

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT NO. E003 OF 2023

AKSHAR INDUSTRIES LIMITED
PLAINTIFF

VERSUS

MAYFAIR CIB BANK LIMITED..... **1ST**
DEFENDANT

LEGACY AUCTIONEERING SERVICES **2ND**
DEFENDANT

Coram: Before Justice R. Nyakundi
M/s Ndalila & Company Advocates
M/s Kariuki & Kayika Advocates

JUDGMENT

- 1.** This suit concerns allegations of fraudulent and predatory lending practices by the 1st defendant against Akshar Industries Limited, the Plaintiff herein. Through an amended Plaint dated 21st November, 2024, the Plaintiff sought reliefs as follows:
 - a. That a forensic audit be conducted to establish whether there are any fraudulent activities and malpractices that occurred during the Plaintiff's banking and loan relationship with the 1st Defendant.*
 - b. That a declaration be and is hereby issued that the recovery process commenced by the Defendants against the Plaintiff and its guarantors is irregular, defective, unlawful, null and void.*
 - c. That a permanent injunction be and is hereby issued restraining the Defendants whether by themselves, their servants, agents or otherwise howsoever from attaching, selling, alienating or in any way whatsoever interfering with the Plaintiff's ownership,*

possession, occupation and use of land parcel number Uasin Gishu/Kimumu Scheme/428 and motor vehicle registration numbers KCR 957J, KCP 882U, KCN 709A, KCR 268W, KCS 008J, ZD 6452, and ZE 6140.

- d. That a permanent injunction be and is hereby issued restraining the Defendants whether by themselves, their servants, agents or otherwise howsoever from selling, alienating or interfering with the Plaintiff's guarantors' property namely land parcel numbers Eldoret Municipality/Block 4/328 and Pioneer/Langas Block 1/91.*
- e. That a declaration be and is hereby issued that the lump sum payment of Kenya Shillings One Hundred and Forty Million (Kshs. 140,000,000) ought to have been applied in reduction of the principal loan sum and normal interest but not penalties and penalty interest.*
- f. That a declaration be and is hereby issued that the penalties and penalty interest totaling Kenya Shillings One Hundred and Ninety Million (Kshs. 190,000,000) levied by the 1st Defendant are irregular, unlawful, null and void and ought not to have been levied as the consequence of the default and accrual thereof was occasioned by the Defendants' own actions and conduct.*
- g. That the Plaintiff be compensated for collapse and loss of its business occasioned by the Defendants' fraudulent and predatory lending practices.*
- h. Costs of this suit.*
- i. Any other or further relief that this Honorable Court may deem just and expedient to grant.*

The Plaintiff's case.

- 2.** The Plaintiff alleged that it has been a banking customer of the 1st Defendant since 2019, having previously banked with Standard Chartered Bank. The Plaintiff avers that it requested for a loan facility from the 1st defendant herein and the same was lent as follows:

- a. A sum of Kshs. 140,000,000/= made being an overdraft facility of Kshs. 70,000,000/=;
 - b. A sum of Kshs. 70,000,000/= as an inter-available working capital facility;
 - c. A sum of Kshs. 20,000,000/= as a short-term revolving facility;
 - d. A sum of Kshs. 76,000,000/= being a term loan facility; and
 - e. A sum of Kshs. 17,500,000/= being an asset finance facility.
- 3.** The Plaintiff further averred that the above-named loan facilities were secured through the following securities:
- a. First legal charge over LR. No. Eldoret Municipality/Block 4/328 I.N.O Isaac Kipkoech Saina.
 - b. First legal charge over LR No. Pioneer/Langas/Block 1/91 I.N.O Urbano Jemeli A.K Koimur and Isaac Kipkoech Saina;
 - c. First Legal Charge over LR No. Uasin Gishu/Kimumu scheme/428 I.N.O Akshar Industries Limited;
 - d. Lien over a fixed deposit account number 04001170001 I.N.O steel and cement Eldoret Limited; and
 - e. Chattels over motor vehicles registration number KCR 957J, KCP 882U, KCN 709A, KCR 268W, KCS 008J, ZD 6452 and ZE I.N.O Akshar Industries Limited.
- 4.** According to the Plaintiff, it dutifully commenced repayment of the loan facility from the date of the disbursement of the respective loan facilities until late in the year 2022 albeit with a lot of frustrations from the 1st defendant. That the 1st defendant without any justifiable cause or reason severally dishonored cheques issued to the Plaintiff's creditors/suppliers without reference to the Plaintiff. That the 1st defendant dishonored its cheques despite the fact that it had not exhausted the overdraft facility hence defeating the very essence of the facility.
- 5.** The Plaintiff further alleged that the 1st Defendant began carrying out unauthorized transactions in its bank accounts, thereby causing significant inconvenience to its business operations. Despite reaching

out to the 1st Defendant on several occasions to resolve these issues concerning its banking and loan transactions, the Plaintiff's efforts were frustrated by the lack of sufficient cooperation from the bank.

- 6.** In November 2022, recognizing the challenges it faced, the Plaintiff sought the 1st Defendant's consent to sell its motor vehicles and land parcels, and to liquidate the Fixed Deposit Account that formed part of the loan securities. The intention was to use the proceeds to offset the arrears on the loan facility. However, for reasons unknown to the Plaintiff, the 1st Defendant ignored and refused this request for consent. This refusal had dire consequences as the Plaintiff lost potential purchasers, making it increasingly difficult to keep up with the loan repayments.
- 7.** The Plaintiff contended that the actions of the 1st Defendant have adversely and regrettably contributed to its inability to repay the outstanding loan facility. More seriously, the Plaintiff alleged that the 1st Defendant engaged in fraudulent and predatory lending practices. These practices included dishonoring and bouncing cheques issued to the Plaintiff's creditors and suppliers without justifiable cause and without reference to the Plaintiff; carrying out unauthorized transactions in the Plaintiff's bank accounts; failing to abide by the Central Bank of Kenya's regulations and guidelines on lending; levying exorbitant interest on the loan facility without the Plaintiff's knowledge and consent; declining to provide proper communication channels between the parties; refusing consent for the sale of securities at opportune moments; failing to advise the Plaintiff on the status of its loan facility in a timely manner; and failing to honor contractual obligations, thereby straining the Plaintiff's business relationships.
- 8.** According to the Plaintiff, due to the 1st Defendant's frustrations and actions, its business has now collapsed. The Plaintiff emphasized that it remained conscious of the outstanding loan amount and had been working diligently to repay it, but could only do so within a healthy business environment. The delayed payments and dishonored cheques

resulted in the loss of more than 20 prime suppliers, representing approximately 75-80% of its business. With the exit of these prime suppliers, the Plaintiff lost a huge volume of business, significantly reducing its income and revenue.

