



REPUBLIC OF KENYA



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**Tachasis Wholesalers Company Limited v National Bank of Kenya Limited (Civil Suit 41 of 2019) [2025] KEHC 12822 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12822 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT 41 OF 2019  
JRA WANANDA, J  
SEPTEMBER 19, 2025**

**BETWEEN**

**TACHASIS WHOLESALERS COMPANY LIMITED ..... PLAINTIFF**

**AND**

**NATIONAL BANK OF KENYA LIMITED ..... DEFENDANT**

**JUDGMENT**

1. This suit was initially filed as Eldoret Environment and Land Court Case No. 65 of 2016, before it was transferred to this Court and assigned the present case number.
2. The claim is contained in the Plaint dated 22/03/2016, and filed herein on the same date, through Messrs Rioba Omboto & Co. Advocates, in which the Plaintiff sought Judgment against the Defendant as follows:
  - a. A permanent injunction restraining the Defendant, its servants, agents and or auctioneers from advertising and/or offering for sale of those parcels of land namely Eldoret Municipality Block 5/46/1, Eldoret Municipality Block 9/1727 and Eldoret Municipality Block 20/38 either by public auction or private treaty.
  - b. The Plaintiff (sic) to compel the Defendant to furnish the Plaintiff with the better and true particulars of the mortgage instrument to wit:-
    - i. The loan application form duly signed by the Plaintiff.
    - ii. The duly certified approval letters of the advanced loans.
    - iii. Letter of Offer and acceptance duly signed confirming acceptance and condition or commitment.
    - iv. First down payment made to the Plaintiff pursuant to the approval of the loan.



- v. Duly signed forms
  - vi. Updated statements of the Plaintiff's loan account if any from the time the loan was advanced by the Defendant.
  - vii. The Statement of Obligation Interest Account (OBLIST)
  - viii. The total amount on the unwarranted entries and the account interest created by the Defendant's staff who have since been sacked and/or arrested by the Anti-Fraud Police Unit Officers.
  - ix. The Report and findings on the suspended/ suspension account to pave way for reconciliation and also account occasioned or caused by "computer errors"/report on the total amount with interest posted to the Plaintiff account occasioned by computer error.
  - x. The total amount together with accrued interest on "Debit for Blocked Account".
  - xi. The Special Board or the Plaintiff's directors meeting to discuss and pass resolutions to apply for the purported loan or overdraft facility.
- c. Cost of this suit.
- d. Any other relief this Honourable Court may deem fit and just to grant.
3. In the body of the Plaint, it was pleaded that on or about 23/02/2016, the Plaintiff, through its purported directors/agents was served with a Notification of Sale and 45 days Redemption notice from the Defendant's agents, namely Legacy Auctioneers, threatening to realize an alleged loan balance amounting to the sum of Kshs 42,826,897/-. It was averred that the Plaintiff neither borrowed any money from the Defendant nor offered the advertised or proclaimed properties as collateral securities for the alleged sum, that the Plaintiff is thus a stranger to the purported outstanding loan arrears as it has never, in its legal capacity, applied for any credit facility from the Defendant at all, and neither has the Plaintiff, in its legal capacity, owned the properties or been a guarantor thereof. The Plaintiff further contended that the purported mortgage instruments affording the Defendant the option to realize the alleged securities are in contravention of the relevant provision under the *Land Act* and other enabling provisions of the law, and that in view of the above circumstances, the Plaintiff has asked for the better and true particulars of mortgage instruments from the Defendants as particularized in prayer (b) above.
4. Based on the above, the Plaintiff contended that the Defendant's intended statutory power of sale is illegal, untenable, null and void and/or an exercise in futility, particulars whereof were given as purporting to instruct Auctioneers whilst knowing that the Plaintiff neither applied nor received credit facility (loan), purporting to instruct auctioneers to proclaim and advertise for sale the parcels of land without following the proper procedure in law, unlawfully subjecting the Plaintiff's agents and/or directors to harassment, intimidation and suffering, unlawfully issuing the Plaintiff with a 45 days redemption notice and a notification of sale to a stranger/different legal entity, failing to furnish the Plaintiffs with mortgage instruments, and purporting to instruct auctioneers to advertise for sale, the Plaintiff's parcel of land without issuing a requisite notice in the prescribed form.
5. In response, the Defendant, through Messrs Omwenga & Co. Advocates, filed the Statement of Defence dated 11/05/2016. It was stated that the Plaintiff borrowed money after offering the 3 parcels land referred to above as collateral security, that after the Plaintiff failed to pay the loan facility, the Defendant exercised its statutory power of sale and advertised the securities for sale as provided by



the law. The Defendant maintained that the Plaintiff owes it the said total sum of Kshs 42,826,897/- and interest continues to accrue, that the Defendant sends out statements of accounts to its customers monthly, and that at a fee, the statements may be made available to a customer who requires the same. It was further averred that the Plaintiff is not entitled to the prayers sought since it alleges that it does not own the said parcels of land offered as security, and also, since it alleges that it has never borrowed any money from the Defendant, nor offered the properties as collateral securities. In conclusion, it was averred that there are 3 other suits which the same Plaintiff has previously instituted against the Defendant some of which have been dismissed, namely, Eldoret CMCC No. 904 of 2012, Eldoret HCCC No. 59 of 2000, and Eldoret HCCC No. 329 of 1997, and urged that the suit is an abuse of the Court process.

6. The Plaintiff then filed the Reply to Defence dated 26/05/2016, which basically reiterated the matters pleaded in the Plaintiff, and denied the allegations made in the Defence.
7. At the time that it filed the suit, the Plaintiff had also filed an Application seeking a temporary injunction restraining exercise of the Defendant's statutory power of sale pending hearing and determination of the suit. By his Ruling delivered on 14/07/2017, Ombwayo J, upon finding that the Plaintiff had established a prima facie case and the other applicable conditions, allowed the Application, and thus granted the Plaintiff the temporary injunction.
8. The parties then filed Witness Statements and Lists (bundles) of documents.
9. In his Witness Statement dated 3/05/2021, one Jassan Kiptoo Kosgei stated that he is one of the directors of the Plaintiff which was, and still is, a customer of the Defendant since the 1980s. He stated that he, on behalf of the Plaintiff, operated the Bank Account No. 400-xxx-xxx, and 401-xxx-xxx [particulars withheld] at the Defendant's Eldoret Branch and that the Plaintiff is the registered owner of the parcel of land Eldoret Municipality/Block 20 (Kapyemit)/38, which the Plaintiff, on 10/05/1994, charged to the Defendant. He however denied that the Plaintiff was advanced a loan of Kshs 5,700,000/- in exchange for the charge. He also denied that the Plaintiff is the registered owner of the properties, Eldoret Municipality Block 5/46/1, Eldoret Municipality Block 9/1727, and Eldoret Municipality Block 6/190, but stated that one of them, Eldoret Municipality Block 6/190, was charged to Kenya Commercial Finance Corporation (KCFC) in 1993 in exchange for a loan of Kshs 17,000,000/-, and that it is the Defendant that referred and connected him to the said KCFC. He then stated that he finally paid the loan advanced by KCFC and the title discharged, but the Defendant, through its gimmicks, illegally charged the same property. He stated further that on 25/04/2016, the Plaintiff, through himself, was served with the Notification of Sale and 45 days' Redemption Notice in respect to the properties, Eldoret Municipality Block 5/46/1, Eldoret Municipality Block 9/1727, and Eldoret Municipality Block 20 (Kapyemit)/38.
10. He then reiterated that neither the Plaintiff nor himself has ever applied for a credit facility (loan) from the Defendant to warrant the Defendant's exercise a statutory power of sale. According to him, the Defendant, in exercising the statutory power of sale, also issued the purported notices to the wrong entity (Plaintiff) and did not serve the bona fide loanee and/or guarantors or owners of the properties. He stated that he has on several occasions requested the Defendant to supply the particulars of the statements of account maintained with the Defendant and supply copies of the mortgage documents, but in vain. He urged further that the Plaintiff moved the Court by way of Eldoret Chief Magistrate's Court Civil Suit No. 904 of 2012 whereof he sought orders that the Defendant do release to the Plaintiff the loan Application letters, approved letters of the loans, copies of the Letter of Offer and acceptance and statements of documents showing when the Plaintiff made its first drawings withdrawals, that Judgment was delivered on 17/05/2019 in favour of the Plaintiff and ordering the Defendant to release the said documents but however, to date, the Defendant has not complied. In



conclusion, he averred that the Defendant and/or its agents, have failed to comply with Section 90(2) and 97 of the Land Act 2012, and Rule 15 of the Auctioneers Rules.

