REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.478 OF 2007

KIRINYAGA COMPLEX ACADEMY LTD.....PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LTD.....1ST DEFENDANT

GARAM INVESTMENTS.....2ND DEFENDANT

JUDGMENT

Introduction

1. The plaintiff through an amended plaint dated 30th May 2012 sued the defendants herein seeking the following orders:-

a. A permanent injunction restraining the Defendants whether by themselves, their appointed auctioneers, servants or agents or Advocates from advertising for sale, selling by public auction or private treaty or otherwise howsoever alienating, transferring, leasing or in any other manner whatsoever interfering with **ALL THAT PROPERTY** known as Land Reference **No. Inoi/Kerugoya/2037** situated in Kerugoya within the Republic of Kenya.

b. A declaration that the purported lending is null and void for want of a proper Resolution and that the Charge document dated 18th February 2000 is equally null, void and unenforceable and an order directing de-registration of the same forthwith.

c. A declaration that the 1st Defendant is not entitled to the excessive monies it has demanded from the Plaintiff, or at all, in that the same are illegal, oppressive and constitute of illegal interest charges and/or a breach and variation of the contract of lending, The Central Bank of Kenya Act, The Banking Act and are therefore unlawful, irrecoverable and not due from the Plaintiff.

d. A declaration that the Plaintiff has fully discharged its obligations to the 1st Defendant.

e. ALTERNATIVELY, an Order directing the 1st Defendant to prepare and/or render to the Plaintiff a true, proper and accurate account of all the financial dealings conducted in the Plaintiff's Loan account from the year 2000 to-date and/or an Order for proper accounts to be taken.

f. A declaration that the purported advertisement and public auction of the suit property held by the Defendants on 18th May 2006 was irregular, illegal, null and void and that the statutory power of sale had not properly accrued in favour of the 1st Defendant.

g. Damages under paragraph 17, 19, 21, 23, 24, 26 and 27 above amounting to Kshs. 11,374,670.60 together with interest thereon at court rates.

h. Such other or further consequential relief or directions as this Honourable Court may deem fit and just to grant.

i. Costs of this suit together with interest thereon at court rates.

2. The defendant filed an amended defence dated 5th July 2012 denying liability and praying that the plaintiff's suit be dismissed with costs.

3. The plaintiff filed Reply to amended defence on 8th August 2012 praying that the amended defence be dismissed with costs and that judgment be entered in favour of the plaintiff as prayed in the amended plaint.

Plaintiff's Case

4. The plaintiff's claim is a claim by chargor against the chargee in which the chargor challenges the 1st defendant's right to exercise its statutory power of sole over **L.R. No.Inoi/Kerugoya/2037.** The plaintiff also challenges a previous aborted staging of public auction/attempted sale of the subject property that had occurred on 18th May 2006.

5. From the plaintiff's pleadings and evidence from **PW1- PW3,** for the plaintiff, the basis of the plaintiff's claim can be summed as follows:-

a. First that the initial letters of offer and acceptance of the initial loan dated 1/2/2000, the letter dated 27/10/2003 rescheduling the loan, as well as the charge document dated 18th February 2000 are illegal, null and void because "no resolutions to borrow were demanded and none were passed by the plaintiff authorizing the borrowing" and consequently, the advances granted by the 1st defendant to the plaintiff are contended to be "illegal and irrevocable".

b. It is further contended that the 1st defendant breached the loan agreement in the following ways:-

i. Charging what the plaintiff characterizes as "excessive unconscionable and illegal interest."

ii. Failing to keep the plaintiffs accounts in good and proper order befitting a banker and unreasonably clogging the plaintiff's right to redeem the pledged property; failing to disburse a sum of Kshs.600,000 and wrongfully to credit the plaintiff's account with the said Kshs.600,000/-.

iii. Wrongfully applying a portion of the loan under the letter of 27th October 2003 to offset the previous loan.

iv. Harassing the plaintiff alleging default and threatening to sell the charged property notwithstanding there was no default.