- 9.** The Plaintiff stressed that due to the 1st Defendant's interference with its business operations arising from the default, it became extremely difficult to keep up with loan repayments. The Plaintiff argued that to successfully repay the outstanding amount, its business needed to make profits through healthy relationships with its creditors and suppliers; otherwise, its efforts would continue to be in vain. The Plaintiff noted that it had attempted to pay creditors directly through other means, but these efforts were not sustainable as the business operations remained entirely dependent on a functional banking relationship.
- 10.** The Plaintiff averred that the 1st Defendant commenced a recovery process regarding the loan facility through a Demand Letter and Statutory Notices dated 22nd December 2022. However, the Plaintiff contended that the 1st Defendant failed to serve these Statutory Notices upon all concerned parties as required by law. The Plaintiff alleged that this recovery process has vanquished the surviving portion of its business, throwing its future and that of its shareholders and employees into limbo.
- 11.** The Plaintiff stated that the 1st Defendant instructed the 2nd Defendant (Legal Auctioneering Services) to attach the Plaintiff's motor vehicles and sell them in pursuit of the recovery process. The Plaintiff emphasized that these motor vehicles form the backbone of its business operations, and the attempt by the Defendants to dispose of them was aimed at paralyzing its business, making it completely impossible to effectively service the loan facility.
- 12.** The 2nd Defendant issued a 7-day Proclamation Notice on 19th January 2023, making the sale of the motor vehicles imminent. The Plaintiff noted that this Notice indicated the outstanding loan as at 19th January

2023 was Kshs. 260,340,970, a sum which the Plaintiff considered contentious, noting that it had already paid a cumulative sum of approximately Kshs. 150,000,000 towards the loan.

- 13.** The Plaintiff maintained that it had no problem paying back the money rightfully due to the 1st Defendant, provided it was furnished with a full and accurate account of repayment and accrual of the loan, and provided the 1st Defendant took responsibility for its own defaults and improper conduct. The Plaintiff highlighted that the Defendants' actions had exposed it to potential claims by third parties, including the Guarantors and creditors.
- 14.** The Plaintiff averred that it and its Guarantors would suffer permanent and irreparable harm if the recovery process proceeded and their assets were ultimately sold. The Plaintiff therefore contended that it was in the interest of justice for the court to grant the prayers sought. The Plaintiff confirmed that there had never been any other suit before a court of law between the parties over the subject matter, and that the High Court at Eldoret was vested with the requisite pecuniary and subject matter jurisdiction to hear and determine the suit.

The defence case

- 15.** The 1st Defendant denies all allegations of fraud and predatory lending, maintaining that all its actions were contractual and lawful. The Defendant contends that the Plaintiff defaulted on its loan obligations and that it properly exercised its rights to recover the outstanding debt through statutory procedures. The 2nd Defendant was engaged by the 1st Defendant to facilitate the recovery process.
- 16.** The defendants also added that the Plaintiff's loan facilities were also secured by the following additional instruments:
 - a. Security rights agreement between the Plaintiff and 1st defendant.
 - b. Fixed and floating debenture over all assets of the Plaintiff.
 - c. Specific debenture over fully automated plastic scrap recycling machine full set 2 units of agglomerator 40HP motor with starter,

draper with motor and starter and crusher with motor and starter.

- 17.** The defendants further denied the Plaintiff's allegations. On the question of dishonored cheques, the defendants averred that on the material dates when the cheques were issued, the Plaintiff's accounts had insufficient funds. The Plaintiff submitted cheques to the 1st defendant while aware that it had reached the limit of its overdraft facility and consequently, the cheques could not be honored. The defendants further stated that payments are an operational issue and invoice discounting is time-bound with specific cut-off times. Despite delays of a few hours, all the Plaintiff's creditors were paid as requested, which did not materially affect the Plaintiff's business operations.
- 18.** The parties filed their written submissions which have been briefly captured hereunder:

The Plaintiff's written submissions.

- 19.** Learned Counsel Mr. Ndalila gave a factual background and couched four issues for determination to wit:
 - a. Whether the 1st defendant engaged in predatory lending practices and fraudulent activities against the Plaintiff.
 - b. Whether the 1st defendant breached its statutory duties and contractual obligations to the Plaintiff.
 - c. Whether the Plaintiff is entitled to the reliefs sought.
 - d. Who should shoulder the costs of the suit.
- 20.** Starting with the 1st issue, it is submitted for the Plaintiff that it has accounted for the particulars of fraudulent and predatory lending practices by the 1st defendant as actions of:
 - a. Dishonoring and bouncing cheques issued to the Plaintiff's creditors and suppliers severally without any justifiable cause or reason, and without reference to the Plaintiff.

- b. Carrying out unauthorized transactions in the Plaintiff's bank accounts.
- c. Failing to abide by the regulations and guidelines on lending as provided by the Central Bank of Kenya.
- d. Levying of exorbitant interest on the loan facility without the Plaintiff's knowledge and consent.
- e. Declining to provide a proper communication channel between the Plaintiff and the 1st Defendant.
- f. Declining to give consent for the sale of the securities at the opportune moment to reduce the Plaintiff's exposure.
- g. Failing to advise the Plaintiff on the status of its loan facility at the right time to enable it to make the right decisions.
- h. Failing to honour its contractual obligations, thereby straining the Plaintiff's business relationships.
- i. Frustrating the Plaintiff's business, leading to its collapse without regard to the centrality of the business to the repayment of the loan facility.
- j. Failing to give a proper and accurate account of the performance, accrual, and repayment of the Plaintiff's loan facility.
- k. Failing to offer the Plaintiff a fair chance to discuss a proper solution to the purported default on repayment despite the Plaintiff's willingness.
- l. Seeking to dispose of the Plaintiff's assets at throw-away prices without undertaking a proper valuation.
- m. Employing a punitive strategy on the recovery process without regard to the Plaintiff's credit history.
- n. Irregularly holding the Plaintiff's director's motor vehicle registration KCN 893J without the same being a security for the subject loan facilities.