11. In his Witness Statement dated 16/07/2021, one Paul K. Chelang'a stated that he is an employee of the Defendant where he works as a Credit Remedial Manager. He stated that the Plaintiff has been a customer of the Defendant since the 1980s and had borrowed various loan facilities from the Defendant using the properties, Eldoret Municipality Block 5/46/1, Eldoret Municipality Block 9/1727, and Eldoret Municipality Block 20/38, as collateral security and that the loans were advanced through the Plaintiff's bank accounts. He averred that the Plaintiff serviced the loans but did not fully pay the same and several reminders were made to it to comply but none was obliged. He added that upon failure by the Plaintiff to pay the loans, the Defendant exercised its statutory power of sale and advertised the securities for sale as provided by the mortgage instrument to realize the outstanding balance which stands at Kshs 42,827,897/- and which continues to accrue interest and other penalties. He thus refuted the claim that the Plaintiff is a stranger to the loan arrears or that it did not apply for the loan in its legal capacity, and maintained that the loan was applied for by the Plaintiff's director, Jassan Kiptoo Kosgei with the Plaintiff's full authority and the loan advanced was to be used for business purposes by the Plaintiff.
12. He stated further that the Plaintiff was fully aware of the terms of the loans and knew the consequences of default, but that upon default and being served with a notice of sale, instead of repaying the balance, instituted several other claims against the Defendant arising from the same cause of action. He then urged that the Plaintiff's Witness Statement is contradictory as it admits, in one paragraph, that the Plaintiff was advanced the loan facility but in others, denies the same. In conclusion, he stated that the Plaintiff's actions have caused great suffering and irreparable loss to the Defendant as the Plaintiff already benefited from the loan, that the Defendant legally registered the 3 properties to secure its interest on the sum advanced, and the Plaintiff wilfully surrendered the titles as securities. According to him therefore, if the Court grants the Plaintiff the orders sought, then the Defendants shall have been closed from the avenue of having the loan arrears repaid by the Plaintiff.
13. After considerable time spent on interlocutory Applications and intervening matters, including transfer from the ELC as aforesaid, the suit eventually proceeded to full trial. At the trial, each party called 1 witness, both very lengthy though, as the Plaintiff's witness' testimony took 3 days while the Defendant's took 2 days.
14. PW1 was the said Jasan Kiptoo Kosgei, who testified before me on 8/03/2023, 2/05/2023, and 26/10/2023, and who stated that he is a director of the Plaintiff together with one Jane Kosgei. Led by his Counsel, Mr. Omboto, he adopted his said Witness Statement and testified that his business relationship with the Defendant began about 1983, and that he used to bank with the Defendant. He testified that the last took a loan with the bank in 1990 in exchange to which he gave as security, the title to the property Eldoret Municipality/5/46/1 which is in his name. He then stated that he gave out the title to the Defendant in 1983 as security for a loan of Kshs. 40,000/-.
15. He was then taken through the entries made against the title showing the various loans he took from the Defendant over the years, namely a loan of Kshs 40,000/- in 1983, Kshs 300,000/- and Kshs 800,000/-. He however denied taking any loan for Kshs 1,300,000/- as appears therein nor receiving any statement showing that amount. He also maintained that he fully paid back all the loans he had received from the Defendant. He further testified that that he gave the title document for Eldoret Municipality Block 9/1727 to the Defendant as security but he never received any payment. He further testified that there is an entry showing that he received a loan in 1983 yet the title itself was issued in 1991. He thus denied receiving the alleged amount of Kshs 40,000/- alleged. According to him, he gave out the title to the Defendant to be given funds for a construction project he had, but he got the funds elsewhere. He



- then referred to the title to the property Eldoret Municipality Block 20 (Kapyemit)/38 which is in the name of the Plaintiff, and when shown the entry therein showing a loan of Kshs 5,700,000/-, he admitted to charging the property but denied receiving any such money. He testified that he signed the charge but did not sign any other documents, and that he had demanded documents from the Defendant but he has not been supplied with any, and reiterated that he sued the Defendant for failing to supply the documents, and the Court ordered that he be so supplied. He reiterated that the case he filed was Eldoret CMCC No. 904 of 2012, which the Defendant appealed vide Eldoret High Court Civil Appeal No. 66 of 2019, and which appeal was dismissed.
16. At this juncture, the witness' attempt to produce the Plaintiff's bundle of documents was opposed by the Defendant's Counsel, Mr. Omwenga, as some of the documents were said to be inadmissible. Under these circumstances, I stood down the witness and gave the Counsels time to discuss and agree on the documents to be produced, and once so agreed, the Plaintiff to file a fresh agreed bundle. On 2/05/2023 when the Counsels returned, they confirmed that they had managed to agree on a fresh bundle, dated 15/03/2023, and which the Plaintiff had now filed. Accordingly, the earlier bundle dated 3/05/2021 stood expunged from the record. The Counsels also informed the Court that items 4, 8 and 13 contained in the new bundle, were included in error and would therefore not be produced or considered.
  17. Another relevant matter that the Court was informed of by Mr. Omboto, Counsel for the Plaintiff, was that prayer No. (b) of the Plaint – the prayer seeking the furnishing to the Plaintiff of better and true particulars of the mortgage instrument – having already been litigated upon and determined elsewhere, and thus no longer in issue, now stood abandoned.
  18. Against the above background, PW1 returned to the stand to continue with his evidence-in-chief (on the said 2/05/2023) and accordingly, produced the Plaintiff's said fresh/replacement List (bundle) of documents dated 15/3/2023 save for the items number 4, 8 and 13 thereof. Although therefore the bundle contained 17 documents, those produced were 14.
  19. When PW1 resumed his testimony, he reiterated that the Defendant had announced the sale of the properties citing a balance of Kshs 42,826,897/-. yet he does not owe any such debt. He reiterated that he charged the property with the Defendant but he never received any money, that there is no application, no offer, no valuation, no approval setting out the loan, or interest or repayment schedule. According to him, a Manager at the Defendant told him that the Defendant could not grant him a long-term loan, and the Manager instead took him to the said KCFC where he was offered a long-term mortgage product, and which loan KCFC indeed agreed and gave him against the security for Eldoret Municipality Block 6/190. He testified that KCFC told him that this one security was adequate, and gave him Kshs 17,000,000/-, and that they told him that since the title for Eldoret Municipality Block 6/190 was already in the custody of the Defendant, he did not need to execute a new security or charge and that is why the Defendant did not give him a Letter of Offer.
  20. He reiterated that he has never received a statement from the Defendant in respect of the alleged loan. He stated that he did not bother to collect his title deed from the Defendant, and that the Manager thereat, one Mr. Okungu told him that the reason they were referring him to KCFC was because the Defendant was experiencing financial challenges at that time. He urged the Court to compel the Defendant to return his securities. He also contended that when he asked for the Statements, the Defendant's then new Branch Manager, Mr. Mburu who had taken over from Mr. Okungu, told him that they were still reconciling the entries because some of the Defendant's staff had tampered with the statement. He testified further that he wrote a letter to the Central Bank of Kenya (CBK) which sent its anti-banking fraud team which upon conducting investigations, discovered irregularities and 6 staff members, plus the said Mr. Mburu were suspended. According to him, by this time, the Defendant



had suspended his account and opened a separate one, and that when he made inquiries seeking the outcome of the probe, he was told that the staff were still in Court.

21. In cross-examination by Mr. Omwenga, PW1 stated that the letters from him on record were written in English because it was his Secretary who typed them but under his instructions, and that the Advocate who handled the charge with the Defendant was the Defendant's Lawyer but he could not recall his name. He agreed that in his Statement, he stated that that on 10/5/1991, he charged the property to the Defendant, but that no loan was advanced, and that the Plaintiff is not the registered owner of the properties, which are registered in his name in his personal capacity. He maintained that it is not the company that gave the properties and agreed that he and the company are different entities in law. He also agreed that he had filed other cases against the Defendant over the same properties, one of which is Eldoret HCCC No. 325 of 1997 in which he was the Plaintiff in his own personal capacity. He agreed that in the Plaintiff filed in that case, he stated that he obtained a loan of Kshs 4,000,000/- from the Defendant and stated that this loan of Kshs 4,000,000/- is separate from the latter one of Kshs 17,000,000/- that he received from KCFC. He also agreed that in his statement, he stated that he has paid off the loan, that there was a current account which was serving the loan, that the amount sought by the Defendant was exaggerated, and that without giving him notice the Defendant had advertised the property for sale. He agreed that he asked for an injunction pending reconciliation of accounts or taking of accounts but stated that the Court declined to grant the injunction.
22. Regarding Eldoret HCCC No. 59 of 2000 Eldoret, he agreed that he stated that all his loans were paid, and that he had taken a total of about 4,000,000/-, and also agreed that it is the same loan that he had referred to in the Plaintiff in Eldoret HCCC No. 325 of 1997. He also conceded that the suit was dismissed and he did not appeal. He stated that the title he referred to in his Statement therein is Eldoret Municipality Block 6/190 and that the same is in his possession. Regarding his allegation that it is the Defendant's Manager, George Okungu, who took him to KCFC, he agreed that he has no proof to support that allegation. He also agreed that it is him who took the titles referred to in this suit to the Defendant, and not the Advocate, and he also agreed that he has not sued the Advocate who registered the charge. He however stated that his problem is not the charge, but that he never received any money. He reiterated that he never applied for any loan or credit facility from the Defendant, that the Kshs 17,000,000/- he received from KCFC he fully paid it, and the charge was even discharged. He stated that the earlier loans from the Defendant, before the KCFC loan, were applied for by the Plaintiff company. He also agreed that in an Affidavit herein, he had stated that the properties form part of his matrimonial home and stated that he lives in Eldoret Municipality Block 5/46.
23. He also insisted that the Statutory Notice was issued to the Plaintiff company, a wrong entity, but he conceded that the Notice, if issued to him, would still be valid. He also agreed that the notice was yet to be published in the Newspapers and stated that the notice also did not show the principal sum. Due to time constraints, PW1 was again stood down and his further cross-examination fixed for a fresh date.
24. When he resumed his cross-examination on 26/10/2023, PW1 told the Court that he wants the 3 charges to be discharged since he never received any money from the Defendant. In regard to the bank statements contained in the Defendant's new Further bundle filed on 10/7/2023, he denied ever seeing the statements before but confirmed that the account was his. He termed the entries therein as not genuine, that he never made the payments indicated therein, and that he finished paying the genuine loans way back in 1992 or thereabouts. He then stated that he is not aware of Tachasis Wholesalers (1974), which is not the Plaintiff herein. He reiterated that there was interference in his account by staff of the Defendant and that he even reported the same to the CBK which conducted investigations, and that this was around 1998. He reiterated that he has never seen the alleged statements contained in the Plaintiff's newly filed Further bundle, and insisted that although the account was genuine, the



