REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL CASE NO. 315 OF 2017

GOLDEN SERVICES ORGANIZATION.....1ST PLAINTIFF

KANG'ALIKYA MALUKI.....2ND PLAINTIFF

IBRAHIM MURITHI MAGIRI.....3RD PLAINTIFF

PAUL JESSE MUNGATIA.....4TH PLAINTIFF

= VERSUS =

SIDIAN BANK LIMITED.....DEFENDANT

J U D G E M E N T

1. The plaintiffs herein have sued the defendant vide their plaint dated 28th August 2017 and amended on 7th Feb 2019 praying that judgment be entered in their favour in the following terms;

a) An order of permanent injunction to restrain the Defendant, their servants, auctioneers, licensees, agents or any other persons acting on their behalf from howsoever advertising for sale, selling, auctioning, alienating, transferring, disposing, dispossessing or in any way interfering with the right of ownership and proprietorships to LR. No. Mombasa/Shanzu Squatter/1464, Title Number Gaturi/Githimu/5556, Title Number Kilifi/Kijipwa/369 and CR. 21195/1 a sub-division of MN/111/1512.

b) An order for the immediate release of all Title security documents in respect of LR. No. Mombasa/Shanzu Squatter/1464, Title Number Gaturi/Githimu/5556, Title Number Kilifi/Kijipwa/369 and CR. 21195/1 a subdivision of MN/III/1512 as well appropriate documents of discharge for each title.

c) An order directed to the defendant to pay the first plaintiff a sum of Kshs.142,806,841.00 being the value of lost income and business consequent to the material breach of contractual obligations plus interests at commercial rates with effect from 28th July, 2017.

d) General damages.

e) Costs of the suit plus interests.

f) Any other or further relief as this court may deem fit and just to grant.

2. It is pleaded that the first plaintiff has been operating table banking services for women and youth since 2005 within the Coastal region. That it has been banking with the defendant then known as K-REP bank Limited. The plaintiff stated that the 1st plaintiff would borrow monies for working capital from the defendant which it has been faithfully repaying for almost 10 years since November 2007 when it got its first loan.

3. That due to good repayments and growth the 1st plaintiff borrowed more sums against the titles Gaturi/Gathimu/5556 registered in name of the 3rd plaintiff Mombasa/Shanzu Squatter/1464 registered in the name of 2nd plaintiff and Kilifi/Kijipwa/369 and charge over CR 21195/1 both registered in name of Paul Jesse Mungatia. The plaintiffs continued that on further advice from the defendant and the inherent need to grow its business, the 1st plaintiff applied for a loan facility of Kshs.50 million which loan would inter alia convert the existing unsolicited and expensive overdraft of Kshs.2 million and all the previous securities be replaced by one security and a charge over title No. Kwale/Mswambeni A/2910.

4. The plaintiffs pleaded that the said loan was approved and a letter of offer executed on 25/1/2016 and a charge registered over Kwale/Mswambweni A/2910 on 2/2/2016. That however without any reason and after 9 months, the defendant reneged on the loan of the Kshs.50 million without releasing the other securities or the newly charged security and its guarantors as previously undertaken. The 1st plaintiff stated that it had promised its clientele funds and made elaborate business plans in anticipation of the further capital injection.

5. That the 1st plaintiff severally pleaded with the defendant to disburse the funds or release the securities in vain. It is pleaded that because of this decline and material breach, the 1st plaintiff who was already feeling the heat of the delayed disbursements got into severe financial crisis, and for the first time since 2007 was unable to service the existing facilities.

6. The plaintiffs accused the defendant of thereafter engaging in intimidation and harassment by threatening to foreclose and recalled the full loans. The 1st plaintiff plea for indulgence and or short term loan of Kshs.4 million fell on deaf ears. The plaintiff further pleaded that it suddenly started making losses and its auditors are projecting a loss of earning amounting to Kshs.142,806,841 for the period stretching to December 2021 directly attributable to the defendant's action and which amount the 1st plaintiff claims from the defendant.

7. The plaintiffs pleaded further that the defendant did not discharge the title Kwale/Mswambweni "A"/2910 until March 2017. Neither did the defendant remove the loan processing fee of over Kshs.750,000 nor refund the legal expenses of Kshs.691,150 for charging the Msambweni property. That the defendant was envious of the business of the 1st plaintiff and plotted to sabotage and kill it.

8. Lastly, it is pleaded that the defendant has not served the plaintiffs with any statutory notice for 90 days or the 40 days and yet the defendant through ANTIQUE Auctioneers purported to issue a 45 days' redemption notice on 26/7/2017 and purportedly served on 27/7/2017 but actually delivered on 10/8/2017 to the 1st plaintiff's premises. The plaintiffs averred further that no valuation of the charged properties have been done nor notice to spouses of the individual guarantors given. Wherefore, the plaintiffs pray for judgment against the defendant as set out in paragraph 1 above.

9. The plaintiffs' suit was supported by the bundles of documents and witnesses' statements filed on 29/8/2017 and the supplementary bundle filed on 25/1/2019.

10. The suit is defended vide a statement of defence filed on 27th September 2017. The defendant pleaded that;

a) By an offer letter dated 1/11/2007, the Bank made available the first facility to the Customer. It

was an Overdraft Facility in the sum of Kshs.500,000.

b) By an offer letter dated 30/10/2009, the Bank made the second facility available to the Customer. It was a Kshs.3,000,000.00, term loan.

11. That the loan was secured by a legal charge over Mombasa/Shanzu Squatter/1464 for Kshs.2 million. That the 1st plaintiff applied for and were granted additional facilities on 15/10/2011 and 7/10/2013 which facilities were to be secured by;

(i) Existing legal charge dated 6/1/2010 over Mombasa/Shanzu Squatter/1464 registered in the name of the 2nd plaintiff to cover Kshs.2,000,000.

(ii) Existing further legal charge dated 19/12/2011 over Mombasa/Shanzu/1464 registered in the name of the 2nd plaintiff for Kshs.800,000.

(iii) Personal Guarantee and indemnity by the 2nd plaintiff.

(iv) Legal charge over Shanzu Settlement Scheme/1321 registered in the name of Garama Randu Mkazi to cover Kshs.2,800,000.

(v) Personal guarantee and indemnity by Garama Randu Mkazi.

(vi) Legal charge over Gaturi/Githimu/5556 for Kshs.4,400,000 registered in the name of Ibrahim Murithi Magiri, the 3rd Plaintiff.

(vii) Personal guarantee and indemnity b the 3rd plaintiff.

12. The defendant pleaded further that in April 2014, the 1st plaintiff applied to substitute the securities provided by Garama Rangu Mkazi and Ibrahim Murithi Magiri with the security of a board of trustee member called Mr. Paul Jesse Mungatia the 4th plaintiff. That the defendant accepted the proposal through a supplementary letter of offer dated 24/4/2014 and a charge registered over Kilifi/Kijipwa/369 for Kshs.4,400,000.

13. That pursuant to an application by the 1st plaintiff for additional term loan on 25/8/2014, the same was approved and disbursed on 5/3/2015 following perfection of these securities;

(i) A legal charge over CR No. 21195 registered in the name of the 4th plaintiff for Kshs.14,000,000.

(ii) A further charge of Kshs.1,800,000 over Kilifi/Kijipwa/369 registered in the name of the 4th plaintiff making the aggregate amount secured thereunder to stand at Kshs.6,200,000.

(iii) A further charge of Kshs.1,800,000 over Gaturi/Githimu/5556 registered in the name of the 3rd plaintiff making the aggregate amount secured thereunder to stand at Kshs.4,600,000.

(iv) A second further charge for Kshs.1,800,000 over Mombasa/Shanzu Squatter/1464 registered in the name of the 2nd plaintiff making the aggregate amount secured thereunder to stand at Kshs.4,600,000.

(v) Personal guarantees and indemnities by the 2nd, 3rd and 4th plaintiffs registered over their respective properties.

(vi) Board of trustees personal guarantee jointly and severally for Kshs.23,835,000.

