



**Sam- Con Limited v National Bank of Kenya Limited & 2 others (Civil Case 174 of 2003)
[2023] KEHC 20399 (KLR) (Commercial and Tax) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 20399 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 174 OF 2003
A MABEYA, J
JUNE 16, 2023**

BETWEEN

SAM- CON LIMITED PLAINTIFF

AND

NATIONAL BANK OF KENYA LIMITED 1ST DEFENDANT

ANDREW DOUGLAS GREGORY 2ND DEFENDANT

ABDUL ZAHIR SHEIKH 3RD DEFENDANT

JUDGMENT

1. By a plaint amended on 9/12/2003, the plaintiff prayed that the 2nd and 3rd defendant be restrained from acting as receivers and the defendants be restrained from selling or disposing its properties and machinery. That the 2nd and 3rd defendant be ejected from its premises and properties and for a declaration that a sum of Kshs. 102,939,542.75 was not recoverable under the debentures and that the appointment of the 2nd and 3rd defendant as receivers and managers was illegal.
2. The plaintiff also sought that the 2nd and 3rd defendant be compelled to account for all the sales and expenses incurred during the receivership period. A declaration that a sum of Kshs. 30,000,000/- had already been recovered and the mortgage exhausted. General damages for trespass and receivership, a declaration that the interest charged was illegal and not recoverable, an order for accounts amongst others.
3. The basis for the said reliefs was that, the plaintiff had been a customer of the 1st defendant (“the bank”) for more than 25 years during which period, it was afforded various financial facilities by the bank by way of loans and overdrafts. That on 19/4/1994, the plaintiff and the bank agreed on a supplementary debenture whereby the amount secured by the debenture was agreed at Kshs. 30,000,000/- together



with interest. The amount was further secured by a mortgage over L.R No 455/21 Nakuru and L.R. No 21692, Nairobi, respectively.

4. That under the supplemental debenture, the bank was not entitled to recover more than the aggregate amount of Kshs. 30,000,000/- inclusive of interest. That the plaintiff was offered other banking facilities which were however, not guaranteed by the debentures.
5. That in 1991, Central Bank of Kenya revoked gazette notice no 1617 of 1990 and the bank was therefore not permitted thereafter to increase interest rates without the permission of the Minister. That in the premises, the increase of interest after 23/7/1991 by the bank was illegal and monies paid in respect thereof ought to be refunded. That failure by the bank to reduce its interest rates caused the plaintiff to default in servicing on time the facilities offered.
6. That the bank charged an excess of Kshs. 23,047,341.28 by way of unauthorized debits and penalties. That the bank was in breach of the terms of the agreements by charging interest at excessive rates and by appointing the 2nd and 3rd defendant as receivers of the plaintiff.
7. As a result of the bank's actions, the plaintiff's reputation suffered irreparable injury and damage. It led to loss of business, production and sales and loss of dealership with General Motors. That the defendants sold the plaintiff's assets at gross undervalue and depleted the said assets instead of continuing the business.
8. The defendants opposed the suit vide an amended statement of defence dated 16/1/2004. They averred that the facilities granted to the plaintiff were secured by debentures and mortgages over L.R No 455/21 Nakuru and L.R. No 21692, Nairobi. They denied that the amount recoverable under the debentures was Kshs. 30,000,000/=.
9. They contended that the plaintiff had defaulted in both the loan account and the overdraft repayment and had approached the 1st defendant for restructuring of the accounts. That the securities by guarantors were of a continuing nature. They denied that the facilities were subject to the provisions of the Central Bank of Kenya (Amendment) Act 2000 and stated that, after the revocation of Gazette Notice No 1617 of 1990, the banks' dealings with customers was based on mutual contracts, prevailing market conditions as well as customs and usages of the banking industry.
10. That the interest charged was not illegal or irrecoverable. That the bank had lawfully demanded the sum of Kshs. 102,939,542.75 and the appointment of the receivers was regular and proper.
11. At the trial, the plaintiff called Mr. Paramjit Singh Bhogal as its first witness. He adopted his witness statement dated 24/11/2017 and produced the plaintiffs bundle of documents dated 20/9/2012.
12. He testified that the plaintiff's directors executed personal guarantees which were continuous. That as at the time the securities were executed, he was not a director as he was appointed director in 1994. He admitted having read and understood the nature of the guarantee he signed. With respect to the debentures, he stated that the amount of Kshs. 30 million was the aggregate sum recoverable under the debentures.
13. PW2 Wilfred Onono adopted his witness statement of 6/6/2018 as his evidence in chief. He testified that he was instructed by the plaintiff to undertake an interest recalculation on its two loan facilities whereafter he prepared his report dated 9/12/2002 ("IRAC report"). According to him, the total overcharge of interest was Kshs. 23,047,341.28.



