Mombasa Water Products Limited v NIC Bank Limited & another (Civil Suit 69 of 2019) [2025] KEHC 9052 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEHC 9052 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 69 OF 2019

OA SEWE, J

MAY 23, 2025

BETWEEN

MOMBASA WATER PRODUCTS LIMITED ..... PLAINTIFF

AND

NIC BANK LIMITED ..... 1ST DEFENDANT

OCEANFREIGHT (E.A.) LIMITED ..... 2ND DEFENDANT

JUDGMENT

1. The plaintiff is a limited liability company engaged in the business of real estate development and transportation. It filed this suit against the two defendants in connection with an agreement for sale of property between it and the 2nd defendant. The agreement was in respect of the property known as Plot No. 4811/VI/MN for a consideration of Kshs. 165,000,000/=. It was the averment of the plaintiff that the 2nd defendant made a down payment of Kshs. 60,000,000, leaving a balance of Kshs. 105,500,000/= which was to be paid by instalments of Kshs. 1,765,000/= per month from September 2010.

2. The Agreement provided that the balance of the purchase price would be guaranteed by a reputable bank. To which end the 1st defendant furnished the plaintiff with a guarantee on behalf of the 2nd defendant for Kshs. 105,500,000/=. The guarantee, No. GTE03-101046 was dated 24th August 2010. On the basis thereof, the plaintiff applied for a term loan of Kshs. 70,000,000/= from the 1st defendant, payable within 60 months by monthly instalments of Kshs. 1,610,689/=. According to the plaintiff, it was agreed between the parties that the 1st defendant would timeously credit the plaintiff's loan account with the monthly payments received from the 2nd defendant; and that the issue of default or penalties would not arise, granted that the payments had been guaranteed by the 2nd defendant.

3. The plaintiff's cause of action was that, in breach of the obligations placed upon the 1st defendant as a banking institution by *the Constitution* of Kenya, the *Banking Act* and the *Consumer Protection Act*, the 1st defendant made wrongful deductions from its account in September 2013 and credited the

same to the loan account in disregard of the agreement between the parties. In the plaintiff's view, the deductions were fraudulent. He supplied the particulars of fraud in the Plaint dated 19th August 2019, at paragraph *35*. The plaintiff also pleaded the particulars of breach of the *Consumer Protection Act*.

4. Accordingly, the plaintiff prayed for the following reliefs against the two defendants jointly and severally:

   (a) Immediate payment of the sum of Kshs.25,819,141.88 as claimed in the Plaint.

   (b) Interest on the aforesaid sum at commercial rate from the date of filing the suit.

   (c) Immediate and unconditional release of the original certificate of title Cr. No. 60789 and Cr. No. 60790 being held by the 1st defendant to the plaintiff.

   (d) General damages in respect of the illegal lien exercised by the 1st defendant over the original certificates of title Cr. No. 60789 and Cr. No. 60790.

   (e) Refund of all monies unlawfully charged as penalty interest payments and default charges/late fees.

   (f) Interest on [e] above from the date of filing the suit.

   (g) A declaration that the payment was not under any contract or contractual agreement or otherwise to repay the term loan of Kshs. 70,000,000/=.

   (h) A declaration that the term loan minimum monthly repayment was limited to Kshs. 1,610,689.25 and the maximum monthly repayment was limited to the guaranteed monthly payment of Kshs. 1,765,000/=.

   (i) A declaration that the letter of offer dated 3rd August 2010 did not provide for the monthly repayments exceeding the monthly payment under the repayment guarantee.

   (j) An order that account be taken between the plaintiff and the 1st defendant.

   (k) interest on [j] above at court rate.

   (l) Costs of the suit.

   (m) Any other relief the Court may deem fit to grant.

5. The plaintiff amended the Plaint on 28th June 2021 with the leave of the Court to furnish details of the various accounts it held with the 1st defendant and to provide further particulars in relation to the loan and its repayment terms. The plaintiff also amended Prayer [a] to read Kshs. 57,401,810.70 as the total sum of amounts wrongfully debited by the 1st defendant from its account. The plaintiff prayed for interest on that sum, at paragraph (b) of the Amended Plaint, at commercial rates from 1st July 2015 when the loan account was to be closed. Other notable amendments in the prayers included additional prayers for damages for wrongful referral of the plaintiff to the Credit Reference Bureau and an order directing the 1st defendant to remove the plaintiff's name from the Credit Reference Bureau.

6. The 1st defendant filed an Amended Defence on 31st August 2021. It denied that the facility granted to the plaintiff was granted on the strength of the real estate transaction between the plaintiff and the 2nd defendant as alleged in Paragraph 6A of the Amended Plaint. It averred that, sometime in May 2010, the plaintiff made an application for the grant of a development loan in the sum of Kshs. 86,000,000/=; and that, vide a Letter of Offer dated 3rd August 2010, the 1st defendant agreed to provide to the plaintiff a facility in the sum of Kshs. 70,000,000/=.

7. According to the 1st defendant, the loan proceeds having been disbursed to the plaintiff on the 25th August 2010, it was expected that the monthly repayments would commence one month thereafter on the 25th September 2010, and thereafter on the 25th day of each subsequent month until full payment. The 1st defendant averred that the plaintiff cannot now feign ignorance of the repayment date. The 1st defendant further stated that it was a term of their agreement that the repayments would, by the express instructions of the plaintiff, be deducted from its current account No. 100 000 2271, depending on availability of funds in the said account.

