



**Mire v Spire Bank Limited (Formerly Equitorial Commercial Bank Limited) & another (Commercial Suit 309 of 2016)
[2025] KEHC 10780 (KLR) (Commercial and Tax) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10780 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT 309 OF 2016**

**NW SIFUNA, J
JULY 24, 2025**

BETWEEN

BIRE HUSSEIN MIRE PLAINTIFF

AND

SPIRE BANK LIMITED (FORMERLY EQUITORIAL COMMERCIAL BANK LIMITED) 1ST DEFENDANT

REGENT AUCTIONEERS 2ND DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit through a plaint dated 29th July 2016. His case is that he is the registered proprietor of the property known as Land Reference 209/15360 (the suit property). The 1st Defendant agreed to advance to Bear Afric (Kenya) Limited (“Bear Afric”) Ksh 12,600,000= through a credit facility letter dated 10th February 2014. The loan was secured by a charge dated 16th January 2014 over the suit property.
2. The Plaintiff avers that it was a term of the performance bond that the amount shall not exceed that which was agreed and executed as a legal charge and the facility letter.
3. The Plaintiff also avers that on 21st August 2015, he demanded the release and discharge of the original title document and discharge of the performance bond. However, the 1st Defendant refused to release the title and or render the true statement of account without any justifiable cause.
4. The Plaintiff claims that through an advertisement in the Daily Nation of 18th July 2016, the Defendants advertised the suit property for sale purportedly in exercise of its statutory power of sale.



5. The Plaintiff also claims that the legal charge secured Ksh. 12,600,000/- and not the alleged Ksh 143,825,228/60 that the Defendants intend to arbitrarily dispossess him of the suit property based on the alleged amount of Ksh 143,825,228/60 and that the 1st Defendant's actions are illegal, malicious and unlawful.
6. Through letters dated 21st October 2015 and 20th January 2016 to the Plaintiff, the 1st Defendant revised the terms and conditions of the performance bond, where it purported to capitalise the interest and introduce a sum of Ksh 143,825,228/60.
7. The 1st Defendant's statement of account does not reflect the true account bearing in mind the performance bond was executed on 10th February 2014 whereas the statement provided runs from 12th August 2011.
8. The Plaintiff asserts that the 1st Defendant is obliged to give the Plaintiff true, correct, regular, periodic or monetary statement of account in respect to the Plaintiff's account without any notice or demand by the Plaintiff. He contends that however, the 1st Defendant failed to correct erroneous entries, illegal entries, unlawful entries made on the Plaintiff's account even after being notified.
9. The Plaintiff claims that the 1st Defendant inserted ambiguous and imprecise clauses in the Legal Charge, Performance Bond and guarantee entitling it to:
 - a. Unilaterally levy and increase interest and other charges despite clear provisions of the law, and
 - b. Claim unlawful, oppressive, unconscionable interest and other charges from the Plaintiff thereby fraudulently misrepresenting the entire advance to the Plaintiff with a view of unjustly enriching itself.
10. The Plaintiff therefore prays for entry of judgment against the 1st and 2nd Defendants jointly for:
 - a. The Defendants whether by themselves, agents, servants, employees or otherwise howsoever be restrained from advertising, offering for sale, auctioning, selling, leasing, transferring, alienating and/ or otherwise dealing with the Plaintiff's property known as LR No. 209/15360.
 - b. The 1st Defendant be directed to render and deliver to the Plaintiff true and correct accounts and the entire statements of accounts of the Plaintiff account operated by the 1st Defendant for the performance bond.
 - c. A declaration that the Plaintiff's liability to the 1st Defendant under the performance bond has been settled in full.
 - d. The 1st Defendant be directed to execute and deliver to the Plaintiff a discharge of charge on property known as LR No. 209/15360.
 - e. The 1st Defendant be directed to deliver to the Plaintiff the original title document of the property LR No. 209/15360 duly discharged.
 - f. Costs of the suit together with interest thereon for such period and such rate as the court may deem appropriate.



