Isiye & 2 others v African Banking Corporation Ltd (Commercial Case 2 of 2018) [2024] KEHC 158 (KLR) (16 January 2024) (Judgment)

Neutral citation: [2024] KEHC 158 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

COMMERCIAL CASE 2 OF 2018

RE ABURILI, J

JANUARY 16, 2024

BETWEEN

MORRIS MUNAMEZA ISIYE ..... 1ST PLAINTIFF

EPHY IMBALI ..... 2ND PLAINTIFF

KAMADEP GUEST HOUSE LIMITED ..... 3RD PLAINTIFF

AND

AFRICAN BANKING CORPORATION LTD ..... DEFENDANT

JUDGMENT

1. The plaintiffs Morris Munameza Imbali Isiye, Ephy and Kamadep Guest House Limited vide an amended plaint dated 15th October 2021 sought the following orders against the defendant African Banking Corporation Ltd

    a. A declaration that the Defendant acted illegally by not giving a statutory notice and that the Defendant acted illegally by levying or loading the accounts with figures not agreed upon.

    b. A permanent injunction be issued to stop the Defendant, agents, employees and servant from taking undue advantage of the Plaintiffs' situation and unfairly attempting disposing, selling or auctioning the property of the Plaintiffs namely LR No. Kakamega/Municipality/ Block 111/10 and the Defendant breached the *Consumer Protection Act* (No. 46 of 2012)

    c. An order for accounts to be taken to determine the exact amount of money owed by the Plaintiffs to the Defendant, if any for settlement and an order that Defendant owes the Plaintiffs and should refund the surplus.

    d. Costs of this suit.

2. The plaintiffs' case as pleaded is that being customers to the defendant Bank at the latter's Kisumu Branch, sometimes in 2013, the plaintiffs sought a development loan facility from the defendant and charged their property No. LR No. Kakamega/Municipality Block 111/10 (hereinafter known as the suit property).

3. It was the plaintiffs' case that sometime in 2017, the business shrank and thus they faced financial challenges in their obligations to the defendant but endeavoured to pay up when required but that to their shock and dismay, the defendant instructed Nyaluoyo Auctioneers vide a letter dated 27th March 2018 to sell the property by way of public auction claiming that the plaintiffs owed it Kshs. 20,460,387.95 whereas the plaintiffs had paid the defendant a substantial amount save for Kshs. 500,000 and further that the defendant had served no statutory notice on the plaintiffs in violation of the law.

4. The plaintiffs further averred that in a bid to obtain a quick sale, the defendant valued the suit property at Kshs. 85,000,000 yet in 2013 they had valued the suit property at Kshs. 130,000,000.

5. The plaintiffs further averred that the defendant had subjected the loan facility to illegal penalties, unreasonable interest rates on the outstanding balances and other strange debits unknown to the plaintiffs thus making repayment unmanageable.

6. The plaintiffs averred that they hired an independent auditor who confirmed that they had paid the defendant Kshs. 26,126,006 which surpassed the principal amount of Kshs. 22,500,000 and that in total, they had paid Kshs. 32,696,461 which amounts were sufficient and adequate to have offset the loan in toto and thus the defendant's claim for Kshs. 23,007,861.15 was illegal, unconscionable and unjust, against the Customer Protection Act (No. 46 of 2012).

7. In response, the defendant filed an amended defence dated 16th November 2022 denying the allegations made by the plaintiffs and put the plaintiffs to strict proof. The defendant further contended that the plaintiffs' initial default in servicing the loan advanced occurred in November 2016.

8. It was the defendant's contention in defence that prior to the notification of sale issued by Nyaluoyo Auctioneers on the plaintiffs, the defendant had issued and served several prior notices to the plaintiffs as follows:

    i. 30-day Notice dated 13.12.2016

    ii. Statutory Notice dated 4.9.2017

    iii. 30-day Notice dated 9.2.2017

    iv. Statutory Notice dated 17.10.2017

    v. 40-day Notice dated 6.3.2018

9. The defendant contended that the averment by the plaintiffs that the outstanding balance owed by the plaintiffs was Kshs. 500,000 was incorrect, misleading and fallacious as the plaintiffs have all along been made aware of the status of their accounts furnished to them and that they had even made proposals on settlement through their advocates.

10. The defendant further denied that it intended to obtain a quick sale over the suit property or that it had valued the property at Kshs. 85,000,000 but rather that it would only proceed with the sale based on a genuine and accurate value so as to ensure that the outstanding loan is paid off and the balance thereof paid over to the plaintiffs.

Oral Testimonies

11. In support of their case, the plaintiffs and the defendant adduced viva voce evidence. The 1st Plaintiff testified as PW1 and adopted his witness statement dated 31st March 2022 as his evidence in chief and stated that he had overpaid the loan and does not understand why the defendant Bank loaded penalties on his account without consulting him. He also alleged that the suit property was undervalued hence the intended sale was actuated with malice. He stated that in all the instances, the Bank debited his account with valuation charges without his consent, and that the last valuation resulted into Kshs 447,000/= being debited into his account.