14. In cross examination, he stated that he had relied on the documents provided by the bank including bank statements and correspondence to do the recalculation. That he did not have any information prior 1992 and that he worked with the bank's opening balance of 1992.
15. With respect to interest rates, he testified that he actually worked with the rate of 24% from 1985 and which changed to 23%. That in 1998, it changed to 28% and in 1999 it dropped to 24%, 28% and again 24%. His testimony was that his report did not include penal interest as the facility document letter dated 1999 did not have the provision for penal interest.
16. Mr. Samuel Odiyo testified for the defendant. He adopted his witness statement dated 17/8/2017 as his evidence in chief and produced the bundle of documents dated 2/7/2012. He stated that he was appointed by the bank as one of the receiver managers of the plaintiff. In cross examination, he stated that he did not file a report on receivership but the bank was notified of the progress.
17. That since 2003, the plaintiff's premises was still in the possession of the bank. That he did not have evidence of revocation of his appointment as receiver. That the business machinery was closed in 2006 but he would from time to time visit the premises.
18. With respect to payments, he stated that between July and August 2004, the receivers collected Kshs.10,286,016/- from which they paid themselves Kshs.6,686,785/-. That according to the debenture, the maximum amount that was secured was Kshs. 30 million. He admitted that the word 'penalty' was not in the debenture although penalty charges were based on agreements between the bank and the customers.
19. He observed that the debenture was not upgraded to reflect additional lending in the letters of offer and that penal interest was charged. That according to his witness statement, the bank only received Kshs. 11 million and the rest of it was used to settle debts. That the bank did not revoke the receivership because of the outstanding balance despite having other securities.
20. Both parties submitted. It was the plaintiff's submission that the aggregate amount for the debentures was Kshs. 30,000,000/- whereby, each debenture had given the amount to be secured. That the words "continuing security" in the debenture dated 19/3/1994 ought to be interpreted to mean the charge created under the debenture was a continuing security for the amount secured.
21. It was further submitted that the additional facilities could not be secured by the fixed and floating debentures for Kshs 30,000,000/- but were unsecured. If the intention was to secure those facilities by debentures, then the bank ought to have created other securities by way of debentures. Counsel submitted that the only amount recoverable under the debenture was confined to the aggregate amount secured of Kshs. 30,000,000/-.
22. With respect to the interest charged, the plaintiff submitted that the defendant was not entitled to recover the interest charged and debited into the plaintiffs account above the rate of 19% p.a. That the interest charged for the period of January 1992 to March 1994 was non-contractual as it was not contained in the debentures. That the defendant charged penal interest amounting to 70% on the excess overdraft.
23. That according to the IRAC report, the defendant had overcharged the plaintiff to the tune of Kshs. 23,047,431.28. The report was on the basis that the interest charged was not contractual. That the bank failed to provide a full statement of accounts to prove that the amount claimed was genuine and correct.
24. On their part, the defendants submitted that the bank used the security provided in the 1st debenture to secure the moneys advanced to the plaintiff in the subsequent debentures. That the debentures for



- Kshs. 30 million was used to secure other amounts advanced to the plaintiff besides the said Kshs. 30 million. Counsel submitted that the debentures and mortgages were continuing securities and the bank could recover amounts secured by them besides the Kshs. 30 million.
25. It was further submitted that by accepting and signing the Letters of Offer, the plaintiff agreed to the contractual rate of interest charged by the bank. That the plaintiff irregularly operated the accounts by exceeding the overdraft limit and ultimately defaulted. As regards the IRAC report, it was submitted that failure to include the penal interest charged made it inaccurate. That the admission of debt was enough for the appointment of the receivers.
26. I have considered the pleadings, the evidence, the submission by Learned Counsel and the authorities relied on. The parties identified a total of 16 issues which can be summarized as follows: -
- a. Whether the securities given were of a continuing nature or whether the aggregate amount secured by the debentures limited to only Kshs. 30 million.
 - b. Whether the facilities were subject to the provisions of the CBK (Amendment) Act 2000 and the effect of Gazette Notice No. 1617 of 1990 and section 44 of the *Banking Act* (Cap 488).
 - c. Whether the levies and interest charged by the bank after 23/7/1991 was lawful
 - d. Whether the bank overcharged the plaintiff with interest and whether the demand for Kshs.102,939,542/75 was proper.
 - e. Whether the appointment of the 2nd and 3rd defendant as receiver managers was actuated by malice and whether they miscondacted themselves.
 - f. Whether the plaintiff suffered any loss and damage as a result of the defendants' actions and whether the plaintiff is entitled to the remedies sought in the Amended plaint.
 - g. Who should bear the costs?
27. The first issue is whether the securities given by the plaintiff were of a continuing nature. From the record, the plaintiff was advanced credit facilities that were secured by the following securities; debenture dated 17/3/1977 for Kshs. 200,000/-, debenture dated 6/9/1977 for Kshs 700,000/-, debenture dated 15/9/1981 for Kshs. 2,900,000/-, debenture dated 28/3/1984 for Kshs 2,200,000/- and the debenture dated 19/3/1994 for Kshs 24,000,000/-. The aggregate sum for all the debentures was Kshs. 30,000,000/-. These are the only securities that were under contention. The mortgages and guarantees were not.
28. The plaintiff's case was that the securities offered were not of a continuing nature. That in each of the debenture, the secured amount was limited to the aggregate maximum sum. That the bank created different debentures because the security of each debenture was limited to the amount under it. That by creating a debenture for each of the transaction, the bank intended that each amount advanced be secured by its own debenture.
29. In its response, the bank contended that it used the security provided in the 1st debenture to secure the money advanced to the plaintiff subsequently. It was the bank's case that the debentures and mortgages were continuing securities and the bank was at liberty to recover further amounts advanced besides the Kshs. 30 million.