Defence

11. The 1st and 2nd Defendants filed a statement of defence dated 29th July 2016. Their case is that there was an advance to Bear Afric for a credit facility letter dated 10th February 2014 and the Plaintiff accepted the terms as the director of Bear Afric.
12. Under the facility letter Bear Afric was to receive credit facilities in the principal amounts of USD 843,055.00 and a term loan for Ksh. 3,500,000.00. The purpose was to enable Bear Afric to finance the importation of 75MMS ACSR conductors in accordance with the contract dated 26th November 2017 between it and the Rural Electrification Authority.
13. It was a condition precedent that the directors of Bear Afric, the Plaintiff and Lorenzo Kodzo Makonnen, would give personal guarantees for the principal amounts of USD 843,055.00 and a term loan for Ksh. 3,500,000.00. The Plaintiff issued the guarantee but failed to settle the sum guaranteed to date.
14. A legal charge over the suit property was prepared and perfected. The Plaintiff's claim for the release of the title and discharge of charge is contrary to the terms of the charge.
15. The 1st Defendant paid for the costs of importation of the conductors being:
 - a. USD 663,000 paid to Tonga-Da Cable Limited as costs of the conductors.
 - b. Import duty taxes amounting to Ksh 29,963,865=
 - c. Clearing charges and transportation costs totalling to Ksh 18,817,602=.
 - d. Transit Insurance Charges of Ksh 652,965=.
 - e. Container Freight Station (CFS) charges of Ksh 3,301,754=
16. The total amount owed and/ or due and payable to the 1st Defendant by the Plaintiff and the borrower is Ksh 143,749,828/60 as at 21st June 2016 further to interest accruing at the rate of 32.5% per annum until payment in full, tabulated as follows:



Particulars/ Details	Amount(ksh.)
Loan disbursed	3,500,000
LC amount USD 663,000@103.45	68,587,350
LC Commissions	830,265.10
Clearing Agent fees and transport charges	18,817,602
KRA taxes	29,963,865
CFS charges	3,301,754
Legal charges	1,331,850
Transit insurance	652,965
Bank interest and charges	16,764,177.50
Total	143,749,828.60

17. The 1st Defendant denied that the Plaintiff fully repaid the amount owed. It averred it demanded payment of the outstanding sum due through service of the statutory notice dated 21st October 2015 and the 40 days' notice dated 1st April 2016. It also averred that it served the statutory notice upon the Plaintiff in compliance with the charge and the law and that the 2nd Defendant served the Plaintiff with the subsequent notice in compliance with the law. It highlighted that the Plaintiff has not denied service.
18. The 1st Defendant disputed that the consent in *HCCC 361 of 2015* discharged the Plaintiff's liability. It denied the allegations and particulars of fraud, misrepresentation and illegality.
19. The 1st Defendant contended that the suit is vexatious, frivolous and an abuse of the process of the court for the subject matter is the subject of other proceedings before the court in *HCCC 361 Of 2015, Equatorial Commercial Bank Limited v Bear Afric (k) Limited And Nairobi Elc 722 Of 2016; Saido Sugule Duale & Nima Abdi Adan v Equatorial Commercial Bank Limited, Bear Afric Limited, Bire Hussein Mire & Peter M. Gachie, T/a Regent Auctioneers*.
20. The Defendants prayed for:
- Dismissal of the Plaintiff's suit with costs.
 - A declaration that the Plaintiff's suit, as filed herein, is an abuse of the court process.
 - An order directing the Plaintiff not to file any further suit on the subject matter pending determination of the other related suits.