8. The 1st defendant conceded that it was aware of the sale transaction between the plaintiff and the 2nd defendant; and that the 2nd defendant would make monthly payments of Kshs. 1,765,000/= through the plaintiff's current account. It however denied that the plaintiff was thereby relieved of any obligation to ensure timely repayment of the loan facility. The 1st defendant further averred that the Letter of Offer dated 3rd August 2010 provided that, in the event of default, it would charge 1% per month on the portion in default in addition to the agreed rate of interest. It was therefore the assertion of the 1st defendant that any late fees, interest or penalty charges levied on the plaintiff's account were contractual, lawful and levied with the full knowledge and consent of the plaintiff.

9. The 1st defendant denied having fraudulently deducted any money from the plaintiff's account or having exercised lien over the plaintiff's Certificates of Title No. CR. 60789 or CR. No. 60790 as alleged in the Amended Plaint or at all. It denied violating lending principles or breaching its obligations under *the Constitution*, the *Banking Act* or *Consumer Protection Act* as alleged by the plaintiff and put the plaintiff to strict proof thereof. It therefore averred that the plaintiff is not entitled to any of the reliefs sought in the Amended Plaint.

10. The 2nd defendant also denied the plaintiff's allegations. Its Statement of Defence dated 29th August 2019 was filed herein on 30th August 2019. It confirmed that it entered into a Sale Agreement dated 27th May 2010 with the plaintiff for sale of the property known as Mainland North/Section VI/4811 at the agreed price of Kshs. 165,000,000/=. The 2nd defendant further stated that, pursuant to the terms of their agreement, it made a down payment of Kshs. 60,000,000/= and was to pay the balance of Kshs. 105,000,000/= in monthly instalments of Kshs. 1,765,000/= from September 2010; which it cleared on 1st July 2015.

11. The 2nd defendant therefore averred that it has fully discharged its obligation under the Agreement dated 27th May 2010; and therefore it is not liable in any way to the plaintiff. It further stated, that the plaintiff's cause of action is based on Bank/Customer relationship to which it is not privy; and that the Guarantee was only meant to secure the payment of the balance of the purchase price in the event of default. The 2nd defendant added that, since no act of default occurred in respect of payment of the purchase price, it was wrongly impleaded in this suit.

12. At the hearing of the suit, the plaintiff called its Managing Director, Joseph Mbugua Gichanga (PW1). He adopted his witness statement dated 28th June 2021. He explained that the plaintiff is a client of the 1st defendant's and had 7 different accounts with the 1st defendant as at the year 2010. PW1 testified that the plaintiff's key business is real estate development, farming and transportation; and that between 2010 and 2015, the plaintiff's real estate business was booming. He stated that the plaintiff had six clients making substantial monthly payments to the main current account; hence the need for each disbursement to be credited to the appropriate account to satisfy each contractual obligation.

13. PW1 further testified that this suit relates to a facility granted by the 1st defendant on the strength of a real estate transaction between the plaintiff and the 2nd defendant, whereby the 2nd defendant agreed to purchase the plaintiff's property known as LR 4811/VI/MN situated in Mombasa County at a

consideration of Kshs. 165,000,000/=. He further testified that upon depositing Kshs. 60,000,000/= the 2nd defendant was to pay the balance in monthly instalments of Kshs. 1,765,000/= over a period of 5 years; and that the instalments were to be credited by the 1st defendant into the plaintiff's loan account No. 1-0000-02271 on the 25th day of each month with effect from 25th September 2010.

14. To ensure that the 2nd defendant repaid the balance of the purchase price as agreed, it obtained a Guarantee from the 1st defendant, being Guarantee No. GTE03-101046 dated 24th August 2010. It was therefore the testimony of PW1 that, based on the above arrangements, the plaintiff applied for a term loan of Kshs. 86,000,000/= from the defendant, repayable within 60 months. The facility, which was intended to finance the plaintiff's development projects, was duly approved by the 1st defendant but in the sum of Kshs. 70,000,000/= only.

15. It was further the testimony of PW1 that the term loan was secured by a general indemnity by the 2nd defendant against the Guarantee of Kshs. 105,500,000/=; an irrevocable standing order dated 25th September 2010 by the 2nd defendant as well as an irrevocable standing order by the plaintiff dated 25th September 2010. In addition, the 1st defendant demanded a cash cover collateral of Kshs. 105,500,000/= from the 2nd defendant for the Guarantee. Thus, the plaintiff's case was that the 1st defendant was to credit the term loan account with monies deposited monthly by the 2nd defendant, such that it was not necessary for any funds to be drawn from the plaintiff's current account.

16. It was therefore the plaintiff's case that, the mandate given to the 1st defendant as supported by the terms of the Letter of Offer, created a principal/agent relationship between the plaintiff and the 1st defendant; and therefore it was expected that the 1st defendant would carry out the exact instructions of the plaintiff as far as crediting the term loan account with the repayment instalments of Kshs. 1,610,689.25 as received from the 2nd defendant. PW1 testified that the 1st defendant not only breached those instructions by failing to remit the agreed amount to the loan account in time, but also proceeded to load unwarranted interest and penalty charges on the plaintiff's account.