30. In *Jane Wangui Kinuthia v Barclays Bank of Kenya Limited* [2007] eKLR, the court observed that: -
- “The words “continuing security” can only be interpreted within the descriptions given in the charge and guarantee documents.”
31. From the foregoing, the recitals in the debenture documents are relevant in ascertaining the intention of the parties. With respect to the 1st debenture dated 17/3/1977, the 1st paragraph stated thus: -
- “... Provided ALSO that the total moneys for which this debenture constitutes a security shall not at any time exceed the sum of shillings 200,000 together with interest at the rate aforesaid from the time of such moneys becoming payable until actual payment thereof.”
32. Clause 15 provided that: -
- “It is hereby agreed and declared that this debenture shall be a continuing security notwithstanding any settlement of account or other matter or thing whatsoever and shall not prejudice or affect any agreement which may have been made with the bank prior to the execution hereof relating to any security which the bank may now or at any time hereafter hold in respect of the moneys hereby secured or any part thereof.”
33. The plaintiff’s contention was that bank merely stated that it was holding the debentures and that the letters of offer did not secure the said facilities. On its part the bank submitted that the letters of offer clearly stated that the debenture for Kshs. 30 million and the mortgage was used to secure the subsequent facilities.
34. These clauses set out above were mirrored in all the five debentures created by the plaintiff. Where’s it is clear that in each instrument, there is a recital that the maximum amount secured is that which is set out therein, my view is that the subsequent recital that “...this debenture shall be a continuing security notwithstanding any settlement of account or other thing” makes the debentures a continuing security. However, the question is, a continuing security for what amount?
35. The issue for determination therefore is, whether those debentures as drawn covered the subsequent advances. In my view, parties are bound by the terms of the contracts they enter. The concluding words of clause 15 is very clear. The debenture was to be a continuing security in respect of the monies secured or any part thereof and not the subsequent advances. Indeed, as submitted by the plaintiff, the fact that each specific advance was followed by a debenture instrument, the parties were clear in their minds as to the amounts in respect of which the debentures applied.
36. I have considered all the five debentures. There is no use of such words to the effect that the debentures were a security for the “monies hereby advanced or to be advanced from time to time....” In my view, where a security instrument is intended to secure both the current and future advances, it should expressly so state. There was no such provision in the debentures in question. In my view, what was secured by the debentures and continuing to be secured as such was the amounts expressly stated therein together with interest at the rate agreed.
37. I have a perused the letters of offer dated 1/9/1995, 4/11/1998, 30/11/1998 and the other correspondence on record. From the said letters, the clause on security variously provided thus: -
- “Security held.
- We hold joint and several guarantee by the company directors, supported by a fixed and floating debenture over the entire company assets for Kshs 30 million.



The debenture incorporates a legal charge for Kshs 30 million over property L.R No 455/21 valued at Kshs 50 million by M/s Lloyd Masika Ltd on 27/7/93.”