14. That on 8/7/2015, the 1st plaintiff applied for an overdraft facility in the sum of Kshs.2 million which the bank approved vide its letter of 12/9/2015. That on 10/11/2015, the 1st plaintiff requested the overdraft facility to be converted into a term loan. The defendant further pleaded that the 1st plaintiff on 28/12/2015 requested to substitute the existing collaterals with a higher value which request was approved on 25/1/2016 following which all the securities held were substituted with a legal charge over Kwale/Mswambweni "A"/2910 in the name of the 4th plaintiff together with a personal guarantee by the 4th plaintiff.

15. That the defendant was unable to accommodate the 1st plaintiff's request for a loan of Kshs.50 million made vide its letters dated 14/12/2015 and 5/1/2016. That this communication was made to the 1st plaintiff on 17/6/2016. That the refusal was on account of over-reliance on external borrowed funds for onward lending rather than internally generated funds. That in July 2016 the plaintiff requested for the release of the Msambweni A/2910 title which requests the defendant said it granted on 21/7/2016.

16. The defendant pleaded that meanwhile the 1st plaintiff defaulted on the existing facilities and it was duly notified by the letter dated 23/12/2016 and subsequently a 40 days' notice given on 25/4/2017. That the customer did not remedy the default nor redeem the charged properties making the defendant's right to sell to accrue. The defendant continued that it instructed Adept Realtors to provide a valuation report for Shanzu Squatter/1464; Gaturi/Githimu/5556 and CR 21195 and copies of the valuation made available to the customer. Further that arising from the default, the defendant instructed Antique Auctions on 19/6/2017 to sell the charged properties as the customer's default has continued unabated for 462 days as at 5/9/2017 at aggregate total amount of Kshs.15,952,937.51.

17. The defendant denied the contents of paragraphs 8-20 of the plaint and gave specific responses to the allegations *inter alia*;

> *(a) Following a review of the application letters dated 20/11/2015 and 14/12/2015, by the Bank's credit Committee, the application for further facilities post the consolidation of the existing facilities was found to be unviable. The determination on this was communicated to the Customer through the bank's letter dated 17/6/2016*
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> *(b) As a matter of fact, by their letter dated 29/7/2016, the customer indicated that they had received the bank's email to the effect that their loan request had been declined by the Bank.*
>
> *(c) Additionally, by an email dated 13/6/2017, the customer had clearly made a follow-up to their loan request of Kshs.50,000,000 made to the bank in November 2015.*
>
> *(d) The allegations of intimidation made in paragraph 19 are totally misconceived. The bank was, and remains entitled to take all steps authorised by the law to recover the outstanding facilities.*

18. In response to the claim for refund of legal costs incurred, the defendant pleaded that the 1st plaintiff is yet to furnish the bank with evidence of payment as requested. The plaintiffs were also put to strict proof in regard to paragraphs 25 – 33 of the plaint. The defendant concluded that the 1st plaintiff has acknowledged the default which has not been remedied. That the plaintiffs are not entitled to the reliefs sought because the defendant complied with all the statutory and contractual conditions precedent to the exercise of her statutory power of sale and asked the court to dismiss the plaintiffs' suit with costs.

19. The plaintiffs' responded to the defence by filing a holding reply on 23rd October 2017. In the reply, the plaintiffs, reiterated all the contents of the plaint. The plaintiffs denied being served with the statutory notices. The 1st plaintiff pleaded that it has suffered immense losses as claimed in the plaint. The plaintiff reserved the right to file a detailed reply upon being served with the defendant's list of documents.

20. At the close of pleadings and interlocutory applications, parties called oral evidence in support of their respective Cases. The plaintiffs called evidence of 2 witnesses with the defendant also calling two witnesses.

21. TRIPHOSA NCORORO JESSE testified as **PW1**. She is a director and the Chief Executive Officer of the 1st plaintiff. She made a witness statement dated 28/7/2017 and supplementary statement dated 24/1/2019 which she adopted as part of her evidence. **PW1** stated that they started engaging with the defendant in the year 2005 when she opened an account with it. In 2007, the 1st plaintiff took a loan facility from the defendant. That the 1st plaintiff is a Non-Governmental Organisation that was formed to empower the youth and marginalised women through table banking. That all through, they banked at the defendant's Moi Avenue branch. **PW1** said they approached the defendant because they had limited cash flow.

22. **PW1** continued that they graduated their financial facilities from Kshs.50,000 to Kshs.15 million. That in September 2015, they applied for a top up of Kshs.50 million. That the bank manager visited their offices and advised them to provide a collateral of higher value to cover the existing facility and for an advance of Kshs.50 million. That heeding to the advice, they made a formal application for the 50 million on 20/11/2015. That there was a delay in getting a response to their letter so they did another letter on 14/12/2015 and 28/12/2015 which letters also requested for the release of the other collaterals.

23. **PW1** said she met the defendant's C.E.O who gave them good promises. That instead of being given a loan of 5 million, the defendant gave an overdraft which facility was not conducive to their business. By a letter dated 10/11/15 the plaintiffs asked that it be changed into a term loan which was converted on 18/1/2016. **PW1** stated that the defendant was to switch the higher collateral for the existing 4 collaterals. To this end, the witness said they signed the letter dated 25/1/2016.

24. That instead, the bank did not give them the Kshs.50 million nor release the other collaterals. **PW1** stated that they got a buyer for the Kilifi/Kijipwa/369 plot but the defendant refused to release the title as per their letter of 29/7/2016. Thereafter they received the defendant's letters dated 17/6/2016 and 28/7/2016 saying they could not give the loan. The witness said that what followed were demand letters dated 8/7/2016, 1/8/2016, 3/8/2016 and 21/9/2016. **PW1** avers that they continued pleading with the defendant to restructure the facility by the letters dated 18/8/2016, 14/9/2016 and 28/11/2016 but which pleas the defendant did not accede to.

25. It is the plaintiffs evidence that the refusal to give the loan led to the increased default from the women (the 1st plaintiff's customers). Secondly that when the interests were capped by the Central Bank of Kenya, they never got reprieve from the defendant and to-date the defendant has never released to them the 4 collaterals. That the defendant only signed a discharge for the Msambweni plot in January 2017.

26. The plaintiffs aver the defendant was doing the same business as them and sometimes it would steal their clients. This made them complain with the defendant later apologising as shown in the letter dated 8/4/2014. The plaintiffs accused the bank of sabotaging their business. The details of sabotage listed included listing them with the Credit Reference Bureau. That they requested the defendant for a copy of the letter dated 25/1/2016 as they had lost their original letter but which copy was only provided on 13/9/2016. and under valuing the Mtwapa plot from Kshs.22 million to 9 million; the defendant failing to give reconciliation of accounts. **PW1** urged the Court to give compensation as per the audited report.

27. **PW1** was put on cross-examination by Mr. Muthama learned counsel for the defendant. **PW1** said they started the organisation with small loans before later graduating upwards. That each loan request would be subjected to internal approvals and in most cases they accepted what the bank gave. **PW1** conceded they owed the defendant about Kshs.20 million at the time they asked for the top up. **PW1** said they requested for a loan not an overdraft but still they spent the 2 million provided as overdraft. **PW1** disputed the resolution attached to the replying affidavit requesting for an overdraft. Equally she denied the signatures of trustees appearing on the document at page 176 of their documents but admitted the letter at page 179 dated 10/11/2015 because the overdraft was already marked in their account.

28. **PW1** continued in cross-examination that the letter at page 181 of the defence documents was manipulated which manipulation included;

(a) Date of execution.

(b) The clause on 50 million was removed from page 1 but still appeared on page 4 of the letter.

(c) The letter was not initialed on every page.

29. That according to the document, the facility was for Kshs.6,861,206.29 whose purpose was paid down balance. **PW1** agreed she had requested for a loan of Kshs.10 million and at page 189, the loan taken was Kshs.13,412,229 with Kwale/Msambweni A/2910 indicated as the security. That the document did not state the defendant agreed to grant a loan of Kshs.50 million. PW1 said she did not know about the letter of 5/1/2016. That as per the letter of 18/1/2016, the total outstanding loan was Kshs.13,343,000 plus the 2 million overdraft facility.

