



REPUBLIC OF KENYA



**Bonyo & another v K-Rep Bank & another (Commercial Case
50 of 2018) [2025] KEHC 4796 (KLR) (9 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4796 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE 50 OF 2018**

MS SHARIFF, J

APRIL 9, 2025

BETWEEN

WASHINGTON MWAGAH BONYO 1ST PLAINTIFF

BEATRICE AKINYI BONYO 2ND PLAINTIFF

AND

K-REP BANK 1ST DEFENDANT

JANE ANDHOGA STAUSI 2ND DEFENDANT

JUDGMENT

1. Vide an Amended Plaint dated 22nd March 2019 and filed on the even date, the Plaintiffs herein aver that they had obtained a loan facility of Kshs. 9,000,000/= from the 1st Defendant herein for development purposes and the said development loan was secured by registration of legal charges over parcel Nos Kisumu/Pandpieri/1648 and Kisumu/Pandapieri 1649.
2. The Plaintiffs who are also Directors of Milimani Maternity Hospital Limited further aver that they had also obtained another loan facility of Ksh 2,000,000 from the 1st defendant; for medical purposes, in the name of the company and they used land parcel No. Kisumu/Manyatta "B" /511 as collateral. The plaintiffs aver that the two loan facilities were distinct and separate.
3. The plaintiffs averred that in order to facilitate for the repayment of the development loan, they approached Kenya Commercial Bank Limited (hereinafter referred to as "KCB") to pay the Kshs. 9,000,000/= to the 1st Defendant on their behalf and KCB duly transferred the Kshs. 9,000,000/= to the 1st Defendant vide the 2nd Defendant. It is further averred that the upon receiving the said amount, the 1st defendant released the titles documents of parcel Nos Kisumu/Pandpieri/1648 and Kisumu/Pandapieri 1649 to the 2nd Defendant for onward transmission and charging to KCB.



3. It is the plaintiffs' case that after receiving the Kshs. 9,000,000/=, the 1st Defendant, while acting in bad faith, forwarded another letter to the Plaintiffs claiming that they still owed it Kshs. 1, 811,275.55/=, which the Plaintiffs maintain, was not outstanding as the development loan had already been paid.
4. The Plaintiffs further aver that they were shocked that the rate of interest was enhanced from 21% to 31% without any prior notice to the them. That upon them visiting the 1st Defendant herein at to inquire about their loan status, the 1st Defendant informed them that they still owed the it Ksh. 10,726,903/= which was a different amount to what the 1st Defendant had initially demanded from them; Kshs. 9, 214, 140/=. The Plaintiffs aver that they also failed to comprehend the change of the quantum of the payable monthly installments from 243, 480/= to Kshs. 352,000/=.
5. The Plaintiffs aver and maintained that the 1st Defendant's actions were actuated by malice in the manner that it has dealt with them and they pleaded the following particulars of malice and fraud:
 - a. Fraudulently taking away land parcel number Kisumu/Manyatta "B"/511 which had not been charged to this loan account.
 - b. That the discharges the title of the parcel number Kisumu/Manyatta "B"/511 only to turn back and fraudulently get the title even after the Plaintiffs had cleared the loan amount.
 - c. That they created another fictitious charge which was not for the account of Kisumu/Manyatta "B"/511.
 - d. That they maliciously forwarded the names of the Plaintiffs to CRB even where there was a dispute in Court to simply punish the Plaintiffs.
 - e. That they intentionally incited Standard Chartered Bank not to advance any loan to the Plaintiffs in order to frustrate the Plaintiff's business.
 - f. Charged interest beyond the statutory figure of 14%.
 - g. Inflating the loan amount from Kshs. 9,000,000/= to Kshs 10,700,903/= without proper cause.
 - h. Increasing the interest from 21% to 31% by the 1st Defendant
 - i. The 1st Defendant's failure to supply the Plaintiff with Bank breakdown on how they arrived at Ksh. 10,700,903/=
 - j. 1st Defendant's failure to avail the Plaintiffs with amortization payment schedule which indicates the payment procedures.
 - k. The 1st Defendant clandestinely including the medical loan with the development loan which had actually being settled by KCB.
 - l. The 1st Defendant's change of installment from Kshs. 243,480/=to Ksh. 352,000/= per month was made in bad faith.
 - m. The 1st Defendant inflating the loan amount to Kshs. 9, 214.140/= even though the same was settled by KCB.
6. The Plaintiffs crave for the following orders:
 - a. A permanent injunction restraining the 1st Defendant demanding the return of property title land parcel No. Kisumu/Pandpieri/1648 and Kisumu/Pandpieri/1649 from Kenya



