



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO.174 OF 2007

GEORGE LALLA ODUOR.....PLAINTIFF

-VERSUS-

CANNON ASSURANCE (K) LTD.....DEFENDANT

JUDGEMENT

Plaintiff's Case

1. The Plaintiff herein, **George Lala Oduor**, describes himself as an adult of sound mind residing in Nairobi while the defendant herein, **Canon Assurance (K) Ltd**, is described as a limited liability company duly incorporated in Kenya under Cap 486 of the Laws of Kenya.
2. According to the plaint, at all material times the Plaintiff was and is the registered owner of LR No. Nairobi/Block 79/813 situated at Buru Buru Estate Nairobi (hereinafter referred to as “the suit property”). It was pleaded that sometime in 1999, the Defendant advanced to the Plaintiff Kshs.1,500,000/= and was supposed to effect a charge over the suit property. However, it was pleaded that on 22nd April 1999, the Defendant lodged “a Charge” on the said property which charge is defective and unknown to the Plaintiff.
3. The Plaintiff however contended that to date he had paid to the Defendant Kshs. 3,685,000/=.
4. To the Plaintiff the said charge being defective and unknown to him, is bad in law and equity and is, therefore, not available for the Defendant to exercise its power of sale of the charged property. It was contended that the charge registered on 22nd April 1999 was neither executed by the Plaintiff nor was the same brought to his attention as is required by the law.
5. Despite the foregoing the Defendant vide its letter dated 28th March 2007 to the Plaintiff intimated its intention to fore-close and sell the Plaintiff's suit property.
6. It was further averred by the Plaintiff that the Defendant did change and/or vary the terms of the charge documents executed between the parties and illegally, fraudulently and unlawfully inserted and/or replaced some pages on the charge documents and letter of offer.
7. The Plaintiff therefore sought the following orders:
 - a. . **A declaration that the charge effected on the Plaintiff's suit premises LR No. Nairobi/Block 76/813 is illegal, Defective and the security it provides is also illegal and unenforceable whereof the same stands discharged and accounts be taken.**
 - b. . **A permanent injunction restraining the Defendant jointly and/or severally by herself, through her agents, servants and/or employees from advertising, selling, trespassing, evicting, auctioning and/or in any other manner interfering with the suit property LR No. Nairobi/Block 76/813.**