30. **PW1** admitted this letter only talked about substitution but did not refer to the offer of 50million. That at page 188, the letter dated 14/12/2015 was asking for Kshs.25,000,000 and by 5/1/2016 the plaintiffs did not have an approval for Kshs.50 million. The witness said she did not see the email of 5/5/2016 which stated that the 1st plaintiff could not service an additional loan. That by 17/6/2016, the defendant wrote their refusal to give additional funding (page 194). **PW1** admits they refused to sign some offer letters restructuring the loans because the terms were harsh. However, she had not seen the offer letter dated 21/7/2016. She acknowledged receipt of the letter dated 25/7/2016 (page 204) which referred to an upper limit of Kshs.50 million and that the Kshs.50 million included the existing loans and they would work with the balance.

31. The witness further conceded that as at July 2016, the amount owed of Kshs.20 million must have gone up. She however maintained that if the loan was released in January 2016, the loan would not have increased. **PW1** said she received the letter of 1/8/2016 which gave the loan book balance at Kshs.840,000 as at December 2015 and the loan at approximately 25 million. That they had other creditors which included Micro Enterprise Support Program owing a loan of Kshs.5 million and they had paid Kshs.2 million. She denied that their pattern of banking did not match the size of the loan book.

32. In response to paragraph 6 of page 209, the witness said they did not present any sale agreement to the bank for the release of the title deed of Kijipwa land. That the letter dated 14/9/2016 at pages 211 – 213 show at paragraph 6 that they did not get alternative finances because the defendant held the collaterals. That they did not approach other banks to buy off their loans because of their loyalty to the defendant. That it was possible to arrange for a set off with other institutions but they did not do so. That had they paid the facilities, the defendant would not have enlisted them to Credit Reference Bureau. That their clients old or new needed support and the banks refusal to give the loan eroded the trust and good will from their clients. **PW1** denied that their business model was flawed because it gave loans to people who could not repay unless given additional loans. She relied on the letter of 25/1/2016 and the charge document to show that the defendant had agreed to disburse a loan of Kshs.50 million.

33. In re-examination, **PW1** said the bank was not honest in their letter of 18/1/2016. That the bank charged the property for 50 million. Further the bank was aware of their business model when they disbursed previous loans. That when she wrote the letter of 13/9/2016, this case had not been filed by which time, the defendant had not informed them of its intention not to give the loan of Kshs.50 million. That the defendant never wrote to say they qualify for any amount. **PW1** said they expected to receive about Kshs.30 million after the existing loans were set off.

34. She insisted that their claim for loss of business is on the amount of Kshs.30 million. That after her request for 50 million, she received an offer letter and the charge was registered but the bank never gave them any money after registration of the charge. In response to the email of 5/5/2016 by Agnes to Wickliff, the witness said Wickliff was not the person the defendant was communicating to. That it is after making the enquiry on 17/7/2016 when received the defendant's letter dated 28/7/2016 enclosing the

letter of 7/6/2016. **PW1** said they made an appeal for even smaller monies. That they continued paying instalments until June 2016. According to **PW1**, the letter of 25/1/2016 has paragraphs 2, 4 and 6 missing. **PW1** also said they never met on 8/9/2015 to pass a resolution for an overdraft facility. That because she did not expect the defendant not to honour its word, they did not look for finances elsewhere. It is **PW1's** further evidence that they were borrowing on basis of demand. That when the bank let them down, they also let down their clients. That the bank also knew their clients so they reached out to them.

35. **CLEOPHAS OKOTH** gave evidence as **PW2**. He told the Court that he is an Institute of Certified Public Accounts of Kenya Member No. 21974 and works with Ogot & Associates which is an audit firm. **PW2** was aware of the audit report which he said was prepared using projections under accounting policies and standards. That their report was to establish the loss incurred by the plaintiffs due to the defendant's decline to give the loan. The report also included loss on sale of properties and loan processing fee as well as loss on interest on old loans.

36. **PW2** gave the total loss at Kshs.140,000,563. **PW2** said that the plaintiffs suffered loss of Kshs.2,257,278 which came from unauthorised bank overdraft. Secondly that some bankings made by the plaintiffs were never credited. The witness presented both reports in evidence in support of the plaintiffs' case. **PW2** continued that the loan application fee was calculated at 2% of the loan taken by 50 – 60 per cent of the members taking loans. The witness proceeded to state the amounts taken as loans in the years 2011 at Kshs.26 million, in 2012 at Kshs.40 million and 2015 at Kshs.84 million. **PW2** said they were given valuation reports of the properties held by the defendant and he believed the securities could fetch the values given.

37. In critiquing the defendant's audit report, **PW2** stated that the plaintiffs' client lost trust which made them default resulting in the loss of Kshs.1.2 million. That the clientele would guarantee each other for the loans given by the plaintiff. Consequently, the members kept off when there were no new applicants. **PW2** said he did not agree with the defendant's audit report.

38. On cross-examination, **PW2** said their report was conducted between 3rd August – 14th August 2017 and it covers a period of 6 years. That the documents they examined were not annexed to their report. The bank statements used was for the period 2015 – 2017 from K-Rep bank. That the members' statements were prepared by the 1st plaintiff as well as payment and receipt vouchers. **PW2** said he never saw the letter of offer but he saw the letter of acceptance from the plaintiff which was signed on 21/1/2016 although the letter was dated 25/1/2016. That this is what made them believe there was an acceptance.

39. **PW2** said the offer of Kshs.50 million was indicated under the clause on securities. That the offer of Kshs.50 million was not expressly provided for in the letter. **PW2** also agreed that the letter referred to an existing letter offer and substitution of the securities. **PW2** did not agree that what the defendant agreed to make available was *(1) limit on term loan (2) Overdraft of 2 million and (3) Term loan of Kshs.13,412,229.55.* That their finding No. 5 assumed the defendant would disburse the entire Kshs.50 million. That as per the offer letter, what was to be disbursed was approximately Kshs.29 million. Therefore, his finding of Kshs.43 million would have been earned as interest over the 6 years period was not valid because Kshs.50 million was not available for lending. **PW2** said business is about perception.

40. On finding No. 6, **PW2** agreed there was an error as substituting securities meant old securities would be released to the plaintiff. On finding 7, assumption is that proceeds of sale would be lent to members. **PW2** said he did not see any agreement of people interested to buy the suit properties. He said that you cannot sell without a title deed. He was aware the bank's lien can allow sale of charged property. The witness was then referred to the letter dated 1/8/2016 by the defendant giving permission to sell provided their interests were taken care of. **PW2** maintained the perception also affected giving of grants (finding No. 9). **PW2** said he had no evidence of any organisation who refused the plaintiffs grant because the defendant refused to advance the loan.

41. In re-examination by Mr. Kirimi learned counsel for the plaintiffs, **PW2** said the letter dated 12/9/2015 did not give the application date for the overdraft. That the facility letter referred to limit 1 of

Kshs.7.5 million and limit 2 of Kshs.14 million. **PW2** said his report covered the period 2016 – 2021. That he knew his client applied for a loan of Kshs.50 million and there was an offer letter dated 25/1/2016 which was accepted by the 1st plaintiff. He was also aware that the 50 million was to be used to offset the existing loans and swap the securities. That after the swapping, the plaintiffs intended to sell the securities which would have been released. That the interest of Kshs.83.7 million was calculated based on the loan sum of Kshs.50 million. That even if he worked out with the loan sum of kshs.29 million, the interest of 83.7 million would still be valid.

42. **PW2** added that the permission to sell was given about 9 months from the date of the loan application when the damage was already done. That at page 43, the letter by Women Enterprise Fund was made after continuous default of the plaintiff. That at page 50 was a grant of Kshs.3.2 million given on 1/10/2015 but he did not see any grant given to them after the defendant messed them up. That had the loan been disbursed, the interest earned would have been amazing. This marked the closed of the plaintiffs' Case.

