



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 18 OF 2019

(FORMERLY NAIROBI COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 709 OF 2009)

JOHN JOEL KANYALI.....PLAINTIFF

VERSUS

FIDELITY COMMERCIAL BANK LIMITED

(NOW SBM BANK (KENYA) LIMITED).....DEFENDANT

JUDGMENT

[1] This suit was filed by the plaintiff herein, **John Joel Kanyali**, against **Fidelity Commercial Bank Limited** (now **SBM Bank (Kenya) Ltd**) vide the **Plaint** dated **1 September 2009**, in which he averred that in or about **November 2007**, he applied for a Development Loan of **Kshs. 7,000,000/=** from the defendant to enable him complete the construction of a commercial building in Diani on land parcel number **KWALE/DIANI BEACH/BLOCK 605**. The loan was secured by a Charge over the title to the plaintiff's other property, **L.R. NO. KWALE/DIANI BEACH/BLICK 603** (hereinafter, "**the suit property**"). The plaintiff further stated in his **Plaint** that by a **Letter of Offer** dated **23 November 2007**, the defendant offered him a **Term Loan** of **Kshs. 7,000,000/=** to be disbursed over a period of six (6) months; and that the **Term Loan** would be repayable over a period of sixty (60) months.

[2] It was further the contention of the plaintiff that it was expressly stated in the **Letter of Offer** that the repayment, in monthly instalments of **Kshs. 170,227/=**, was to commence on the 30th day after the date of final drawdown; and that during the six months' disbursement period, he would only be obliged to pay interest on the disbursed sums; and that such payment would be premised on the **Architect's Certificate**, indicating the progress of the construction. The plaintiff's cause of action was therefore that, in total breach of the terms set out in the **Letter of Offer** and the **Charge**, the defendant started to charge interest at the rate of 16% on the entire sum of **Kshs. 7,000,000/=** on the 16th day of the first month, thereby creating an artificial default on his part by **20 June 2008**.

[3] The plaintiff further stated that he brought his concerns to the defendant; and that to ameliorate the situation, consultative meetings were held between him and representatives of the defendant in which it was resolved that he granted an additional **Term Loan** of **Kshs. 3,000,000/=** to enable completion of the project. The second borrowing was secured by a **Further Charge** on the suit property, and the **Further Charge** was registered on **18 July 2008**. The plaintiff also stated that, although the building was completed in or about **October 2008**, it took time before tenants took up occupancy thereof. He was consequently constrained to apply for and was given an **Overdraft Facility** by the defendant in the sum of **Kshs. 2,000,000/=** to enable him meet his loan repayment obligations; and on the understanding that once the building was let out to tenants, they would pay rent directly to the plaintiff's current account and clear the overdraft.

[4] The plaintiff further stated in paragraph 21 of his **Plaint** that he was shocked to discover from an extract of his title, held at **Kwale District Lands Registry** that an amount of **Kshs. 3,000,000/=** had been posted in the records as being the amount of the **Overdraft** and the **Second Further Charge**, instead of **Kshs 2,000,000/=**. He added that although he immediately notified the defendant and asked for rectification of the error, his pleas were ignored by the defendant. He therefore averred that this erroneous entry, together with the defendant's failure to reverse the interests wrongfully charged on the account, had the effect of creating an artificial default for which the defendant issued a statutory notice dated **8 June 2009**, demanding **Kshs. 15,111,443.25** from him, yet he was not at all in default.

[5] The plaintiff consequently filed this suit praying for Judgment against the defendant for:

[a] A declaration that he is not in default or arrears of the loans and/or the terms thereof as granted by the defendant pursuant to the **Charge** dated **26 March 2008**, the **Further Charge** dated **11 July 2008** and the **Second Further Charge** dated **24 November 2008**.

[b] An Order for rectification of Entry No. 8 on Title No. **KWALE/DIANI BEACH/BLOCK 603** inserting the correct figure of the Second Further Charge in the Title's records.

[c] An Order nullifying the statutory notice dated **8 June 2009** issued by **Philip Muoka, Advocate**, on behalf of the defendant as being null and void.

[d] An Order compelling the defendant to furnish the plaintiff with a full statement of accounts and breakdown of all disbursements for the loans granted under the Charge dated **26 March 2008**, the Further Charge dated **11 July 2008** and the Second Further Charge dated **24 November 2008**.

[e] An Order for reconciliation of all the plaintiff's loan accounts with the defendant by an independent financial, accounting or audit firm to be agreed between the parties and/or appointed by the Court on such terms as the Court may determine.

[f] A Permanent Injunction restraining the defendant by itself, its agents, officers or anybody acting on its behalf from in any way interfering with, advertising, realizing or disposing of the charged property No. **KWALE/DIANI BEACH/BLOCK 603** pursuant to the Statutory Notice dated **8 June 2009** or any other such notice as a consequence of the disputed accounts.

[g] General Damages for breach of contract/loan agreement.

[h] Costs of the suit and any other relief as the Court may deem just and expedient to grant in the circumstances of this suit.

[6] The defendant opposed the suit vide its Defence dated **12 October 2009**. While admitting that the plaintiff applied for a loan which it granted on terms, its assertion was that there was no express agreement that the loan would be disbursed directly to the contractor as alleged in the plaintiff's Complaint. It was further the assertion of the defendant that, the plaintiff applied for additional financial accommodation solely because he was unable to complete his project under the initial lending. In respect of the anomaly as to the amount lent by way of Overdraft, the defendant's contention was that the Second Further Charge was duly and validly executed; and that any typographical defect at the registration stage was rectifiable by the Land Registrar upon notification under **Section 142 of the Registered Land Act, Chapter 300 of the Laws of Kenya** (now repealed). Thus it was the assertion of the defendant that it is non-suited in respect of that anomaly as the plaintiff has no remedy against it.

[7] The defendant further asserted, at paragraphs 13 and 14 of its Defence that the plaintiff is in serious and serial default on his loan and overdraft facilities; and that the Statements of Account have always been available to the plaintiff. It therefore posited that the reliefs claimed in paragraph 32 of the Complaint are unavailable to the plaintiff. Accordingly, the defendant prayed for the dismissal of the plaintiff's suit with costs.

[8] In support of his case, the plaintiff testified herein on **7 June 2016** as **PW1**. He adopted his witness statement dated **17 September 2012** and his Further Statement dated **27 January 2015** as part of his evidence in chief. He testified that he applied for a Development Loan in or about the month of **November 2007** to enable him complete the construction of a building on the suit property. He further testified that his application found favour with the defendant and that by a Letter of Offer dated **23 November 2007**, the defendant offered him a Term Loan of **Kshs. 7,000,000/=** to be disbursed over a period of six months from the date of commencement of the disbursements; and that the said loan was to be repaid in monthly instalments of **Kshs. 170,227/=** for 60 months with effect from the 30th day after the date of final draw-down.

[9] The plaintiff also told the Court that the facility was secured by a Charge over the suit property in favour of the defendant; and that the Charge instrument was drawn by the defendant's Advocates, **M/s Atkinson Cleasby & Satchu Advocates**. The plaintiff explained that his intention was to charge the property for which the loan was taken, namely **KWALE/DIANI BEACH/BLOCK 605**, as opposed to the suit property; and that upon noting the discrepancy in the Charge, he immediately brought it to the attention of the defendant's manager, but was advised that the title to the suit property would be discharged and the security substituted upon completion of the building. It was therefore the testimony of the plaintiff that it was on that understanding that he executed the Charge dated **26 March 2009**. He also confirmed that thereafter, the **Kshs. 7,000,000/=** loan was disbursed and applied for the intended purpose.

[10] The plaintiff further testified that, in total breach of the terms set out in the Letter of Offer as well as the express and implied terms of the Charge, the defendant started to charge interest on the loan amount of **Kshs. 7,000,000/=** 15 days after the first disbursement and well before the final draw-down. The plaintiff further explained that, because this act had the effect of creating an artificial default, he raised the issue with the defendant and they came to a common understanding that he should apply for an additional Term Loan Facility of **Kshs. 3,000,000/=** to enable completion of the structure and to clear the sums deemed outstanding by the defendant. He drew the Court's attention to the fact that his projections for the project in terms of prices and completion date had been adversely affected by the **2007/2008** post-election violence.

[11] The plaintiff further testified that, on the foregoing understanding, he submitted an application which was accepted by the defendant vide a Letter of Offer dated **2 July 2008**. He confirmed that the second facility was secured by a Further Charge over the suit property; and that it was to be repaid in monthly instalments of **Kshs. 72,955/=** over a period of 60 months. The plaintiff further stated that, although the defendant undertook to revise the first loan account and to reverse the interest wrongly charged in readiness for the scheduled repayment with effect from **September/October 2008**, this was not to be.

[12] Regarding the Overdraft Facility, the evidence of the plaintiff was that, whereas the construction was already complete by **October 2008**, he was yet to do the fittings, painting and partitioning in readiness for letting; and that he again approached the defendant for assistance by way of extension of the commencement date for repayments. He added that, upon discussions with the defendant's manager, it was agreed that he would be given an overdraft of **Kshs. 2,000,000/=** to enable him undertake the finishing aspects of the project and settle the due instalments pending occupation of the building by tenants. Accordingly, he applied for the Overdraft Facility which was granted by the

defendant for 12 months; and which was secured by a Second Further Charge over the suit property, dated **24 November 2008**.

[13] The plaintiff mentioned that he got concerned when it came to his attention that the records held at the Kwale District Lands Registry indicated that he had been given an overdraft in the sum of **Kshs. 3,000,000/=** as opposed to **Kshs. 2,000,000/=**; and that he took up the issue with the defendant's manager at Ukunda with a view of a quick rectification of the anomaly. His evidence was that he believed it to be a genuine mistake; but was surprised when the defendant ignored his pleas and refused to take any corrective action. He also stated that the defendant refused to provide a breakdown as to how the so called arrears was computed. He therefore concluded that these were deliberate acts on the part of the defendant aimed at furthering the artificial default perpetrated against him for ulterior motives by the defendant.

[14] It was the testimony of the plaintiff that in the midst of the foregoing, he was shocked to receive a Statutory Notice dated **8 June 2009** from **Philip Muoka Advocates** on behalf of the defendant, recalling the loans and demanding a sum of **Kshs. 15,111,443.25**; threatening to realize the security unless that amount was paid. According to the plaintiff, this notice was issued within six months of the Overdraft Facility, yet that facility covered the payments due on all the facilities for a period of 8 months. It was therefore the evidence of the plaintiff that the two term loans had been regularly serviced and that the alleged default on the Overdraft Account is attributable to disputed sums charged by the defendant as interest on the two Term Loan Accounts for the period **April-July 2008** and **August-October 2008**, respectively.

[15] The plaintiff also mentioned that, upon being served with the Statutory Notice dated **8 June 2009**, he visited the defendant's branch in Ukunda but the manager was unable to address the issues he raised. He was therefore referred to the defendant's Head Office. Ultimately, he had to seek legal intervention through the law firm of **T.O. K'Opere & Company Advocates**, as no settlement could be reached in respect of the contentious issues raised by him. In the course of time, the defendant instructed **M/s Thara Auctioneers** to serve a Notification of Sale and to advertise the charged property for sale; and that it was in reaction thereto that he filed this suit along with an interlocutory application for injunction, in respect of which an interim order was made on **29 October 2009**.

[16] The plaintiff testified that he continued to service the facilities during the pendency of the injunction application and maintained that course of action even after his interlocutory application was dismissed by **Hon. Kimondo, J.** on **17 November 2011**. He mentioned too that he filed an appeal from that dismissal, being **Civil Appeal No. (Nai.) 264 of 2011 (UR 174/2011)** and that, on **28 March 2012**, the Court of Appeal found in his favour and granted him a temporary injunction pending the hearing and determination of this suit. He added that he has continued to make payments pursuant to the conditions set by the Court of Appeal; such that between **November 2009** and **May 2012**, he repaid the sum of **Kshs. 7,651,143/=**. Further to the foregoing, it was the evidence of the plaintiff that he continued to repay the loan even after the appeal was finally concluded in **February 2016**; and that he henceforth made payments in accordance with the order issued by the Court of Appeal.

[17] The plaintiff concluded his evidence by asserting that the dispute between him and the defendant revolves around what he termed the manipulation of the 1st Term Loan Account between **April-July 2008** and the 2nd Term Loan Account between **August-October 2008** and the false entries loaded onto the Overdraft Account between **November 2008-June 2009**. He urged the Court to find in his favour and grant the prayers sought by him in his Pleint.

[18] In his Further Statement dated **27 January 2015**, the plaintiff set out the particulars of the payments made by him to the defendant which, in his view, were not taken into account by the defendant. He pointed out that during the pendency of this case, and while preparing for the hearing of this case on **18 December 2014**, he realized that he had made payments to the defendant in the sum of **Kshs. 7,894,325/=** as at **22 January 2014** in terms of the Schedule filed in Court on **21 July 2014**; and made a further payment of **Kshs. 243,182/=** on **23 January 2015**, bringing the total payments to **Kshs. 8,137,507/=** between **29 September 2009** when this suit was filed and **23 January 2015**.

[19] The plaintiff further stated that, contrary to the assertions of the defendant that he never made any repayments towards the Loan Accounts after **May 2008**, he ascertained from his records that he had made deposits towards the **Loan Account No. 70200005** which were not reflected in the bank statements. According to him payments totaling **Kshs. 391,264.15** towards the repayment of the 1st Term Loan and **Kshs. 168,800/=** in respect of the 2nd Term Loan had not been accounted for by the defendant, yet the deposit slips in respect thereof were clearly marked to indicate the purpose of the payments. The plaintiff exhibited the relevant pay in slips as part of his Supplementary Bundle of Documents dated **27 January 2015**.

[20] In his Further Witness Statement, the plaintiff stated that he opened an account on **13 August 2008** for the specific purpose of servicing the loan repayments and made deposits therein between **15 September 2008** and **15 June 2009** totaling **Kshs. 1,702, 270/=**. It was therefore his evidence that, by **June 2009** when the defendant's Advocate issued the Statutory Notice dated **8 June 2009**, he had already paid the defendant **Kshs. 2,262,335.15** which had not been taken into account by the defendant; and therefore that the Loan Accounts were not in arrears at all. He urged the Court to find that, altogether, he had paid **Kshs. 10,399,842.15** by the time he made his Further Statement; and that the issuance of the Statutory Notice was uncalled for. In his view therefore, the attempt to realize the security was not only irregular, but was also unlawful, null and void. The plaintiff produced his List and Bundle of Documents dated **17 September 2012** as well as the Further List and Bundle of Documents dated **27 January 2015** in support of his testimony as **the Plaintiff's Exhibit 1** herein.

[21] On the defendant's part, evidence was called from **Beline Akeyo Ochiel (DW1)**, the manager of the defendant's Debt Recovery Unit. The defendant had initially proposed to call **Advocate Philip Muoka, Stella Mbuli and Juda Deli**; to which end their witness statements were filed herein dated **12 September 2012, 21 July 2014 and 19 August 2016**, respectively. While **Juda Deli** attended Court on **16 June 2017** and commenced his testimony in chief, efforts by the defence counsel, **Mr. Kanjama**, to secure his attendance thereafter for purposes of cross-examination proved unfruitful. Accordingly, his application to call **Beline Akeyo Ochiel (DW1)** as a replacement witness was allowed on **4 February 2019**.

[22] **DW1** relied on and adopted her witness statement dated **31 January 2019** as well as her further statement dated **15 October 2019**. She confirmed that **Fidelity Commercial Bank Ltd** changed its name on **16 May 2017** to **SBM Bank (Kenya) Ltd**. **DW1** further confirmed that the plaintiff applied for a **Kshs. 7,000,000/=** loan from the defendant in the year **2008**; and that he offered his property known as **KWALE/DIANI BEACH/BLOCK 603** (the suit property), as security. The application was approved and a Letter of Offer dated **23**

November 2007 issued by the defendant to the plaintiff. She also confirmed that the Charge instrument was prepared and perfected; whereupon the loan funds were disbursed to the plaintiff.

[23] **DW1** further testified that after full disbursement of the **Kshs. 7,000,000/=** loan, the plaintiff again requested for fresh credit facilities in the sum of **Kshs. 3,000,000/=** on the ground that the initial funds were insufficient to complete the works, granted increased building costs; and that the request was granted by the defendant vide the Letter of Offer dated **2 July 2008**. She added that, to secure the additional facility, the plaintiff executed a Further Charge dated **11 July 2008** in favour of the defendant over the suit property; and that it was followed in quick succession by a third facility, an Overdraft for **Kshs. 2,000,000/=** and a Second Further Charge in that sum dated **24 November 2008**.

[24] It was the testimony of **DW1** that, vide the Second Further Charge, the plaintiff covenanted to pay the new aggregate sum of **Kshs. 12,000,000/=** together with further charges and interest as per the terms of the initial Charge, Further Charge and Second Further Charge; and therefore that the defendant was entitled to demand payment of the entire advanced sum on any date after **15 April 2008** under **Section 65(2)** of the **Registered Land Act**. She added that, although the plaintiff fell into default almost immediately after disbursement, the defendant did not demand for payment of any sums after the due date in order to allow the plaintiff time to regularize the loan accounts.

