



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 251 OF 2006

NAHASHON NJAGE NYAGGAH.....PLAINTIFF

VERSUS

SAVINGS & LOAN KENYA LIMITED.....1ST DEFENDANT

RICHARD N. NYARIKI T/A BASELINE AUCTIONEERS.....2ND DEFENDANT

JUDGMENT OF THE COURT

The Background

1. The Plaintiff commenced the suit herein vide a Plaint filed in court on **15th May, 2006** in which the plaintiff claims that he was at all material times to the suit the registered owner of the suit property known as **L.R.NO. 209/10480/152, Amboseli Court, South C, Nairobi** (*the suit property*). On **5th September, 1996** the Plaintiff charged the suit property to the defendant to secure a loan of **Kshs. 750,000**. The loan was to be repaid in a period of ten (10) years by monthly installments at Ksh. 19,700 at an interest rate of 28% per annum which could only be varied upon notice given to the plaintiff by the 1st defendant bank. The plaintiff alleges that it was expressly agreed and understood that within the validity and limit of the loan facility the rate of interest charged on the mortgage account would not exceed the maximum rate which financial institutions may charge on advanced facilities as a result of interest regulation by the Central Bank of Kenya, and that in any event the 1st defendant would only charge such maximum interest as was allowed or approved by the Central Bank of Kenya and/or the provisions of Central Bank of Kenya Act and Regulations made thereunder from time to time, the Banking Act and other relevant and applicable Statutory provisions regulating the relationship of a Mortgagor and Mortgagee in Kenya. In the cause of time, the defendant, without lawful excuse alleged that the plaintiff was in arrears and had lagged behind the repayment and so on or about 30th May, 2006, the 2nd defendant acting on the instructions given by the 1st defendant threatened to sell the plaintiff's property by Public Action to purportedly recover Shs. 1,307,668.37 allegedly owing to the 1st defendant by the plaintiff. The plaintiff claims that todate he has paid to the 1st Defendant a total sum of Kshs. 2,070,233.25 and has fully discharged his obligations to the 1st defendant under the said charge. The Plaintiff then consulted the **Interest Rates Advisory Centre (IRAC)** to investigate the said account, and the Interest Rates Advisory Centre report reveals that the 1st defendant has illegally and in breach of duty of care levied illegal charges, penalties and interests in the plaintiff's account, and that the 1st defendant has acted fraudulently, recklessly, oppressively with malice and absolute bad faith. That is the reason the plaintiff has brought this suit against the 1st and 2nd defendants seeking the following orders;

a. A permanent injunction restraining the Defendants and each of them whether by themselves, their 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 L.R. No. 209/10480/152, situated in Amboseli Court, South C, Nairobi.

b. An Order prohibiting all further registration or change of registration in the ownership, leasing, sub-leasing, allotment, user, occupation or possession or in any kind of right, title or interest in **ALL THAT** parcel of land known as L.R. No. 209/10480/152, Amboseli Court, South C, Nairobi with any Land Registry, Government Department and all other registration authorities until further orders of the Court.

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 a breach and variation of the contract of lending, The Central Bank of Kenya (Amendment) Act (2000), the Banking Act and are therefore unlawful, irrecoverable

and not due from the Plaintiff.

d. A declaration that the Plaintiff has paid the mortgage fully and an Order directing the 1st Defendant to prepare, sign and deliver to the Plaintiff a Discharge of Charge over the property known as L.R. No. 209/10480/152, Amboseli Court, South C, Nairobi.

e. ALTERNATIVELY, an Order directing the 1st Defendant to prepare and/or render a true, proper and accurate account of all the financial dealings conducted in the Plaintiff's mortgage account from 1996 to-date and/or an Order for proper accounts to be taken.

f. Damages under paragraph 16 of the Plaint.

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

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

2. The plaintiff's suit is controverted by a joint defence filed by the defendants on **19th July, 2006**. Save that there was a charge/chargee relationship between the plaintiff and the 1st defendant under which the plaintiff had defaulted, the defendants deny the allegations contained in the plaint. The 1st defendant states that the said loan was advanced at the rate of 28% per annum which could be varied upwards or downwards at the sole discretion of the 1st defendant and without notice to the plaintiff. The 1st defendant further states that the interest to be charged was to be pegged on the maximum rate, if any, set by the Central Bank of Kenya, except that at all material times to the said relationship the Central Bank of Kenya did not set interest rates Cap whatsoever. The defendants further deny the allegations that they mishandled the plaintiff's account; they deny allegations of fraud, illegality, malice and they denied the report by Interest Rates Advisory Centre stating that Interest Rates Advisory Centre has no legal mandate to do the alleged investigations.

3. At the same time with the suit the plaintiff had sought for injunctive orders against the defendants. After interlocutory injunction applications were heard, the plaintiff filed an appeal in the Court of Appeal being Civil Appeal No. 190 of 2007.

4. The plaintiff sought and obtained an order of injunction restraining the 1st defendant from realizing the suit property pending the hearing and determination of the appeal. The said appeal is still pending. In the cause of time this suit was dismissed for want of prosecution but the same was later reinstated on **4th July, 2012** paving the way for Case Management, filing of Documents and Witness Statement and eventual hearing which took place between **10th June, 2015** and **23rd May, 2016**.

The Hearing

5. The Plaintiff called two (2) witnesses, being the plaintiff himself (PW1) and one **Wilfred A. Onono** (PW2), an accountant and consultant with Messrs Interest Rates Advisory Centre Limited (IRAC), while the defendant called one witness **Kennedy Kasamba** (DW1).

6. The Plaintiff's testimony as contained in his Witness Statement and orally in court echoed the claim in the plaint, while PW2's evidence tried to prove that the allegations of illegal charges and interests and penalties was correct. The defendant's (DW1's) evidence also appeared to support their defence. I will critically look at the entire evidence holistically and relate them to the issues for determination.

