REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. **E327** OF 2024

AFRICAN BANKING CORPORATON LIMITED…..……..……APPELLANT

-VERSUS-

MAGTECH INSPIRATION CENTRE LIMITED.....1ST RESPONDENT

MAGRET WANJIRU IKUAH……...…2ND RESPONDENT

MARCY WANJIKU IKUAH……3RD RESPONDENT

(Being an appeal from part of judgment and decree in the Senior Principal Magistrate's Court at Ruiru (Hon. J.A. Agonda PM) civil case number E133 of 2022 dated 17th January 2024)

JUDGMENT

In its amended plaint dated 13th October 2023, the appellant prayed for reliefs against the respondents jointly and severally as follows;

a. *Kshs 8,564,143,19.*
b. *Interest thereon at contractual rates from the date of filing the suit till payment in full.*
c. *Interest on (d) below at court rates from the date of filing the suit till payment in full.*
d. *Costs of the suit.*
e. *Any other relief the court deems fit to grant.*

The basis of the claim was that the appellant advanced credit facilities to the first respondent between 14th January 2016 and 27th June 2018 which were secured by charges over parcels numbers 27818/188 (hereinafter referred to as 'the Ruiru property') and Naivasha/Mairagushu Block 10/3888 (hereinafter referred to as 'the Naivasha property'), debenture over motor vehicle registration number KCA 801H and deeds of guarantee and indemnity executed by the 2nd and 3rd respondents. It was pleaded further that the 1st respondent defaulted in payments of the loans and when the appellant moved in to realize the securities, it only managed to sell the motor vehicle as attempted sale of the Ruiru property met some legal hurdles.

The appellant pleaded further that on 27th June 2018, the loans were restructured to the tune of Kshs 3,554,778.45 and at paragraph 14 of its amended plaint, the appellant summarized its claim as follows;

- Outstanding amount at Non-Performing Asset
  as at 25th September 2018 Kshs 3,858,512.90
- In duplum amount
  (double amount at NPA plus recovery costs) Kshs 8,564,143.00

By their amended defence dated 3rd September 2023, the respondents admitted taking the loans and averred that the credit facilities were for Kshs 6,000,000.00. The respondents also denied entering into further charge and maintained that the only charge they signed was for facilities advanced in 2012 and pleaded that any further charge over the properties was a fraudulent scheme by officials of the plaintiff to get the properties. They also denied that the appellant sold the motor vehicle and stated that it was the 2nd respondent who sold the same and paid part of the loan. According to the respondent's said defence, after payment from the motor vehicle sales left a balance of Kshs 2,500,914.54. The respondents added that the

demand by the appellant offended the in duplum rule by raising the amount to over nine million.

On 28-08-2023, a consent was recorded by the parties to the effect that judgment was entered for the appellant against the respondents for Kshs 2,500,914.54 being the amount admitted by the respondents. The disputed amount was to go for trial.

After a full hearing where each side called two witnesses, the trial court in the impugned judgment gave the following orders;

1. *An order is hereby issued directing the plaintiff to provide to the defendants full statements for the loan account and loan repayment schedule with effect from the date interest rate cap law came into effect in 2016. The certified loan statements of accounts to be issued within 14 days from the date of this judgment.*

2. *The plaintiff and defendants and/or their advocates or representatives to meet and reconcile accounts on actual amount owing with regard to outstanding loan arrears within fourteen (14) days from the date of this judgment.*

3. *The plaintiff is hereby directed to recalculate the outstanding loan amount with interest based on the interest rate applicable at the time of the alleged default on the basis of the agreed loan repayment period to enable the 2nd defendant repay.*

4. *Thereafter, the plaintiff shall be at liberty to proceed with sale of the property, should the 2nd defendant fail to regularise the breach on expiry of 45 days redemption notice or take necessary steps to exercise its options*

under the charge should the 2nd defendant fail to repay the correct amount of the loan.