c. . **Costs of the suit.**

8. In his evidence the Plaintiff, who gave evidence as PW1, testified that he was a businessman dealing in furniture in Nairobi and was working with Standard Bank till his retirement in 1997.
9. In his evidence he testified that he took a loan of Kshs 1.5 million from the Defendant in May, 1997 which according to him, he repaid in full with interest. According to him there was a letter of offer dated 18th March, 1989. The reason why the Plaintiff approached the Defendant for the loan was because he had a life policy with the Defendant in the sum of Kshs 1 million which he had paid for, for a period of 10 years. However, the Defendant only agreed to advance him a mortgage loan. In support of his case, the Plaintiff produced a copy of his policy as DExh. 1.
10. According to him, he was requested to apply for the mortgage loan which he did and before the mortgaged was processed he was issued with a letter of offer on 18th March, 1989. When he perused the letter of offer, he realised that the same was not signed by the Managing Director. On inquiring, he was told by the Financial Controller with whom he was dealing to just sign his part and the MD would sign his part later after which he would get his copy. He however testified that he never got the same till 2006 when he disputed the interest calculations and only then did he realise that there were some variations such as the insertion of penalty interests of 5% per month which according to him was not there at the time he executed the agreement. Another variation according to him, was with respect to indication of Kshs 1,650,000/- life policy when he already had Kshs 1,000,000/=. Further the charge was meant to be drawn by Hamilton, Harrison and Mathews Advocates. Referred to the document in the bundle the Plaintiff denied that the same was the one signed by him. He contended that the same was altered because it was prepared by one **Kennedy Moseti Onkwani**, a member of the Defendant's staff, instead of Hamilton, Harrison & Mathews. Even the plaintiff's address was wrongly indicated as 14436 Nairobi instead of 49797, Nairobi.
11. According to the Plaintiff the insertion of the 5% penalty interest had the effect of pushing the interest rate to 60% per annum yet he was never informed of these changes. He produced a copy of the charge document in respect of the suit property for the sum of Kshs 1.5 million as DExh. 2. It was however his evidence that by the time the dispute arose he had paid over Kshs 3.6 million though as at 31st October, 2006 the Defendant was still demanding Kshs 3,709,070/=. According to the Plaintiff since he was unable to reconcile the statements of account he approached the Defendant to do so several times. He eventually approached the Interest Rates Advisory Centre (IRAC) to do the assist him.
12. The plaintiff testified that IRAC prepared a report based on the recalculated payments based on the statements prepared by the Defendant, excluding the penalty interest, he had overpaid the loan by over Kshs 800,000/= and he exhibited the same report as DExh. 3. According to the Plaintiff the Defendant was haphazardly imposing figures which according to him amounted to fraud. According to the Plaintiff, there were other charges which were imposed by the Defendant but which were not agreed upon. The Plaintiff testified that instead of paying the amount demanded by the Defendant, he made inquiries from the Central Bank of Kenya in order to find out whether the Defendant was registered or had a licence for mortgage lending and the CBK responded that that was not the position. It was then that the Plaintiff realised that he was not dealing with the right.
13. The Plaintiff testified that as a result of working for the Standard Chartered Bank for 27 years, he was aware of the interest rates and he produced the statement as DExh. 4. He also produced a bundle of 10 repayments receipts which according to him amounted to Kshs 3.6 million as DExh. 5. The Plaintiff therefore prayed that the Court makes a declaration that he had repaid in full the amount loaned to him and that he owed the Defendant nothing hence the Defendant ought to return to him his title to the suit property which they are holding.
14. With respect to the counterclaim the Plaintiff urged the Court to disallow the same on the basis that the Defendant has no power to conduct mortgage lending. He also sought the costs of the suit and asserted that he had not admitted owing the Defendant.
15. In support of his case the Plaintiff produced the letter dated 6th April, 2009 from the CBK confirming that it does not licence insurance companies and does not regulate their products. The importance of this letter according to the Plaintiff was to support his dispute relating to penalty interests which according to him was illegal and amounted to imposition of over 87% interest

