



**Kaoko v Barclays Bank of Kenya (Commercial Case E002B of 2021)  
[2023] KEHC 23529 (KLR) (2 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23529 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
COMMERCIAL CASE E002B OF 2021  
RE ABURILI, J  
OCTOBER 2, 2023**

**BETWEEN**

**GORDON ORURE KAOKO ..... PLAINTIFF**

**AND**

**BARCLAYS BANK OF KENYA ..... DEFENDANT**

**JUDGMENT**

1. Vide a further amended plaint dated 30<sup>th</sup> January 2023 and filed in court on 30<sup>th</sup> January 2023, the Plaintiff herein Gordon Orure Kaoko pleaded that on or about the 15<sup>th</sup> day of March 2000 which is over 23 years ago, he entered into an agreement with the defendant whereby the defendant Barclays Bank of Kenya Ltd (now Absa, agreed to advance the Plaintiff and the Bank did advance him Kshs.1,500,000 and secured a charge over title No. LR Kisumu/Bar/1990.
2. The Plaintiff claims that he dutifully and diligently paid the instalments in servicing the loan as and when they fell due together with interest accrued thereon.
3. He alleges that the defendant failed to meet its obligations under the Agreement by failing, refusing, ignoring and or neglecting to keep proper records of the loan and interest repayments by the plaintiff and consequently levying unlawful interest charges and ended up claiming from him Kshs.3,124,415.46 or thereabouts which subsequently led to the unlawful, illegal and unprocedural sale of the security property to recover the alleged outstanding debts in the absence of any valuation and service of statutory Notices as required by law.
4. The Plaintiff pleaded the following as particulars of breach of the Agreement by the defendant:
  - a. Failure to keep proper records on the loan account.
  - b. Failure to furnish the defendant with statement of account on the loan facility upon demand as required.



- c. Charging excessive unconscionable and unlawful interest rates on the loan facility.
  - d. Prematurely invoking the right to exercise the statutory power of sale when the same had not arisen since there were no defaults on the loan account.
  - e. Selling the said property without serving the plaintiff with the statutory Notices as required under the law or at all.
  - f. Exercising the statutory power of sale without having done a valuation of the said property as provided under the law.
  - g. Selling the suit property at an undervalue price and conducting the said sale to the detriment of the plaintiff contrary to the law.
  - h. Failure to render an account of how the proceeds from the said sale were expended.
5. The Plaintiff claims further that as at the time of such sale, the Defendant had not served on the plaintiff a valid or any notification of sale as mandatorily provided for under the Auctioneer's Rules, 1997.
  6. The Plaintiff claimed that at the time of the alleged unlawful sale, the security property was covered with mature gum trees and other developments there and that its approximate value then was Kshs.10,000,000.
  7. As a result of the alleged illegal action of the defendant, the Plaintiff had suffered irreparable loss and damage.
  8. The plaintiff therefore prayed for judgment against the Defendant and orders for:
    - a. An order for valuation of the charged property No. L.R Kisumu/Bar/1990.
    - b. An order that the Plaintiff be issued with Certificate of Sale.
    - c. An order that the Defendant furnishes the plaintiff with a statement of account and/or report of the proceeds of the sale.
    - d. An order that the Plaintiff be compensated by the Defendant the difference between the value of the property from the valuation and the amount owed at the time of the sale of the suit property with interest from the date of the auction.
    - e. Cost of the suit.
  9. The Defendant in its defence filed on 6<sup>th</sup> July 2010 admitted that it advanced to the Plaintiff a loan of Kshs.1.5 million vide letter of offer dated 26<sup>th</sup> March 2001 which offer was accepted and that indeed the plaintiff offered and had his parcel of land No. Kisumu/Bar/1990 charged to secure the said loan. That the Plaintiff further secured a further loan of Kshs.2,000,000 by creating a further charge on the same property title and further offered as security Kisumu/Bar/1703 to secure a further loan facility of Kshs.500,000.
  10. It was contended that the Plaintiff defaulted in his repayment obligations thereby crystallising the Defendant's statutory right of realising its securities by way of sale.
  11. The Defendant denied all particulars of breach or that it illegally or unprocedurally sold the charged property as alleged. It was further pleaded that on 24<sup>th</sup> August 2007 the defendant sent to the plaintiff a statutory Notice demanding payment of the outstanding sums and that upon the plaintiff's non-compliance with the demand thereof, the defendant instructed the Auctioneers to sell the charged properties by way of public auction but that due to an inadvertent error, the Notification of Sale



