount of Kshs. 99,236,917 did not give the bank the remedy of attaching and selling the securities, for the said amount was illegal penalties. It further relied on Section 20(1) of the Customer Protection Act that prohibits a creditor from repossessing or reselling a security where

the debtor had paid two thirds or more without obtaining leave from the High Court. The bank had not obtained the said leave hence was not entitled to repossession and sale of the trucks.

42. The bank and the auctioneer failed to serve it with the statutory notices as provided for by Rule 12(1)(c) of the Auctioneers Rules and it also relied on the case of Real People Kenya Limited & Another v Nyandega T/A Akmal Enterprises & Another [2022] KEHC 2118. It added that the bank had breached its fiduciary duty of care to it and the guarantor by sale of the trucks and it failed to call a valuer to justify the depreciation of over Kshs. 37,710,000/of the trucks. This was because the bank failed to conduct a prior and genuine valuation of the trucks and it also failed to take reasonable steps to obtain the best prices during the public auction. For this it relied on the case of NCBA Bank PLC v Cyrus Ndungu Njeri T/A Digital Tours and Logistics [2021] eKLR.

43. The bank sold the trucks while there existed injunctive orders as noted earlier thus proving it was in contempt of court orders. The Plaintiff had already entered into contracts with third parties, which were existing at the time of repossession. It produced invoices to prove it was using the trucks for transport business hence it was entitled to Kshs. 100,000,000 being the loss it had incurred.

44. In the supplementary submissions, it stated that the 36% interest rate charged by the bank was unlawful penalty for it was above the prevailing rate of 9.13% thus making it impossible for it to redeem the trucks. Reliance was made on the cases of Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR where it was held that the court should not allow an unconscionable interest rate to stand even where it had been agreed upon under a contract and Cityland and Property (Holdings) Ltd v Dabrah, which was cited with approval in the case of Margaret Njeri Muiruri (supra).

45. It further reiterated that the Bank had increased its interest rates without giving notice to it for which it relied on the case of Mbuthia Macharia v Annah Mutua Ndwiga & Another [2017] eKLR. The bank had also failed to discharge its evidentiary burden by not adducing evidence substantiating the amounts, rates and dates of interest it charged it.

46. In HCCC No. 78 of 2019 it was interesting to note the bank in its pleadings stated that the Plaintiff owed Kshs. 74,070,760 contrary to what it had pleaded in No. HCCC No. 1 of 2019, the amount of Kshs. 99,236,917 which two amounts the bank failed to prove it owed the bank. It further reiterated that the bank had the duty to give notice before increasing the interest, for the bank had a duty to seek approval of the Cabinet Secretary as provided for under Section 44 of the *Banking Act*. For this it relied on the case of Stanbik Bank Kenya Limited v Santowels Limited, Petition No. E005 of 2023.

47. The purported notices of 22/8/2018 and 30/10/2018 relied on by the bank cannot constitute the mandatory 7 days' statutory notice as provided for under Rule 12(1)(c) of the Auctioneers Rules for they were proclamation notices. Reliance was made in the case of George Gikubu Mbuthia v Jimba Credit & Another, Civil Appeal No. 111 of 1986.

48. It further reiterated on its submission of breach of fiduciary duty by the bank and that the bank had failed to justify and/or prove that it still owed it Kshs. 74,070,760 being unlawful interests and penalties. It also relied on the case of Sam Con Limited v National Bank of Kenya Limited & 2 Others [2023] KEHC 20399 KLR and provisions of Section 177(1) of the *Evidence Act*.

49. That the statements of accounts relied on by the bank were therefore inadmissible for noncompliance with the said Section 177(1) of the *Evidence Act* thus urging the court to enter judgment for it against the defendant plus costs of this suit and interest therein.

50. On its part, the Bank through its submissions dated 29/4/2024 posed ten (10) issues for determination among them whether it varied interest rates as alleged by Exon Investments. On the issue of interest rates, it referred the court to clause 5 of the Letter of Offer.

51. Accordingly, it was the bank's position that these were terms which were expressly agreed upon by the parties. It stated that a party who alleges must lead evidence in support of the allegation. The case of Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others [2014] eKLR was referred to.

52. On the issue of whether the sum of Kshs. 99,236,917 was lawfully due, the bank made reference to the demand letter dated 6/8/2018 and in concluded that the amount was legally due and that it was never an illegal penalty.

