



**Shamia v Letshego Kenya Limited (Commercial Case E002 of 2024)  
[2025] KEHC 8578 (KLR) (13 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8578 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
COMMERCIAL CASE E002 OF 2024**

**AC BETT, J  
JUNE 13, 2025**

**BETWEEN**

**HILLARY MBALILWA SHAMIA ..... PLAINTIFF**

**AND**

**LETSHEGO KENYA LIMITED ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff instituted this suit vide a Complaint dated 9<sup>th</sup> April, 2024 seeking the following reliefs:
  - i. A permanent injunction restraining the Defendant whether by itself, officers, directors and/or its agents or whomsoever is acting on its behalf from selling, advertising for sale, transferring and/or dealing with Title No. Isukha/Shitoto/1704, in any manner.
  - ii. An Order be issued directing the Defendant to render accounts to the Plaintiff on loan account and repayments made.
  - iii. General damages
  - iv. Any other or further order this honourable court may deem fit to grant in the circumstances
  - v. Costs of this suit.
2. Accompanying the Complaint was an application dated 09.04.2024 which was however compromised on 23.05.2025, in terms that the status quo be maintained in that no sale would be conducted pending determination of this matter. Directions were taken that the matter do proceed by way of case stated and the parties were also directed to file their respective documents, a statement of issues for determination and written submissions.



3. In a nutshell, the Plaintiff was advanced a loan of Kshs 14,000,000/= which was secured by a Charge registered against the title of all that property known as Title No. Isukha/Shitoto/1704.
4. It is apparent that the Plaintiff fell into arrears whereupon the Defendant set in motion steps to exercise its statutory power of sale.
5. The Plaintiff contests this, asserting that the requisite statutory notices were never served upon him as required by law. The Plaintiff also avers that the Defendant never disbursed the entire loan amount, in the first place, but also charged fees and interests that were neither provided for in the letter of offer nor in the charge document.

### **Issues for Determination**

6. In view of the parties' pleadings, statement of issues evidence and submissions, this court construes the following issues for determination:
  - i. Whether the Plaintiff was in default of his obligations under the Letter of Offer and the attendant Charge instrument;
  - ii. If the answer to the foregoing is in the affirmative, whether the Plaintiff was served with the requisite statutory notices prior to the Defendant's attempt to exercise its statutory power of sale;
  - iii. Whether the Defendant levied fees, interest and/or charges that were not contractually provided for; and
  - iv. What reliefs ought to issue in the circumstances of this case?

### **Analysis and Determination**

#### **Whether the Plaintiff was in default of his obligations under the letter of offer and the attendant Charge instrument**

7. The Plaintiff averred that he has been making payments towards settlement of the loan facility but his endeavors have been frustrated by inconsistent charges, levies and interest charged by the Defendant.
8. It is evident from the Letter of Offer that the loan facility extended to the Plaintiff was repayable in 48 monthly instalments of Ksh. 478,125.79/= according to Clauses E & H) of the Letter of Offer dated 24.10.2022.
9. The letter of offer, clause 7, thereof, further indicated that the Plaintiff would inter-alia be deemed to be in default if, he was in breach of any of his obligations for more than 15 days.
10. From the loan statement submitted in evidence, it is evident that the Plaintiff made only five payments/credits on his loan account during the period between 25.11.2022 and 04.02.2024 against at least fourteen expected monthly instalments.
11. It cannot thus be gainsaid that as at 11<sup>th</sup> September, 2023, when the Defendant is said to have issued a ninety-day statutory notice pursuant to the provisions of section 90 of the *Land Act*, the Plaintiff was in default. The Chargee's right to exercise its statutory power of sale had thus accrued.



**If the answer to the foregoing is in the affirmative, whether the Plaintiff was served with the requisite statutory notices prior to the Defendant’s attempt to exercise its statutory power of sale**