Commercial Bank and further that the 2nd Defendant should not return the aforementioned titles and general damages for fraud.

- b. A declaration that increase of interest from 21% to 31% and the change of installment from Kshs. 2443,480/= to Kshs 352,000/= was illegal and fraudulent and therefore accounts must be taken since the amount has been paid in full and general damages for fraud.
 - c. Costs of the suit and interest.
7. The Plaintiffs filed annexed a particularized list of documents dated 4th February 2013, statements of Washington Mwangi Bonyo and Beatrice Akinyi Bonyo, both dated 4th February 2013, a further list of documents dated 24th January 2019, a further supplementary list of documents filed on 23rd March 2023, further statements of Washington Mwangi Bonyo and Beatrice Akinyi Bonyo both filed on 14th February 2019, in support of their claim.
 8. In response to the Amended Plaint, the 1st Defendant filed its Statement of Defence dated 17th April 2019 and filed on 25th April 2019, wherein it averred that it had transferred the loan facility of Kshs. 9,000,000/= to Kenya Commercial Bank vide the 2nd Defendant and that upon receiving the said amount from the latter, it released the title document deeds of land parcels No. Kisumu/Pandpieri/1648 and Kisumu/Pandpieri/1649 to the 2nd Defendant for onward transmission and registration of a charge in favour of Kenya Commercial Bank Limited.
 9. The 1st Defendant averred and maintained that upon receiving the Kshs. 9,000,000/= it issued the plaintiffs with a demand of a further sum of Kshs. 1, 811,275.55/= which amount had remained outstanding from the Plaintiffs to it and that the said outstanding amount continued to accrue interest rates of 31% per annum as from the time of the recall.
 9. The 1st Defendant denied any visitation by the Plaintiffs to inquire about the loan repayment and it further denied that it had never informed them of the outstanding Kshs. 10,726,903/=.
 10. The 1st Defendant denied that it had clandestinely included the Plaintiffs medical loan to the development loan given that the medical loan was secured by a different entity using a different parcel of land namely Kisumu/Manyatta "B"/511. It also denied that the development loan had been repaid fully by Kenya Commercial Bank Limited.
 11. The 1st Defendant maintained that its actions were not actuated by malice nor were the same fraudulent in nature as pleaded and itemized in the Amended Plaint. It averred that the loan facility of Kshs. 9,000,000/= applied for by the Plaintiffs was approved subject to various terms and conditions; that the interest rate charged was to be at the base lending rate plus 8% per annum and that the 1st Defendant reserved the right to vary the interest rates subject to the prevailing commercial base lending rates. The 1st Defendant averred that the payable installments by the Plaintiffs varied from Kshs. 243,480/= to Kshs. 352,000/=.
 12. The 1st Defendant averred that upon receiving a letter from the 2nd Defendant intimating the intention of Messrs KCB to purchase the Plaintiffs outstanding loan balance in respect to the development loan, it responded thereto by stating that the Plaintiffs owed it a sum of Kshs. 10, 726,903 as at 12th October 2012 and that the said amount continued to accrue interest at 31% per annum. Further that after discussions between counsels for both banks, a consensus was reached and an agreement executed wherein the 2nd Defendant would pay to the 1st Defendant's counsel Kshs. 10, 726,903/= together with interest at 31% per annum with successful registration of a discharge of charge and subsequent registration of a charge to settle the outstanding amounts owed to the 1st Defendant by the Plaintiffs.