- which according to him was unfair and illegal since the lending rates are governed by the CBK. Without the CBK licence, it was contended that the Defendant had no basis to raise the rate of interest on the mortgage.
16. The Plaintiff testified that though he had been advanced Kshs 1.5 million by the time of coming to Court he had repaid Kshs 3.85 million which was more than double the sum advanced. According to him, the attempts to reconcile the statements did not yield any fruit. Although the IRAC report was transmitted to the Defendant the Defendant neither refuted the same nor commented on it though they acknowledged receipt thereof. The Plaintiff produced a bundle of documents as DExh. 6. While not disputing the fact that he had been advanced the loan, the Plaintiff's case was that he had repaid the same and had reservations with respect to the interests charged.
 17. The Plaintiff testified that although he paid Kshs 50,000/= meant for Hamilton, Harrison & Mathews, the charge document was prepared by **Kennedy Moseti Onkwani** instead. He further stated that the charge that was taken to him, he signed all the pages. However, the second charge that was availed to him was blank hence was not the one he executed.
 18. The plaintiff urged the Court to grant the prayers as sought in his plaint.
 19. In cross-examination by **Miss Ngonde**, learned counsel for the Defendant, the Plaintiff, he admitted that he was advanced Kshs 1.5 million by the Defendant in 1999 and an additional Kshs 200,000/= which was requested vide a letter dated 10th June, 2002, and which he admitted having been granted to him. He reaffirmed that the CBK informed him that they do not regulate insurance companies and though he was advised to defer his inquiries to the Insurance Regulatory Authority he did not do so.
 20. He stated that the charge was prepared by Hamilton Harrison and Mathews Advocates to whom he paid Kshs 55,000/= as per the first item in the statement and indicated as a credit. The said sum was however paid to the Defendant since the said firm was their lawyer. According to him, his lawyer confirmed that the charge was prepared by the said firm though after registration the same was not availed to him and he did not have a copy.
 21. However referred to his letter dated 13th October, 2006, he confirmed that it was seeking particulars of the outstanding amount and requesting for a copy of the loan agreement on the ground that his copy had been destroyed. He however denied that his copy had been burnt. His explanation for resorting to the said excuse, according to him, was because his attempts to get a copy had not been fruitful. He however said that it was true his workshop burnt down. Asked whether he complained about the over-charge he said he had no such letters though he maintained the over-charge appeared in the statement and that he raised the complaint immediately and visited the Defendant several times.
 22. Referred to his letter dated 23rd November, 2013, he admitted that he said therein that things were difficult due to state of the economy and made repayment proposals and appealed to the Defendant not to apply the penal interests. According to him, as at 27th June, 2003, he was in arrears and was aware that the Defendant was charging penal interest though he politely intimated that he would not honour the same. Referred to the letter dated 30th November, 2004, he said it showed he owed Kshs 2,348,974/= and requested to regularise the account which according to him he did. He reiterated that by the time he came to Court he had paid Kshs 3,685,000/= and when he went to see the Defendant he paid Kshs 200,000/=.
 23. Referred to the Defendant's letter dated 18th April, 2005, he said it was asking him to regularise the account and to remit a sum of Kshs 200,000/= which he did regularise. To him between November, 2004 and April, 2005 he made many statement though during the period he did not make any payments. He conceded that his payments were not regular due to the state of the business as exemplified by his letter dated 6th January, 2006 referring to a discussion of 4th January, 2006 in which he proposed a repayment of Kshs 80,000/= per month and enclosed a cheque for the same with a proposal to make similar repayment on the 6th of each month and pleading that the penalty interest should not be levied as the Defendant continued levying the same.
 24. The Plaintiff confirmed that from the statement the loan was disbursed in 1999 and he was to commence repayment and never skipped any such repayment. He however admitted that he had no problem with the repayments in the statements though they were irregular. While admitting that he defaulted, he said that he explained the cause and the terms were renegotiated in order to clear the

- arrears. He however had problems with the interest rates and penalties.
25. While admitting that he signed the charge before his lawyer, **Mr Omuga**, and understood the effect of the charge, he reasserted that the charge he signed before his lawyer was not the one drawn by **Kennedy Onkwani** because when he signed the charge the said **Kennedy Onkwani** was the Defendant's employee. According to him, he could not have paid Kshs 50,000/= to the Defendant's employee. Asked about the charge, he confirmed that he same was dated 16th April, 1999 and was presented for registration on 22nd April, 1999. According to the said charge which was created over his suit property shown to him, there was a provision for penalty interests. The rate of interest was provided as 27%.
 26. The plaintiff testified that according to the report by IRAC the penalty charges were not factored in, in the recalculation pending clarification. It was however indicated that the outstanding balance was Kshs 842,003.83.
 27. Referred to the letter of offer, the Plaintiff confirmed that it was provided that a default in the repayment would incur interest at the rate of 5% in addition to the normal applicable rate of interest.
 28. In re-examination by **Mr Ochanda**, the Plaintiff stated that in his letter dated 13th October, 2006 he detailed the matters he was unhappy with. To him, he would not have sought for the information if he had a copy of the charge which he did not have.
 29. The next witness for the plaintiff who testified as PW2 was **Wilfred Abincha Onono**, a Certified Public Accountant since 1978 and the Managing Consultant of Interest Rates Advisory Centre since 2001.
 30. According to him he prepared a report dated 5th December, 2006 in respect of the plaintiff and the defendant herein. According to him, he was approached by the plaintiff to recheck for him the interest charged on his account which showed that the plaintiff owed the Defendant the sum of Kshs 3,565.7656 on the loan of Kshs 1,700,000/= and as at 31st August, 2006, the plaintiff had paid Kshs 3,445,000/=.
 31. Based on the terms contained in the letter of offer and the charge document, the witness stated that he was able to pick the rate of interest at 27% per annum and that in default there would be a foreclosure without notice for the entire loan. There was also a penalty interest of 5% per month which translated to 60% per annum. To him, this meant the borrowing was at the rate of 87% which he was of the opinion was too high. Based on the said rate of 87.5% he was of the view that the outstanding balance would have been Kshs 16,980,087/=.
 32. Based on the instructions of the plaintiff, the witness calculated the amount based on Kshs 1,700,000/- at the rate of 27.5% which reduced to 20% in effect leaving out the penalty interest. Based on this he was of the view that as at 31st August, 2006 the outstanding balance should have been Kshs 954,908.62 hence based on the counterclaim there was a difference of Kshs 2,610,856.38 overcharge.
 33. In cross-examination by **Miss Ngonde**, the witness confirmed that the amount owed to the Defendant was Kshs 954, 908.62. He said that in arriving at his figure, he relied on the letter of offer, the charge and the statements of account running from 23rd March, 1989 to 1st August, 2008. According to him, the first time he based his opinion on the terms and arrived at Kshs 16 million as opposed to Kshs 3.4 million. Therefore if the penalty was factored in the amount would have been much higher than what was being claimed.
 34. According to him the Defendant started applying penalty in April, 2002 from which date he got the said Kshs 16,098,087/=. According to him, from April, 2001 the repayments were regular and from April, 2002 penal interests were applied every month totalling Kshs 1,898,725/= between April, 2002 and August, 2006. In arriving at his report the witness testified that he did not personally contact the Defendant.
 35. The plaintiff closed his case after the testimony of PW2.