Issues for determination

7. The parties did not agree on issues for determination by Court. The Plaintiff filed its own version of the Statement of Issues on 27th March 2013 whereas the Defendant filed its own set on 16th April 2013. After reconciling those issues pursuant to pleadings and evidence, this court summarizes the issues for determination as follows:-

1. a) What was the agreed rate of interest in the charge document?
- b. Did the Charge document allow the Defendant to vary the interest rate at its sole discretion and without giving notice to the Plaintiff?
- c. If not, did the Defendant issue a proper notice to the Plaintiff to vary the interest rate upwards?
- d. Was there a regulation of the chargeable interest rate by CBK during the relevant period?
- e. Whether the Defendant has clogged the Plaintiff's right to redeem the suit property.
- f. Whether the Plaintiff is indebted to the Defendant in the sum of Kshs. 1,307,668.37/- or at all?
- g. Whether the Plaintiff was served with a valid statutory notice by the Defendant prior to the auction.

h. Whether the 1st Defendant has breached the provisions of the Central Bank of Kenya Act the CBK (Amendments) Act or the Banking Act as alleged by the Plaintiff or at all.

i. Whether the findings and calculations of Interest Rates Advisory Centre (IRAC) are correct and binding on the parties?

j. Did the Defendant credit the Plaintiff's account with all payments made by the Plaintiff?

k. Is the Defendant entitled to exercise its statutory power of sale over the suit property?

l. Did the Plaintiff promise to pay the alleged outstanding debt? If yes, is he estopped from denying the alleged debt at this juncture?

w. Whether the Plaintiff is entitled to the prayers sought in the Plaint or at all.

n. Who should pay the costs of this suit?

Plaintiff's case and submissions

8. The Plaintiff testified that he borrowed the principal sum of Kshs. 750,000/- only in the year 1996. The application for the loan was produced at page 4 to 6 of Plaintiff's exhibit 1. The loan was approved vide the Letter of Offer dated 9th April 1996 produced at page 10 to 17 of Plaintiff's exhibit 1. The Charge document signed between the parties is produced at page 16 to 31 of Plaintiff's Exhibit 1. These documents constitute the contract of lending between the parties.

9. At the time of applying for the loan the Plaintiff indicated that his basic salary was Kshs. 10,000/- whereas his gross salary was Kshs. 13,076/-. The plaintiff submitted that the defendant must have considered the income of the Plaintiff before accepting to advance the loan facility and the Defendant was under an obligation to ensure that it did not vary the contract of lending and/or increase the rate of interest and penalty charges drastically and unreasonably to the extent of clogging the Plaintiff's equity of redemption of the suit property.

10. The Plaintiff testified that before approval of the loan, the Defendant required the Plaintiff to deposit Kshs. 56,019/- being three (3) months instalments and the Plaintiff duly complied by depositing Kshs. 60,000/- in his savings account as reflected in the statement of account. The Defendant was supposed to utilize this deposit if the Plaintiff fell in arrears of payment but the evidence produced shows that the Defendant failed to do so until very late.(see pages 7,8 and 9 of the Plaintiff Exhibit 1).

11. PW1 testified that the Letter of Offer dated 9th April 1996 at page 10 to 15 of Plaintiff's exhibit 1 contains contradictory clauses regarding the manner of calculating and debiting interest to the Plaintiff's account. The first paragraph thereof merely states that the sum of Kshs. 750,000/- will be repaid with interest at 28% per annum, which denotes simple interest. On the other hand, clause 7 thereof states that interest will be applied at 28% per annum on compounded basis. A further contradiction is imminent in the Memorandum as to Advances clause 1(b) thereof which expressly states that;

“Interest is calculated on the amount of the advance to 31st December following the date of the advance and thereafter on the balance owing at the 1st January in each year. The Mortgage Deed or Charge confers on the company the right, on giving notice, to increase the rate of interest”

12. Plaintiff submitted that it is clear from the above clause 1(b) that interest was to be applied on simple method basis at the end of every year and **NOT** on compounded basis. It is submitted that from above clause, the Defendant was obliged to serve notice before increasing the rate of interest initially agreed in the Letter of Offer and/or before charging compound interest. The plaintiff submitted that the various clauses highlighted above contradict each other and it is not clear whether the Defendant was required to apply simple interest or compounded interest on the Plaintiff's account. However, it was submitted that the lending documents must be interpreted against the bank being the author and the benefit of contradiction given to the Plaintiff. The plaintiff urged the court to find that the 1st Defendant was supposed to apply simple interest on the Plaintiff's Mortgage account.

13. The Plaintiff accepted the Letter of Offer by signing an Acceptance Note on 24th April 1996 produced at page 15 of Plaintiff's exhibit 1. The Acceptance Note states as follows:-

“Having read the company's Memorandum as to Advances, I hereby accept the offer contained in the company's Letter of Offer dated 9th April 1996 subject to the conditions contained therein and in the said Memorandum as to Advances”

The plaintiff submitted that the Memorandum of Advances was a critical document and the Defendant was obliged to charge interest on simple method basis and to give notice before increasing the rate of interest from time to time. The Defendant was further under an obligation to ensure that the interest charged on the Plaintiff's account did not exceed the maximum rate which financial institutions may charge on advance facilities as laid down by Central Bank of Kenya in accordance with clause 7 of the Letter of Offer.

14. The Charge document dated 19th August 1996 was produced at page 16 to 31 of Plaintiff's Exhibit 1. Clause 3(i) thereof states that interest shall be applied at the rate of 28% per annum for the time being calculated on compounded basis and the

Defendant shall in its sole discretion charge such rate or rates of interest as the Defendant shall from time to time decide and that the Defendant shall not be required to advise the Plaintiff prior to any change in the rate of interest payable. PW1 testified that this clause contradicts the express provisions contained in the Letter of Offer and the Memorandum as to Advances as submitted above. The Defendant was not at liberty to vary the terms agreed in the application for the loan and in the Letter of Offer and charge compound interest at will without serving any notice as purported. The Plaintiff did not agree to contract under those terms and conditions in the Letter of Offer. In the circumstances, the plaintiff submitted that clause 3(i) of the Charge document is contradictory, null and void and urged the court to find so. The Defendant was obliged to calculate interest on simple method basis and to issue a notice prior to changing the rate of interest from 28% per annum as agreed in the Letter of Offer and the Memorandum as to Advances.

15. Clause 3(i) of the Charge document further expressly provides that in case of the Defendant charging higher interest than 28% per annum such higher interest was subject to the maximum rate stipulated by the Central Bank of Kenya from time to time. It was submitted that the Defendant was obliged to observe this clause in its dealings with the Plaintiff's account.

16. The plaintiff submitted that neither the Letter of Offer nor the Charge document granted the Defendant any permission to debit **penalty charges** on the Plaintiff's account. The Defendants Witness (DW1) expressly admitted during cross-examination that the Charge document did not contain any clause which enabled the Defendant to charge penalty charges. However, it is clearly evident in the Statements of Account that the Defendant charged interest beyond 28% per annum on compounded basis every month and also charged hefty penalty charges on arrears and other unexplained charges every month which were not permitted by the Charge document.