was sent to an address which did not belong to the Plaintiff hence the auction did not take place as scheduled, which error in posting was an irregularity which did not clog or invalidate the defendant's statutory power of sale but only bared it from selling the subject properties based on the said Notification of Sale but did not preclude the Defendant from issuing a fresh Notification.

12. It is important to note that the suit herein was first initiated in 2009 vide HCC No. 108 of 2009 and simultaneous with the filing of the plaint, the Plaintiff sought for an injunction to restrain the defendant from exercising the statutory power of sale, which applicant was opposed by the defendant and which application for injunction was eventually dismissed.
13. Later, the matter was transferred to the Environment and Land Court and allocated ELC No. 680 of 2015 before the file was returned to this court in 2021 and allocated the present case number.
14. The parties complied with Order 11 of the [Civil Procedure Rules](#) and the suit was finally set down for hearing.
15. The plaintiff Gordon Orure Kaoko testified as PW 1 adopting his witness statement filed on 30<sup>th</sup> January 2023 reiterating the contents of his further amended plaint and emphasized that to the best of his knowledge, he paid to the defendant Bank all the instalments as and when they fell due including the interest accrued thereon.
16. The Plaintiff testified in addition that despite his advocate writing to the Bank informing it that he had cleared the loan and requesting for statements of accounts of the loan, the Bank never responded and that in 2012, the Bank purported to realise the security L.R Kisumu/Bar/1009 and that to date, the certificate of Sale requested and an account of how much was realised and how it was realised had not been furnished to him hence this suit. The plaintiff stated that the sale was way below the property's true value considering the matured trees and other developments thereon. The Plaintiff produced his documents filed in court on 28<sup>th</sup> and 30<sup>th</sup> November 2018 as exhibits.
17. In cross examination, the plaintiff stated that he had lived in Tom Mboya Estate since 1994. That his postal address was 1595 Kisumu and that he was one of the Directors of Gulf Fabricators. He stated that the said company was operational and was incorporated around 2002. He stated that they are about 5 directors of the said company. He denied that he signed the documents for Gulf Fabricators. He acknowledged the offer letter dated 26<sup>th</sup> March 2001 and the signature on page 14 of the said letter of offer. He admitted that he signed the offer letter and that he agreed to charge his property known as Kisumu/Bar/1990 for Kshs.1.5 million. He acknowledged all the terms of the offer letter and stated that he read the said terms.
18. He stated that he paid instalments as and when they fell due as per his Bank Statements. He acknowledged that he had not produced in court any bank deposit slips or transaction statement. He maintained that he had settled the entire outstanding loan.
19. He stated that he wrote to the Bank of his willingness to settle the entire amount before sale of the property. He stated that he was not aware that the Defendant produced all the documents that he had asked for, during the hearing of the application for injunction vide the Replying affidavit sworn by Nerea Okanga. He also stated that he was not aware that his application for an injunction was dismissed.
20. He stated that he was aware that the property was sold in 2011 and that he did not bid for the said property and neither did he know who bid for the said property. He stated that the value of the property sold being Kisumu/Bar/1990 was Kshs.10,000,000 although he had not produced any valuation report on the value.