Defendant's Case

36. In its defence, the defendant pleaded that a valid charge was executed by the plaintiff and registered against the suit property with the plaintiff's acquiescing. Accordingly, the defendant denied that the charge was defective and/or that it was unknown to the plaintiff as alleged.

37. It was pleaded that the plaintiff signed the charge before his own advocate, **Mr. M O Omuga**, on 16th April, 1999 who witnessed and certified the plaintiff's signature on the charge lodged on 22nd April, 1999 at the Land's Office. The defendant therefore denied changing the terms of the charge illegally, fraudulently and/or unlawfully by inserting or replacing some pages of the charge document and/or letter of offer as alleged.
38. The defendant claimed that the plaintiff owed it outstanding sum of Kshs 4,088,258/= being arrears on loan repayment, interests, penalty and replacement fees as provided under the letter of offer and charge both of which were signed by the plaintiff. The defendant therefore pleaded that the plaintiff was estopped from denying the provisions of both documents allowing the charging of interest and penalty as he agreed to the same and made repayments on the basis of the same hence cannot approbate and reprobate.
39. It was asserted that the plaintiff on 5th December 2006 admitted owing the Defendant the amount of Kshs 842, 003.86 which was arrived at by relying on the letter of offer dated 18th March, 1999 and charge dated 16th April, 1999 though he failed to include the penalty interests and replacement fees which he was aware was included.
40. According to the defendant, he had all along furnished the plaintiff with statements of accounts since inception of the loan and the plaintiff had not objected to the same save for seeking indulgence in repayment and also had copies of the letter of offer and the charge.
41. In support of its case, the defendant called **Edith Nyambura Muchiri**, its Manager in Charge of Accounting in its Life Business, as DW1. According to her, she had been with the defendant since 2006 and was aware that the defendant gave a loan to the plaintiff which the plaintiff applied for in 1988 and was given a letter of offer in 1989 for the sum of Kshs 1.5 million. According to her the terms of the said letter were reduced into writing and the same was signed by the plaintiff.
42. According to the witness the terms of the offer included the valuation of the property, registration of a first, legal fees, insurance life assurance policy for Kshs 1,650,000/= with a repayment period of 5 years at the monthly instalment of Kshs 49,000/= as well as penal interest on default of 5% per month. According to her the plaintiff signed the letter of offer on 19th March, 1989 and complied with the said requirements. Accordingly, valuation was done on the property and a legal charge placed on the suit property incorporating the terms of the letter of offer and providing for penalty charge in its clause 4(a).
43. The witness testified that the charge was signed by all the parties and by the plaintiff in the presence of his said advocate. According to her **Kennedy Moseki** was a legal officer with the defendant. She however admitted that the charge indicated that the charge would be prepared by Hamilton, Harrison & Mathews Advocates though the same was not prepared by the said firm but by the said **Kennedy Moseki Onkwani**.
44. It was her evidence that the money was however disbursed to the plaintiff in the sum of Kshs 1.5 million with an additional sum of Kshs 200,000/=. According to her though initially the plaintiff was making repayments in October, 1989 he defaulted. However around April, 2002 the plaintiff started defaulting in large periods. It was testified that in the case of default, penal interest would be levied at the rate of 5% per month and this was reflected in the statement in addition to the loan interest in the sum of Kshs 27.5%. This, it was averred was reflected in the letter of offer and in the charge as well.
45. According to her the plaintiff was on various occasions reminded to repay the amount and in the letter dated 13th October, 2006 he sought for the details of the breakdown of the sum demanded as well as a copy of the loan agreement on the basis that his got lost. In the said letter, the plaintiff referred to the sum of Kshs 3,000,000.00 and the balance was Kshs 3,565,765/=. Referred to the plaint and the statement, the witness said that though she could not state how much the plaintiff had repaid, the balance due was Kshs 3,972, 310/=.
46. The witness testified that apart from the charges indicated in the letter of offer there were no other charges levied on the facility. However, placement fees and administration fees were provided for in the letter of offer and the charge and were included in the statement furnished to the plaintiff. She however disclosed that the plaintiff took a life insurance policy which was assigned to the defendant in the event that the plaintiff passed away before full repayment. However though initially the loan was repaid in due course some payments were not made.
47. According to the witness as at the time of filing the counterclaim the sum due from the plaintiff