- entries were not. He further insisted that the employment of the implicated bank staff was terminated as a result of the interference but denied having colluded with them, and maintained that those staff members made unwarranted entries in his account.
25. He agreed that this dispute between him and the Defendant has been in existence for a long time and confirmed that he still has a personal account with the Defendant but stated that he closed the company account and that he tried to negotiate with the Defendant to reach an amicable settlement. He conceded that he did not present to Court the unwarranted entries he referred to, but maintained that the Defendant claimed that he took a loan which he does not know of. He told the Court that when at one time he got the statements from the Defendant when he visited the Branch, he noted the unwarranted entries and when he complained to the Manager, the latter instead, detained the statements. He also conceded that he has had several Court cases with the Defendant on similar issues but denied ever seeing the Affidavit sworn on 10/9/1997 in Eldoret HCCC No. 325 of 1997 contained in the Defendant's newly filed Further bundle. He however conceded that it bears his name, and that it alleges that he took a loan around 1990 up to 1993 of Kshs 14,500,000/-, and that it refers to the same properties in issue herein. When shown the Ruling dated 22/5/90 delivered by Hon. Lady Justice Nambuye, he agreed that the Ruling refers to the said Affidavit alleged to have been sworn by him on 10/9/1997, and that in the Ruling, the Judge gave the Plaintiff 45 days to pay the outstanding amount. He confirmed that he never appealed against the Ruling. In regard to the Ruling delivered on 17/10/2012 in Eldoret HCCC No. 59 of 2000 by Hon. Justice Ibrahim (as he then was), he agreed that he is indicated as being the Plaintiff and that the Ruling stated that he was alleged to be owing the Defendant a sum of Kshs 26,000,000/-, and that Hon. Justice Ibrahim, upheld the earlier Ruling of Hon. Justice Omondi Tunya.
26. In re-examination by his Counsel, Mr. Omboto, PW1 stated that around 1993 and 1995, he sought a loan from the Defendant and that he gave the Defendant 3 titles, that the Defendant already had one title and he added them the other two. He stated for the property Eldoret Municipality Block 5/46/1, he had received 40,000/- and that those he added the Defendants were Eldoret Municipality Block 9/1727 and Eldoret Municipality Block 20 (Kapyemit)38. He reiterated that the Defendant took him to KCFC which agreed to give him a further loan but he however maintained that only the 1<sup>st</sup> security, Eldoret Municipality Block 5/46/1, was to cater for this further loan from KCFC, and that he left the two other properties with the Defendant for custody for future use in case he needed a further loan from the Defendant. He also reiterated that he fully settled the 1993 loan with the Defendant, and reiterated further that the properties were charged but he never received the money. Regarding the statements contained in the Defendant's said newly filed Further bundle, he pointed out that the same begins from 2/08/1994 with a balance of Kshs 7,771,755/- and is up to 31/05/1999 with a balance of Kshs 28,610,126/-. He insisted that he never received the alleged money and reiterated that the Bank Manager confiscated the statements when he complained about the entries, and that the Defendant suspended the account when it learnt of the unwarranted entries, and opened a new account instead. He also reiterated that the Defendant's staff interfered with the account and upon investigations by the CBK, some were terminated. At this juncture, the Plaintiff closed its case.
27. When the matter came up on 20/02/2024 for defence hearing, before the same could take off, Mr. Omboto informed the Court that he had filed a Further Statement from another intended witness - one Thomas Owen Ondieki - whom he wished to call, and who would also produce further documents. He therefore prayed to re-open the Plaintiff's case. This request was vehemently opposed by Mr. Omwenga for reasons that, inter alia, no prior communication about it had been made, the Plaintiff had already closed its case, no leave had been sought or obtained to file the Further Witness Statement or documents, the documents sought to be produced did not even belong to the Plaintiff, no good reasons had been given on why the new witness is necessary and why he was not called earlier. He



also averred that he had prepared the whole day before to commence the defence case and his witness had travelled from Nairobi, and had also come to Court on several earlier occasions, that the case had already been delayed for too long due to adjournments caused by the Plaintiff, and admitting the new Witness, his statement, and documents would inevitably lead to yet another adjournment since the Defence would have to be given an opportunity to peruse and consider the new documents, yet the case was already too old and had been in Court for far too long.

28. After hearing the Counsels, I agreed with Mr. Omwenga and declined the request to re-open the Plaintiff's case. Accordingly, I expunged the said Further Witness Statement dated 16/02/2024, together with the documents attached thereto. The defence hearing thus commenced on the said 20/02/2024.
29. DW1 was the said Paul Chelang'a who thus testified before me on 20/02/2024 and 22/10/2024. Led by his Counsel, Mr. Omboto, he adopted his Witness Statement referred to above. He agreed that the Plaintiff was the Defendant's customer, and stated that PW1 was the Plaintiff's officer who was dealing with the Defendant on its behalf, and was a director and also guarantor of the loan herein. He testified that the Plaintiff received loan facilities from the Defendant but defaulted and the Defendant made attempts to recover in 2016 but the Defendant filed this suit. He stated that the Defendant had duly registered a charge, and he then produced the documents contained in the Defendant's 3 separate bundles, namely, Further List of documents dated 16/7/2021, Further List dated 13/2/2023 and the initial List dated 10/7/2023, comprising, in aggregate, 28 documents. He testified that the Plaintiff had admitted that it owed the Defendant and there are even Court Rulings to that effect, and that the Plaintiff even made some payments. He urged that the case be dismissed and the injunction vacated.
30. Under cross-examination by Mr. Omboto, DW1 stated that he has been an employee of the Defendant for 27 years, and stated that to qualify for a loan, one must be an account holder, must sign an Application letter and must also offer security, and that the purpose of the loan must also be clear. He stated that the Plaintiff made the 1<sup>st</sup> Application around 1983, the date of the very 1<sup>st</sup> charge. He also stated that there must have been a Letter of Offer but that there was a "leakage" into their internal documents and some were stolen and that they suspect the Plaintiff although the "leakage" affected many other accounts and not just the Plaintiffs. When shown the title for Eldoret Municipality Block 5/46, he agreed that the properties charged were 3, the 1<sup>st</sup> Charge being registered on 12/3/1985 at Kshs 300,000/- and which was reflected in the bank statements, the 2<sup>nd</sup> charge was registered on 15/4/1996 for Kshs 80,000/=, and the 3<sup>rd</sup> charge on 6/8/1993 for Kshs 1,300,000/-. He stated that there was consolidation of these further advances but that the statements/entries are mysteriously missing from their system, that the culprits involved in the disappearance were the Defendant's own employees who were charged in a Criminal Court. According to him therefore, it was thus was an "inside job" and he stated that the staff involved were terminated although he did not know whether they were also convicted. He stated further that the account herein is an old one called OBLIST which is opened as a suspense account to avoid a non-performing loan from accruing interest but that the CBK later outlawed it, terming it bad practice.
31. He stated that in the OBLIST account, only a sum of Kshs 1,800,000/- was debited and that the Defendant later remedied the matter by debiting the Kshs 1,800,000/- back to the Plaintiff's account but that the supporting documents to that remedial action are also part of those that were interfered with. He maintained that the amount owing as at 17/2/2016, the date of the 45 days Notification of Sale was Kshs 42,826,897.85, and stated that the Defendant had around that time also stopped loading interest. At this juncture, due to time constraints, the cross-examination was adjourned and the witness stood down.