17. Regarding the last instalment payment of Kshs. 1,365,000/=, PW1 testified that the same was credited into the plaintiff's account on 25th August 2015, but was thereafter reversed by the 1st defendant on 28th August 2015, creating a 'NIL' effect in terms of the loan repayment for no apparent reason. PW1 also mentioned that on 29th April 2014, the 1st defendant dishonoured a cheque issued by the plaintiff for Kshs. 300,000/= in the ordinary course of business, contending that there were insufficient funds in the account, yet the said account was in funds at the time to the tune of Kshs. 2,300,000/=.

18. It was also the testimony of PW1 that the plaintiff deposited two Certificates of Title with the 1st defendant through its Regional Manager, Mr. Mwamburi. According to PW1, the Certificates were given as additional security for the term loan and that receipt thereof was duly acknowledged by the 1st defendant vide an email dated 29th February 2016 (at page 197 of the plaintiff's Bundle of Documents). The plaintiff sought the release of those Certificates of Title.

19. Lastly, the plaintiff accused the 1st defendant of having unprocedurally reported it to the Credit Reference Bureau (CRB) due to purported later charges which were never the case. The plaintiff stated that this action by the 1st defendant had adversely affected its real estate development business and integrity. Accordingly, the plaintiff sought to be compensated by way of general damages for having been wrongfully listed in the CRB database and for failure to remove the listing after demands were made for such removal.

20. The plaintiff called Thomas Odero Arucho (PW2) as its second witness. PW1, an auditor with the firm of Irungu Macharia Associates, was instructed by the plaintiff to carry out an audit of its accounts

to ascertain the status thereof. Upon undertaking the audit exercise, PW2 prepared his report which he produced as the Plaintiff's Exhibit 53. The report is at pages 187 to 216 of the plaintiff's Bundle of Documents. PW2's finding was that the 1st defendant over-deducted monies from the plaintiff's account to the tune of Kshs. 57,660,596.11 which ought to be refunded by the 1st defendant.

21. On behalf of the 1st defendant, its Assistant Credit Manager, Ms. Sally Ooko, testified on 2nd October 2023. She confirmed that the plaintiff was given a facility of Kshs. 70,000,000/= by the 1st defendant. She further confirmed that the facility was to be repaid over a period of 5 years in instalments of Kshs. 1,610,689.25 at a variable interest rate of 1% above the base rate of 14.5%. DW1 also confirmed that the loan was disbursed on 25th August 2010 and that the first instalment was due one month later on 25th September 2010.

22. DW1 testified that they reconciled the plaintiff's account and established that his claim of overpayment of Kshs. 57 million was baseless. According to the 1st defendant, the total amount repaid by the plaintiff was Kshs. 105,289,791.33 and not Kshs. 154,301,951.11 as alleged by the plaintiff. She discounted the approach taken by PW2 and explained that he relied on misleading conclusions from the bank statements to come up with the amount alleged to be an overpayment. DW1 further testified that there were four occasions when the repayment instalments were delayed and therefore the 1st defendant was entitled to charge a penalty for such late payments.

23. DW1 adopted her witness statement and produced the 1st defendant's Bundle of Documents as exhibits.

24. The 2nd defendant also denied the plaintiff's allegations. Its evidence, through its Legal Manager, Ms. Cecilia Ndeti (DW2), was that the 2nd defendant had a land sale agreement with the plaintiff at an agreed purchase price of Kshs. 165,000,000/=. DW2 confirmed that the money was paid in instalments of Kshs. 1,765,000/= over a period of 60 months after a down payment of Kshs. 60,000,000/=. DW2 further confirmed that all the instalments were paid by way of a standing order from the 2nd defendant's account to the account of the plaintiff; and that the 2nd defendant furnished a Payment Guarantee to the plaintiff through the 1st defendant. She denied that any of the instalments was delayed.

25. In its closing submissions, the plaintiff reiterated its evidence and proposed the following issues for determination:

    (a) Whether there was an overpayment in the loan account, and if so, by how much?

    (b) Whether the 1st defendant is holding the original certificates of the plaintiff.

    (c) Whether the plaintiff is entitled to the reliefs sought in the Amended Plaint dated 28th June 2021.

26. The plaintiff relied on the Audit Report produced by PW2 to support his claim that the loan was overpaid by Kshs. 57,401,810/70. The plaintiff pointed out that no audited statement or report was produced by the 1st defendant to controvert PW2's Audit Report. Therefore, it submitted that its unchallenged report ought to guide the Court in confirming the overpayment. The plaintiff relied on Dick Omondi Ndiewo t/a Ditch Engineering Service v Cell Care Electronics [2015] eKLR for the proposition that the evidence of an expert can only be challenged by the evidence of another expert.

27. The plaintiff took issue with the assertion by the 1st defendant that the loan was repayable on the 25th day of the subsequent months. It submitted that where a date for repayment of monies secured by a charge is not specified in the charge instrument, or where repayment is not demanded by the chargee on the date specified, the money shall be deemed to be repayable three months after the service of a

demand in writing by the chargee. In this regard, the plaintiff relied on Section 7 of the *Consumer Protection Act*, 2012, Section 56(2) of the *Land Registration Act* as well as the cases of Bamboo Holding Ltd v National Bank of Kenya Limited [2019] eKLR and Kwanza Estates Ltd v Dubai Bank Kenya Ltd [2013] eKLR.