5. *The defendants are ordered to pay Kshs 2,500, 914,54/= as per consent judgment entered on 28th August 2023 within 45 days in default the plaintiff shall be at liberty to execute.*

6. *Costs of the suit to the plaintiffs.*

The above findings precipitated this appeal which raises the following grounds;

1. *The learned Principal Magistrate's decision erred in law and fact as the Court totally misapprehended the appellant's claim and therefore failed to consider and determine the fact in issue which was that the appellant sought to call up guarantees to recover the outstanding amounts.*

2. *The learned Principal Magistrate's decision erred in law and fact in ordering the appellant to reconcile and recalculate the outstanding amounts and failed to consider all the evidence adduced before the Honourable Court with respect to the loan amount and the outstanding balance.*

3. *The learned Principal Magistrate's decision erred in law and fact in ordering the appellant to exercise its right of redemption and failed to consider the evidence availed with respect to the appellant's inability to realize the charged properties due to ownership disputes over the property known as L.R Number 27818/118 and the remote location over the property known as Naivasha/Mairagushu Block 10/3888.*

4. *The orders issued were ambiguous, vague and unenforceable as the court failed to address itself on the appellant's recourse if the parties did not agree on reconciliation and recalculation of the outstanding amount.*

5. *The orders issued were also vague and unenforceable as the Honourable court failed to issue an order for execution in the event that the parties agreed on the outstanding amount.*

It is trite that an appellate court has the duty to re-evaluate, re-analyse and re-consider the evidence adduced in the trial court and come to its own independent conclusion but it should bear in mind and give due allowance to the fact that it did not take the evidence of the witnesses first hand and had no opportunity to observe the demeanour of the witnesses. The same was the case in ***Palace Investments Limited v Geoffrey Kariuki Mwenda & another (2015) KECA 616 (KLR)*** where the Court of Appeal stated that;

> *'This being a first appeal, it behoves us to re-evaluate, re-assess and analyze in a fresh and exhaustive manner, all the evidence on record before making our own inferences of fact and arriving at our own independent conclusions.'*

The appellant's case

The appellant called one Muthoka Deborah Mbaku, a banker who told the court through her written statement dated 10-05-2023 that pursuant to a loan application by the 1st respondent, the appellant advanced it credit facilities which were later restructured at an outstanding amount of Kshs 8,026,295.00 vide letter dated 2nd June 2016. These facilities were secured by legal charge, a further legal charge and a second further legal charge dated 3-05-2012, 6-08-2013 and 4-02-2016

respectively over the Ruiru and Naivasha properties, specific debenture of Kshs 3,4000,000.00 over the motor vehicle and deeds of guarantee and indemnity executed by the 2nd and 3rd respondents.

The witness added that the 1st respondent serviced the credit facilities poorly resulting to sell of the motor vehicle at Kshs 600,000.00 with the money going to reduce the loan liability. The default continued forcing the appellant to issue requisite statutory notices and demands through its advocates and auctioneers but upon lapse of the notice period, the appellant was unable to realise the securities as the Ruiru property was found to be a product of fraudulent transactions hence the suit. She added that the loans liabilities stood at Kshs 9,700,154.68 as at 19-07-2021 and continued to earn interest at the rate of 13 per cent per annum and default rate of 24 per cent per annum. The witness produced a total of forty exhibits.

In cross-examination, the witness stated that the loan balance as at 2-06-2019 was Kshs 3,499,000.00. She added that, loan of Kshs 8.8 million was disbursed in three trenches. She admitted that a loan can only be restructured upon request by the customer and insisted that the bank had done due diligence before the two properties were charged. She stated further that, the Kshs 3,499,000.00 was not paid but admitted that some 596,000.00 was paid on 2-06-2018 and that the motor vehicle was sold with the consent of the appellant. She also admitted that in 2018, there was no new loan but only restructuring. She was not sure whether the respondents signed further charge dated 6-08-2013. She added that they were still looking for a buyer for the Naivasha property.