38. It would seem that the letters of offer may have intended to use the debenture for Kshs. 30 million as security for those facilities. However, there is no evidence that either the said debentures were up-stamped for the additional advances. They either had to be upstamped or fresh debenture issued. Since they were not of a continuing nature for additional advances, they could not cover the same by way of reference by way of letter of offer.
39. Accordingly, my finding is that the intention of the parties was that the debentures were a security for the sum of Kshs 30 million plus interest only as expressly stated therein. That was the maximum sum recoverable under the debentures and no more. The additional advances were not covered by those debentures due to their wording.
40. The 2nd to 4th issues are interrelated. These are whether there was excessive overcharge of interest and the place of the CBK (Amendment) Act, 2000 and section 44 of the [Banking Act](#).
41. The plaintiff contended that the bank charged interest rates that was not contractual. On its part the bank contended that the interest charged was contractual, customary and based on usage in the banking industry.
42. I have considered the debentures in issue in this matter. They provided for the minimum annual rate of interest of 10%, 13% and 15%. However, the debenture dated 19/3/1994 provided for interest “at the current rate of interest”.
43. From the record, it is not clear what rate of interest the bank was charging the plaintiff from 1977 to 1991. However, from 1992, the interest charged by the bank fluctuated between 24%, 23%, 22% and 28%, respectively.
44. Prior to 1997, Kenya was under a controlled interest rate regime. This was by virtue of sections 39 of the Central Bank of Kenya and section 44 of the [Banking Act](#). Section 39 of the CBK Act provided: -

“The Bank may from time to time acting in consultation with the Minister determine and publish the maximum and minimum rates of interest with specified banks or specified financial institutions may pay on deposit and charge for loans or advances.....”
45. On the other hand, section 44 of the [Banking Act](#) provided that:-

“ 44. No institution shall increase its rate of banking or other charges except with the prior approval of the minister”.
46. The net effect of the two provisions meant that it was the CBK in consultation with the Minister that was to fix the rates of interest. This was the case until 1991 when vide Gazette Notice No. 3348 of 1991, Gazette Notice No. 1617 of 1990 was revoked. The later gazette had fixed the maximum rate of interest at 19% per annum on loans and advances.
47. As at the time the Gazette Notice No. 1617 of 1990 was revoked, the rate of interest then fixed by the CBK was 19%. Under section 39 of the CBK Act, it was CBK that was permitted to determine the rate of interest. Since section 39 of the CBK Act remained in force until 1997 and the banks could not increase the rate of banking charges without the Minister’s approval under Section 44 of the [Banking Act](#). That being the case, the rate of interest applicable would be the one which the banks were charging as at the date of the revocation of the said Gazette Notice. That rate continued to apply until section



- 39 of the CBK was repealed in 1997. It is upon the repeal of the said section, that the rate of interest regime can be said to have been freed and left to be agreed between the lenders and the borrowers. See *National Bank of Kenya Ltd vs Cadour Investment Ltd* HCC No. 2105 of 2000 (UR).
48. It is clear from the said debentures that they did not state the exact rate of interest to be charged. That was because they were prepared during the controlled interest rate regime. The banks were to charge that rate which CBK fixed under section 39 of the CBK Act. Before its repeal in 1997, still section 44 of the *Banking Act* required banks to seek the approval of the Minister before increasing the rate of interest after 1991.
49. The defendants contended that the rate of interest charged after 1991 was contractual, current rate of interest and was in accordance with the customs and usage in the banking industry.
50. Firstly, as already stated, the said debentures did not have a specific rate of interest to be charged. They only provided for the minimum rate of interest of 10%, 13% and 15%, respectively. One of them provided for “the current rate of interest”. There was no evidence adduced by the bank to prove or show what “the current rate of interest” was between 1991 and 1997. He who alleges must prove as decreed by sections 107 and 108 of the *Evidence Act*.
51. As regards custom and usages in the banking industry, it is trite law that custom and usage must be proved by cogent and consistent evidence. It must be shown that a particular way of events is so notorious and has been used consistently to have acquired notoriety in the community for it to have acquired the norm of a custom or usage.
52. In *Harilal & Co & Anor vs The Standard Bank Ltd* [1967]EA. 512, the East African Court of Appeal held at page 516 thus:-
- “A trade usage may be described as a particular course of dealing between parties who are in a business relationship, which course of dealing is so generally known to all persons who normally enter into that relationship that they must be presumed to have intended to adopt that course of dealing and to have incorporated it into their contractual relationship unless by agreement is it expressly or impliedly excluded
- ...
- A trade usage may be proved by calling witnesses, whose evidence must be clear, convincing and consistent, that the usage exists as a fact and is well known and has been acted on generally by persons affected by it. A usage is not proved merely by the evidence of persons who benefit from it unsupported by other evidence. Where a particular usage has acquired sufficient general or local notoriety judicial notice may be taken of it under s. 60 of the *Evidence Act*. Where a trade usage is proved to exist then, unless expressly or impliedly excluded, it is presumed to have been incorporated into the contract between the parties and this is so even though one of the parties may in fact be unaware of the usage so long as the circumstances are such that he ought to have been aware of it”.
53. In the present case, no evidence was led by the bank to show that the interest it charged between 1991 and 1997 was either contractual, customary and usage or was the market rate. Accordingly, I hold that the rate of interest applicable between 1991 until 1997 when section 39 of the CBK Act was repealed remained at 19% p.a.
54. That brings the Court to the issue of alleged penalty interest charged by the bank. It is trite law that a court of law cannot re-write a contract between the parties. Once a party to a contract willfully enters into a contract and finds itself in a bad bargain, too bad for it. Save for the special cases where equity