32. When he returned on 22/10/2024, PW1 reiterated that the interest suspense account was an issue that was picked by the CBK, that it affected many customers, and that the Defendant remedied the same by debiting all the affected customers, including the Plaintiff. He stated that OBLIST is the term used for such accounts created for those that are non-performing and it is thus an interest suspense account. He explained by creation of OBLIST, the monthly interest accruing to a loan account is debited in a second account opened for the same account, so instead of the loan accruing interest on itself, the interest is accrued on a separate account. According to him therefore, for OBLIST and suspense interest account, the only difference is that instead of the loan balance increasing, it will appear stagnant. He stated that among the staff who were implicated in the scandal of removing the documents and whose employment was terminated in 1999, was one Mr. Mburu, Branch Manager, and one Mr. Owens Thomas Ondieki, and the others were credit officers who were handling the files. According to him, the Plaintiff was part of the malpractice as he colluded with the staff since he was the beneficiary, although he agreed that no one from the Plaintiff was charged alongside the implicated staff.
33. He reiterated that the properties charged were first, Eldoret Municipality Block 9/1727 for Kshs.1.800,000/-, the 2<sup>nd</sup> was Eldoret Municipality Block 5/46/1 for Kshs 40,000/-, then for Kshs 300,000/-, then Kshs 80,000/-, and then Kshs 1,300,000/- (second charges), totalling to Kshs 1,720,000/-. He stated that the 3<sup>rd</sup> property was Eldoret Municipality Block 20 (Kapyemit)/38 for Kshs 5,700,000/- and the grand total was therefore Kshs 9,220,00/- as per the last charge of May 1994. He added that they were able to retrieve some statements despite the fraud, but agreed that from the records, the repaid amount cannot be ascertained accurately. He also conceded that the Magistrate's Court had directed the Defendant to supply the documents but contended that the Defendant has been unable to comply because it does not have them due to the fraud, and that they have an appeal pending.
34. Under re-examination by Mr. Omwenga, PW1 stated that the in duplum rule came into force on 25/05/2007, and the grand aggregate loan amount was advanced long before that date. Regarding the OBLIST accounts practice, he stated that the same was discontinued by the CBK during its routine checks since according to CBK, it appeared that the Defendant was concealing the true level of customers' indebtedness. He refuted the Plaintiff's allegations that it never took the loan since, according to him, when the Defendant sought to recover, the Plaintiff filed Eldoret HCCC No. 325 of 1997 and in its Affidavit therein, it admitted liability of Kshs 26,556,396.40 and this is supported by the Ruling delivered therein on 13/07/1998, and that the Defendant allowed it to settle the debt "slowly". He stated that the Plaintiff however defaulted and then filed Eldoret HCCC No. 59 of 2000 after the Defendant sought to proceed with recovery, and that there is a Ruling dated 17/10/2012 which re-affirmed that there was still an outstanding debt. According to him, the Defendant is not even asking for interest since the Defendant had realized that the loan was non-performing. At this juncture, the defence also closed its case.
35. At the close of the trial, the parties filed written Submissions. The Plaintiff filed the Submissions dated 2/12/2024 while the Defendant's is dated 28/01/2025.

### **Plaintiff's Submissions**

36. Counsel for the Plaintiff submitted that it is a banking practice that to create or bring into existence or generate a debt in form of a loan or overdraft into a Bank's customer's account, documentary evidence is key on such contract respecting bank-customer relationship. He then listed the several items and/or documentary evidence, that according to him, must be in place to establish that a customer procedurally legally and lawfully acquired a debt to tally with their balances in the bank's books. He



listed these items as letter of request by the customer, appraisal of the request at the bank's Advances department, evidence of approval by the bank's Branch Manager showing how much was/is approved, collateral security offered by the customer, Letter of offer, duplicate copy of the Letter of offer duly signed by the customer conveying acceptance thereof, letter from the bank calling on the customer to deposit the offered security property so as to cause the process of creating a charge thereon by the bank's Lawyers, letter by the Bank's Branch Manager forwarding the security property to the bank's lawyers to facilitate creation of the charge, form of guarantee duly filed, dated and signed by the guarantors, and execution of the same by the bank's Lawyers, letter by the Bank's lawyers forwarding the executed charge document and the guarantee form to the bank, release of the facility by the bank to the customer's account, and evidence of drawdown of the facility vide bank account statement of the customer on monthly basis until there is complete draw-down of the facility by the customer.

37. Counsel urged that any lack of evidence of any of the above listed steps and/or documents is evidence of no facility having been applied for and released to the customer and that evidence of only a charge document and an executed guarantee form is not adequate evidence of a released facility to the customer. He urged further that unless there is evidence of a duplicate copy by a loanee or an issue of overdraft and release of the facility followed by clear evidence of drawdown, there is no evidence that the customer enjoyed the facility in question. According to him, the Defendant did not follow the due process in advancing the credit to the Plaintiff. He also averred that the defence witness admitted, under oath, that there was no evidence of Letter of offer conveying acceptance of the facility by the Plaintiff and their guarantors, and that no bank statement showing drawdown of the facility by the Plaintiff, if at all they ever did. He further submitted that it is on record that the bank blamed its former employees, 6 of whom were sacked in 1999, with a claim that the bank discovered that the necessary letters of offer with signature of the Plaintiff accepting the facility and bank account statements drawdown were illegally stolen and spirited away and given to the Plaintiff to allude to the net effect that the customer (Plaintiff) were not indebted to the Defendant. He also cited the defence witness' testimony that the said sacked staff were arrested and charged in Court for the theft of the Plaintiff's bank documents to benefit the Plaintiff as in this suit but pointed out that no Occurrence Book number, no charge sheet, no case number and no evidence of the criminal judgment documents was produced.
38. According to Counsel, the Defendant's claims are merely hearsay, falsehoods and a fishing expedition as there is no proof of the criminal charges brought against the staff. He submitted further that in respect to signed loan forms, the only evidence produced is that the guarantors signed the guarantee forms to cause charge of the property but he pointed out that this was only on the basis of anticipatory future request of banking facility, the Plaintiff having been a long-time customer of the Defendant. Counsel urged that there is no any other evidence that the Plaintiff conveyed acceptance of any facility, that without monthly statements, the Plaintiff lacks knowledge whatsoever of whether the account is credited or debited and if there is a debt balance, and that the customer would not know whether the debt is increasing or decreasing or if there are unwarranted account interference. He contended that a customer account at the bank is in the custody of the bank on behalf of the customer, the bank can close it (illegally or legally with the letter by way of a Court order), change figures therein by unlawful entries by hand, legal or by illegal print or by using whatever methods but that any such action in changing the account position unilaterally and arbitrarily, precipitate actions without reference to the customer makes the resultant account position useless, null and void, and the bank and not the customer is responsible.
39. He contended that such changes by the bank without necessary evidence or reference to the customer/ debtor are mere fabrication and forgery, that there is evidence that the Plaintiff was never provided with regular monthly bank account statement and that the account was subject of inclusion into the illegal computer program known as the OBLIST. He urged that Article 33 of the Kenya Constitution,



read together with the CBK Prudential Guidelines is very clear that all citizens have a right to access information hence the Plaintiff ought to have been issued with the same as a matter of right. He thus contended that the only available remedy in the circumstances is for this Court to issue orders compelling the Defendant to produce the instruments as listed in the Plaint as the said instruments are supposed to be in the Defendant's custody. He cited the case of Cityland and Property (Holdings) Ltd vs Debrah (1967) ALL ER 639, and also the case of Wafubwa vs Housing Finance Co. of Kenya. Regarding the effects of the OBLIST practice, Counsel submitted that the account became automatically blocked and the customer could not access the account at all, that no monthly interest was being generated for the customer's advice and therefore this customer was no longer being appraised of either its credit or debit balance to its account. He contended that if there was any interest chargeable to its "debt" account, then monthly interest was not being debited to the customer's account or even reserved in the interbank account book known as interest suspense account (ISA) which, according to him, is a provision account into which monthly interest charged on bad and doubtful debts (BDDD) are credited to, instead of crediting the same to Profit & Loss Account (P&L Account).