14. The 1st Defendant avers that the total sum of Kshs. 10, 726,903/= together with interest at 31% per annum having not been fully paid, the 1st Defendant retained the right to recall the title documents in respect to land parcels Nos. Kisumu/Pandpieri/1648 and Kisumu/Pandpieri/1649.
15. In response to the Amended Plaintiff, the 2nd Defendant filed a Statement of Defence dated 15th July 2013, wherein she averred that the Plaintiffs did approach KCB to buy out and/or take over the Plaintiffs debt of Kshs. 9,000,000/= then owing to the 1st Defendant and that KCB proceeded to pay the sum of Kshs. 9,000,000/= only, to the 1st Defendant, for and on behalf of the Plaintiffs herein. She denied that the monies were paid through her. She averred that the release of property titles in respect to land title Nos. Kisumu/Pandpieri/1648 and Kisumu/Pandpieri/1649 was undertaken on 28th November 2012 and the sum Kshs. 9,000,000/= was paid to the 1st Defendant on 11th January 2013 whereafter she proceeded to forward the respective titles to KCB limited.
16. The 2nd defendant maintains that the Amended Plaintiff herein is misconceived, bad in law and is legally untenable as the same fails to disclose any reasonable cause of action; the suit constitutes an abuse of Court process; the suit is an exercise in futility and that this Court is devoid of jurisdiction to vary and/or interfere with the contractual terms entered into between the Plaintiffs and the 1st Defendant.

Plaintiffs case

17. PW1 Beatrice Akinyi Bonyo, testified that she is a doctor by profession and the 2nd Plaintiff herein. At her request, the Court adopted her recorded witness statements one dated 4th February 2013, two undated, filed on 11th February 2019 and 5th February 2020 respectively, as her evidence-in-chief and the plaintiffs' list of documents dated 4th February 2013 and further list of documents dated 24th January 2019 were produced as Plaintiffs' exhibits in the manner enumerated in the said lists. It was her testimony that she took a loan of Kshs. 9,000,000/= for development but had prior thereto, taken another medical loan of Kshs. 2,000,000/=. That in respect of the development loan, this witness testified that the plaintiffs' had had provided title documents of parcels Nos. Kisumu/Pandpieri/1648 and Kisumu/Pandpieri/164 to be charged as collateral while for the medical loan, the plaintiffs' issued land title No. Kisumu/ Manyatta "B"/511.
18. On cross-examination by the 1st Defendant's counsel, she testified that jointly with her husband, they had been issued with a letter offer dated 23rd July 2011 for the amount of Kshs. 9,000,000/= and that the same specified an interest rate of 21% p.a with a provision that the 1st Defendant could vary the rate of the interest at its sole discretion. She told the Court that the same letter of offer stated that in case of a default the whole amount outstanding becomes due and payable immediately. She told the Court that the payments were to be made vide monthly installments of Kshs. 258,990/= for 60 months, with a grace period of 6 months. That they executed the letter of offer and were thus bound by the terms thereof, including the variable interest rate.
19. The 2nd Plaintiff testified that in July 2012, she approached KCB to take over the loan from the 1st Defendant and vide a letter dated 8th October 2012 from the 2nd Defendant, the latter requested for the titles deeds from the 1st defendant so that KCB could clear the outstanding loan due to the 1st Defendant.
20. It was the evidence of the 2nd plaintiff that vide a letter dated 15th October 2012, the firm of Odhiambo Owiti & Co. Advocates sought professional undertaking from the 1st defendant's advocates and a bank to bank undertaking from KCB Limited with the terms stipulating that a sum Kshs. 10,726,903/= together with an interest of 31% p.a from 12th October 2012 was then outstanding. The conditions under the undertaking stipulated that in the event of default by KCB to settle the entire loan amount,



firm of Odhiambo Owiti & Co. Advocates could demand for the return of the security documents and the 2nd Defendant would be bound comply with the demand.

