REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PETITION NO. E026 OF 2025

IN THE MATTER OF ENFORCEMENT & INTERPRETATION OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGMENT OF THE RIGHTS AND FREEDOMS IN ARTICLE 2(1), ARTICLES 3(1), ARTICLE 4, ARTICLE 10(1) (C), 2(B), ARTICLE 20(1), (2), (3) AND (4), ARTICLE 21(1) & (3), ARTICLE 22(1), 2(B) & (C), ARTICLE 23(1) AND (3), ARTICLE 25(C), ARTICLE 27(1), (2), (3), (4) and (6), ARTICLE 28, ARTICLE 35(1) (A), (B), AND (2), ARTICLE 40(1), (2) AND (3), ARTICLE 46(1A), (1B), (1C), & (1D) AND (3), ARTICLE 47 (1), ARTICLE 48, ARTICLE 55(A), ARTICLE 56(B) & (C) AND (2) ARTICLE 165(3), ARTICLE 259(1), (A), ARTICLE 56(B)
& (C) AND (2), ARTICLE 165(3), ARTICLE 259(1), (A), (B) & (C) AND ARTICLE 260 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 23(1) AND (3), ARTICLE 27(1), (2),
(3), (4), (5), AND (6), ARTICLE 28, ARTICLE 35(1)(A), (B), AND (2), ARTICLE 40(1),
(2) AND (3), ARTICLE 46(1A), (1B), (1C) AND (1D) AND (3) AND ARTICLE 47 (1 AND
2)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULE, 2013

AND

IN THE MATTER OF SECTION 85, SECTION 89, SECTION 103, SECTION 105 AND SECTION 106 OF THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF SECTION 12, SECTION 13, SECTION 15, SECTION 17 AND SECTION 84, CONSUMER PROTECTION ACT NO. 46 OF 2012

AND

IN THE MATTER OF SECTION 44A OF THE BANKING ACT

AND

IN THE MATTER OF THE APPLICATION FOR THE CEASATION OF INTEREST RATES ON NON-PERFORMING LOANS UNDER THE IN DUPLUM RULE BY KENYA DEVELOPMENT CORPORATION (formerly known as **INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION)**

BETWEEN

NICHOLAS KIBET KOSITANY, TRUPHENA CHELAGAT SERONEY, ALICE JEPTOO KOSITANY AND CALEB KIPKEMEI KOSITANY (Suing as Legal Representative in the estate of **SIMEON KOSITANY) ……. …… PETITIONER AND**

KENYA DEVELOPMENT CORPORATION ……. RESPONDENT

Coram: Before Justice R. Nyakundi
M/s Lazarus M. Odongo, Advocate.
M/s Kalya & Co. Advocates

JUDGMENT

1. The petition before this Court was filed by the representatives of the estate of the late Simeon Kositany. The petition seeks reliefs as hereunder:

a. *A Declaration that the Respondent's actions in demanding and/or recovering sums exceeding the lawful limits prescribed under the in Duplum rule, including interest and penalties beyond the principal sum of KSh 10,000,000/=, are unconstitutional, unlawful, and in contravention of* **Article 46 of the Constitution, Section 44A of the Banking Act, and the Consumer Protection Act.**

b. *A Declaration that the unilateral alteration of the principal loan amount from KSh 10,000,000/= to KSh 21,000,000/=, the imposition of usurious interest and penalties, and the continued accrual of charges after full repayment, are unconstitutional, illegal, and void for contravening* **Articles 27 and 47 of the Constitution.**

c. *A Declaration that the Respondent's refusal to discharge the charge over L.R. No. 8411 (Grant No. I.R. 10084) despite full repayment, and its demand for an additional KSh 19,500,000/=, constitute an unlawful deprivation of property in contravention of* **Article 40 of the Constitution** *and a violation of the Petitioner's right of redemption under* **Sections 85 and 89(1) of the Land Act.**

d. *A Declaration that the Respondent's conduct amounts to a breach of the*

Petitioner's right to fair administrative action under **Article 47 of the Constitution**, *for failing to provide lawful, reasonable, and procedurally fair decisions and for withholding transparent and accurate loan account information.*

