

**IN THE COURT OF APPEAL  
AT MOMBASA**

**(CORAM: GATEMBU, MURGOR & OCHIENG,**

**JJ.A.) CIVIL APPEAL NO. E066 OF 2022**

**BETWEEN**

**FIDELITY COMMERCIAL BANK LIMITED.....APPELLANT**

**AND**

**MAHENDRAKUMAR CHANDULAL SHAH.....1<sup>ST</sup>  
RESPONDENT KIRTIBALA MAHENDRAKUMAR  
SHAH.....2<sup>ND</sup> RESPONDENT MUGANDA WASULWA T/A  
KEYSIAN AUCTIONEERS.....3<sup>RD</sup> RESPONDENT  
ARYAN LIMITED.....4<sup>TH</sup>**

**RESPONDENT** *(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (J.O. Otieno, J.) dated 25<sup>th</sup> May 2022*

*in*

***HCCC No. 212 of 2011***

*As Consolidated With*

***HCCC No. 130 of 2012)***

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**JUDGMENT OF THE COURT**

1. In this appeal, the appellant, Fidelity Commercial Bank Limited (the Bank), has challenged the judgment of the High Court at Mombasa (**P. J. Otieno, J.**) delivered on 25<sup>th</sup> May 2022. In that judgment, the court set aside the sale by the Bank, in exercise of its statutory power of sale under a

legal

charge of the property known as Title Number Mombasa/Block XII/45 owned by Mahendrakumar Chandulal Shan and Kirtibala Mahendrakumar Shah, the 1<sup>st</sup> and 2<sup>nd</sup> respondents (the Guarantors). The 1<sup>st</sup> and 2<sup>nd</sup> respondents had charged that property to the Bank to secure banking facilities extended to a company known as Mahek Limited, which was not party to the suit. In the judgment, the court also ordered the Bank to pay to the 1<sup>st</sup> and 2<sup>nd</sup> respondents' general damages of Kshs. 3,000,000.00 and to the 4<sup>th</sup> respondent, special damages of Kshs. 26,556,347.00.

2. The background in brief is that the Bank extended banking facilities to Mahek Limited (the Borrower) which, as already indicated, were secured by a legal charge over the property known as Title Number Mombasa/Block XII/45 (the charged property) owned by the Guarantors. In addition to the legal charge, the Guarantors executed a deed of guarantee and indemnity in favour of the Bank. The Borrower defaulted in the repayment of the banking facilities. The Bank issued the requisite statutory notices with a view to exercising its statutory power of sale under the legal charge. Subsequently, the Bank instructed Keysian Auctioneers, the

3<sup>rd</sup> respondent

(the Auctioneer), to sell the charged property by public auction to recover the outstanding debt. Following advertisement, the Auctioneer held the public auction on 24<sup>th</sup> June 2011. The highest bid for the property at the auction for Kshs. 53 million was made by the 4<sup>th</sup> respondent Aryan Limited (Aryan). However, that bid fell short of the reserve price of Kshs. 59 million and was not accepted.

3. Evidence on record shows that after that abortive auction on 24<sup>th</sup> June 2011, the Bank reached out to Aryan and a sale of the charged property by private treaty was concluded. Aryan agreed to buy the same from the Bank for Kshs. 59 million. In that regard, the Bank offered Aryan a loan to be used towards payment of the purchase price. That loan was secured by a charge in favour of the Bank over Aryan's other property known as Title Number Mombasa/Bloc XX/265A. The charged property was then transferred to Aryan.

4. The Guarantors then instituted a suit against the Bank, the Auctioneer and Aryan before the High Court at Mombasa (Civil Case No. 212 of 2011) complaining that the Bank had clogged their equity of redemption; wrongly consolidated

the

Borrower's accounts; and unilaterally varied the legal charge

by lumping amounts into the account of the Borrower for which the Guarantors were not liable. They pleaded that the purported sale by private treaty of the charged property to Aryan, not having been conducted by public auction as required under Section 77 of the repealed Registered Land Act, was fraudulent, null and void. In addition to seeking orders of injunction to restrain the Bank and Aryan from dealing with the charged property, they also sought cancellation of the transfer of the charged property in favour of Aryan, as well as general and special damages.

5. Aryan on its part instituted a separate suit against the Bank before the High Court at Mombasa (Civil Suit No. 130 of 2012). It asserted that the sale and transfer of the charged property by the Bank to it was based on misrepresentations and non-disclosure of material facts; that Aryan only discovered after the fact that the Guarantors had instituted suit against the Bank challenging the Bank's exercise of its statutory power of sale; and that Aryan's ability to utilize the charged property or the rental yields therefrom was fettered by the litigation initiated by the Guarantors. Aryan

prayed for a declaration that the purported sale to it of  
the charged

property by the Bank was unprocedural, illegal and unlawful; the cancellation of the transfer of the charged property in its favour; discharge of charge in respect of its property known as Title Number Mombasa/Bloc XX/265A; as well as general and special damages.

6. The Bank denied the claims in both suits which were consolidated and heard together. During the trial, Joel Kioko (PW1) testified on behalf of the Guarantors. The essence of his testimony being that he represented the Guarantors at the abortive auction that was conducted on 24<sup>th</sup> June 2011 and there was no successful bidder. Mahendra Chandulal M. Shah (PW2), the 1<sup>st</sup> respondent testified on behalf of the Guarantors. His testimony was that he is a joint owner alongside the 2<sup>nd</sup> respondent of the charged property which they charged to the Bank to secure liabilities to the Borrower for a maximum principal amount of Kshs. 28 million; and that the Bank had wrongly loaded further liabilities onto the Borrower's account to which the Guarantors were not privy and neither did they consent to the same.

7. The Deputy General Manager of the Bank, Shukesh

Dabholkar (DW1) testified that the Bank advanced loan

facilities to the Borrower secured by the charged property and guarantees issued by the Guarantors. A second property, a house in Kizingo, Mombasa, which was also supposed to be charged as further security was however not charged on account of missing title and instead the Bank registered a caution against it; that the Borrower defaulted in the repayment of the loan and the Bank sold the charged property to Aryan for Kshs. 59 million in exercise of its statutory power of sale.

8. The last witness in the trial was Mahesh K. Shah (DW2) the Managing Director of Aryan. He stated that Aryan's manager, one Boniface Wanyonyi, attended the auction on 24<sup>th</sup> June 2011 and submitted Aryan's bid for Kshs. 53 million which was however not accepted as it fell below the reserve price; that later the Bank's Managing Director, one Mr. Kimji called him and offered the property for Kshs. 59 million; that he signed a Memorandum of Sale on 6<sup>th</sup> July 2011, paid Kshs. 19 million to the Bank and obtained a loan of Kshs. 40 million from the Bank; that in purchasing the property Aryan expected to earn rental income of Kshs. 450,000.00 per month which would have been utilized to

settle the loan instalments; that Aryan was served with a court order in November 2011 following the suit instituted by the Guarantors.

9. Having reviewed the evidence and submissions, the learned trial Judge framed six issues, namely, whether the legal charge was unenforceable because of amalgamation of debts by the Bank; whether the charged property was sold by private treaty or by public auction and if by public auction, whether the sale was legal; and whether the Guarantors and Aryan were entitled to the remedies they sought in their respective suits.
10. The learned Judge held that under the provisions of the legal charge the Bank was entitled to consolidate accounts, but in as much as that was permitted under the legal charge, under the instrument of Guarantee and Indemnity, the liability of the Guarantors to the Bank was capped and limited to an amount not exceeding Kshs. 28 million, interest and other charges. The Judge concluded that there was no breach by the Bank in consolidating the Borrower's accounts, and subject to the cap aforesaid, the legal charge was

enforceable.

11. As to whether the charged property was sold by private treaty or by public auction, the learned Judge found as a fact that the sale was by private treaty; that the legal charge had no provision for sale of the security by private treaty and that Section 77(1) of the repealed Registered Land Act provided for sale by public auction; and that “realization of the security had to be by public auction conducted by a licensed auctioneer” and the sale by private treaty was an affront and a violation of the law. The Judge set aside the sale of the charged property by the Bank to Aryan holding:

***“...it thus follows that the sale and transfer of Mombasa/ Block XII/45 in favour of [Aryan] together with all/any subsequent dealings and entries are declared null and void and must be reversed and deleted so that the status of the register be restored as at the date of the invalidated sale.”***

12. Further, the Judge held that every transaction founded on that invalidated sale agreement including the loan facilities extended to Aryan to enable it finance the sale and the execution of the charge over its property Mombasa/Block XX/265A to secure that loan “have no legal or just basis to stand upon and are equally invalidated, declared null and

void and to be deleted from the register” so that the Bank

and Aryan “are restored to respective positions prior to the alleged memorandum of sale executed only by... [Aryan] on 6<sup>th</sup> July 2021.” The Judge awarded Aryan special damages of Kshs. 26,555,859.00 as costs of acquisition of the charged property.

13. The Judge further held that as “a consequence” of the violation of the law by the Bank in that regard, the Guarantors are “entitled to a recompense in general damages which the court assesses in the sum of Kshs. 3,000,000.00.”

14. The Judge went on to find that the Bank had acted inequitably and should not be allowed to benefit from such conduct by demanding and collecting interest for the period post the auction date. In the end, the learned Judge made the following final orders in favour of the Guarantors:

**(a) The sale of the suit property having been done by private treaty was null and void and is thus set aside, the transfer to [Aryan] was itself null and void and is equally set aside and an order issued that the entries in the register be accordingly cancelled so that the register is restored to its status as at the date of the aborted auction.**

**(b) The accounts of the [Guarantors] with the [Bank] be worked so that any obligation mounted upon the Hire purchase facility be**

***excluded in whole and the [Bank] be at liberty***

**to realise its security for the sum contractually secured by the charge and the guarantee.**

- (c) The accounts be worked and agreed within 30 days from the date hereof.**
- (d) For clarity purposes, the [Bank] is not entitled to charge and recover interests for the period between the date of aborted auction and the date of this judgment.**
- (e) General damages 3,000,000.**
- (f) The suit against the [Auctioneer and Aryan] is dismissed.**

15. In favour of Aryan, the court made the following final orders:

- (a) A declaration that the memorandum of sale purporting to accept a bid of Kshs 59 million from [Aryan] for the suit property was unlawful, null and void, incapable of constituting a valid sale of the property and all dealing with the said property pursuant to the said sale was invalid hence the transfer in favour of [Aryan] is nullified and the entries in that regard expunged.**
- (b) On the basis of (a) above, declaration that that (sic) the purpose for which there was executed and registered a legal charge dated 19.9.2011 between the [Bank] and [Aryan] was premised on illegality and the same is nullified and invalidated. The entry of that charge in the register be cancelled by the registrar if not discharged by the [Bank] within 30 days from the date hereof.**
- (c) Special damages in the sum of Kshs 26,556,347/-.**
- (d) The costs of the suit are awarded to the [Guarantors] and [Aryan] to be paid by the [Bank].**

- (e) ***The [Gaurantors] and [Aryan], the decree-holders, get interest on the sums awarded at the prevailing commercial rates charged by the [Bank] till payment in full. Interests shall be calculated from the date of the suit save for those on general damage which shall be computed from the date of this judgment.***

16. Aggrieved, the Bank lodged this appeal which we heard on 3<sup>rd</sup> March 2025 when learned counsel **Ms. Odongo** appeared for the Bank. There was no appearance for the Guarantors despite notice of hearing having been served and neither were written submissions filed on their behalf. Learned counsel **Mr. Anangwe** appearing for Aryan informed the Court that his client (Aryan) is no longer interested in the matter as its claim has since long been settled.
17. Although the Bank challenged the judgment on twenty-one grounds of appeal set out in its Memorandum of Appeal, in Bank's written submissions which Miss. Odongo highlighted during the hearing of the appeal, three main issues were identified, namely, whether the Judge erred in: awarding the Guarantors general damages of Kshs.3 million; holding that the Bank is not entitled to interest from the date of the auction to the date of judgment; and in revoking the sale

and transfer of the charged property.

18. As regards the question whether the trial court erred in awarding the Guarantors general damages of Kshs.3 million, counsel submitted that having nullified the sale and transfer of the charged property, the trial court thereby provided the Guarantors with the remedy for breach, and there was therefore no reason or basis to further award general damages. Moreover, generally, general damages are not recoverable in cases of alleged breach of contract, and there was no basis in the present case for awarding the same. In support of that proposition, counsel relied on decisions of this Court in **Micro-City Computers Limited & Another vs. National Social Security Fund Board of Trustees & Another, Civil Appeal No. 49 & 59 of 2020(Consolidated) [2024] KECA 444 (KLR)**; and **Kenya Tourist Development Corporation vs. Sundowner Lodge Limited [2018] eKLR**, among others.

19. As to whether the Judge erred in holding that the Bank is not entitled to interest from the time of the auction to the time of the judgment, it was submitted that under the terms of the letter of offer for facilities to the Borrower

dated 3<sup>rd</sup> April

2009, it was provided that interest on the principal amount,

including default interest would be recoverable and payable to the Bank; that similarly under the instrument of legal charge dated 6<sup>th</sup> April 2009, Clause 1(c) thereof specifically provided for payment of interest on principal amount and so did the Deed of Guarantee and Indemnity executed by the Guarantors.