43. The defence opened her Case with the evidence of **Collins Sabatia** who is working as the defendant's Nairobi Branch Manager in charge of credit and recoveries. **DW1** adopted his witness statement dated 6/02/2019 together with the documents filed in court on 30/10/2017 as annextures to the replying affidavit of Agnes Wanja. **DW1** referred to the offer letter dated 30/10/2009 for Kshs.3 million and the security given as Mombasa/Shanzu Squatter/1464 plus a motor vehicle. Page 25 was a letter requesting for top up loan; page 32 Board resolution for aggregate of 2.8 million; page 33 is further charge; page 50 is letter of plaintiff requesting for Kshs.15 million and page 51 is defendant's letter approving Kshs.10 million. **DW1** continued that the client was not always given what it asked for. The witness referred to the added securities i.e. Gaturi/Gathimu/5556 and plot 1321. He then showed the Board resolution for aggregate sum of Kshs.25 million at page 76 and charge over L.R. No. 1512 CR. 21195 for Kshs.15 million; deed of guarantee indemnity at page 135 by Paul Jesse for existing liabilities of Kshs.23,835,000 as at 23/2/2015. He then referred to page 172 which is an application for overdraft facility and the offer letter dated 12/9/2015 for overdraft of Kshs.2 million.

44. That at page 180 is a request for collateral swap by the 1st plaintiff and page 181 is an offer letter made by the defendant dated 25/1/2016. The new security was Kwale/Msambweni A/2910. According to **DW1**, the offer letter had nothing to do with new lending. That the Kshs.50 million was to enhance the limit of the Customer's borrowing subject to approval by the bank. **DW1** added that since the existing loans were at Kshs.23 million, the ceiling for new borrowing would be Kshs.25 million.

45. **DW1** stated that there was no offer letter dated 18/1/2016. He also denied that the bank tampered with this letter. **DW1's** evidence is that the offer letter was acted upon except the loan was not sanctioned. That the defendant did an appraisal for upper limit and based on the appraisal, the defendant declined additional borrowing. That at page 191, an email was done to the 1st plaintiff raising these issues. **DW1** added that from the time of request of the facility in January and time of giving their response for decline was a period of 5 months. That it is not correct for the 1st plaintiff to say the defendant took 9 months to reply. That on average the bank usually take 3 – 6 months in approving loans and the customer has a critical role in the approval process.

46. **DW1** further stated that the letter at page 195 was an attempt to discharge the Kwale title but the 1st plaintiff did not sign it because she did not want to meet the cost of discharge since the loan had not been sanctioned. Page 203 is a demand letter dated 8/7/2016 issued by the defendant. That the defendant expressed willingness to release the Kijipwa/369 title as long as a sale agreement was shown to it. **DW1** said the defendant is still willing to accommodate the customer to sell the properties to offset the liabilities. **DW1** also said the bank ultimately refunded the costs of charging the Kwale title (page 227).

47. **DW1** said the conclusions reached at by Ogot & Associates were not correct because;

(i) The amount asked by the plaintiff was not Kshs.50 million.

(ii) The 1st plaintiffs' business was on a downward trend.

(iii) The 1st plaintiff had admitted she had no buyers to the properties.

(iv) The defendant had no relationship with the 1st plaintiff's donors.

DW1 concluded that the defendant is not liable to the plaintiffs and that the plaintiffs still owe the defendant. He urged the Court to dismiss the claim.

48. On cross-examination, **DW1** said he joined the defendant's employment in 2016 as credit manager. He did not have a letter or authority signed by the directors to give evidence on behalf of the defendant. **DW1** was aware that the 1st plaintiff's business was table banking. The defendant was and is lending to groups but which lending is different to that of the plaintiffs. **DW1** said he was not aware the defendant breached customer confidentiality of the plaintiff but he was aware of the letter of apology by the bank at page124.

49. **DW1** said the defendant had a Managing Director called Albert Ruturi. That all requests for a facility are in writing and they were done by the 1st plaintiff's Company Executive Officer before being approved by the board. That the request for an upper ceiling was made in writing although there could have been informal discussions with the branch manager. The first request for Kshs.50 million was made on 14//12/2015 and another letter on 28/12/2015. **DW1** confirmed the 1st plaintiff made a request for collateral swap around the same time. That the bank responded to the request on 25/1/2016. The witness was referred to the letter dated 18/1/2016 where the defendant acceded to two requests which letter was accepted on 20/1/2016 by the plaintiff.

50. **DW1** denied the averment that the defendant refused to provide the plaintiff with a copy of the letter of 25/1/2016. He said that the application for the overdraft of 2 million is at page 178 – 179 of their documents although the said letter dated 8/7/2015 does not give the name of the chairman. That paragraph 1 of the letter dated 18/1/2016 is a typo error. That there was no correspondence from the bank after the charge was registered on previous titles. That the charge on title number Msambweni A/2910 was a binding contract but no bank is obliged to lend unless the client qualifies.

51. **DW1** stated that the first communication of the loan decline was by email dated 5/5/2016 but he had no evidence that the email reached the client. That the delayed loan disbursement does not confirm the client was unaware the loan had been declined. **DW1** said that after the letters of 18/1/2016 and 25/1/2016, the plaintiff still made a request for a loan of Kshs.50 million.

52. That before giving the loans, the properties were valued. The valuations done in 2018 were pursuant to notices of sale issued. **DW1** denied the defendant was sabotaging the plaintiff's business. **DW1** said they paid the lawyer for refund. That if there were any uncredited deposits the defendant is ready to sort out. That the demand for arrears was done within the law.

53. In re-examination, **DW1** said the letter of 18/1/2016 had an error on the amount of the charge. That there was no commitment made by the bank to provide an additional loan of Kshs.50 million. That to the best of his knowledge, the 1st plaintiff asked for an overdraft of 2 million and actually utilised it. That it was open for the board of the defendant to approve or decline the loan. That after the decline of the loan, the defendant proceeded to discharge the Msambweni title.

54. **KENETH MUCHIRI** testified as **DW2**. He is Certified Public Accountant No. 9187 and works with Ndubi Mugambi & Associates. **DW2** said he has been an accountant for the past 19 years. He stated that they were consulted by the defendant in regard to this case to review the report by Ogot & Associates. Subsequently, they made their report. According to **DW2**, Ogot's report contained inconsistencies. **DW2** said the interest on new loans was not supported by the loans disbursed. That for the plaintiffs to earn an interest of Kshs.43 million, they ought to have disbursed Kshs.30 million every year from 2016 – 2021.

55. That there was a huge difference on the loans disbursed and the loan processing fee stating that for the 1st plaintiff to collect Kshs.11,716,000 in processing fee they ought to have disbursed Kshs.585,800,000. On interest from sale of the properties, **DW2** said there was no evidence of an intending buyer to determine the amount claimed. **DW2** further stated that the 1st plaintiff not being a deposit taking institution they could not suffer loss of confidence. **DW2** added that nothing stopped them from collecting the outstanding loans from their clientele thus the conclusion by Ogot & Associates on this was not valid.

56. On grants and donations, **DW2** said there was no history of any donation and such a claim was speculative. That the donors ought to have stepped in when the defendant did not give the facility. That the report of Ogot & Associates assume the bank was to disburse the amount of Kshs.50 million. That if less amount was disbursed, it would change the interest on loans as well as the processing fee so the numbers given by Ogot's report is not valid.

57. On cross-examination by Mr. Kirimi advocate for the plaintiffs, **DW2** said he relied on the credit analyst report by the bank. **DW2** denied that he was not objective because he did not look at the documents that the Ogot's looked at. **DW2** was unaware that there was a charge registered on the Msambweni title. That the bank would have recovered the existing facility of Kshs.21.4 million from the Kshs.50 million leaving approximately Kshs.29 million to the 1st plaintiff to disburse. That from the audited accounts of the plaintiffs, Kshs.79.9 million had been lent out. **DW2** disagreed that the 1st plaintiff would have been able to lend Kshs.30 million every year had the loan been disbursed. He referred to the part of the table on the trend of lending which showed in 2013, Kshs.8.7 million; in 2014, Kshs.13.5 million and in 2015 Kshs.18.2 million was lent out.