40. He thus contended that for the bank to claim that it reversed the debit in ISA which is a provision account (known only to contain credits only) to the customer's account on 21/06/1999, is clearly not adding up and is not normal in any banking ethics. Counsel pointed out that the defence witness told the Court that the CBK notified the Defendant that OBLIST and its operation was illegal and stopped it on 21/06/1999. According to him, without doubt the figure of Kshs 1,878,027/- at an interest rate of 28 per cent per annum had a huge effect and being that interest has continued to be charged to the account to date then to say that it affected the Plaintiff's account would be an understatement. He then made reference to testimony of DW1 regarding the sacked staff, and submitted that it is evidence and confirmation that the account was indeed interfered and he refuted the allegation that the Plaintiff was part of the collusion. According to him, the Defendant is vicariously liable for the acts of its said sacked staff. He also reiterated that the Court in Eldoret CMCC No. 904 of 2012 on 17/05/2019, directed the Defendant to release the loan application forms, approval letters of the loans, copies of the letter of offer and acceptance and statement of accounts showing when the Plaintiff made the first drawing and which Judgment was affirmed on Appeal by the Eldoret High Court on 19/05/2022.
41. In respect to the statutory power of sale, Counsel submitted that the Defendant has fallen foul of the mandatory statutory requirements stipulated in Section 90(2) of the Land Act, and contended that although the Plaint, the Defendant's Replying Affidavit and the Redemption Notice dated 22/03/2016 imply that the Defendant owes the Plaintiff an alleged outstanding amount of Kshs 42,826,897/-, and although it is mandatory for the notice to show with clarity the amount of interest due should the borrower opt to make the payments, the Redemption Notice herein does not disclose the interest hence the statutory notice is null and void. He cited the case of David Gitome Kuhiguka vs-Equity Bank Ltd (2013) eKLR and the case of Alfred Osanya vs. Giro Commercial Bank Limited & Another (2014) eKLR. On service of the statutory notice, Counsel submitted that Section 96(2) of the Land Act is clear that the statutory notice ought to be served upon its chargor and the guarantor which the Defendant has not complied with. He cited several authorities, namely, the case of Rose Chepkirui Mibei-vs-Jared Mokua & 2 others (2015) eKLR, the case of Abdulgader Shariiff Saleh & Jamal Shariiff Sweleh T/A Jingo Tours & Safaris Ltd-Vs Sothern Credit Banking Coporation Limited Johnstone K Muli T/A Kithemu Auctioneers, , the case of David Ngugi Ngaari -vs-Kenya Commercial Bank Limited (2015) eKLR, and also the case of Margaret Njeri Muiruri-Vs Bank of Baroda (Kenya) Limited (2014) eKLR. In conclusion, Counsel submitted that the subject parcels of land at risk of sale are of sentimental value hence any sale ought to be done on the clearest of circumstances. He also cited the case of Alice Owino Okello -vs- Trust Bank Ltd & Anor LLR No. 625 (CCK).



## Defendant's Submissions

42. On the issue of whether the Plaintiff took loan facilities from the Defendant, and the allegations made in the Plaintiff that the Plaintiff has never taken out any loan facility from the Defendant or offered the properties herein as collateral to the loan, Counsel cited Section 107 of the *Evidence Act* and also the case of *Irungu v Britam General Insurance Company Limited (Civil Appeal E295 of 2023) [2024] KEHC 13925 (KLR)* and urged that the burden of proof lies with the Plaintiff to prove the allegations raised in the Plaintiff. He averred that although the Plaintiff alleges that it does not have a loan with the Defendant, asserting that any loan the Plaintiff received was from the now-defunct KCFC, no evidence was adduced to demonstrate that the loan originated from KCFC, and not the Defendant, or that it was repaid in full. Counsel reiterated that in previous litigation, namely, Eldoret HCCC No. 325 of 1997, as Eldoret HCCC No. 59 of 2000 and Eldoret CMCC No. 904 of 2012, the Plaintiff had expressly admitted that it was given the said loans by the Defendant, and that it still owed loan balance arrears save that the Defendant had exaggerated the amount owing, and that Court Rulings are on record. According to him therefore, the Plaintiff contradicts itself by alleging that it never borrowed any money from the Defendant.
43. He also pointed out during his testimony, the Plaintiff's director (PW1) denied having sworn the Affidavit dated 10/9/1997 filed in Eldoret HCCC No. 325 of 1997 and contended that such denial clearly shows that the Plaintiff is not truthful considering that the same was filed in Court by the Plaintiff's own Advocate. Counsel pointed out particularly the Affidavit sworn by PW1 on 13/07/1998 and filed by him in the said Eldoret HCCC No. 325 of 1997 in which PW1 deponed that the Plaintiff owed the Defendant the sum of Kshs 26,556,396.40. According to Counsel therefore, this acknowledgment directly contradicts the Plaintiff's allegations and reinforces the existence of the loan facility which has not been cleared, and that by reason thereof the Plaintiff is now estopped from denying the same as PW1 is its director and thus its agent. He cited Sections 18, 20 and 120 of the *Evidence Act*, and also the case of *National Bank of Kenya v. Pipe Plastic Samkolit (K) Ltd (2001) eKLR*. Counsel further submitted that during the hearing, PW1 testified that the parcel of land known as Eldoret Municipality Block 9/1727 and Eldoret Municipality Block 5/46/1 belonged to him, while Eldoret Municipality Block 20 (Kapyemit)38 belonged to the Plaintiff, and that he was a customer of the Defendant as from 1983, and also that charges on the properties were registered, but that he was not given the money and/or thus that loan was never disbursed. Counsel urged that if indeed the Plaintiff gave his properties as security and received no money, it could not have waited for this long period of time only to come and claim at this point that it was not given the loan despite giving its properties as securities to the Defendant and charges having been registered.
44. He referred to the entries made against the titles confirming registration of the charges and the amounts of money registered against each. According to Counsel, the above actions could not have been taken without an underlying loan agreement and actual disbursement of the loan amount. He contended that the Plaintiff has failed to explain how the title documents ended up in the hands of the Defendant and subsequently, charges registered in the Defendant's favour without the Plaintiff's knowledge or consent. He also pointed out that nowhere in these proceedings, whether in the pleadings, Submissions or during the hearing, did the Plaintiff allege that the Defendant obtained the charge instruments and title deeds illegally. He submitted that the action of the Plaintiff wilfully executing the charge instruments, in itself indicates that there was an agreement between the parties. He further urged that from the foregoing, it is clear that the Plaintiff took several loans from the Defendant, which were consolidated at Kshs 42,826,897.85/-, an amount which the Plaintiff has declined to pay. In respect to the prayer for a permanent injunction, Counsel submitted that the Plaintiff has not demonstrated



sufficient cause to warrant granting of the same, the Defendant having demonstrated that the Plaintiff took a loan facility from the Defendant and has defaulted in repayment.

45. He termed the Plaintiff's prayer for the Defendant to be restrained from realizing the outstanding loan as being malicious and unlawful since Section 74 of the Registered *Land Act*, Cap. 300, provides that once a borrower defaults in paying the loan, a lender is legally entitled to exercise its power of sale over the charged property. He maintained that due to the Plaintiff's failure to service the loan, the Defendant commenced the process of sale after serving the Plaintiff with the requisite notices including the 45 days redemption Notice dated 23/02/2016 and Notices of sale dated 17/02/2016. He contended that the Plaintiff has come to Court with unclean hands as PW1 gave contradicting evidence. He then cited the case of *Air Travel & Related Studies Ltd vs Equity Bank (Kenya) Ltd Civil Application [2017]*, the case of *John Edward Ouko V National Industrial Credit Bank Ltd [2013] eKLR*, and also the case of *Nguruman Limited v. Jan Bonde Nielsen & 2 Others [2014] eKLR* and submitted that it is very clear that there has been no infringement of the Plaintiff's rights and, that in any case, it is the rights of the Defendant to recover its lawful money that is being infringed. He refuted the claim that the Plaintiff will suffer irreparable loss and averred that the Plaintiff, having given out the properties as security for the loan, and having defaulted, was aware of the consequences under the charge, and that the balance of convenience tilts in favour of the Defendant for the reason that the Court cannot not rewrite the agreement between the parties by restraining the Defendant from exercising its rights as a lender.
46. Much of the rest of the Submissions are repetitions save that Counsel cited the case of *Kitur & Another v Standard Chartered Bank & 2 others [2002] eKLR*, and also the case of *Pine Court Malindi Limited & another v Imperial Bank of Kenya (Under Receivership) & 2 others [2019] eKLR*. Regarding the demand that the Plaintiff be furnished with the mortgage instruments, Counsel submitted that the prayer is *Res judicata*, the same having been litigated upon and appealed in Eldoret HCCA No. 66 of 2019 and Judgement delivered on 19/05/2022, and against which the Defendant has preferred a further appeal to the Court of Appeal, namely, Eldoret COACA No. E041 of 2023 which is still pending for determination. He urged that despite the original documents missing due to theft as elaborated by DW1, the Court should rely on the secondary evidence in accordance with Section 65 of the *Evidence Act*, such as the charge documents, title deeds, green cards and the pleadings produced which demonstrate the chargee-chargor relationship between the Plaintiff and the Defendant. He averred that the Defendant made diligent efforts to locate the missing documents and conducted investigations but all in vain, and that even in the absence of the original loan documents, a pattern of disbursements and repayment supporting the existence of a loan issued to the Plaintiff, and also the bank statements produced are a clear indication that the Plaintiff was servicing the loans. In conclusion, on the issue of award of costs, he cited Sections 1A, 1B, 3A and 27 of the *Civil Procedure Act*, and urged that the suit should be dismissed with costs.

