National Bank of Kenya Limited v Langat (Civil Case 955 of 2002)
[2025] KEHC 12953 (KLR) (Commercial and Tax) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12953 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 955 OF 2002

F GIKONYO, J

SEPTEMBER 18, 2025

BETWEEN

NATIONAL BANK OF KENYA LIMITED ..... PLAINTIFF

AND

PAUL KIPKETER LANGAT ..... DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit through a plaint dated 25th July 2002, seeking entry of judgment against the defendant for:-
    a. Kshs 37,805,080.40/-.
    b. Interest on (a) above at the rate of 29% per annum on monthly rates calculable on daily balances from 1st June 2002 until payment in full.
    c. Costs of the suit and interest.
2. The background is that between August 1995 and February 1996, the plaintiff granted the defendant, at his request, overdraft facilities in the sum of Kshs. 8,000,000/- to purchase the Four Seasons Hotel in Mombasa.
3. The facility was repayable on demand, and the plaintiff was empowered to recall the facility without notice. Interest payable was 28% per annum with monthly rates calculated on daily outstanding balances. The plaintiff could vary the rate of interest without notice to the defendant. A commitment or appraisal fee of 2% was to be charged upfront.

4. The facility was to be secured by a legal charge for Kshs. 10,000,000/- drawn and registered in favour of the plaintiff over L.R. No. 1/697, Kilimani, Nairobi (the charged property). The mortgage was duly registered at the Government Lands Registry on 16th August 1996.

5. In exercise of its statutory right of sale, the plaintiff sold the mortgaged property for Kshs. 7,100,000/-, credited to the defendant's overdraft account, leaving a balance of Kshs. 37,805,080.40 as at 31st May 2002. The balance continues to attract interest at 29% per annum from 1st June 2002 until payment in full.

6. In admission of his indebtedness and in partial satisfaction, the defendant made various appeals and proposals to the plaintiff and made some payments which were accepted on account and without prejudice to the plaintiff's rights.

7. The defendant filed Nairobi Milimani HCCC No. 169 of 2001 against the plaintiff to challenge its statutory power to sell the mortgaged property. The suit has now been overtaken by events.

Response

8. The defendant filed a defence and counterclaim dated 28th May 2003. The defendant admitted that it obtained the overdraft facility, but claimed that only Kshs. 5,000,000/- and Kshs. 3,000,000/-, respectively, were disbursed on diverse dates. He denied that Florence Chelangat Lang'at signed the mortgage. He also denied owing Kshs. 37,805,080/- and claimed that the amount is grossly inflated.

9. The defendant asserted that he repaid to the plaintiff the sum claimed together with interest and that there is no sum due. That the entire sum due was repaid through deposits made by him and through the auction of his property in exercise of the plaintiff's statutory power of sale.

10. The defendant contended that there was an undue and unconscionable delay by the plaintiff to timeously exercise its rights under the mortgage and as a consequence, interest continued to accrue on the loan account to his prejudice. That the plaintiff sold the charged property in bad faith at an undervalue of Kshs. 7,000,000/- while the property was valued at Kshs. 13,000,000/- before improvements. That the defendant made several improvements, including but not limited to a carbro paved driveway, a garage, a luxurious self-contained guestwing and a steel gate perimeter wall and internal renovations. That at the time of the sale, the property was increased to Kshs. 16,000,000/-.

11. The defendant claimed that the plaintiff breached its duty to render a complete, true and accurate statements of account. That the plaintiff failed to credit any of the payments made or the proceeds from the sale. That the plaintiff wrongfully and illegally consolidated the defendant's account with Toloch Enterprises Limited's account, which had already been repaid and discharged. That the plaintiff applied exorbitant, harsh, unconscionable and oppressive interest rates on his loan account. That the plaintiff has levied illegal penalties and charges on his loan account contradictory to the *Banking Act*.

12. The defendant denied that he had admitted the sums due and stated that the all alleged admissions were negotiations that led to the oral agreement made on 11th January 2002 to the effect that in consideration of him not challenging the statutory sale by public auction, the plaintiff would accept the proceeds of sale in full and final satisfaction and discharge the debt owing.

13. The defendant claimed that due to the plaintiff's failure to obtain the best possible price, he has suffered both general and special damages. Accordingly, he urged the court to dismiss the plaintiff's suit with costs and allow his counterclaim for:-

    a. Special and general damages.

b. Interest on (a) above at the rate of 18% from the date of the suit until payment in full.

c. Costs of the suit.