The second witness for the appellant was Nancy Wangari Mwikwi an advocate of the High Court. She told the court that she prepared the legal charges referred to in

PW1's testimony which were securing an aggregate sum of Kshs 4,000,000.00 plus profit, default damages, costs and other expences. These charges were duly executed by the 1st, 2nd and 3rd respondents. She also stated that she prepared the deeds of guarantee and indemnity and had both the charges and the deeds duly registered.

Respondent's case

The 2nd respondent and one Moses Kamau Waithaka testified on behalf of the respondents. The 2nd respondent who was a director of the 1st responded testified that she approached the appellant in 2016 for a loan of Kshs 6,000,000.00 which was given against security of charge over the Naivasha property. She added that the 1st respondent also took a bank guarantee of 100,000 QR for a business in Qatar which was secured vide log book for the motor vehicle and the Ruiru property. She added that the 1st respondent cleared the guarantee within year and cleared some arrears of Kshs 600,000.00 from the sale of the vehicle and requested for release of both the log book and the title for the Ruiru property but she shockingly learned that it had been charged on her loan.

The 2nd respondent claimed to have paid a sum of Kshs 4,642,779.75 of the claim while the loan as demanded by the appellant totaled to Kshs 14,649,777.43 and in that regard, the demands were hugely exaggerated, oppressive and onerous. She stated that she suffered business loss due to economic climate and added that she had a sitting with her chief accountant in which they did reconciliation which showed that the loan balance was Kshs 2,500,914.54.

The 2nd respondent added that they took the loans in dispute in 2016 and when she was unable to pay, she asked the bank to restructure. She admitted that she had

three loans, that is; an overdraft, bank guarantee and loan which were secured differently. She stated that she sold the motor vehicle at Kshs 2.1 million and cleared arrears of Kshs 600,000.00 and when she asked for the vehicle's log book and title for the Ruiru property, she was told that it had been charged without her consent. She maintained that in 2018, the loan arrears were Kshs 2.5 million.

In cross-examination, the 2nd respondent admitted that she had not paid the admitted sum as per the consent. She stated that the loan was Kshs 4,000,000.00 and 2, 000,000.00 for the overdraft. She stated further that she was not denying the two charges of 2014 and 2016. She did not make further payments after 2-06-2018 when the outstanding loan amount was Kshs 3,499,084.46. She alleged that she requested for bank statement severally in vain and added that before February 2020, she made payment of Kshs 300,000.00. She also stated that her accountant said that the outstanding loan amount was 5 million.

Moses Kamau Waithaka, a financial and medical consultant told the court that he had worked with the 1st respondent between 2016 and 2020 and had gone through its records in respect of the loans in question. He stated that the respondents opened up a credit line with the appellant in 2016 and borrowed Kshs 8,800,970.00. He stated that upon going through the records, he discovered that Kshs 3,499,086.46 was outstanding as at 2-06-2018 leaving a balance of Kshs 2,500,914.54 for the entire restructured loan.

The witness argued that the arrears duly payable could not be above Kshs 5,001,828.00 and claimed that the loan was mixed up from 2012, 2014 and 2016. He confirmed that the loan disbursed was Kshs 6,000,000.00 which the respondents were paying until she got financial difficulties and failed to pay

arrears. He claimed that the bank denied him access to the records in respect of the loan and instead gave the respondents conflicting figures of Kshs 4 million and Kshs 6 million. He claimed that there were duplications totaling to Kshs 727,110.80 whose breakdown he gave and claimed that there was application of different interest rates. According to him the interest charged was 110 per cent and the penalties were punitive to the 1st respondent.

In cross-examination, DW2 said that he did not audit the account but had prepared internal report which he admitted he had not filed in court. He also admitted that there was no letter complaining about interest rates or other charges on the credit facilities.