## Determination

47. As already stated hereinabove, on 2/05/2023, when PW1 returned to Court to continue with his evidence-in-chief, before he did so, the Plaintiff's Counsel, Mr. Omboto, informed the Court that the Plaintiff was abandoning prayer No. (b) of the Plaint – the prayer seeking to compel the Defendant to furnish the Plaintiff with the better and true particulars of the mortgage instruments – and which documents, 11 in number, had been listed therein. According to Counsel, there was no need to canvass that issue as it had already been litigated upon and determined elsewhere. It is clear that by “elsewhere”, Counsel was referring to Eldoret CMCC No. 904 of 2012, and the appeal in Eldoret High Court Civil Appeal No. 66 of 2019. Under the circumstances, I formally marked the said prayer (b) of the Plaint as abandoned. Although therefore the issue to some extent, again, inexplicably featured in the



Submissions filed by the respective Counsels, such submissions turn on nothing as there is nothing to be determined on that issue.

48. In view of the foregoing, the one broad issue remaining for determination in this suit is:
- “whether the Defendant should be permitted, in exercise of its alleged statutory power of sale, to proceed with the sale or disposal of the 3 parcels of land the subject hereof, against which respective legal charges have been registered as alleged collateral or securities”.
49. Needless to state, to determine the above broad issue, the Court will first have to determine whether the loans alleged herein were indeed advanced by the Defendant to the Plaintiff, whether the Plaintiff defaulted in repaying the loans, and whether the procedures required to be complied with prior to exercising a chargee’s statutory power of sale, including service of the necessary notices, were so complied with.
50. In answering the above questions, I note that there is really no dispute that the Plaintiff and the Defendant have had a business relationship that dates back to around the year 1983 or thereabouts. It also not in dispute that the Plaintiff and the Defendant have litigated over the issue of the alleged loans in various previous Court cases. The previous suits brought to the Court’s attention in this case and all filed by the Plaintiff are Eldoret HCCC No. 325 of 1997, Eldoret HCCC No. 59 of 2000, and Eldoret CMCC No. 904 of 2012. There was then the Appeal, Eldoret HCCA No. 66 of 2019 preferred by the Defendant, and there is also alleged to be pending before the Court of Appeal, Eldoret Court of Appeal Civil Appeal No. E041 of 2023, also preferred by the Defendant. The 3 properties the subject herein, or at least some of them, have also been the subject of the said previous suits.
51. One matter that I found interesting in this case, and which was indeed, raised by the Defendant, is that the Plaintiff states that two out of the three properties in issue herein, Eldoret Municipality Block 5/46/1 and Eldoret Municipality Block 9/1727, are not owned by the Plaintiff but are owned by, and registered in the name of Jason Kiptoo Koskei, the Plaintiff’s director who testified herein as PW1. Indeed, copies of the searches and titles on record confirm this fact. Since the said Jasson Kiptoo Koskei is not joined as a co-Plaintiff in this suit in his own personal capacity, one wonders how the Plaintiff can purport to be the one making claims in respect of the two said properties which it admits it does not own. The absence of locus standi clearly locks out the Plaintiff from agitating over those two properties.
52. Be that as it may, it is not disputed that on 25/02/2016 or thereabouts, the said Jasson Kiptoo Koskei apparently on his own behalf and also on behalf of the Plaintiff, being its director, was served with the Notification of Sale and 45 days’ Redemption Notice indicating or notifying him and/or the Plaintiff of the impending sale of the properties, Eldoret Municipality Block 5/46, Eldoret Municipality Block 9/1727, and Eldoret Municipality Block 20 (Kapyemit)/38. According to the Plaintiff however, it has never applied for any credit facility/loan from the Defendant to justify the Defendant’s exercising its statutory power of sale. Although therefore the Plaintiff denies having any outstanding loan facility with the Defendant or owing any debt, the Defendant maintains that the Plaintiff owes it Kshs 42,826,897.85/- being the balance of the loans and thus, the Defendant prays that it should be allowed to recover the debt by exercising its statutory power of sale.
53. The Plaintiff’s case, as advanced by its said director, Jasson Kiptoo Kosgei (PW1), is basically that the Defendant, on 10/05/1994, registered a charge over the parcel of land Eldoret Municipality/Block 20 (Kapyemit)/38, which is registered in PW1’s personal name and who denies that the Plaintiff was advanced a loan of Kshs 5,700,000/- in exchange for registration of the charge. Regarding the other properties, namely, Eldoret Municipality Block 5/46/1, Eldoret Municipality Block 9/1727, and Eldoret Municipality Block 6/190, he stated that one of them, Eldoret Municipality Block 6/190,



was charged to Kenya Commercial Finance Corporation (KCFC) in 1993 in exchange for a loan of Kshs 17,000,000/-, and that it is the Defendant that referred and connected him to the said KCFC. He stated that the Plaintiff fully repaid the loan advanced by KCFC and the title was discharged, but that somehow, the Defendant, again, illegally charged the same property. PW1 thus maintained that although the respective charge instruments were registered, the Defendant never released any funds to the Plaintiff. The Plaintiff does not therefore deny that it freely gave out the titles to the said properties as security for loans advanced to him by the Defendant.

54. On the issue of the failure by the Defendant to prove the existence of the credit facilities, and to supply and/or furnish statements of account to support computation of the amounts demanded by the Defendant, and/or copies of the loan documents, the Defendant, through DW1, avers that there was a “leakage” into their internal records and some documents were stolen and that they suspect that the Plaintiff was involved, although he clarified that the “leakage” affected many other accounts, and not just the Plaintiff. According DW1 therefore, the statements/entries mysteriously went “missing” from their records and stated that the people implicated were the Defendant’s own employees, and who were charged in a Criminal Court. He believes that the theft was an “inside job” and stated that the staff involved were terminated although he did not know whether they were also convicted.
55. The Defendant has however produced some statements ranging from May 1999 to March 2000, which DW1 testified that they managed to belatedly retrieve. PW1 was however emphatic that he had never seen those statements before as they had never been supplied to him. Indeed there was no proof that the same had ever been supplied to the Plaintiff. He also challenged the authenticity and correctness of the entries appearing in the statements.
56. The Defendant also produced copies of 3 registered charge instruments, which DW1, too, testified that they managed to belatedly retrieve. The Defendant also produced copies of searches from the Lands office. Read together, the charge instruments and the searches show the existence of successive charges registered in favour of the Defendant against the 3 properties herein, as follows:

<b>Eldoret Municipality Block 5/46/1</b> registered in the name of <b>Jasan Kiptoo Koskey</b>	Kshs 400,000/-	04/10/1983
	Kshs 300,000/-	12/03/1985
	Kshs 800,000/-	15/04/1986
	Kshs 1,300,000/-	06/08/1993
<b>Eldoret Municipality Block 9/1727</b> registered in the name of <b>Jasan Kiptoo Koskei</b>	Kshs 1,800,000/-	20/06/1993
<b>Eldoret Municipality Block 20(Kapyemit)38</b> registered in the name of <b>Tachasis Wholesalers Ltd</b>	Kshs 5,700,000/-	10/05/1994

57. From the evidence on record, it is not in dispute that the Defendant concedes that it is not in possession of, or is unable to produce the pre-contractual documents preceding the registration of the charges, or any document to demonstrate that the loan amounts referred to above were in fact disbursed or advanced to, or received by the Plaintiff. The Defendant thus admits that it has to date been unable to



comply with the orders made in Eldoret CMCC No. 904 of 2012 in which the Defendant was directed to supply the said documents to the Plaintiff. As aforesaid, the Defendant's explanation is that all these documents (including the loan application forms, letter of offer, letter of acceptance, and duly signed guarantor forms) mysteriously disappeared as a result of underhand dealings by the Defendant's own unscrupulous staff who colluded to remove and/or steal the documents from their office records. The parties basically agree that 6 of staff implicated were "fired" as a consequence of these acts. What the parties do not agree upon is whether any criminal charges were also preferred against the staff.

58. According to DW1, the Plaintiff is suspected to have been part of the "disappearance" of the documents because the Plaintiff would have been, and indeed, has turned out to be the beneficiary of such "disappearance". However, the Defendant, despite alleging that the Plaintiff was part of the collusion to steal the loan application and disbursement documents, failed to present any evidence of the Plaintiff's involvement in the malpractice.
59. There is also no dispute that at some point, when the alleged loan account herein became non-performing, the Defendant applied the practice of what was said to be referred to, in the banking circles, as Obligation Interest Account (OBLIST) account opening. Under cross-examination, DW1 explained that by creation of OBLIST, the monthly interest accruing to a loan account is debited in a second account opened for the same account, so instead of the loan accruing interest on itself, the interest is accrued on a separate account. According to him therefore, the difference between OBLIST and suspense interest account, is that instead of the loan balance increasing, it will appear stagnant. He explained further that the OBLIST is opened as a suspense account to avoid a non-performing loan from accruing interest. He however conceded that the CBK outlawed the practice when it discovered it, terming it bad practice. He then stated that in the OBLIST account that was opened, only a sum of Kshs 1,800,000/- was debited and that the Defendant later remedied the matter by debiting the Kshs 1,800,000/- back to the Plaintiff's account but that the supporting documents to that remedial action are also part of those items that disappeared. There are also allegations that during the operation of the OBLIST, the account remained suspended and was thus not accessible to the Plaintiff during that period. It is therefore suspected that during this period that the unscrupulous staff may have taken advantage and also conducted their own fictional transactions in the account undetected. With the above history, I have to agree with the Plaintiff's Counsel that the loan account, if any, seems to have been heavily interfered with on different occasions such that even if the full statements of account were to be availed, they may still be of no assistance as there would be so much doubt on the accuracy of the entries made therein.
60. Going only by the above state of affairs therefore, it may be inevitable for this Court to readily hold and find that in the absence of the documents supporting the application for, the approvals, processing, and disbursement of the loans, regardless of how this absence arose, the existence of the loans alleged by the Defendant has not been supported by any evidence. Similarly, in the absence of the full bank statements of accounts, the Court may also inevitably have to hold and find that there was no way of ascertaining or verifying the correctness of the figures alleged by the Defendant to be owing, even if disbursement of the loans was to be proved.
61. To the above extent, the Plaintiff may appear to be inevitably matching towards unchallenged victory. Not so fast though as there are other relevant angles that also arose, and which I will also consider and analyze before I make a final determination.
62. There is for instance, the angle which has been heavily advanced by the Defendant. This is in respect to the contents of the averments made in the pleadings filed by the Plaintiff in the various previous Court cases that the parties have been involved in. Incidentally, all the Affidavits filed in those cases on



behalf of the Plaintiff were sworn solely by PW1 herein, Jassan Kiptoo Koskei. The averments have been captured in the Defendant's Advocates' Submissions as shall be reproduced hereunder.

63. For instance, in Eldoret HCCC No. 325 of 1997, at paragraph 3 of his Complaint, the Plaintiff pleaded as follows:

“3. That on or about the year 1990 to 1993 the Plaintiffs obtained facilities from the Defendant company of about Kshs. 4,000,000/- and had his properties namely: Eldoret Municipality Block 5/46/1, Block 9/1727 and Eldoret Municipality Block 20/Kapyemit/38 charged to said bank as securities.”

64. Further, in the same Eldoret HCCC No. 325 of 1997, PW1, in his Affidavit sworn on 10/09/1997 in support of an Application for injunction, deposed as follows:

“2. That in the year 1990 to 1993 I was provided with bank facilities by the defendant company which I have fully repaid.

3. That the amount claimed by the defendant, a sum of Shs. 14,500,000/- is exaggerated and I believe is much less than the amount claimed.

.....

4. That I have written to the defendant to allow me to clear the balance of an amount which we will arrive at after the taking of accounts ....

.....

65. In the Ruling rendered in the same Eldoret HCCC No. 325 of 1997 and dated 09/6/1998, Hon. Justice R. Nambuye (as she then was), while dismissing the Application, held and directed as follows:

“..... the Plaintiff has no alternative but to go back to the Defendant and to negotiate fresh terms of repayment .... The correct position is that financial difficulties is not one of the grounds for granting an injunction once indebtedness is admitted, the only remedy the plaintiff has to stop the defendant from exercising its power of sale is to repay the loan or renegotiate fresh terms of repayment.

.....

As regards the issue of the correct figure still outstanding on the loan the Plaintiff should sort it out with the Defendant. For the reasons given, the Plaintiff is given only 45 days from the date of the reading of the ruling to pay off the amount claimed failing which the Defendant will be at liberty to realize the security.”

66. PW1, in his subsequent Affidavit sworn on 13/07/1998 in the same Eldoret HCCC No. 325 of 1997, whereof he sought review of the dismissal of the earlier Application, deposed as follows:

“3. That the Court also gave the Plaintiffs 45 days to pay off the outstanding amount due failing which the defendant be at liberty to realise the security.

.....

7. That due to the economic situation in Kenya today which has resulted in business deadline the Applicant has not been able and cannot be able to raise



Kshs. 26,556,396.40/= within a period of 45 days given the size of the business of the Applicant and its capability.

8. That with extended period of re-payment of the loan the Applicants would be in a position to repay the loan at the rate of Ksh. 350,000 per month .....
10. That the outstanding amount is currently sh. 26,556,396/40 and continue to attract interest.”

67. The Plaintiff, in its Plaintiff filed in Eldoret HCCC No. 59 of 2000, pleaded as follows:

- “3. The Plaintiff was and has been a customer at the Defendant Bank's branch in Eldoret since 1983 to date.
4. During this period the Plaintiff has applied for loan facilities at various times and he got some but others were also refused.”  
.....
5. The Plaintiff had at various times given to the Defendant the Defendant the following documents and titles as security for the loan facilities granted to him, namely
  - a) Eldoret Municipality/Block 5/46/1 in his own name
  - b) Eldoret Municipality/Block 9/1727 in his own name
  - c) Eldoret Municipality/Block 20(Kapyemit) 38 in his own name  
.....”

68. In the same Eldoret HCCC No. 59 of 2000, Hon. Justice M. Ibrahim (as he then was), in a Ruling dated 9/08/2012 and delivered on his behalf by Hon. Justice Azangalala, while dismissing the Plaintiff's Application seeking review of the dismissal of an earlier Application whereof the Plaintiff had also sought an injunction, held as follows:

“The Plaintiff had indicated that he owes the Defendant the sum of Kshs. 26 million and has not provided evidence which would have led me to reasonably arrive at a conclusion that the Plaintiff has settled his accounts. I therefore hold that the Applicant has not satisfied this Court that there is discovery of new and important matter which was not available to them with the exercise of due diligence at the time the Court's earlier ruling was made and delivered.”

69. The Plaintiff, further, in its Plaintiff filed in Eldoret CMCC No. 904 of 2012 stated that:

- “4. The Plaintiff was advanced loans by the Defendant during which transactions the following documents were executed.
  - a) Loan application forms
  - b) Approval letters and conditions and acceptance letters
  - c) Letter of offer and conditions and acceptance letters
  - d) Statements indicating the first drawing



5. The Plaintiff's proprietor executed the documents and handed the same over to the Defendants to facilitate the loan approval."
70. It is not in dispute that PW1, Jasan Kiptoo is a director of the Plaintiff, Tachasis Company Limited, and is, in fact, for all intents and purposes, the main force behind the company. He is therefore the agent of the company, and Affidavits and pleadings sworn or drafted under his instructions and authority, are binding upon the Plaintiff, his company.
71. In view of the foregoing, I am constrained to agree with Mr. Omwenga, Counsel for the Defendant, that it is therefore clear that the Plaintiff, by the said Affidavit sworn on its behalf by PW1 on 13/07/1998, expressly acknowledged a liability to the Defendant of Kshs 26,556,396.46/- as being loan arrears. I agree with Counsel that this evidence directly contradicts the Plaintiff's claim that it owed no debt to the Defendant and reinforces the existence of the loan facility, which has not been cleared. I further agree with Counsel that PW1 contradicts himself by alleging that the Plaintiff never borrowed any money from the Defendant while in the Affidavits quoted above, he expressly admits having received the money from the Defendant, and also acknowledging that he was in arrears.
72. In light of the above, I also have no alternative but to agree with Counsel that with the several admissions made by PW1 on the Plaintiff's behalf in the above matters, not once, but on several separate occasions, the Plaintiff is estopped from denying that it never took any loan from the Defendant and also from denying that it was in arrears. In any case, the Plaintiff has tendered no evidence whatsoever that it has settled the loans in full and if so, in what manner.
73. Mr. Omwenga therefore correctly cited the provisions of Sections 18, 20 and 120 of the *Evidence Act*. Section 18 provides that:
- "Statements by party to suit or agent or interested person (1) Statements made by a party to the proceeding, or by an agent to any such party, whom the court regards in the circumstances of the case as expressly or impliedly"
74. The strange thing on the part of the Plaintiff that I find interesting is that Mr. Omboto, the Plaintiff's Counsel has, in his final Submissions, not at all commented or responded to the above very crucial questions raised about the matters sworn under oath by his own client, and has, instead, chosen to maintain a studios silence thereon, seemingly seeking refuge in the fact that the Defendant is unable to produce documents supporting the advancing of the loans. This loud silence, coupled with PW1's inability to controvert the matters, is in my view, quite telling and I interpret it to be admission of the correctness and truth of the facts alleged, or in the alternative, absence of any defence thereto.
75. In light of the foregoing, I also have my misgivings and doubts about the truth of the denials made by PW1 in this instant suit. First, he does not deny that he has at all times been aware of the existence of the said charges registered against the 3 properties in favour of the Defendant, which as we have seen, were registered between 1983 and 1994. However, it is strange that the correspondence on record shows that it is only from around the year 2000 that the Plaintiff began alleging that it was never advanced the monies by the Defendant. There being evidence that the relevant malpractices by the Defendant's staff leading to the disappearance of the records took place around the late 1990s, this timing viz a viz the delay to register any protest by the Plaintiff, seems too convenient and by extension, very suspicious.
76. PW1 has also alleged that after completing repayment of the loans that he had taken from the Defendant in the name of the Plaintiff, the last one being in 1990, and the properties discharged, he only thereafter charged one property to Kenya Commercial Finance Corporation (KCFC) in 1993 in exchange for a loan of Kshs 17,000,000/-, which he also repaid in full and the title also discharged,



- and that it is the Defendant that even referred and connected him to KCFC. PW1 also alleged that he had simply left the titles to his properties with the Defendant for custody for future use in case he needed further loans from the Defendant. According to him therefore, any loan the Plaintiff received after around 1993 was from the now-defunct KCFC, and not the Defendant.
77. Despite making all the above serious allegations however, PW1 did not produce any supporting documents whatsoever to prove that indeed, he took any loan from KCFC as aforesaid, or that he completed repaying such loan and the property discharged, or that he left his properties with the Defendant for safe custody for future use. Surely, there would have been documentation to prove these matters. Under these circumstances, I take with a pinch of salt PW1's claims that the Defendant, through its gimmicks, illegally charged the properties, or that after repaying the loan then due to the Defendant, he never again took any other fresh loan from the Defendant. I say so because it is clear that, as demonstrated above, PW1 had in previous litigation, expressly admitted that he took the loans from the Defendant in the name of the Plaintiff as its director, and that the Plaintiff still owed loan balance arrears. His only bone to pick was clearly only that the Defendant had exaggerated the amount owing. PW1 therefore contradicts himself by alleging that the Plaintiff never borrowed any money from the Defendant that is still owing.
78. I also note that while in some instances, PW1 stated that the last loan took from the Defendant was in 1990, in other areas, and also in his previous Affidavits cited above, he conceded that he actually took some loans up to 1993. Before this Court, he denied that there were any applications for any loan from the Defendant beyond 1993, or Letters of offer, or valuations, or approvals of the loans, or interest or repayment schedules, yet under cross-examination, he conceded that indeed he took loans from the Defendant between 1990 and 1993 aggregating to about Kshs 4,000,000/- in exchange to which he gave out the properties herein as security. He also admitted that the same loans that he had referred to in his Plaint in Eldoret HCCC No. 325 of 1997 are the same loans he referred to in Eldoret HCCC No. 59 of 2000 Eldoret. The contradictions apparent in the Plaintiff's case and testimony are just too many and too substantial and material to be ignored.
79. I am also disturbed by the fact that in the Plaintiff's initial bundle of documents, there were some internal memos and letters for the Defendant, not addressed to the Plaintiff. Although the initial bundle was subsequently expunged from the record and replaced with a fresh one, and has thus not formed part of this Court's reasoning, there being no explanation on how these internal memos landed into the Plaintiff's possession, the allegation that the Plaintiff may have been somehow involved in the "disappearance of the Defendant's loan documents, does not seem too far-fetched.
80. I may also mention that to say the truth, the Plaintiff's witness, PW1, Jasson Koskei, did not at all impress me as a credible or reliable witness. His demeanour throughout his testimony was of a person struggling to hide the truth. He was visibly evasive on many issues and appeared selective in his disclosure of information. He was also on several occasions, during cross-examination, caught denying obvious facts apparent from the record, such as when he purported to deny knowledge of the Affidavit dated 10/09/1997 filed in Eldoret HCCC 325 of 1997 and produced in evidence herein yet the Affidavit clearly that it was sworn in his own name, signed by him, relied on and advanced in the case, and was filed in Court by his own Advocate. A witness who blatantly lies under oath, and before a Judge in Court, does not at all inspire the Court to believe him on anything else he says.
81. Having established that the Plaintiff owes the loan arrears, the next question is to establish the amount so owed.
82. In answering the above question, I note that in its Notification of Sale and 45 Days Redemption Notice dated 26/04/2016, the Defendant stated the amount owing as at 17/02/2016, to be Kshs



- 42,826,897.85. On its part, as aforesaid, the Plaintiff in its previous Affidavits filed in earlier cases, acknowledged owing a sum of Kshs 26,556,396.46/- as at 13/07/1998.
83. In demanding the amount of Kshs 42,826,897.85, the Defendant never included any interest component thereon or the interest rate, and left the same blank. DW1, during cross-examination, also testified that the Defendant had around the time of serving the Notification of Sale and 45 Days Redemption Notice, stopped loading interest. In fact, during re-examination by his own Counsel, DW1 expressly stated that the Defendant is not even asking for interest since the Defendant had realized that the loan was non-performing. I therefore believe that I can safely presume that no further interest is being demanded by the Defendant. Regarding the figure of Kshs 42,826,897/- however, the Defendant has not been able to give a computation thereof, or an explanation on how the said figure has arisen. Needless to state, this is because, according to the Defendant, the relevant documents mysteriously “disappeared” as they were stolen or removed from the Defendant’s records by unscrupulous staff whose employment was later terminated, and who were also charged with a criminal offence. Again, needless to state, the Defendant suspects that the Plaintiff was involved in that scandal but could not prove the same. Be that as it may, the status is that those records, including the full statements of account, are said to be unavailable for scrutiny. In the circumstances, the figure of Kshs 42,826,897.85 claimed by the Defendant, besides being contested by the Plaintiff, also remains unproven.
84. Under the above circumstances, I will adopt the figure acknowledged by the Defendant, namely, Kshs 26,556,396.46/- as at 13/07/1998. Interest not having demanded by the Defendant as aforesaid, and the right to levy interest also not having been demonstrated, no interest will accrue on the figure of Kshs 26,556,396.46/-.
85. The remaining issue is now whether the Defendant is at liberty to proceed with recovery of the said amount by way of exercising its statutory power of sale.
86. It is not in contention that a chargee, in exercising its statutory power of sale, before it can sell or dispose of a collateral or security so charged, in the event of default in repayments, is required, by law, to first issue and serve notices to the chargor as follows:
- a. 90 days’ statutory notice of default, pursuant to Section 90(1) and (2) of the *Land Act*, 2012.
  - b. 40 days’ notice of intention to sell, pursuant to Section 96(2) of the *Land Act*, 2012.
  - c. 45 days’ redemption notice pursuant to Rule 15(d) of the Auctioneers’ Rules, 1997.
  - d. 14 days’ notification of sale, pursuant to Rule 25(e) of the Auctioneers’ Rules, 1997.
87. It is not in dispute that only the Redemption Notice (c) above, and the Notification (d) above, have, in this case, been produced by the Defendant. The Notice of default (a) above, and the Notice of Intention to Sell (b) above, have not.
88. Again, as aforesaid, the Defendant’s explanation is that although it did serve the two notices, copies of the same are among the documents or items that mysteriously disappeared from its file and were later discovered to have been stolen and removed by the Defendant’s unscrupulous staff. While the above explanation may be believable, and possibly true, as it is, the position remains that the Defendant has not been able to prove service of the statutory notices for scrutiny. This Court therefore has no way of verifying whether such service was indeed effected particularly since the Plaintiff denies any such service.
89. Under the above circumstances, the Defendant, if it wishes to achieve recovery by exercising its statutory power of sale, will have no choice but to commence the whole process afresh by serving or re-serving all the above notices afresh.



Final Orders

90. In the premises, I rule and order as follows:

- i. The suit herein is hereby dismissed with costs to the Defendant.
- ii. It is accepted and adopted by this Court that the loan arrears amount acknowledged by the Plaintiff in a previous suit between the parties herein, namely, Eldoret HCCC No. 325 of 1997, as owing from the Plaintiff and payable by it to the Defendant, as at 13/07/1998, was Kshs 26,556,396.40.
- iii. The Defendant having failed to prove or demonstrate the computation of the amount of Kshs 42,826,897.45 demanded by it as the outstanding loan arrears owing from the Defendant as at 17/02/2016, and also having not demanded any interest thereon or justified levying of interest, the amount of Kshs 26,556,396.40 acknowledged by the Plaintiff as owing as at 13/07/1998 as above, there being no evidence that the amount or any part thereof has been settled, is hereby adopted and applied as the same amount still owing and payable by the Plaintiff to the Defendant as at the present date, with no interest accruing thereon.
- iv. The Defendant having failed to demonstrate or prove that it complied with the mandatory statutory procedures, namely, service of statutory notices upon the chargor, required to be complied with before exercising the chargee's power of statutory sale, it is hereby ordered that the Defendant will have to begin the process of exercising that power of statutory sale afresh by serving the said notices afresh, should it still wish to exercise that right.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2025**

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**WANANDA JOHN R. ANURO**

**JUDGE**

Delivered in the presence of:

N/A for the Plaintiff

Mr. Omwenga for the Defendant

Court Assistant: Brian Kimathi