Reply

14. The plaintiff joined issue with the defendant on his defence and counterclaim through the reply to defence and defence to counterclaim dated 16th December 2003. It averred that it acted diligently in the exercise of its statutory power of sale. That all sums paid by the defendant and the proceeds of sale have been received on account and credited to reduce the indebtedness. That the interest and other charges levied on the defendant's account are lawful, fair and contractual.

15. The plaintiff denied that; there was a consolidation of the defendant's and Toloch Enterprise's accounts; there was oral agreement of 11th January 2002 or that there was an agreement that the proceeds from the sale were to be in full and final settlement of the debt due.

16. The plaintiff urged the court to dismiss the defendant's defence and counterclaim and to enter judgment as claimed in the plaint.

Evidence

17. The suit was heard by Hon. M. Odero J. on 10th April 2019. The plaintiff called John Kibet Tarus (Mr. Tarus) as PW1. He adopted his witness statement dated 14th June 2018, similar to the plaint, as his evidence in chief. He produced the plaintiff's consolidated list and bundle of documents dated 22nd June 2018, filed on 11th July 2018, comprising of the plaintiff's lists and bundles of documents dated 24th May 2004, 2nd June 2004 and 10th September 2006.

18. Mr. Tarus stated that he was the plaintiff's projects manager, South C Branch. He was a loan recovery officer at the Kenyatta Avenue Branch from 1996 to 2001.

19. Mr. Tarus maintained that the property was sold at the proper forced sale value, not at a fraudulent undervalue. He mentioned that the interest rates applied to the facility ranged from 21% to 35%. That by letter dated 29th August 1995, the bank reserved the right to vary the rate of interest by giving notice.

20. Upon cross-examination, Mr. Tarus confirmed that the plaintiff intended to consolidate the defendant's accounts as per the letter of 12th December 1996. However, he maintained that the defendant's three accounts (Toloch Enterprises Ltd- Eldoret branch, Personal accounts- Eldoret and Kenyatta avenue branches), were not consolidated.

21. Mr. Tarus acknowledged that the defendant paid Kshs. 3,050,000/-. However, he denied knowledge that the plaintiff received Kshs. 9,300,000/- by cheques towards redeeming the defendant's indebtedness. He also denied knowledge of Kshs. 3,000,000/- payment by cheque in March 2015.

22. Mr. Tarus confirmed that in 1995, at the time of charging, the mortgage value of the suit property was Kshs. 13 Million. That the market value of a property is higher than its mortgage value. That properties in Nairobi, Kilimani area are generally expected to appreciate in value over time. That the bank had an obligation to get the best possible price. That the Kilimani property was sold at Kshs. 7,100,000/- in 2001. That in 2001, the market value of the property was Kshs. 9,000,000/- as per the advice of a professional valuer. That the pictures showed that no improvements had been made at all. That the bank did not deem it necessary to seek a second valuation of the property.

23. Mr. Tarus stated that the bank did not issue notices of variation of interest rates. That such notices were made publicly. That the applicable rates were based on those issued by the Central Bank of Kenya (CBK).

24. Mr. Tarus acknowledged that there were several meetings held between the defendant and the bank's chief executive officer. He stated that he did not attend the meetings and that he was not aware of what was discussed. However, he acknowledged that the defendant raised concerns about the validity of the interest rates.

25. In re-examination, Mr. Tarus clarified that the defendant's accounts remained separate, but the facilities on the accounts were consolidated.

26. The defendant called three witnesses, himself as DW1, Luka Kimutai Cheptoo (Mr. Cheptoo) as DW2 and Herbert Mwangi Kamau (Mr. Kamau) as DW3.

27. The defendant, Paul Kipketer Langat, DW1, adopted his witness statement, similar to the defence and counterclaim, filed on 10th April 2019. He also produced his list and bundle of documents dated 4th April 2019.

28. Upon cross-examination, Mr. Langat confirmed that the facilities were consolidated to a total of Kshs. 19,559,298.85. That he paid Kshs. 9,300,000/- towards offsetting the consolidated sum outstanding. That his lawyers undertook to pay the balance and did so. That he made a further payment of Kshs. 3,050,000/-. That the bank sold the charged property for Kshs. 7,100,000/-. That this fully discharged his obligation with the bank as agreed between him and the bank's the managing director, the late Marambii, the late Kilimithi and Mr. Kiptoo at a meeting held on 11th January 2002.