might be prepared to relieve a party from a bad bargain, a party cannot be allowed to escape from a bad bargain.

55. In this case, there is no dispute that the bank charged or levied penalty interest on arrears. Indeed, in correspondence produced, the bank had indicated that the excess overdraft contributed to about 70% of the interest levied. As already stated, the bank did not lead any evidence to show that at the time, that was the custom or trade usage in the banking industry. In this regard, to the extent that the interest rate charged by the bank between 1991 and 1997 exceeded 19% p.a, such interest was not contractual. It was unlawful and unrecoverable.

56. In *National Bank of Kenya Ltd vs Pineplastic (K) Ltd & Anor* [2000] eKLR, the Court of Appeal delivered itself thus: -

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

57. In the present case, the contracts entered into by the parties as crystalized in the debentures were clear as to the interest to be charged. Nowhere in those contracts was penalty interest provided for. I will echo the words of Odunga J (as he then was) in *Joseph Kamau Ichachia vs Housing Finance Company Ltd* [2014] eKLR wherein he stated: -

“ 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”.

58. Accordingly, to the extent that the bank levied penalty interest which was neither agreed upon nor provided for in the security documents, the same was unlawful and irrecoverable. It is the said penalty interest that greatly contributed to the plaintiff’s inability to service the facilities.

59. The next issue is the alleged overcharge of Kshs 23,047,731/28 on interest and the demand for Kshs. 102,939,542/75 by the bank on 15/1/2003.

60. From the record, it would seem that sometimes in mid-2002, the plaintiff and the bank were not in agreement on the amount due from the plaintiff. In a letter dated 7/10/2002, the bank opined that the “directors of the company were to examine/reconcile the account(s) first, seek clarifications or any discrepancies from the Branch and”

61. What followed was the commissioning of Interest Rates Advisory Centre (IRAC) by the plaintiff to undertake the reconciliation and interest recalculation. PW2 testified that upon instructions, he wrote to the bank for certain clarifications but the bank did not respond.

62. In the absence of a response, PW2 proceeded to undertake a recalculation of interest based on the documents provided by the plaintiff and made a report dated 6/12/2002 which was sent to the bank. In that report, PW2 concluded that the bank had overcharged the plaintiff by Kshs 23,047,341/28.



That report was produced in evidence and showed the basis on which the conclusions were arrived at. On 12/6/2018, Kasango J gave the bank leave to file evidence in rebuttal to PW2's witness statement and report but none was filed.

63. PW2 appeared and defended his report. The bank was given that report way back in 2002. It neither denied nor challenged the same. The testimony of PW2 was firm and was not displaced. The report was only criticized for not having taken into account penalty interest. I have already found that the bank was not entitled to charge such interest as it was neither contractual nor customary. Accordingly, I make a finding that the bank did overcharge the plaintiff by Kshs 23,047,731/28 on interest.
64. Collolary to the foregoing, is the bank's demand for Kshs 102,939,542/75 as at 15/1/2003. In support of this claim, the bank produced bank statements at pages 60 to 97 of its bundle of documents. They related to two account Nos 020-389-2260 and 301-020-116, respectively.
65. I have considered the said statements. They do not cover the entire period of the facilities. The statement for account no. 020-389-2260 was for the period between 20/02/2002 and 31/7/2003 while Ac No. 301-020-116 was for the period between 4/1/1999 and 31/1/2003. The opening balances for the accounts was Kshs. 20,000,000/= and Kshs 61,781,728/60, respectively.
66. It should be recalled that there was already a dispute between the parties in 2002 as to the amount due. This is what triggered the commissioning of IRAC in November, 2002 to undertake the interest recalculation. The facilities dated back to 1977. The bank did not explain why it did not produce the bank statement for the entire period or from the time both parties had an agreed amount as the one due from the plaintiff.
67. Section 177 of the Evidence Act Cap 80 provides: -