21. He acknowledged his signature on the charge instrument of 16<sup>th</sup> March 2000 and the consequences of the default clause.
22. In re-examination, the plaintiff restated that he sought to be furnished with documents but that the Defendant never responded to his letter dated 8<sup>th</sup> September 2008 to supply him with statements of accounts and that to date, the documents requested for had not been supplied.
23. He added that he had overpaid the loan facility plus interest. He stated that he was not furnished with a valuation report before his property was sold.
24. The Defendant called three witnesses. DW 1 Mr. Joseph Muli testified and produced the defendant's list and bundle of documents dated 27<sup>th</sup> April 2020 and 4<sup>th</sup> May 2023 respectively as exhibits 1-17 respectively and adopted his witness statement dated 28<sup>th</sup> April 2023. He reiterated the contents of the defence filed by the defendant.
25. DW 1 stated that the letter of offer and the charge and further charges were registered on the title Kisumu/Bar/1990 for the amounts stated. He also stated that upon the Plaintiff defaulting, a demand Notice D. Exhibit 6 dated 24<sup>th</sup> August 2007 was sent via Registered mail to Box 1595 Kisumu. He also referred to accounts statements D. Exhibit 10 at pages 49 – 70 of the supplementary bundle of documents filed by the Defendant. He stated that from the said statements, repayments were made by the plaintiff from 30<sup>th</sup> November 2001 to 5<sup>th</sup> April 2020 then 7<sup>th</sup> May 2020 and that the interest charged was default rate of 10% above the base rate.
26. He stated that prior to this suit, the Plaintiff had filed suits for injunctions to stop the Defendant Bank from selling the security in 2009, but that the applications were dismissed and that that is when the Bank instructed Nyaluoyo Auctioneers who sold the property to realise the outstanding loan.
27. In cross-examination, DW 1 maintained that the Plaintiff was supplied with all documents in 2009 although he could not recall when the documents were supplied. He acknowledged the letter dated 2<sup>nd</sup> December 2023 and stated that the documents therein were provided to the successful bidder who purchased the property, not to the plaintiff.
28. Babu Njihia Mwangi testified as DW 2 and stated that he was a valuer and had been practicing for 12 years. He had a Bachelor's Degree in Land Economics. He adopted his witness statement dated 22<sup>nd</sup> May 2023 and produced the bundle of documents listed as 1 and 2 in the supplementary bundle of documents dated 4<sup>th</sup> May 2023 as D. Exhibit 8 and 9 respectively.
29. He stated that in 2011, his firm of Njihia, Muoka & Rashid Company Limited were instructed by the Defendant Bank, through a service level Agreement to value property Nos. Kisumu/Bar/1990 and Kisumu/Bar/1703 which valuation they undertook on a 'drive past' visual inspection basis relying on expertise and market knowledge, to get the value thereof because the plaintiff owner thereof was hostile to the valuers who went to inspect the property as per the preamble to D. Exhibit 8. He stated that they used a sales comparison method. He stated that the valuation report refers to some trees planted in the compound and some buildings. That they considered permanent structures but that impermanent structures and trees do not form part of the market value of the property in question.
30. He stated that the market value was Kshs.5,000,000 Forced Sale Value (FSV) for Kisumu/Bar/1990 was Kshs.2.5 million while (FSV) for Kisumu/Bar/1703 was Kshs.600,000 and market value was Kshs.850,000.
31. On being cross examined by Ms. Awuor counsel for the Plaintiff, DW 2 stated that he was not present during the valuation and that the preamble to the valuation Report on Kisumu/Bar/1990 gives an



account of the inspection and valuations. He stated that the valuers could not access the internal area of the land and that only permanent structures which were 3 were considered in the valuation because the temporary structures could be demolished anytime. He reiterated that the report does not give details of the property's interior because the valuer could not access the property due to its owner's hostility. He denied the suggestion that the valuation Report left out important information which could have pushed up the value of the property.