58. That at page 27, the 1st plaintiff got an income of 4.6 million while the projected income for 2016 was 6.8 million. That based on the table 3 of the report and page 22 of defendants' report, it was possible for the plaintiff to generate interest of 11 million within a period of 6 years. **DW2** did not know the defendant took 9 months before declining the loan. That they derive values from valuations and sale agreements. **DW2** was not aware that groups would default if there was no money to lend. **DW2** said he looked at the 1st plaintiffs audited accounts for 2014 – 2015 and it was beyond his scope to know whether the defendant had financial losses in 2015 – 2016. This marked the close of the defendant's case.

59. The plaintiffs filed their submissions on 2nd October 2019. The plaintiffs framed the following issues for determination;

(a) Did the Defendant agree to lend to the 1st plaintiff a sum of Kshs.50 million and was there a binding agreement and/or contractual relationship binding the defendant to lend the 1st plaintiff the said sum?

(b) Did the defendant's refusal and decline to lend the sum of Kshs.50 million or any portion of the same occasion the 1st plaintiff immense losses totalling to Kshs.142,806,841.16.

(c) Did the Defendant sabotage the 1st plaintiff business and stifle it to death inter alia to cut competition?

(d) Does the defendant have a viable defence to the plaintiffs' claim.

(e) Are the plaintiffs entitled to the prayers sought in the plaint as amended on 7th February, 2019.

60. The plaintiffs proceeded to recite the evidence given by PW1 in answer to issue (a). The submission referred to page 232 which contained the letter dated 20th Nov 2015 for the loan request of Kshs.50 million and collateral swap. According to PW1, the loan was approved on 18/1/2016 and a supplemental offer letter dated 25/1/2016 given. Thereafter a charge was registered over Msambweni 'A'/2910. That

the defendant turned around after 9 months without any reason to decline the loan. The plaintiff submitted that the charge document created a binding contract. That the decline to lend the sum of Kshs.50 million or any part thereof occasioned the plaintiff immense loss totalling Kshs.142,806,841.16 and eventual closure of the business. The plaintiffs urged the Court to grant the prayers sought in the plaint as amended on 7/2/22019.

61. The plaintiffs further submitted that the defendant was estopped from reneging on the undertaking and agreement with the plaintiff(s). On estoppel, the plaintiffs cited inter alia;

(i) Section 120 of the evidence Act.

(ii) Decision of Newbold J in the Case of Nurdin Bandali Vs Lom Bank (1963) EA page 304.

(iii) Breach of the provisions of Section 3 of the Law of Contract Act.

(iv) Citation from Chitty on contracts that, ***"if a person contracts to lend money, the borrower cannot sue for the money agreed to be loaned as a debt, for this would be tantamount to an order of specific enforcement, and such an order will not normally be granted for a contract of loan. But the borrower can claim damages for the failure to advance the money. The damages will very often be merely nominal, but if expense has been reasonably incurred in procuring the loan elsewhere, that expense is recoverable special damage provided it was caused by the breach and was within the contemplation of parties. If the borrower can only procure the loan from other sources at a higher rate of interest than that agreed under the contract, and this was reasonably foreseeable at the time when the contract was made, it seems that the borrower can recover the additional interest he will have to pay as damages from the lender. If the borrower is unable to raise the money from other sources at all, and he is consequently unable to enter into or complete some transaction for which the money is required, the lender may be liable for loss of profit on such a transaction or other consequential loss."*** (emphasis ours).

(v) Peter Ngure Ng'ang'a Vs pioneer Building Society (in Liquidation) (2014) eKLR.

62. The defendant filed its submissions on 22nd October 2019. It opened her submissions that by this Court's ruling delivered on 14/12/2018, the Court already made a determination that the defendant had properly served statutory notices upon the 1st plaintiff and the respective chargors. Consequently, there being no appeal filed against the said decision an import is drawn that the plaintiffs accepted the said findings. It is therefore their submission that the issue of whether or not the bank had served the requisite notices and or caused the properties to be valued no longer fall for determination by the Court now.

63. Besides giving a summary of the evidence adduced by the parties the defendant raised the below questions which it said relate to the determination of the remainder of the dispute suit;

(a) Whether or not the bank had made available, at the 1st plaintiff's request, overdraft facilities in the sum of Kshs.2,000,000.

(b) Whether or not the bank was entitled to repayment of the said overdraft facilities by the 1st plaintiff together with interest thereon as covenanted from the date of draw down till the date of payment in full.

(c) Whether or not there was a binding contract or agreement between the bank and the 1st plaintiff by which the bank had agreed to provide and disburse additional loan facilities in the sum of Kshs.50,000,000 to the 1st plaintiff upon the perfection of the substituted security, the charge over the Kwale property.

(d) Whether or not the 1st plaintiff banked the sum of Kshs.31,140 but the bank failed to credit the said bankings in the 1st plaintiffs Bank Account.

(e) Whether or not the bank should pay interest to the 1st plaintiff at the rate of 24% per annum amounting to the sum of Kshs.174,057.17 in respect of the alleged un-credited bankings.

(f) Whether or not the bank, for a period of 6.5 months starting from 14/9/2016 up to 31/3/2017, charged the 1st plaintiff interest on the 1st plaintiff's loans amounting to the sum of Kshs.623,425.99 in excess of the maximum rate of interest permitted by the law.

(g) Whether or not the bank should refund the sum of Kshs.623,425.99 charged on the 1st plaintiff's loan as interest in excess of the maximum rate of interest permitted by the law and,

(h) Who should bear the costs of the suit?

64. In answering these issues, the defendant submitted that a party is bound by his/her pleadings and that going by paragraph 9 of the plaint which was reproduced, the plaintiff conceded to the existence of the overdraft facility. That the evidence adduced confirm the same was applied for by the plaintiffs specifically the defendant's letter of offer dated 12/9/2015 and the plaintiff's letter dated 10/11/2015 requesting the defendant to convert the overdraft into a term loan.

65. The defendant further submits that there was no binding agreement between it and the 1st plaintiff on account of the following;

(i) The two supplemental letters of offer dated 18/1/2016 and 25/1/2016 did not bind the defendant to make available to the 1st plaintiff an additional loan facility in the sum of Kshs.50 million since there was no acceptance. To support this averment, the bank cited the holding in the case of ***William Muthee Muthami Vs Bank of Baroda (2014) eKLR*** thus;

> ***"The dispute was essentially grounded on the law of contract. The nature of our civil process is that only a person who has incurred loss as a result of another's action can bring claim for a legal or equitable remedy. The dispute may involve, as here, private law issues between individuals. In the law of contract, the aggrieved party to an agreement must, in the addition, prove that there was offer, acceptable and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach."***

(ii) That there was no meeting of the minds or consensus ad idem between the two parties. The defendant referred to the evidence adduced and *inter alia* the case of ***Alfred M.O. Michira Vs Gesima Power Mills Limited Kisumu Court of Appeal Civ. Appeal No. 197 of 2001*** where the Court expressed itself thus; **"All those circumstances show that the respondent was in a position to complete the agreement by the time the appellant claimed damages for breach of contract. So what prevented the parties from completing the contract?**

> **We believe that the answer must be because, as the learned Judge correctly found, there was no meeting of the minds of the contracting parties thereby making the contract incapable of performance. It is strange that in the suit that the appellant filed on or about 18th February 1997, he did not seek the equitable relief of specific performance although the land had not been sold to another person. It is therefore also probable that the appellant could not raise the balance of the purchase price.**
>
> **In addition to factors which made the learned Judge conclude that the agreement was void, there is also the uncertainty about the payment of the purchase price. Clause 7 as read with Clause 6 of the agreement envisages that the land would be transferred to the appellant before he pays the balance of the purchase price which in this case is Shs.9 million."**

66. On the uncredited sum of Kshs.31,140 plus interest earned of Kshs.174,057.17, the defendant

submitted that the deposits complained of were made between 7/11/2006 and 10/09/2009. That by dint of Section 4(1)(a) of the Limitation of Actions Act, the 1st plaintiff was bound to bring these claims within 6 years from the date the cause of action accrued. That a claim presented after 28/10/2016 is incurable out of time and totally beyond redemption. Since the Court cannot award the principal amount claimed as uncredited bankings (31,140) means the Court cannot also award the interest claimed in respect of the alleged uncredited bankings of Kshs.174,057.17.