21. Mr. Ndalila submitted that the 1st defendant has not produced any evidence to show that the Plaintiff's concerns raised in the email

correspondence were conclusively addressed. As a result, the said actions of the 1st defendant forced the Plaintiff to seek protection orders from the court, which were issued on 11th December, 2024 against the defendant. Consequently, the court on 9th December, 2024 granted the Plaintiff an order allowing the appointment of a forensic auditor to conduct an audit on the accounts of the Plaintiff held with the 1st defendant to establish whether there had been any fraudulent activities and malpractices by the 1st defendant. Counsel submitted that the forensic audit was done and a report dated 16th May, 2025 submitted to the court and adopted on 25th June, 2025 when the Forensic Auditor testified on its contents.

- 22.** Learned Counsel submitted that the report captures specifically evidence in detail, the claim of fraud and predatory lending by the 1st defendant. The findings of the report indicate that:
- a. While the balance in the Plaintiff's account as of January 2021 with the 1st Defendant stood at Kshs. 79,343,646 cheques presented by the Plaintiff were dishonored by the 1st Defendant (page 825 of the Plaintiff's List of Documents).
 - b. While the balance in the Plaintiff's account as of 1st and 2nd February 2021 stood at Kshs. 74,793,288 further cheques were dishonored by the 1st Defendant (page 825 of the Plaintiff's List of Documents).
 - c. On 17th February 2021, a new loan of Kshs. 17,500,000 was granted, reducing the utilization exposure to Ksh. 60,046,101. Thereafter, normal banking and clearance of cheques continued with credit utilization level rising to highs of 80m until 1st July 2021, when more cheques were dishonoured (page 826 of the Plaintiff's List of Documents).
 - d. More cheques were dishonoured between 27th July & 1st August 2022 when the utilization level had risen to highs of 95m (page 827 of the Plaintiff's List of Documents).

- e. On 30th September 2022, a new loan was disbursed Kshs. 15,565,993, but there was no application or any form of request from the Plaintiff (this was admitted by the 1st Defendant's witness Alex Mugambi during the hearing, who testified that there were instances when the 1st Defendant issued a loan without informing or seeking the consent of the Plaintiff). The proceeds of this loan were utilized by the 1st Defendant to recover interest arrears, but the Plaintiff was not aware of it (page 827 of the Plaintiff's List of Documents). Contracts of guarantee have to be in written format.
- f. In May and September 2023, huge payments into the Plaintiff's account with the 1st Defendant (Kshs. 10,000,000, Kshs. 18,000,000, and Kshs. 112,000,000) settled it to a positive balance. These payments were found to be proceeds of the Plaintiff's business land sale at 140 million, all received directly into the Plaintiff's account. However, in October, several other loans were recovered through the account by the 1st Defendant, and on 13th March 2024, a repayment from Steel & Cement Store Eldoret of Kshs. 5,419,938, leaving a loan balance of Kshs. 9,120,914 that continues to be charged with default interest and other charges (page 827 of the Plaintiff's List of Documents).
- g. Concerning the utilization of the letter of Credit facility, the facility granted was Kshs. 20,000,000, which included a post-import financing facility, Kshs. 16,000,000 as a sublimit. In lieu of 20% cash cover, the equivalent amount of 4 million was reserved by the bank, and only 16 million was available for use by the customer as of July 2021 (page 827 & 828 of the Plaintiff's List of Documents).
- h. That, there were errors and omissions in the offer for credit facility to the company dated 8th July 2021 and the security agreements in place as follows; five motor vehicles that are already held by the bank missing in the securities schedule at

facilities aggregation point, the two security agreements maintained are neither dated nor executed by the bank, and one of them doesn't have any schedule of securities referenced, and similarly, the addendum on securities for facilities aggregation misses out the motor vehicles mentioned as missing in the offer (page 832 of the Plaintiff's List of Documents).

- 23.** Learned Counsel Mr. Ndalila submitted that during the hearing, there was an admission from both of the 1st defendant's witnesses (Maureen Kahiro and Alex Mugambi) that:
- a. The Plaintiff requested consent to dispose of property at market value to pay off the loan, but the consent was not issued by the 1st Defendant.
 - b. The 1st Defendant did create loan facilities without informing the Plaintiff or seeking consent to do so.
 - c. That the 1st Defendant relied on verbal agreements, meaning they were not signed, hence the documents provided by the 1st Defendant so far are inconclusive.
 - d. That there were no Contracts of Guarantee issued by the 1st Defendant informing the Guarantors of its intentions. The Plaintiff submits that contracts of land must be in writing.
 - e. That the 1st Defendant has not provided any evidence to show that the Plaintiff has exhausted the overdraft facility of Kshs. 70,000,000, yet several cheques were being bounced.
- 24.** It is therefore submitted for the Plaintiff that within this context and the full context of the Financial Audit Report dated 16th May 2025, it is beyond clear that the 1st Defendant engaged in predatory lending practices and fraudulent activities against the Plaintiff.
- 25.** Moving to the second issue, learned counsel submitted that it is a well-established principle of contract law that parties to a contract are bound by the terms that they have negotiated and agreed upon. On this counsel cited the decision in National Bank of Kenya Ltd v. Pipeplastic Samkolit (K) Ltd & Another (2001) eKLR.

- 26.** Counsel further submitted that the Prudential Guidelines issued by the Central Bank of Kenya (CBK), particularly those on consumer protection, impose obligations on banks to treat consumers fairly, equitably, and honestly at all stages of their relationship. The guidelines urge banks to desist from unethical, inequitable, and unfair business practices, ensure transparency and disclosure of all terms and conditions, including pricing, not engage in unfair, deceptive, oppressive, or aggressive practices such as intimidating consumers, not lending recklessly or negligently, not disguise or conceal material facts of warnings, and not mislead or misadvise the consumer.
- 27.** It was further submitted for the Plaintiff that according to Art. 46 of the Constitution of Kenya on consumer rights guarantees consumers the right to goods and services of reasonable quality, information necessary for them to gain full benefit from goods and services, and protection of their health, safety, and economic interests. Further that the Consumer Protection Act, 2012, also provides a comprehensive framework for consumer protection in Kenya. Section 3 outlines the objects of the Act, including protecting consumers from unconscionable, unfair trade practices, including misrepresentation, unconscionable representations, and unconscionable acts or practices. That section 5 prohibits deceptive trade practices, including making false, misleading, or deceptive representations.
- 28.** On whether the Plaintiff is entitled to the reliefs sought, it is submitted that its business started operations in 2016 and, step by step, it built trust with the suppliers who supported this growth. It initially banked with standard chartered bank before Mayfair-CIB approached with a promise to offer them funding solutions for business growth. Learned counsel submitted that the suppliers from the Plaintiff's main suppliers grew gradually upon the start of the relationship, but suddenly declined from around the third quarter of 2021 to around the middle of 2022. This coincides with the period immediately succeeding a wave of cheques being dishonored by the bank. The company turnover grew

and declined in a similar pattern, indicating consistency with the behavior of the suppliers.