32. He stated that it was not mandatory that the owner of the property be present during the valuation but that all they needed was access, although the valuers were unable to access the property's interior hence they carried out a drive past valuation.
33. In re-examination, the witness reiterated his evidence that the drive past valuation was undertaken because of the hostility on the ground exhibited by the owner of the property as was recorded in the valuation report.
34. James Josiah the Principal Auctioneer for 43 years for Nyaluoyo Auctioneers testified as DW 3 and adopted his witness statement dated 19<sup>th</sup> May 2023 as evidence in chief.
35. He also produced as exhibits 10-15 the documents listed in the Defendants supplementary bundles of documents. He testified that they are service providers for the Defendant and that in 2011, they were instructed by the defendant to realise the securities Kisumu/Bar/1990 and Kisumu/Bar/1703 and that on 16<sup>th</sup> May 2011 they served the Plaintiff with a Redemption Notice which he received but declined to sign and they documented the same. That on the same day, they served him with a Notification of Sale but again, he refused to sign and that on expiry of 45 days, they advertised the property for sale and sold it on 26<sup>th</sup> July 2022 as per D. Exhibit 11. That they sold the 2 properties to 2 purchasers outside DW 3's offices. The purchasers were Owen Odhiambo Eliud Ojuka who bought Kisumu/Bar/1990 for Kshs.2.9 million while Kisumu/Bar/1703 was bought by Elisha Odhiambo Oloo. This witness was not cross-examined.
36. The Defendant then closed its case and the court directed parties to file written submissions and gave them 21 days but as at 19<sup>th</sup> June 2023, none of the parties had filed written submission hence the court fixed today for Judgment delivery and gave them 7 days to file submissions. Both parties filed submissions which I have considered below.

### **The plaintiff's Submissions**

37. The applicant's counsel submitted that there was no dispute that the suit property was sold at auction at the behest of the respondent for recovery for an alleged un-serviced loan facility but rather that the bone of contention was whether the auction was done procedurally. Reliance was placed on the case of *John Kuria Mathenge T/A Aberdare Filling Station v Caltex Oil (K) Ltd & Another* 2015 eKLR where the court held that a chargee owes a statutory duty of care to a chargor to ensure that property sold is subject to a reserve price. Further reliance was placed on the case of *Harrischa Bhovanbhai Jobanputra & Another v Paramount Universal Bank Ltd & 3 Others* [2011] eKLR where the court held *inter alia* that failure to indicate the reserve price was an express breach of Rule 11 (1) (b) (x) of the *Auctioneers Act* and that failure to comply could denote that no valuation of the property was undertaken.
38. Counsel for the applicant submitted that section 97 (2) of the *Land Act* places a mandatory obligation on a chargee who intends to exercise its statutory power of sale over land to ensure a forced sale valuation is conducted as was reiterated in the case of *Koileken Ole Kipolonka Orumoi v Mellech Engineering & Construction Limited & 2 Others* Civil Suit No. 545 of 2014 [2018] eKLR.



39. It was submitted that no particulars or conditions of sale had been exhibited by the bank and further, that the amount at which the suit property was sold was well below the market price. The applicant submitted that the auction was irregular and the set procedure was not followed and thus the applicant's suit was merited.

### **The Defendant's Submissions**

40. On behalf of the defendant, it was submitted that the Plaintiff did not deny that he had an outstanding facility with the defendant bank and that neither did he deny that he had not settled the entire outstanding amount as at the date of the auction.
41. The defendant submitted that in 2001, the plaintiff defaulted in making monthly payments and that in 2009, the defendant bank commenced the process of disposing of the properties charged as security by the plaintiff which action was discontinued after the Auctioneers, Garam Investments, contracted by the defendant bank, sent out the 45-day notice to a different postal address from the plaintiff's postal address.
42. It was submitted that despite the defendant's demands, the plaintiff continually defaulted in repaying the loan amounts and that the defendant bank instructed Njihia Muoka Rashid Co. Ltd to carry out a valuation of the charged properties and the said firm carried out a drive past valuation over the charged properties that was necessitated by the hostility faced by the valuer who was inspecting the property at the time.
43. The defendant's counsel submitted that the plaintiff had merely made allegations that the valuation was not conducted properly and that the property was sold at an undervalue but that the plaintiff provided no evidence to support his claim as was reiterated in the case of *Zum Zum Investment Limited v Habib Bank Limited* [2014] eKLR.
44. It was submitted that the plaintiff's submission discounting the process of sale of the property Kisumu/Bar/1990 was premised on legislation/Act of Parliament that was enacted after the sale had been conducted and as such, the *Land Act*, 2012 had no retrospective applicability to a sale that was conducted before its enactment. Reliance was placed on the *Interpretation and General Provisions Act* as well as the case of *Samuel Kamau Macharia 7 Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR.
45. The defendant's counsel submitted that the plaintiff had an opportunity to settle the outstanding amount before the auction was conducted on the 26<sup>th</sup> July 2011 but rather ignored several demands to settle the same despite always being aware of the amounts he was required to deposit monthly towards repayment of the facility. The defendant submitted that the plaintiff bore unclean hands and as such, the law and the court could not come to his aid.