A copy of an entry in a banker's book shall not be received in evidence under section 176 of this Act, unless it be first proved that:-

- a. the book was, at the time of making the entry, one of the ordinary books of the bank; and
 - b. the book is in the custody and control of the bank; and
 - c) the entry was made in the usual and ordinary course of banking business; and
 - d) the copy has been examined with the original entry, and is correct.
- (2) Such proof may be given by an officer of the bank, or, in the case of the proof required under subsection 91) (d), by the person who has performed the examination, and may be given either orally or by an affidavit sworn before a commissioner for oaths or a person authorized to take affidavits."
68. From the foregoing, it is clear that a statement of account by a bank will constitute entries in a banker's book. It will be admissible if proved and verified as provided for under section 117 of the Evidence Act.
 69. In the present case, the statement of accounts that were produced were never proved and verified as required by section 117 (2) of the Evidence Act. I have looked at the evidence of Samuel O. Odiyo as contained in his undated witness statement filed on 17/8/2017. Nowhere in that statement did he either mention the said statements or did he verify the contents thereof. This is so notwithstanding that he produced the defendants bundle of documents wherein those statements were contained. Production without prove and verification is not enough. He only referred to correspondence to try



- and prove that as at the time the bank was appointing the receivers, the plaintiff was indebted to the bank.
70. The foregoing coupled with the testimony of PW2, Winfred Abincha Onono, by which the bank is found to have overcharged the plaintiff, I hold that the demand for Kshs 102,939,542/75 had no basis.
71. Am alive to the contention by the bank that the plaintiff had admitted being indebted to it. It relied both on correspondence exchanged between the parties as well as the plaintiff's Board Resolution dated 1/7/2002. However, I do note that the same was given before the interest recalculation by IRAC. A similar situation arose in James Kabathi Mwangi vs KCB NBI HCC No. 21 of 2007 (UR) wherein Waweru J was of the view that, such admission was negated by the latter confirmation by IRAC.
72. Further, the bank contended that the plaintiff had admitted indebtedness in the plaint. I have looked at the Amended plaint, there was no such admission. The pleading at paragraphs 26, 27 and 28 of the Amended plaint was without prejudice to paragraph 25 thereof which pleaded the excess over charge of interest and that the amount claimed was unrecoverable.
73. In any event, if it was true that there was any such amount due, the same could have been counterclaimed in the Amended Defence dated 16/1/2004. Since the bank alleged that it had not recovered the total amount due from the plaintiff, the only logical thing it would have done was to counterclaim any amount due. This it did not do casting doubt on the alleged debt.
74. The next issue is the appointment of the receivers and their conduct. On 15/1/2003, the bank demanded from the plaintiff the immediate payment of Kshs 102,939,542/75. Immediately thereafter, it appointed the 2nd and 3rd defendant as receiver/managers of the plaintiff. The basis of the appointment was that there was default and the appointment was under the five debentures.
75. I have already found that there is evidence that as at December, 2002, the bank had overcharged the plaintiff in excess of Kshs 23 million. A call by the plaintiff on the bank to discuss that issue was never responded to. I have already found that it is not clear how Kshs 102, 939,542/75 demanded on 15/1/2003 was arrived at. Even the statements of account at pages 60 to 96 of the defendants' bundle do not show that that was the amount due as at that date.
76. Further, the debentures themselves secured a maximum amount of Kshs 30 million plus interest. That was the amount recoverable under the debentures. There was no evidence that the same had not been recovered as at that date. The further facilities advanced by the bank were never covered by the debentures.
77. In this regard, it follows that by appointing the receivers on an explained sum of Kshs 102,509,542/75, the same was actuated by malice. The amount had no basis. By demanding such a huge unexplained sum which was not under the debenture, the same had no basis. It was illegal and unlawful and therefore null and void. Parties are bound by contracts which they have entered into and no more.
78. As to the conduct of the receivers, I would respectfully echo the words of Gikonyo J in Surya Holdings & 2 Others vs CFC Stanbic Bank Ltd [2015] eKLR. In that case, Gikonyo J delivered himself thus: -

“Receiver and Manager is an agent of the company, but stand in a fiduciary relationship with and owes duties to both parties. Given the very nature of the position of Receiver and Manager who has control over the property of the company and is running the enterprise as a going concern as is the case here, doubtless, has a duty to account to the law, the debenture holder and the company. Similarly, it should not be forgotten that even if the primary duty is to the debenture holder where there are preferential or pari pasu secured creditors as well as guarantors of the company, the receiver and manager owes a duty not to act negligent



with the assets or business of the company. See the case of *Medforth v Blake*, [1993] 3 All ER 97 that subject to the primary duty to the debenture holder a receiver managing mortgaged property owes duties to the mortgagor and anyone else interested in the equity of redemption. And so, must act in good faith in exercising his powers of management as well as manage the property with due diligence.