- was Kshs 15,681,310/= which was demanded vide a letter dated 21st September, 2011. However referred to the IRAC's report, the witness stated it indicated that the sum due was Kshs 842,003.86 hence confirming that the plaintiff owed the defendant money which had not been repaid.
48. The witness produced the defendant's bundle of documents as DExh. 1, 2 and 3 and urged the Court to order the plaintiff to pay to it Kshs 18 million as per the contract between the parties.
49. In cross-examination by **Mr Onyancha**, learned counsel for the plaintiff, DW1 explained that her role at the defendant is that of a manger in the accounts department and was a Certified Public Accountant. She confirmed that according to the letter of offer, the charge was to be prepared by Hamilton, Harrison & Mathews Advocates by were prepared by **Kennedy Moseki** though she had no evidence of change of instructions.
50. According to the witness the defendant is licensed by section 50 of the **Insurance Act** to offer mortgage finance and that different companies have different rates. In her evidence while the Central Bank of Kenya regulates banks, the insurance companies are regulated by the Insurance Regulatory Authority and that the defendant was guided by the market rates as issued by the Central Bank which rate was agreed between the parties. According to her calculation, as at 31st August, 2006, the plaintiff had paid the sum of Kshs 3,285,000/=. However, the defendant's claim of Kshs 18 million was based on the interest rate of 27.5% - 20% and the penalty. Whereas the plaintiff took out an insurance policy the witness could not tell how much was paid on the policy.
51. According to the witness the interest rate was not illegal but was contractual and was signed for. The legal charge on the other hand was executed before the plaintiff's advocate, **Mr Omuga**, though in his letter of 2006, the plaintiff stated that he had lost the loan agreement. The witness however had no document from the plaintiff acknowledging having received the agreement document.
52. According to the plaintiff the allegation that the interest and charged were unmerited was incorrect and she maintained that the counterclaim was merited.
53. In re-examination by **Miss Ngonde**, the witness stated that the issue of the variation of interest was not an issue before the Court and that the same was contained in the contractual documents. To her the rate was varied downwards as was reflected in the statement.
54. After the testimony of DW1 the defendant closed its case.