Defendant's Case

6. The defendants deny the plaintiff's claim as per amended statement of defence and oral evidence tendered to court through **DW1.** The defendants contended that the letters of offer and acceptance and the charge are not illegal or null and void as contended by the plaintiff, urging that it was the primary duty of the plaintiff to ensure that all its internal procedures and conditions precedent for authorizing borrowing and charging the security to secure the borrowing were followed before applying for the loan and executing the letters of offer and acceptance as well as the charge document. It is further contention of the defendants that it is trite law that outsiders dealing with companies are entitled to assume that internal company rules are complied with even if they are not.

7. The defendants contend that the plaintiff having executed the loan agreement and the charge documents as well as taking the benefit of the loan advances based on those documents, the plaintiff is estopped by record and conduct from denouncing those documents as being illegal or null and void.

Plaintiff's evidence

8. The plaintiff called three witnesses in support of its case; **PW1** Jane Mueni, a director of the plaintiff company; PW2 Francis Mwaniki Ngura, a Professional Accountant/Auditor and **PW3** Wilfred Abincha Onono, a Professional Accountant and the Director of Interest Rates Advisory Centre **(IRAC).** The witnesses produced *(Exhibit P1),* plaintiff's list and Bundle of documents filed on 1st March 2011, *(Exhibit P2),* witness statement of Jane Mueni dated and filed on 3rd December 2018, *(Exhibit P-3),* witness statement of Francis Mwaniki Ngure filed on 24th July 2014 (Exhibit P-4), witness statement of Wilfred Abincha Onono filed on 18th July 2014.

9. PW1 Jane Mueni duly sworn adopted her witness statement. **PW2** and **PW3** also adopted their witnesses statements.

Defendant's evidence

10. The defendant called one witness Anet Rop who adopted her witness statement filed on 22nd November 2018 and produced the defendant's list and Bundle of documents filed on 13th February 2015 *(Exhibit D-1).*

Analysis and Determination

11. I have very carefully considered the pleadings, witnesses statements and oral evidence, counsel rival submissions, and from the above the issues for consideration can be summed up as follows:-

a. Whether the contract entered into between the parties is legally valid and binding; whether interest rates and Bank charges debited to the plaintiff account was founded in good faith and whether plaintiff's indebted to the plaintiff?

b. Whether 1st Defendant is entitled to exercise its statutory power of sale over the suit property?

c. Whether the public auction of suit property held on 18th May 2016 to recover the alleged debt of Kshs. 1,240,405/- was lawful and valid?

d. Whether plaintiff has suffered loss and damage amounting to Kshs.11,374,670.65 as consequences of auction held on 18th May 2006 or at all and whether the plaintiff is entitled to an award of the said damages or at all?

A. Whether the contract entered into between the parties is legally valid and binding; whether interest rates and Bank charges debited to the plaintiff account was founded in good faith and whether plaintiff's indebted to the plaintiff?

12. In this suit the principal document following the contract of lending between the plaintiff and the defendants are not in dispute between the parties. By a letter dated 1st February 2000 the plaintiff got into an agreement with the defendant for a facility of 1,500,000 where the loan limit was Kshs.873,000 and an overdraft limit of Kshs.627,000/-. The loan was secured by a legal charge of **L.R. No.Inoi/Kerugoya/2037.** The amount was payable by 36 monthly instalment of Kshs.24, 240.00 exclusive of interest. In this matter no further letter was produced by the defendants or plaintiff stating how the accrued interest was to be paid since the instalment of 24,440.00 was exclusive of interest. The agreed rate of interest was 6% mark-up above bank is then prevailing base rate of 24% *(30% per annum)* calculated on daily balances and debited monthly. The rate was however subject to change at the discretion of 1st defendant.

13. It should be noted that parties agreed in the said letter of offer that a legal charge for Kshs.1, 500,000 was to be registered against Title **No. Inoi/Kerugoya/2037** to secure the loan advanced. Other notable clause and/or other terms and conditions of the said letter of offer stipulated that a review charge of 2% will be charged if the overdraft is extended and further under condition 4 thereafter that a penalty fee of 0.5% will be charged on overdraft facility if the period of 12 months was extended. In this matter I note, that no documentary evidence was produced by the 1st defendant to guide the plaintiff and demonstrate to the court on how the penal interest and other charges were repayable since the installment agreed upon were exclusive of interest.