28. The plaintiff also submitted that the 1st defendant had the obligation to notify it of any variations in the interest rate. The plaintiff relied on Nairobi HCCC No. 1601 of 1999: Housing Finance Co. of Kenya Limited v Gilbert Kibe Njuguna to support its submission that any variation of the interest rate on the term loan without prior notice was therefore unlawful and punitive.

29. The plaintiff submitted at length on what it perceived to be wrongful deductions by way of interest. It contended that no penalties ought to have been charged on the term loan considering that its repayment was guaranteed by the 2nd defendant through a Payment Guarantee issued by the 1st defendant as well as a cash cover provided by the 2nd defendant. The plaintiff argued that it would be wrong for the 1st defendant to submit, as it did, that the Guarantee was a separate arrangement and did not form part of the term loan agreement, yet it formed part of the conditions precedent for the term loan.

30. The plaintiff relied on Brogden v Metropolitan Railway Company [1876-7] L.R. 2 App Cas 666 (House of Lords) for the submission that acceptance of a written contract/offer can either be explicit or implicit and therefore that both the 1st and 2nd defendants were liable to ensure the instalments paid by the 2nd defendant were applied towards repayment of the term loan. Hence, the plaintiff's stance was that the 1st defendant's obligation would only cease once the Guarantee was fully effected or upon full payment of the property purchase instalments by the 2nd defendant.

31. The plaintiff also urged the Court to find as a fact that the 1st defendant is holding two of its Certificates of Title, being CR. No. 60789 and CR. No. 60790 on the basis of the evidence adduced by it. It submitted that the intention was the creation of a Charge for another facility; which facility was not granted by the 1st defendant. Accordingly, the plaintiff submitted that there is no justification for the 1st defendant to keep holding the said documents. He placed reliance on George Njogu Residences Limited v National Bank of Kenya Ltd [2013] eKLR in which it was held that it cannot be right or proper for an intended chargee to hold onto title documents of the chargor indefinitely as that would amount to an interference with the rights of proprietor of the suit land. Consequently, the plaintiff submitted that its suit is well merited and should be allowed with costs.

32. The 1st defendant filed written submissions dated 19th February 2024 and thereby proposed the following issues for determination:

    (a) Who was under the obligation to repay the loan facility advanced to the plaintiff?

    (b) Whether the loan facility was to attract interest a variable rate;

    (c) Whether the 1st defendant could charge late fees.

    (d) Whether the 1st defendant was in possession or custody of the plaintiff's Original Titles over the properties known as C.R. 60789 and C.R. 60790;

    (e) Whether the plaintiff has made out a case for the refund of the sums sought;

    (f) Whether the expert testimony is reliable and accurate;

    (g) Whether the plaintiff is entitled to an order directing the 1st defendant to remove its name from the Credit Reference Bureau and damages for listing with the Credit Reference Bureau.

(h) Whether the 1st defendant violated the provisions of the *Consumer Protection Act*, 2012.

33. It was the submission of the 1st defendant that the responsibility for the repayment of the loan facility advanced to the plaintiff lay squarely with the plaintiff; and that the Guarantee would only come into effect in the event of default and upon a 30-day demand notice being given. The 1st defendant urged the Court to note that while the Guarantee is dated 24th August 2010, the loan facility was approved on 3rd August 2010. The 1st defendant therefore submitted that its role was limited to transferring funds from the plaintiff's current account to the loan account.

34. The 1st defendant further submitted that it was a term of the facility that the interest rate was variable; and therefore the total sum payable by the plaintiff to the 1st defendant would also vary depending on the repayment pattern of the facility. Accordingly, the 1st defendant posited that the plaintiff would only have paid Kshs. 96,641,355/= if the facility was paid on time without late payments that would attract default interest, and if the Base Rate remained at 14.5% per annum for the entire term of the facility.

35. The 1st defendant relied on National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd [2002] 2 EA 503 and Shah v Guilders International Bank Ltd [2002] 1 EA 269 for the proposition that a court of law cannot rewrite a contract between the parties; and that where the rate of interest has been agreed upon by the parties, the court is obliged to enforce the agreed rate unless it is illegal, unconscionable or fraudulent.

36. On whether the 1st defendant could charge late fees, reference was made to page 17 of the Letter of Offer dated 3rd August 2010 to demonstrate that an additional charge of 1% per month in addition to the normal rate of interest was provided for in the event of default. The 1st defendant pointed out that, whilst the Letter of Offer did not contain a repayment date, the first instalment was due one month from the date of disbursement of the loan. In the same vein, subsequent instalments would be payable on the same date of disbursement.

37. The 1st defendant therefore contended that failure to pay the instalments on the 25th day of the month would attract late payment charges. It pointed out that there were several instances when the instalments were not paid in time; and therefore it was justified in levying late payment penalties. In particular, the 1st defendant singled out the months of February and August 2013, December 2014 and May 2015 as some of the months in which delays were witnessed.

38. Regarding the two Certificates of Title allegedly handed over to the 1st defendant as security, the 1st defendant submitted that no evidence was led by the plaintiff to demonstrate this allegation. The 1st defendant pointed out that the email communication exhibited at page 107 of the plaintiff's Bundle of Documents does not state specifically which Titles were deposited and in relation to which facility. The 1st defendant urged the Court to rely on the list of titles furnished by it at page 37 of its Bundle of Documents; which list does not include the Titles in question. The 1st defendant therefore urged for the dismissal of the plaintiff's prayers in connection with the two Titles, No. C.R. 60789 and 60790.