Plaintiff's Submissions

55. It was submitted on behalf of the plaintiff that the actions of the defendant in altering and inserting pages in the charge document and varying the rates of interest unilaterally rendered the said document invalid and of no legal consequences.
56. It was further contended that the drawer of the charge was changed without the attention of the plaintiff hence the charge that was submitted to the plaintiff was not the same one that the plaintiff executed hence unenforceable.
57. It was submitted that the defendant needed written permission from the regulatory authority in order to vary the rate of interest. It was further submitted that the defendant lacked the legal capacity to do mortgage finance business and therefore contravened section of the **Banking Act** which requires anybody dealing in mortgage finance to have a licence form Central Bank. Accordingly, it was submitted that the defendant's actions contravened the said Act and were therefore void *ab initio*. To the plaintiff since the Central Bank acknowledged that the defendant was not under the supervision of the Central Bank, the rate of interest applied by it was not authorised by law and was a nullity.
58. The plaintiff submitted section 191 of the **Insurance Act** prohibits an insurance company from engaging in any other business thus the plaintiff had no capacity to enter into the business of advancing loan. Therefore the money advanced to the plaintiff was just a normal debt between the parties and the defendant's option was to move the Court to claim in the event of default but not to sell the suit property as it tried to do.
59. It was further submitted that the sum advanced was in any event fully repaid and even overpaid hence the counterclaim ought to be dismissed.

Defendant's Submissions

60. On the issue of the existence of a valid charge, it was submitted that the same was duly registered and that the allegation that the plaintiff signed a charge drawn by Hamilton Harrison & Mathews was not corroborated by any other party. The charge that was registered was duly executed by the plaintiff in the presence of his advocates. In support of its case the defendant relied on **Govindji Popatlal Shah vs. Nathoo Visandjee [1960] EA 361** which was upheld in **Govindji Popatlal Shah vs. Nathoo Visandjee [1962] EA 372** as well as **Nancy Kahoya Amadiya vs. Expert Credit Limited & Another [2015] eKLR**.
61. On the issue of fraud it was submitted that the plaintiff had not met the standard required in proving fraud and relied on **Secretary of State for the Home Department vs. Rehman [2001] UKHL 47, Jammieson Mkumbo T/A Ziotech Motors vs. Barclays Bank of Kenya Civil Case No. 39 of 2012** quoted in **Central Bank of Kenya Ltd vs. Trust Bank Ltd & 4 Others Civil Appeal No. 215 of 1996**.
62. To the defendant the plaintiff's evidence contradicted the documentary evidence in which the plaintiff admitted having defaulted in his repayments and relied on **Kenya Commercial Finance Company Ltd vs. Kipng'eno Arap Ng'eny & Another [2002] KLR**.
63. On the issue of the penalties, it was submitted that this was contained in the charge document hence the Court cannot rewrite the contract for the parties. In support of this submission the defendant relied on **Samuel Kamau Macharia vs. Daima Bank Ltd [2008] KLR, National Pipeplastic Samkolit (K) Ltd & Another [2001] KLR** and **Fina Bank Limited vs. Spares & Industries Limited [200] KLR**.
64. According to the defendant section 50 of the *Insurance Act* gives insurance companies, regulated by the Insurance Regulatory Authority the power to offer loans as well as hold securities for advanced money and relied on **Al Jalal Enterprises Ltd. vs. Gulf African Bank [2014] eKLR** in which the case of **Coast Brick & Tiles Ltd & Others vs. Premchand Raichand Ltd [1966] EA 154** was cited.
65. To the defendant the Court is bound to enforce the contract between the parties hence it is entitled to the sum of Kshs 18,681,310.00.