12. Flowing from the finding above, this court is now obliged to consider whether the Chargee, the Defendant herein, complied with the dictates of the law in its quest to exercise its statutory power sale.
13. The Court appreciates that the law imposes an obligation on a Chargee intending to exercise its statutory power of sale to issue the following notices:
  - i. A ninety (90) day statutory notice as prescribed under Section 90 (1), (2) and (3) of the Land Act, 2012.
  - ii. A forty (40) day statutory notice as per Section 96 (2) and (3) of the Land Act, 2012.
  - iii. A forty-five (45) day redemption notice under the Auctioneers Act.
14. Moreover, Section 97 (1) and (2) of the Land Act, 2012 requires a Chargee to conduct a forced sale valuation of the subject property. This matter was not however pleaded and inasmuch as the Plaintiff raised it in his submissions, the Court will not delve into it as it would be prejudicial to the Defendant.
15. In determining so, the court is guided by the established rule that parties are bound by their pleadings. See the decision of the Supreme Court in *Raila Amolo Odinga & Another vs. IEBC & 2 others* [2017] eKLR where it was held:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”
16. Back to the statutory notices, the Defendant avers that it duly served the aforementioned notices. Notably, the Defendant asserts that it duly served the Plaintiff as follows:
  - i. The 90-day statutory notice dated 11.09.2023 served via registered post as evidenced by the Certificate of Postage dated 23.11.2023.
  - ii. The 40-day statutory notice dated 30.01.2024 served via registered post as indicated in the postage receipt.
  - iii. The 45-day redemption notice equally was served by way of registered post.
17. The Plaintiff disputes this, asserting that the notices were all served via email only on 12<sup>th</sup> March, 2024 and at the same time in a bid to limit his equity of redemption.
18. Looking at the Charge document and the Letter of Offer (Clauses 30.5 & 14, thereof; respectively), service upon the Chargor by way of registered post through his known postal address was acknowledged by the parties as one of the means of effecting service of any notice.
19. Noteworthy, the Plaintiff has not disputed ownership of the postal address cited in the Charge document nor has he submitted any evidence controverting the Defendant’s contention that he was duly served by way of registered post.



20. The court has perused the Defendant's documents and is satisfied that service of the requisite statutory notices was indeed effected upon the Plaintiff.
21. The court also notes the explanation tendered by the Defendant regarding the email sent to the Plaintiff on 12.03.2024 and observes that the fact that all the notices were attached to the said email does not in itself negate or take away the fact that the Plaintiff had in fact been previously duly served in the prescribed manner.
22. In the circumstances, this court finds that based on the material placed before it, it is evident that the Plaintiff was duly served with the requisite statutory notices.

**Whether the Defendant levied fees, interest and/or charges that were not contractually provided for**

23. In this regard, the Plaintiff asserted that the Defendant levied the following fees and/or charges that were not contractual:
  - i. Ad hoc fee on November 25, 2022-Kshs 137,817/=
  - ii. BPRD INT on December 4, 2022 - Kshs 98,767.12/=
  - iii. Demand and receipt of Kshs 577,000/= on January 4, 2023
  - iv. Capitalized interest on January 4, 2023- Kshs 305,580.53/=
  - v. Capitalized interest on February 4, 2023- Kshs 295,787.73/=
  - vi. Capitalized interest on March 4, 2023- Kshs 264,071.02/=
  - vii. Capitalized interest on April 4, 2023- Kshs 292,364.35/=
  - viii. Capitalized interest on May 4, 2023- Kshs 282,933.24/=
24. The court thus has to grapple with the issue as to whether the aforesaid fees, interest and charges were warranted. In this regard, it must be remembered that one of the Plaintiff's complaints was that Kshs 13,311.038/= only, was disbursed against an expected amount of Kshs 14,000,000/=. This according to the Plaintiff, constituted a breach of the contract entered between the parties.
25. The court however notes that according to the loan statement the amount indicated to have been disbursed to the Plaintiff was Kshs 13,511,183/=:, only. The figure submitted by the Plaintiff is however not supported by any evidence. As such, the court will rely on the loan statement that the figure actually disbursed was Kshs 13,511,183/= as opposed to Kshs 13,311,038/=:.
26. Needless to state, this disbursement is less than the secured loan amount of Kshs 14,000,000/=: . In explaining this discrepancy, the Defendant averred that various deductions in terms of processing fees, adhoc fees, credit life insurance, RTGS disbursement fees and security perfection fees were part of the costs incidental to the loan facility.
27. In this regard, the court gleans from the letter of offer, clause F thereof, that a processing fee was chargeable at the rate of 2.5% of the loan facility being advanced. Moreover, clause 13 of the Letter of Offer clearly provided that the borrower would pay the Defendant, on demand, all reasonable costs, charges and expenses incurred on the account failing which the Defendant would debit the borrower's account with such costs, charges and expenses. The costs in fact includes legal expenses.