21. The 2nd plaintiff testified that the 2nd Defendant gave a professional undertaking to pay the outstanding amount and saw no need for a separate undertaking by KCB but she stated that the redemption amount was Kshs. 9,000,000/= and not Kshs. 10,726,903/= but the firm of Odhiambo Owiti & Co. Advocates stated that the 1st Defendant would not accept the lesser figure of Kshs. 9,000,000/=. The 1st Defendant then made a recall for the securities with an option of a bank to bank undertaking.
22. The 2nd plaintiff told the Court that the 1st Defendant increased the interest rates unlawfully and she concedes that she did execute the letter of offer and that she was bound to the terms as contained thereof, but complained that the interest was exorbitant. She conceded that she did not provide any proof that the 1st Defendant prevailed upon Standard Chartered Bank not to advance any monies to the plaintiffs as alleged in the Amended Plaint. She refuted that the development loan with the 1st Defendant was in arrears and she maintained that KCB had cleared the entire Kshs. 9,000,000/=and as of 30th January 2013, the statement of account had no outstanding balance.
23. On cross examination by the 2nd Defendant's counsel, the 2nd Plaintiff told the Court that she had approached the 1st Defendant seeking a loan facility of Kshs. 9,000,000/= and that such a loan attracts interest. She admitted that the plaintiffs executed the letter of offer and confirmed the terms of the offer were binding upon her. She conceded that whereas a professional undertaking was given by the firm of Staussi & Asunah Advocates, the plaintiffs only sued Jane Staussi yet the law firm of Stausii & Asunah Advocates had two partners. She told the Court that the 2nd Defendant was representing KCB and the 1st Defendant advanced her a facility of Kshs. 9,000,000/= which attracts interest. She stated that she had repaid some money but was not sure of the total sum.
24. On re-examination, she reiterated that she did not give the firm of Staussi & Asunah instructions to issue an undertaking of 10,726,903/= but for the amount of 9, 214,000/=. She told the Court that the loan was issued in November 2011 and they approached KCB in July 2012. Further that a lot of the correspondences between the firm of Staussi & Asunah and the firm of Odhiambo Owiti & Co. Advocates were not copied to her.
25. According to the 2nd Plaintiff, when the 1st Respondent received the Kshs. 9,000,000/= they released the relevant securities to KCB Limited. Thereafter, they demanded for an additional amount of Kshs. 1,000,000/=. She insists that letter of offer did not state by what percent the 1st defendant would increase the interest and that the interest charged was exorbitant.

1st Defendant's case

26. DW1 Enock Makanga, requested the Court to adopt his recorded witness statement dated 25th January 2021 as his evidence –in -chief and his bundle of documents dated 25th January 2021, be produced as his exhibits No. 1t to 25. The court duly acceded to that request. He testified that he works with the 1st defendant.
27. On cross-examination by the Plaintiffs' counsel, he testified that as per the charge document duly executed by the Plaintiffs the interest base is at rate set by Central Bank of Kenya and that the bank was at liberty to charge interest rate over and above the base rate. In this case, the base rate was 13 % but the 1st Defendant added 8%. According to him, as at July 2011 Parliament had not fixed the interest rate at 14% p.a and that there existed a legal provision allowing banks to charge above the base rate. The Plaintiffs were to pay the monthly installments of Kshs. 258,990/= but he had no evidence of default.