e. *A Declaration that the Respondent's actions constitute unfair, misleading, and unconscionable business practices contrary to* **Article 46 of the Constitution and Sections 12, 13, 15, 16, 56, and 60 of the Consumer Protection Act.**

f. *A declaration that under the in Duplum rule, as enshrined in* **Article 40(1), Article 46(1), and Article 20(2) and (3) of the Constitution**, *and* **Sections 12 and 56 of the Consumer Protection Act**, *the Respondent is not entitled to recover from the Petitioner/borrower interest and penalties exceeding double the principal sum at the time the loan became non-performing.*

g. *A declaration that the Respondent's failure to apply the in Duplum rule, while continuing to demand excessive sums, constitutes discrimination against the Petitioner as compared to other borrowers is contrary to Article 27(1) and (4) of the Constitution.*

h. *A declaration that the Petitioner's right to equal protection and benefit of the law under* **Article 27 of the Constitution** *has been violated by the Respondent — who have subjected him to discriminatory treatment, contrary to the protection accorded to similarly situated borrowers under* **Section 44A of the Banking Act.**

i. *A declaration that the Respondent's conduct violates the Petitioner's consumer rights under Article 46(1) of the Constitution, including the right to fair, reasonable, and honest dealing in financial transactions, and infringes the Petitioner's socio-economic rights under Article 43(1)(e) and (f) of the Constitution, particularly the right to economic security, housing, and livelihood.*

j. *A declaration that the enactment of* **Section 44A of the Banking Act** *was a legislative measure by the State to fulfill its constitutional duty to protect borrowers from unjust enrichment, economic exploitation, and inequitable lender-borrower relationships — and that its principles, including the in Duplum rule, are applicable to loans advanced under statutory corporations such as the Respondent.*

k. *A declaration that the application of the in Duplum rule to the Petitioner's loan is not a discretionary matter to be arbitrarily determined by the*

Respondent, but a legal and constitutional obligation grounded in public interest, consumer protection, and the right to equitable treatment under the law.

l. *An Order of Mandamus compelling the Respondent to forthwith execute and register a discharge of the charge registered on 20-12-1996 over* **L.R. No. 8411 (Grant No. I.R. 10084)** *and to unconditionally release the original title documents to the Petitioner.*

m. *An Order directing rectification of the loan account to reflect that the Petitioner has fully repaid the facility and that no further sums are due or owing to the Respondent.*

n. *An Order for restitution and/or refund of* **Kenya Shillings, Two Million,**

Five Hundred and Thirty Thousand Shillings (KShs. 2, 530,000.00/=), *paid in excess of double the principal amount of recovered by the Respondent from the Petitioner in excess of the Constitutional/ statutory limits under the in Duplum rule, together with interest at Court rates from the date of each excess payment until payment in full.*

o. *An Order of Permanent Injunction restraining the Respondent, whether by itself, its servants, agents, or otherwise howsoever, from*

making any further demands, taking any enforcement action, or otherwise interfering with the Petitioner's quiet possession, ownership, and enjoyment of **L.R. No. 8411 (Grant No. I.R. 10084).**

p. *General damages for breach of constitutional rights, including but not limited to the rights to property, fair administrative action, consumer protection, equality, and human dignity, as the Court shall assess.*

q. *An award of exemplary or punitive damages to deter the Respondent and similarly placed institutions and/or public financial institutions from engaging in deceptive, predatory, and oppressive lending practices that disregard borrowers' Constitutional/ Statutory rights, violate public policy, and undermine constitutional values.*

r. *Costs of this Petition and interest thereon at Court rates.*

s. *Any other or further orders that this Honourable Court may deem just, equitable, and expedient to grant in the circumstances of this case.*

The Petitioner's case

2. The Petitioner's case is that the late Simeon Kositany was the registered proprietor of all that property known as L.R. Number 8411 (Grant Number I.R. 10084), a leasehold interest for a term of 957 years from 1st July, 1953. On 18th December, 1996, Kabobo Company Limited entered into a loan agreement with the Respondent, which advanced the company a principal sum of Kenya Shillings Ten Million (Kshs. 10,000,000/=). As security for the repayment of the said facility, the late Simeon Kositany, as chargor, charged L.R. Number 8411 (Grant Number I.R. 10084) to the Respondent. The charge was duly executed, attested, and registered at the Central Registry on 26th December, 1996. Additionally, on 7th January, 1997, the late Simeon Kositany executed a Personal Guarantee in favour of the

Respondent, personally undertaking to repay the sum of KShs. 10,000,000/= being the amount advanced to the Principal Debtor.

3. The Petitioners aver that on diverse dates, the Petitioner and/or Kabobo Company Limited fully paid the outstanding loan, including both the principal sum and accrued interest, in accordance with the agreed terms of the facility. The said payments were made in good faith and totaled Kshs. 22,530,000/= (Kenya Shillings Twenty-Two Million Five Hundred and Thirty Thousand). The Petitioners aver that this total amount paid is in excess of double the principal sum of Kshs. 10,000,000/= originally advanced, in contravention of the in Duplum principle under Section 44A of the Banking Act and in violation of the Petitioner's rights under Articles 40 and 46 of the Constitution of Kenya, and the provisions of the Consumer Protection Act.

4. Despite full repayment, on 6th December, 2022, the Petitioners, through their advocates, issued a written request to the Respondent demanding the discharge of the charge registered over L.R. Number 8411 (Grant Number I.R. 10084) and the release of all security instruments and the original title documents. On 7th March, 2023, the Respondent declined to approve the demand for discharge and instead demanded payment of alleged accrued interest amounting to Kshs. 19,500,000/= (Kenya Shillings Nineteen Million and Five Hundred Thousand). Notably, the loan account statement enclosed with the Respondent's letter reflected a unilateral alteration of the principal sum from Kshs. 10,000,000/= to KShs. 21,000,000/=, a change the Petitioners state was made without their consent and contrary to the original terms of the facility.

5. On 11th September, 2024, the Petitioners, through their advocates, responded to the Respondent's letter of 7th March, 2023, demanding the unconditional discharge of the entire charge registered on 20th December, 1996, and asserting that the Respondent's further demand of Kshs. 19,500,000/= as a precondition to discharge amounted to foreclosure of the Petitioner's equity of redemption, contrary to Section 89(1) of the Land

Act. The Petitioners also pointed out that under the applicable law, no financial institution may recover interest or other charges exceeding the statutory maximum of KSh 20,000,000/= in aggregate, and that the Petitioner had already paid KSh 2,530,000/= in excess of this limit. The Petitioners further noted that the certified loan statement confirmed the unilateral alteration of the principal amount to KShs. 21,000,000/= and the imposition of usurious interest and penalties exceeding the principal, all in contravention of Article 46 of the Constitution, Section 44A of the Banking Act, and the in Duplum rule. The Respondent acknowledged receipt of the letter on 12th September, 2024 but has to date failed, neglected, or otherwise refused to issue any response. The Petitioners aver that by its silence, the Respondent is deemed to have admitted, acquiesced to, and not denied the veracity of the factual averments and demands contained in the said letter.

6. The Petitioners further aver that there is no other suit pending or decided between the same parties over the same subject matter, save for Eldoret HCCHRPET E022 of 2023 Kabobo Limited & Another versus Kenya Development Corporation — which was withdrawn vide a Notice of Withdrawal dated 11th August, 2025.

7. The Petition challenges the legality, constitutionality, and fairness of the Respondent's continued demand for excessive interest and penalties amounting to Kshs. 19,500,000/=, despite the Petitioner having repaid a cumulative amount of Kshs. 22,530,000/= on a facility whose principal was Kshs. 10,000,000/=. The Petitioners contend that the said demand grossly exceeds what is lawfully recoverable under law, equity, and sound commercial practice.

8. The Petitioners state that as a direct consequence of the Respondent's unlawful, unreasonable, and unconstitutional acts and omissions, they have suffered, continue to suffer, and stand to suffer the following injuries and prejudice: economic loss and unlawful enrichment arising from the Respondent's demand for amounts far beyond the lawful in Duplum

ceiling; denial of the equity of redemption by conditioning discharge on an unlawful further payment; arbitrary deprivation of property through the Respondent's refusal to release title despite full repayment; violation of consumer rights through the imposition of excessive, opaque, and punitive charges without disclosure or lawful basis; economic and social prejudice through severe financial strain, impaired investment capacity, and threat to housing and economic security; and discrimination and unfair treatment by failing to accord the Petitioners the same protection afforded to other borrowers under the in Duplum rule, while enforcing disproportionately harsh terms against them.

9. The Petitioners further contend that the Respondent's conduct, in unilaterally altering the principal loan sum from Ksh. 10,000,000/= to Ksh. 21,000,000/=, imposing usurious interest and penalties exceeding the principal, foreclosing the Petitioners' equity of redemption by demanding an additional Ksh 19,500,000/= prior to discharge, and failing to discharge the charged property despite repayment of more than double the principal constitutes a breach of multiple constitutional guarantees, including the right

to property, equality before the law, fair administrative action, and consumer protection rights. The Petitioners further aver that the Respondent, being a state-linked financial institution, bears a heightened constitutional obligation to act lawfully, transparently, and accountably, and that its conduct in this matter defeats constitutional values and undermines public confidence in financial justice.

Respondent’s Replying Affidavit

10. In Response to the Petition, the Respondent through Ernest Lewa Mwahui who deposed that he is employed by the Respondent as the Senior Portfolio Management Officer, filed a Replying Affidavit sworn on 29th September 2025, in which he made various averments can be captured as hereunder:

11. That the Industrial and Commercial Development Corporation (ICDC), Tourism Finance Corporation (TFC) and IDB Capital Limited were merged into the Kenya Development Corporation Limited by virtue of the Kenya Development Corporation Limited (Vesting) Order, 2021, published vide Legal Notice No. 113 on 2nd July 2021. The deponent clarified that the Vesting Order did not in any way extinguish, waive, or compromise debts lawfully due to the Respondent, nor did it create any new rights in favour of the Petitioners beyond those already existing in law and contract

12. The Respondent contested the Petitioners' locus standi, stating that it was not certain whether the Petitioners were the duly appointed legal representatives and/or administrators of the estate of the late Simeon S. Kositany and put them to strict proof thereof.

13. On the substantive facts, the Respondent deposed that by a Loan Application Form dated 26th July 1996, Kabobo Company Limited (the Borrower) applied for a loan facility of KES. 10,000,000/= to finance its horticultural business conducted on L.R. No. 8411 (I.R. No. 10084), Eldoret West District, measuring approximately 587 acres. By a Letter of Offer dated 3rd December 1996, the Respondent approved the facility at an interest rate of 26% per annum, repayable over 60 months in monthly instalments of KES. 338,322/=. The facility was secured by a First Debenture over all the assets of the Borrower and a First Legal Charge over L.R. No. 8411, together with a Personal Guarantee executed by the late Simeon S. Kositany on 7th January 1997. The loan of KES. 10,000,000/= was duly disbursed on 13th January 1997.

14. The Respondent stated that the Borrower immediately defaulted in repayment and no payments were made until 2014 when the Petitioner approached the Respondent with a proposal for a negotiated partial settlement. The partial settlement was approved on the following terms: a settlement amount of KES. 21,000,000/= (comprising KES. 20,000,000/= negotiated principal and KES. 1,000,000/= recovery costs) payable within six (6) months; any balance remaining unpaid after six months would

accrue interest at the prevailing market rate for a further six months, after which the offer would lapse entirely. Despite these clear conditions, the Petitioners failed to honour the time limits stipulated. The payments made were intermittent KES. 1,000,000/= on 9th June 2014, KES. 2,000,000/= on 31st October 2016, and subsequent intermittent payments with the last payment of KES. 1,400,000/= made on 31st July 2022, bringing the cumulative total to KES.
21,530,000/=.

15. The Respondent confirmed that it declined to discharge the security over L.R. No. 8411 (I.R. No. 10084) and instead demanded payment of a further KES. 19,500,000/= being accrued interest on the negotiated principal of KES. 20,000,000/=. The Respondent communicated this position clearly to the Petitioners' advocates by letter dated 7th March 2023. The Respondent categorically stated that it cannot mark the loan account as fully settled nor discharge the security until this interest sum is paid in full.