- 29.** The Plaintiff submitted that even with the difficulty it was facing, it managed to repay a sum of Kshs. 140,000,000/= to the 1st defendant demonstrating good faith on its part. That on page 8 of the 1st defendant's supplementary affidavit dated 24th June, 2025, the defendant admits that the facility granted on 15th October, 2020 of Kshs. 76,000,000/= was repaid satisfactorily until 15th July, 2022. It also admits that on 30th June, 2023, Kshs. 11,281,961 was recovered, and Kshs. 63,693,153 was recovered on 2nd October, 2023 fully repaying the facility.
- 30.** The Plaintiff further submitted that for it to successfully repay the outstanding loan amount, its business has to make a profit through a healthy relationship with its creditors, who are its suppliers; otherwise, its efforts will continue to be in vain. Counsel maintained that the 1st defendant engaged in fraudulent and predatory lending practices against it, and it contributed to the collapse of the Plaintiff's business, reputation in the market, financial losses, dispute between the Plaintiff's directors, and loss of business land. This is demonstrated by the 1st defendant's disregard for agreements with the customer, dishonoring supplier payments and delaying supplier payments leading to stopping of supplies, irregular loans issued to customer increasing repayment burden, failure to respond to customer requests to find solutions, failure to consent to security assets sale when there is a good deal, excessive charges for default occasioned by the bank's actions as well as failure to adhere to CBK prudential guidelines on consumer protection.
- 31.** In the final analysis, it was submitted for the Plaintiff that the 1st defendant is liable to compensate the Plaintiff for financial losses and any other damages determined by the court because its actions are directly responsible for the collapse of the Plaintiff's business. That it is

therefore, only fair and in the interest of justice that the court does grant the reliefs sought by the Plaintiff.

- 32.** On the question of costs, learned counsel cited the case in **Party of Independent Candidate of Kenya v. Mutula Kilonzo & 2 others (2013) eKLR** and urged the court to award the Plaintiff costs of the suit.

The Defendants' written submissions.

- 33.** The defendants through learned Counsel Mr. Kayika gave a background of the suit and identified six issues for determination being:

- a. Whether there is any authority and/or resolution filed by the Plaintiff to institute the instant suit.
- b. Whether the forensic audit report compiled by GNM accountants LLP dated 16th May, 2025 is impartial.
- c. Whether the court can order for a forensic audit of the Plaintiff's accounts with the 1st defendant to ascertain the alleged fraud.
- d. Whether the entire recovery process commenced by the defendants against the Plaintiff and its guarantors is regular and lawful.
- e. Whether the Plaintiff is entitled to an order of permanent injunction.
- f. Whether the Plaintiff is entitled to compensation for the collapse and loss of business.

- 34.** On the first issue, learned counsel submitted that the Plaintiff is a limited liability company duly incorporated under the Laws of Kenya. Counsel highlighted that there is no resolution signed and sealed by the directors of the Plaintiff authorizing the filing of the instant suit, fact that was confirmed by PW-1 during the hearing of this suit. He submitted that the deponent of the Plaintiff's verifying affidavit sworn on 25th January, 2023, one Dillip Panda, did not have the requisite authority to sign and swear the verifying affidavit on behalf of the Plaintiff. That it is therefore evident that the suit is a non-starter due to

lack of an authority and resolution of the Plaintiff to commence the suit. Being an artificial person, the Plaintiff would only have the capacity to institute a suit through a resolution passed by its board of directors. On this, counsel cited the decisions in **Thome Farmers Company No. 4 Ltd v. Farm of Faith investor Ltd (2019) eKLR** and **Philomena Ndanga Karaja & 2 others v. Edward Kamau Maina (2015)**.

- 35.** On whether the forensic audit report is impartial, it is submitted for the defendants that a forensic audit involves a thorough examination of financial records to detect and investigate fraud, financial misconduct and uncover criminal activities. Counsel submitted that unfortunately, the forensic audit report produced by PW-2 does not give figures of the Plaintiff's loan facility that is currently outstanding which means that the figures provided by the 1st defendant are either correct or the forensic auditor did not conduct a proper forensic audit. He further submitted that the report has failed to give an explanation of the source and basis for the sums of Kshs. 140,000,000/= and Kshs. 190,000,000/= sought as reliefs in the Plaintiff's amended Plaint. In addition, PW-1 confirmed during the hearing that the Plaintiff has no issue whatsoever with the various bank statements provided by the 1st defendant.
- 36.** Mr. Kayika maintained that the forensic audit report produced equally failed to explain if there is any fraud on the Plaintiff's bank accounts held at the 1st defendant bank. He argued that a court of law can only order a forensic audit if only there are fraudulent activities exhibited in the accounts, which is not the case in the instant suit. It is thus clear that there has been no fraud shown to have been conducted by the defendant nor are there any figures in dispute between the parties as confirmed by PW-1 in his testimony in court.
- 37.** It is further submitted for the defendant that the report is nothing but a fishing expedition and a mere regurgitation of the opinions of the Plaintiff and is sorely lacking in any professional analysis of facts as

would be required of an impartial auditor. He submitted that the forensic auditor who testified as PW-2 even confirmed before the Honorable Court that in preparing the audit report, he selected the emails that he attached as part of this report. That a forensic auditor is supposed to be neutral in his findings, which was not the case with the instant forensic audit. He urged this court to disregard the report due to its exhibited bias.

- 38.** On the third issue, it is submitted for the defendants that the forensic report filed by the Plaintiff has not expressly indicated if there was overcharging on interest, any penalties that were wrongly applied on the Plaintiff's accounts, any miscalculation of the loan facilities or any error at all in the statements filed in court by the Plaintiff and the defendant. That the audit merely reiterates the Plaintiff's position without any evidence to support the same. With this, learned counsel maintained that it is unclear what purpose another forensic audit will serve other than to assist the Plaintiff in its fishing expedition, delaying resolution of this matter and muddying the waters. The defendants therefore opposed the issuance of orders for a forensic audit.
- 39.** On the recovery process learned counsel submitted that the Plaintiff is bound by the terms of the letters of offer, addendum letters of offer, security rights agreement, debentures and charge instruments that it voluntarily executed. Counsel argued that the Plaintiff is bound by all clauses of the letter of offer, addendum letters of offer, security rights, agreements, debentures and charge instruments and that it executed including but not limited to the clauses on consequences for defaulting in repaying the outstanding loan facilities. By failing to repay the outstanding loan facilities as and when they fell due, the Plaintiff breached the contractual terms of the letters of offer, addendum letters of offer, security rights agreement, debentures and charge instruments. Hence the 1st defendant has a right to dispose of the suit motor vehicles and exercise its statutory power of sale over the suit

property so as to recover the outstanding loan facilities due and owing from the Plaintiff.