29. Mr. Lang'at admitted that the bank did not respond to his letter of 11th January 2002, to discharge him from his obligation.

30. Mr. Lang'at mentioned that at one meeting, the parties agreed to freeze interest rates after he complained that they were unlawful and exorbitant. However, he indicated that he had no documentary proof of this.

31. Mr. Lang'at confirmed that he had written to the bank regarding the challenges he had faced selling his properties at the coast due to depressed markets arising from the clashes at the time. He confirmed that the letters he wrote referred to the low property market in Kenya, but maintained that he was referring to the properties at the coast.

32. Mr. Cheptoo, DW2 adopted his witness statement filed on 24th April 2019 as his evidence. He stated that he was a former assistant general manager of the plaintiff during the period when the loans were advanced to the defendant. He confirmed that various meetings were held between him, the general manager then, Mr. Mureithi, the managing director, Mr. Marambii and the defendant.

33. Mr. Cheptoo confirmed that the then managing director confirmed and assured the defendant that once the Kilimani property (L.R. No. 1/697) was sold, he would be released from all his financial obligations with the bank and that the bank would not demand any further amounts from him.

34. Upon cross-examination, Mr. Cheptoo confirmed that he either had any written agreement or minutes to prove that there was a waiver granted or his attendance. He also acknowledged that the managing director was required to obtain approval from the board for a waiver.

35. Mr. Cheptoo indicated that he still received a pension from the bank and that there was no conflict of interest because he was telling the truth. He denied being promised anything for testifying.

36. Mr. Kamau, DW3 stated that he is a valuer. He produced the valuation report dated 9th April 2019. He stated that he valued the Kilimani property at Kshs. 16 Million; apportioned into Kshs. 10,000,000/- for the land and Kshs. 6,000,000/- for the developments. He also gave a forced sale value of Kshs. 12,000,000/-. He was given a write-up describing the property by the defendant.

37. Upon cross-examination, Mr. Kamau confirmed that he captured the prevailing economic status in 2001 in the report. He acknowledged the valuation report in respect of the Kilimani Property by Crystal Valuers, which concluded that the real estate in Kenya was directly depressed. He stated that he disagreed with that conclusion. However, he admitted that he did not comment on this in the report.

38. Mr. Kamau indicated that he did not make available the write-up which he relied on. He confirmed that he was not given copies of the title and deed plan to the property. He stated that he used the survey map to locate the property. He also stated that there was no house since it had been demolished. That therefore, he used contractor's approach.

Submissions

39. The plaintiff and the defendant filed written submissions dated 29th October 2021 and 30th April 2022, which I have carefully considered. I will refer to them from time to time in the analysis as necessary.

Analysis and Determination

40. The key issues for determination are whether the parties have proved their respective claims.

41. The undisputed facts of this case are that the defendant was granted a facility of Kshs. 8,000,000/- to purchase the Four Seasons Hotel Mombasa. There is also no dispute that the plaintiff registered a charge over the defendant's Kilimani property to secure the mortgage debt of Kshs. 10,000,000/-, interest thereon and recovery costs. And, that the charged property was sold at Kshs. 7,100,000 and the proceeds applied towards the repayment of the facility.

Consolidation of facilities

42. It is common ground that the defendant held two personal accounts at the plaintiff's Eldoret and Kenyatta Avenue branches, and a business account for Toloch Enterprises Ltd at the Eldoret branch. It is also not disputed that he took out various credit facilities through the accounts.

43. According to the plaintiff's letter dated 24th May 1996, as at 30th April 1996, the position of the defendant's accounts stood at Kshs. 19,559,298.85, broken down as follows:-

    Toloch Enterprises Ltd. (Eldoret) – Kshs. 9,404,510.65

    Personal Account (Eldoret) - Kshs. 1,658,037.10

    Personal Account (Kenyatta Avenue) – Kshs. 8,496,751

44. In the letter, the plaintiff recommended that the accounts be centralised in any of the two branches, whichever was convenient for the defendant for ease of monitoring.

45. The banks witness Mr. Tarus admitted that there was an amalgamation of the defendant's three facilities taken out under his three accounts.

46. Therefore, to my mind, the issue of consolidation of the facilities is not in contention. The issues in contention regard the interest rates charged on the consolidated debt and the outstanding loan amount.