17. The plaintiff referred the court to the three (3) different sets of Statement of Account produced as Defendant's Exhibit 1 (page 29 to 51, Defendant's Exhibit 2) as well. The statements show as follows:-

- i. Interest is debited monthly instead of annually. This means compounded interest contrary to the terms and conditions of the Letter of Offer and the Charge document.
- ii. The account was debited with other charges called M.P.I from time to time, ledger fees, commission on cheques, fire premium which also attracted interest on compounded basic thereby rendering the debit balance in the Plaintiff's account to increase to unmanageable levels. These charges should have been debited separately, if at all, since they are not borrowed by the Plaintiff and the 1st Defendant is not entitled to interest thereon.

18. It was further submit that although the contract of lending required that the Defendant should serve notice before varying the rate of interest, the Defendant did not produce any notice served upon the Plaintiff during the tenure of the loan. The recalculations of IRAC produced by PW3 at page 37 to 55 of Plaintiff's Exhibit 1 shows that the Defendant charged excess interest rates. The court was urged to evaluate the evidence of PW3 and his analysis of the Plaintiff's account and find that it has validity.

19. On the basis of the foregoing, the plaintiff urged the court to determine the above issues and find as follows:-

- i. That the Charge document and the Letter of Offer are contradictory and the Defendant did not reserve the right to vary the rate of interest freely without notice.
- ii. That the Defendant did not issue any notice to the Plaintiff to vary the interest rate from time to time.
- iii. That the agreed rate of interest was 28% per annum and that the interest was to be calculated on simple method basis.
- iv. That the Defendant debited the Plaintiff's account with excessive interest and penalty charges contrary to the contract of lending and without justification and that such illegal charges are not recoverable.
- v. That the Defendant breached the terms of the Letter of Offer, the Charge document and the contract of lending between the parties.

20. The plaintiff also submitted on the following issues;

- i. Whether the Plaintiff is indebted to the Defendant in the sum of Kshs. 1,307,668.37/- or at all?
- ii. Did the Defendant credit the Plaintiff's account with all payments made by the Plaintiff?

At the time of filing this suit the 1st Defendant was demanding Kshs. 1,307,668.37 being the alleged debt due and owing from the Plaintiff as at 30th March 2006. The 2nd Defendant duly instructed by the 1st Defendant served a forty five (45) days' notice (**at page 33**) of Plaintiff's exhibit 1 threatening to auction the suit property to recover the alleged debt. It is the Plaintiff's case that the alleged debt is not properly due and owing to the 1st Defendant. It is further the Plaintiff's case that the 1st Defendant failed to keep proper accounts and/or to credit the account with all the payments made by the Plaintiff. The plaintiff submitted that the defendant has failed to demonstrate that the Plaintiff was indebted in the sum of Kshs. 1,307,668.37 or any debt at all. During the trial the 1st Defendant produced three (3) sets of statements of accounts which contained different figures and DW1 failed to explain this anomaly.

21. The first set of statement of account was produced at page 41 to 51 of Defendant's exhibit D1. This statement runs from the date of opening the account on 5th September 1996 upto 30th April 1999 only and it is the Plaintiff's case that it is incomplete and neither the alleged outstanding debt of Kshs. 1,307,668.37 as at 30th March 2006 or the current outstanding debt of Kshs. 3,567,554.95 is reflected anywhere. This, it should be noted is the original and genuine statement of account printed on the letterhead of the 1st Defendant yet it is incomplete. The 1st Defendant also produced at page 29 to 38 of Defendant's Exhibit 1 another set of statements of account which is printed on a plain paper without the letterhead of the bank neither are the statements signed or certified by the bank. At page 31 thereof the outstanding balance as at 30th March 2006 is reflected as Kshs. 973,181.83 and not Kshs. 1,307,668.37. The current balance alleged to be outstanding is also missing in this statement.

22. The third set of statement of account was produced at page 2 to 16 of Defendant's exhibit D2. The plaintiff submitted again that this set of statement is also not original neither is it stamped or certified by the 1st Defendant as a true copy of the original. It is merely printed on plain paper. Nonetheless, the outstanding debt as at 30th March 2006 is reflected as Kshs. 1,443,970.94 and not Kshs. 1,307,668.37. The Plaintiff's case is that during the hearing it demonstrated through cross-examination of the Defendant's witness DW1 that the entries/figures in the three (3) statements aforesaid do not tally. The other glaring differences in the Statement of Account produced by the 1st Defendant are demonstrated as follows:-

i. A close perusal and comparison of the original and genuine statement of account produced at page 41 to 51 of Defendant's Exhibit D1 and the statement produced as Exhibit D2 shows that only the first three (3) opening debit balances tally, namely on 6th September 1996, 30th September 1996 and 30th September 1996 which reflect a debit balance of Kshs. 750,000/-, 750,200/- and 764,587.24 respectively in both sets of statements. All the other monthly and yearly debit balances which appear thereafter in both statements do not tally and they reflect different amounts on different dates.

ii. The debit balances as at 30th March 2006 when the 1st Defendant threatened to exercise the statutory power of sale is different in all the three (3) statements.

iii. The credit (payment) of Kshs. 13,025/- made on 4th October 1996 is missing in the statement marked exhibit D2.

iv. The amount of Kshs. 3,567,554.95 alleged to be currently due and owing as per the evidence of DW1 is not reflected anywhere in the statements of account produced at page 41 to 51 and at page 29 to 38 of Defendant's Exhibit 1.

23. The Plaintiff further submitted that it was expressly admitted by DW1 during cross-examination that the statements of account contained the following other anomalies.

i. The sum of Kshs. 93,000/- paid on 12th February 1997 was missing.

ii. The sum of Kshs. 5,000/- paid on 26th August 1997 was missing.

iii. The sum of Kshs. 25,000/- paid on 9th August 2000 is missing.

iv. The sum of Kshs. 43,316.60 paid on 10th April 2003 is missing.

v. The lump sum payments made by the Plaintiff as reflected in the Schedule of payments (Plaintiff's Exhibit 2) were missing namely

<u>Date</u>	<u>Amount</u>
21.03.05	170,000/-
14.03.05	30,000/-
13.07.05	200,000/-
31.03.06	100,000/-

vi. The sum of Kshs. 200,000/- paid on 19th May 2005 was credited eight (8) months later on 30th March 2006 yet the 1st Defendant continued to accrue interest on the account.