- 40.** Mr. Kayika submitted that in seeking to dispose of the suit motor vehicles, the 1st defendant fully complied with the provisions of the Movable Property Security Rights Act, 2017. He cited the provisions of section 67 and 72 and submitted that they were fully complied with.
- 41.** It is submitted for the defendants that the Plaintiff has failed to settle the outstanding loan facilities due and owing to the 1st defendant. The Plaintiff has further admitted in his amended Plaint dated 21st November, 2024 that it is very conscious of the outstanding loan amount owed to the 1st defendant. Therefore, having made this admission, it would then be absurd for the Plaintiff to request this Honorable Court to restrain the 1st defendant from exercising its rights as granted under the various letters of offer that the Plaintiff voluntarily executed allowing the 1st defendant to realize the securities if the Plaintiff defaulted on the facilities granted to it.
- 42.** Learned Counsel maintained that it is default that necessitated the 1st defendant to instruct the 2nd defendant to recover the outstanding loan facilities repossessing and disposing the suit motor vehicles. The Plaintiff having failed to repay the outstanding loan facilities, the 1st defendant has a right to dispose of the suit motor vehicles so as to recover the outstanding loan facilities. The Plaintiff has no option but to lose the suit motor vehicles, which is the 1st defendant's security for repayment of the loan facilities.
- 43.** On 22nd December, 2022, the 1st defendant issued the Plaintiff and its guarantors with 90 days' statutory notices of its intention to exercise its statutory power of sale over Title Number Uasin Gishu/Kimumu Scheme/428, title Number Eldoret Municipality/Block 4/328 and title number Pioneer/Langas Block 1/91. Counsel submitted that the Plaintiff then proceeded to institute the instant suit while the timelines for the 90 days' statutory notices were yet to lapse to enable the 1st defendant

issue the 40 days' statutory notice and other notices as required under the Land Act, 2012.

44. It is submitted for the defendant that while charging the suit property, the Plaintiff knew too well that the suit property had become a commodity for sale and there is no commodity for sale to which a value cannot be attached. On this he cited the decision in Joseph Kariuki Kinyuigwa v. Mwananchi Credit Limited & Mary Rita Wanjiku t/a Mistan Auctioneers (2019) eKLR and Jim Kennedy Kiriro Njeru v. Equity Bank (K) Limited (2019) eKLR.
45. On whether the Plaintiff is entitled to a permanent injunction, it is submitted for the defendants that the Plaintiff did not prove that the statutory power of sale did not accrue on its default. That it has instead disputed the exercise of the statutory power of sale on the basis that there was no service of statutory notices. That this cannot be a ground to deny the 1st defendant its right to realize the securities. Counsel cited the cases of **Heshimart Enterprises v. Kenya Women Microfinance Bank Limited (2021) eKLR**, **Showind Industries v. Guardian Bank Limited & Another (2002)1 EA 284** and **Ambient Construction v. National Bank of Kenya Limited (2019) KEHC 9680 (KLR)**.
46. Learned Counsel submitted that the Plaintiff has not option but to lose the securities which it offered to the 1st defendant as a continuing security for the repayment of the loan facilities. That the Plaintiff has made no efforts to settle the outstanding loan facility due and owing to the 1st defendant yet it seeks an equitable remedy. He argued that it is long established that no injunction should be granted to restrain a chargor from exercising the power of sale conferred by the statute unless the amount in question has been paid to the charger.
47. On the final issue, it is submitted for the defendants that compensation for collapse and loss of business is a special damage. It is trite law that special damages must be specifically pleaded and strictly proved. He urged the court to find that the Plaintiff's business collapse was caused

by the Plaintiff's own actions and inaction and other circumstances not related to the actions of the defendant. He further urged this court to dismiss the prayer to grant compensation for collapse and loss of business as neither specifically pleaded or strictly proved.

48. It is submitted that the Plaintiff's forensic audit report, the Plaintiff's witness himself admitted that business was extremely slow due to rain and other things and stock not moving at all. That it is therefore clear that even the Plaintiff is aware that the cause of his business collapsing was not the 1st defendant's actions and this claim is merely a gimmick for the purpose of these proceedings.
49. On the issue of a loan facility of Kshs. 15,000,000/=, which the Plaintiff did not apply for, it is submitted for the defendants that DW-1 testified that at times, the 1st defendant gave the Plaintiff temporary overdraft facilities when its overdraft facilities when its overdraft limit was exceeded. This is what culminated to Kshs. 15,000,000/= to a time loan facility was meant to protect the Plaintiff from penalty interest and reduce the Plaintiff's exposure.

Analysis and determination

50. Having carefully considered the pleadings, evidence presented, written submissions, applicable law, and the forensic audit report, I now proceed to determine this matter on its merits.
51. The defendants raised a preliminary issue that the Plaintiff lacked proper authority to institute this suit, arguing that there is no board resolution authorizing the commencement of these proceedings. It is not in doubt that the Plaintiff is a separate legal entity. Lord Denning MR in his characteristic literary style summed up the law in **Moir v. Wallersteiner [1975] 1 ALL ER 849** at p. 857, as follows:

"It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrong doer, the company itself is the one person to sue for the

damage. Such is the rule in Foss v Harbottle [1843] 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue”.

52. While it is true that a company must act through proper corporate authority, the evidence before this court shows that Mr. Dillip Panda, who swore the verifying affidavit, is a director of the Plaintiff company. The suit was filed by advocates on record who were duly instructed. During the hearing, PW1 testified and gave evidence on behalf of the Plaintiff company. The defendants did not raise this objection at the earliest opportunity but waited until final submissions. They continued to engage with the matter on its merits throughout the proceedings. In the circumstances, I find that the Plaintiff had sufficient authority to institute these proceedings. This preliminary objection is therefore dismissed.

53. At the heart of this dispute lies the relationship between a bank and its customer. This is a contractual relationship founded on mutual obligations and utmost good faith. In ***Equity Bank of Kenya & Another v Robert Chesang [2016] eKLR***:

“A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations with its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer.....The bank/customer relationship is based on utmost good faith. The bank is also under a contractual duty to diligently handle accounts of a customer, to ensure that funds deposited on account are available when required by the customer. Any deviation from that understanding without

justifiable reasons which should be communicated to the customer well in advance or immediately, the bank is in breach of a contract with the customer and is liable in damages.”