### **Analysis And Determination**

46. I have considered the pleadings and evidence adduced by both parties and the submissions as filed by their respective counsel. The issue for determination is whether the plaintiff proved his case against the defendant on a balance of probability.
47. The plaintiff's claim against the defendant as prayed in the plaint is for:
- a. an order for valuation of the charged property LR Kisumu/bar/1990.
  - b. An order that the plaintiff be issued with a certificate of sale





- c. An order that the plaintiff be issued with a statement of accounts and or report of the proceeds of sale
  - d. An order that the plaintiff be compensated by the defendant the difference between the value of the sale of the suit property with interest from the date of the auction
  - e. Costs of the suit and any other order the honourable court deems fit and just to grant.
48. I have considered the pleadings, evidence and submissions by the plaintiff and the defendant. In my view, the issues for determination flow from what the plaintiff sought hence I will determine each prayer as an issue with necessary additions.
- f. Whether the property LR Kisumu/bar/1990 should be valued by an order of this court
  - g. Whether the plaintiff should be granted the prayer for issuance of the certificate of sale
  - h. Whether the plaintiff is entitled to the statements of account by an order of this court.
  - i. Whether the plaintiff is entitled to be compensated by the defendant the difference between the value of the sale of the suit property with interest from the date of the auction
  - j. What orders should this court make
  - k. Who should bear costs of the suit?
49. In determining the above issues, this court will no doubt determine other important questions arising therefrom. Onto the first issue, whether this court should order for valuation of the property in issue, the plaintiff claimed that he had repaid the entire loan advanced to him yet his property was sold at an undervalue and without being valued to arrive at a proper value which according to him, was over ten million.
50. On the valuation of the suit property, the Plaintiff asserted that his property was illegally sold yet he had repaid the entire loan as per the agreement and that he had also paid all the instalments and even overpaid the same. The Plaintiff, for avoidance of doubt, does not deny that he read and signed the letter of offer as per defence exhibit 1 of the defendant's exhibits. He does not deny securing his properties for the loan facilities although he does not disclose that after the first loan facility was advanced, he took the second and third loan facilities secured by title No. Kisumu/Bar/1703 as well, which sums of money as advanced to him, were repayable monthly with interest and in the event of default, the default interest was also stated therein as 10% above the base rate. The Plaintiff does not deny that he was bound by the letter of offer and the default clause.
51. The Plaintiff however denies that he ever defaulted in repaying the loan advanced and maintains that he fulfilled all his obligations hence the sale of his property by the defendant was illegal.
52. From the onset, and as earlier alluded to, this suit was first initiated in 2009 before it was taken to the Environment and Land Court then it was returned to this court in 2021 hence it has a history and reasons for the delayed hearing and determination.
53. When the suit was first filed, the Plaintiff also sought orders of injunction to restrain the defendant from disposing of the charged property and the court observes that after the plaintiff obtained interim orders and failed to proceed and prosecute his application interpartes on 28<sup>th</sup> October 2010, the application dated 7<sup>th</sup> July 2009 was dismissed with costs by Abida Aroni J.
54. The application for injunction and the suit were prompted by the defendant putting in Motion the process of selling the charged property to recover the defaulted loan.