Evidence

21. The Plaintiff was the sole witness in his case. He adopted his witness statement, similar to the plaint, dated 29th July 2016, as his evidence. He also produced the primary and further list and bundle of



- documents dated 29th July 2016 and 17th January 2023, marked as P. Exb 1-56. He urged the court to allow his claim with costs and that the original title documents to the suit property be released.
22. Upon cross-examination, the Plaintiff confirmed that he is a director of Bear Afric; that Bear Afric had a contract to supply a consignment of containers and that Bear Afric required a performance bond.
 23. The Plaintiff stated that he only offered the suit property as security for a consignment of containers. He, however, confirmed that he signed the credit facility letter. He also confirmed that he offered the suit property as security. He confirmed that the charge bore his name and signature. He indicated that he did not know the conditions therein. He also indicated that he does not know how to read and write in English. Yet, he acknowledged that the documents he produced were all in English and do not bear a Certificate of Translation.
 24. The Plaintiff acknowledged receipt of the bank statement running from 2011. He also acknowledged receipt of the statutory notice of sale. He confirmed that the notice bore the same postal address on the charge.
 25. In re-examination, the Plaintiff restated that the suit property was to secure Ksh 12,600,000/-. He stated that he did not know whether the company took any loan from the bank. He also stated that the amount secured by the charge has since been paid. He indicated that the postal address on the statutory notice and the charge are not his.
 26. The 1st Defendant called Mercy Mwobobia, a debt recovery manager at Equity Bank. She stated that she was testifying in the case as the bank is an agent of Spire Bank as it bought some of its assets. The sale was gazetted in the Kenya Gazette Notice No. 660 of 27th January 2023.
 27. Ms Mwobobia adopted her witness statement dated 14th February 2018, filed on 18th February 2018, as her evidence in chief. She also produced the 1st Defendant's list and bundle documents dated 19th April 2017, marked as D.Exb 1-10.
 28. Upon cross-examination, Ms Mwobobia, was firm that the credit facility of Ksh 12,600,000= was issued to Bear Afric; that under Clause 6 of the letter of offer, the condition for the issuance of the facility was that the loan would be secured by a charge over Land Reference No. 209/15360 (Original No. 209/14214/64); and that the charge secured Ksh. 12,600,000/-.
 29. Ms Mwobobia confirmed that Spire Bank issued the Plaintiff with the statutory notice dated 21st October 2015 demanding for Ksh 143,749,828/60; the title of the notice was in respect of Land Reference No. 209/15360 (Original No. 209/14214/64); and that this was the same property referred to in the credit facility letter.
 30. Ms Mwobobia confirmed that the same facility was the subject of *HCCC 361 of 2015*, instituted by Bear Afric against the 1st Defendant; that there was a consent which led to some sums being deposited in a joint account in the names of the parties' advocates; that the amount was in relation to what was owing and it was partial payment only.
 31. In re-examination, Ms Mwobobia clarified that the consent in *HCCC 361 of 2015* did not settle the entire suit but an application in the suit; that the payment was partial and did not settle the outstanding amount at the time; that the amount in the statutory notice is more than the initial loan because it includes interest and other costs and that there were two facilities in the dispute; the performance bond of USD 843,055,000 and a term loan of Ksh. 3.5 Million.



The Submissions by Parties.

32. The Plaintiff filed written submissions dated 17th July 2024. He submitted that he has proven that the debt secured by the suit property has been fully repaid. He also submitted that any debt owing to the Defendants was fully repaid when the Defendant entered into consent with the other parties in *HCCC 361 of 2015* where the same performance bond which was partially secured by the suit property was the issue in dispute. Therefore, the Plaintiff asserted that the charge ought to be discharged.
33. The Plaintiff relied on:
- a. [*Kenya Commercial Bank Ltd v Joseph Njoro Kabechu*](#) [2017] eKLR.
 - b. [*Rajnikantkhetshi Shah v Habib Bank A. G. Zurich*](#) [2016] eKLR.
 - c. [*David Gitome Kihuguka v Equity Bank Limited*](#) [2013] eKLR.
 - d. [*DGM v EWG*](#) [2021] eKLR.
34. The Defendants filed written submissions dated 19th June 2024. They submitted that the Plaintiff's case lacks merit. They urged the court to dismiss the suit with costs.
35. The Defendants relied on *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334 to assert that the burden of proof rests with the Plaintiff. They relied on [*NN v ZZ & Ord*](#) [2013] EWHC 2261 (Fam) (26 July 2013) to argue that the suit is fatally defective due to the Plaintiff's failure to provide an affidavit or statement in Somali, yet he lacks proficiency in English.
36. The Defendants submitted that there is a valid charge of the property; that the charge operated under the principle of continuing security and that the Plaintiff has not proved that an injunction should issue against them. They relied on [*Nguruman Ltd v Jan Bonde Nielsen & 2 others*](#), CA No. 77 of 2012, [*Mrao Ltd v First American Bank of Kenya Ltd*](#) [2003] KLR 125, [*Robert Njoka Muthara & Another v Barclays Bank of Kenya Limited & Another*](#) [2017] eKLR, [*Kitbo Civil and Engineering Company Limited v National Bank of Kenya*](#) [2021] eKLR. See also [*Halsbury's Laws of England*](#) vol. 32, 4th Edition page 752.

Analysis and Determination

37. I have considered the pleadings, the evidence, the submissions and the authorities by the respective parties. The issue for determination is whether the Plaintiff has proved its claim.

Certificate of Translation

38. Before addressing the substantive issue, I will consider whether the suit is fatally defective due to the Plaintiff's failure to provide an affidavit or statement in Somali accompanied by a certificate of translation, given that he lacks proficiency in English. The 1st Defendant relied on the persuasive decision in [*NN v ZZ & Ord*](#) [2013] EWHC 2261 (Fam) (26 July 2013) by the High Court of England and Wales.
39. During the trial, the Plaintiff's counsel indicated that the Plaintiff does not understand English. He therefore testified orally with the assistance of a court-appointed translator. In my view, the Plaintiff demonstrated understanding of the matters pleaded and affirmed the contents of his witness statement and the documents produced.



40. Article 159(2)(d) enjoins the Court to administer justice without undue regard to procedural technicalities. I do not think that the Plaintiffs' failure to file the certificate of translation has caused any prejudice to the Defendants.
41. Thus, I find that the absence of a certificate of translation in respect of the verifying affidavit and witness statement filed is not fatal to the Plaintiff's claim.

Fraud, Misrepresentation and Illegality

42. The Plaintiff's claim against the 1st and 2nd Defendants is for fraud, misrepresentation and illegality.
43. Fraud is defined in *Black's Law Dictionary*, 2nd Ed. as follows:
- “Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other.”
44. Fraud is quasi-criminal and has a burden of proof slightly higher than an ordinary civil claim, which is proved on a balance of probabilities, but lower than the standard in a criminal case of beyond a reasonable doubt. See *R. G. Patel v Lalji Makanji* [1957] EA 314.
45. In *vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, the Court observed as follows that:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
46. According to the *Merriam Webster Dictionary*, to misrepresent is to give a false or misleading representation of usually with an intent to deceive or be unfair. Contractual misrepresentation may be classified as fraudulent, negligent or innocent misrepresentation. An illegality is that which is not according to or authorized by law.
47. The particulars of the fraud, misrepresentation and illegality are as follows:
- a. Failing to render true and correct statement of account of the promissory note.
 - b. Failing to keep the Plaintiff's account which the debts and credits are entered.
 - c. Failing to disclose that by an order dated 18th December 2015 the 1st Defendant was put in funds of USD 1,061,000.
 - d. Failing to reflect amount received pursuant to the order of the court and to regularize the account.
 - e. Failing to levy interest in terms of the *Banking Act*.
 - f. Failing to give true value of the property.
 - g. Purporting to issue a statutory notice of sale while all the secured amounts were settled.



- h. Acting contrary to the *Banking Act*.