28. He testified that the letter dated 28th November 2012 from the firm of Odhiambo Owiti & Co. Advocates cites the redemption amount of Kshs. 10.7 M as at 15th October 2012 with the applicable interest set at 31%, which is the default rate. The letter dated 30th April 2012, by the 1st Defendant talks of a grace period of 3 months and if the loan was issued in November 2011, the grace period would run from that date but herein it ran from 30th April 2012 making the repayment to be by August 2012, and the same grace period is applied on the whole outstanding loan.
29. DW1 told the Court that the 1st Defendant wrote to CRB on 11th August 2015, while the matter was already in Court, as the Plaintiffs had defaulted the Kshs. 9,000,000/= loan and he could not confirm if by then, the 1st Defendant had already been paid that loan. He maintained that the 1st Defendant received Kshs. 9,000,000/= only from KCB, leaving a balance of Kshs. 1,851,862/=. He told the Court that despite the 1st Defendant entering an undertaking with KCB, the Plaintiffs are still the borrowers. He admitted that the release by the 1st Defendant of the security documents before the payment of all outstanding amounts was not ordinary bank practice.
30. On cross-examination by the 2nd Defendant's counsel, DW1 told the Court that he has worked with the 1st Defendant as a Relationship Manager for 2 years and his duties involve recovery of outstanding debts and outstanding arrears. He stated that the Plaintiffs and the 1st Defendant executed a letter of offer and the same became binding on both parties. Further that upon receipt of a letter from the 2nd defendant, the 1st Defendant duly responded and disclosed that the outstanding loan was Kshs. 10,726,903/= as at 12th October 2012. That the 2nd Defendant gave an undertaking to take over the loan facility and pursuant thereto, the KCB advanced the plaintiffs Kshs. 9,000,000/= by remitting the same to the 1st defendant. This witness told the Court that the Plaintiffs still owe the 1st Defendant Kshs. 1,251,218/= as indicated in the bank statement from the 1st Defendant.
31. On re-examination, DW1 told the Court that the 1st Defendant was varying the interest rate throughout the duration of the loan as per the terms of the letter of offer and that the rate of interest in cited as 31% was inclusive of default as the clients had defaulted in servicing the facility. On 18th January 2012, the Kshs. 9,000,000/= loan was credited to Plaintiffs' loan account. Further that as per the executed letter of offer dated 30th April 2012, the grace period for the loan facility ran from May 2012 to July 2012. He reiterated that KCB only took over the loan of Kshs. 9,000,000/= leaving an outstanding balance as the cited amounts was Kshs. 10,726,903/= as at 12th October 2012. He elaborated that as at 30th January 2013 the outstanding balance was Kshs. 1,251,418.03/=. He told the Court that as a bank, it was the mandate of the 1st Defendant to give defaulting customers a notice and if the default continues the 1st Defendant would notify CRB to have the defaulters listed.

2nd Defendant's case

32. DW2 Jane Staussi testified that she is the 2nd Defendant herein and an Advocate of the High Court of Kenya formerly practicing under the firm of Staussi & Asunah Advocates. At her request this Court adopted her recorded statement dated 26th February 2021 as her evidence -in-chief and her documents as contained in her list of documents were produced in Court as 2nd Defendant's exhibits 1 to 9 in the order that they are enumerated in the said list of documents.
33. DW2 told the Court that she the firm of Staussi & Asunah Advocates had issued a professional undertaking to KCB but the same was rejected. She stated that her then partner Mrs Asunah was the one who has signed the professional undertaking.