12. PW1 further testified that the defendant had valued the suit property at Kshs. 63,750,000 but that following this court's order for valuation, the suit property was valued at Kshs. 186,000,000 thus showing that the defendant had devalued the suit property. He testified that the defendant demanded the principal sum of Kshs. 22,500,000 from him whereas he had paid the defendant Kshs. 32,696,468.81 an overpayment of Kshs. 1,817,317.01 which he wanted the court to order to be refunded to him.

13. PW1 testified that on 6th February 2019, the court nullified the intended auction of the suit property as due process was not followed yet the auctioneer's fees were loaded onto his loan statement. He further alleged non-service of statutory notices prior to the aforementioned auction.

14. In cross-examination, PW1 admitted that in 2013 he took a loan of Kshs. 22,500,000 and that the loan was to be repaid within 60 months at monthly instalments of Kshs 583,600 which was later restructured to be repaid in 120 months at monthly instalment of Kshs. 387,000. PW1 admitted that the issue of undervaluation was settled by the Court which ordered for a fresh joint valuation which has since been undertaken by the parties.

15. PW1 admitted that prior to order of joint valuation, there was an application for breaking – in order but that he did not participate in the reevaluation, and did his own valuation. PW1 agreed that the reevaluation had been ordered by the Court and that he had requested that it be jointly carried out in the presence of his representatives. He however stated that he disputed the last valuation by the Bank. PW1 asserted that as per the calculations by his auditor, he had overpaid the loan by Kshs. 1,817,317.

16. PW1 admitted that he was previously represented by the firm of Phoebe Muleshe & Company Advocates. He testified that he did not agree to the valuation expenses being debited on his account and that the expenses should be applied in consultation with clients. PW1 admitted that he was aware that in case of default of repayment, default interest and penalty would accrue but that still he was overcharged. H also admitted that recovery costs are stipulated in the letter of offer and charge document. He further stated that he was not aware that when the court ordered for valuation, their respective representatives were to be present. He stated that his claim of undervaluation arose before the court ordered for a joint reevaluation.

17. In re-examination, PW1 stated that he was not aware of the breaking–in order. PW1 stated that the letter of instructions to Pinnacle Auctioneers was not disclosed to him, nor the charges for valuation. He stated that he did not agree for the valuation to be debited on his account and also did not agree to the overcharging of his account with unreasonable penalties. He stated that he did not agree with the valuation findings by Pinnacle Auctioneers.

18. PW2, Ben Anyango Achola, a CPA with Khoya & Company stated that he was instructed by the 1st plaintiff who asked them to carry out a reconciliation and that he subsequently analyzed the loan account statements for the period from December 2013 to June 2021 as well as the loan agreement.

PW2 testified that he arrived at the conclusion that PW1 had paid Kshs. 32,696,468.81 whereas the principal loan was Kshs. 22,500,000. He further testified that the interest charged surpassed the principal which was not normal.

19. In cross-examination, PW2 admitted that his witness statement or the audit report did not show that he relied on the provisions of the letter of offer and charge document to arrive at his conclusions. He also admitted that the loan statement showed where there was default and that in August 2014, the loan was restructured. He reiterated that as at June 2021, there was an overpayment.

20. In re-examination, PW2 stated that his analysis was from December 2013 to June 2021 and that they concluded that there was overpayment as per the audit report. He stated that the first document that he looked at was the loan agreement where he got the figure of Kshs. 22,500,000.

21. PW3, Luke Okeyo Madende, a valuer and real estate agent and Director of All Property Consultants testified that they did a valuation of the suit property and found the market value to be Kshs. 186,000,000. It was his testimony that any other report done at the same time with a lower value would not be correct. He produced the Valuation Report dated 15th May 2019 as PEX11.

22. In cross-examination, PW3 stated that he was not aware of any joint valuation and that he carried out his own valuation based on instructions received and following his inspection of the property on the 17/4/2019. He stated that he did not have any history of his client's attempts to sell the suit property and further that he had not been involved in any negotiation for the intended sale of the property.

23. In re-examination, PW3 stated that valuation is a science and an art guided by valuation standards and that where valuations differ, the margin of error is upto 15%.

24. On its part, the defendant called two witnesses in support of its statement of defence. DW1, Douglas Okiring adopted his witness statement dated 17th January 2023 as well as the bundle of documents filed on the 18th January 2023 as his evidence in chief and exhibits DEX1 – 22 respectively.

25. DW1's statement aforementioned reiterated the defendant's averments in their amended statement of defence regarding the statutory notices served on the plaintiffs following their default. DW1 further testified that the Bank bent backwards in assisting the plaintiffs regularize the accounts including giving them time to regularize the account and further that the plaintiffs' prayer seeking taking of accounts was aimed at delaying resolution of the matter as the Bank statement have always been availed to the plaintiffs and were availed to their advocates and thus there was nothing stopping the plaintiffs from reconciling their accounts.

26. In cross-examination, DW1 stated that that the loan was only restructured to give the borrower more time to repay the loan through reduced monthly instalments. In response to whether prior to loading costs of the various valuation reports onto the borrower's loan account the borrower's consent had been obtained, DW1 responded that the Bank verbally advised the borrower to agree with the service providers on their costs and that these costs were loaded onto the loan account because the same were contractual. He also clarified that the previous varying valuation reports over the suit property that they had procured had been disregarded because of a Court order obtained by the plaintiffs.

27. DW1 stated that they charged the plaintiffs' account for the cancelled sale an amount of Kshs. 271,400 but had not refunded the money to the borrower because they had charged him for the services. On whether the Bank agreed with or challenged the audit findings by Khoya Accountants, DW1 stated that the said report did not reflect the months in which the Borrower defaulted, and did not capture the penalties that had accrued as a result of the plaintiffs' default.

28. DW1 stated that the principal sum could be less than the amount of interest if the default continued. It was his testimony that the Bank would audit to find out how much the plaintiffs paid.

29. In re-examination, DW1 testified that the loan facility was rescheduled. He testified that in 2019, interest rates as capped were removed and that default led to the recovery process. He testified that they instructed Acumen to value the property and received the report but did not proceed with the auction because a query on the value of the property. It was his testimony that they agreed to carry out another valuation jointly by both parties through Pinnacle Valuers.

30. DW1 further testified that the audit report did not capture the loan processes i.e. interest, repayment, penalties and penalty interest which increases the amount.

31. DW2, Paul Ngugi, a valuer and the managing director of Pinnacle Valuers Limited testified that he prepared a valuation report dated 29th April 2019, which he produced as DEX3, over the suit property following the defendant's instruction dated 7th February 2019. It was his testimony that the plaintiffs and their valuer, Add Property Consultants were present so they did joint measurements.

32. DW2 testified that as per their report, the open market value was Kshs. 154,000,000, the mortgage value Kshs. 124,000,000, the insurable value Kshs. 120,000,000 and the forced sale value Kshs. 116,000,000.

33. In cross-examination, DW3 stated that they did not access movables, furniture or linen and that they only valued the immovable property. He reiterated that the plaintiffs were represented in the valuation by Add Property Consultants. He stated that the customer did not sign anywhere and that further they did not agree in respect of valuation fees. DW3 stated that a valuation was an opinion but that the difference between two valuations over the same property ought not to be wide.

34. In re-examination, DW3 testified that the purpose of the valuation was to advise the bank on the value for recovery purposes and that they did not agree on the fees or valuation with the plaintiffs.

The Plaintiffs' Submissions

35. It was submitted that that no statutory notice was ever served upon the plaintiffs and therefore the intended sale was null and void. Reliance was placed on the Court of Appeal case of Trust Bank Ltd v Eros Chemists Ltd [2000] 2 EA 550 (CAK). The Plaintiffs further submitted that the Defendant did not comply with the second statutory notice as required by section 96(2) of the *Land Act* and as affirmed in the case of Act Fast Security Limited v Equity Bank (2014) eKLR.

36. The plaintiffs submitted that the defendant breached the duty of care owed to them in ensuring that there was proper valuation of the suit property as they were in a hurry to sell this property forcing the court to cancel an intended sale because it was being done without proper valuation of the property and in disobedience of the orders of the Court. It was further submitted that when the chargee chooses to sell the charged land as the remedy, then the provisions of sections 96, 97, 98, 99, 100 and 101 of the *Land Act* come into play and that these provisions are meant to ensure that the sale attracts market value or at the very least the reserve value. Reliance was placed on the case of David Gitome Kuhiguka v Equity Bank Ltd [2013] eKLR where Havelock J. stated that the obligation on chargee to ensure that a forced sale valuation is undertaken by a Valuer comes under the heading to section 97 of the *Land Act*,2012.

37. It was submitted that the defendant in 2013 had valued the property at Ksh 130,000,000 and subsequently when in a hurry to sell the suit property, hired a Company called Acumen Valuers Ltd who on 19th July 2017 valued the property at Ksh 85,000,000. The plaintiffs further submitted

that the price the defendant gave the Auctioneers, Nyaluoyo Auctioneers, was Kshs. 63,750,000 thus evidencing that the defendants were malicious and were bent on fraud.

38. The plaintiffs submitted that the intended sale was fraudulent because the Auctioneers were relying on an expired valuation. It was further submitted that Nyaluoyo Auctioneers on the 17th March 2020 advertised the property for sale based on Acumen Valuers Ltd Report carried out on 19th July 2017 which was in violation of the Auctioneers Rules, 1997 specifically Rule 11 (b) (x) of the Auctioneers Rules 1997 which stipulates that, "The reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale."

39. The plaintiffs submitted that the aforementioned valuation was more than 3 years old and therefore a violation of the Auctioneers Rules and could not be acted upon and thus by acting on an expired valuation report the defendant was acting fraudulently, maliciously and breached the duty of care under section 97 of the *Land Act*.

40. It was submitted that the Court ought to find that based on the fact that the Defendant was charging an interest amount higher than what the law provided in Section 33 (b) of the *Banking Act*, the defendant broke the law and that the moment Parliament introduced section 33(b) on 14th September 2016, they should have stopped charging 19% interest and applied the statutory rates until 19th November 2019 thus the defendant acted illegally and with impunity.

41. The plaintiffs further submitted that even if the interest rates were increased, there was no notice of the same to the Plaintiffs contrary to the provisions of Section 84 (1) of the *Land Act*.

42. The plaintiffs submitted that there was a violation of the in duplum principle and that the court ought to order the defendant to refund the excess payment of interest as the defendant had charged an illegal interest that was far much more than the Principal Loan and this violated Section 44 of the *Banking Act*. Reliance was placed on the cases of Housing Finance Company of Kenya Limited v Scholastica Nyaguthii Muturi & Another (2020) eKLR, Lee G Muthoga v Habib Zurich Finance (K) Limited & Another [2016] eKLR and that of Mwambeja Ranching Company Limited & Another v Kenya National Capital Corporation.

43. It was submitted that the high interest rates applied by the defendant violated the plaintiffs' consumer rights contained in Articles 46 (c)(d) of *the Constitution*. Reliance was placed on the case of Mugure & 2 others v Higher Education Loans Board (Petition E002 of 2021) [2022] KEHC 11951 (KLR) (Civ) (19 August 2022) where it was held interalia that the continued imposition of interest and penalties on non-performing loan accounts even when the interest and penalties had exceeded the principal amount violated the in duplum rule."

The Defendant's Submissions

44. On behalf of the defendant Bank, it was submitted that the Plaintiffs did not demonstrate any illegality with respect to application of interest on the loan account and throughout the trial including via documentary evidence as the Defendant countered that the interest rates charged were the rates which were indicated in the Letters of Offer and the rescheduling documents which represented what was voluntarily agreed upon between the parties themselves.

45. The Defendant further submitted that as default of the Plaintiffs in servicing the loan had been proved, it cannot be rightly said that the Defendant does not have a proper basis to exercise its statutory power of sale under the Charge.

46. As to whether the statutory notices were properly served in accordance with the law, it was submitted that the Defendant provided evidence of issuance of 30 days' Notice dated 13/12/2016; 90 days' Statutory Notice dated 4/9/2017; 30 days' notice dated 9/2/2017; Statutory Notice dated 17/10/2017; 40 days' Notice to Sell dated 6/3/2018 all of which were responded to by the Plaintiffs' Advocates, M/s Phoebe Munihu Muleshe & Company Advocates, prior to the issuance of the 45 days Redemption Notice & Notification of Sale by Nyaluoyo Auctioneers dated 27/3/2018 hence the Court ought to find that the Defendant complied with the provisions of the law as hereinabove cited.

47. As to whether there was gross undervaluation of the charged property, it was submitted that the Plaintiffs were required to challenge the credibility of the Defendant's valuation which they did not and that it was not enough for them to state that the charged property had a higher value than the one relied upon by the Defendant and thus the allegations that the charged property had been undervalued were baseless, an afterthought and intended to frustrate the Defendant's right of sale of the charged property to satisfy the unpaid debt.

48. The defendant submitted that the Plaintiffs had not given sufficient reasons as to why the court should disregard the Defendant's valuation report and rely on their report which was evidently produced as a counter-valuation report and that in view of this, it was evident that the Plaintiffs dispute as to the valuation of the property was a mere afterthought which had been substantively dealt with when the Court issued the order for revaluation of the charged property.

49. It was submitted that the Defendant strictly complied with the requirements on issuance of Statutory Notices and that the Plaintiffs having neglected to rectify the default, were in continuous default which activated the Defendant's remedies in Section 96 (1) of the *Land Act* and as held by the Court of Appeal in the case of Mrao vs First American Bank of Kenya Ltd & 2 others (2003) eKLR.

Analysis and Determination

50. I have considered the pleadings by both parties, their oral testimonies as well as the submissions filed herein. The issue for determination herein is whether the plaintiffs' merit to be granted the orders sought in the plaint as amended. I will therefore deal with each of those prayers sought.

51. The first prayer sought by the plaintiffs against the defendant is for a declaration that the Defendant acted illegally by not giving a statutory notice and that the Defendant acted illegally by levying or loading the loan accounts with figures not agreed upon.

52. The undisputed evidence on record is that pursuant to an application for a development loan facility by the plaintiffs sometime in 2013, the defendant agreed to advance a term loan facility to the plaintiffs vide a letter of offer dated 20.9.2013 which loan was restructured vide letters of offer dated 20.1.2015 all which were duly executed by all the parties.

53. Further, the aforementioned facility provided for the creation of a legal charge dated 11.11.2013 over the suit property in the names of the 1st and 2nd plaintiffs for the initial maximum principal amount of Kshs. 22,500,000. It is manifestly clear and it is undisputed that the Plaintiffs subsequently defaulted in servicing the loan on the 27.9.2016 and the account fell into arrears and continued to be in default prompting the Defendant to issue demand notices for payment as well as statutory notices as required under the *Land Act* 2012.

54. The Plaintiffs pleaded and submitted that they were not served with a statutory notice as required by section 90 of the *Land Act*.

55. A statutory notice issued under section 90(2) of the *Land Act*, triggers the security realization process, which leads to the chargee ultimately exercising its powers outlined under section 90(3) of the Act. The notice is issued where there is default or breach of any covenant under the charge instrument.

56. Section 90 of the said *Land Act* Cap 280 (Laws of Kenya) provides that:

> " If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
>
> The notice required by subsection (1) shall adequately inform the recipient of the following matters—
>
> i. the nature and extent of the default by the chargor;
>
> ii. if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
>
> iii. if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so at to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;
>
> iv. the consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
>
> v. the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies."

57. Despite claims by the plaintiffs that service of the statutory notices was not effected upon them, I note that it was the uncontroverted evidence of DW1 that the Defendant initially issued a 30 days' Notice dated 13.12.2016 informing the plaintiffs that they were in default of their obligation and that as at 24.11.2016, the outstanding debt stood at Kshs. 20,641,904.05; a 90 days' Statutory Notice dated 4/9/2017; a 30 days' notice dated 9/2/2017; a Statutory Notice dated 17/10/2017; a 40 days' Notice to Sell dated 6/3/2018 all of which were responded to by the Plaintiffs' Advocates at the time, M/s Phoebe Munihu Muleshe & Company Advocates, prior to the issuance of the 45 days Redemption Notice & Notification of Sale by Nyaluoyo Auctioneers dated 27/3/2018.

58. Thus, the evidence adduced by the plaintiffs does not reveal patent non-compliance with the statutory provisions. There is indeed compliance in so far as the statutory notice is concerned.

59. There is also apparent evidence of default on the part of the Plaintiffs. Despite denying that they were served with the statutory notices, the evidence before court is that the same were served and the plaintiffs were aware of the same. Hence the various correspondence between the plaintiffs' and the defendant's counsel following the default after issuance of the said notices.

60. It follows that the plaintiffs' challenge to the statutory notice is not merited. I find that the allegation that the statutory notice was not served was not proved by the plaintiffs. On the contrary, the defendant proved that it did issue and serve the same and therefore the plaintiffs were required to provide evidence of lack of service.

61. I find that the Defendant complied with the provisions of the law as hereinabove cited as contained in Documents 10 -24 in the defendant's Bundle of Documents all produced as Defence exhibits 10-24. Accordingly, the claim and allegation that service of the Statutory Notice was not done has no merit and the same is hereby declined and dismissed.

62. On the claim that the Defendant acted illegally by levying or loading the accounts with figures not agreed upon, and commencing with the issue of interest charged including penalty or default interest, the court must first examine the letter of offer and establish whether the interest charged was agreed upon or not. This is because where the Plaintiffs freely and voluntarily charge the suit property and were clearly aware that the facility advanced attracted interest as well as default interest which was quantified in percentage, and that in the event of default in servicing the debt, the default interest stated would apply as well and that properties would be liable to be sold. The Plaintiffs in this case are bound by the agreement they entered into with the Defendant on the interest that was to be paid on the loan amount that was advanced to them by the Defendant, as well as the default interest and unless it is shown that other unlawful charges were levied, this court would not interfere.

63. In case of Andrew Muriuki Wanjohi v Equity Building Society Ltd [2006] eKLR the court held as follows:

> " Whenever the Applicant offered the suit property as security, he was conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the chargee, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had the property evaluated in monetary terms. He had then told the chargee that he knew the property to be capable of providing the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable even if the borrower did not pay it."

64. Thus, the law is that by offering the suit property as security, the chargor was equating them to a commodity which the chargee may dispose of, so as to recover the loan together with interest thereon. Therefore, if the chargee were to sell off the suit properties, the chargor's loss could be calculable on the basis of the real market value of the said property.

65. It was also the Plaintiffs' averment and submission that the Defendant had unilaterally charged illegal and unconscionable interest, against the dictates of the Letter of offer and Charge document. I have perused the Letter of Offer dated 20.9.2013 and the subsequent restructure Letter of Offer dated 20.1.2015 wherein at clause 3 as read with Schedule 2, it provides that interest is charged at the rate of 19% p.a. (KBRR [8.54%] + 10.46%) variable and an interest default rate of 36% per annum.

66. The position in law with regard to the binding nature of a contract executed willingly by the parties is now well settled. In National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & another [2011] eKLR, the Court was categorical that:

> "It is clear beyond para adventure, that save for those special cases where equity might be prepared to re-leave a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."

67. In Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR, after reviewing case law on the subject, The Court reiterated as follows:

> "We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."

68. The issue as to whether the concept of levying default/penalty interest is part of Bank trade usage and custom in Kenya is now settled. There are two schools of thought. One holds that it is and the case of National Bank of Kenya Limited v Beth Ngonyo Ngengi & Another [2012] eKLR in which the Judge stated;

> "I have my own doubts on application of penalty interest for breach of commercial contracts. However, I am aware that it is a known trade usage and custom within the banking industry to charge penalty when a borrower defaults. In this case I need not rely on the implied terms as it was expressly provided for. In my understanding whether or not a charge applied is a 'penalty' in a Commercial Contract is a determination of the court notwithstanding the fact that the charge applied is styled penalty interest."

69. Then another slightly different position is 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. See for example the decision by Odunga J in Francis Joseph Kamau Ichacha v Housing Finance Company Limited [2014] eKLR in which he expressed himself as follows:

> "Can it therefore be said that a practice in which the Banks unilaterally decide to load the customer's account with penalties at their own discretion whose rates are only known to the Bank is such a certain practice that it can be said to amount to trade usage? In my view that would amount to stretching the word "certain" too far. For one to say that the penalty is certain not only ought there be certainty as to the levy of the interest but since the rate is not contained in any contractual document, the rate also must be certain and must be known in the market otherwise such levying of interest would violate the provisions of Article 46(1) (b) of *the Constitution*. To argue otherwise would in my view open an avenue in which the right of redemption may easily be clogged or fettered. I would apply the same reasoning to the case of Maithya vs. Housing Finance Co. of Kenya and Another [2003] 1 EA 133 and the other decisions which in any case are not binding on this Court."

70. I concur with the above holding though persuasive.

71. Thus, if a Bank seeks to impose certain charges or interest, then it must make that intention clear in the contract it enters into with the customer. There must be clarity on what the charges and interest are and how they are to be imposed.

72. That being said, and as stated earlier, it is an established legal principle that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. In National Bank of Kenya Ltd v Pipe Plastic Samkolit (supra), the Court of Appeal at page 507 stated that:

> " A court of law cannot rewrite a contract between the parties as the parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

73. The settled law at sections 108 and 109 of the *Evidence Act* is that he who alleges must prove the allegation with credible evidence. In this case, the terms of the Letter of Offer dated 20.1.2015 provided at clause 3 as read with Schedule 2 that the interest is charged at the rate of 19% p.a. (KBRR [8.54%] + 10.46%) variable and further provided for an interest default rate of 36% per annum.

74. In the absence of any evidence by the plaintiff, of manifest error, fraud or misrepresentation on the part of the defendant, this court cannot vary that contract as it has not been demonstrated that the interest rate and default interest rate charged were beyond what was in the letter of offer as executed by both parties.

75. The plaintiffs having agreed to the terms of the Letter of Offer dated 20.9.2013 and the subsequent restructure Letter of Offer dated 20.1.2015 and the subsequent charge document, they are bound to honour them. The plaintiffs have not adduced any evidence of coercion, fraud or undue influence by the defendant to warrant this court interfering with the aforementioned contracts.

76. The plaintiffs further averred that the defendant acted illegally by levying or loading the accounts with figures not agreed upon. It was the evidence of PW1 that the last valuation resulted into Kshs 447,000/ = being debited into his account.

77. In response, DW1 testified that the Bank verbally advised the borrower to agree with the service providers on their costs and that these costs were loaded onto the loan account because the same were contractual. He also clarified that the previous varying valuation reports over the suit property that they had procured had been disregarded because of a Court order obtained by the plaintiffs. DW1 stated that they charged the plaintiffs account for the cancelled sale an amount of Kshs. 271,400 but had not refunded the money to the borrower because they had charged him for the services.

78. I have perused the Letter of Offer dated 20.1.2015 and note that Clause 6 on Commission, Appraisal Fees and other charges and provides inter alia that "the Bank shall at its sole discretion levy commissions and/or appraisal fees and/or other charges on account of Facility....the borrower will pay all other charges in connection with the operations of any/all accounts held with the bank according to the bank's tariffs from time to time or as otherwise agreed with the bank... and that the fees aforementioned were not refundable".

79. I thus find that the plaintiffs were bound by the terms of the contract in regard to the additional fees charged onto their account. However, in this instance, it is worth noting that vide a ruling rendered on 23rd January, 2019, F. Ochieng J found that the valuation by the bank prior to the attempted sale was grossly low compared to the bank's own valuation carried out before the loan facility was advanced to the plaintiffs and that as there was no satisfactory explanation for such large drop in the value of the property, the valuation of Kshs 85 million a drop from Kshs 130 million was a gross undervaluation. Further, that if the defendant was to sale the property at Kshs 85 million, it would expose the defendant to the real risk that it may well be required to compensate the plaintiffs. The court therefore directed the defendant to undertake a fresh valuation of the property before taking any further steps to realize the security.

80. Again on the 6th February 2019, this court observed that the defendant, despite the orders of 23rd January 2019, had proceeded to take steps to realize the security before undertaking the fresh valuation as ordered by the court. The Court stopped the scheduled sale of the suit property set for the 14th February 2019 noting that the defendant had taken steps that were inconsistent with the orders of the court made on 23rd January, 2019. The upshot of the court's orders aforementioned was that the defendant was thus required to start the process of pursuing the statutory sale of the suit property afresh. The court also ordered that the costs of the scheduled sale were to be borne by the Bank and not to be debited to the borrower's' account.

81. In the circumstances, the charges of Kshs 447,000/= and Kshs. 271,400 levied for valuation and or any other levies including auctioneers' fees or charges following the stopped sale were not justified because the valuation was set aside by the court and the sale as intended based on the said valuations was nullified. In the premises, I find that the two levies are not payable by the plaintiffs to the defendant and the auctioneers charges and are hereby quashed.

82. It was the plaintiffs' case that the court ought to order for accounts to be taken to determine the exact money owed to the defendant, if any, for settlement and an order that the defendant owed the plaintiffs and should refund the surplus.

83. From the evidence on record, it is clear that the plaintiffs are in possession of all bank statements issued to them by the defendant covering the period 2013 to 2019 when this suit was instituted. These statements are the basis upon which the parties did on several occasions enter into attempts to have the monies owed, settled amicably. It is the same statements which the plaintiffs hired a private independent auditor to reconcile the accounts which resulted in what the plaintiffs believe to be an overpayment of the loan advanced. Other than the levies which the court has quashed as they are not payable by the plaintiffs for the reasons given, there is no evidence that the plaintiffs requested for statements of accounts, besides what they had for reconciliation of the account and were denied by the defendant.

84. I thus find that this prayer is unmerited as it will not be of any additional benefit to the plaintiffs and neither are they prejudiced by refusal to grant the order as they already have the statements. It is declined and dismissed.

85. As regards an order for a refund of the surplus, the plaintiff averred that they hired an independent auditor who confirmed that they had paid the defendant Kshs. 26,126,006 which surpassed the principal amount of Kshs. 22,500,000 and that in total, they had paid Kshs. 32,696,461.81 PW2, the auditor testified that PW1 had paid Kshs. 32,696,468.81 whereas the principal loan was Kshs. 22,500,000.

86. However, in cross-examination, PW2 admitted that his witness statement or the audit report did not show that he relied on the provisions of the letter of offer and charge document to arrive at his conclusions.

87. As regards the weight a court of law should attach on expert opinion, in the case of Stephen Kinini Wang'ondu v The Ark Limited [2016] eKLR held that:

> " Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the

field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called."

88. In this case, PW2 admitted in cross-examination that he did not use the letter of offer and charge document in preparing the audit report and thus it would be unlikely that he would have arrived at the proper calculations in auditing the plaintiffs accounts especially as the letter of offer between the plaintiffs and the defendant contained the clauses in regard to default interest.

89. Accordingly, I find that the audit report and subsequent testimony of PW2 are of no probative value and are therefore disregarded.

90. In addition, and answering to the question of whether the defendant has breached the in duplum rule, even assuming that the plaintiffs paid kshs 32,696,468.81, the principal sum was kshs 22,500,000 hence there can be no in duplum rule breach. But what is the in duplum rule?

91. The in duplum rule was explained by the Court of Appeal in the case of Kenya Hotels Limited Vs Oriental Commercial Bank Ltd (Formerly known as Delphis Bank Limited) [2019] eKLR thus:-

> " In duplum" is a Latin phrase derived from the word "in duplo" which loosely translates to "in double". Simply stated, the rule is to the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced. Since the introduction of this principle on 1st May 2007 it has been applied by the courts with reasonable degree of consistency. See Lee G. Muthoga V. Habib Zurich Finance (K) Limited & another (2016) eKLR, Mwambeja Ranching Company Limited & another V. Kenya National Capital Corporation (2019) eKLR, along a host of many others where it has been invoked. The rationale for this rule was elucidated in the latter decision by this Court in the following passage:
>
> "The In duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides."

92. The application of this rule was restated by the Court of Appeal in the case of Housing Finance Company of Kenya Limited v Scholarstica Nyaguthii Muturi & Another [2020] eKLR in the following words:

> " As we have shown section 44A of the *Banking Act* came into force on 1st May 2007. That provision of law sets up the maximum amount of money a banking institution that grants a loan to a borrower may recover on the original loan. The banking institution is limited in what it may recover from a debtor with respect to a non performing loan and the maximum recoverable amount is defined as follows in section 44A(2):
>
> "The maximum amount referred in subsection (1) is the sum of the following-
>
> a) The principal owing when the loan becomes non-performing;
>
> b) Interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and

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

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

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

Section 44A has retrospective effect and this as explained by this Court in the case of James Muniu Mucheru V. National Bank of Kenya Civil Appeal No. 365 of 2017.

93. On the evidence adduced before this court, I am unable to find that the in duplum rule was breached by the defendant. This is because from the loan advanced being Kshs 22, 500,000, even if the plaintiffs were to say that they had paid slightly over Kshs 32,000,000 as per their auditor's report, that would not be double the amount loaned.

94. Therefore, as PW2's testimony and audit report were the basis upon which the plaintiffs based their claim for a refund of the surplus paid, I find that the plaintiff's claim for a refund is devoid of merit and the same is dismissed.

95. On whether the plaintiffs are entitled to the permanent injunctions against the defendant restraining it or its agents from selling the suit charged property, it is important to note that a permanent Injunction fully determines the rights of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the defendant in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the *Civil Procedure Act*, 2010 if it finds that the right of a Party complaining has been infringed, violated and/or threatened to be violated as the Court cannot just sit, wait and watch under the given circumstances.

96. Drawing from the principles in Kenya Power and Lighting Company vs Sheriff Molana Habib (2018) eKLR and Ngurumani Limited v Jan Nielsen (2014)eKLR, for the court to grant a permanent injunction, an applicant must pass the four step test.:

a. That the applicant has suffered an irreparable harm or injury.

b. That the remedies available at law such as monetary damages are inadequate to compensate for the injury.

c. That the remedy in equity is warranted upon consideration of the balance of hardships between the applicant and the respondent.

d. That the permanent injunction being sought would not hurt public interest.

97. Unlike Temporary Injunctions which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are perpetual and issued after a Suit has been heard and finally determined.

98. In this case, the plaintiffs seek for permanent injunction to restrain the defendant from exercising its statutory power of sale over the charged property.

99. In Stars and Garters Restaurant & Another Vs. National Bank of Kenya Ltd [2019] eKLR, W. Korir J (as he then was in the High Court) stated that:

> " The applicants also gave the impression that the amount owed to the respondent is in dispute. That is not a ground for stopping a sale. This was stated long ago in Lalvuna & Others V Civil Servant Housing Co. Ltd [1995] LLR 336 (CAK) as quoted in James Juma Muchemi &Partners Ltd Vs Barclays Bank Ltd 2011 eKLR where Kwach JA stated:
>
> "A court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage."

100. In Mrao Ltd –vs- First American Bank of Kenya and 2 others [2003] KLR 125 the court expressed itself as follows;

> " The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgage has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive." (emphasis added). There is no dispute in this case that Mrao Ltd, (the appellant) borrowed more than Kshs 50m from First American Bank of Kenya Ltd, the first respondent, (First American) on the security of a legal charge over Plot No.714 Section IV Mainland North, Mombasa (the suit land) and a debenture dated 27th July, 1999 over its assets to cover the debt which at the time demand for repayment was stood at Kshs88m, but was by mutual consent reduced to Kshs 68m. Under a timetable agreed between the appellant and First American the sum of Shs 5m was to be paid within 4 weeks after the execution and registration of the security thus reducing the ceiling under the debenture to Shs 63m."

101. Further, the Court of appeal in the case of Jay Super Power Cash and Carry Ltd v Nairobi City Council and 20 others CA 111/2000 held that: -

> " This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it".

102. In the instant case it is clear that the plaintiffs defaulted on the loan advanced to them by the defendant. There is no evidence that the entire loan amount together with the contractual interest as charged together with default interest has been cleared. In essence, therefore, what the plaintiffs seek from this court is to permanently injunct the defendant from recovering any loan amount due from the plaintiffs or selling the property charged.

103. Can this court grant such a permanent injunction in such circumstances? It is common knowledge and sense that when one borrows money from another, that money will be paid back at a certain agreed time and terms. In default, the lender has remedies in law and this court cannot cripple the powers of the lenders in favour of borrowers who are unable to repay the loans advanced to them. What this court would however, expect of the lenders is that they follow the law and procedure for recovery of the loan facility as stipulated in law.

104. It was reiterated in Joseph Okoth Waudi v National Bank of Kenya, Civil Application No. 77 of 2004, the Court of Appeal in dismissing an appeal quoted from Halsbury's Laws of England Vol. 32, 4th Edition page 752, stated that:

> "It is trite law that the court will not restrain a mortgagee from exercising its power of sale merely because the amount due is in dispute or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained however, if the mortgagor pays the amount claimed in court, that is, the amount which the mortgagee claims to be due to it unless on the terms of the mortgage, the claim is excessive."

105. In the case of Francis J. K. Icatha v Holding Finance Co. Ltd. Kenya HCCC No. 414 of 2004 the honourable court held that

> "A Plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his own wrong, for the plaintiff seeks this court to protect him from the consequences of his own default. He who seeks equity must do equity. The plaintiff should not be protected or given advantage by virtue of his own refusal to make payments to the defendant/respondent a debt which he expressly undertook to pay."

106. In the circumstances, I am not persuaded that the plaintiffs warrant grant of the orders sought of permanent injunction. The defendant would be at liberty to exercise its statutory power of sale of the charged property subject to the valuation of the property as at the time of such sale and the valuation report should not be older than 12 months. It will also be at liberty to exercise its statutory power of sale subject to issuing all statutory Notices stipulated in law. It is for that reason that the court cannot permanently injunct or restrain the defendant Bank from exercising its statutory power of sale of the charged property where it is clear that the loan advanced has not been repaid in full by the plaintiffs/ borrowers.

107. It is for the above reasons that I need not delve into the exercise of reproducing or setting out principles for granting of injunction as set out in the Giella vs Cassman Brown case which relates to temporary injunctions. The upshot of the above is that this claim for a permanent injunction also fails.

108. In the end, I find and hold that the plaintiffs' claim against the defendant seeking for a permanent injunction to restrain the defendant from exercising its statutory power of sale of the charged property namely LR No. Kakamega/Municipality/ Block 111/10 lacks merit and is hereby dismissed.

109. Finally, as to the issue of costs, In Republic v Rosemary Wairimu Munene (Ex parte Applicant) v Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2004 Mativo J. held that the issue of costs is the discretion of the Court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party. This position was adopted by the court in Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR.

110. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exist some other good reasons and or cause for not awarding costs to the successful party.

111. In this case the plaintiff failed to prove its case against the defendant on a balance of probabilities. It is for this reason that I find that the defendant is entitled to costs of this dismissed suit.

112. As the file cannot remain dormant owing to the order on costs, the matter shall be mentioned before the Deputy Registrar on 28th February, 2024 to confirm the filing of the defendant's bill of costs for taxation.

113. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 16TH DAY OF JANUARY, 2024.

R.E. ABURILI

JUDGE