[25] According to **DW1**, the principal loan of **Kshs. 7,000,000/=** was payable from the 30th date after the final drawdown, and that the Overdraft Account, which was to be operated within the credit limit of **Kshs. 2,000,000/=** had surpassed that level by **September 2008** and was therefore due for recovery as from that date. It was thus her evidence that the plaintiff instructed the defendant to deduct the monthly principal loan repayment instalment of **Kshs. 170,227/=** from the Overdraft Account commencing **September 2008** after failed promises by the plaintiff to regularize the said account. In the premises, it was the contention of **DW1** that, right from inception, the plaintiff made no effort to service either the Loan Account or the Overdraft Account.

[26] With regard to the Bank's statutory power of sale, **DW1** stated that several requests for payment were made to the plaintiff which were all ignored by him; and that, in those circumstances, the defendant was left with no option but to issue a three-months' statutory notice dated **8 June 2009** demanding for the aggregate sum of **Kshs. 15,111,443.25** together with interest from **1 June 2009** until payment in full. She added that in spite of that notice, the plaintiff failed to settle the arrears owing, then standing at **Kshs. 4,600,000/=**, or any sum at all to reduce his indebtedness to the defendant. Instead, the plaintiff started raising diversionary issues about non-existent oral amendments to the Charges and challenging interest rates and agreed payment timelines to obscure the true position.

[27] Thus, it was the testimony of **DW1** that even though the defendant replied, to the extent possible, to the plaintiff's queries, and provided relevant statements of account, the plaintiff obstinately pursued on a controversial approach to avoid payment, including asking for a moratorium without any basis in law or fact; and that in those circumstances, the only course was for the defendant to instruct auctioneers to issue a 45-day Redemption Notice, which was done via a letter dated **17 September 2009**. That the plaintiff then rushed to Court just as the Redemption Notice was about to expire to mischievously defeat the defendant's accrued rights and obtain delays in the auction of the charged property. She mentioned too that even then, the defendant agreed to two consents for payment which were recorded in Court on **17 February 2010** and on **2 March 2010**; and which were likewise unheeded by the plaintiff.

[28] In her further witness statement dated **5 October 2019**, **DW1** reiterated her stance that the plaintiff had remained in default of his obligations to the defendant in spite of the consent order of **2 March 2010**; and that as a result the sum owing had snowballed to some **Kshs. 71,601,749.21** by **2016**. She explained that the amount due on the 1st Term Loan was **Kshs. 6,648,816.64**, while the 2nd Term Loan Account had a figure of **Kshs. 7,145,016.88** as at **24 November 2016**. As for the Overdraft Account, a staggering sum of **Kshs. 57,807,915.69** was due thereon as at **4 November 2016**. She pointed out that the total sum due from the plaintiff cannot be offset by the **Kshs. 5,930,200/=** that had been paid, during the pendency of this suit, to the escrow account held at **Housing Finance Company of Kenya (HFCK)**.

[29] As for the plaintiff's assertion, in his Further Statement, that certain payments made by him were not taken into account by the defendant, **DW1** endeavoured to demonstrate how each of those payments were treated by producing a bundle of Statements of Account as the **Defendant's Exhibit 3** herein. She concluded her statement by refuting the assertion by the plaintiff that some payments were not captured by the defendant. **DW1** also produced the defendant's List and Bundle of Documents dated **12 September 2012** and the Further List and Bundle of Documents dated **18 July 2014** as the **Defendant's Exhibit 1, and 2**, respectively.

[30] In the light of the foregoing summary of evidence, it was the submission of **Mr. K'Opere**, learned Counsel for the plaintiff, that the plaintiff had proved his case to the requisite standard and that he is therefore entitled to the orders prayed for by him in his **Plaint** dated **1 September 2009**. He urged the Court to find that Statutory Notice by **Mr. Philip Muoka** dated **8 September 2009** was not only premature, but also entirely unwarranted, as **DW1** was unable to demonstrate at what point in time the Loan Accounts went into arrears to justify the issuance of that notice. Counsel cited **Section 69A** of the **Transfer of Property Act** (now repealed) as well as **Section 90** of the **Land Act, 2012** for the proposition that it was imperative that the amount in arrears be specified in the said notice; which, in his view, was not done in this case.

[31] **Mr. K'Opere** also pointed out, in his written submissions dated **28 February 2019**, that the Overdraft Facility was a 12 months' facility and was therefore intended to run until **September 2009**. He was therefore of the view that it was premature for the defendant to call it in at the same time as the two Term Loans. He reiterated the plaintiff's contention that the manner in which the defendant handled the facilities right from inception and during the pendency of these proceedings was so reckless and lopsided as to lead to the conclusion that the alleged default was artificially created to the detriment of the plaintiff. Counsel particularly took issue with the fact that, in disregard of the injunctive orders issued by the Court of Appeal, the defendant made attempts to, *inter alia*, sell the suit property and to have a receiver appointed to manage the developed property for which the loan was obtained.

[32] Thus, at pages 10-13 of his written submissions, **Mr. K'Opere** set out a chronology and particulars of the legal battles that ensued between the parties during the pendency of this suit. He also supplied a digest and copies of the rulings made in respect thereof as well as other authorities in support of the plaintiff's claim. In his oral highlights made on **5 February 2020**, **Mr. K'Opere** urged the Court to ignore the additional Statements of Account produced by **DW1** as the **Defendant's Exhibit 3** for the reason that they related to the period **2015-2016**, long after the filing of this suit. In his view, those statements are irrelevant to critical issues in this suit and cannot form the basis of the

alleged default as at **8 June 2009** when the Statutory Notice was issued.

[33] On his part, **Mr. Kanjama** for the defendant urged the Court to look at the three security instruments from the prism of **Sections 74, 83 and 84** of the **Registered Land Act**, (now repealed) and the clear admission of default by the plaintiff in his cross-examination. He also made reference to **Clauses 5, 7 and 11** of the respective Letters of Offer for the purpose of ascertaining what, in the agreement of the parties, constituted events of default. He accordingly urged the Court to find that indeed the plaintiff was in default as at **8 June 2009** when the Statutory Notice was issued.