34. On cross-examination by the Plaintiffs' counsel, she told the Court that vide letter 20th October 2012, the outstanding liability was Kshs. 10,726,903/= and that according to KCB Limited they had granted the Plaintiffs Kshs. 17,000,000/= loan facility. As per the letter dated 20th November 2012, the redemption amount was Ksh. 9,000,000/= and that is the amount KCB Limited had agreed to pay the 1st Defendant. She testified that the Plaintiffs did not authorize the undertaking as they were not her clients and she was solely representing the Bank. She confirmed to this Court that she released the securities to KCB Limited the moment the firm of Odhiambo Owiti & Co. Advocates gave them to her. She insisted that she gave an undertaking of Kshs. 10,000,000/= but the same was rejected by the firm of Odhiambo Owiti & Co. Advocates as they insisted that they wanted an undertaking from KCB Limited and not the firm of Staussi & Ahsuna Advocates, and that they accepted an undertaking of Kshs. 9,000,000/= from KCB Limited.
35. DW1 told the Court that the 1st Defendant did not write to KCB Limited stipulating that the Kshs. 9,000,000/= loan facility was attracting a 31% p.a interest rate until cleared in full otherwise the figure would have changed. She told the Court that a bank can release the security charge documents after confirmation from and advise of it's Advocates, and if the same was released without receipt of the full amount then the advocate acting for the bank would be the ones at fault.
36. On cross-examination by the 1st Defendant, she told the Court that the redemption amount as per the letter from the firm of Odhiambo Owiti & Co. Advocates was Kshs. 10,726,903/=, but the undertaking by KCB Limited was for Kshs. 9,000,000/=. She confirmed that the firm of Odhiambo Owiti & Co. Advocates demanded for the security documents but she could not recall the reasons why and that the documents were not returned as she had already forwarded them to KCB Limited.
37. On re-examination, she told the Court that the undertaking was given in her name but it was executed by Mrs. Wasuna as she was absent but it was not given of a private capacity rather in the name of the firm of Staussi & Asunah Advocates. She reiterated that the contractual obligations of loan accounts were between the 1st Defendant and the Plaintiffs.

Submissions

38. At the close of the 2nd Defendant's case, this Court directed the parties to file and serve their respective written submissions. All parties complied and proceeded to highlight the same.
39. The Plaintiffs' counsel relied on the written submissions dated 15th January 2024 and he highlighted that the amount that the professional undertaking made by the 2nd defendant and the bank to bank undertaking made by KCB was for a sum of Kshs. 9,000,000/= and there was no disclosure that the plaintiffs owed the 1st defendant any additional amounts over and above the Kshs 9,000,000. He posited that there was no reason for the 1st Defendant to demand an additional amount from the Plaintiffs as it had filed no counter-claim for the additional amount. He submits that the Plaintiffs have proved their case on a balance of probabilities and that the professional undertaking is an issue between the 1st Defendant and the 2nd Defendant. The plaintiffs thus ask for the judgement of this Court plus costs and interest.
40. Counsel for the 1st Defendant submitted that the basis of this suit is based on professional undertaking dated 7th November 2012 and the terms were clear that the redemption amount was Kshs. 10,726,903/= that would be paid to the 1st Defendant together with minimal handling charges which was agreed at Kshs. 31, 108/=. She submits that the professional undertaking was issued by the 2nd Defendant on behalf of KCB and the Plaintiffs, and given that KCB only paid Kshs. 9,000,000/= the latter is at liberty to settle the deficit as the Professional undertaking was done for it's behalf.



41. On the variation of interest rate, counsel submitted that the same was duly agreed upon by the parties and the 1st Defendant reserved the right to vary the rate at its discretion and based on subsisting market value. She submitted that the Plaintiffs claim is not merited and ought to be dismissed with costs.
42. Counsel for the 2nd Defendant submitted that this Court cannot vary contractual terms between the Plaintiffs and the 1st Defendant and that the particulars of fraud as pleaded on the part of the 2nd Defendant herein were not proved. The 2nd Defendant submits that she played no role in the variation of the interest and that she is not in possession of the security charge documents as she handed over the same to her client KCB. Counsel maintains that the 2nd Defendant has no liability whatsoever vis a viz the plaintiffs and that the Plaintiffs had failed to prove their case against the 2nd Defendant wherefore she prayed for it's dismissal with costs.
43. In his rejoinder, counsel for the Plaintiffs submitted that the professional undertakings between the Defendants and KCB are the genesis of this suit and given the testimony of the 2nd Defendant that she had only represented KCB, he failed to understand why the 1st Defendant did not join KCB to this suit so as to address their dispute.

Analysis and determination.