14. The plaintiff contention is therefore, that the said letter of offer was duly executed by the parties, at page 4 thereby and thereafter the charge document dated 7th March 2000 *(Exhibit P-1)* was signed and registered against the suit property for Kshs.1, 500,000 being the maximum principal debt as expressly stipulated by clause 1 of the charge document. It is plaintiff's contention that the maximum principal amount which the 1st defendant would be secured was Kshs.1, 500,000 only and not any other amount above.

15. Under clause 2 of the charge the agreed interest was 30% calculated and debited monthly provided that the lender was at liberty to alter the rate of interest at its own discretion but subject to a rate not exceeding that allowed by the law. The provisions of the said charge document omitted to state that the rate of interest at 30% shall be charged per annum and it does state the 1st defendant is entitled to charge penalty interest for any amount in arrears and/or any other charges. Similarly in the initial letter of offer dated 1st February 2000, it does not expressly provide that the 1st defendant is entitled to charge penalty interest for any arrears and/or other charges; However the only penalties allowed were appraisal fee at 2%, review of the overdraft at 2% and a penalty fee of 0.5% for any amount in excess of the authorized overdraft limit as expressly stated in the letter of offer under the sub-heading **"OTHER TERMS AND CONDITIONS."** The plaintiff submits that no penalties were payable for the loan portion of Kshs. 873,000 and therefore the 1st defendant was not at liberty to charge any penalties.

16. It is evidently clear from a further letter of offer dated 27/10/*2003 (plaintiff exhibit P-1),* the plaintiff was advanced a further loan (top-up) of Kshs.600,000 which was consolidated with the balance of the first loan and overdraft of Kshs.954,484.40 to make a total of Kshs.1,554,484.40. The consolidated loan amount of Kshs. 1,554,484.40 was repayable by the plaintiff in 20 quarterly instalments of Kshs.77, 724.20 for 5 years. This meant that the loan was payable only four (4) times in a year as opposed to monthly pursuant to the plaintiff's letter of request dated 18th June 2001. The defendant however did not honour this new arrangement and started demanding alleged arrears of Kshs.257, 872 two (2) months after the letter of offer dated 27/10/2003 was signed as per its letter dated 20/12/2003. The plaintiff contend the demanded arrears of Kshs.257, 872 were not only erroneous but the amount was sufficient to cover more than three (3) quarterly) instalments at once. The plaintiff further raises issues with further demand letters dated 6th February 2004 *(see Exhibit P-1)* and 7th April 2004 *(see Exhibit P-1).* The plaintiff further avers **DW1** in cross-examination admitted all the anomalies in periodic amounts.

17. The 1st defendant urged the plaintiff did not prove that the 1st defendant was not entitled to recall security given to secure the borrowing of both the initial and rescheduled loan and that it is entitled to permanent injunction being the 1st defendant from taking steps to sell the security to recover its money. The plaintiff was required to prove that it has repaid the loan advanced as well as the accrued interest and any other charges as set out in the contract of lending and charge instrument. I find that the plaintiff other than raising several concerns about the amount demanded it has not put forward any cogent and probable evidence confirming payment of the sum borrowed. It has failed to prove that it has discharged all its obligations under the contract of lending. There is no dispute on the loan advanced as well as the overdraft facility. There is equally evidence that the plaintiff defaulted on agreed loan repayment as well as servicing of the overdraft facility.

18. From the letter of offer and acceptance dated 1st February 2000 the terms of loan repayable was over a period of 36 months by monthly instalment of Kshs.24, 240.00 while the overdraft facility was for a period of 12 months. The plaintiff admits that by 27th October 2003 when the loan was rescheduled, there was an outstanding balance on the loan/overdraft account of Kshs. 954, 484. This was more than 7 months past the 36 months period when the loan was supposed to have been fully repaid. There is therefore clear evidence that the Plaintiff had defaulted in meeting his contractual obligations under the charge instrument. Had the account been regularly serviced going by the contract term, there would have been no basis of requesting for rescheduling the loan repayment on 27th October 2003.