[34] **Mr. Kanjama** relied on **National Bank of Kenya Ltd vs. Pipeplastic Samkolit & Another** [2001] KLR 112 and **Keziah Njambi Maingi T/A Arrivals Textile Shop vs. Barclays Bank of Kenya Ltd** [2016] eKLR to underscore the principle that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. He, likewise, relied on **Thika General Workshop Ltd & Another vs. Kenya Commercial Bank Ltd & Another** [2009] eKLR to support his submission that a dispute as to the amount owed cannot, in law, constitute a sufficient ground for restraining the defendant from exercising its statutory power of sale. In his view, the plaintiff is not entitled to the prayers sought; and therefore his case is for dismissal. He so prayed and asked that an order be made for the release of the escrow funds be released to the defendant.

[35] I have carefully considered the pleadings filed herein and the evidence adduced in support thereof as well as the written and oral submissions made by learned counsel. There is no dispute therefrom that the plaintiff applied for and obtained three separate facilities from the defendant between **November 2007** and **November 2008** to enable him complete the construction of a commercial building on his property known as **KWALE/ DIANI BEACH/BLOCK 605**. All the facilities were secured by a Charge, Further Charge and Second Further Charge over the plaintiff's property number **KWALE/DIANI BEACH/BLOCK 603** (referred to herein as the suit property), which was described as an adjacent plot to the development.

[36] There is further no dispute that the first facility was a Term Loan of **Kshs. 7,000,000/=**, also referred to herein as 1st Term Loan. The plaintiff's undated application in that respect was exhibited at pages 1-4 of the plaintiff's Bundle of Documents dated **17 September 2012** as well as pages 1-4 of the defendant's Bundle of Documents dated **12 September 2012 (Defendant's Exhibit 1)**; and the terms of the borrowing were well provided for in the Letter of Offer dated **23 November 2007** and the Charge dated **26 March 2008** (at pages 5-42 of the plaintiff's Bundle of Documents and pages 5-46 the defendant's Bundle of Documents).

[37] It is common ground that upon the perfection of the security, the funds were disbursed; but that they proved insufficient to complete the intended works. Thus, on **21 June 2008**, the plaintiff was constrained to make an application for an additional loan of **Kshs. 3,000,000/=**. A copy of his letter to that effect was exhibited at page 43 of the plaintiff's Bundle of Documents. He explained that the shortfall was attributable to the rise in the prices of steel and other building materials. That application was granted by the defendant and a second Letter of Offer written to the plaintiff dated **2 July 2008** setting out the terms of the additional facility.

[38] The defendant made it clear that the additional facility would be governed by the terms set out in the first Letter of Offer dated **23 November 2007**; and that, save for the amount and repayment terms, all other terms and conditions including interest rates and bank charges would remain as per the first Letter of Offer aforementioned. The second Letter of Offer dated **2 July 2008** was exhibited at pages 44 and 45 of the plaintiff's Bundle of Documents dated **17 September 2012**, and at pages 45-46 of the defendant's List and Bundle of Documents dated **12 September 2012**. It shows that the plaintiff accepted those terms and signed the letter to signify his acceptance.

[39] In addition to the two Letters of Offer aforementioned, the Charge and Further Charge, the parties exhibited copies of the Title Deed, Certificate of Official Search, an application for consent as well as the Letter of Consent dated **5 November 2008**. In the plaintiff's Bundle of Documents, these documents are at pages 53-61 thereof; while proof of disbursement of the sum of **Kshs. 7,000,000/=** and **Kshs. 3,000,000/=** is in the Statements of Account at pages 81 and 82 of the defendant's Bundle of Documents.

[40] The third and last Letter of Offer dated **24 September 2008** was exhibited by the defendant at pages 50 and 51 of the Bundle of Documents dated **12 September 2012**, by which the defendant offered to grant an Overdraft Facility for 12 months in the sum of **Kshs. 2,000,000/=** to the plaintiff for use as working capital. Its security was to be a Second Further Charge over **L.R. No. KWALE/DIANI BEACH/BLOCK 603** (at pages 49-52 of the plaintiff's Bundle of Documents and pages 53-55 of the defendant's Bundle of Documents). Again, the Letter of Offer made reference to the previous Letters of Offer dated **23 November 2007** and **2 July 2008**, and made it clear that the three facilities would be aggregated. It was also clearly stipulated that the terms would largely remain the same as the terms set out in the initial Letter of Offer.

[41] The dispute between the parties was triggered by the Statutory Notice dated **8 June 2009** (exhibited at page 67-68 of the plaintiff's Bundle of Documents and pages 60-61 of the defendant's Bundle of Documents). That letter was written on behalf of the defendant by **Philip Muoka, Advocate**, demanding the immediate payment of a total sum of **Kshs. 15,111,443.25** together with interest thereon from **1 June 2009** until payment in full. Thus, while the defendant's posturing was that the Loan Accounts were hopelessly in arrears, the plaintiff asserted that it had dutifully paid the instalments due and was therefore not in default of any of the terms of the borrowings. In the premises, having looked at the List of Agreed Issues filed by counsel for the defendant on **12 September 2012** and the summarized versions thereof set out in the written submissions filed herein, the issues that fall for my determination herein are basically two; namely:

[a] Whether the defendant's statutory power of sale had accrued as at **8 June 2009** and if so, whether the Statutory Notice dated **8 June 2009** was validly issued.

[b] Whether the plaintiff is entitled to the reliefs sought.

[a] On the Defendant's Statutory Power of Sale and the Validity of the Notice dated 8 June 2009:

[42] The Charge dated **26 March 2008** as well as the Further Charge dated **11 July 2008** and the Second Further Charge dated **24**

November 2008 were drawn pursuant to the provisions of the **Registered Land Act** (now repealed). It is therefore instructive that in **Section 65(1)** thereof, it was recognized that:

“A proprietor may, by an instrument in the prescribed form, charge his land, lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money’s worth or the fulfilment of a condition, and the instrument shall, except where section 74 has by the instrument been expressly excluded, contain a special acknowledgement that the chargor understands the effect of that section, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation, by one of the persons attesting the affixation of the common seal.”

[43] **Section 74** of the **Registered Land Act**, on the other hand, provided that:

(1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may –

(a) appoint a receiver of the income of the charged property; or

(b) sell the charged property:

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.

[44] At page 23 of the Charge (at page 41 of the plaintiff’s Bundle of Documents), the plaintiff’s acknowledgement, that he understood the effects of **Section 74** of the **Registered Land Act** and Chargee’s rights under **Sections 83 and 84** of the Act, is manifest. It is likewise evident that his attention was brought to the fact that the restrictions under **Section 70** of the Act that would be noted against the title. The same acknowledgment was replicated in the Further Charge and the Second Further Charge. Consequently, the defendant’s statutory power of sale was explicitly recognized by the plaintiff not only in the security instruments but also in his pleadings and evidence herein. For instance, at pages 76 and 77 of the handwritten proceedings, the plaintiff expressly conceded in cross-examination that:

“...I am aware that if a customer is in default, the Bank is entitled to issue a statutory notice of sale. The bank was at liberty to consolidate the 3 facilities. For each of the facilities, I executed a charge document. I confirm that under the 3 charges the bank had the right and authority to issue Statutory Notices and sell the properties in the event of default...”

[45] Having so found, the next question to pose is whether the plaintiff was in default as at **8 June 2009**. Needless to say that this is a question that turns on the agreed terms of the borrowings as set out in the Letters of Offer as well as the security documents. As rightly submitted by **Mr. Kanjama**, the parties are bound by the terms of their contract unless coercion, fraud or undue influence be proved. In this case, no such allegations of coercion, fraud or undue influence were made. Thus, I find apt the words of **Lord Denning** in **Solle vs. Butcher [1949] 2 AllER 1107** that:

“...once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for breach of some condition expressed or implied in it, or for fraud, or on some equitable ground...”

[46] And, in **Prideinn Hotels & Investments Limited vs. Tropicana Hotels Limited [2018] eKLR**, the Court of Appeal restated the principle thus:

“The object of construction of terms of a contract is to ascertain its meaning or in other words the common intention of the parties thereto. Such construction must be objective, that is, the question is not what one or the other parties meant or understood by the words used. Rather what a reasonable person in the position of the parties would have understood the words to mean. See Investors Compensation Scheme Ltd vs. West Bromwich Building society [1998] 1 W.L.R 896.”

[47] With the foregoing principle in mind, I carefully perused the Letters of Offer and the security instruments. One of the salient terms for the 1st Term Loan of **Kshs. 7,000,000/=** is embodied in Clause 5 of the Letter of Offer dated **23 November 2007**. It states thus:

“The Principal Term Loan facility shall be payable to the bank by 60 monthly installments of Kshs. 170,227/= each commencing the 30th day after the date of the final drawdown. However, the loan will be disbursed in tranches based on Architect’s Certificates, and the Borrower shall pay interest on the amount drawn on a monthly basis during the construction period, provided that the Borrower shall repay the Term Loan together with all accrued interest, fees and any other sums due in respect of the Term Loan in any event on or before Facility Termination Date...”

[48] While it was the contention of the plaintiff that repayments would commence 6 months after drawdown; and that the defendant created an artificial default by loading interest and default charges on the account, Clause 5 aforementioned as well as **Clause 1.1** of the Charge show otherwise. As indicated hereinabove, **Clause 5** of the Letter of Offer provided that repayments would commence from the 30th day

after the date of the final drawdown. The Charge, on the other hand provided for **15th day of April 2008** as “the date specified for repayment.”

[49] There appears to be no controversy that the disbursement of the 1st Term Loan was not spread over six months as had been anticipated by the parties in the Letter of Offer, but was paid out in one single tranche, on **14 April 2008**. Indeed, the plaintiff conceded thus in cross-examination:

“The repayment was to be made within 60 months from the final drawdown. The drawdown was in May 2009. The money was not disbursed up to April 2008. The money was disbursed on 14/4/2008. This was the Kshs. 7 million. I was to commence the payment on the 30th day after draw-down...”

[50] It is manifest therefore that the plaintiff’s assertion that the instalments were not due until **September 2008** is not supported by the contractual instruments. Since the entire sum was disbursed all at once on **14 April 2008**, the defendant was perfectly entitled to expect repayments to commence by **14 May 2008**. I therefore find no basis at all for the plaintiff’s assertion that the repayments were to commence in **September 2008**.

[51] In respect of the 2nd Term Loan of **Kshs. 3,000,000/=**, Clause 5 of the Letter of Offer dated **2 July 2008** is, likewise, explicit that repayment thereof would be by monthly instalments of **Kshs. 72,955/=** over a period of 60 months with effect from the 30th day of the first drawdown. The Statement of Account at page 68 of the Defendant’s Bundle of Documents dates **12 September 2012** shows that this facility was also disbursed in one single tranche on **24 July 2008**. Repayments were accordingly due as from **30 August 2008**; and I so find.

[52] I have also looked at the Overdraft Facility Letter dated **24 September 2008**. It confirms that the facility was for **Kshs. 2,000,000/=** and that it was to be utilized as working capital over a period of 12 months only. It was therefore to subsist until **23 September 2009**, barring default. The pertinent Letter of Offer also provided, in **Clause 5** thereof, that:

“The Overdraft shall be repaid upon our written demand made at any time to the Borrower. On such demand the Borrower shall immediately repay all amounts outstanding under the Overdraft facility together with accrued interest, fees and any other sum due under or in respect of the overdraft facility.”

[53] In addition to the clause aforementioned, the parties imported some of the terms and conditions set out in the 1st Letter of Offer for purposes of the Overdraft Facility; including the events of default. Thus, in terms of time, it cannot be said that the Statutory Notice of **8 June 2009** was premature. It matters not, in my view, that the Statutory Notice was issued within the 12 months’ duration, granted that **Clause 5** aforementioned gave the defendant the right to recall the Overdraft at any time during its shelf life. Moreover, the plaintiff agreed to the stipulation by the defendant, by dint of **Clause 16(c)** of the initial Letter of Offer dated **23 November 2007** that:

“We may at any time without notice notwithstanding any settlement of account or other matter whatsoever combine or consolidate all or any of the Borrower’s and/or Guarantors then existing accounts including accounts in the name of the Borrower and/or any Guarantor or of the Borrower and/or any Guarantor jointly with others ...wheresoever situate and set-off or transfer any sum standing to the credit of any one or more such accounts in or towards satisfaction of any obligations and liabilities of the Borrower and/or any Guarantor to us whether such liabilities be present, future, actual, contingent, primary, collateral, several or joint...”

[54] The aforesaid clause was incorporated in the securities as **Clauses 8.1, 8.2, 8.3, 8.4 and 8.5** of the Charge and Clauses 1, 2 and 3 of the Further Charge and Second Further Charge. Thus, in **Clause 8.2** of the Charge dated **26 March 2008**, the parties covenanted thus:

“It is hereby acknowledged and agreed by the Chargor that there shall be no restriction on the right of the Chargee of consolidating mortgage or charge securities and the Chargee hereby reserves the right to consolidate all mortgages and charges which the Chargee may from time to time hold from the Chargor on any account whatsoever and it is hereby declared that neither the Charged Property nor any other property of the Chargor which at any time during the continuance of this security is subject to a mortgage or charge in favour of or vested in the Chargee shall be redeemed except on payment not only of the monies hereby or thereby secured but also of all monies secured by every such mortgage or charge.”

[55] As to whether the plaintiff was in default as at **8 June 2009**, the defendant presented credible evidence to show that the plaintiff’s Loan Accounts were not operated to its satisfaction. Several letters of complaint by the defendant to the plaintiff were exhibited at pages 62-66 of the defendant’s Bundle of Documents. Three of these letters were highlighted at page 9 of the defendant’s written submissions; one of them being the letter dated **24 October 2008** (at page 62 of the defendant’s Bundle of Documents). The defendant thereby complained that it had not received the repayment instalment of **Kshs. 72,955/=** for the 2nd Term Loan, which had fallen due; and that the amount in arrears in respect of that loan was approaching **Kshs. 221,149.61**, taking into account the **November 2008** instalment whose date was also fast approaching.

[56] The purport of that letter is plain; namely, that by **October 2008**, the plaintiff was yet to pay a single instalment in respect of the 2nd Term Loan. Indeed, by its letter dated **18 December 2008** (at page 63 of the defendant’s Bundle of Documents), the defendant was explicit that the plaintiff was yet to make a single payment in respect of the 2nd Term Loan; and that the amount in arrears had increased to **Kshs. 302,898.55**, inclusive of interest. By this time, the plaintiff had been granted the Overdraft Facility; and the same was already reflecting an over-limit balance of **Kshs. 2,105,564.45**. Indeed, the plaintiff expressly admitted in cross-examination that:

“...The running account went into overdraft on 30/6/2008. This was the time I requested the bank for a second loan which

was disbursed on 24/7/2008. The OD was thus cleared. The account again went into overdraft on 18/9/2008. By 23/9/2008 the overdraft had gone up to Kshs. 2,408,789 (see p. 69 of the Defendant's Bundle of Documents). I was then granted Kshs. 2 million OD in September 2008...I have looked at the statements and I confirm that the OD was never kept below 2 million. By December 2008 the OD had gone up to Kshs. 4 million. By February 2009 it had gone up to 4.5 million. By April it was Kshs. 5.7 million. I thereafter made payments upon court orders. By 31/5/2010 the amount outstanding was Kshs. 8,034,468. I did not repay the OD by September 2009...It is true that I did not regularize the accounts. Instead I pleaded with the bank to give me more time to pay..."

[57] In re-examination the plaintiff conceded that he negotiated for the Overdraft to enable him service the Term Loans since the building was not ready for occupation. In the premises, I am satisfied that indeed the plaintiff encountered challenges in repaying the two Term Loan facilities and therefore fell behind the agreed payment timelines; and that the Overdraft was given for the purpose of enabling the plaintiff discharge that obligation. In the circumstances, it is my finding that the defendant's statutory right of sale had indeed accrued and that it cannot be faulted for issuing the notice dated **8 June 2009**, service whereof was acknowledged by the plaintiff. There is no doubt, from a perusal thereof, that the notice was fully compliant for the purposes of **Section 74** of the **Registered Land Act**.

[b] On whether the plaintiff is entitled to the reliefs sought:

[58] Notwithstanding his default and the ripeness of the defendant's statutory power of sale, the plaintiff amply demonstrated that something was amiss regarding the exponential growth of the Overdraft Account. Thus, issue of accounts was probably the most contentious issue in this suit; and was the basis for prayers [d] and [e] in the plaintiff's **Plaint** dated **1 September 2009** by which he sought:

[a] An Order compelling the defendant to furnish him with a full statement of accounts and breakdown of all disbursements for the loans granted under the Charge dated **26 March 2008**, the Further Charge dated **11 July 2008** and the Second Further Charge dated **24 November 2008**.

[b] An Order for reconciliation of all the plaintiff's loan accounts with the defendant by an independent financial, accounting or audit firm to be agreed between the parties and/or appointed by the Court on such terms as the Court may determine.

[59] **Order 20 Rule 1** of the **Civil Procedure Rules** provides as follows in respect of suits for, or which include the prayer for accounts:

"Where a plaintiff prays for an account, or where the relief sought or the plaintiff involves the taking of an account, if the defendant either fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is some preliminary question to be tried, an order for the proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made."