Determinations

Issues

66. Having considered the foregoing, it is my view that the following issues fall for determination:
1. **Whether there existed a valid charge between the plaintiff and the defendant;**
 2. **Whether there was any form of fraud on the Defendant's part in handling the charge;**
 3. **Whether the Defendant is justified to charge penalties arising from the plaintiff's default;**
 4. **Whether the orders sought by the parties ought to be granted;**
 5. **Who should be penalised in costs.**
67. Having considered the pleadings, the evidence adduced, the issues and the submissions made as well as the authorities relied upon by the parties herein, this is the view I form of the matter.
68. On the issue whether there existed a valid charge, it is not in doubt that the same was duly registered. The plaintiff claims that he did not sign the said charge which was prepared by a different advocate from that who was meant to prepare the same. I do not think the issue of preparation of the charge is such a crucial issue with regard to the preparation of the charge as long as the terms were agreed. The plaintiff contended that the terms of the letter of offer which he signed were different from that in the charge which was eventually submitted to him. He however did not produce his copy of the charge which according to him was not availed to him. Yet according to his own letter, he had lost his copy. He admitted that the charge was executed before and attested by his advocate, **Mr Omuga**. For reasons unknown to the Court, he did not deem it fit to call his advocate to corroborate his case. In the case of **Green Palms Investments Ltd vs. Kenya Pipeline Co. Ltd Mombasa HCCC No. 90 of 2003**, it was held that the failure by a party to call as a witness any person whom he might reasonably be expected give evidence favourable to him may prompt a Court to infer that the person's evidence would not have helped the party's case and would have been prejudicial to its case and that the witnesses may have technically avoided to

- testify to escape being embarrassed on cross-examination. In my view this is a classic case in which adverse inference ought to be invoked.
69. That the plaintiff was advanced the facility based on the charge whose validity he disputes is not in doubt. If there was another charge the onus was upon him to adduce evidence to show that that was the case. This is what section 107(2) of the ***Evidence Act*** Cap 80 Laws of Kenya provides. The said section provides that *when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person*. It was therefore upon the plaintiff to prove on the balance of probability that the charge that the defendant relied on was not the one executed by him before his advocate. This he failed to prove. As was held by **Visram, J** (as he then was) in **Mbura and Others vs. Castle Brewing Kenya Limited and Another [2006] 1 EA 185**, the ***Evidence Act*** provides that an act is not proved when it is neither proved nor disproved. Similarly, **Ringera, J** (as he then was) in **Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001** held that a fact is not proved if it is neither proved nor disproved. It is therefore not proved.
70. His conduct during the course of the transaction and his failure to raise issues with respect to the charges which were levied against him raises serious issues on his bona fides. In fact there is evidence that he conceded that he was unable to service the facility in accordance with the terms of the agreement. On my part I associate myself with the position taken in **Govindji Popatlal Shah vs. Nathoo Visandjee [1960] EA 361** which was upheld in **Govindji Popatlal Shah vs. Nathoo Visandjee [1962] EA 372** that the registration of a mortgage duly approved is to be accepted by the Courts as conclusive evidence of the validity of the document effecting it, including that which is a pre-requisite of its validity namely its due execution.
71. Was there fraud on the part of the defendant? In **Yosia Ofumbi vs. Nagongera Farmers & Another Kampala HCCS No. 449 of 1992** fraud was defined as the knowledge of other people's rights, and the deliberate acquisition of a registered title in face of such knowledge actual or constructive, which would render voidable the certificate of title, so obtained, and voluntary ignorance is for this purpose the same as knowledge. According to the plaintiff the facts giving rise to the fraud were that the charge was varied and insertions made without his knowledge. As I have found hereinabove, the plaintiff did not prove to the required standards that in fact there existed any other charge apart from the one which was produced before this Court. As was held in **Central Bank of Kenya Ltd vs. Trust Bank Ltd & 4 Others** (supra) fraud and conspiracy to defraud are very serious allegations and the onus of prima facie proof is much heavier on the person claiming fraud than in ordinary civil cases. In this case the standard of proving fraud has not been satisfied.
72. In this case the plaintiff attempted to adduce parole evidence in order to contradict documentary evidence. However as was held in **Kenya Commercial Finance Company Ltd vs. Kipng'eno Arap Ng'eny & Another** (supra), parole testimony cannot be received to contradict, vary, add to or subtract from the terms in which the parties have deliberately agreed to record any part of their word.
73. With respect to the penalties, it is clear from the charge document that there was provision for penalty interest on arrears at the rate of 5%. As was held in **National Pipeplastic Samkolit (K) Ltd & Another** (supra):