The plaintiff further acknowledged the default on the rescheduled loan in a letter dated 22nd February 2006 which reads:-

"This is to confirm that I shall be able to clear the outstanding arrears around 10th May 2006. If any difficult arises I shall sell my property at Nyeri".

I therefore find that the plaintiff cannot state that he has cleared all his outstanding debts with the 1st defendant. He is estopped from denying the loan was in arrears by his own conduct and admission.

19. The evidence on record is clear that the 1st defendant acceded to the plaintiff plea for rescheduling of the loan and a grant of further Kshs.600, 000 as per the letter of 27th October 2003 at page 26 of the plaintiff's bundle of documents. The new loan was therefore disbursed on 5th November 2003 and Kshs.954, 484.00 applied to settle the existing loan and Kshs.600, 000 credited to the plaintiff's current account *(see account statement at page 60 in the defendant's bundle of documents).* It is reflected in the account statement that the plaintiff actually utilized the Kshs.600, 000 by making drawings. This disapproves PW1's evidence. I find that the 1st defendant did disburse the second loan to the plaintiff. The disbursement of the second loan is admitted by PW3, a witness of the plaintiff in his witness statement and in his oral evidence before court.

20. The plaintiff has in its pleadings and evidence urged that the interest charged is excessive, unconscionable and illegal, whereas the 1st defendant in its pleadings, oral and documentary evidence maintained that the interest charged was contractual. The contractual provisions related to the interest and other charges are clearly set out in the letters of offer and acceptance once as well as the charge document. The contract documents are clear that interest was to be calculated and debited monthly while the principal amount was to be paid periodically over a duration of 36 months and later 60 months after the rescheduling of the loan. The statement of accounts produced revealed, that is what was done in practice and the plaintiff was bound and expected to pay interest on a monthly basis now that the periodical payments of principal instalment was exclusive of interest. I find in view of the terms of the contract between the parties, this would be the only logical way the plaintiff would have met the contractual obligation to pay the loan advanced and interest within the terms specified in the letter of offer and acceptance and the charge instrument. I find no basis for the plaintiff to urge he did not know when the interest was to be paid and that the default of payment of interest did not constitute a default under the contract of lending and charge. I find that the plaintiff had all the information regarding payment of interest and did not bother to pay the same as agreed in the executed contract. I further, note and hold that in matters of commercial contracts between parties the court has no jurisdiction to vary the rate of interest that has been agreed upon by the parties as much as the court cannot also vary the period within which the plaintiff was repaying the loan **(see Jaimii Bora Bank vs Wapak Developers (2018) eKLR).**

21. It is the plaintiff's contention that the 1st defendant charged *"excessive illegal and unconscionable interest"* and that the amount demanded by the 1st defendant of Kshs.1,407,301.20 in the letter dated 21/12/2006 is not due and payable, and in support of that contention, the plaintiff called **PW3** Mr. Onono of **IRAC,** who had prepared a report in which he concludes that the plaintiff has over charged interest and applied other charges to the account and its claim is sensational claim as the 1st defendant is the one who owes the plaintiff. The 1st defendant in contrast tendered oral and documentary evidence to demonstrate that the interest and other charges applied to the account are in accordance with the contract between the parties. The statements of accounts tendered by 1st defendant are comprehensively prepared in ordinary course of banking business. I have considered the parties pleadings, witness statements and exhibits thereto and I find that the 1st defendant has established a prima facie evidence that the plaintiff is still indebted to the 1st defendant. The evidence tendered by the 1st defendant has not been discounted by the evidence tendered on behalf of the plaintiff. I find the computation and analysis of the accounts by **IRAC** are not based on the contract between the parties herein, it did not take into account that the scheduled instalments payments in the letter of offer dated 27th October 2003 as well as the letter of offer rescheduling the loan were infact exclusive of interest. It is further urged the analysis is demonstrably flawed in its premises, for instance, the *"credit verifier"* software programme that **IRAC** has used is not the same software programme that the Bank has used and neither has it been shown to be used or applied by any Bank in Kenya or elsewhere in the world. Further the method applied by the plaintiff's witness in evaluating, analyzing and recomputing the account was not clearly contemplated by contract between the parties herein.