55. The application for injunction having been dismissed, the defendant restarted the process of realising the security. The evidence and exhibits produced by DW 2 show that a drive past valuation of the property in issue was undertaken in 2011 after the Plaintiff became hostile and denied the valuers access to the property to inspect physically and value the same.
56. DW 2 explained how the value was arrived at thereby deriving the marked value of Kshs.5,000,000 and forced value of Kshs.2,500,000 for property 1990. The valuation was undertaken within 12 months before the sale.
57. The Plaintiff claims that the valuation was not done and that the property was undervalued as it is valued over Kshs.10 million. However, the Plaintiff did not produce in court an alternative valuation report that gives the property the value that he believes was the correct one. In *Zumzum Investment Limited vs Habib Bank Limited* [2014] eKLR cited by the defendant's counsel, it was held that:-
- “In my view, the Plaintiff has not demonstrated satisfactorily why this court should disregard the Defendant's valuation report and only rely on the Plaintiff's valuation reports. It is not sufficient for the plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactorily demonstrate why the valuation report that the defendant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time. The Plaintiff needs to show, for instance, that the Defendant's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done way before the time of the intended sale. The Plaintiff has not raised any of such grounds.”
58. The auction was conducted on 26<sup>th</sup> July 2011 whereas the valuation Reports were dated 12<sup>th</sup> April 2011. For the above reasons, I find and hold that the valuation of the suit property was done and therefore the court would not order for another valuation. The plaintiff had the opportunity of carrying out his own valuation and presenting such evidence before court in support of his assertions that the valuation was not done by the defendant or that if such valuation was done, then it was an undervalue. Nothing prevented the plaintiff who was in physical occupation of the property from carrying out his own valuation. This court cannot therefore be asked to assist a party to obtain evidence which that party had the opportunity to obtain unhindered at all times. I find the prayer for valuation not merited and there same is hereby declined and dismissed.
59. On the issuance of certificate of sale the Plaintiff further pleaded and testified that the sale of the property was illegal as no Notification of Sale was served upon him. He further asserted that the Certificate of sale was never issued to him hence, the prayer that the defendant issues him with a certificate of sale of the suit property.
60. To counter the plaintiff's accusations, the Defendant called DW 3 Josiah the Principal Auctioneer for Nyaluoyo Auctioneers who testified and produced as an exhibit at page 39 of the defendants' bundle of documents dated 28<sup>th</sup> April 2023 a Memorandum of Sale which served as a Certificate of sale of the suit property to one Owen Odhiambo Eliud Ojuok for kshs 2,900,000 and duly signed by the Auctioneer and the purchaser on 26<sup>th</sup> July 2011. The defendant also produced as an exhibit a Notification of Sale which was served on the Plaintiff on 16<sup>th</sup> May 2011 and the affidavit of service shows that the Plaintiff declined to sign the same. The Auctioneer's Notice too was served upon the Plaintiff as shown by D. Exhibit 13. There being no payment of the claimed sum of money and there being no injunction or impediment, the Auctioneer advertised the said property for sale by Public Auction vide Daily Nation





as per D. Exhibit 11 and on 26<sup>th</sup> July 2011 the property was sold as per the memorandum of sale, to Owen Odhiambo Eliud Ojuok at Kshs.2,900,000 as per D. exhibit 15.