39. On whether the plaintiff has made out a case for the refund of the sums allegedly wrongfully debited from the loan account, the 1st defendant submitted that the claim is premised on an Amortization Schedule whose authenticity is in question. It also pointed out the sums were calculated on the basis of a false assumption that the interest rate was invariable; and that no late payments were chargeable. In addition, the 1st defendant explained that the plaintiff's auditors erred by treating "payments received", "principal repayment" and "interest repayment" as separate and distinct payments into the plaintiff's loan account.

40. In the submission of the 1st defendant, the issue of whether the plaintiff overpaid the loan facility is not of a technical or scientific nature as to require an expert or to disqualify Sally Ooko (DW1) being an employee of the 1st defendant working in the Credit Risk Department from testifying in the matter. The 1st defendant relied on Stephen Kirimi Wang'ondu v The Ark Ltd [2016] eKLR and Oriental Commercial Bank Ltd v Kenya Hotel Ltd [2021] eKLR for the proposition that expert testimony is not foolproof.

41. On whether the plaintiff is entitled to an order directing the 1st defendant to remove its name from the CRB and damages for such listing, the 1st defendant submitted that it is required by law to furnish the CRB on a monthly basis with details of patterns of payment of credit facilities or default in payment by its customers. It therefore submitted that the plaintiff needed to demonstrate that the listing complained of was in respect of the subject loan facility; which was not done. The 1st defendant relied on Section 31(5)(f) of the *Banking Act* (Cap 488) and the case of Rupa Cotton Mills (EPZ) Ltd & 2 others v Bank of Baroda (Kenya) Ltd [2012] eKLR as to the whole purpose of CRB listing.

42. Lastly, the 1st defendant made submissions in connection with the allegation that it violated the provisions of the *Consumer Protection Act*. According to the 1st defendant, the plaintiff failed to plead with specificity in its Amended Plaint the alleged violations or when the alleged violations took place. It also pointed out that the Act came into force on 14th March 2013 long after the subject loan was advanced to the plaintiff; and therefore that the Act cannot be said to apply retrospectively to the lending between the plaintiff and the 1st defendant. In this regard, reliance was placed by the 1st defendant on Municipality of Mombasa v Nyali Limited [1963] EA 371 and Commissioner of Income Tax v Pan African Paper Mills [E.A.) Limited [2018] eKLR in urging the Court to find that the *Consumer Protection Act* was not intended to have retrospective application. Accordingly, the 1st defendant urged for the dismissal of the suit with costs.

43. The 2nd defendant relied on its written submissions dated 31st January 2024. Its contention was essentially that no claim whatsoever arises from the Agreement dated 27th May 2010 against it and that nowhere in the Plaint has any complaint been raised against it. It submitted that the plaintiff's pleadings as framed do not establish a cause of action against it. It made reference to Attorney General & another v Andrew Maina Githinji & another [2016] eKLR and Letang v Cooper [1964] 2 All ER 929 for the definition of a "cause of action". It also referred to Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR and Jones v National Coal Board [1957] 2 QB 55 for the submission that parties are bound by their pleadings.

44. The 2nd defendant also made submissions on the doctrine of privity of contract and posited that the plaintiff lacks locus standi to sue it on the basis of the loan agreement or the alleged overcharge committed by the 1st defendant. It relied on Savings & Loans (K) Ltd v Kanyenje Karangaita Gakombe & another [2015] eKLR, Agricultural Finance Corporation v Lendetia Ltd and Kenindia Assurance Co. Ltd v Otiende [1991] KLR 38. On that account the 2nd defendant prayed for the dismissal of the suit against it with costs.

45. The Court has given careful consideration to the pleadings and the evidence adduced by the parties in support thereof. Due attention has also been given to the written submissions filed herein by the parties. It is common ground that the plaintiff was a longtime client of the 1st defendant and that, over time, the 1st plaintiff had opened and was operating several accounts with the 1st defendant. The particulars of the various accounts were supplied as hereunder:

Account Number	Purpose of Account	
1	1000696877	Term Loan Account
2	1-0000-02271	Main (Mother) Account
3	4-100-001274 CLI	Money DR from Main Account to Loan Account
4	1001946637	Asset Finance Loan
5	1002006107	Insurance Premium Loan
6	1001936367	Loan Account
7	1001936367	Asset Finance Loan
8	1002866567	Take on Account
9	1001602434	Take on Account

46.

(46) It is not in dispute therefore that vide an agreement for sale dated 27th May 2010, the plaintiff sold its property, namely Plot No. 4811/VI/MN to the 2nd defendant for a consideration of Kshs. 165,000,000/=. The 2nd defendant made a down payment of Kshs. 60,000,000, leaving a balance of Kshs. 105,500,000/= which was to be paid by instalments of Kshs. 1,765,000/= per month from September 2010. The entire purchase price was to be paid over a period of 60 months. Both the plaintiff and the 2nd defendant were in agreement that the purchase price was duly and timeously paid.