Interest rates and outstanding loan amount

47. The plaintiff seeks payment of the balance of Kshs. 37,805,080.40 as at 31st May 2002.

48. The defendant asserted that the Kshs.37,805,080.40/-, claimed by the plaintiff does not represent complete, true and accurate record of his account at Kenyatta Avenue Branch. He claimed that he sold his house at Diani and the proceeds of Kshs. 9,300,000/- were forwarded to the plaintiff to offset the liability. That he also paid an additional amount of Kshs. 3,050,000/- through instalments. Further, that the bank sold the charged property for Kshs. 7,100,000/-. Therefore, his position is that at the time of filing this suit, a total of Kshs.22,450,000/- should have been credited to his account.

49. The defendant further claimed that at a meeting held between him and the plaintiff's managing director, Mr. Marambii, and officers, Mr. Cheptoo and Mr. Mureithi, whereupon he was granted a waiver on the outstanding loan balance remaining after the crediting of proceeds from the sale of the charged property.

50. The plaintiff acknowledged that the defendant paid Kshs. 3,050,000/-. It also acknowledged that it sold the charged property for Kshs. 7,100,000/- and applied the proceeds of sale towards offsetting the outstanding loan. However, it disputed the alleged waiver. It claimed that there was a shortfall of Kshs. 36,128,432.75 as at March 2002.

Was Kshs. 9,300,000 from the proceeds of the sale of the Diani House received?

51. The defendant claimed that he sold his Diani Property and forwarded the deposit sum of Kshs. 1,300,000/- to the Plaintiff on 20th January 1997 and Kshs. 8,000,000/- on or about August 1997.

52. The bank's witness, Mr. Tarus indicated that he was not aware of this that the plaintiff received Kshs. 9,300,000/- by cheques towards redeeming the defendant's indebtedness. He also denied awareness of the Kshs. 3,000,000/- payment by cheque in March 2015.

53. The defendant produced a copy of ABC Bank Limited cheque No. 011111 dated 20th January 1997, in the sum of Kshs. 1,300,000, drawn in favour of the plaintiff. He also produced a copy of ABC Bank Limited cheque No. 014338 dated 13th August 1997, in the sum of Kshs. 8,000,000, drawn in favour of the Plaintiff/ Toloch Enterprises.

54. The defendant did not produce any further supporting evidence to prove that the payments were received, either through his bank statement(s), payment receipts or an acknowledgement.

55. In the circumstances, the court finds that the defendant has failed to discharge its burden to prove that the plaintiff received the Kshs. 9,300,000/-.

Was Kshs. 3,000,000/- received from Musyoka & Wambua

56. The defendant further asserted that the plaintiff received an undertaking for the balance of the purchase price, being Kshs.3,500,000/-, which they enforced in Nairobi High Court Civil Case No. 687 of 2003 - National Bank of Kenya v Musyoka & Wambua Advocates.

57. The defendant exhibited a copy of the ruling dated 6th December 2013 in HCCC 687 of 2003 where the High Court ordered the defendant to pay monies due from its undertaking together with interest due.

58. The defendant also exhibited correspondence between the plaintiff's advocates and the advocates representing the firm of Musyoka & Wambua Advocates.

59. The letter dated 18th March 2014 from the plaintiff's advocates confirms that there was a consent judgment to the effect that the firm had to pay Kshs. 3,000,000/- by 31st January 2014, following which the entire decretal sum would be due.

60. On 19th March 2014, Prof. Musili Wambua wrote to Lumumba & Lumumba Advocates indicating that the decretal sum had been fully settled.

61. The letter dated 20th March 2014 from Lumumba & Lumumba Advocates to the plaintiff confirms that their client, Musyoka & Wambua Advocates, made the payment and requested a clearance letter from the Credit Reference Bureau for removal of their client from the list of defaulters.

62. The court finds it curious that the plaintiff's witness, Mr. Tarus claimed that he was unaware of the Kshs. 3,000,000 paid by Musyoka & Wambua Advocates. It is the plaintiff who commenced the matter through an originating summons to enforce the undertaking.

63. The record, including the ruling of 6th December 2013 and subsequent correspondence, clearly demonstrates that the plaintiff pursued and recovered the said sum. Therefore, the amount ought to be credited to the defendant's accounts.

Loan waiver

64. The plaintiff submitted that there was no evidence of a waiver. It also submitted that there was no conduct on its part that would have led the defendant to believe that there was a waiver.