67. The defendant further submitted that the alleged unlawful interest charges in the sum of Kshs.623,425.99 for a period of 6.5 months between 14/9/2016 – 31/3/2017 was not pleaded. The bank added that the 1st plaintiff's existing facilities are pursuant to letters executed before 12/9/2015 thus the agreements governing the 1st plaintiff's facilities were executed before the date of amendment of Banking Act 2016 came into force. That the parties freely and voluntarily agreed on the rate of interest to be charged by the bank on the said facilities. On costs, the defendant urged that the plaintiffs be ordered to pay them costs of the suit.

68. In determining this dispute, I have considered the issues raised by both sides together with the pleadings and evidence adduced. I have therefore merged the two sets of issues and I summarise them follows;

(a) Whether or not the letters of offer dated 18/1/2016 and 25/1/2016 were binding on the defendant to advance to the 1st plaintiff an additional loan of Kshs.50 million.

(b) Whether the refusal to advance the Kshs.50 million caused the 1st plaintiff to suffer loss in the sum of Kshs.142,806,841

(c) Whether the 1st plaintiff applied for and was granted an overdraft facility.

(d) Whether or not the 1st plaintiff is owing any monies to the defendant.

(e) Whether or not orders of permanent injunction restraining the defendant from realising the securities can issue.

(f) Who bears the costs of this suit?

69. It is not in dispute that the relationship between the 1st plaintiff and the defendant existed from the year 2005 as customer/bank. It is further not in dispute that during the existence of that relationship the bank who is the defendant advanced loans to the customer (suing as the 1st plaintiff) on the request of customer. The relationship only became strained from the end of 2015 – beginning of 2016 that has generated into this dispute.

70. The plaintiffs pleaded that in November 2015 upon advice from the defendant's officers and on the plaintiffs own assessment inherent in the need to grow the business further and stabilise all finances the 1st plaintiff applied for a loan facility of Kshs.50 million from the defendant. The 1st plaintiff wrote the letter dated 20th November 2015 referenced LOAN REQUEST. The letter at paragraph 4 stated thus;

"It is for this reason we are still requesting for a facility worth Kshs.50,000,000 for our long term need. This will support our continuous growth and ease the hustle of borrowing short term loans which are expensive and time consuming.

Upon approval of Kshs.50 million we are kindly request your esteem office to approve a loan of upto Kshs.25,000,000 to meet the urgent loan demand as we finalise the perfection of the Kshs.50 million loan.

At paragraph 7;

"Last but not least we wish to submit one collateral which covers the 50 million loan and then withdrawal all other small collaterals submitted to the bank as security for the loans we currently have with the bank."

71. Again on 28/12/2015, the 1st plaintiff wrote to the defendant requesting to substitute the collaterals currently held by the bank with a collateral of a higher value to enable the organisation access more loan facility from the bank. The defendant's response to the two letters is contained in the supplemental letters of offer dated 18/1/2016 and 25/1/2016. This disagreement arose on the answer to the interpretation whether or not the two letters constituted a contract binding on the defendant to advance a loan of Kshs.50 million to the 1st plaintiffs.

72. The plaintiffs did not pick much dispute with the letter dated 18/1/2016. This letter was executed by the Board of Trustees of the 1st plaintiff and initialled on every page. It set out two limits thus; under **limit 1**

(i) A facility amount of Kshs.6,861,209.29 (principal balance) and described as a term loan payable within 33 months under **limit 2**

(ii) The principal balance was Kshs.13,435,129.18 and converted overdraft 2 million into a term loan giving a total sum of Kshs 15,435,129.18.

(iii) On the part of security, this is what was stated;

(a) Existing security; Board of trustees personal guarantee jointly and severally for Kshs.23,835,000 each.

(b) New security (i) legal charge over title No. Kwale/Msambweni 'A'/2910 to be registered to cover Kshs.22,297,000.

(ii) Personal guarantee and indemnity by Paul Mungatia Jesse registered proprietor of the property.

73. The supplemental letter of offer of 18/1/2016 did not thus mention anything about advancing a loan of Kshs.50 million to the 1st plaintiff. In the supplemental letter of offer dated 25/1/2016 appearing at pages 225-231 of the plaintiffs' documents. This letter referred to the existing duly accepted letter of offer dated 12/9/2015. It had some similarities in content to the letter of 18/1/2016 except its inclusion of 3 limits and under security, it stated that the new security being legal charge over Msambweni 'A'/2910 would cover Kshs.50,000,000. The supplemental letter of offer of 25/1/2016 is also executed by the plaintiffs' board of trustees.

74. On the page of execution by the plaintiffs' board of trustees on both letters stated that it was an acceptance of the banking arrangements in and upon the terms and conditions stated therein. PW1's evidence was that the loan application and offer was premised on the condition that the defendant would *inter alia* convert the existing unsolicited and expensive overdraft facility into a term loan. According to this witness they were duly informed that the said application for Kshs.50 million was duly approved by the defendant's letter of offer dated 18/1/2016 which approved the conversion of the overdraft into a term loan and the supplemental letter of 25/1/2016 which approved the loan request of Kshs.50 million.

75. While it appears that both letters approved the conversion of the 2 million overdraft facility into a term loan, there is no agreement between the parties that the letter of 25/1/2016 approved the loan request for Kshs.50 million. The letter of 25/1/2016 did not specifically provide that the loan request for Kshs.50 million was approved. **PW1** stated that they lost their original copy of the letter dated 25/1/2016 and sought to be supplied with a copy by the defendant which was done on 13/9/2016. The plaintiff however complained that the copy given to them shows the directors signed on a date even before the letter was issued. She also took issue with the fact that the letter of 25/1/2016 was not initialled in every page as in

previous correspondence exchanged between the parties.

76. The dates appearing at the execution page of the impugned letter are all handwritten. The plaintiffs did not plead nor take issue during the hearing that their signatures appearing in the letter of 25th Jan were forged. Neither was evidence led that the hand which inserted the dates were not theirs (not similar to the handwriting making the signatures). Section 107 of the Evidence Act provides that he who alleges must prove. The plaintiffs did not demonstrate and or prove who committed the error on the dates at their part of execution of the document and if the variance of the execution date affected the contents thereof. Further it is this supplemental letter which forms the backbone of the plaintiffs' claim that the defendant committed to advance them the additional loan of Kshs.50million. There was no other letter upon which the court could draw a comparison. The plaintiffs want to approbate and reprobate on the validity/genuineness of the copy provided to them and still expect the Court to find in their favour.

77. The supplemental letter of 25/1/2016 had 5 pages. On page 1, it gave details of terms of Limit (1); page 2 contained details of (a) Limit (2) which was the overdraft facility of Kshs.2 million, (b) Limit 3 which was a term loan of Kshs.13,412,229.55 (c) Security substitution on outstanding liabilities (d) Terms of the repayment of the loan. Page 3 and 4 was a continuation of the terms at page 2. PW1 in her evidence said that paragraphs **2**, **4** & **6** of the letter was missing. The missing paragraphs were under the heading on "CONDITIONS". The court will not infer that offer to advance the loan of Kshs.50million was contained in the missing clauses unless the contents were compared to previous letters of offer. The witness did not make any such reference/comparison.

78. It is at page 4 paragraph (b) of the letter of 25/1/2016 on new security where an amount of Kshs.50 million is mentioned. The amount was not given a description as a LIMIT like the previous pages categorized as LIMIT 1, 2 and 3. The accompanied documents which were the personal guarantee signed by Paul Mungatia Jesse on 21/1/2016 and the resolution signed by Trifosa Jesse and Paul M. Jesse on 22/1/2016 also did not make mention of a loan of Kshs.50 million (page 230 and 231 of plaintiffs bundle). My reading of the two supplemental letters is that no such offer to advance the plaintiffs Kshs.50 million was made by the defendant based on their contents.