....

The duty to account by the Receiver and Manager is better understood by looking at the liability to account even for his remuneration. Liability to account attaches to the Receiver and Manager and may extend after his appointment has lapsed. Accordingly, the duty to account by Receiver and Manager who has taken control of the assets as well as the entire business of the enterprise is not limited to filing of statutory form with Registrar of the Companies. That is just one of the duties of receiver and Manager. There is more he must do by accounting to the company too on the entire transactions undertaken by him, money received, contracts awarded or performed, debt repaid etc. In appropriate cases, Receiver and Manager may be obligated to preserve the goodwill of the company. As the powers of the Directors of the Plaintiff Companies are paralysed on appointment of the Receiver and Manager as an agent of the companies, the Receiver and Managers are in law and equity bound to account to the company and the directors.

....

Further insights on the duty to account are found in the literary work by F.M.BReynoldas, Bowstead & Reynolds on Agency, 18th Edition page 240 and the case of *Smiths Ltd vs Middleton*, [1979] 3 All ER 842. Receiver and Manager who is in control of the business and assets of the company has a duty to keep full accounts, as well as file statutory abstracts of receipts and payments required under section 351 of the *Companies Act*.”

79. From the foregoing, it is clear that a receiver should act in the best interest of both the debenture holder and the company. The plaintiff contended that the 2nd and 3rd defendant conducted the receivership without any regard to the plaintiff's interest causing the business to collapse. That they sold the plaintiff's assets, stocks and equipment at gross undervalue. That they misused funds belonging to the plaintiff and failed to keep records of proper sales. That when the plaintiff requested for accounts, it was only given abstract accounts as opposed to full accounts which did not reflect the true position of the company.
80. On their part the defendants submitted that the main duty of the 2nd and 3rd defendant was to recover the debt owed to the bank. DW1 testified that the main aim of the receivers was to make recovery of the amounts owed and leave the company to the owners. He stated that the plaintiff's business premises was closed in 2006. That ever since the receivership started in 2003 to the date he was giving his testimony, the premises was still in the possession of the bank.
81. The plaintiff was placed under receivership while it was a profitable going concern. The bank had assessed its book value at Kshs 314 million a year before. At pages 309-338 of the plaintiffs' bundle, the 2nd and 3rd defendant indicated in the Memorandum of sale that 4 years succeeding the placement under receivership, the plaintiff was making handsome profit. Instead of continuing with the business of the plaintiff, the 2nd and 3rd defendant proceeded to strip its assets, sold them and finally sold the plaintiffs entire business for about 10% of its book value.
82. The plaintiff placed before court clear evidence to show that its assets were sold at an undervalue. It proved that the recoveries made as at 14/5/2003 was in excess of Kshs 125 million. However, according