Analysis and determination

I have read the submissions of the appellant dated 14-08-2025. I note that the respondents did not file submissions despite having been served severally. I have also gone through the memorandum of appeal, the evidence of the parties and the judgment of the lower court. In my understanding of the record, there is no dispute that the 1st respondent applied and was advanced loan facilities through letters of offers dated 14th January 2016, 2nd June 2016 and 27th June 2018. These facilities were managed through one account whose statement was produced in court as the appellant's exhibit 39.

Going by the orders of the Honourable Magistrate, the appellant was allowed to after reconciling and recalculating interest the accounts to proceed and sell the securities to recover the outstanding debt. There was no order which would allow the applicant to execute after the reconciliation safe for the admitted sum of Kshs 2,500,914.54.

The appellant was not seeking to be allowed to realise the securities neither was the case before the Honourable Magistrate premised on the legality of the securities. Whether the securities are still available for the appellant or not is irrelevant as the law gives the chargee the right to sue for recovery of the amount owed where the chargor is personally bound to pay. The respondents have admitted executing deeds of indemnity which in my view bind them to personally pay the debt. Section 91(1)(a) of the Land Act provides that;

> *The chargee may sue for the money secured by the charge only if the chargor is personally bound to repay the money.*

Honourable Justice EC Mwita held in ***David Karanja Kamau v Harrison Wambugu Gaita & another (2020) KEHC 2591 (KLR)*** that;

> *'A proper reading of section 90(3), therefore, shows that the 2nd defendant, as chargee, was required to make an election on which of the remedies to go for. The subsection uses the word* ***or*** *which means the remedies are disjunctive and not conjunctive, distinct and not cumulative. The 2nd defendant could only choose one remedy and not more.'*

Neither the appellant nor the respondents made any prayers for provision or taking of accounts. The respondents did point out the specific charge of interest or penalty they had problems with except what they stated to be duplications. The report of DW2 in which he alleged discredited the statement of account was not produced and the court cannot act on assumptions or mere statements which are not backed by evidence.

Based on the above, I hold that the Honourable Magistrate was not justified to give orders as she did. A court has no business venturing out of the confines of the pleadings of the parties unless it is clear that the orders are justified in the circumstances of the case and are meant to bring the dispute to an end. I do not think that the prayers granted by the trial court were justified as the case before it was for recovery of a specified liquidated debt. If the Magistrate had found that the appellant had not proved the debt, she should have dismissed the case but not to take the parties back to the drawing board. She had a duty to bring the litigation to an end instead of opening another battle front which is what would definitely be the effect of the orders she gave.

Another issue for consideration is whether there was unlawfulness, confusion or illegality on the interest and penalties charged. Reading through the judgment, it is clear that the court's decision was informed by the position that the interest charged on the loan was unlawful, unclear or exorbitant. In my view, there can't be unlawfulness in charging interest which is contractual unless it is shown that the same was unconscionable, against clear provisions of the law or against public policy. I see nothing in the proceedings or the evidence produced by the respondents that demonstrates either of these scenarios.

The letters of offers and subsequent charges provided for the applicable rate of interest and default penalty. The respondents in their evidence and submissions before the trial court did not point out what was illegal or unlawful about the interest. They did not deny signing the letters of offer and the charges and they cannot come to court to challenge what they executed on their free will. I have not seen any evidence in the statement of account which suggests that interest rates were varied or adjusted upwards to the disadvantage of the respondents.

Having said the above, this court is left with the issue of establishing whether the appellant had proved the debt on a balance of probabilities. There is no dispute that the 1st respondent defaulted in payment of the loan. There is also consensus between the parties that the amount outstanding inclusive of interest and penalties as at 2-06-2018 was Kshs 3,499,085.46 and some Kshs 596,953.00 was paid after sale of the motor vehicle. What is disputed is the amount owed or outstanding thereafter. While the appellant maintains that the loan had grown to Kshs 10,006,997.68 as at 25-06-2021 which is the date of the last entry of exhibit 39, the respondents maintain that the liability should remain Kshs 2,500,914.54, the amount they had admitted and consented to pay. Looking at the loan account statement, the version of the respondents is openly wrong. The payment of the proceeds of the sale of the vehicle did not reduce the debt to Kshs 2,500,914.54. It reduced it from 4,096,038.46 to Kshs 3,499,085.46 and there is where we should start in establishing the level of liability.