53. On whether it was entitled to repossess the security and sell them, it was the bank's position that being their security, they were entitled to do so. They made reference to the case of Athman Mustafa Mohamed v Ecobank Kenya Limited & 2 Others [2015] eKLR. It further submitted that section 20 (1) of the *Consumer Protection Act* did not apply to the case. Reference was made to the Court of Appeal decision in Engineers Board of Kenya v Jesse Wahome Waweru & Others.

54. On whether the sale of the motor vehicles was unlawful, unprocedural and illegal, the bank set out in extenso the letter dated 25/8/2018. According to the bank, it issued valid notices prior to repossession. The Court of Appeal decision in George Gikubu Mbuthia v Jimba Credit & Another was referred to.

Analysis and Determination

55. I have considered the pleadings, the evidence tendered, submissions filed both for and against, the authorities cited as well as the law and I discern the following issues for determination: -

    a. Whether either party proved their case to the required standard; and

    b. Who bears the costs?

56. At the onset, it is not in dispute that parties entered into a financial contract wherein the bank lent money to Exon to a tune of Kshs. 186,000,000. Further, in 2020, this court rendered a ruling to the effect that 65% of the advanced amount had been repaid. This was never controverted. Simple calculations indicate that as at the time the court rendered its ruling in 2020, Exon had paid a sum of Kshs. 120,900,000.

57. It is trite law that parties are bound by the terms of their contract and it is not the business of the court to rewrite what parties agreed to. In National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, the Court of Appeal expressed itself as follows: -

> "...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..."

58. This court is bound to give effect to what the parties expressly agreed. This being the case, the court's duty is simple. Give effect to the various letters of offer which constituted the agreement between the parties. Despite Exon's concerted efforts in making reference to the *Consumer Protection Act*, I respectfully decline the invite.

59. If reference to the said Act was intended by the parties, nothing would have been easier than stating so. Any reference to the said Act is therefore irrelevant and to this end, am in agreement with the bank's submissions that it has no application in this matter.

60. Having stated as above, in the year 2020, this court rendered itself that Exon had already paid 65% of the loan amount. This has never been disputed. The amount of Kshs. 186,000,000 was inclusive of

interests and charges. Exon cannot be said to be a party who takes a loan, does not pay, sits pretty and then rushes to court seeking an order of injunction as against the lender. This is a party who made steps to comply with its obligations.

61. Having stated as above, the bank repossessed the security motor vehicles. Though there is an admission on the part of Exon than there was an earlier proclamation issued in the month of August, 2018, what the auctioneer relied on to have to advertise is a proclamation dated 30th September, 2018. This is the very date that the securities were repossessed. It is equally not in dispute that after the earlier proclamation, parties engaged in negotiations.

62. The proclamation notice usually gives a number of days within which a party is given time to redeem the proclaimed property. It is normally seven (7) or fourteen (14) days. Common sense dictates that one cannot proclaim on the same day and repossess the security. It was the bank's duty to ensure that they complied with the law in terms of repossession of their security. Having failed to do so, I have no hesitation in holding that they breached their duty of care towards Exon.

63. The bank's actions clogged Exon's right to redeem the security and as such, the prayer on clogging of Exon's right to redeem the security is not an idle one and it is for granting.

64. Exon have made further claims in terms of loss of earnings and future earnings. They have specifically pleaded the sums they claim. A sum of Kshs. 35,710,000 has been pleaded as the difference in terms of what the security was sold at and what they had been valued for. It was not disputed that in May, 2018, the security was valued at Kshs. 62,110,000. When the bank exercised its right of sale, the security was sold at Kshs. 26,400,000. This explains the amount claimed under this head.

65. Section 97 (1) of the *Land Act* requires a chargor such as the bank herein to obtain the best price reasonably obtainable at the time of sale. Thought this Act addresses issues of charged lands, the principles flowing apply to commercial transactions as the foregoing. It is not open for a financial facility such as the bank herein to just repossess and sell the securities they hold just the way they want. Surely, vehicles worth Kshs. 62,110,000 in May, 2018 could not have depreciated by over 50% in January, 2019.

66. Being alive to the fact that the security in issue were immovable property, the value of 62,110,000 in May, 2018 cannot be the same in January, 2019. The reason is simple. They must have depreciated by January, 2019 due to wear and tear. On the foregoing, I find that a sum of Kshs. 30,000,000 would be reasonable in the circumstances and which I proceed to award.