24. DW1 freely admitted the above anomalies during cross examination and further admitted that the accounts were not properly kept by the 1st Defendant. He also offered to meet the Plaintiff and discuss a suitable settlement. On the basis of the glaring anomalies above. The plaintiff submitted that the 1st Defendant did not keep proper accounts as mandated by the law. Further, the 1st Defendant has failed to demonstrate that the Plaintiff is indebted to it in any manner whatsoever in the absence of proper accounts. It was submitted that the only legal and acceptable means of demonstrating that the Plaintiff was properly indebted to the 1st Defendant was through production in evidence of a complete, accurate and proper statement of account showing all the financial dealings in the Plaintiff's account.

25. The plaintiff asked the court to note that whereas the 1st Defendant failed to credit the amounts paid promptly or at all, it continued to debit the account with compound interest and to charge penalty interest on arrears as if no payment had been received contrary to the factual situation. This led to accumulation of illegal interest and penalty charges on arrears which were not properly due and owing being debited to the account and which made the account irredeemable hence leading to the plight of the Plaintiff.

26. The plaintiff urged the court to find that the 1st Defendant has charged and debited illegal interest and penalty charges to the Plaintiff's account. The court was also urged to find that the 1st Defendant did not credit the Plaintiff with all the payments made and that the statements of account produced by the 1st Defendant are not proper and/or correct.

27. As to whether the 1st Defendant has breached the provisions of the Central Bank of Kenya Act or whether the findings and calculations of Interest Rates Advisory Centre (IRAC) are correct and binding on the parties; the plaintiff submitted that the 1st Defendant as a licenced banking institution is obliged to comply with the provisions of The Banking Act Cap 488 of the Laws of Kenya and the Central Bank of Kenya Act Cap 491 by keeping proper and accurate statements of accounts for all the customers and to properly account for all monies received from its customers. The obligation placed on a bank is to act honestly and keep proper accounts for all the customers. The 1st Defendant failed to observe this requirement. Further, by altering the agreed rate of interest from simple interest to compounded interest, the 1st Defendant breached the express requirement under section 44 of the Banking Act Cap 488 of the Laws of Kenya.

28. The plaintiff also submitted that the evidence of PW3 (IRAC) is credible and the court should accept it. It was submitted that PW3 carried out an independent audit of the Plaintiff's account and discovered that the 1st Defendant was not keeping the Plaintiff's account in a proper manner. The Plaintiff produced a schedule of payments and receipts (Plaintiff's exhibit 2) as proof that he had paid in excess of Kshs. 2,070,233.25 to the 1st Defendant. PW3 also came to the conclusion that the Plaintiff's account ought to reflect a credit balance of Kshs. 204,703.25. It was submitted that the evidence and finding of PW3 in this regard is well supported and sufficiently demonstrated in his report produced at page 37 to 55 of the Plaintiff's exhibit 1.

29. The Plaintiff further submitted that it has never acknowledged the debt or promised to pay as alleged despite the enormous pressure and stress exerted on him by the 1st Defendant for many years. In all the letters written by the Plaintiff to the 1st Defendant which were produced in evidence, the Plaintiff was expressly complaining about the hefty interest being applied on his account and the 1st Defendant's apparent failure to keep proper accounts.

30. The Plaintiff further testified that sometime in the year 2005 he held a meeting with the Debt Recovery Manager of the 1st Defendant and he was allowed to pay a total of Kshs. 700,000/- in full and final settlement of the alleged outstanding debt. Correspondence in this respect was produced at page 92 and 93 of Plaintiff's exhibit 1. The Plaintiff testified that on the basis of this agreement, he made lump sum payments on 21st February 2005, 20th July 2005 and 31st March 2006. The said lump sum payments are reflected in the Schedule of Payment produced as Plaintiff's Exhibit 2. The Plaintiff however stated that after making the said lump sum payments, the 1st Defendant reneged on the agreement. This was the only time the Plaintiff acknowledged the debt and he in fact paid off what was agreed upon. However, besides reneging on the promise, it was submitted that the 1st Defendant never credited the lump sum payments as submitted above.

31. Arising from the above the Plaintiff submitted that the 1st Defendant has not sufficiently demonstrated that the Plaintiff is indebted to it. The amount which the 1st Defendant is claiming from the Plaintiff is not certain and DW1 expressly admitted that it was not possible to determine the proper outstanding debt, if any, from the statements produced in evidence which show different figures. More importantly, the 1st Defendant did not file any counter-claim against the Plaintiff for recovery of any debt which may be outstanding as alleged and the suit has now been heard fully and concluded. It was submitted that the 1st Defendant was obliged in law to file and prove a counter-claim against the Plaintiff if indeed any money is due and owing from the Plaintiff. In the absence of a counter-claim, the 1st Defendant is estopped in law from re-opening this issue in any other forum and/or from demanding any debt from the Plaintiff in future. Further, the Plaintiff submitted that the 1st Defendant cannot exercise the statutory power of sale to recover an unknown or uncertain debt more so when the statements produced in evidence are manifestly erroneous as demonstrated in evidence. There cannot be any justification therefore for the 1st Defendant to exercise its power of sale and/or to continue retaining the Plaintiff's Title.

32. The Plaintiff submitted further that evidence produced has sufficiently demonstrated that the Plaintiff has paid the 1st Defendant in excess of Kshs. 2,070,233.25 against the principal amount of Kshs. 750,000/- only which was borrowed 20 years ago in 1996. The Plaintiff has therefore paid approximately three (3) times the principal amount borrowed yet the 1st Defendant is still demanding more without showing any proper basis for demanding further money. It was submitted that the 1st Defendant is estopped from recovering any further money under the "in duplum" rule amplified in Section 44 A (6) of the Banking Act which came into operation on 1st May 2007 vide legal Notice No. 52 of 20th April 2007 which states that upon the loan becoming non-performing, the mortgage shall cease to apply further interest on the loan if the interest accrued exceeds the principal loan advanced. It was submitted that the Plaintiff's loan became non-performing in March 2006 when the 1st Defendant threatened to exercise the statutory power of sale and section 44 A (6) of the Banking Act is applicable.

33. Plaintiff submitted that it has sufficiently demonstrated that he has fully repaid the mortgage debt together with any lawfully accrued interest thereon and that the 1st Defendant is not entitled to demand and/or recover any further money from him. The plaintiff urged the court to grant the prayers sought in the Plaint and to order the 1st Defendant to discharge the suit property forthwith and unconditionally. They also prayed for the costs of the suit.