22. The Report is further challenged on the basis that it does not properly explain the reason for difference is between the figures by **IRAC** and those in the account statements presented by the Bank. For example, at paragraph 10.2 of the report, it is indicated that Co-operative Bank's opening balance is Kshs.1,479,484.40 on 15/01/2002 being a consolidation of outstanding balance on loan account No.01201-345204-00 arrears account No. 01613/345204/00 and current account No.01120/345204/00 of Kshs.388,200, Kshs.293,130 and Kshs.788,158.40 respectively on 15/01/2002 is said to be a consolidation of outstanding debt balances on the loan amount of Kshs.655,746.63 and Kshs.604,216.15 respectively. It is interesting to note that the source of these figures is not indicated or disclosed, neither is there any explanation why the arrears accounts has been omitted in the computation.

23. It is again noted that paragraph 10.4 of the Report states **IRAC** has omitted the rescheduled repayment and instead only included actual payments as debited. It is also noted that there are contradictions between the assertions at (paragraph 10.5 and paragraph 10.6), in the report where outstanding amount in the Banks account No. […] is acknowledged at Kshs.804,136.64 but the difference of Kshs.159,347.76 accounted for in account No.[…] and […] are clearly omitted without assigning any explanation.

24. The court has previously held that reports from **IRAC** are far from being objective and reasonable and as such cannot be given much weight **(see Jamii Bora Bank vs Wepak Developers (2018) EKLR).** The plaintiff witness **PW3** in his evidence stated in carrying out their duty they actually do verification of borrower's account to check on interests on borrowing accounts and rely solely on accounts of the instructing client(s). There seem to be no room for comparison of such accounts with the accounts held by the lending bank and in most cases, if not all, their reports are always in favour of their clients who has hired or contracted them. In that case a lot of caution is required in considering such reports. In view of the above it is my finding that the findings by **IRAC** in this matter are not reliable and not relevant for the purpose of ascertaining the actual indebtedness of the plaintiff to the 1st defendant.

25. It is plaintiff's contention, that the defence witness **DW1,** during cross-examination she admitted there have been various anomalies in respect of amounts demanded through various demand letters, such as demanding Kshs.257,872 in less than two months after the loan was consolidated and restructured for repayment by quarterly installment of 77,724.25. She admitted that no arrears were properly due and payable by the time of demand of Kshs.257, 892/-. She also admitted the accounts were not kept and maintained in a proper manner and

amount demanded in the said letters were erroneous, admitting that the error/mistake was carried forward upto the time the 1st defendant instructed the 2nd defendant to advertise the suit property for sale by public auction of 18th May 2006 to recover the alleged debt of Kshs.1, 240, 405.60. I find from evidence of **DW1** and on clear admission of an alleged debt/arrears, whether manifestly erroneous or not the court should not shut its eyes and let the Bank proceed to exercise its power of sale until the issue of proper amount due is ascertained. I therefore find the Bank on its own admission failed to maintain proper accounts and that justifies the plaintiff complaint on alleged illegal debits. This calls for proper taking of accounts and ascertaining of the actual amount due and payable by the plaintiff to the 1st defendant.

B. Whether 1st Defendant is entitled to exercise its statutory power of sale over the suit property?

26. The plaintiff urges that the 1st defendant has not produced sufficient evidence to demonstrate that it is indebted in any sum to date or at all, terming the alleged debt to be due and owing to the fictitious and accounting. It is plaintiff's contention that the alleged debt or any at all is not properly due and owing to the 1st Defendant and that the 1st Defendant failed to keep proper record. It should however be noted failing to keep proper record do not per se connote that a debt is not owed.

27. The plaintiff in this suit admitted having executed loan agreement and a charge document as well as taking the benefit of the loan advances. The plaintiff has not called evidence to prove settlement of the sum advanced to him cover the period of 36 months. It also admitted the indebtness through a letter and offered to clear the arrears as from 10th May 2006. There is no evidence of payment of the arrears even after rescheduling the loan. The fact that the accounts might have been improperly kept or there are instances or errors in the books of account cannot be basis for the plaintiff to urge that it is not indebted to the plaintiff and more so when the plaintiff has not adduced sufficient evidence on payment. I therefore find that the burden of proof of payment of the full debt lies with the plaintiff, who asserts to have paid the full amount. This burden of proof has not been discharged and I find once the accounts are reconciled the 1st Defendant shall be entitled to exercise its statutory power of sale over suit property upon complying with the relevant provisions of the law, if the debt due is confirmed.