Whether the Plaintiff's liability was capped at Ksh 12,600,000=

48. The Plaintiff contended that his liability in relation to the performance bond was strictly capped at Ksh 12,600,000=. On the other hand, the Defendant argued that the charge operated under the principle of continuing security.
49. During trial, the Plaintiff admitted that he signed the credit facility letter dated 10th February 2014. The letter provides that the 1st Defendant provided credit facilities in the principal amount of USD 843,055 and Ksh 3,500,000=. The letter also provides that interest rate on the term loan is 20% and the default past due rate of 28.5%. It further provides for the commissions and arrangement fees.
50. I note that during trial, the Plaintiff admitted that he agreed to charge the suit property to Spire Bank as security for the bond. The charge secured the principal amount of Ksh 12,600,000=. However, the charge was a continuing security.
51. Clause 12 of the Charge reads as follows:
- “This charge being a continuing security, the Bank may make further advances and give credit to the Chargor and/ or the Borrower on a current or continuing account and such further advances shall, in accordance with section 82 of the *Land Act*, 2012, rank in priority to any subsequent charge of the Premises. Such further advances shall be secured hereunder as if they had formed part of the original principal sums secured herein and shall be subject to all the terms and conditions hereof save the further advances shall bear interest at such rate or rates and be repayable in such manner as may be separately agreed upon between the Bank and the Chargor.”
52. The above shows that the charge was a continuing security and the bank could give further advances on the Plaintiff's current account.
53. Clauses 1(a) and 3 of the Charge read as follows:
- “(a) No payment by the Chargor and/ or the Borrower to the Bank shall be treated as being a payment on account of the principal unless all interest due or deemed to be due or accrued has been paid.”
- (3) The amount secured by the Charge shall be the aggregate of the principal amount, all interest from time to time due and payable to the Bank and all costs, taxes, liabilities, obligations, charges and expenses incurred by the Bank from time to time in relation to the charge.”
54. In the credit facility letter dated 10th February 2014, produced by the Plaintiff, it is indicated that Equitorial Commercial Bank agreed to grant Beari Afric a letter of credit of USD 749,520.00 and a performance bond of USD 93,535 (Ksh 843,055=) and a term loan of Ksh 3,500,000=.
55. The 1st Defendant averred that it paid the following amounts:
- USD 663,000.00 paid to Tonga-Da Cable Limited as costs of the conductors.
 - Import duty taxes amounting to Ksh 29,963,865=.
 - Clearing charges and transportation costs totalling to Ksh 18,817,602=.



- d. Transit Insurance Charges of Ksh 652,965=.
- e. Container Freight Station (CFS) charges of Ksh 3,301,754=.

56. The 1st Defendant also averred that the total amount owed and/ or due and payable to the 1st Defendant by the Plaintiff and the borrower is Ksh 143,749,828/60 as at 21st June 2016 further to interest accruing at the rate of 32.5% per annum until payment in full, tabulated as follows:

Particulars/ Details	Amount (ksh)
Loan disbursed	3,500,000
LC amount USD 663,000@103.45	68,587,350
LC Commissions	830,265/10
Clearing Agent fees and transport charges	18,817,602
KRA taxes	29,963,865
CFS charges	3,301,754
Legal charges	1,331,850
Transit insurance	652,965
Bank interest and charges	16,764,177/50
TOTAL	143,749,828/60

- 57. The 1st Defendant produced evidence of payment of the amounts. It also produced the bank account statement. The Plaintiff did not controvert the aforementioned.
- 58. Thus, the contention that the amount was capped at Ksh 12,600,000= fails. Similarly, the claims of fraud and misrepresentation fail for want of proof.

Whether the Consent Dated 18th December 2015 in HCCC 361 of 2015 fully settled the performance bond

- 59. The Plaintiff submitted that the parties entered into the subject consent to have USD 1,061,000 paid to the Defendant and that the same debt for which the suit property secured.
- 60. The 1st Defendant countered that the Plaintiff cannot be discharged. It highlighted that the sum of USD 1,061,000, which the court directed be deposited in an escrow account is equivalent to approximately Ksh 100,000,000=. Which falls short of the outstanding debt of Ksh 143,749,828/60.
- 61. The Plaintiff produced a copy of the consent dated 18th December 2015 in *HCCC 361 of 2015*. The suit was between Equitorial Commercial Bank and the Rural Electrification Authority and Bear Afric (K) Limited. The consent states that the Plaintiff's suit against the 1st Defendant was marked settled on the condition that the 1st Defendant shall deposit USD 1,061,000 into a joint account of counsels for the Plaintiff and the 2nd Defendant.



62. The USD \$1,061,000 would have been approximately Ksh 108,613,960= as of 18th December 2015. The 1st Defendant claims a debt of Ksh 143,749,828/60. Therefore, there is a shortfall. Thus, the Plaintiff's claim that the performance bond was fully settled by the amount deposited pursuant to the consent is not proven.
63. The Plaintiff submitted that the charge ought to be discharged. However, there was no other proof of payment of the amount that was presented.

Statement of Account and Interest

64. The Plaintiff claimed that the 1st Defendant failed to provide a true and correct statement of account. He also claimed that the 1st Defendant charged interest contrary to the *Banking Act*.
65. According to the charge, the interest was 20% and the default rate is 28.5%. However, the 1st Defendant also indicated that the total amount owed by the borrower is Ksh 143,749,828/60 with interest at 32.5% per annum with effect from 30th April 2016. The 1st Defendant claims interest of Ksh 16,764,177/50.
66. In *Stanbic Bank of Kenya Limited v Santowels Limited* (Petition No. E005 of 2023), the Supreme Court of Kenya held that banks are required to seek the approval of the Cabinet Secretary responsible for matters relating to finance before increasing interest rates on loans advanced.
67. The 1st Defendant did not provide any evidence that it obtained the requisite approval before increasing the interest rate to 32.5%. Therefore, I find that the agreed interest of 28.5% is applicable.
68. The 1st Defendant produced the statutory notices dated 21st October 2015 and 1st April 2016 together with certificates of postage. However, due to the above finding, the 1st Defendant shall issue fresh statutory notices reflective of the accurate arrears with the agreed interest applied.
69. Banks are also required to comply with the in duplum rule. In *Housing Finance Company of Kenya Limited v Scholarstica Nyaguthii Muturi & another* [2020] KECA 833 (KLR), the Court of Appeal observed as follows:

“As we have shown section 44A of the *Banking Act* came into force on the 1st May, 2007. That provision of law sets up the maximum amount of money a banking institution that grants a loan to a borrower may recover on the original loan. The banking institution is limited in what it may recover from a debtor with respect to a non performing loan and the maximum recoverable amount is defined as follows in section 44A(2):

“The maximum amount referred in subsection (1) is the sum of the following –

- a) The principal owing when the loan becomes non performing;
- b) Interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non performing; and
- c) Expenses incurred in the recovery of any amounts owed by the debtor.”

By that provision if a loan becomes non performing and the debtor resumes payment on the loan and then the loan becomes non performing again the limitation under the said paragraphs shall be determined with respect to the time the loan last became non performing. In addition, by section 44A (6) it is provided:



“This section shall apply with respect to loans made before this section comes into operation, including loans that have become non-performing before this section comes into operation.”

That is to say that the provision applies to loans and has retrospective effect.”
James Muniu Mucheru v National Bank of Kenya Limited [2019] eKLR.

Final Disposition

70. In the end, this Court finds that the Plaintiff’s claim is partially successful to the extent that the 1st Defendant increased interest contrary to the [Banking Act](#). Consequently, it is hereby ordered as follows:
- a. The 1st Defendant to within 60 days from the date of this judgment, render a true and accurate statement of account with the particulars of the debits made and the rate of interest charged, date when the loan became non-performing, the amount of the principal when the loan became non-performing and the total interest charged.
 - b. The 1st Defendant to issue fresh statutory notices reflective of the accurate arrears with the agreed interest applied.
 - c. For reason of the Plaintiff’s suit having succeeded partially, each party shall its own costs.

DATED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JULY 2025.

PROF (DR) NIXON SIFUNA

JUDGE