Defendant's Case and Submissions

34. In their submissions the defendant quoted the plaintiff's PW1 in paragraph 5 of his Statement as follows:

"... principal sum of Kshs. 750,000/= secured by the Charge together with interest thereon was payable within a period of approximately ten (10) years by monthly instalments of Kshs. 19,700/=. At the time of charging my property, I understood that the amount payable to the Defendant would not exceed the maximum sum of Kshs. 2,340,000/= if I decided to repay the loan within the period of Ten (10) years".

35. The Defendant submitted that at the trial, the Plaintiff did admit that the total sum repaid by him did not reach the sum of Kshs. 2,340,000/= and therefore, his allegation of redemption and or overpayment could not be further from the reality. Further, as at 2006 when this suit was filed, the loan was still due. In paragraph 6 of his Statement, the Plaintiff stated as follows:

"... interest would be charged on the principal loan on a reducing balance method at the rate of 28% per annum and that the 1st Defendant would not vary the agreed rate of interest upwards without serving me with a proper notice requiring payment of such higher interest..."

36. The Plaintiff also stated as follows in paragraph 15 of his statement:

"I am further advised by Mr. Onono who is the Managing Consultant at IRAC...(ii) The 1st Defendant has applied interest in excess of 19% p.a. from September 1996 upto 17th April 1997 in excess of the maximum rate of interest prescribed by the provisions of the Central Bank of Kenya Act and the Banking Act at that time".

37. PW2, Winfred A. Onono from IRAC stated as follows in his evidence:

In paragraph 9.6.7 of his statement he stated follows:

"Between 18th April 1997 and 31st December 2000, the interest rates regime was contractual, between Lenders and Borrowers".

38. The defence submitted that during cross-examination, PW 2 admitted that **"the CBK decontrolled interest rates in 1991"** (see Gazette Notices Nos. 1617 and 3348 appearing at pages 12 and 13 of the Plaintiff's Bundle 3). When the Governor of the CBK revoked Gazette Notice No. 1617 at page 12 of the Plaintiff's Bundle 3, which fixed the rates of interest at 19% p.a. he left the market to decide and contract the rates of interest;

39. The defence submitted that the lending between the Plaintiff and the 1st Defendant took place in or about 5th September 1996. Essentially, the short lived amendment to the CBK Act made in 2002, and which was soon thereafter declared unconstitutional, did not and could not affect the relationship between the Plaintiff and the 1st Defendant.

40. **Kennedy Kasamba (DW 1)** stated in paragraph 6 of his Witness Statement as follows:

"I wish to state that the interest to be charged by the 1st defendant was to be pegged on the maximum rate, if any set by the Central Bank of Kenya. I however do point out that for the duration of the existence of the relationship between the plaintiff and the 1st defendant, the Central Bank of Kenya has not set the interest rate caps whatsoever".

41. The defence also submitted that during cross-examination, the Plaintiff admitted that he was infrequent in repayments, and that the payments he made never reached Kshs. 2,340,000/=. The Defendant observed that in his expert report, PW2 confirms that during the entire period of the mortgage, the 1st Defendant charged rates varying between 19% p.a. to 28% p.a. The rate of interest varied between 19% p.a. 28%, 26% p.a. 18.16% p., 19.12% p.a. 19.40% p.a. 17.92% p.a. 15.80 % p.a. etc. The rate continues to decrease according to the analysis by PW 2. The Defendants submitted that the Plaintiff's complaints on the variations of interest rates above the rate of 28% p.a. provided for in the charge document are unfounded. The defence submitted that the evidence adduced by both parties belies the Plaintiff's argument that the 1st Defendant raised the agreed interest rate of 28% p.a. or that the 1st Defendant charged a higher rate than that provided for under the agreements between the parties.

42. The Defendants case is that the trial was awash with evidence of the Plaintiff's default. Apart from the Plaintiff's admissions, there was evidence in the statement of account of non-payment for long periods and even when the Plaintiff made repayments in bigger sums, they came after application of interest and bank charges. During cross-examination, the defence submitted that the Plaintiff admitted that he defaulted in making the monthly instalments during the months of November and December 1996, January 1997 amongst other periods. He also admitted that he was infrequent in making his repayments. The Plaintiff also admitted that his total repayments had not even reached the sum of Kshs. 2,340,000/= that he was expected to repay as outlined above.

43. The defence further observed that **PW 2, Mr. Onono** also admitted that the Plaintiff defaulted in his repayments. The defence submitted that given the above scenarios, there is no way the court can properly conclude that the plaintiff had redeemed his loan. The defence urged the court to find that the Plaintiff defaulted in repaying his mortgage.

44. The defence observed that the Plaintiff admitted that the sum of Kshs. 1,015/= that he had indicated as a repayment under item 11 of the Schedule of payments (see page 2 of Bundle 2 by the Plaintiff) was for payment of electricity to Kenya Power and Lighting Co Ltd (KPLC). Indeed the payment was shown to have been paid into account number 210 580 005 as per the second slip at page 7 of Bundle 2. Therein on the slip is a stamp written "Kenya Power and Lighting Co Ltd".

45. The Plaintiff also admitted that the sum of Kshs. 93,000/= which was listed under item 64 of the Schedule of Payments at page 3 of Bundle 2 was actually credited to his mortgage account at page 44 of the Defendants D1. These payments were repeated because he had already listed the sum of Kshs. 93,000/= under items 1, 2, 5 and 6 of the same schedule. The Plaintiff admitted that the breakdown as put to him with respect to items 1, 2, 5 and 6 was explained to him in a letter dated 27th February 1997. The transfer of the sum of Kshs. 93,000/= from the Savings Account to the Loan Account was undertaken after his express request for the bank to transfer the money from the Savings account to the Loan account. Therefore, the defence submitted, it was not that the bank delayed in making the payment or transfer from the Savings to the Loan Account.

46. During cross-examination, the Plaintiff denied that the sum actually paid by him was the sum listed in his Schedule of Payments less the Repeated amounts i.e. Kshs. 1,848,315/= less Kshs. 246,700/= leaving the total payments by the Plaintiff to be Kshs. 1,601,615/=. However, the defence submitted once the court considers the matters in full context, the court will agree that the Plaintiff's payments are as shown herein, that is, Kshs. 1,761,916/=.

47. PW 2 (Mr. Onono) did testify and when questioned on his report, he stated that as per his assessment, the Plaintiff had repaid the sum of Kshs. 1,289,025/=. When questioned both by the Defendants' counsel and the court, PW 2 stated that he would go by the Plaintiff's alleged repayment figure of Kshs. 1,848,315/=. On this basis the defence submitted that the allegations that the 1st Defendant had not kept proper records was not true.

48. DW 1 gave evidence on behalf of the bank. In summary, the witness stated that the 1st Defendant had recomputed the figures involved and established that the Plaintiff had repaid the sum of Kshs. 1,761,916/= against the Plaintiff's alleged repayments of Kshs. 1,848,315/=.

49. DW 1 also stated that the failure by the Plaintiff to repay the debt had led to application of interest. He testified that the sum that the 1st Defendant was demanding from the Plaintiff was Kshs. 1,314,351.41cts.

50. During cross-examination, the plaintiff alleged that there were differences in the statements of account produced by the 1st Defendant. However, the defence submitted that this approach by the Plaintiff overlooked the reality that by his own admission, the Plaintiff had not even repaid the sum of Kshs. 2,340,000/= that he contracted to repay to the bank within a period of ten (10) years as the mortgage debt. Further, there was continuing accrual of interest due to default in prompt monthly repayments. The defence case is that even by the admission of his expert witness, PW 2, Mr. Onono, the Plaintiff had defaulted severally and he had not reached the threshold of Kshs. 2,340,000/= in his repayments. On this ground the defendants submitted that the Plaintiff's claim for an order of accounts should be dismissed. In any event, there was ample evidence that the 1st Defendant kept the Plaintiff fully informed about the loan account. As a matter of fact, DW 1 did include some payments in his analysis of the Plaintiff's account which even the Plaintiff had not included in his schedule of repayments.

51. On the Plaintiff's plea for Discharge of Charge to his property, the Defendants submitted that the Plaintiff has not proved that he has redeemed his property. The Plaintiff has not proved that he has overpaid the debt. The Plaintiff has admitted being in default of his obligations to repay the debt. The Plaintiff has failed to show that he repaid the sum of Kshs. 2,340,000/= which was liable to repay if he had paid his loan promptly and within Ten (10) years. The Plaintiff has not shown that the 1st Defendant has failed to credit his repayments. The Defendants urged the court to dismiss the Plaintiff's suit with costs.

The Determination

52. I have carefully considered the pleadings and submissions of the parties. I have also considered the issues raised by the parties for determination. I have reconciled those issues, and I raise the following issues for the court's determination;

- i. What was the agreed rate of interest in the letter of offer and in the charge document?
- ii. Could the rate of interest be varied without notice to plaintiff?
- iii. Whether there was a regulation of the chargeable interest rate by the CBK during the relevant period.
- iv. Whether the defendant has clogged the plaintiff's right to redeem his property.
- v. Whether the plaintiff is indebted to the defendant in the sum of Kshs. 1,307,668.37 or at all.
- vi. Is the defendant entitled to exercise its statutory power of sale over the suit property?
- vii. In *Duplum Rule*.
- viii. Costs.

53. It is important to note that the parties had identified quite a number of issues for determination. However, it is the view of

this court that not all the said issues need to be determined, since some of them would automatically be determined upon the determination of the above issues I have raised for determination.

54. I will deal with issue numbers 1 to 3 together as they all address the issue of interest. These issues are – what was the agreed rate of interest, and whether the same could be varied without notice to the plaintiff, and whether the same was regulated by CBK during the relevant period.

55. What is to be noted in these regard is that interest was agreed at 28% per annum the same to be varied only with notice to the plaintiff. This rate also was not to exceed that as regulated by the CBK. The other issue is whether or not the interest rate charged would be simple or compounded.

56. PW1 testified that the Letter of Offer dated 9th April 1996 at page 10 to 15 of Plaintiff's exhibit 1 contains contradictory clauses regarding the manner of calculating and debiting interest to the Plaintiff's account. The first paragraph thereof merely states that the sum of Kshs. 750,000/- will be repaid with interest at 28% per annum, which denotes simple interest. On the other hand, clause 7 thereof states that interest will be applied at 28% per annum on compounded basis. A further contradiction is found in the Memorandum as to Advances clause 1(b) thereof which expressly states that

“Interest is calculated on the amount of the advance to 31st December following the date of the advance and thereafter on the balance owing at the 1st January in each year. The Mortgage Deed or Charge confers on the company the right, on giving notice, to increase the rate of interest”

57. Plaintiff submitted that it is clear from the above clause 1(b) that interest was to be applied on simple method basis at the end of every year and not on compounded basis. According to the Plaintiff, the Defendant was obliged to serve notice before increasing the rate of interest initially agreed in the Letter of Offer and/or before charging compound interest. The plaintiff submitted that the various clauses highlighted above contradict each other and it is not clear whether the Defendant was required to apply simple interest or compounded interest on the Plaintiff's account. However, it was submitted that the lending documents must be interpreted against the bank being the author and the benefit of contradiction given to the Plaintiff. The plaintiff urged the court to find that the 1st Defendant was supposed to apply simple interest on the Plaintiff's Mortgage account.

58. The Plaintiff accepted the Letter of Offer by signing an Acceptance Note on 24th April 1996 produced at page 15 of Plaintiff's exhibit 1. The Acceptance Note states as follows:-

“Having read the company's Memorandum as to Advances, I hereby accept the offer contained in the company's Letter of Offer dated 9th April 1996 subject to the conditions contained therein and in the said Memorandum as to Advances”

The plaintiff submitted that the Memorandum of Advances was a critical document and the Defendant was obliged to charge interest on simple method basis and to give notice before increasing the rate of interest from time to time. The Defendant was further under an obligation to ensure that the interest charged on the Plaintiff's account did not exceed the maximum rate which financial institutions may charge on advance facilities as laid down by Central Bank of Kenya in accordance with clause 7 of the Letter of Offer.

59. The Charge document dated 19th August 1996 was produced at page 16 to 31 of Plaintiff's Exhibit 1. Clause 3(i) thereof states that interest shall be applied at the rate of 28% per annum for the time being calculated on compounded basis and the Defendant shall in its sole discretion charge such rate or rates of interest as the Defendant shall from time to time decide and that the Defendant shall not be required to advise the Plaintiff prior to any change in the rate of interest payable. PW1 testified that this clause contradicts the express provisions contained in the Letter of Offer and the Memorandum as to Advances Clause. The Defendant was not at liberty to vary the terms agreed in the application for the loan and in the Letter of Offer and charge compound interest at will without serving any notice as purported. The Plaintiff did not agree to contract under those terms and conditions in the Letter of Offer. In the circumstances, the plaintiff submitted that clause 3(i) of the Charge document is contradictory, null and void and urged the court to find so. The Defendant was obliged to calculate interest on simple method basis and to issue a notice prior to changing the rate of interest from 28% per annum as agreed in the Letter of Offer and the Memorandum as to Advances.