79. Without a specific letter of offer, the question that begs to be answered is whether or not the registration of a charge over title Kwale/Msambweni 'A'/2910 can be construed as an offer to advance the loan of Kshs.50 million. The plaintiffs stated and submitted that the defendant satisfied itself of the value of the collateral offered by carrying out a valuation using its independent valuer (GIMCO Limited) who gave the property a market value of Kshs.120 million before registering a charge over it on 2nd February 2016 for Kshs.50 million. The charge document at pages 251 – 285 of the plaintiffs bundle is dated 19/2/2016. Clause (C) of the charge stated thus; ***"For avoidance of doubt, it is hereby declared that the total amount secured by this charge is Kshs.50 million in addition to interests and other charges as hereinafter prescribed"***

Clause 'B' stated thus;

> ***"The chargor in consideration of the Chargee granting financial accommodation to the borrower has agreed to create a Legal Charge (being this Charge which is also referred to as "this security" over the Charged Property on the terms and conditions contained herein and in the Chargee's Facility Letter and as may be amended, supplemented, varied or reviewed from time to time."***

80. The defendant on its part gave a different version on what led to the registration of the charge over the Msambweni property. It submitted that the defendant was merely acting on the plaintiffs' letter dated 28/12/2015 requesting to be allowed to substitute the existing collaterals with one of a higher value so as to enable the 1st plaintiff access additional facilities without having to apply again and again. There is no denying that the 1st plaintiff applied for a loan of Kshs.50million vide its letter dated 20/11/2015 and substitution of the existing collaterals with one of a higher value. A further reminder for the collateral swap was made by the letter of 28/12/2015 (produced in evidence at page 236 of plaintiffs bundle).

81. While the swapping of collaterals was part of the contents of both the letters of 18/1/2016 and 25/1/2016; the issue on offer of the additional loan of Kshs. 50M was not captured in the letter of 18/1/2016 and in the letter of 25/1/16 it is stated that the security limit was upped to Kshs. 50M. For the collateral to be swapped the bank would not accept the swap without first ascertaining the value of the security offered thus the valuation by GIMCO Limited is dated 11/1/2016 (pages 237 – 249 of plaintiffs bundle).

82. There was no correspondence produced neither did the Charge document indicate that upon the registration of the charge over title no Msambweni A/2910, a certain amount of money would be disbursed. It is my considered opinion and I so hold that from the evidence adduced, there is no corroboration of the averment that charging the property besides securing the existing loans gauranteed the 1st plaintiff an approval to a further facility of Kshs.50 million from the defendant. The evidence is lacking from what was before the Court. This is based on the admission of both PW1 & 2 that had the defendant advanced Kshs. 50M as requested, part of it would have been used to offset the existing debt. That would have been made available to the 1st plaintiff was Kshs. 50M. Further the defendant led evidence that it was not always the case that the 1st plaintiff was granted the exact amount they requested for. DW1 gave the example where the 1st plaintiff made an application for Kshs. 15M but only Kshs. 10M was approved and disbursed. This then creates doubt as to whether the entire sum of Kshs 50M would have been approved and disbursed. Therefore, the doctrine of estoppel for which the plaintiffs have invoked would apply only where the facts are not contradictive.

83. Further from the admission by the plaintiffs that the amount of Kshs. 50 million was not available to be advanced even if the letter of 25/1/2016 was treated as approving a loan of Kshs.50 million (which is not the case) yet the loss claimed is based on default to advance the sum of Kshs 50M. During cross-examination of both PW1 and PW2 it is conceded that after taking into consideration the existing facilities, the amount that was available to be advanced to the 1st plaintiff was approximately Kshs.29 million. Can the answer to the question posed by the plaintiffs' submission **"that the defendant agreed to lend the 1st plaintiff the sum of Kshs.50 million and that there was a binding agreement to that effect"** have a direct answer of YES? There would be no direct answer as it would put the Court to infer the answer from the actions of the parties.

84. The quote from the case of **Surya Holdings Ltd & 4 others vs ICICI Bank Ltd & Ano (2015**) that "*a promisors obligation to perform is discharged only if the performance rendered exactly matches the requirements of the contract including as to the time of the performance if performance is exact there is failure to perform unless parties have agreed to the contrary*" does not lie in this case where there was no promise made by the defendant neither was there a document setting the time for the performance of any obligations. Lending/borrowing is a contract that is supported by documents and the courts cannot infer, as it may result to the court rewriting the contract between the parties.

85. Consequent to the conclusion drawn that the total sum Kshs50M was not available (taking into account the existing debt) to be lent to the 1st Plaintiff this court is unable to make a finding for the loss suffered by the 1st plaintiff as calculated by PW2 on account of the defendant's failure to advance the total amount of Kshs.50 million could not be disbursed. The plaintiffs also submitted on the loss occasioned due to failure to advance any portion of the sum of Kshs.50 million. To support this claim, the plaintiffs relied on the report dated 15/8/2017 produced by Mr. Cleophas Okoth who testified as PW2. PW2 said that he examined bank statements; members' statements, payment and receipt vouchers; bank correspondences and valuers' report while compiling their report. In re-examination PW2 said he did not know whether the documents had been admitted in evidence.

86. Among the documents admitted in evidence are payment and receipts vouchers at pages 96 – 197 of the plaintiffs' supplementary bundles; valuation reports and Bank correspondences. There was no bank statements but the members' statements for period 2015 – 2016 was produced. The auditor's report stated that the 1st plaintiff did not realise an interest of Kshs.83,722,000 because the loan of Kshs.50,000,000 was not advanced. The witness did not however provide the workings of interest that would have been earned if approximately Kshs.29 million (portion of the 50 million) was advanced. Pw2 maintained that

even if Kshs 29M was advanced, the difference in interest to be earned would be minimal from the calculations of interest on the sum of Kshs 50M. Although the Court is not mandated to do calculations in determining the amounts as it would deny the defendant an opportunity to test the veracity of the amount determined. But this court is not persuaded that the interest earned on a working capital of 50M would only be slightly different if the working capital was Kshs 50M. If the plaintiffs were aware that they were only entitled to a portion of the 50M then they ought to have engaged PW2 to make findings of accruing interest appropriately. This was a claim for special damages that ought to have been pleaded and proved. Where there is no proof of the interest earned on the part of the Kshs 50M I am unable to award any amount.

87. PW2 also said the 1st plaintiff lost income of Kshs.51,264,000 because the old securities were not discharged to enable the 1st plaintiff sell them. During cross-examination of PW1, she said that they did not present any copy of sale agreement to the defendant for the release of either of the titles held as securities. From the evidence of DW1, the bank maintained they were willing to allow the plaintiffs to sell the securities as long as a sale agreement was presented that took care of the defendant's interest. No such agreement was shown in evidence nor was any evidence led by any person who was interested to buy any of the titles held by the defendant. Secondly the loss if any would have been limited to the period of 19/2/2016 when the charge over Msambweni 'A'/2910 was registered until July 2016 when the plaintiffs became aware that their loan had been declined. After 28/7/2016, the bank was under no obligation to release the old securities unless the existing facilities were paid. Therefore, PW2 calculating the loss from January – December 2021 without any evidence of a proposed buyer or the existing facilities being settled was speculative thus unmerited.

88. PW2 proceeded to state that the default rate for the year under review amounted to Kshs.5,194,795 which the 1st plaintiff would have realised an income of Kshs.1,246,750. In my view and I so hold, the monies advanced by the 1st plaintiff to her clients are debts due to her. The 1st plaintiff can use laid down process to recover the same. Infact, the vouchers annexed show that the persons paid by the 1st plaintiff was for purposes of recovering the defaulted loans. Blaming any losses for sums not recovered from their clients on the defendant was stretching the defendants' obligation beyond what is provided in the law of contract. Further the plaintiffs did not present members statement for the previous years for comparison that the default rate in 2016 was higher than in previous years. Most of the payments vouchers for loan recovery annexed were dated between February 2016 – May 2016 (see pages 101 – 125 of the supplementary plaintiffs bundle). By this time the defendant had not declined the application for the loan of Kshs.50 million. No basis was laid how it relates to the consequent action of the defendant declining to advance the loan since by this time they did not know whether the monies would be disbursed or not.