- 54.** It is trite law that parties are bound by the terms of their contract and it is not the business of the court to rewrite what parties agreed to. In **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR**, the Court of Appeal expressed itself as follows:

“...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...”

- 55.** This court is bound to give effect to what the parties expressly agreed. The Plaintiff entered into various loan agreements with the 1st Defendant and executed security documents. These agreements created binding obligations on both sides. The Plaintiff was obliged to repay the loans as agreed, and the bank was obliged to conduct itself in accordance with the terms of the contract, the law, and established banking practice.

- 56.** One of the central complaints by the Plaintiff concerns the dishonoring of cheques issued to its suppliers and creditors. The evidence before this court, including the forensic audit report, confirms that cheques were indeed dishonored on multiple occasions despite there being sufficient funds in the Plaintiff's accounts to honor them.

- 57.** In **Halsbury’s Laws of England, 4th Edition, Volume 3 at paragraph 125** on banker- customer relationship and obligations thereto, it is stated that:

“The characteristic usually found in bankers are:

- 1. That they accept money from and collect cheques for their customers and place them to their credit;*

2. That they honor cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly; and

3. That they keep current accounts in their books in which the credits and debits are entered.”

58. Paragraph 155 of the same volume on wrongful dishonor of a cheque states;

“If without justification, a banker dishonors his customer’s cheque, he is liable to the customer in damages for injury of credit. Proof of actual injury to credit is not necessary to secure substantial damages, either for a business customer or for personal customers. The answer on a cheque dishonored on presentation by a third person may constitute libel, but such cases are rare; in such cases general damages may be awarded.”

59. In Paget’s Law of Banking, 13th Edition the learned **author** states:

“The Credit of a customer may be seriously injured by the wrongful dishonor of a cheque. Yet it is rare that a customer will be able to prove special damage. His claim is for general damages in respect of injury to his reputation.

As regards trading customers, the law presumes injury without proof of actual damage. The special position of traders was recognized by the House of Lords in Wilson Vs United Counties Bank Ltd (1920) AC 102, where, after reviewing the authorities, Lord Birkenhead said:

‘The Ratio decidendi in such cases is that the refusal to meet the cheque, under such circumstances, is so obviously injurious to the credit of a trader that the latter can recover, without

allegation of special damage, reasonable compensation for the injury done to his credit''.

- 60.** The forensic audit report dated 16th May 2025 provides specific instances where cheques were dishonored despite sufficient funds. For example, in January 2021 when the account balance stood at Kshs. 79,343,646, cheques were dishonored. Similarly, on 1st and 2nd February 2021 when the balance was Kshs. 74,793,288, further cheques were dishonored. These instances occurred before the Plaintiff had exhausted its overdraft facility of Kshs. 70,000,000.
- 61.** In **Harit Sheth and Richard Kariuki T/A Harit Sheth Advocates v. NIC Bank Limited** (Civil Suit 280 of 2010) [2023] KEHC 18933 Justice Mabeya held:

"In this regard, it should have been in the contemplation of the defendants that dishonoring a cheque written on a clients' cheque would have dire consequences on its customers, the plaintiffs. It is no surprise that the plaintiffs lost a valued client like the payee with the attendant loss of business. The loss of instructions from the payee and the consequent loss of fees cannot be said to be so remote as claimed by the defendant."

- 62.** In the present case, the Plaintiff was a trading entity engaged in the plastics industry. Its business depended entirely on maintaining good relationships with its suppliers who provided materials on credit. When cheques issued to these suppliers were dishonored, the natural and foreseeable consequence was that these suppliers would lose confidence in the Plaintiff and stop supplying goods. The Plaintiff submitted that it lost more than 20 prime suppliers representing 75-80% of its business. This in my view was not a remote consequence but a direct and foreseeable result of the bank's actions.
- 63.** The forensic audit report reveals that on 30th September 2022, a loan of Kshs. 15,565,993 was disbursed to the Plaintiff's account without

any application or request from the Plaintiff. This fact was admitted by the 1st Defendant's witness, Alex Mugambi, during the hearing. He testified that there were instances when the 1st Defendant issued loans without informing or seeking the consent of the Plaintiff.

- 64.** The 1st Defendant's explanation through DW1 was that this was a temporary overdraft facility meant to protect the Plaintiff from penalty interest. However, this explanation is unsatisfactory. A bank cannot unilaterally create loan facilities for a customer without their knowledge or consent and then charge interest on those facilities. Such conduct violates the fundamental principle that a contract requires mutual consent.
- 65.** The proceeds of this unauthorized loan were used by the 1st Defendant to recover interest arrears, but the Plaintiff was not aware of it. This amounted to the bank using the customer's account to settle the bank's own claims without proper authorization. Such conduct cannot be justified under the guise of protecting the customer
- 66.** The Plaintiff has invoked the Prudential Guidelines issued by the Central Bank of Kenya, particularly those on consumer protection. These guidelines, while not having the force of primary legislation, represent important regulatory standards that banks are expected to observe. The guidelines require banks to treat consumers fairly, equitably, and honestly at all stages of their relationship. They urge banks to desist from unethical, inequitable, and unfair business practices and to ensure transparency and disclosure.
- 67.** Article 46 of the Constitution guarantees consumer rights, including the right to goods and services of reasonable quality, information necessary to gain full benefit from goods and services, and protection of economic interests. The Consumer Protection Act, 2012 provides a comprehensive framework prohibiting deceptive trade practices and unconscionable conduct.
- 68.** While the relationship between a bank and its customer is primarily contractual, banks must still conduct their operations in a manner

consistent with these broader consumer protection principles. The evidence in this case suggests that the 1st Defendant's conduct fell short of these standards in several respects, including the lack of proper communication, the dishonoring of cheques without justification, and the creation of unauthorized facilities.

69. Having said all that, it is important to recognize that the Plaintiff is not without fault in this matter. The Plaintiff admits in its own pleadings that it owed to the 1st Defendant. The evidence shows that the Plaintiff did default on its loan repayments from late 2022. By the time the 2nd Defendant issued the Proclamation Notice on 19th January 2023, the outstanding amount was stated to be Kshs. 260,340,970.