65. The record contains a letter by the defendant dated 11th January, 2002 addressed to the plaintiff's managing director, Mr. Marambii captioned "Request for Discharge of Indebtedness On A/C No 021-087-XXX Kenyatta Avenue Branch". The defendant referred to the alleged meeting and thanked him for agreeing to discharge him from all indebtedness. He also stated that he looked forward to his confirmation.

66. At the trial, the defendant admitted that there was no documentary evidence of the alleged waiver or minutes of meetings. Mr. Cheptoo, who testified that there was an agreement for a waiver at the meeting, did not produce any written confirmation thereof. At cross-examination, he confirmed that there were no minutes for the alleged meeting and that there was no written agreement confirming that the plaintiff agreed to waive any outstanding loan amount. Therefore, his evidence is not substantiated.

67. Accordingly, I find that the defendant has not discharged his burden to prove that the defendant waived the outstanding loan after the sale of the charged property and application of the proceeds to offset part of the loan.

Was the charged property sold at a fraudulent undervalue?

68. The defendant submitted that the plaintiff breached its duty of care to obtain the best price reasonably obtainable at the time of sale of charged property. It complained that the bank sold the charged property at Kshs. 7,100,000 instead of Kshs. 12,000,000/-, which was, according to him, the forced sale value at the time of the sale.

69. The defendant's witness, Mr. Kamau, produced the valuation report dated 9th April 2019. According to him, at the time of the sale, the market value of the charged property was Kshs. 16,000,000/- and the forced sale value was Kshs. 12,000,000/-. However, this report was made several years after the sale of the suit property.

70. At cross-examination, Mr. Kamau admitted that his report was based on a write up given to him by the defendant. He also admitted that he had no evidence that the property was undervalued at the sale and that he only heard about that orally. He confirmed that he was aware of the report by Crystal Valuers commissioned by the plaintiff.

71. Crystal Valuers inspected the property on 15th December 2000. The report is dated 17th December 2000 and the market value of the property was said to be Kshs. 9,000,000/- and the forced sale value Kshs. 7,000,000/-. It noted that the real estate market was depressed due to the prevailing economic recession at the time.

72. Mr. Kamau was aware of the report by Crystal Valuers. He said that he disagreed with its conclusion that the market for real estate property was depressed at the time. Yet, Mr. Kamau in his report, did not comment on the report by Crystal Valuers or any of its conclusions. He also did not specifically mention the prevailing economic status in 2001.

73. At cross examination, the defendant's conceded that he had communicated that he was unable to sell his other properties located at the coast due to the depressed market.

74. There is nothing from Mr. Kamau which shakes the foundations of the report and conclusions by Crystal Valuers on the valuation undertaken on the property. All these pointing to undermine the defendant's proposition that the charged property was sold at a fraudulent undervalue.

75. The Court of Appeal in the case of Mbuthia v Jimba Credit Finance Corporation and another [1986-1989] EA 340; [1988] KLR 1 held that:-

> " A sale made at a fraudulent undervalue will be set aside. But the Court will not set aside a sale merely on the ground that it is disadvantageous, unless the price is so low as to be in itself evidence of fraud."

76. Accordingly, I find no merit in the defendant's counterclaim.

Variation of interest rates

77. The next issue is whether the plaintiff lawfully varied the interest rates.

Notice

78. The plaintiff submitted that the interest rates charged by the bank were not only contractual but also lawful. That the basis of the interest charged was the offer letter dated 29th August 1995, which states that interest is to be charged at a rate of 28% per annum (p.a.) on monthly rests calculated on daily balances with liberty to vary such rates upon notice.

79. The plaintiff argued that under the provisions of the charge, it had no obligation to notify the defendant of changes in the interest charged and that the provision prevailed over the offer letter.

80. The defendant insisted that it did not waive its right to a notice of variation of interest rate. He submitted that the plaintiff unlawfully effected different interest rate regimes ranging from 21% to 35% from 1995 to the year this suit was filed. He also submitted that the plaintiff had also unlawfully subjected the credit facility to penal interests that were harsh and oppressive.

81. The defendant relied on Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited [2014] eKLR, where the High Court recognised the importance of a lender giving a notice of variation of interest rate to the borrower.