47. The plaintiff and the 1st defendant were also in agreement that at around the same time, the plaintiff applied for a term loan facility from the 1st defendant in the sum of Kshs. 86,000,000/=. The 1st defendant considered the request and approved it in the sum of Kshs. 70,000,000/=, to be repaid over a period of 5 years (60 months) at the rate of Kshs. 1,610,689.25 per month. The point of departure is the assertion by the plaintiff that, whereas it was supposed to pay only Kshs. 96,641,335/= at the end of the 60 months, inclusive of interest, the 1st defendant ended up debiting its loan account to the tune of Kshs. 154,053,165.70.

48. Therefore, the plaintiff contended that it had overpaid the loan by some Kshs. 57,401,810.70 which it now seeks to recover. The plaintiff also accused the 1st defendant of holding onto its title documents without any justifiable cause, an accusation which the 1st defendant denied. The plaintiff also complained that, at the instance of the 1st defendant, it was wrongfully listed by CRB as a defaulter.

49. In the premises, the issues for consideration herein are as follows:

(a) Whether there was an overpayment in the loan account and if so, by how much?

(b) Whether the 1st defendant is holding the original certificates of title No. CR. 60789 and CR. No. 60790.

(c) Whether the 1st defendant is liable for the plaintiff's listing at the CRB.

(d) Whether the plaintiff is entitled to the reliefs sought in the Amended Plaint dated 28th June, 2021.

A. On Overpayment of the Term Loan Facility:

50. The plaintiff's evidence was that the loan facility was obtained on the basis of the sale agreement between him and the 2nd defendant; such that it was agreed that the instalment payments made by the 2nd defendant would be transferred, by way of a standing order, towards repayment of the loan. In the plaintiff's letter dated 27th May 2010 (exhibited at page 122 of the plaintiff's Bundle of Documents) by which the request to the 1st defendant for a loan of Kshs. 86,000,000/= was made, the plaintiff expressly indicated that:

> "The loan will be secured by a Banker's Guarantee by Ocean Freight (EA) Ltd Bankers of Kshs. 105m and who have purchased our property at Miritini at Kshs. 165.5m. The property we intent [sic] to develop (a) is next to the sold one and the Hotel is bordering the same property facing the Sea and Moi International Airport.
>
> The repayment will come from Ocean Freight (EA) Ltd Monthly at Kshs. 1,765,000/= and our other revenue sources not less than Kshs. 2.7m per month in total..."

51. Accordingly, the 2nd defendant's instalments were to be credited by the 1st defendant into the plaintiff's loan account No. 1-0000-02271. The plaintiff relied on the terms of the Facility Letter dated 3rd August 2010, exhibited at pages 1 to 10 of the Plaintiff's Bundle of Documents.

52. The Schedule to the Letter of Offer confirms that the purpose of the facility was:

> "To partly re-finance the payment guarantee issued to Mombasa Water Products Ltd by NICB on behalf of Oceanfreight (EA) Ltd amounting to Kshs. 105.5 million. The term loan is to be used for developing properties owned by the borrower for commercial purposes."

53. The parties were in agreement that the 1st defendant furnished a Guarantee No. GT03-101046 to the plaintiff in the sum of Kshs. 105.5 million. The said Guarantee is dated 24th August 2010 and was exhibited by the plaintiff at page 32 of its Bundle of Documents. It reads as follows in part:

> "...We NIC Bank Limited irrevocably and unconditionally guarantee to the seller to pay to the seller on demand, within 30 business days of reception of the demand. All monies which are now due or become due owing or incurred by the buyer to or in favour of the seller under the sale agreement whenever the buyer does not pay such amount when due.
>
> The total amount recoverable by the seller from NIC Bank Limited shall not exceed Kes 105,500,000.00 (Kenya Shillings One Hundred Five Million Five Hundred Only) but it is agreed that this amount shall be reduced by the monthly instalments stated below.
>
> Under the sale agreement the Principal amount claimable from NIC Bank Limited is to be reduced by Kes 1,765,000.00 (Kenya Shillings One Million Seven Hundred Sixty Five Thousand Only) monthly installment 10 business days after the date of the first monthly installment. Further reduction will take place 10 business days after each monthly installment date, if no event of default has occurred..."

54. In the premises, the 2nd defendant cannot be heard to say that it was not privy to the loan agreement between the plaintiff and the 1st defendant. Additionally, there is credible evidence herein to the effect that the term loan was also secured by a general indemnity by the 2nd defendant against the Guarantee of Kshs. 105,500,000/=; an irrevocable standing order dated 25th September 2010 by the 2nd defendant in addition to the irrevocable standing order supplied by the plaintiff dated 25th September 2010.

55. The evidence of PW1 that the 1st defendant also demanded for a cash cover collateral of Kshs. 105,500,000/= from the 2nd defendant for the Guarantee was also unrebutted. It is therefore my finding that the plaintiff has proved to the requisite standard that the sale agreement between it and the 2nd defendant was intertwined with the term loan facility that the 1st defendant offered to the plaintiff for purposes of the plaintiff's commitments for repayment. Thus, the plaintiff's assertion that the 1st defendant was to credit the term loan account with monies deposited monthly by the 2nd defendant is unassailable.