60. Clause 3(i) of the Charge document further expressly provides that in case of the Defendant charging higher interest than 28% per annum such higher interest was subject to the maximum rate stipulated by the Central Bank of Kenya from time to time. It was submitted that the Defendant was obliged to observe this clause in its dealings with the Plaintiff's account.

61. The plaintiff submitted that neither the Letter of Offer nor the Charge document granted the Defendant any permission to debit **penalty charges** on the Plaintiff's account. The Defendants Witness (DW1) expressly admitted during cross-examination that the Charge document did not contain any clause which enabled the Defendant to charge penalty charges. However, it is clearly evident in the Statements of Account that the Defendant charged interest beyond 28% per annum on compounded basis every month and also charged hefty penalty charges on arrears and other unexplained charges every month which were not permitted by the Charge document.

62. The plaintiff referred the court to the three (3) different sets of Statement of Account produced as Defendant's Exhibit 1 (page 29 to 51, Defendant's Exhibit 2) as well. The statements show as follows:-

i. Interest is debited monthly instead of annually. This means compounded interest contrary to the terms and conditions

of the Letter of Offer and the Charge document.

ii. The account was debited with other charges called M.P.I from time to time, ledger fees, commission on cheques, fire premium which also attracted interest on compounded basis thereby rendering the debit balance in the Plaintiff's account to increase to unmanageable levels. These charges should have been debited separately, if at all, since they are not borrowed by the Plaintiff and the 1st Defendant is not entitled to interest thereon.

63. It was further submit that although the contract of lending required that the Defendant should serve notice before varying the rate of interest, the Defendant did not produce any notice served upon the Plaintiff during the tenure of the loan. The re-calculations of IRAC produced by PW3 at page 37 to 55 of Plaintiff's Exhibit 1 shows that the Defendant charged excess interest rates. The court was urged to evaluate the evidence of PW3 and his analysis of the Plaintiff's account and find that it has validity.

64. However, the defendant controverted the above by quoting PW2, **Wilfred Onono** as follows;

65. PW2, **Winfred A. Onono** from IRAC stated as follows in his evidence:

In paragraph 9.6.7 of his statement he stated as follows:

"Between 18th April 1997 and 31st December 2000, the interest rates regime was contractual, between Lenders and Borrowers".

66. The defence further submitted that during cross-examination, PW 2 admitted that **"the CBK decontrolled interest rates in 1991"** (see *Gazette Notices Nos. 1617 and 3348 appearing at pages 12 and 13 of the Plaintiff's Bundle 3*). When the Governor of the CBK revoked Gazette Notice No. 1617 at page 12 of the Plaintiff's Bundle 3, which fixed the rates of interest at 19% p.a. he left the market to decide and contract the rates of interest;

67. Arising from the foregoing, this court finds that the Charge document and the Letter of Offer are contradictory and the Defendant did not reserve the right to vary the rate of interest freely without notice. The court also finds that the Defendant did not issue any notice to the Plaintiff to vary the interest rate from time to time. It is further the finding of this court that the agreed rate of interest was 28% per annum and that the interest was to be calculated on simple method basis. The Defendant debited the Plaintiff's account with excessive interest and penalty charges contrary to the contract of lending and without justification and that such illegal charges are not recoverable. In effect the Defendant breached the terms of the Letter of Offer, the Charge document and the contract of lending between the parties.

68. This brings me to the next issue, that is, whether the Defendant has clogged the plaintiff's right to redeem his property. This issue is critical in the sense that its determination depends on the competence with which a bank manages a customer's account. Certain acts of negligence, which may not be intended by the bank, may end up clogging a customer's right to redeem his property. A loan is given out by a bank on certain terms as to amount to be repaid, when the same is to be done, how much interest is to be paid during which period, and what interest penalty shall apply upon which faults. A variation of any of these terms can positively or negatively affect the plaintiff's right to redeem his property. An example is where the plaintiff, say, deposits Kshs. 200,000 meant for the loan account, but the same is deposited by the bank into a savings account. This misdeposition could have a tremendous effect on the loan, interests and penalties chargeable.

68. In the case at hand, the plaintiff has submitted that his loan account was seriously mismanaged right from the start, where deposits meant to the loan account were put into his savings account, interest and penalties charged were not known, and that even the amount the defendant is demanding from the plaintiff is not known. At the time of filing this suit the 1st Defendant was demanding Kshs. 1,307,668.37 being the alleged debt due and owing from the Plaintiff as at 30th March 2006. The 2nd Defendant duly instructed by the 1st Defendant served a forty five (45) days' notice (at page 33) of Plaintiff's exhibit 1 threatening to auction the suit property to recover the alleged debt. The plaintiff submitted with the concurrent of this court that the defendant has failed to demonstrate that the Plaintiff was indebted in the sum of Kshs. 1,307,668.37 or any debt at all. During the trial the 1st Defendant produced three (3) sets of statements of accounts which contained different figures and DW1 failed to explain this anomaly.

69. The first set of statement of account was produced at page 41 to 51 of Defendant's exhibit D1. This statement runs from the date of opening the account on 5th September 1996 upto 30th April 1999 only and it is therefore incomplete and neither the alleged outstanding debt of Kshs. 1,307,668.37 as at 30th March 2006 or the current outstanding debt of Kshs. 3,567,554.95 is reflected anywhere. This, it should be noted is the original and genuine statement of account printed on the letterhead of the 1st Defendant yet it is incomplete. The 1st Defendant also produced at page 29 to 38 of Defendant's Exhibit 1 another set of statements of account which is printed on a plain paper without the letterhead of the bank neither are the statements signed or certified by the bank. At page 31 thereof the outstanding balance as at 30th March 2006 is reflected as Kshs. 973,181.83 and not Kshs. 1,307,668.37. The current balance alleged to be outstanding is also missing in this statement.