70. The Plaintiff cannot escape the fundamental fact that it borrowed money from the 1st Defendant and undertook contractual obligations to repay that money according to agreed terms. When a borrower defaults, the lender has legitimate rights under both the contract and the law to recover its money. The Plaintiff voluntarily executed various security documents, including charges over land and chattels over motor vehicles. In doing so, the Plaintiff knew and agreed that these securities could be realized in the event of default.

71. In **Simba Commodities Ltd vs Citibank N.A. Civil Case No. 236 of 2003 (2013) eKLR**, the court citing the case of **Karak Brothers Company Ltd versus Burden (1972) ALLER**, held: -

“As to the nature and extent of the contractual duty of care owed by a paying bank to its customer when called on to honour a cheque drawn by the customer; and in particular, in the case of a corporate customer which has given the usual mandate to its bank, to what extent the bank is entitled to place exclusive reliance on the fact that the cheque is signed by the corporation’s duly authorized signatories the conclusion reached by Ungoed-Thomas J was as follows:

... a bank has a duty under its contract with its customer to exercise “reasonable care and skill” in carrying out its part with

regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stock broker into his account of proceeds of sale of his client's shares) of necessity does not suggest that it is out of the ordinary course of business. If "reasonable care and skill" is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in the exercise of reasonable care and skill again depends on circumstances.

'As between the company and the bank, the mandate, in my view, operates within the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal obligation of using reasonable skill and care; and that duty, on the part of the bank, of using reasonable skill and care, is a duty owed to the other party to the contract, the customer, who in this case is the plaintiff company, and not to the authorized signatories. Moreover, it extends over the whole range of banking business within the contract. So the duty of skill and care applied to interpreting, ascertaining, and acting in accordance with the instructions of a customer; and that must mean his really intended instructions as contrasted with the instructions to act on signatures misused to defeat the

customer's real intentions. Of course, omnia praesumuntur rite esse acta, and a bank should normally act in accordance with the mandate – but not if reasonable skill and care indicate a different course.”

- 72.** The question I then ask myself is: can the Plaintiff, having admitted that it has not fully repaid the loan, seek to restrain the bank from exercising its contractual and statutory rights to recover the debt?
- 73.** The defendants challenge the impartiality and conclusions of the forensic audit report prepared by GNM Accountants LLP. They argue that the report does not give the current outstanding figures, does not explain the source of the sums of Kshs. 140,000,000 and Kshs. 190,000,000 sought in the reliefs, and that PW1 confirmed the Plaintiff has no issue with the bank statements provided.
- 74.** The defendants' criticism that the report does not calculate the exact current outstanding amount is valid but does not invalidate the entire report. The purpose of the forensic audit was to investigate whether there were fraudulent activities and malpractices, not necessarily to produce a final reconciliation of the account. The report has identified several concerning practices by the bank that would warrant this court's attention.

Were the Actions of the Bank Fraudulent or Predatory?

- 75.** The evidence in this case does not establish fraud in its technical legal sense. There is no evidence that the bank intended to deceive the Plaintiff from the outset or that the loan agreements were entered into dishonestly. However, the evidence does establish that the bank engaged in practices that were unfair, unreasonable, and detrimental to the customer's interests. These practices include the wrongful dishonoring of cheques, the creation of unauthorized facilities, the refusal to grant reasonable consent for the sale of securities, and inadequate communication.

- 76.** Whether one characterizes this conduct as predatory or simply as poor banking practice, the fact remains that the bank breached its duties to its customer in several material respects. These breaches contributed significantly to the deterioration of the Plaintiff's business. A business cannot survive when its cheques to suppliers are being dishonored. Suppliers will naturally refuse to continue extending credit or supplying goods to a customer whose payments are unreliable. The loss of 20 major suppliers representing 75-80% of business is a catastrophic blow to any trading entity. While the Plaintiff's business difficulties may have been exacerbated by other factors, the dishonoring of cheques in my view was a contributing cause.
- 77.** The 1st Defendant issued statutory notices dated 22nd December 2022 indicating its intention to exercise its statutory power of sale over the charged properties. The Plaintiff contends that these notices were not properly served on all concerned parties as required by law.
- 78.** The law requires proper service of statutory notices before a bank can exercise its power of sale. In cases involving third-party guarantors, all concerned parties must be served. The burden of proving proper service lies with the bank.
- 79.** While there may have been technical irregularities in the service of notices, this is not the main issue in this case. The central issue is whether the bank's conduct prior to and during the recovery process was proper and whether the amount being claimed is accurate.

The Question of Injunctive Relief

- 80.** The Plaintiff seeks a permanent injunction restraining the defendants from selling or interfering with its properties. An injunction is an equitable remedy that requires the applicant to come to court with clean hands.
- 81.** In **Kenya Power & Lighting Co. Ltd vs Sheriff Molana Habib [2018] eKLR**, the court held that a permanent injunction is granted on

the merits of the case after the evidence in support of or against the claim has been tendered. A permanent injunction finally determines the rights of the parties before the court.

- 82.** The Plaintiff in this case admits it has not paid the outstanding loan. It disputes some of the charges and penalties but does not deny the existence of the principal debt. Under normal circumstances, this would be fatal to the claim for injunction. However, the circumstances of this case are not usual.
- 83.** The evidence shows that the bank contributed significantly to the Plaintiff's inability to service the loan through its improper conduct. The dishonoring of cheques destroyed the Plaintiff's supplier relationships, which were essential to generating the income needed to repay the loan. The refusal to consent to the sale of securities prevented the Plaintiff from reducing its exposure when it had the opportunity to do so. The creation of unauthorized facilities increased the debt burden.
- 84.** In such circumstances, it would be inequitable to allow the bank to proceed with the sale without proper accounting for its own role in creating or exacerbating the default. However, equally, it would be inequitable to grant a permanent injunction that allows the Plaintiff to retain the securities indefinitely without paying the debt.
- 85.** This court then must fashion a remedy that does justice to both parties while recognizing that both bear some responsibility for the current situation.
- 86.** First, on the issue of compensation for business loss, the Plaintiff has established that it suffered loss as a result of the bank's wrongful actions, particularly the dishonoring of cheques. While it is difficult to quantify the exact amount of business loss, given the multiple factors that affect business performance, the evidence shows that the Plaintiff lost substantial business. The claim for compensation is well-founded in principle, though the aspect of quantum cannot be established.
- 87.** Beyond the issue of pleading and proof, there is a fundamental principle of equity that must be considered. It is well established that a

party cannot recover damages to the extent that those damages were caused or contributed to by their own actions or failure to mitigate their loss. In the present case, while the 1st Defendant's improper conduct undoubtedly harmed the Plaintiff's business, the Plaintiff also contributed to its predicament. The Plaintiff continued to issue cheques when it knew or ought to have known that its relationship with the bank was deteriorating. The Plaintiff failed to take adequate steps to mitigate its losses by seeking alternative banking arrangements or pursuing formal dispute resolution mechanisms earlier. Most significantly, the Plaintiff ultimately defaulted on its loan obligations, which was the trigger for the recovery proceedings. A party cannot invoke equity when their own hands are not entirely clean, nor can they claim full compensation for losses to which they themselves partly contributed.