“The learned judge erred not only in substituting what he thought ought to have been the proper rate of interest in place of what was agreed between the parties but he also erred in assuming jurisdiction to hear arguments, and rule thereon, on taking and settlement of accounts when such a relief was not part of the plaintiff's claim. Taking and settlement of accounts is not done, normally by judges. Order 19 rule 1 of the Civil Procedure Rules provides that if a plaintiff prays for an account or where the relief sought or the plaintiff involves taking of an account an order for proper accounts with all necessary inquiries and directions in similar cases shall be made. It must be noted that, as pointed out earlier, there was no issue in the plaintiff, for taking of accounts. We reiterate that it is not for a Judge to take accounts. The reason is clear. It is not the job of a judge to be an accountant. That is why Order 20 rule 16 of the Civil Procedure Rules gives special directions as to taking accounts. Elaborate provisions have been made therein. The ad hoc method in which the learned judge proceeded to take and settle accounts was not only unprocedural but erroneous and

without jurisdiction”.

74. This was the position adopted by the Court of Appeal in **Husamuddin Gulamhussein Pothiwalla Administrator, Trustee and Executor of The Estate of Gulamhussein Ebrahim Pothiwalla vs. Kidogo Basi Housing Corporative Society Limited and 31 Others Civil Appeal No. 330 of 2003** that:

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.”

75. I have considered the decision in **Orion East Africa Ltd vs. Housing Finance Co. of Kenya Ltd Nairobi HCCC No. 914 of 2001** where the learned Judge expressed himself as follows:

“When any loan account goes into arrears, penalty interest is normally chargeable and in this case, even going by the letter of 27th May, 1998, I have referred to hereinabove, this account went into arrears and cannot be said to have been properly serviced. Penalty interest was therefore called for and I cannot see any valid complaint on that. As to charging of interest rate that were not part of the agreement, the Applicant did sign the charge through its Director and Director/Secretary on 18th March, 1997.”

76. In this case the plaintiff had the benefit of advice from his own legal representative.

77. I further agree with the position adopted in **Fina Bank Limited vs. Spares & Industries Limited** (supra) that save for those special cases where equity might be prepared to relieve a party from a bad bargain it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain. In the said case the Judge was faulted for substituting what he thought ought to have been proper rate of interest in place of what was agreed by the parties.

78. On the issue whether the defendant had the powers to advance loans on securities, the Central Bank of Kenya was clear that it does not regulate insurance companies and the plaintiff was referred to Insurance Regulatory Authority but it seems that the plaintiff failed to take this very apt advice seriously. However a reading of section 50 of the ***Insurance Act*** seems to permit the insurance companies to invest by way of advancement and to take securities. The plaintiff has not shown in what manner this provision was violated by the defendant. In the premises I agree with the decision in w but also in assuming in **Coast Brick & Tiles Ltd & Others vs. Premchand Raichand Ltd** (supra) that the Court ought not to have sympathy for debtors who after executing valid security documents and benefiting therefrom, later turn around challenging the validity thereof years when the Bank commences the realisation of the securities in order to frustrate the bank from the said realisation.

79. Having considered the evidence adduced herein I find that the plaintiff’s case is unmerited and the same cannot be allowed.

80. With respect to the defendant’s claim, there is no evidence that the defendant has released the charged property. To grant the counterclaim in the manner sought before the security is realised at an amount known to the Court may well amount to unjust enrichment. Accordingly, I decline to grant the counterclaim.

Order

81. In the premises, both the plaintiff’s suit and the defendant’s claim fail.

82. There will be no order as to costs

Dated at Nairobi this 6th day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Ngonde for the Defendant

Cc Mutisya