61. That being the case, the Plaintiff could not redeem his property. As correctly submitted by the defence counsel, the sale took place in 2011 whereas the *Land Act* came into effect in 2012 hence the law did not operate retrospectively. See *S. K. Macharia & Another vs KCB Limited & 2 Others* [2012] eKLR.
62. From the evidence adduced by the plaintiff, I am satisfied that the valuation of the plaintiff's property was done, that the statutory Notices and Notification of sale were served on the plaintiff and that the plaintiff had defaulted in repaying the loan advanced to him hence the defendant's right to exercise its statutory power of sale of the security had crystallised. The memorandum of sale served as the certificate of sale as the contents are the same and whereas the Memorandum of sale was applicable before 2012, the certificate of sale is applicable after the enactment of the *Land Act* in 2012.
63. Additionally, the certificate of sale is normally issued to the successful purchaser of the property at an auction, to certify that they have purchased the property which they are now allowed to take possession of and to enable them process the transfer of the purchased property into their names. There is no legal requirement that the defaulter who has been unable to redeem his property is entitled to a certificate of sale. Nonetheless, there is no dispute or contrary evidence in this case that the sale materialised in favour of the highest bidder who purchased the suit property and that the plaintiff herein did not bid for the said property. Accordingly, the prayer sought is declined and dismissed.
64. On whether the plaintiff should be supplied with his loan statements of accounts or is he entitled to the same by an order of this court? The Plaintiff pleaded and testified that he was never supplied with statements of accounts of his loan facility and that the interest charged was illegal and excessive. To counter this assertion, the defendant produced a statement of accounts for the Plaintiff's loan account and there was no denial that the plaintiff traded as Gulf Fabricators, the name of the account where the loan repayments were to be made. The statements at page 49 – 70 of the defence bundle dated 23<sup>rd</sup> September 2014 show that the Plaintiff only repaid the loan for a few months in 2001 and defaulted in 2002 and from there, no payments were made between 2002 and 2011.
65. The Plaintiff does not state when he finished repaying the loan and although he claimed that the interests charged was illegal and excessive, he did not produce any evidence of reconciliation of the account conducted by any other independent expert to fault the loan and penalty interest calculator as applied by the defendant.
66. The defendant produced all statements of the loan account for the plaintiff herein not only from the onset of these proceedings as annexed to the Replying affidavit opposing the application for injunction dated 7<sup>th</sup> July 2009, but also those statements produced as exhibits as contained in the defendant's bundle of documents produced as exhibits. I find no merit in the prayer by the plaintiff that he should be supplied with statements of accounts yet he did not even fault or challenge the statements which were produced in court showing his loan account and the fact that he had not fully repaid the loan advanced to him. In my view, the Plaintiff never intended to repay the loan that he was advanced on terms that he accepted freely. For that reason, the law cannot come to his defence. See *Mrao vs First America Bank of Kenya & 2 Others* (2003) KLR 125 where it was stated that.

“I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance



challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters.”

67. I therefore find that the prayer for statements of accounts to be produced or supplied to the plaintiff is devoid of any merit and the same is hereby declined and dismissed.
68. On whether the plaintiff is entitled to be compensated by the Defendant the difference between the value of the property from the valuation and the amount owed at the time of the sale of the suit property with interest from the date of the auction, the plaintiff claimed that his property was not valued and that the sale was an undervalue hence the compensation sought. I have already found that there was valuation of the property in issue via a drive past method owing to the hostility exhibited by the plaintiff who did not allow or permit the valuers to access the premises and value the property physically and taking into account every detail therefrom.
69. I have also found that the plaintiff did not repay the loan advanced to him in full and that he defaulted after making a few instalments. I have further found that the sale of the suit property was lawful and that the plaintiff did not demonstrate that the sale value was an undervalue as he did not adduce any evidence of a contrary value to that which was sold after a drive past valuation thereof. Accordingly, I find and hold that in view of the above situation, the plaintiff is not entitled to and he has not proved on a balance of probabilities that he is entitled to any compensation sought. The prayer for compensation is declined and dismissed.
70. In the end, I find and hold that the Plaintiff has not proved his case against the Defendant on a balance of probabilities. The suit herein is found to be devoid of any merit and the same is hereby dismissed with costs to the Defendant Bank.
71. Mention on 24/10/2023 before the Deputy Registrar to confirm the filing of the bill of costs.
72. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 2<sup>ND</sup> DAY OF OCTOBER, 2023**

**R. E. ABURILI**

**JUDGE**