44. I have considered the pleadings, the documents of the parties, the testimonies of the witnesses, the issues raised by the parties and their written submissions. The issues that emerge for determination are as follows:
 - a. Whether the variation of interest by the 1st defendant is lawful?
 - b. Whether the 1st defendant is entitled to claim the interest amount that was not included in the redemption notice after KCB took over the loan.
 - c. Whether the plaintiffs have made out a case for issuance of a permanent injunction against the 1st Defendant.
45. Vide a loan agreement dated 23rd July 2011, and duly executed by the Plaintiffs herein on 17th August 2011, the 1st Defendant advanced the Plaintiffs herein a loan facility of Kshs. 9,000,000/= subject to the following terms and conditions:

Lending Rate

The loan will be charged a variable rate interest at Base+8% per annum (currently at 13%+8%=21% per annum). However, the Bank reserves the right to vary the rate at its sole discretion subject to compliance with any regulatory requirement at any time without reference to you.

Default interest

In the event of any default, all facilities outstanding will become due and payable immediately. The amount in arrears will default interest at 5% above the prevailing lending rate of 21% p.a
46. According to PW1, the 1st Defendant claimed that the Plaintiffs should pay Kshs. 10,726,903/= which was the total amount due at the time KCB was to take over the loan facility. She insisted that the amount that was to be taken over by KCB was Kshs. 9,214,140/=. She told the Court that she was informed that they were to settle the balance as the 1st defendant had revised the interest rate from 21% to 31% thus culminating to an increase in the monthly repayment sum from 243,480/=to 352,000/=.
47. DW1 on the other hand testified that as per the charge document duly executed by the Plaintiffs, the interest base was at a rate set by Central Bank of Kenya and that the 1st defendant was at liberty to



charge interest at a rate over and above the base rate. In this instance the base rate was 13 % and the 1st Defendant opted to add 8%. It was the testimony of this witness that as at July 2011 Parliament had not fixed the interest rate at 14% p.a and it was therefore lawful and proper for banks to charge interest rate over and above the base rate. He testified that the letter dated 28th November 2012 from the firm of Odhiambo Owiti & Co. Advocates cited the redemption amount of Kshs. 10.7 M as at 15th October 2012 with the applicable interest set at 31%, which was the default rate.

48. It is evident that in a letter dated 8th October 2012, from the firm of Staussi & Asunah Co. Advocates, the 2nd Defendant herein indicated that they required the land title Nos. Kisumu/ Pandpieri/1648 and Kisumu/ Pandpieri/1649 which were in the custody of the 1st Defendant as KCB, the 2nd Defendant's client, was offering financial accommodation to the Plaintiffs and needed to know the quantum of the outstanding amount as of the date of the letter so as to enable the firm of Staussi & Asunah Co. Advocates, issue a suitable undertaking. In response via a letter dated 12th October 2012, the 1st defendant confirmed the outstanding balance as of 12th October 2012 as Kshs. 10, 726, 903/= and noted that the same continued to accrue interest at a daily rate of 31% p.a until cleared in full.
49. Premised upon the evidence analyzed hereinabove I do find that the plaintiffs entered into a lawfully binding loan agreement with the 1st defendant and they were well versed with the terms and conditions thereof and specifically on the right of the bank to change chargeable interest rate. The plaintiffs cannot plead estoppel at this juncture as the 1st defendant did not, in accepting a buy out of the loan agreement, waive its rights to accrued interest as per the terms and conditions of the loan agreement. I thus find that the 1st defendant acted lawfully and within the terms and conditions of the said loan agreement when it varied the chargeable interest rate.
50. In the case of Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling) the court considered the binding nature of a signed agreement thus:
- “...When a person signed a document, that signature should denote an intention to be bound by the terms and conditions embodied in the signed document...”
51. On the issue of whether the 1st defendant was entitled to recover interest that was not disclosed in the redemption notice I do find that vide a letter dated 15th October 2012, the 2nd Defendant's Exhibit No. 4, the firm of Odhiambo Owiti & Co. Advocates forwarded a professional undertaking to the firm of Staussi & Asunah Co. Advocates for execution and indicated therein that the redemption amount that KCB was to pay the 1st Defendant was Kshs. 10, 726, 903/= together with interest which continued to accrue at 31% p.a. KCB was to also remit nominal handling charges of Kshs. 58,000/= (VAT 16% included).
52. Subsequently vide a letter dated 7th November 2012, 2nd Defendant's Exhibit No. 5, the 2nd Defendant in her professional undertaking requested the firm of Odhiambo Owiti & Co. Advocates to forward to the firm of Staussi & Asunah Co. Advocates the security documents that the 1st Defendant, had in its custody with duly executed discharge of the charge and acknowledged that her client, KCB, will remit the total outstanding amount which as at 12th October 2012 was Kshs. 10, 726,903/= together with interest which continues to accrue at the rate of 31% per annum and that they will remit the redemption amount and the minimal handling charges of Kshs. 31,108/= (VAT 16% included).
53. Referring to the 2nd Defendant's Exhibit 7, wherein KCB Limited in a letter dated 20th November 2012, to the 1st Defendant acknowledged that it will pay only up to a maximum of Kshs. 9,000,000/= the sum outstanding and requested that the 1st Defendant forwards to their Advocates, firm of Staussi