20. It was urged that in depriving the Bank of contractual interest, the trial court thereby erroneously re-wrote the contract between the Bank, the Borrower and the Guarantors. In that regard, reference was made to the decision in **Kenya Commercial Finance Company Limited vs. Ngeny & Another [2002] 1 KLR.**

Furthermore, it was

submitted, the trial court having applied the doctrine of restitution, there was no justification for barring the Bank from recovering interest accrued to it on account of the failure by the Borrower and the Guarantors to discharge their obligations, and the Judge, thereby misdirected himself and wrongly re-wrote the contract between the parties. The decision in **National Bank of Kenya Limited vs. Pipeplastic Samkolit (K) Ltd & Another [2001]**

**eKLR** was

cited in support of this submission.

21. On the question whether the Judge erred in revoking the sale and transfer of the charged property in favour of Aryan, it was submitted that the court having determined that the auction of the charged property was botched, and noting that the property had already been transferred to Aryan, should have made an award of damages as compensation as provided in Section 99(4) of the Land Act which provided that a person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power; that the value of the charged property was quantifiable and the loss could be compensated by way of damages. In that regard, the case of **Elijah Kipng'eno Arap Bii vs. Kenya Commercial Bank Limited [2001] eKLR** was cited.

22. None of the respondents, as already stated, made submissions in opposition to the appeal.

**23.** We have considered the appeal and the submissions in accordance with our mandate under Rule 33 of the Court of Appeal Rules. As stated by the Court in **Abok James Odera T/A A.J Odera & Associates vs. John Patrick**

## **Machira**

**Advocates [2013] KECA 208 (KLR)** our

primary role as a first appellate

court is:

***“...to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-***

***“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”***

24. With those principles in mind, we first consider whether the Judge erred in awarding the Guarantors general damages of Kshs.3 million. As the editors of **Chitty on Contracts**, Volume 1, 13<sup>th</sup> edition state in Chapter 26, the traditional view is that damages for breach of contract committed by the defendant are a compensation to the claimant for the damage, loss or injury he has suffered through that breach. The claimant is placed in the same position, as far as

money can do it, as if the contract had been performed.  
However, as

noted by the Court in **Dharamshi vs. Karan [1974] EA 41**

such damages “are usually quantifiable and are not at large” and that where “damages can be quantified they cease to be general.” That case stands for the proposition that, generally, general damages are not awardable for breach of contract. Expounding on that principle, this Court in **Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited vs. Janevams Limited [2015] KECA 822 (KLR)** stated as

follows:

***“The next issue raised by the appellant is the propriety of the award of general damages for breach of contract. As a general rule, there can be no damages for breach of contract. This was the holding of this Court in Provincial Insurance Co. East Africa Ltd v Nandwa LLR No. 867 (CAK). In Habib Zurich Finance (K) limited vs. Muthoga & Another. [2002] 1 EA 81 at page 88 cited with approval the decision of the Court of Appeal for Eastern Africa in the Case of Dharamshi vs. Karan (supra) where that court held as follows:***

***“This case has been accepted by this court as an authority for the proposition that general damages cannot be awarded for breach of contract and that proposition makes sense because damages arising from a breach of a contract are usually quantifiable and are not at large. Where damages can be quantified they cease to be general...”***

***(See also Securicor Courier (K) Ltd vs Benson***

**David Onyango [2008] eKLR).**

***However, where there has been some loss arising from such breach, then damages may be awarded so as to***

***put the claimant in a good position as if there had been no such loss. This was the holding of the Court in Visoi Saw Mills Ltd v The Attorney-General [1997] eKLR (Civil Appeal No. 78 Of 1996):***

***“But whether the claim is in contract or tort the only damages to which the appellant is entitled is a pecuniary loss: it is to put the appellant into as good position as if there had been no such breach or interference. Normally this would entitle the appellant to recover damages for the expenses caused by and gains foregone because of the breach or interference.”***

25. See also ***National Social Security Fund vs. Sifa International Limited [2016] eKLR***; and ***Kenya Power & Lighting Company Limited vs. Abel M. Momanyi Birundu [2015] KECA 861 (KLR)***. The Guarantors did not plead, nor did they prove any special damages and the basis on which the learned Judge made the award of Kshs. 3. Million in their favour is not shown. Therefore, the award of Kshs. 3. Million is hereby set aside.
26. Next are the inter-related questions whether the Judge erred in revoking the sale and transfer of the charged property to Aryan and in holding that the Bank is not entitled to interest from the date of the auction to the date of judgment. We will consider the two issues together. It

was established during the trial, and there is no dispute that the public auction of

the charged property that was scheduled to take place on 24<sup>th</sup> June 2011 aborted as the reserve price was not realized. The Bank subsequently reached out to Aryan and purported to conclude a sale by private treaty on 16<sup>th</sup> July 2011. As the learned Judge correctly stated in the judgment, Section 77(1) of the repealed Registered Land Act prescribed that sale of charged property in exercise of the statutory power of sale would be by auction. Section 77(1) provided that:

***“A chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor, and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction through a licensed auctioneer for a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the chargee thinks fit, with power to buy in at the auction and to resell by public auction without being answerable for any loss occasioned thereby, and may himself bid at any auction..”***

27. The Judge was therefore correct in holding as he did that that realisation of the security had to be by public auction conducted by a licensed auctioneer. In effect the purported sale by private treaty of the charged property was no sale at all and the learned Judge cannot be faulted for having

nullified it and restoring the parties to the respective position

they were in prior to the purported sale. We uphold the finding by the Judge that there was never a valid sale to Aryan and that, “any and every transaction on the title and register of the suit property done pursuant (sic) of the invalid sale were all invalid, null and void and must all be set aside.”

28. Having nullified and set aside the sale, the parties were restored to the position they were in prior to the abortive public auction on 24th June 2011. As at that time, the Borrower and the Guarantors were in breach of their obligations to the Bank. The Bank’s right to exercise its statutory power of sale, as at 24<sup>th</sup> June 2011 had accrued, had arisen and was exercisable.

29. In those circumstances, what then was the basis for the learned Judge to deprive the Bank of interest to which it was contractually entitled? In that regard, the Judge stated that

“the court considers that having reinstated the charge, the obligation to pay interest by the debtor and its guarantors would be as a matter of course and logic.” However, the Judge went on to state that it would be unjust for the Bank

to benefit from income “on the debt for a period over which  
it  
was instrumental in creating” and that had the Bank

“changed tact” “by owning up to the impropriety of the transaction” and engaged in “negotiations or mediation, a middle ground or some amicable settlement would have been achieved and the time for payment of such interests (sic) contained” and further that under Central Bank of Kenya guidelines on non-performing loans, the Bank should have ceased or suspended accrual of interest in accordance with those guidelines.”

30. For a start, it is noteworthy that the learned Judge declined the invitation by the Guarantors to declare that the legal charge dated 6<sup>th</sup> April 2009 is invalid and unenforceable. At paragraph 43 of the judgment, the Judge stated:

***“The court thus finds that the claim by the [Guarantors] to find the Charge dated 6<sup>th</sup> April, 2009 as unenforceable not to be plausible because it would amount to the [Guarantors] getting the nod from the court to run away from the obligations they had knowledge of.”***

31. The same instrument of legal charge (as well as the instrument of Guarantee and Indemnity) obligated the Borrower and the Guarantors to pay interest and other charges. The Borrower, being the principal debtor was not privy to the suit and did not challenge interest. The

matter

concerning suspension of interest on non-performing loans and further that it would be unjust for the Bank to charge interest over the period in question appear to have been raised by the Judge on his own motion in the judgment. The matters were not pleaded nor was evidence led on them and they were not canvassed.

32. Furthermore, given the provisions in the legal charge reserving the right to the Bank to charge interest, there is merit in the Bank's complaint that the pronouncement by the learned Judge in that regard was tantamount to re-writing the contract for the parties. To echo the words of this Court **Richard Akwesera** — **Onditi vs. Kenya Commercial Finance Company Limited [2010] KECA 58 (KLR)**, “there were terms agreed between the parties in respect of the loan and, ordinarily, it is not in the province of the Courts to re- write those terms for the parties, however onerous they may be to one of them...”. There is merit therefore in the complaint by the Bank that the learned Judge erred in depriving it of interest to which it was contractually entitled.

33. In conclusion therefore, the appeal succeeds to the extent that the award of general damages for Kshs. 3 million in

favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents is hereby set aside. Further the holding that the appellant is not entitled to charge interest for the period between the date of the abortive auction and the date of judgment of the High Court is similarly set aside.

34. The Bank will have half costs of the appeal payable by the 1<sup>st</sup>

35. Following the untimely death of the Hon. Mr. Justice Fred Ochieng, JA prior to delivery of this judgment, and the remaining members of the Court being unanimous, this decision is delivered in accordance with Rule 34(4) of the Court of Appeal Rules.

**Dated and delivered at Mombasa this 21<sup>st</sup> day of November 2025.**

**S. GATEMBU KAIRU, FCI Arb, C.Arb.**

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**JUDGE OF**

**APPEAL A.K.**

**MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the  
original.*

*Signed*

**DEPUTY REGISTRAR**