



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 105 OF 2002

LESLIE OKUDO AKUMU.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiff filed this suit vide a plaint dated 30th January 2002 and amended on 23rd April 2012, seeking for judgment against the defendant for:

- a) An order of injunction restraining the defendant by themselves or any of their servants or agents from selling or in any other manner alienating or dealing with the plaintiff's land parcel No. L.R. No. Nairobi/Block 94/63, Nyari Estate Nairobi;*
- b) A declaration that the intended sale by public auction on 19th March 2002, is illegal and in breach of the statutory requirements of the law;*
- c) Kshs. 8, 478, 800. 21, as claimed in paragraph 8 of the plaint and interest thereon at commercial rate;*
- d) General damages and interest thereon;*
- e) Costs of the suit and interest thereon;*
- f) Any other relief that the Honourable court may deem fit and just to grant.*

2. The plaintiff avers that; there existed a banker-customer relationship between the parties, wherein he held an account number, 401021858. That, on 17th June 1987, the defendant advanced him, a credit facility in the sum of; Kshs 220,000, at an interest rate of 14% per annum secured by a charge over L.R. No. Nairobi/Block 94/63, Nyari Estate Nairobi (herein "the suit property").

3. On 29th October 1991, he applied for a bridging loan of; Kshs. 2,500,000, but the defendant approved Kshs. 1, 800,000, only on 16th November 1991. A further charge was created over the suit property.

4. On 5th November 1991, he requested the defendant for approval to overdraw the account by a sum of; Kshs. 600,000, on the basis of the bridging loan facility he had applied for but there was no immediate response, although eventually, he was allowed to overdraw the account on 18th November 1991, even before the registration of the further charge to secure the sum of; Kshs. 1,800,000.

5. That, for unknown reasons on 10th December 1991, the defendant credited his account with a sum of; Kshs. 667,307, without any explanation or communication and debited it's in house books of accounts on an account whose name, title or number was unknown to him. On 12th October, 1992, he applied for and was granted a further bridging facility in the sum of; Kshs. 1,000, 000 bringing his total indebtedness to the defendant in the sum of; Kshs. 3,000,000, together with interest rate of 20% per annum. The facility was secured by a further charge.

6. By 2nd June 1993, the total debt was; Kshs. 3, 500, 000 which was secured by a supplemental further charge reflecting interest rate of 24% per annum. That he subsequently repaid the secured sum in full and even overpaid. However, the defendant overcharged him by levying

unauthorized, unconscionable and punitive charges, often wrongly levied two, three, or even four times a month, purporting it to be; commission, ledger fees, interest and thereby exaggerating the true position of the credit facility at any one time.

7. Further, the defendant has maliciously charged interest, well beyond the maximum rate of; 16.5% per annum, up to and exceeding 44% per annum, against the interest authorized under, the Central Bank of Kenya Act, (cap 491) Laws of Kenya, especially during the period of; February 1991 to end June 1996. Similarly, the defendant has, maliciously continued to claim false and unfounded sums.

8. That as at 9th January 2002, the defendant claimed a sum of; Kshs 19,848,828.10, when in true fact, the plaintiff had fully repaid the entire facility and overpaid by a sum of; Kshs 8,478,800.21 as at 30th January 2002. That when he asked to be provided with an explanation for the sum demanded, the defendant neglected and/or refused to offer any explanation at all, instead threatened to sell the suit property, by public auction through various firms of Auctioneers. In addition, the defendant continues to hold the title to the suit property illegally. Thus depriving him of the use thereof and causing him loss and damage, to his professional reputation and stand in society.

9. The plaintiff further avers that, the defendant has ignored the current value of the suit property and has opted to rely on the value assessed at; Kshs, 27,000,000, as at January 1999, instead of the current value of, Kshs. 35,000,000. That, the threatened sale of the suit property by M/s Garam Investments Auctioneers, is patently illegal and in breach of the defendant's statutory powers of sale.

10. The previous proceedings between the parties in; Nairobi HCCC No. 2032 of 1997, was dismissed for want of prosecution on 20th December 2001, in his absence and without his knowledge hence, the institution of the suit a fresh.

11. However, the defendant filed a statement of defence dated; 12th February 2002 and denied each and every allegation contained in the plaint. The defendant averred that, there existed a banker-customer relationship between the parties herein and subsequently in the year 1987, the plaintiff was granted a credit facility of; Kshs 220, 000 secured by the suit property as aforesaid. The defendant further advanced the plaintiff a facility of Kshs. 1,800,000 and a further charge dated 27th November 1991, registered over the suit property. In the year, 1993, the plaintiff was granted a further sum of; Kshs. 3,500,000 with a further charge registered over the suit property. Finally, a loan of Kshs. 667,307 was granted to the plaintiff on 10th December, 1991. The nature of the facilities was bridging loan given in short time for takeover by M/s Alico Kenya Limited.

12. The defendant avers that, the plaintiff enjoyed the facilities but breached the terms of the agreement by not paying back and left the debt to escalate despite demand. He severally admitted the claim and despite several proposals and indulgences, he failed to meet his obligations as envisaged and is estopped from denying the same at this juncture.

13. Further, having failed to redeem the property, the defendant is well within its right to instruct an Auctioneer to realize the suit property at the best available price. The defendant averred that, the interest and levies charged, were based on the letters of offer and the charge instruments which are binding to the parties. Therefore, the claim of overpayment is baseless and meant to conceal material facts.

14. The defendant stated that, there have been previous proceedings between the parties; in HCCC No. 2032 of 1997, litigating under the same title. Thus, the plaintiff is simply being vexatious. Further, the suit is incurably defective, does not disclose a cause of action against the defendant and is an abuse of the due process of the Honourable court. It should thus be dismissed.

15. The case proceeded to a full hearing. The Plaintiff testified in support of his own case, and relied on a bundle of documents he filed in court dated 2nd February 2010. He reiterated the averments in the plaint, save to add that, as per the clauses in the charge documents, the bank was to notify him whenever there was change in the interest rate, but did not at all. Further, the interest rate kept on changing, from time to time, with highest interest charged at 89.89%, as indicated in the bank statement as per the entry of January 1992; yet the interest rate provided for in the charge documents is 14% per annum.

16. That when the defendant failed to offer an explanation for the interest rates charged, he approached Interest Advisory Centre, and furnished them with the bank documents to re-calculate the interest charged and established the amount he owed the defendant. That according to the report received, he noticed that he had repaid the loan by, 24th September 1996, in excess of Kshs. 29,288,137.14. He also established that he had lost a total sum of Kshs. 93,223,815 from the property, as indicated the valuation report by Property wise Kenya Limited.

17. During cross examination he stated that, he was aware the loan advanced was repayable with interest and the least interest rate payable was 14% but subject to change. That the bank had the discretion to increase the principal sum and interest and/or review the rates but had to notify him, which he could accept or reject by paying the balance.

18. He stated that, the loan from the defendant was a stop gap measure, pending a long-term loan from, M/s Alico Kenya Limited. He confirmed Kshs. 600,000 was paid by the defendant directly to the contractor, who was constructing for him a house on the suit property. By the time the payment was made on 18th November 1991, his account was overdrawn with a sum of; Kshs. 18,006.

19. He stated, that he could not recall the defendant writing to him about a term loan. Further, the sum of Kshs. 3,500,000 was the total amount advanced, not an independent facility and/or that the sum of Kshs. 667,307 credited to his account was a loan from the defendant. That, as at 30th April 1994, the outstanding balance was Kshs. 5,062,394 on the account and the closing balance at 30th January 1999 was; Kshs. 8,621,818.10 as per the bank statement. He stated that he operated the bank account, questioned many entries without response from the bank.

20. He further testified that; he paid the Defendant Kshs. 10,266,519.20 but conceded that he did not write to the bank for immediate discharge of the title to the suit property. He also confirmed that, when the defendant offered the property for sale. He filed a suit number, HCCC 2032 of 1997, to restrain the sale. However, the case was dismissed in September 1997 for want of prosecution.

21. He conceded that he offered a sum Kshs. 5,000,000 to stop the sale of which, Kshs. 2,000,000 was paid by Hanber Singh, but the balance was not paid. In the month of January 1997, he deposited cheques amounting to Kshs. 4,000,000 and only cheques for Kshs. 1,000,000 was honored while the others were dishonored. In 1998, he negotiated with the bank and made some payments. However, by 31st March 1998, the amount demanded was Kshs. 6,166,365.60. He accepted not having paid that money but seeks for Kshs. 24,620,359.64, in terms of excess interest paid as at 28th February 2010 and general damages of Kshs. 93,223,395 for loss of his property.
22. In re-examination, he reiterated that, the bank was supposed to give him one-month notice before variation of interest rate, but did not. That in the month of August 1996, he wrote to the bank complaining but the defendant still did not give him a notice. He conceded, he was given reprieve once of approximately; Kshs. 300,000 on penalty clause. He denied allegation that clause 7 (i) of the charge allowed him to let out the suit property when there was an outstanding balance. That, since he finished repaying the loan in 1996, the bank owed him rent, as at that date, which is the basis of his claim.
23. He insisted that he did not know the source of the Kshs. 667,307 credited to his account as he never applied for a loan from the defendant for that sum of money, and no loan account was created on 10th December 1991. The demand of Kshs. 7,739,486 on 18th September 1997 did not include that sum of money as the same was made eight (8) years and five (5) months later.
24. Further, that the facilities advanced were an overdraft not term loan facility and the proposals made to repay the loan were based on the assumption that, the bank was charging the correct interest rate. That the first suit was dismissed as the lawyer was one and did not attend court.
25. The Plaintiff further called Jimmy Rod Kavilu who relied on the witness statement he prepared dated 11th July 2012, and filed on 17th July 2012. He stated that, he has twenty-six (26) years' experience in the banking industry and is a Certified Public Accountant. That he was requested by the plaintiff to look at his bank statement in relation account number 401-021-858 and other related documents and give him an opinion on whether the bank had acted prudently and in accordance with the Kenyan set banking standards & practice; as provided for under the Banking Act (cap 488) Laws of Kenya and the Central Bank Prudential Guidelines. That he acted accordingly and prepared a report dated 11th July 2012, produced herein.
26. In cross-examination, he stated that he did not look at the letters of offer. He termed his report as an opinion. He stated that, he was not part of the negotiation between the parties, but was aware that the interest rate was 14% and then 24%. He further testified that, his opinion would override the negotiations between the parties as it is based on the universal banking guidelines and policies.
27. He conceded that, as a bank customer, if he found a credit of Kshs. 667, 307 into his account, and he was not aware of its source, he would question the bank. However, in this case, he did not find documentation relating to the same, but treated it as a bridging loan. He conceded that, there is entry of; 10th December 1991, showing "LD 900" but he did not understand the code and did not confirm what it was.
28. However, he stated that, he confirmed Kshs. 667,307 was credited to the plaintiff's account and reversed eight (8) years later increasing the plaintiff's indebtedness to the bank. He could not also tell whether interest was charged on that amount or not. That he called the facilities herein, "Ever green overdraft" as it was a "never ending and incremental overdraft." There were twelve (12) facilities consolidated into a bridging term loan totalling Kshs. 3,000,000 for the purpose of construction of the plaintiff's house. There was no time frame for the facility although according to; M/s Alico Kenya Limited, it was fifteen (15) months.
29. He confirmed that, he had the valuation report dated 26th September 1997, when carrying out his mandate and it indicated that, the house was not yet complete, therefore, as per the terms of the offer, the completion had not occurred neither had M/s Alico Kenya Limited liquidated the sum of Kshs. 3,000,000 as per the records. He testified that on paper, the plaintiff was given a "term loan" but in operation, it was an "overdraft."
30. That on 31st November 1991 there was a debit balance of Kshs. 602,846.50 on the plaintiff's account, arrived at through a reference "TR", though he did not know what "TR" meant, and did not ask the plaintiff. The plaintiff operated a current account not a loan account. He confirmed he did not see any written complaint from the plaintiff to the defendant.
31. He stated in re-examination that, the sum of Kshs. 667, 307, did not feature in the statement for seven and a half years, but re-appeared on 31st May 1999. Further, interest was charged twice, for the entire period of November 1991 to 31st May 1999, thus escalating the debt and increasing repayment. He confirmed that, he arrived at the conclusion, that the plaintiff's statement of account was overstated and distorted. However, he did not do the computation and tabulation and could not state what amount of money was payable by the plaintiff nor the debt due. In re-examination, he maintained that, the amount of Kshs. 667,307 was not understandable.
32. The plaintiff's third witness was Wilfred Abincha Onono, who testified that, he was instructed by the plaintiff to re-calculate the outstanding debt, (if any), to the defendant, in relation to account number 401 021 858. He carried out the exercise, and on 17th July 2012, he filed a report dated 11th July 2012.
33. He conceded that, the parties executed several charge documents and are bound by the terms thereof. He stated that he calculated interest rate at 16.5% per annum before 27th November 1991 to 17th April 1997. He did not apply interest rate of 19% per annum stated in the further charge of; 27th November 1997 or the 24% per annum, as provided for in the further charge dated 21st June 1993.
34. That in the year 1989, the law was amended and interest rate was capped at 15.5% per annum for loans of less than three (3) years and 18% per annum for loans of over three (3) years. The interest rate of; 16.5% per annum was provided for in the Gazette Notice No. 1458, which was operational until it was repealed by Act No. 9 Of 1996. That he based all his calculations on the interest rate of 16.5% per annum.