[60] As to the procedure to be employed in **Rule 3 of Order 20, Civil Procedure Rules**, stipulates that:

"An application for such order as is mentioned in rule 1 and 2 shall be made by chamber summons and be supported by an affidavit when necessary filed on behalf of the plaintiff stating concisely the grounds of his claim to an account; and such application may be made at any time after the time for entering an appearance has expired."

[61] This, to my mind, is in recognition that where the accounts are disputed, the contentious issues ought to be dealt with in an interlocutory manner well before a final decision on the dispute is pronounced; so as to facilitate an effectual resolution of the dispute. In this connection, I note that the plaintiff had indeed made an interlocutory application dated **22 October 2009** for injunction and accounts, and that the said application was dismissed. Be that as it may, the defendant had sufficient notice that the issue of accounts was pertinent. In the ruling dated **17 November 2011**, the Court (Hon. **Kimondo, J.** held thus:

"A dispute occurred primarily over the following areas. First is a question of accounts and whether the sums now claimed by the plaintiff or in the statutory notice of Kshs. 15,111,443.25 as at 8th June 2009 are truly due from the plaintiff, or were drawn down. Second is the plaintiff's claim that irregular debts of interest have been lumped on top of the loan or overdraft account to create an artificial default. Third is the plaintiff's claim that it has regularly paid the debt and is not in default. On that aspect, the defendant's position is that the plaintiff is in default and that accordingly, the statutory notice is regular and so is the process of sale to realize its security...those matters can only be fully ventilated at the trial and on tested evidence upon cross-examination..."

[62] Similarly, when the matter went to the Court of Appeal, again the issue of accounts took centre stage. The Court of Appeal made it clear to the parties that it is this suit that would ultimately determine **"...whether or not the applicant has fully repaid the loans as he claims..."** Accordingly, the burden of proof was on the defendant to demonstrate how the figure of **Kshs. 15,111,443.25** that it raised in its statutory notice dated **8 June 2009**, and in particular the Overdraft component of **Kshs. 4,069,620.15**, was arrived at. No such explication came forth from the defence witness, **Ms. Beline Ochiel (DW1)**, for here is all she had to say:

"It is true some payments were made into the loan account. I am not in a position to say, as I stand here, how much is outstanding from the plaintiff to the Bank. The Plaintiff still owes the Bank, but I cannot say how much. The last payment made by the plaintiff directly to the Bank was on 23/1/2015...I have not come with the statements showing the payments made by the Plaintiff between 2009 and 2015. That is a period of 6 years, the duration of the Term Loans... As a Bank we did not supply the Plaintiff with particulars of what was due from the plaintiff in respect of each A/C. I have not provided the Court with any evidence to show exactly what is owing from the Plaintiff to the Bank. I however do not agree that the Plaintiff has fully paid his debt to the Bank."

[63] With regard to the payments made after the settlement of the appeal in **Civil Appeal No. 325 of 2012, DW1** conceded that:

“I am aware this matter went to the Court of Appeal but I am not aware of the Ruling of the Court of Appeal. I am aware the Plaintiff was directed to repay the loan into an Escrow Account. I am not aware of the latest payments after Dec. 2018 that have been made to the Escrow Account.”

[64] In the light of the foregoing, it is my finding that the plaintiff has demonstrated that he is entitled to accounts. This will not only clarify matters as to what was due as of **8 June 2009**, but also take into account all the payments made by the plaintiff during the pendency of the case, some of which may not have been taken into account in the subsequent statements comprising the **Defence’s Exhibit 3**. Accordingly, while I find absolutely no basis for the plaintiff’s prayer for general damages for breach of contract, final orders in respect of the following prayers can only be made after reconciliation of accounts:

[a] A declaration that the plaintiff is not in default or arrears of the loans and/or the terms thereof as granted by the defendant pursuant to the Charge dated **26 March 2008**, the Further Charge dated **11 July 2008** and the Second Further Charge dated **24 November 2008**.

[b] A Permanent Injunction restraining the defendant by itself, its agents, officers or anybody acting on its behalf from in any way interfering with, advertising, realizing or disposing of the charged property No. **KWALE/DIANI BEACH/BLOCK 603** pursuant to the Statutory Notice dated **8 June 2009** or any other such notice as a consequence of the disputed accounts.

[c] Costs of the suit and any other relief as the Court may deem just and expedient to grant in the circumstances of this suit.

[65] As for the prayer for rectification of Entry No. 8 on Title No. **KWALE/DIANI BEACH/BLOCK 603** in the Title’s records, I would agree with **Mr. Kanjama** that it is a non-issue as it is common ground that the error was made out of inadvertence. At no time did the defendant claim that it lent the plaintiff **Kshs. 3,000,000/=** by way of Overdraft. Moreover, that is a matter that the plaintiff is at liberty to pursue and accomplish administratively, pursuant to **Section 79** of the **Land Registration Act**. With respect to the prayer for an Order compelling the defendant to furnish the plaintiff with a full statement of accounts and breakdown of all disbursements for the loans granted under the Charge dated **26 March 2008**, the Further Charge dated **11 July 2008** and the Second Further Charge dated **24 November 2008**, there has been substantial compliance. The defendant, produced herein a bundle of statements as **the Defence’s Exhibit 3**. Whatever is outstanding could still be called for and supplied accordingly.

[66] In the result, the orders that commend themselves to me, and which I hereby grant, are as follows:

[a] That an Order be and is hereby made for reconciliation of all the plaintiff’s loan accounts with the defendant by an independent financial, accounting or audit firm to be agreed between the parties and/or appointed by the Court on such terms as the Court shall determine on notice to the parties.

[b] That further orders as to costs or otherwise to await the taking of accounts.

It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 3RD DAY OF JULY 2020

OLGA SEWE

JUDGE