- 88.** However, the Plaintiff has pleaded this as a general claim for collapse and loss of its business without providing specific figures for the actual loss suffered. Special damages must be specifically pleaded and strictly proved. The Plaintiff's claim in this regard is too general and lacks the specificity required for an award of special damages.
- 89.** Second, on the issue of the penalties and penalty interest totaling Kshs. 190,000,000, it is evident that the Plaintiff made a lump sum payment of Kshs. 140,000,000 (being proceeds from the sale of its business land). The Plaintiff contends this should have been applied to reduce the principal and normal interest, not penalties. This is a reasonable contention. Penalties should not consume payments meant to reduce the principal debt, particularly when the default arose partly from the bank's own conduct.
- 90.** Third, on the issue of injunctive relief, while the Plaintiff is not entitled to a permanent injunction in the absolute terms sought, the court must ensure that any sale of securities is conducted fairly and that proper accounting is done before such sale proceeds.

- 91.** This case presents a situation where both parties bear responsibility for the unfortunate turn of events. The bank breached its duties to its customer in several material respects, creating unauthorized facilities, and failing to cooperate when the customer sought to liquidate securities. These actions contributed significantly to the deterioration of the customer's business.
- 92.** On the other hand, the customer did default on its loan obligations and must bear responsibility for that default. The customer cannot escape its fundamental obligation to repay borrowed money.
- 93.** In fashioning the appropriate remedy in this matter, this court is mindful that it must do justice to both parties while recognizing the unique circumstances that have brought them before this court. The bank, as a financial institution, has a right to recover its money and to enforce its security. However, that right must be exercised fairly, transparently, and in accordance with the law. Where, as in this case, the bank's own conduct has materially contributed to the borrower's difficulties, equity demands that the bank cannot proceed as if it bears no responsibility for the current state of affairs. Conversely, the Plaintiff cannot hide behind the bank's improprieties to avoid its fundamental obligation to repay borrowed funds. The Plaintiff must take responsibility for its default and cannot expect to retain the benefit of both the loan proceeds and the securities indefinitely.
- 94.** It is trite that the statutory power of sale in mortgage contracts is generally exercisable upon default provided statutory notice requirements are met . The courts emphasize now and again that while lenders have this power under the Land Act 2012 it is subject to a duty of care to obtain the best price reasonably. I found the authority of *Downsview Nominees Ltd v First City corporation* (1993) AC 295 Instructive. Thus: “ *Several centuries ago equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and, secondly, that a security for*

repayment of a debt is only a mortgage. From these principles flowed two rules, first, that powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, powers conferred on a mortgagee may be exercised although the consequences may be disadvantageous to the borrower. These principles and rules apply also to a receiver and m “If a mortgagee exercises his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor. Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd. [1971] Ch. 949 is Court of Appeal authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price but is no authority for any wider proposition.

95. In assessing the indicators of the issues raised by the Plaintiff against the Defendant in particular those touching on the mortgagor /mortgagee contract there are matters of evidence touching on the various loan agreements which even with the voluminous forensic report could not answer with precision. There was nothing before the court on the part of the Plaintiff to demonstrate that the category of loans borrowed from the first Defendant have been fully settled in compliance with the commercial contract of lending and borrowing. The Evidence showed some level of repayments made particularly on the amount of 140,000,000 but the rest of the other money is borrowed and payments made remains sketchy. It is my view that the standard and burden of proof at all times is vested with the Plaintiff on mortgagor /mortgagee contracts. I am of the view therefore, that pursuant to Section 1(A), 1(B), 3 and 3(A) of the Civil Procedure Act be invoked to the extent of meeting the ends of justice in this matter as herein under ordered.

96. In the final analysis, the following orders shall abide:

- a. *The 1st Defendant is hereby ordered to provide to the Plaintiff, within 30 days, a full and accurate statement of account showing:
 - i. All loan facilities advanced.
 - ii. All payments received.
 - iii. How the payment of Kshs. 140,000,000 was applied.
 - iv. A breakdown of principal, interest, penalties, and other charges.*
- b. *The lump sum payment of Kshs. 140,000,000 shall be applied first to the principal sum and normal contractual interest. Any penalties or penalty interest that accrued as a result of defaults caused or contributed to by the 1st Defendant's conduct (including the dishonoring of cheques and refusal to consent to sale of securities) shall be waived.*
- c. *The 1st Defendant shall not proceed with the sale of any of the securities until all of the following conditions have been satisfied:
 - i. The 1st Defendant must provide the statement of account as ordered in (a) above;
 - ii. A period of 90 days must have elapsed from the date of providing the said statement of account to allow the Plaintiff opportunity to make payment arrangements or to challenge specific items through appropriate legal channels;
 - iii. The 1st Defendant must comply with all statutory requirements for the sale of securities under the Land Act, 2012 and the Movable Property Security Rights Act, 2017, including proper valuation of the securities and service of all requisite notices on all concerned parties including the guarantors.*
- d. *Pending the satisfaction of the above conditions, the status quo ante is hereby preserved and maintained. The Defendants are restrained from interfering with, attaching, selling, alienating, or*

in any manner whatsoever dealing with the securities, namely: land parcel numbers Uasin Gishu/Kimumu Scheme/428, Eldoret Municipality/Block 4/328, and Pioneer/Langas Block 1/91; and motor vehicle registration numbers KCR 957J, KCP 882U, KCN 709A, KCR 268W, KCS 008J, ZD 6452, and ZE 6140.

- e. The Plaintiff's prayer for general compensation for business collapse is refused as the claim was not specifically pleaded and proved to the required standard.*
- f. The forensic audit established that there were improper banking practices, but did not establish fraud in the legal sense. The prayer for a declaration of fraud is therefore refused.*
- g. Each party shall bear its own costs of this suit, given that both parties contributed to the situation that gave rise to this litigation.*

97. Orders accordingly.

**DATED SIGNED AND DELIVERED AT ELDORET, THIS 5TH DAY OF
FEBRUARY, 2026**

.....

**R. NYAKUNDI
JUDGE**