56. I therefore find merit in the plaintiff's contention that, the mandate given to the 1st defendant as supported by the terms of the Letter of Offer, created a principal/agent relationship between the plaintiff and the 1st defendant. It was expected that the 1st defendant would carry out the exact instructions of the plaintiff as far as crediting the term loan account with the repayment instalments of Kshs. 1,610,689.25 as received from the 2nd defendant. Had the 1st defendant carried out its mandate diligently, the burden on the plaintiff, by way of interest, would not have exceeded the plaintiff's expectations.

57. The 1st defendant through DW1 did explain that the plaintiff's standing order could only be honoured if the account was in funds. This is of course true; and therefore the question to pose is, why the account was not in funds, yet in the evidence of DW2, the instalments towards the purchase price were all paid timeously. This anomaly points to some element of negligence on the part of the 1st defendant. Indeed, in one of the 2nd defendant's letters to the plaintiff dated 16th September 2016 (at page 105 of the plaintiff's Bundle of Document), the 2nd defendant acknowledged that:

> " ...In our records, in February 2013 the bank did not debit our account however two debits were done in April 2013, on 8th April 2013...and on 25th April 2012 effectively taking care of February 2013..."

58. Under those circumstances, it is unjustified for the 1st defendant to penalize the plaintiff for its own inaction. In National Bank of Commerce Ltd v Nabro Ltd & another [2008] 1 EA 432

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

59. Therefore, there is merit in the plaintiff's assertion that the 1st defendant not only breached its clients' instructions by failing to remit the agreed amount to the loan account in time, but also proceeded to load unwarranted interest and penalty charges on the plaintiff's account on the basis of its omissions.

60. Also uncontroverted is the evidence of PW1 that, although the last instalment payment of Kshs. 1,365,000/= was credited into the plaintiff's account on 25th August 2015, it was thereafter inexplicably reversed by the 1st defendant on 28th August 2015, creating a 'NIL' effect in terms of the loan repayment for no apparent reason. PW1 also adduced uncontroverted evidence to prove that on 29th April 2014, the 1st defendant dishonoured a cheque issued by the plaintiff for Kshs. 300,000/= in the ordinary course of business, contending that there were insufficient funds in the account, yet the said account was in funds at the time to the tune of Kshs. 2,300,000/=.

61. Further to the foregoing, the plaintiff relied on the expert evidence of Thomas Odero Arucho (PW2), an auditor with the firm of Irungu Macharia Associates. PW2 testified that he carried out an audit of the plaintiff's accounts to ascertain the status thereof. His finding was that the 1st defendant over-deducted monies from the plaintiff's account to the tune of Kshs. 57,660,596.11 which ought to be refunded by the 1st defendant. PW2 prepared his report which he produced as the Plaintiff's Exhibit 53. The report is at pages 187 to 216 of the plaintiff's Bundle of Documents.

62. Although DW1 attempted to impugn the evidence of PW2 contending that it was based on a false premise, DW1 conceded that there were four occasions when the repayment instalments were delayed. She did not endeavor to explain the delays and therefore, granted the lapses aforementioned on the part of the 1st defendant, it is my considered view that those delays were attributable to the 1st defendant's negligence. Moreover, any assertion by the 1st defendant that the audit report was misguided ought to have been made, not on the basis of its partisan employee such as DW1, but on the evidence of another expert. In Stephen Kinini Wang'ondu v The Ark Limited [2016] eKLR, it was pointed out that:

> "...Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, providing; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.
>
> While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account.

63. Taking into account all the foregoing, it is my finding that the plaintiff has proved on a balance of probabilities that the 1st defendant unjustifiably and unlawfully deducted Kshs. 57,401,810.70 from its account; and that the plaintiff is accordingly entitled to a refund thereof.

B. On whether the 1st defendant is holding the original certificates of title No. CR. 60789 and CR. No. 60790:

64. The case of the plaintiff was that sometime in May 2015, the plaintiff visited the 1st defendant's office with a view of taking further facilities. He offered the two titles as security and handed them to one of the 1st defendant's managers, Mr. Ellie Mwamburi, for purposes of verification. However, the said manager sent an email to the plaintiff indicating that the same could not be considered after they had received Kshs. 10,000,000/= from one of the plaintiff's debtors, namely Mawingo Construction 2010 Ltd.

65. According to the plaintiff, the 1st defendant promised to commence the process of verification and that it was on that basis that the titles remained with the 1st defendant's manager. The plaintiff further

testified that, on the 18th May 2015, the 1st defendant sent one of its staff, Mr. Antony Kiiru to visit its businesses to verify how they were performing so as to determine the amount which could be released to the plaintiff. According to the plaintiff, no such loan funds were ever released by the 1st defendant.

66. The 1st defendant denied that it is holding the titles and therefore the burden of proof was on the plaintiff to demonstrate that it handed over the subject Title documents to the 1st defendant as security. No tangible document, say by way of a Charge, was presented. The plaintiff opted to rely on the email communication exhibited at page 107 of the plaintiff's Bundle of Documents. However, as was pointed out by the 1st defendant, that email does not state specifically which Titles were deposited and in relation to which facility. The 1st defendant also demonstrated that, over time, it received various Title documents from the plaintiff. It presented a list of such Titles at page 37 of its Bundle of Documents. The two Titles in issue herein, namely, No. C.R. 60789 and 60790 are not in that list.