- to DW1, the total recoveries were only Kshs 69,078,601.30 which constituted Kshs. 11,256,149.20 (according to DW1 although the abstract accounts showed Kshs. 21,870,059/=) given to the bank and expenses of Kshs 57,822,452/15. The alleged expenses were not proved.
83. It is clear from the foregoing that the 2nd and 3rd defendant did not act in the best interest of either the bank or the plaintiff. They were not diligent at all. They mishandled the receivership which led to the collapse of the plaintiff and the bank recovered nothing. They stripped the company of its assets which they sold for a song. They miscondacted themselves to the detriment of the plaintiff. A Company valued at over Kshs 300 Million went for less than Kshs. 40 million.
 84. The final issue is whether the plaintiff has suffered any loss and damage and the remedies due, if any. In a letter of offer dated 21/2/2002, the bank placed the plaintiff's book value at Kshs. 314.9 Million. In the memorandum dated 17/11/2003 for the proposed sale of the business of Sam-con Limited, the 2nd and 3rd defendant showed that in the years 1999, 2000, 2001 and 2002 immediately prior to being placed under receivership, the plaintiff was operating profitably and the least profit made was Kshs. 23,129,000/= in the year 2000.
 85. Further, between January and August 2003, the 2nd and 3rd defendant collected a total sum of Kshs. 54,238,368/37 from the plaintiff's debtors. As if that was not enough, the bank had two other securities by way of charges over LR 455/21, Nakuru Municipality valued at Kshs. 80M as at 9/10/1997 and LR No. 21692 Mombasa Road valued at Kshs. 37M as at 26/4/1996.
 86. With the foregoing background, there was no basis for the bank to have rushed to appoint a receiver over the plaintiff. The receiver upon being appointed just plundered the assets of the plaintiff and closed down its business. They literary killed the company and left it in the grave yard todate. The bank continues to be in occupation of the plaintiff's premises to-date without an explanation as to why. Why were the immoveable properties not sold? If they were sold, for how much? The court was not told.
 87. As a result of the foregoing, no doubt the plaintiff has suffered extreme loss and damage. It lost its business that was doing well at the time of being placed under receivership. Instead of continuing with the business, since all that was happening was that the plaintiff's business was only struggling and was not incurring any losses. It was meeting its obligations. The bank wrongfully appointed the 2nd and 3rd defendant as receivers who shut down the business and disposed of its assets for a song. That was a death knell for the plaintiff. I hold that as a result of the actions of the bank and the 2nd and 3rd defendant, the plaintiff suffered loss and damage. Receivers are not supposed to be agents of death for struggling businesses an alternative to the management.
 88. It is worthy to note that the receivership has never been lifted nor terminated since 2003. That is 20 years and still counting.
 89. In view of the foregoing, what remedies are available to the plaintiff. There is no injury without a remedy. The plaintiff prayed for various declarations which in view of the findings I have made, it is entitled to. As regards damages, the plaintiff prayed for Kshs. 906,195,132/= plus punitive damages of Kshs. 30Million.
 90. Damages are meant to restore a wronged party to the position he was ante, before the wrongful act. The plaintiff's book value as at 15/1/2003 was Kshs 314.9 M. The 2nd and 3rd defendant made sales of Kshs. 54,238,368/37 between January and August, 2003. The bank sold LR No. 21692, Mombasa road for Kshs. 40,500,000/= and got paid Kshs. 10M pursuant to a Court Order of 14/5/2003.
 91. It is not in dispute that the plaintiff was a profitable business making a minimum profit of Kshs. 23M as at the time it was given a "kiss of death" in January, 2003. It is not clear for how long it would have



continued to make such or other profit. However, I take judicial notice that it had been operating profitably since 1977. I will give a maximum of 10 years of Kshs. 23M per year to make the loss of profit at Kshs. 230,000,000/=.

92. From the statement of A/Cs that were produced, which I however hold were not verified and the amount due on the facilities not proved, the total amount that seem to have been due as at 15/1/2003 was Kshs. 92,488,148/25. This is notwithstanding that loaded therein was an overcharge of Kshs. 23,047,341/28 as found by IRAC. From the recoveries of Kshs. 54,238,368/37, 10M, Kshs. 45.5M, and overcharge of Kshs.23,047,341/48 that amount was obliterated and an excess of Kshs. 40,297,561/50 achieved.
93. Accordingly, I will award the plaintiff damages of Kshs. 562,150,220/10 made up as follows:
- a. Book value as at 15/1/2003 – Kshs. 314,900,000/=
 - b. Loss of profit for 10 years at Kshs 23,000,000/= per year – Kshs. 230,000,000/=
 - c. Excess after recoveries – Kshs. 40,297,561/50
-
- Kshs. 585,197,561/50

There was no evidence of Kshs. 21,249,400/90 claimed for unaccounted vehicles.

94. There was no basis for punitive damages. I will not award any.
95. Accordingly, the plaintiff has proved its case on a balance of probability and judgment is entered for the plaintiff against the defendants jointly and severally as follows: -
- a) The 2nd and 3rd defendant be restrained by themselves, their agents or servants from acting and/or purporting to act as Receivers and/or Managers of the plaintiff and from interfering in any manner with the plaintiff's quiet possession and enjoyment of all the plaintiff's land, properties, machinery, equipment and assets.
 - b) The defendants and their agents or servants be ejected and removed from all the plaintiff's premises and properties and the plaintiff's possession of all its premises and properties be reinstated.
 - c) The sum of Kshs. 102,939,542.75 is not recoverable under the subject debentures and therefore the appointment of the 2nd and 3rd defendant by the 1st defendant as Receivers and Managers of the plaintiff was illegal, null and void and of no legal effect.
 - d) Since the sum of Kshs. 30,000,000/= has already been recovered by the bank the debentures and mortgages herein have been exhausted and no further sums are recoverable thereunder.
 - e) Damages in the sum of Kshs. 585,197,561/50 plus interest from the date of this judgment until payment in full.
 - f) A declaration that the 1st defendant having fully recovered its outlay it is not entitled to exercise any other powers under the debentures, Mortgages or guarantees held and the same are hereby discharged forthwith.
 - g) Costs of the suit together with interest thereon.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE, 2023.



A. MABEYA, FCIArb

JUDGE