82. Clause 1 (a) of the charge dated 10th January, 1996, provides in part that the plaintiff could charge "interest at a rate (not exceeding that allowed by the law) decided by the lender and calculated on daily balances and debited monthly by way of compound interest. No notice of any change in the rate of interest charged need be given to the borrower."

83. Where there is an inconsistency between a letter of offer and the charge, the charge usually prevails because it is the registered instrument. Rainbow Acres Limited v NCBA Bank Kenya PLC (Civil Suit 97 of 2014) [2023] KEHC 957 (KLR) (Commercial and Tax) (17 February 2023) (Judgment)

84. Therefore, I find that the Charge provided for change in the interest rate and no prior notice to the defendant was required. But, the discretion is circumscribed in law as per the jurisprudence below.

85. In Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR, the Court of Appeal observed that:-

> " Once interest is agreed upon, and an agreement is entered into which in effect gives a lender the discretion to vary the interest, it is our view that the discretion cannot be exercised willy nilly to charge exorbitant interest."

86. The Court of Appeal also found it:-

> " objectionable that the lender can vary interest to its benefit, without any recourse to or passing such information to the borrower, especially where such interest rises up to an exorbitant level."

87. The Supreme Court in Stanbic Bank Kenya Limited v Santowels Limited [2024] KESC 31 (KLR) quoted with approval the above holding and found that:-

> " 68 ....interest rates on loans/facilities are subject to the regulation under section 44 of the *Banking Act*. This means that while a contract that is mutually agreed by parties might provide the bank with the discretion to alter/vary interest rates on loans, that discretion is not absolute/unlimited due to the objective of bank regulation."
>
> 70 ...that such banks/financial institutions are required to seek the Cabinet Secretary's approval under section 44 of the *Banking Act* prior to increasing interest rates on loans and/or facilities advanced to its customers."

Were the interest rates that were applied lawful?

88. The plaintiff submitted that it charged interest rates provided in law and ratified by the Central Bank of Kenya (CBK). As per the letter of offer, the agreed interest rate was 28%. However, the charge provided that the interest rate was subject to variation by the plaintiff.

89. The plaintiff, thus, effected different interest rate regimes ranging from 21% to 35% from 1995 to 2002, when this suit was filed.

90. The defendant urged the court to issue an injunction to restrain the plaintiff from demanding the amounts based on the varied interest rates. He argued that the interest and the penalties were manifestly excessive.

91. The defendant highlighted that at the time of filing this suit, the plaintiff required him to have paid a total of Kshs. 60,255,080 plus further interest on the debt of Kshs. 37,805,080 at a rate of 29% per

annum on monthly rests calculable on daily balances from 1st June 2002 until payment in full. He argued that the difference between the amount he is expected to have paid at the time of filing this suit (Kshs. 60,255,080) and his total liability in 1996 (19,559,298.85) is huge, given that 1996 to 2002 is just 7 years. According to him, the foregoing clearly shows that the plaintiff inflated the loan balance, and the debt claimed is composed of illegal charges and interests.

92. The defendant also urged the court to declare the loan advanced to the defendant by the plaintiff as fully settled, as the interest rates applied by the plaintiff were excessive and unlawful.

93. As earlier noted, Clause 1 (a) of the charge dated 10th January, 1996, provides in part that the plaintiff could charge "interest at a rate (not exceeding that allowed by the law) decided by the lender and calculated on daily balances and debited monthly by way of compound interest."

94. The Court of Appeal in National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd [2002]2 EA 503 observed that:-

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

95. The plaintiff submitted that it charged interest rates provided in law and ratified by the Central Bank of Kenya (CBK). While the defendant disputed this, it did not provide evidence to prove that the varied interest rates applied were unlawful.

96. Therefore, I find that the defendant has not proved that the interest rates ranging from 21% to 35% applied by the plaintiff were unlawful.

Penalties

97. The defendant also contended that the plaintiff subjected the subject credit facilities to varying penal interest rates, which were harsh, oppressive and illegal. He asserted that this was without his consent.

98. Conversely, the plaintiff submitted that it apprised the defendant of the amount due and the interest charged at various points in time through correspondence issued to the defendant, reminding him to settle the debt.

99. The plaintiff contended that the defendant was aware of the interest and the penalty charged but did not challenge them. However, in the same breath, it pointed out that he asked for a reduction and/or waiver of the interests numerously.

100. Indeed, the evidence on the record is that by letters dated 19th May 1999 and 29th January, 2001, the defendant asked for waiver of interest and penalties.