& Asunah Co. Advocates the security documents, the 1st Defendant, had in its custody with duly executed discharge of the charge. Subsequently, firm of Staussi & Asunah Co. Advocates vide a letter dated 29th November 2012, forwarded the original titles for Kisumu/Pandpieri/1648 and Kisumu/Pandpieri/1649 to KCB Limited and enclosed the discharge of the charge.

54. A professional undertaking given by Advocates is separate and distinct contract which is enforceable between the parties. The respective clients of the Advocates in the undertaking are not parties in the undertaking. Therefore, only the Advocates can enforce the professional undertaking. Njagi J in the case of David Karanja Thuo vs. Njage Waweru HCC No.209 Of 2008 (OS) rendered himself on the enforceability of a professional undertaking as follows ;-

“In the first instance, it should be noted that the professional undertaking was between the advocates and none of the clients was a party to such an undertaking”.

55. The plaintiffs cannot enforce a professional undertaking that was never made to them but to the 1st defendant and I thus find that the plaintiffs have no cause of action against the 2nd defendant.

56. On the balance I do find that the 1st defendant is entitled to recover all accrued interest from the plaintiffs as full disclosure of the redemption amount and accruable interest had duly been made to KCB which opted to pay the principal sum only.

57. Finally, on the whether the Plaintiffs are entitled to an order of permanent injunction restraining the 1st Defendant from demanding for the securities from KCB. As established, the failure of KCB Limited to remit to the 1st Defendant the full outstanding amount was not a fault of the Plaintiff herein rather the Advocates involved and the respective banks. It is clear that the 1st Defendant released the securities prior to receiving the full redemption amount. It is incumbent upon the plaintiffs to demonstrate that they have established the principles for the grant of injunctions as enunciated in the case of Giella Vs Cassman Brown & Company (1973) EA358.

58. I have already found that whereas the plaintiffs had approached KCB to buy out their loan with the 1st defendant, the same was never paid in full as the accrued interest remain outstanding wherefore the plaintiffs have failed to establish a prima facie case against the defendants. The plaintiffs have also failed to establish a case of malice and fraud on the part of the 2nd Defendant herein as pleaded in their Amended Plaint. Conversely the 1st defendant is still incurring a loss of the unpaid accrued interest that is still accruing interest todate.

59. On the balance I do hereby find that the plaintiffs have not proved their case against the defendants on a preponderance of evidence and I hereby dismiss it with to costs to the defendants.

60. This file is hereby marked as closed.

61. Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 9TH OF APRIL 2025

MWANAISHA .S.SHARIFF

JUDGE

In The Presence Of:

N/A for Plaintiffs

N/A for 1ST Defendant

N/A for 2nd Defendantt