67. On the claim for Kshs. 31,291,137, it is trite that loss of earnings is a special damage claim. As was decreed by the Court of Appeal in Hahn v Singh [1985] eKLR, special damages must be particularly pleaded specifically proved. In Cecilia W. Mwangi & Another v Ruth W. Mwangi [1997] eKLR, the Court of Appeal expressed thus: -

> "...Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved..."

68. It has not been disputed that Exon is in the transport industry and indeed it has provided evidence in terms of invoices that it was raising prior to the repossession by the bank. I have no hesitation in holding that indeed it lost its earnings from the period of repossession until the securities were sold. I therefore find that the sum of Kshs. 31,291,137 is well made and I award the same.

69. On the claim for Kshs. 100,000,000, having found that Exon lost its earnings, an interrogation on this claim must be made. Indeed, I have no doubt in my mind that Exon was to make earnings from the

securities for a considerable period of time. However, ten (10) years as suggested by it is on a higher side. I take cognizance of the fact that being movable property, they were subject to wear and tear among other vagaries of nature.

70. Similarly, a party is bound to mitigate his or her losses. In African Highland Produce Limited v John Kisorio [2001] eKLR, the Court of Appeal observed as follows: -

> " ...It is manifestly clear that the plaintiff did not take reasonable steps to mitigate the loss which he sustained consequent upon the accident. Being a man of considerable means he could have within 21 days, repaired his BMW car instead of incurring unnecessarily heavy hire charges. He did not act prudently. A prudent man would certainly not have acted in the way the plaintiff did. He acted, in our view, unreasonably. The learned judge was in error to allow the plaintiff any loss of user for more than 21 days. The plaintiff is entitled only to the loss of user for 21 days which period was necessary to effect in full all repairs on the BMW car. There was no justification whatsoever in law to allow him to enjoy and to harvest from an illegal territory..."

71. Exon's claim on this head is based on a futuristic earnings which as decreed by the Court of Appeal above, a party is required to mitigate his or her losses. As such and being guided as above, I find that a sum of Kshs. 30,000,000/= is reasonable and I so award.

72. On whether Exon and its guarantors ought to be discharged from their loan obligation, having found that the bank breached its duty of care thereby clogging Exon's right to redeem the security, I find that indeed it ought to be. In 2020, this court found that Exon had paid 65% of the loan. The bank proceeded to sell the securities in the manner it did. It would be so onerous to expect Exon to pay anything any further. The losses lie where they fall.

73. In Joseph Ndungu Gachoka v United Insurance Company Limited [2002] eKLR, Waki, J (as he then was) observed as follows: -

> " ...It may well be time, in order to stave off such negligence and encourage prudence, to insist on high standards of legal practice and to let the losses lie where they fall..." "Emphasis added"

74. The bank made the bed and it is their duty to lie on it. As such, I find no reason to continue holding Exon and its directors accountable to them. I therefore proceed to discharge Exon and its directors from any further obligation in terms of the loan towards the bank.

75. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The Halsbury's Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes as follows: -

> " The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice"

76. Any departure from this trite law can only be for good reasons which the Supreme Court in Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case.

77. In Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR the court noted as follows: -

> "The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Costs follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

78. I see no reason as to why I should deny Exon costs of the case and I therefore award the same.

Determination

Following the foregone discourse, the upshot is that the following orders do hereby issue: -

a. An order is hereby issued declaring that the Bank's action in repossessing the securities clogged the Plaintiff/1st Defendant's right to redeem the same;

b. A sum of Kshs. 30,000,000/ is hereby awarded under the head of difference in value between May, 2018 and January, 2019;

c. A sum of Kshs. 31,291,137.50 under the head of loss of earnings is hereby awarded;

d. A sum of Kshs. 30,000,000 under the head of lost life span of the securities;

e. The Plaintiff/ 1st Defendant and its guarantors are discharged from their loan obligation to the bank;

f. Costs to the Plaintiff/ 1st Defendant; and

g. For avoidance of doubt, Plaintiff/ 1st Defendant is hereby awarded a cumulative sum of Kshs. 91,291,137.50.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MARCH, 2025.

……..

F. WANGARI

JUDGE

In the presence of;

Mr. Karina Advocate for the Plaintiff/ Defendants

Miss Gitari Advocate for the Defendant/ Plaintiff

M/S Salwa, Court Assistant