101. The plaintiff highlighted that after it refused to waive the penalties and interests as requested, the defendant further requested a waiver through a letter dated 2nd January, 2001.

102. The plaintiff submitted that after this suit was filed, the defendant, through the Request for Particulars dated 9th June, 2003 sought clarification on, the interest and the penalties charged. The plaintiff replied vide Answer to Request for Particulars dated 30th September, 2004, giving detailed particulars of all the interests and penalties charged. The defendant never filed any pleading in protest of the Answer to Request for Particulars.

103. The plaintiff faulted the defendant for failing to raise his concerns at the earliest opportunity.

104. However, the plaintiff did not point to any clause in the letter of offer and the charge which allowed it to charge penal interest.

105. In Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited [2014] eKLR, the court held that the imposition of penalty interest/default rate is a contractual matter, which must be expressly provided in a contract before it can be implemented.

106. Therefore, I find that the plaintiff is not entitled to charge penalties upon the facilities. Appropriate orders shall be issued thereto.

Statement of accounts

107. The defendant faulted the plaintiff for never issuing him regular statements of accounts.

108. On the other hand, the plaintiff asserted that the statements of accounts were continuously supplied to the defendant on monthly basis through computer-generated monthly statements.

109. The plaintiff produced the statements. It produced letters dated 28th June, 1997, 2nd October, 1997, 5th December, 1997, 2nd March, 1998 and 20th January, 2001 to show that it continuously informed the defendant of the consolidated amount owing.

110. Accordingly, I find no merit in this claim by the defendant.

In duplum rule

111. The defendant contended that the plaintiff did not provide any documents that showed the principal owing when the loan became non-performing. That, therefore, he is unable to calculate the amount.

112. The plaintiff did not make any specific submissions in this regard.

113. The Court of Appeal in James Muniu Mucheru v National Bank of Kenya Limited [2019] eKLR Civil Appeal No. 365 of 2017 held that:-

> " 25. Finally, regarding Section 44A of the *Banking Act* that imports the in duplum rule, the same came into force on 1st May, 2007. The suit that gave rise to this appeal was filed on 22nd February 2002, long before Section 44A came into operation. Section 44(1) and (2) states as follows:
>
> > " (1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2)
> >
> > (2) The maximum amount referred to 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 nonperforming; and

(c) expenses incurred in the recovery of any amounts owed by the debtor."

25. Subsection (6) has a retrospective effect in that it covers even loans that were advanced before the section came into operation. It states as follows:

> "(6) 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:
>
> Provided that where loans became non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following-
>
> (a) the principal and interest owing on the day this section comes into operation; and
>
> (b) interest, in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and
>
> (c) expenses incurred in the recovery of any amounts owed by the debtor."

26. It is therefore evident that in computing the actual amount that is due and payable by the appellant to the respondent, the provisions of Section 44A of the *Banking Act* must be borne in mind and factored in the computation. It is not for this Court to do the calculation. The respondent must adjust the sum payable in accordance with the law. To that extent only this appeal succeeds."

114. Consequently, I find that Section 44A of the *Banking Act* ought to be factored into the computation of the actual outstanding amount on the loan. Accordingly, the plaintiff ought to adjust the sum payable.

Disposal

115. In conclusion, the issue that is pending is whether the plaintiff is entitled to the orders sought. The court has found that there is a need to credit the Kshs. 3,000,000/- from Musyoka & Wambua Advocates, to remove the unlawful penalties and to factor Section 44A of the *Banking Act* into the computation of the actual outstanding amount on the loan.

116. Accordingly, the court finds that it is proper that accounts be taken between the parties herein taking into account the finding of this court in this judgement. Inter alia, credit the Kshs. 3,000,000/- from

Musyoka & Wambua Advocates, and remove the unlawful penalties and to factor Section 44A of the *Banking Act* into the computation of the actual outstanding amount on the loan.

117. The court directs the parties to agree on and appoint an independent accountant(s) to take accounts between the parties and file his report within 45 days from the date of his appointment.

118. Further orders of the Court to await the filing of the said report.

119. Liberty to apply.

120. The nature of the decision makes these structural interdict orders necessary.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER, 2025 THROUGH TEAMS ONLINE APPLICATION.

F. GIKONYO M

JUDGE

In the presence of: -

Ms. Lilian for Wandabwa for defendant

Liech for plaintiff

CA - Kinyua