The respondents' second witness spoke of duplication which in my assessment I will not take into account for the following reasons;

- The amount of Kshs 72,523.38 shown twice as entry for 3-08-2018 did not affect or change the actual balance of the loan. The narrations may not be clear to me but the fact is that the actual balance of the loan in the last column remained the same.
- The Kshs 90,906.16 shown against entry for 27-08-2019 for the same reason as above. They did not affect the actual balance.
- The two entries of Kshs 35,800.00 and 34,354.80 given by the witness for 11-12-2019 are not seen in the statement. What is there and appears twice

are recovery costs of Kshs 354,800.00 which will not be relevant for reason given elsewhere in this judgment in respect of recovery costs.

- Two entries of Kshs148,288.00 for 31-05-2021 being recovery costs are also not relevant for reasons shown later in this judgment.

Even if I were wrong and the above double entries were to be taken into account by reducing the amount shown in the statement of account, the balance due would still be higher than the capping considered under in duplum rule.

The appellant has picked the date when the loan became non-performing as 25-09-2018 which is three months after the last payment of Kshs 596,953.00 and in my view, the appellant is correct on that aspect. As at that time, the loan was standing at Kshs 3,858,512.90. Where I part ways with the appellant is its simplistic way of applying in duplum rule by doubling the figure and adding recovery costs without giving details. The appellant did not in my view show by way of evidence what these recovery costs of Kshs 847,117.39 were and how they were incurred. The appellant should have given the breakdown of how it arrived at the amount as recovery costs. I would therefore disallow the amount based on lack of proof of the same and this is the reason I stated in an earlier paragraph that duplication of these costs would not affect the outcome of the judgment

In addition, the application of the in duplum rule does not necessarily mean that the appellant was entitled to the double the amount of liability as at the time the loan became non-performing. The position is that the appellant is not allowed in law to recover more than double the amount owed. That therefore called for the appellant to give proper calculation from the date the loan became non performing to when the suit was filed. I nevertheless note that the statement of account runs up to 25-

06-2021 whereas this suit was filed on 16-03-2022. The statement shows that as at 25-06-2021, the liability stood at Kshs 10,006,997.68 meaning that it had surpassed the maximum allowed under Section 44A (1) and (2) of the Banking Act which provides that;

1. *An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).*

2. *The maximum amount referred to in subsection (1) is the sum of the following-*
   (a) the principal owing when the loan becomes non-performing;
   (b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and
   (c) expenses incurred in the recovery of any amounts owed by the debtor.

Based on the above this court finds that on a balance of probabilities, the respondents were liable to pay the debt which obviously had grown beyond the maximum allowed in law and in that regard, the appellant can only recover a maximum of Kshs 7,717,025.80 considering that the loan became non-performing at Kshs 3,858,512.90.

Consequently, the appeal herein is merited and judgment of the trial court is hereby set aside and substituted for judgement in favour of the appellant in the following terms;

1. Judgment is entered for the appellant against the respondents jointly and severally for Kshs 7,717,025.80.

2. For avoidance of doubt the amount stated in (1) above is inclusive of the Kshs 2,500,914.54 agreed in the consent entered in the trial court on 28-08-2023.

3. The decretal sum shall attract interest at court rates from the date of filing suit in the lower court until payment in full.

4. The respondents shall pay the costs of this appeal and in the court below.

Dated, signed and delivered at Nairobi this **28th** day of **November** 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Maina holding brief for Mr. Omoto for the appellant and in absence of the respondent.