C. Whether the public auction of suit property held on 18th May 2016 to recover the alleged debt of Kshs. 1,240,405 was lawful and valid?

28. The plaintiff urge the auction of 18th May to recover a debt of Kshs.1, 240,450 was unlawful and unjustified as the 1st defendant did not keep its accounts in proper manner. The plaintiff urged **DW1** Anet Rop freely admitted that accounts were not kept properly by the 1st defendant by the time of staging auction.

29. The 1st defendant relies on statements of accounts and plaintiff's witnesses statements and oral evidence which show that the loan account was in arrears as at time of the aborted auction of 18th May 2006 was conducted. The accounts have not been regularized to date and I find no legal basis to declare that the plaintiff has discharged his obligation under the charge instrument. The 1st defendant testified before court indeed there are outstanding loan balances which the plaintiff is under obligation to pay. The court held the statutory notice issued pending attempted auction of 18/05/2006 was irregular and 1st defendant issued another notice on 21st December 2006 to regularize the position. I therefore find that as of now the 1st defendant was allowed to issue a fresh notice and proceed with realization of the property in the ruling dated 25th March 2009 and is no longer relying on statutory notice of 18th June 2001 which has already been declared irregular.

D. Whether plaintiff has suffered loss and damage amounting to Kshs.11,374,670.65 as consequences of auction held on 18th May 2006 or at all and whether the plaintiff is entitled to an award of said damages or at all?

30. The plaintiff states that it suffered a loss from the actions of the defendants amounting to Kshs.11, 374,670.60. The plaintiff to be able to recover the said sum is required to specifically plead and strictly prove the claim. That other than the plaintiff asserting the claim, it has not produced any receipts in support. I find no credible, probable and cogent evidence that has been adduced before the court by the plaintiff to demonstrate the two schools were closed due to the advertisement and the public auction that aborted. There is on the other hand evidence, that the schools were not doing well before the aborted public auction *(see plaintiff's letters dated 29/8/2001 and 22/2/2006 on pages 6 and 11 of the defendant's book).* There is evidence that the principal directors and shareholders of the plaintiff had no experience in running the schools as a business. There is further no material evidence on record to show the number of the pupils and students withdrawn from the school merely because of the aborted auction in the year 2006. The plaintiff has further failed to demonstrate the factual basis of the figure of Kshs.11, 374,640.60 claimed as projected lost profit. The plaintiff merely relies on just projections prepared by a partisan and which are not backed by primary evidential material.

31. In the case of **Kenya Breweries Limited vs Kiambu General Transport Agency Limited (2000) eKLR** Lakha JA *(as he then was)* dismissed a prayer for a claim for special damages for alleged loss of profits based on financial forecasts. The learned judge observed that there was nothing to show that the element of mitigation of damages was considered sufficiently or at all in reaching the final figures for loss. The figure also took no account of risks that the business might not be able to operate successfully or profitably for a further period of ten years. It was the observation of the Judge that the calculations/forecast were all very fine in theory but the overall figures had no relation whatever to reality.

32. I have considered this matter and facts of the case and events leading to the aborted auction and hold that any inconvenience that the Plaintiff may have undergone when the charged property was advertised for sale was foreseeable and voluntarily assumed by the Plaintiff when it offered the property as a security for the loan. Courts have previously held that *"By offering the charged property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover its loan together with interest thereon."* ***(See Andrew M. Wanjohi –VS- Equity Building Society & 2 others (2006) eKLR).*** Since the Plaintiff offered the suit property as security for the loan therefore, the land became a commodity for sale and therefore subject to sale in case of default in loan repayment the chargor therefore goes has would claim for damages that may arise out of an aborted auction by the chargees.