35. He stated that, he treated the figure of; Kshs. 667,307 as an overdraft converted into a loan; retaining interest as debited by the bank. However, he conceded that the figure was removed from his second report and that he gave two views on the figure to assist the court. He also removed debits amounting to; Kshs. 860,056.50 which are contrary to the Banking Act. Similarly, all the fees charged as commission were removed for the entire duration of the loan. That he proceeded on the understanding that, the bank did not seek the necessary approval to levy the charges.

36. Further, he omitted Kshs 1,164,894.90 on the instructions of the plaintiff as the exact details were not clear to the plaintiff. He also removed a debit of Kshs 75, 100.50, as the plaintiff did not know what it was all about. He arrived at the conclusion that, the plaintiff had cleared the loan as at 23rd September 1996 on the basis that section 44 of the Banking Act was applicable. However, he conceded that, if his interpretation of section 44 of the Act is wrong, then his calculation will not be correct. Similarly, if the charges he has omitted are included, then the figures in his reports will be different.

37. He informed the court that, the plaintiff did not tell him that sometime after the year 1996, he admitted indebtedness of about Kshs. 7,000,000. Neither was he given the information regarding a demand for the sum of; Kshs. 3,000,000 from the defendant. He was not aware of the affidavit by the plaintiff where he stated that, he would arrange to pay the bank a sum of; Kshs. 5,000,000 by 19th December 1997. He stated that, the difference between the defendant's debit of Kshs. 29,226,423.70 and the IRAC's credit of Kshs. 10,106,766.41, is a sum of; Kshs. 39,333,190.00, in favour of the plaintiff. He told the court that, he presented two different reports, showing figures of; Kshs. 51,454,784.62 and Kshs. 53,882,865.78.

38. In re-examination, he stated that, he prepared two (2) reports to assist the court have two scenarios. That, as the bank failed to rely on the contractual interest rate and relied on illegal rates, the plaintiff has the right to recover the same. That, in the year 1991 to 17th April 1997, interest rate was 16.5% per annum; unless the Central Bank of Kenya granted authority to vary the same, which was not the case herein. Further, his first report included a sum of; Kshs. 667,307 but the second report omitted the same. That, if there was an admission of the debt, it was based on errors now clearly detailed in his report. The plaintiff is owed a sum of; Kshs. 8,478,800.21; as per entry of 31st December 2001, of the first report.

39. The plaintiff's fourth witness was Margaret Wangari Waithera, the Managing director, of Property wise Kenya Limited, a company that deals in estate management and studies related to Property. She testified that, she carried out a valuation on the suit property, in the year 1996, on the instruction of the plaintiff and prepared a report which she has been updating. The report dated 11th July 2012, indicates, the open market value of the suit property as Kshs. 45,000,000 and rental income was Kshs. 95,000 in the year 1996, and Kshs. 270,000 in the year 2013, and Kshs. 300,000 to Kshs. 350,000 in the year 2014. That at the time of valuation, she was not aware of the dispute herein. In cross examination, she stated that, the house was 100% complete, and occupied by the plaintiff when she carried out the valuation.

40. The defendant's case was supported by the evidence of Paul Chelang'a attached to the defendant's recovery department. He relied on the witness statement he wrote dated 5th October 2012. He reiterated the averments in the defence. However, he stated briefly that, the plaintiff held a current account number, 401-021-858 and a loan account number, 0201421900 at Eldoret branch.

41. That, after grant of the several facilities referred to herein, M/s Alico Kenya Limited confirmed that it would redeem the property to an extent of Kshs. 3,000,000. The money was to be used to construct the plaintiff's house which was supposed to be completed within fifteen (15) months. However, it was not completed within that period; as at 14th June 1993, and M/s Alico Kenya Limited had not honoured the promise to take over the loan.

42. On 13th August 1993 the defendant demanded for repayment of a sum of; Kshs. 5,130,575. On 8th October 1995, the amount outstanding was Kshs. 5,462,851 and instead of paying as per the demand, the plaintiff sought for a further facility of Kshs. 3,000,000 to enable him complete the house. He continued paying though in an erratic manner. In the year 1997, the defendant sold treasury bills on behalf of the plaintiff and credited the sum of; Kshs. 2,000,000 to the debit account, but the last payment made was on 31st March 1998 of Kshs. 1,000,000.

43. On 8th October 1993, the plaintiff undertook to pay the entire debt by 30th April 1994, but failed to do so. By 22nd March 1996, he had not paid yet, nor completed the house; and the bank undertook to sell the property. He gave a proposal for repayment and post-dated cheques, amounting to Kshs. 5,000,000, but only two cheques amounting to Kshs. 1,000,000 were paid, the others were dishonoured.

44. As the bank sought to sell the property, the plaintiff obtained an injunction order and restrained the sale. The witness told the court that the IRAC calculations have no basis. That, interests of bridging loans are always higher than normal loans and cannot be capped at 16.5% per annum. The rates herein were specific and contractual. The loan was for a period of fifteen (15) months but has taken over twenty (20) years. That, Kshs. 667,307 was a loan and not a repayment. He denied that the plaintiff informed the bank that he was leasing the property.

45. During cross examination, the witness said that, the plaintiff was granted an overdraft on 10th December 1991. It was not credited to his account. He conceded that the interest rates changed from 16.5% per annum to 24% per annum; as the cap on the interest rate was degazetted. In re-examination, he stated that, the plaintiff was granted both the loan and overdraft facility and the funds were disbursed.

46. The parties filed their final submissions wherein, the plaintiff invited the court to determine the following issues: -

a) Whether the credit facilities offered were term loans or evergreen overdraft facilities? What is the status of; Kshs. 667, 307, credited into the plaintiffs current account?

b) Whether the defendant levied un-contractual, illegal, fraudulent and unconscionable and/or illegal charges and/or interest rates in the plaintiffs current account?

c) Whether the plaintiff liquidated his indebtedness to the Bank? Whether the plaintiff has overpaid the defendant, thus entitled to a refund? If so, what is the amount of refund?

d) Whether the defendant has continued to improperly detain the plaintiff's title even after satisfaction of the debt?

e) Whether the defendant is liable in damages for the detainment of the plaintiff's title? If so, what is the amount of damages?

f) Who should bear the costs of the suit?

47. The defendant on its part invited the court to determine the following issues: -

a) Whether there was a contract of lending between the plaintiff and the defendant and what were the terms of lending thereof;

b) Whether the defendant applied contractual interest rates at all material times;

c) Whether the plaintiff repaid the sums of money owed pursuant to the charge and further charge;

d) Whether, the plaintiff overpaid to the defendant the sums of money owed and the effect of the IRAC reports presented in this matter by PW3 Wilfred Abincha Onono;

e) Whether the defendant's statutory power of sale had arisen;

48. I have considered the evidence adduced alongside the submissions filed by the parties and I find that the following issues have arisen for consideration: -

a) Whether the defendant granted the plaintiff any credit facility(s); and if so, what facilities was he advanced;

b) What was the nature of the facility(s), if any;

c) Whether the plaintiff has fully repaid any facility(s) granted and/or overpaid;

d) Whether the plaintiff should be granted the orders sought;

e) Who should bear the costs?

49. I shall deal with the first and second issues jointly. As regards the first issue, I find that, it is not in dispute that, the defendant advanced the plaintiff the following credit facilities: -

a) A sum of; Kshs. 220,000 on 17th June 1987; at interest rate of 14% per annum;

b) A sum of; Kshs. 1,800,000 on 16th November 1991; at interest rate of 19% per annum;

c) A sum of; Kshs. 1,000,000 on 12th October 1992; at interest rate of 24% per annum;

50. However, there is a dispute as to whether a sum of; Kshs. 667,307 credited on the plaintiff's account on 12th October 1992 was a credit facility and whether the sum of; Kshs. 3,500,000 was advanced on 2nd June 1993, at an interest rate of 24% per annum. As regards a sum of; Kshs. 667,307, the defendant avers that; the said facility is made up of a sum of; Kshs. 600,000, paid to the plaintiff's contractor on 18th November 1991, at the plaintiff's request and before the approval and disbursement of the sum of; Kshs. 1,800,000 bridging loan, on 7th December 1991. The sum includes Kshs. 67,307 which stood in debit on the plaintiff's account. The amount was converted into a loan and debited on the Plaintiff's loan account number 0201421900. Further as well known to the plaintiff, the defendant had a right to combine accounts as provided for under clause 13 (1) of the charge document created on 17th June 1987. However, the plaintiff maintains that there are no documents to show whether he had requested for that sum either as a term loan or an overdraft.

51. I have considered the evidence adduced and I find that on 5th November 1991, the plaintiff applied for a facility of; Kshs. 2,000,000 and on 16th November 1991, he was given a letter of offer in the sum of; Kshs. 1,800,000. On 18th November 1991, the defendant paid the plaintiff's contractor sum of; Kshs. 600,000 at the request of the plaintiff. The plaintiff does not dispute that the contractor was paid upon his request. If indeed the payment discharged the plaintiff's legitimate debt, then as much as it is clear from the evidence adduced that, the plaintiff did not apply for the same facility as a loan or overdraft, he is liable to pay it back. However, it is not clear why the defendant entered it on the plaintiff's account as a credit, if indeed it was part of, the facility of; Kshs. 1,800,000, which the plaintiff had applied for.

52. As regards the sum of; Kshs. 3,500,000, I note from the correspondence, it constitutes consolidation of all the facilities advanced to the plaintiff. It is not an independent credit facility as argued.

53. The next issue to consider is; what is the nature of the facilities advanced. The plaintiff submitted that, the facilities advanced were overdraft facilities and not term loan, as is informed by the fact that, after the bridging, the term loan of; Kshs. 1,800,000 was approved, the

parties did not execute a facility agreement to indicate the terms of the loan; particularly the term or period of the facility and the amortization payments or repayment amounts. Further, the facilities were disbursed through the plaintiff's current account and payments were made at the plaintiff's convenience and flexibility, as there was no structured way of payment, and were to be paid all at once in one lump sum.

54. That the facilities were temporary meaning; they were overdraft facilities and not term loans and were payable on demand. Further, the defendant has admitted making several demands for payment. In addition, the charge documents herein invariably provide accordingly. However, the defendant submitted that, the plaintiff applied for a bridging loan and was granted overdraft facility which he later accepted by overdrawing the account.

55. I have considered the evidence herein and I find that the plaintiff operated a current account on which all the undisputed short term and/or bridging loans were credited. The facilities did not have identifiable monthly or termly repayments and no loan account was opened for these facilities (as alleged to have been the case in relation to the facility of; Kshs. 667,307). Further, clause 2 of the charge document dated 27th November 1991, states the facility offered is "fluctuating" overdraft facility. Traditionally overdrafts are granted on current accounts. In that regard, I concur with the opinion formed by Mr. Kavilu, that though the plaintiff was granted what was termed as a "bridging loan", it was more so on paper, as the facilities were operated as overdrafts. I find that these facilities were overdrafts facilities.

56. The next issue to consider is whether the plaintiff has fully repaid the sums advanced and/or overpaid. I will deal with this question alongside the issues raised by the plaintiff regarding the interest rate that was applied by the defendant on the facilities granted.

The plaintiff relies on the bank statements, the report by Mr. Kavilu but more importantly the IRAC reports by Mr. Onono. The defendant on the other part, relies on bank statements, demand notices, alleged admissions and/or requests for indulgence.

57. The defendant's witness statement states that the plaintiff is still indebted to the defendant to the tune of; Kshs. 41,428,310.35 together with recovery costs of; Kshs. 338,199.05 as at June 2007. However, the plaintiff states that, as at 30th January 2002, he fully repaid the loan amount and overpaid by a sum of; Kshs. 8,478,800.21.

58. From the evidence adduced herein, it is clear that the plaintiff had challenges servicing the facilities advanced. There was an undertaking from; M/s Alico Kenya Limited, to remit to the defendant a sum of; Kshs. 3,000,000, on successful completion of the plaintiff's residential house. The defendant wrote to the plaintiff a letter dated 12th May 1993, requesting him to hasten completion of the construction of the house to enable the defendant enforce the undertaking from; M/s Alico Kenya Limited as the facilities were on arrears, in the sum of; Kshs. 4,657,205.50.

59. There was no response to this letter, provoking a reminder dated 4th June 1993, but still there was no response, whereupon the defendant wrote a third letter dated 8th June 1993 stating that, it was regrettable, that, the plaintiff had not responded to the earlier letters, nor provided funds to meet monthly charges nor completed construction as requested vide telephone conversation, and a site visit was scheduled for 14th June 1993 to assess the progress.

60. The plaintiff did not honor the demand made for repayment of the arrears, and by a letter dated 13th August 1993, from Nyairo & Co. Advocates, a demand was made on behalf of the defendant for a sum of; Kshs. 5,138,575. The Plaintiff responded to this letter by a letter dated 8th October 1993, in which he states inter alia; that, he had been making effort to obtain funds from various sources towards reduction of his indebtedness to the bank, but had been unsuccessful.

61. That he had made progress in purchasing items for finishing the house and made a request to the bank to consider financing the project to completion by advancing just about Kshs. 3,000,000 needed to complete the house. That if the request was not acceptable, the bank should indulge him to 30th April 1994 to repay the entire indebtedness. He proposed to pay; Kshs. 500,000 by 31st December 1993, thereafter be paying; Kshs. 250,000, every month until completion of the house. He stated that the sale price of the house to completion would be in the region of; Kshs. 12,000,000.

62. However, he could not "see" how the figure of Kshs. 5,138,575 demanded was arrived at, as the statement of; 30th September 1993, indicated a sum of; Kshs. 4,796,544.50 as owing to the defendant. He requested to be allowed to scrutinize his bank statement as, the same would likely reveal that, the indebtedness is significantly less than 4,795,544.50.

63. The defendant responded by a letter dated 28th October 1993 stating that, the debt was attracting interest and 1% penalty surcharge. It supplied the plaintiff with a statement of his account as at 30th September 1993. The content of that letter reveals that, the defendant's demand included the sum of; Kshs. 667,307 and an overdraft of; Kshs. 4,795,544.50. These figures were also reflected in a letter dated 2nd November 1993, from Nyairo & Co. Advocates, declining the plaintiff's proposal in the letter dated 8th October 1993.

64. Apparently from the following correspondence, there was no much activities until the 23rd June 1994, when the defendant wrote to the plaintiff to pay the first proposed installment of; Kshs. 1,000,000 at the end of the month of June 1994. Again, there was no further communication until 15th March 1995, when Nyairo & Co. Advocates wrote to the plaintiff to the effect that, they had instructed an Auctioneer to realize the security, which would only be stopped if the full payment was made, including costs and those of the Auctioneers.

65. The plaintiff responded in March 1995, complaining over the penalties charged and requesting that, all penalties be waived off, from his outstanding indebtedness and be given up to July 1995, to pay off completely the balance of his indebtedness. He indicated that, the house would be completed by May 1995. However, there is no indication as to whether the bank responded to this letter.

66. On 5th April 1995, the plaintiff wrote to the defendant seeking that, the interest rate chargeable be retained at around 20% per annum. Again, there is no indication to whether the defendant responded to this letter. What followed was a notification of sale dated 16th March 1995, from M/s A.O Leonard & Co. Auctioneers.

On 27th March 1995, the defendant wrote to; Nyairo & Co. Advocates instructing them to inform the Auctioneer to stop the auction of the property scheduled for 18th April 1995.

Subsequently, the defendant gave the plaintiff a rebate of interest chargeable in the sum of Kshs. 318,486.20 applied retrospectively from January 1994 however, the debit balance remained at Kshs. 6,002.069.

67. On 7th November 1995, the defendant wrote to the plaintiff regretting an error informing the plaintiff that his indebtedness was Kshs. 5,494,923.30 instead of Kshs. 5,994,923.30, occasioned by failure to take into account the previous unpaid cheques. On 15th November 1995, the defendant regretted it was no longer getting regular payments towards reduction of liabilities and served fourteen (14) days' notice to sale by public auction of the suit property. On 6th December 1995, the defendant acknowledged receipt of a cheque for a sum of; Kshs. 500,000. On 29th January 1996, the defendant acknowledged receipt of a cheque for a sum of; Kshs. 500,000. On 2nd March 1996, the plaintiff wrote to the defendant regarding site visit to the house under construction. The letter is illegible save for where it is indicated the house would be ready for rental. He promised to have his lawyers write to the defendant to give professional undertaking on the matter.

68. On 23rd March 1996, the defendant wrote to the plaintiff to clear the debt within fourteen (14) days. On 12th April 1996, the plaintiff wrote to the defendant referring to an arrangement between the parties as detailed in the letter dated 22nd March 1996, confirming the work was still on schedule; and the house would be ready for rental in the month of July 1996. In response to the plaintiff's letter, the defendant wrote a letter dated 22nd April 1996, giving the plaintiff indulgence to July 1996; and indicated, they expected the plaintiff to pay them rental income of; Kshs. 1,800,000 as stated in his letter. The defendant undertook to review the plaintiff's matter in their books.

69. On 30th July 1996, the defendant acknowledged receipt of five (5) cheques forwarded by a letter dated 30th July 1996. However, Cheque No. 434271 dated 16th August 1996, for a sum of; Kshs. 1,000,000 was returned unpaid with remarks, "effects not cleared." As a result, the plaintiff's account was debited with a sum of; Kshs. 2,500 as commission. On 24th January 1997, the defendant informed the plaintiff that, three (3) other cheques Nos 434273/74/75 in the total sum of; Kshs. 4,000,000 were returned unpaid with reason "not arranged for."

70. On 14th January 1997, the plaintiff wrote to the defendant, to the effect that, he was committed to settling the indebtedness; with the defendant. However, he stated that, although he borrowed Kshs. 3,000,000 and had paid over Kshs. 5,000,000. Further, the cheques were presented when he had instructed otherwise, and that, delay in settling the matter was hurting in relation to interest rates charged. He requested for a bank statement since inception of the loan up to 31st December 1996, to forward to a friend in America who was willing to take it over. He proposed to pay Kshs. 3,000,000 in full and final settlement but, Mr. Kiptoo from the defendant told him to pay; Kshs. 5,000,000.

71. However, later the defendant responded to this letter vide a letter dated 24th June 1997 to the effect that, it had declined the proposal to settle the debt by a payment of; Kshs. 5,000,000. The plaintiff offered to increase the amount to; Kshs. 6,000,000 but did not pay and the defendant advised the branch to advertise the property for sale.

72. On 2nd July 1997, the plaintiff wrote to the defendant to the effect that, he was committed to paying off the debt, hoping that, the bank would not defame him in the public media. On 7th July 1997, the defendant insisted the plaintiff clears his debt. On 1st August 1997, the firm of, Nyaundi Tuiyott & Co. issued the plaintiff with a letter demanding a sum of; Kshs. 7,389,401.80 which also constituted a statutory demand of three (3) months.

73. On 8th August 1997, Kedo Auctioneers sent the plaintiff a notification of sale of the suit property. On 24th September 1997, the said law firm wrote to the firm Onalo & Co. Advocates, acting for the plaintiff forwarding the client's statement showing the following accounts in debit:

Current Account No. 401021858- -Kshs. 7,449,874.10

Loan Account No. 402014219--- Kshs. 667,307.00

Total ----- Kshs. 8, 117,181.10

74. In response, the firm of Onalo & Co. Advocates stated that, the plaintiff was willing "to pay Kshs. 3,000,000 on or before 21st November 1997 and monthly installments of; Kshs. 200,000 on or before 15th December 1997 and similar amount until payment in full; in default auction to proceed. On 24th November 1997, the firm of; Oraro & Rachier to wrote to the defendant's lawyers that they were acting for an intended purchaser of the property.

75. On 27th November 1997, the plaintiff wrote asking for a bit more time to settle the debt completely at Kshs. 7,000,000 on or before 31st January 1998 and that, one Hardy Singh, the Proprietor of Olympic Sports House was prepared to make commitment to the bank in that regard. Further, there was a payment of Kshs. 19,320,000 due to him from the Official Receiver of; Kenya National Assurance Company (in Liquidation).

76. On 17th March 1998, the defendant regretted that, the plaintiff had paid Kshs. 2,000,000 only and not honored, the payment of Kshs. 3,000,000. He was given fourteen (14) days to clear the same. It is not clear as to what happened, as there appears to have been a notification of sale of property by Summit Auctioneers Limited dated 22nd January 1999, issued to the plaintiff over outstanding debt of Kshs. 8,726,723.60. The sale was scheduled for 30th March 1999. Again, it is not clear what happened as another notification for sale of the property was issued by; M/s Garam Investments on 15th January 2002, for sale of the property to recover a sum of; Kshs. 19,818,828.10 as at 9th January 2002. The sale was to take place on 19th March 2002.

77. I have taken time, to analyze the correspondence between the parties herein to demonstrate the following: -

a) *The relationship between the parties started with the first credit facility granted on 17th June 1987 and the last facility of; Kshs. 1,000,000 granted on 12th October 1992. Despite the defendant advancing what it terms to be a bridging loan, and/or a short-term loan, by the time the plaintiff filed the first suit High Court Civil Case No. 2032 of 1997, it had taken the parties a total of 10 years.*

b) *The plaintiff filed the subject suit alongside a notice of motion application dated 18th August 1997; wherein the court issued orders restraining the defendant from selling the property. It is clear that thereafter, that suit was dismissed for want of prosecution.*

c) *What is however puzzling is the fact that despite the defendant alleging that the plaintiff had challenges in repaying the facility, the defendant kept on indulging the plaintiff instructing several law firms to issue demand notices and withdrawing the same. This is evident in the statement of; Mr. Paul Chelang'a in which he states inter alia that; "for the period of 31st December 1992 to 31st December 1993, the plaintiff did not service his current account, or at all, escalating his current debt and that the last payment was made on 31st March 1998 in the sum of; Kshs. 1,000,000. He goes on to state that; the plaintiff failed to honour his promise to pay the debt as evidenced by several letters produced. Yet the defendant did not take any legal action.*

d) *Even after the suit was filed, it is alleged the plaintiff continued to make promises that he would pay off his debts, but did not honour the same and all the while interest was accruing and charged to the outstanding balance.*

78. The question that arises is: why did the defendant take so long to realize the security as the interest on the loan was increasing tremendously. Be that as it were, it is clear that the plaintiff had challenges servicing the loan facility. However, the plaintiff claims to have overpaid the loan and relies mainly on the evidence of; Mr. Kavilu and Mr. Onono to the effect that the defendant levied illegal interest charges and/or commissions beyond a maximum of 16.5% per annum allowed under the law.

79. These averments raise several questions: -

a) *What was the interest rate agreed upon by the parties;*

b) *What interest rate was applied by the defendant;*

c) *What was the interest rate applicable as at that time?*

80. The interest rate agreed on by the parties is well stipulated in the respective charge documents dated; 17th June 1987, 27th November 1991 and 21st June 1993, and was ranging from 14% per annum to 24% per annum. It is stated that, interest would be calculated on the sum being unpaid, by equal monthly payment on the first day of every month, calculated at the "minimum of fourteen (14) per centum per annum, on reducing balance in advance on the principal sum then outstanding and payable monthly in arrears together with monthly repayment of principal sum.

81. It was further "provided that no part of any payment made by the borrower to the lender shall be treated as repayment of the principal sum until all interest and other charges costs and expenses due and payable to the lender shall have been paid."

82. The defendant reserved the right to vary the same and in that regard, the charge document provided that: -

"the lender may from time to time serve on the borrower with not less than one (1) month notice requiring payment of the principal and/or of, interest at such increased or reduced rate or rates as the lender shall in its sole discretion determine and such determination by the lender shall bind the borrower and shall not be questioned on any account whatsoever and so that, the first of such increased monthly repayment of principal and/or of interest shall become due and payable on the first day of the month next after notification of the amount thereon to the borrower."

83. The plaintiff avers that; he has never been served with the notice of the variation of interest rates and that the interest charged is unlawful. I have gone through the documents produced by the plaintiff showing the various interest rates charged. Within the period of February 1991 to January 2002, I note that, the highest interest rate charged in the month of June 1998, was 38.96% and the lowest being 10.73%, in the month of March 2000.

84. In the same vein, Mr. Onono indicated in his reports that the interest rates charged by the defendant were ranging from the rate of 20% per annum to 30% per annum. There is no evidence to support the plaintiff's allegation that, interest rate was charged up to 89.89% per annum. However, it is not in dispute that several legal notices were issued that capped interest rates at 16.5% per annum with effect from the year, 1990 then revoked in 1991. There is no evidence that, the defendant adjusted its interest rates at any time to reflect the changes in the law.

85. The next question to determine is whether: the IRAC reports have established that the plaintiff fully repaid the facilities offered. Mr. Onono produced two (2) reports dated 11th July 2012 and 6th March 2015. I note from the reports and the witness statement of that, debits amounting to; Kshs. 850,056.50, allegedly being fees, charges and commissions levied by the defendant contrary to section 44 of the Banking Act (cap 488) Laws of Kenya, were omitted. Further, that Mr Onono conceded that, he applied interest rate of; 16.5% per annum up to 17th April 1997 when section 39 of the Central Bank Act was repealed.

86. He states further that, he omitted debits totaling; Kshs. 1,164,894.90, as the exact details of this transaction are unclear to the client. Further, he excluded the credit of; Kshs. 667,307 and the respective interest repayment debit because of the contentious treatment of the loan facility. Finally, that the two (2) reports give different sums of the recalculated credit balance with the first report showing a sum of; Kshs. 49,584,197.21 as at 31st July 2012, whereas the second report shows a recalculated cleared balance sum of; Kshs. 84, 135,319.46. Similarly, the second report gives two (2) scenarios giving rise to two (2) different figures in the sane report.

87. The defendant has challenged these reports on the ground that the author thereof imposed interest rates of 16.5% and applied the same throughout the calculations. The defendant further faults the witness for relying on the information provided by the plaintiff and omitting entries that; the plaintiff did not appreciate thus, failing to exercise his professional skill and prepare an objective report. Finally, the report is impugned on the basis it has no particulars of the alleged charged interest that was not regularly effected. I have indeed note that, the Reports by IRAC, are inconsistent as stated by the defendant and are not reliable.

88. The defendant then refers the court to the bank statements it has produced. Having evaluated all the evidence herein, in an effort to establish from the bank statements produced by the parties how much money was advanced, repaid and/or owing, I found that, the statement of accounts produced are for the period of; 16th February 1991 to June 2007.

89. However, the ones by the Plaintiff were incomplete as the statements went up to 30th November 2001. Therefore, the statements were least helpful in that, they did not commence from the date when the first facility was given in the year 1987. Further, I found several statements of accounts in the defendant's bundle missing, for example, the statement of; August 1992, August and December 1994, February to April 2001 and August 2002. The court was therefore unable to get answers to the issue at hand and/or aforesaid.

90. The last issue to consider is whether the plaintiff has proved his claim. Prayer one (1) on the order for injunction to restrain the defendant from alienating and/or dealing with the suit property can only issue if it is shown and proved that, the plaintiff has fully repaid all the credit facilities given to him, which has not been proved herein by the evidence adduced.

91. As regard the prayer for declaration that the public auction scheduled for 19th March 2002 is illegal, the same cannot be granted for reasons inter alia that, by the date thereof it is overtaken by events and/o in the absence of evidence that facilities granted are fully repaid, the court cannot order any intended sale of the suit property to be invalid and/or null and void.

92. The third prayer relates to a claim of; Kshs. 8,478,800.21 which is alleged to be owing to the plaintiff as at 30th January 2002. It cannot be granted based on the evidence herein. Further to the aforesaid on the IRAC reports, I note the report dated 11th July 2018; shows at paragraph 10.9 that, the interest recalculation variance as a sum of; Kshs. 39,333,190.11 as at 31st May 2003 in favour of the plaintiff. In the report dated 6th March 2015, a figure of; Kshs. 39,810,114.64, is indicated in favour of the plaintiff as at 31st May 2003. Throughout the entire report, I cannot see the figure of; Kshs. 8,478,800.21 claimed herein or supported by any of the documents produced. The outstanding balance as at 31st May 2003 is stated to be Kshs. 39, 782,529.90, yet the plaintiff was not amended to include that figure.

93. Although the plaintiff has claim general damages, it is not clear at all what these damages are for and if they are for what is termed to be "detainment of the plaintiff's title", the same cannot be awarded in view of the findings above. Finally, having held that both parties have not adduced evidence to assist the court on whether the facilities granted herein have been repaid or not, I order that in the circumstances each party will meet its own costs.

94. The order on costs is supported by the following main findings herein: -

a) *The defendant granted the plaintiff a term loan, is a bank product with a pre-established repayment program and for a given term usually transacted on a loan account and yet operated the same as an overdraft which is repayable on demand and operated on a current account. That makes it extremely difficult to appreciate when was the amount advanced due, overdue and/or in arrears.*

b) *In the same vein, the manner in which the amount of; Kshs. 667,307 was granted and transferred between 10th December 1991 to 31st May 1999, to the loan account number 0201421900, and returned to the current account by debiting that account seven (7) years and ten (10) months later is not understandable, although the defendant purports to have converted it into a loan and/or exercised its right of combination and/or consolidation. There is no evidence that the exercise of that right was brought to the knowledge of the plaintiff and/or what the terms of the alleged loan were and the reason why it was left for so long in arrears without enforcement of recovery and/or return of the same to the current account.*

c) *With utmost respect to the defendant, this kind of transaction does not prove that the defendant properly exercised a duty of care. If there is any interest payable on this amount, it should be completely waived; in view of the manner in which that sum was dealt with. However, as already said as the sum of; Kshs. 600,000 was paid to discharge the plaintiff's legitimate claim and/ or responsibility; he cannot fail to repay the money back.*

d) *In the same vein, although the plaintiff alleges that he has paid and overpaid the money owed to him, taking into account the manner in which Mr. Onono carried out his recalculations of the sums of money advanced and/or repaid and in particular completely omitting the interest rates agreed on by the parties and applying a flat interest of 16.5% per annum, even when the first*

charge provided for 14% per annum, and completely relying on the plaintiff to guide him on what sums of money were clear and omitting those sums of money that were “not clear” to the plaintiff; coupled with other reasons already advanced herein, I find that report is not objective and/or liable. It does not therefore reflect a true and/or correct position of how much money the plaintiff had repaid and whether he has fully repaid the facility.

95. Therefore, each party will bear its own costs. The final prayer is for the court to make any other order that it deems appropriate to meet the ends of justice. In that regard, I order that the defendant should not sell the plaintiff's property unless it has given him a detailed statement of accounts of; the amount advanced on the three (3) undisputed facilities and the interest rate applied on each account, the amount paid back and the amount owing.

96. In the same vein, the plaintiff can only redeem his title upon sufficient evidence of repayment of the sum advanced. In my considered opinion, the parties should engage an independent third party to deal with these issues raised and the IRAC having participated in the reports filed herein may not be eligible for the exercise. A mediator versed with adequate knowledge would assist the parties reach an amicable settlement.

97. Those are the orders of the court.

Dated, delivered and signed this 5th day of May 2020

G.L. NZIOKA

JUDGE

In the presence of;

Mr Tollefor the plaintiff

Mr Ngugi.....for the defendant

Robert.....Court Assistant