28. Having voluntarily signed the Letter of Offer and thus committing himself to abide by its terms, the Plaintiff cannot be heard claiming that the such costs, charges, fees and/or expenses were not warranted.
29. This is not however to say that the Defendant is at liberty to lump all manner of charges and expenses on the Plaintiff's account.
30. As a matter of law, Section 44 of the [Banking Act](#) provides:
- “No institution shall increase its rate of banking or other charges except with the prior approval of the Minister.”
31. Whereas the Defendant was authorized under clause 3.2 of the Letter of Offer to vary the interest rate payable from time to time, this court finds that such right is not unfettered. See the decision of the court in Trustees of Maximum Miracle Centre v Equity Bank (K) Limited (Civil Case E055 of 2021) [2021] KEHC 237 (KLR) (Commercial and Tax) (11 November 2021) (Ruling).
32. Back to the matter at hand, the Plaintiff avers that the Defendant charged what was termed as capitalized interest without contractual backing. Per clause 3.2 aforesaid, the Defendant is entitled to interest payable monthly in arrears, which interest would be compounded in the event of delay. That is the essence of capitalized interest for capitalization entails adding accrued interest on a principal amount that had already attracted interest earlier on.
33. Clause 3.1.3 of the Charge on the land provides:
- “That the Chargee shall in its sole discretion determine the rate or rates and methods of calculating the interest applicable from time to time...”
34. Clause 3.1.5 reinforces this position as it stipulates that the Chargee shall not be required to seek the consent of Chargor or other principal debtor while exercising such discretion.
35. In Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR, the Court of Appeal held:
- “...It is not for the Court to rewrite a contract for the parties. As this Court held in National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999 “a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.”
- Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case.” (See Black's Law Dictionary, 9th Edition, Gardner, Ed.).
36. While the provisions of the Letter of Offer and Charge cited above are objectionable perhaps bordering on unconscionable given the spirit espoused in the decision of the Court of Appeal in Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited (supra), this court is at loss as to how to rationalize them in the instant case.



37. I say so noting that whereas the Plaintiff asserts that the Defendant levied interest and charges that were not due, he failed to provide a clear tabulation of what he considered was the right rate and method of calculating interest in the circumstances of this case. Perhaps had the Plaintiff submitted a report by a financial expert in this regard, the court would have been better placed to pass judgment in this regard.
38. Unfortunately, all the Plaintiff did was allege that the interest charged by the Defendant was not contractual. The court cannot now descend into the arena of conflict and purport to play the role of an accountant in a bid to ascertain the rightful interest chargeable in the circumstances of the case.
39. Moreover, no material was also placed before this court to enable it to interrogate whether the interest charged was in compliance with the dictates of Section 44 of the Banking Act.
40. In the circumstances, this Court is left with no choice but find that the Plaintiff failed to prove that the interest charged by the Defendant were not contractual and/or was otherwise levied in violation of the provisions of Section 44 of the Banking Act which restricts financial institutions from varying interest rates without prior ministerial approval.

**What reliefs ought to issue in the circumstances of this case?**

41. Going by the findings expressed above, this suit must fail. The prayer for a permanent injunction restraining the Defendant from inter alia, selling the property is untenable. Similarly, the prayer for rendering accounts cannot issue for the reasons cited above and also on account of non-compliance with the provisions of Order 20 Rules 1 & 3 of the Civil Procedure Rules which provide:-

“1. Order for accounts [Order 20, rule 1]

Where a plaintiff prays for an account, or where the relief sought or the plaintiff involves the taking of an account, if the defendant either fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is some preliminary question to be tried, an order for the proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made.”

“3. Procedure [Order 20, rule 3]

An application for such order as is mentioned in rule 1 and 2 shall be made by chamber summons and be supported by an affidavit when necessary filed on behalf of the plaintiff stating concisely the grounds of his claim to an account; and such application may be made at any time after the time for entering an appearance has expired.”

42. Ultimately, this suit lacks merit and is hereby dismissed with costs to the Defendant.

43. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 13<sup>TH</sup> DAY OF JUNE 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

Ms. Atieno holding brief for Mr. K'Oceyo for the Plaintiff



Ms. Misiko for the Defendant

Court Assistant: Polycap

HC. Commercial Case No. E002/2024 – Judgement Page 4 of 4