89. PW2 also said that the 1st plaintiff lost grants/donations amounting to Kshs.39 million. The plaintiff annexed a letter from Women Enterprise Fund dated 13/6/2018 to support the evidence of this loss. The letter is referenced, **"SACCO LOAN APPLICATION – Kshs.10 million.** In paragraph 2, the letter stated thus;

> ***"The committee noted that the institution had non-performing loan facilities with SIDIAN Bank totalling Kshs.16,709,977 as at the time of evaluation which hindered further processing of the loan facility. The institution to resolve the conflict between it and SIDIAN bank as regards the letter of 24/5/2018 which indicated reasons for default".***

This letter is self-explanatory that what the 1st plaintiff was a SACCO loan (not grant/donation) and that it is true the 1st plaintiff owed the defendant.

90. The agreement between Micro Enterprise Support Programme exhibited at pages 44 – 49 was made on 1/6/2014. The parties probably already undertook their obligations under that contract because there was a subsequent contract executed in October 2015. The plaintiff did not bring any document to this Court that it made any application for a grant/donation but which application was refused for the period under review because the defendant had declined to advance a further facility. Consequently, I am unable to find any basis laid for loss of grants/donations amounting to Kshs.39 million. It also amounts to

speculations.

91. The plaintiff further produced the report dated 14/3/2018 in support of the claim for loss of Kshs.2,267,278.16. The report concluded that they were comprised of interests on unauthorised overdraft of Kshs.2,000,000 with applicable interest of Kshs.1,469,795. Table A at page 168 gave details on how the interest was debited. The defendant stated that the overdraft was given to the 1st plaintiff upon her request. The bank added that the overdraft was actually utilized by the 1st plaintiff. From the evidence before Court, the 1st plaintiff's letter dated 10/11/2015 requested to have the overdraft termed out as a loan. In this letter, the 1st plaintiff did not state that the overdraft was unauthorised. Secondly the 1st plaintiff did not deny utilising the facility. PW1 in cross-examination admitted that the bank never forced them to withdraw the money.

92. The witness contested the resolution at page 172 which said they requested for the overdraft of 2 million. She further denied the signatures of the trustees appearing on page 176. The witnessed said they utilised the funds because the same was marked into their account. However, she did not deny her awareness that it was marked as an overdraft in their account. Thus the witness denial of the board resolution ought to have been corroborated in an instance such as this where the disputed funds were actually utilised and the 1st plaintiff's issued a letter subsequently requesting its conversion of the O/D into a term loan. The Plaintiffs by their conduct acquiesced to the transaction whether requested for or not are estopped from taking the responsibility to pay the interest accrued from the said overdraft.

93. The plaintiffs further claimed refund of uncredited deposits of Kshs.31,140 together with interest accrued thereon totalling Kshs.174,057.17. At table B of the report dated 14/8/2018, the impugned amount was given as deposited on 28/10/2010. PW2's narration is that the amount was earning interest at 24% per annum. First, there was no agreement produced nor based laid why the interest chargeable on this sum would be 24% per annum. Secondly, this claim was also not pleaded. The amount demanded of Kshs.31,140 amount to special damages which must be specifically pleaded and specifically proved. The defendant submitted that the claim for uncredited deposits was time barred. This aspect was not raised in the defence therefore I will not delve into it. DW1 admitted that if there were any amounts that were deposited but uncredited by the bank, the defendant was willing to credit the same. Since the amount was not denied other than the interest charged, the same is awarded to the plaintiffs. The interest awarded is at court rates from date of filing this suit until date of credit/payment.

94. In light of the preceding paragraphs, I conclude that the plaintiffs have not proved on a balance of probabilities their claim on loss suffered totalling to Kshs.142,806,841.16 minus the sum of Kshs 31140 being uncredited deposits . This then brings to question whether they are entitled to an order of permanent injunction restraining the defendant from realising the securities. As at the time of filing the plaint on 28/8/2017, the plaintiffs also filed an interlocutory application seeking orders of temporary injunction. After determination of the application inter parties, the Court found for the plaintiffs/applicants that the statutory notices were not properly served. After this ruling, the defendant proceeded to issue fresh statutory notices to the plaintiffs.

95. Upon the expiry of time provided under the fresh notices, the defendant re-advertised the properties for sale. The plaintiffs filed an application dated 10/9/2018 against the sale which application was determined by this court's ruling of 14/2/2018. By that decision, the Court found that the defendant had now properly served the notices and dismissed the application with costs. **PW1** in her evidence did not touch on the issue of the fresh notices served on them. She also admitted that they owe the bank as at the date of her testimony approximately Kshs.20 million. That the loan was secured by the properties they provided.

96. Under paragraph 30 of the plaint, it was pleaded that the defendant had not conducted valuation of the suit premises as required in law. The plaintiffs cited the case of **Olkasasi Limited vs Equity Bank (2015) eKLR** which quoted Kasango J in **Zum zum investments & Ano vs Consolidated Bank Ltd (2014)** thus, "*That the court should disregard the Respondent's valuation report and only rely on the applicants' valuation reports… The purpose of a valuation report under section 97(2) of the Land Act is*

to obtain the best price at the time of sale thus protecting the charger and secondly to prevent unscrupulous charges from selling the charged property at a price which is peppercorn."

97. Unfortunately, what was pleaded was whether a valuation had been conducted before the sale of the suit land was scheduled. The authority cited above was in regard to determination on which of the two valuations was to be adopted thus distinguishable. Given that the money owing to the bank has not been settled, it follows that an order of permanent injunction to restrain the bank from selling the securities cannot issue.

98. The plaintiffs also pleaded and submitted that the defendant sabotaged the 1st plaintiff's business and stifled it to death. DW1 in his evidence conceded that the defendant was doing the business of micro lending money to groups. The plaintiff submitted that when well controlled is healthy to competing business. According to the plaintiff because they had grown from borrowing a loan of Kshs. 500,000 to Kshs 15,000,000 their business had become enviable to the defendant which then made it to plot to kill it by pledging a facility of 50M, securing it but later refusing to disburse the funds.

99. The plaintiff did not however tell this court that the defendant only started micro-lending after them or they were all aware about the defendant's micro-lending business even when they took the previous loans. This allegation sought of contradicts the plaintiffs' evidence that their relationship with the defendant was good from 2007 when they took the first loan. That their loan portfolio with the defendant grew from Kshs.500,000 to Kshs.15,000,000. The plaintiffs knew their clients and yet they did not make mention of any of them that had been diverted by the defendant. I also find the claim under this head as speculative.

100. There is a prayer made for the award of general damages for the emotional distress and they proposed a figure of Kshs.500,000 for each of the plaintiffs giving a total sum of Kshs.2.0 million. They relied on the Case of ***Alex Muthinji Njeke & Ano Vs Attorney General (2017) eKLR*.** The claim herein was based on breach of contractual obligations hence an award for general damages could only accrue if the alleged breach was proved. Since I have found above that there was no breach on the part of the defendant, I award nil damages.

101. What orders should the Court grant in this Case? I make an order that the plaintiff's Case has not been proved under prayers **(a), (b) & (d)** and are hereby dismissed. **Prayer (c)** succeeds partially in terms of the sum of Kshs.31,140 awarded to the plaintiffs with interest at court rates from date of filing of the suit. The remainder amount of Kshs.142,775,701 (obtained by deducting 31,140 from142,806,841) is dismissed. The costs of the suit is awarded to the defendant.

Dated and signed at BUSIA this 4th day of June 2020.

A. OMOLLO

JUDGE

Judgment delivered electronically by email this 9th Day of June, 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE