



**Kenya Commercial Bank Limited v Orapa & another (Civil Suit E336 of 2023)  
[2025] KEHC 12949 (KLR) (Commercial and Tax) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12949 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E336 OF 2023  
H NAMISI, J  
SEPTEMBER 19, 2025**

**BETWEEN**

**KENYA COMMERCIAL BANK LIMITED ..... PLAINTIFF**

**AND**

**JOHN MOSES ORAPA ..... 1<sup>ST</sup> DEFENDANT**

**SALOME SAFO MWAURA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit seeking judgement against the Defendant, jointly and severally, for a sum of Kshs 13,023,170.44 along with interest at 19% per annum from 30 June 2024 until payment in full, as well as costs of the suit.
2. In 2010, the Defendants approached the Plaintiff, seeking a mortgage loan to enable them acquire a property known as LR No. 330270, House No. 1 situated in Nairobi County. The Plaintiff advanced them a facility of Kshs 22,050,000/=, which was to be repaid within 15 years through monthly instalments of Kshs 282,868/=. The Defendants defaulted on their repayment obligations after making approximately 15 monthly instalments. Following the default, the Plaintiff proceeded to exercise its statutory power of sale. The property was valued and subsequently sold by way of public auction on 25 April 2014 for Kshs 20 million. The Plaintiff alleges that after applying the sale proceeds, an outstanding balance of Kshs 13,023,170.44 remained due. It is this amount that the Plaintiff seeks to recover.

**The Plaintiff's Case**

3. PW1, Nancy Gaitho, is a Credit Manager at the Plaintiff Bank. She adopted her witness statement dated 14 October 2024 and produced a bundle of documents, Plaintiff's exhibits 1 to 13. It was the



PW1's testimony that since the loan was advanced to the Defendants, the Defendants made repayments amounting to Kshs 4,469,202/=. Thereafter, the Defendants defaulted and the loan fell into arrears. The Plaintiff issued several demand letters between 2011 and 2012. All the while, the Defendants continued in their default. Eventually, the Plaintiff issued a statutory notice of its intention to exercise its statutory power of sale. A statutory notice dated 10 July 2012, indicates that the outstanding amount at the time was Kshs 19,772,175.50.

4. PW1 testified that on 15 January 2013, Auctioneers issued the requisite notification of sale to the Defendants, following the valuation done by Zenith Management Valuers Ltd. The property was advertised and subsequently sold by way of public auction on 25 April 2014 for a sum of Kshs 20,050,000/-. The sale proceeds were applied to the loan balance but were not sufficient to fully redeem the same, leaving a shortfall of Kshs 13,023,170.44. The Plaintiff issued a demand letter dated 14 July 2014 for the outstanding balance.
5. Later, on re-examination, PW1 testified that the amount owed to the Plaintiff prior to the sale was approximately Kshs 33 million. Following the sale, the Plaintiff did not inform the Defendants about the proceeds. The only communication to the Defendants was vide letter dated 17 July 2014 from the Plaintiff's lawyers.
6. On cross examination, PW1 confirmed that the Plaintiff had instituted proceedings earlier in 2014, which suit was dismissed. He confirmed that once a mortgaged property is sold at an auction, the proceeds are applied to the loan to cover the principal sum and interest. According to PW1, the outstanding loan amount prior to the public auction was Kshs 27 million, thus leaving a balance of Kshs 7 million. However, he could not explain how the figure accrued to Kshs 13 million in the span of one year.

### **The Defendants' Case**

7. DW1, the 1st Defendant, adopted his witness statement dated 6 October 2023 and produced documents, marked as Exhibits 1 to 13. He confirmed that the Plaintiff sold their house, but from the statements, he could not see where the money was apportioned. DW1 stated that he did not receive any letters from a law firm concerning the proceeds of the sale.
8. On cross examination, DW1 confirmed that he had received the notices from the Plaintiff prior to the public auction. The property was sold at Kshs 20 million. The loan balance as at 2013 was Kshs 29,220,059/=:, and the balance after the sale was Kshs 9 million. He further confirmed that he did not pay any of the costs attendant to the sale.

### **Analysis & Determination**

9. I have carefully considered the pleadings, the evidence and the submissions by counsel for the parties. The issue of res judicata having been determined in a Ruling delivered on 30 April 2024, I will not revisit the same. In the premise, the following issues lend themselves for determination by this Court:
  - i. Whether the suit is statute barred by the *Limitation of Actions Act*;
  - ii. Whether the Plaintiff has proved its case against the Defendants on a balance of probabilities;
  - iii. Who should bear costs of the suit.
10. In his Amended Defence, the 1<sup>st</sup> Defendant has raised the defence of limitation of time. The Plaintiff's claim is founded on a contract for a loan facility that was executed in 2010. In the Plaintiff's claim, the cause of action arose on 30 June 2014, the date from which the Plaintiff claims interest on the outstanding loan



sum. The demand letter seeking the outstanding balance is dated 17 July 2014. The suit was filed on 28 July 2023, approximately 9 years after the cause of action accrued. During cross examination, PW1 admitted that 9 years had lapsed between the 2014 suit that was dismissed and the present suit that was filed in 2023. She was unaware if any extension of time had been sought or granted.

11. Section 4(1)(a) of the *Limitation of Actions Act* provides that actions founded on contract may not be brought after the end of 6 years from the date on which the cause of action arose. By virtue of this provision, this suit is well outside the 6-year statutory period.
12. In *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] KECA 152 (KLR), the Court of Appeal reaffirmed that the 6-year limitation period for contract-based claims is absolute and cannot be extended. It stated:

“It is common ground that the cause of action in this matter was based on contract and that section 4 of the *Limitation of Actions Act* prohibits suits filed after the end of six years from the date on which the cause of action accrued. As Potter, JA observed in the case of *Gathoni vs Kenya Cooperative Creameries Limited* (Civil Application No. 122 of 1981):

“The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

It is also trite law that the period of limitation cannot be extended. If any authority is necessary, this Court in *Divecon vs Samani* (1995-1998) EA 48 stated as follows:-

“...to us, the meaning of the wording of section 4 (1) is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that „„the wording of section 4 (1) of the *Limitation of Actions Act* (Chapter 22) suggests a discretion that can be invoked??”

13. In *Bosire Ogero v Royal Media Services* [2015] KEHC 4728 (KLR), the Court stated thus:

“The law of limitation of actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them. The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a Matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over. See the case of *Pauline Wanjiru Thuo vs David Mutegi Njuru* CA 2778 of 1998.”



14. The Plaintiff has not pleaded any grounds for exemption or shown any acknowledgement of the debt by the Defendants that would reset the limitation clock under section 23(3) of the Act.
15. Further, in its Verifying Affidavit, the Plaintiff averred that “there is no other suit pending and that there have been no other previous proceedings in any Court between the Plaintiff and Defendants over the same subject matter.” This statement is evidently false, in light of the existence of HCCOM No. 569 of 2014, which was filed in 2014 and subsequently dismissed. PW1 admitted, under oath, that she was aware of the previous suit. She further admitted that she was unaware of the status of the appeal filed by the Plaintiff against the dismissal, nor did she present any evidence of its withdrawal or abandonment. Swearing a false Affidavit in a serious matter that strikes to the heart of the integrity of the judicial process.
16. This conduct aligns with what the Court of Appeal cautioned against in *Uhuru Highway Devt Ltd -vs- Central Bank of Kenya & 2 Others*, Civil Appeal Nai 140 of 1995, where it stated:

“A man who is prepared to deceive a Court into granting it an order cannot validly claim that he has a meritorious case and would have been entitled to the order any way. If the case is meritorious, there can be no reason for concealing some parts of it from the Court.”
17. Similarly, in *Madara Evans Okanga Dondo v Housing Finance Company of Kenya* [2005] KEHC 506 (KLR), the Court, in striking out the suit, observed that:

“In the instance case, apart from concealing material facts from this court in order to obtain interim orders of injunction from this court, the plaintiff made false averments in his plaint to the effect that no suit existed or ever existed between the plaintiff and the defendant over the same subject matter of the suit. The plaintiff swore a false verifying affidavit that the averments made in the plaint was true and correct.”
18. The Plaintiff deliberately concealed the existence of prior proceedings. The act of initiating fresh proceedings on substantially the same issues while an appeal concerning a previous dismissal of those issues is still active, and simultaneously failing to disclose these facts, is a clear abuse of judicial process. The lack of candour demonstrates that the Plaintiff has approached the seat of justice with unclean hands. For this reason, too, the suit is liable for dismissal.
19. For the foregoing reasons, this Court finds that the Plaintiff’s suit is fatally incompetent. The same is hereby dismissed, with costs to the Defendants.

**DATED AND DELIVERED AT NAIROBI THIS 19 DAY OF SEPTEMBER 2025**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For Plaintiff: Mr. Chebon

For 1st Defendant: Mr. Were

For 2nd Defendant: Ms. Muma

Court Assistant: Lucy Mwangi