67. It appears there is no document to show that a formal loan application was made in respect of which the titles were called for and supplied as security. The plaintiff opted to leave the titles in an informal arrangement with one of the officers of the 1st defendant and therefore has no valid basis for holding the 1st defendant to account. It is also noteworthy that the evidence in connection with the titles involved third parties who are not parties to this suit. It is therefore my finding that this aspect of the plaintiff's claim is totally unwarranted

C. Whether the 1st defendant is liable for the plaintiff's listing at the CRB.

68. I have also considered the plaintiff's contention that the 1st defendant of unprocedurally reported it to the Credit Reference Bureau (CRB) on account of the of the alleged late charges. The plaintiff testified that this action by the 1st defendant had adversely affected its real estate development business and integrity. Accordingly, the plaintiff sought to be compensated by way of general damages for having been wrongfully listed in the CRB database and for failure to remove the listing after demands were made for such removal.

69. On its part, the 1st testified that it is required by law to furnish the CRB with monthly reports containing details of patterns of payment of credit facilities or default in payment by its customers. It therefore submitted that the plaintiff needed to go further and demonstrate that the listing complained of was in respect of the subject loan facility; which was not done. The 1st defendant relied on Section 31(5)(f) of the *Banking Act* (Cap 488) and the case of Rupa Cotton Mills (EPZ) Ltd & 2 others v Bank of Baroda (Kenya) Ltd [2012] eKLR as to the whole purpose of CRB listing.

70. Section 31(5)(f) of the *Banking Act* states:

> "No duty to which the Central Bank, Kenya Deposit Insurance Corporation, a credit reference bureau, an institution licensed under this Act, or the *Microfinance Act* (Cap. 493C) or institutions licensed under the *Sacco Societies Act* (Cap. 490B) institutions registered under the *Co-operative Societies Act* (Cap. 490), public utility companies and any institution mandated to share credit information under any written law or their respective officers may be subject, shall be breached by reason of the disclosure, in good faith, of any information under subsection (2), ..."

71. In the circumstances, I find the defence proffered by the 1st defendant to be plausible. There is therefore no merit in this aspect of the plaintiff's case.

D. Whether the plaintiff is entitled to the reliefs sought in the Amended Plaint dated 28th June, 2021:

72. In the light of the foregoing, it is my finding that the plaintiff is entitled to a refund of Kshs. 57,401,810.70 which was unlawfully debited from the plaintiff's loan account by the 1st defendant. The plaintiff claimed for interest on that sum at commercial rates from 1st July 2015 when the loan account was to be closed.

73. In principle, the Court has the discretion to award pre-judgment and even pre-suit interest if this is warranted. Section 26(1) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, is explicit that:

> " where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

74. The rationale for the above provision was well explained in the case of Lata v Mbiyu [1965] EA 592 that an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money or specific goods through act of a defendant. Hence, in Dipak Emporium v Bond's Clothing [1973] EA 553, it was held that:

> " The court's right to award interest is based on Section 26(1) of the *Civil Procedure Act* which states that where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of payment or to such earlier date as the court thinks fit ... Where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment."

75. And in Francis Joseph Kamau Ichatha vs. Housing Finance Company of Kenya Limited [2015] eKLR, Odunga, J. (as he then was) had occasion to summarize the three instances provided for in Section 26(2) of the *Civil Procedure Act* in which interest is awardable thus:

(a) Interest adjudged on the principal sum from any period prior to the institution of the suit. Here the court must first decide on the evidence, the question of awardability of this interest and then on the rate at which it is to be awarded if any;

(b) Interest on the principal sum adjudged from the date of filing the suit to the date of the decree, where, the court decides at its discretion, the rate of interest to be awarded; and

(c) Interest on the aggregate sum so adjudged from the date of decree to date of payment in full.

(76) There is no gainsaying therefore that pre-action or pre-judgment interest have to be pleaded and justification shown for awardability during the trial for the Court to have some basis for

making such an award. This was the holding in the case of Sempra Metals Ltd v Inland Revenue Commissioners and Another [2007] 3 WLR 354 in which it was held that:

> "In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will here, as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge."

76. Similarly, in Kawoko Estate Coffee Factory Limited v Zassa Civil Appeal No. 32 of 1969 UR the court was of the view that undue delay in bringing an action may be a good ground for refusing interest on money wrongly withheld, and that failure to prosecute a suit with diligence might well have the same result; and therefore that the trial court would be best placed to consider all these matters in exercising its discretion in respect of the interest payable.

77. I therefore take the view that no justification has been made for an award of interest from the year 2015 yet no justification was made by the plaintiff as to why it took it time till 2019 to file the instant suit. Moreover, in this instance, the overpayment required proof and was not ascertained until the date hereof. It is therefore my finding that the plaintiff is only entitled to interest from the date of this judgment. In the same vein, the other prayers sought by the plaintiff were unwarranted and are therefore untenable and are all declined.

78. In the result, judgment is hereby entered for the plaintiff against the 1st defendant as follows:

    (a) That a refund of Kshs. 57,401,810.70 which was unlawfully debited in the plaintiff's loan account by the 1st defendant be made by the 1st defendant to the plaintiff.

    (b) That interest on the aforesaid sum be paid by the 1st defendant at court rates from the date of this judgment until payment in full.

    (c) Costs of the suit to be paid by the 1st defendant to the plaintiff.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF MAY 2025.

OLGA SEWE

JUDGE