70. The third set of statement of account was produced at page 2 to 16 of Defendant's exhibit D2. This set of statement is also not original neither is it stamped or certified by the 1st Defendant as a true copy of the original. It is merely printed on plain paper. Nonetheless, the outstanding debt as at 30th March 2006 is reflected as Kshs. 1,443,970.94 and not Kshs. 1,307,668.37. During the hearing the Plaintiff demonstrated through cross-examination of the Defendant's witness DW1 that the entries/figures in the three (3) statements aforesaid do not tally. The other glaring differences in the Statement of Account

produced by the 1st Defendant disclose anomalies as follows: A close perusal and comparison of the original and genuine statement of account produced at page 41 to 51 of Defendant's Exhibit D1 and the statement produced as Exhibit D2 shows that only the first three (3) opening debit balances tally, namely on 6th September 1996, 30th September 1996 and 30th September 1996 which reflect a debit balance of Kshs. 750,000/-, 750,200/- and 764,587.24 respectively in both sets of statements. All the other monthly and yearly debit balances which appear thereafter in both statements do not tally and they reflect different amounts on different dates. The debit balances as at 30th March 2006 when the 1st Defendant threatened to exercise the statutory power of sale is different in all the three (3) statements. The credit (payment) of Kshs. 13,025/- made on 4th October 1996 is missing in the statement marked exhibit D2. The amount of Kshs. 3,567,554.95 alleged to be currently due and owing as per the evidence of DW1 is not reflected anywhere in the statements of account produced at page 41 to 51 and at page 29 to 38 of Defendant's Exhibit 1.

71. Furthermore, it was demonstrated in evidence and expressly admitted by DW1 during cross-examination that the statements of account contained the following other anomalies. The sum of Kshs. 93,000/- paid on 12th February 1997 was missing. The sum of Kshs. 5,000/- paid on 26th August 1997 was missing. The sum of Kshs. 25,000/- paid on 9th August 2000 was missing. The sum of Kshs. 43,316.60 paid on 10th April 2003 was missing. The lump sum payments made by the Plaintiff as reflected in the Schedule of payments (Plaintiff's Exhibit 2) were missing namely –

<u>Date</u>	<u>Amount</u>
21.03.05	170,000/-
14.03.05	30,000/-
13.07.05	200,000/-
31.03.06	100,000/-

The sum of Kshs. 200,000/- paid on 19th May 2005 was credited eight (8) months later on 30th March 2006 yet the 1st Defendant continued to levy interest and penalty charges on the account. Although most of the alleged missing sums were later accounted for in evidence, the way the accounts were kept cannot lay a satisfactory basis for believing the Defendant's explanations.

72. DW1 freely admitted the above anomalies during cross examination and further admitted that the accounts were not properly kept by the 1st Defendant. He also offered to meet the Plaintiff and discuss a suitable settlement. On the basis of the glaring anomalies above this court finds that the 1st Defendant did not keep proper accounts as mandated by the law. Further, the 1st Defendant has failed to demonstrate that the Plaintiff is indebted to it in any manner whatsoever in the absence of proper accounts. The only legal and acceptable means of demonstrating that the Plaintiff was properly indebted to the 1st Defendant was through production in evidence of a complete, accurate and proper and verifiable statements of account showing all the financial dealings in the Plaintiff's account. It is apparent that some of the statements produced by the 1st Defendant are not generated in the ordinary course of maintaining the account, and appear to have been re-calculated, generated and printed on plain paper by the 1st Defendant for the specific purpose of plunging the many mistakes which the 1st Defendant has committed during the tenure of the account including failing to give credit to the Plaintiff promptly every time he made the payments. There is no justification why the 1st Defendant should have three (3) sets of statements which do not tally instead of one statement of account. This fact alone is sufficient to tilt the court's decision in favour of the Plaintiff.

73. Although the defendant has tried to show that the plaintiff's account was properly managed, it has done so merely by attempting to correct errors which actually existed in the account. This court takes notice that such errors should in the first instance be noted by the bank rather than by the customer. It is the bank that is obligated to keep proper accounts and entries; it is the bank that is obligated to provide proper accounts. When the bank issues different sets of accounts or statements which are conflicting on the same issue, it is difficult to know where the truth lies. This has the effect of creating a doubt as to who is telling the truth. Wherever such a doubt exists between a bank and its customer, the court will naturally give the benefit of the doubt to the customer. In this regard, this court is satisfied that the plaintiff has proved that his loan account as kept by the bank were so carelessly and unprofessionally kept, that it is difficult to know what amount of the loan has been paid and what is outstanding, and that the conflicting positions on this issue between the plaintiff, **PW2 Mr. Onono**, and the 1st defendant bank is a clear indication of the uncertainties herein. That the bank intends to exercise its statutory power of sale over the suit property without making a monetary counter-claim in this matter is a clear proof that even the bank does not know what, if any, is owed to it by the plaintiff. This is a serious indictment on the part of the bank for failure to keep dependable account records. The plaintiff had prayed for accounts to be rendered. Of course the defendant has dismissed the prayer. The obvious reason is that there are no such accounts and the court cannot issue orders in vain.

74. It is the finding of this court that the defendant by the negligence and unprofessional way of keeping and managing the plaintiff's loan account has clogged the plaintiff's right to redeem his property. The effect of this finding is that it is highly doubtful whether the plaintiff owes the defendant alleged sum of Kshs.1,307, 668.37 or indeed any money at all, and the fact that the 1st defendant bank has not made and counterclaim of the same is not any helpful.

Is the defendant entitled to exercise its statutory power of Sale over the suit property?

75. A bank cannot purport to exercise its power of sale when the bank as a lender does not know what it is owned by a debtor,

and more importantly for this case, does not even make any counter-claim. What then would be the basis for exercising its power of sale? It is the finding of this court that the plaintiff has established on a balance of probability a case for permanent injunction against the 1st defendant bank restraining the 1st defendant and the 2nd defendant from exercising any purported statutory power of sale over the suit property.

76. The court is satisfied that a prayer for permanent injunction against the sale of the suit property has been proved on a balance of probability on the basis that either the mortgage debt has been fully repaid by the plaintiff, or as stated above, the defendant has clogged the plaintiff's right to redeem its property. However, a prayer for damages under paragraph 16 of the plaint has not been proved by the plaintiff and the same is not allowed.

77. In the upshot, Judgment is entered for the Plaintiff against the Defendants as follows:

a. A permanent injunction restraining the Defendants and each of them whether by themselves, their 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 L.R. No. 209/10480/152, situated in Amboseli Court, South C, Nairobi.

b. It is hereby declared 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 a breach and variation of the contract of lending, The Offer Letter and the Mortgage Contract.

c. It is hereby declared that the Plaintiff has paid the mortgage fully and an Order hereby issues directing the 1st Defendant to prepare, sign and deliver to the Plaintiff a Discharge of Charge over the property known as L.R. No. 209/10480/152, Amboseli Court, South C, Nairobi.

d. Costs of this suit together with interest thereon at court rates shall be for the Plaintiff.

E. K. O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2017

LADY JUSTICE G. NZIOKA

JUDGE