33. I further take the view that in absence of any effort from the plaintiff to rectify those defaults, which the plaintiff was aware of and aware of the impending grave consequences in default of rectifying the default, I find that this court is not able to find that the plaintiff suffered any loss as the defendant was exercising its legal **right (see commonwealth vs Amann Aviation Property Ltd (1991). 174 CLR 64 at page 116** in which Deane, J held that:-

> **"The general principle governing the assessment of compensatory damages in both contract and tort is that the plaintiff should receive monetary sum which, so far as money can, represents fair and adequate compensation for the loss or injury sustained by reason of the defendant's wrongful conduct."**

34. I find that a bank's exercise of its statutory powers of sale is the cornerstone of any normal lending transaction involving registered charges as security. If court readily dismissed the banks right under the charge, then the concept of accepting a charge as security would be in serious jeopardy and access to financing would be limited. A party who voluntary charges his property is deemed to be ready to bear the grave consequences of having to part with his property in default of meeting the terms and conditions agreed between the chargor and chargee. The bank acting in accordance of the provisions of the law should not be restrained when exercising the statutory power of sale.

35. I now turn back on the issue of taking of the accounts. The plaintiff contention is that the plaintiff did not keep its accounts in a proper manner leading to it claiming amount that was not justified. **DW1** in her evidence admitted the accounts were not properly kept. She admitted mistakes on actual amount were carried forward. She admitted that the rate of interest was charged without forwarding a letter to the plaintiff. **DW1** admitted that the 1st defendant was at liberty to calculate interest and charge for penalty.

36. In the case of **Margaret *Njeri Muiruri vs Bank of Baroda(Kenya) Limited [2014] eKLR*** the learned judges opined that

> **"This court is in total agreement with the decisions cited above which upholds the view that a chargee cannot be restrained from exercising its power of sale merely because there exists a dispute as to the amount owing or interest charged. However, the chargee maybe be retrained where the amount claimed is paid in court or is excessive and unconscionable, and or the interest charged is un contractual or illegal I also wish to categorically state that the existence of a dispute touching on the interest rate payable is not an excuse for non-repayment of the principal amount of the loan facility. Thus despite existence of a dispute on interest rate payable, the Borrower should be able to continue repaying at least the principal amount of the loan facility pending the determination of the dispute on interest payable. In cases like this, evidence that the borrower continues repayment of the loan facility or at least the principal amount or proof of his willingness to do so is paramount."**

37. The 1st defendant on taking of accounts aver that it provided the plaintiff with proper accounts on a monthly basis, which copies the plaintiff urges it has provided to the court, and which accounts it is urged are detailed and elaborate. It is averred they show amount advanced, the interest charged and other charges applied to the account from the time upto when the statements were filed in court. The 1st defendant is not however opposed to the order for taking of accounts so long as this is done by persons in the industry and familiar with banking procedures. In view of clear admission of existence of errors by 1st defendant's witness I find the solution of the dispute relies in the calculation of sum due and as such, both parties should proceed to have accounts taken.

38. The upshot is that the plaintiff's suit is meritorious and I proceed to make the following orders:-

a. Prayer (a) is declined.

b. Prayer (b) is declined.

c. Prayer (c) is declined.

d. Prayer (d) is declined.

e. In the alternative to prayers (a) to (d) above, An order be and is HEREBY made directing the 1st Defendant to prepare and/or render to the Plaintiff a true, proper and accurate account of all the financial dealings conducted in the Plaintiff's Loan account from the year 2000 to-date and proper accounts to be taken by the persons in the industry and familiar with Banking Procedure, plaintiff to appoint one person and the 1st defendant the other person. The two to prepare the Report to be submitted to the court within 90 days from the date of judgment.

f. A declaration be and is HEREBY made that the purported advertisement and public auction of the suit property held by the Defendants on 18th May 2006 was irregular, illegal, null and void and that the statutory power of sale had not properly accrued in favour of the 1st Defendant.

g. Claim for damages of Kshs.11, 374,670.60 not proved and is declined.

h. Costs of the suit to the plaintiff.

Dated, signed and **delivered** at **Nairobi** this **19th**day of **September, 2019.**

…….

J .A. MAKAU

JUDGE