16. Regarding the Petitioners' reliance on a *Business Daily* article of 22nd July 2024 headlined "*KDC to Review Interest in 1960 Defaulted Loans,*" the Respondent averred that this was a general media article and does not constitute binding policy or a lawful waiver of the Respondent's rights. Being a State Corporation, any write-off of debts must strictly comply with the Public Finance Management Act, and no such authority had been issued by the National Treasury or any competent government agency in respect of the Petitioners' debt.

17. On the applicability of the *in Duplum* rule, the Respondent averred that the facility had become non-performing by 1st May 2007, the commencement date of Section 44A of the Banking Act at which point the outstanding principal and accrued interest stood at KES. 70,101,120.44. Applying Section 44A (6) strictly, the maximum recoverable amount comprised: (a) the base amount of KES. 70,101,120.44, plus (b) post-commencement interest capped at an equal amount of KES.

70,101,120.44, yielding a maximum principal-andinterest ceiling of KES. 140,202,240.88. After crediting the Petitioners' postcommencement payments of KES. 21,530,000/=, the maximum amount due as at 15th August 2025 (the date of the Petition) stood at **KES. 118,672,240.88**, plus any documented recovery expenses recoverable under Section 44A(6)(c).

18. The Respondent further submitted that the demand of KES. 41,030,000/= (comprising KES. 21,530,000/= credited as the working principal and KES. 19,500,000/= to close the account) was in fact a commercial concession well below the maximum the statute permits, and therefore invited the Court, even on the Petitioners' own preferred legal framework, to apply Section 44A (6) correctly and enter judgment for KES. 118,672,240.88 as the lawful maximum due.

19. The Respondent concluded by praying that this Honorable Court be pleased to dismiss the Petition with costs to the Respondent, and affirm the Respondent's contractual and statutory right to recover all outstanding sums together with accrued interest in accordance with the terms of the loan facility and the law.

Petitioner’s Further Affidavit.

20. Nicholas Kibet Kositany (ID No. 3936250), one of the Court-appointed Administrators of the estate of the late Simeon Kositany alias Simion Kositany alias Simeon Arap Kositany alias Simeon Sawe Arap Kositany (Deceased),

filed a further affidavit. He deposed that the Replying Affidavit neither answers the Petitioners' pleadings nor rebuts the documentary evidence before the Court, and that it is riddled with falsehoods, deliberate omissions, and mischaracterizations of material facts designed to conceal the Respondent's continued illegal retention of L.R. Number 8411 (Grant Number I.R. 10084) and to frustrate the estate's right to redemption and

restitution. He further describes it as an affront to constitutional accountability, unworthy of judicial indulgence.

21. On the question of legal standing, the deponent takes strong exception to paragraph 6 of the Replying Affidavit, in which the Respondent purports to that the Petitioners are the Legal Representatives of the estate. He states that this assertion is both erroneous and disingenuous, as the Petitioners' standing is not a matter of allegation but of conclusive judicial record. The Petitioners hold an Amended Grant of Letters of Administration Intestate issued by the High Court on 12th July 2022, vesting in them all rights, duties, and powers under Section 79 of the Law of Succession Act. He contends that any suggestion to the contrary amounts to a reckless disregard of judicial record and due process, offending the national values of good faith, accountability, and respect for the law enshrined in Article 10 of the Constitution.

22. The deponent further addressed the principal loan facility. He notes that in paragraphs 11 and 14 of its Replying Affidavit, the Respondent expressly acknowledges that the facility advanced to Kabobo Company Limited was secured by a legal charge and that the principal sum disbursed was Kenya Shillings Ten Million (Kshs 10,000,000). He contends that this unequivocal admission confirms that the principal was fixed and definite, as evidenced by the Letter of Offer dated 3rd December 1996 (ELM-6), Letter of Acceptance dated 4th December 1996 (ELM-7), Loan Agreement dated 18th December 1996 (ELM-8), Legal Charge dated 18th December 1996 (ELM-9), and the Debenture of 17th December 1996 (ELM-11). He argues that any subsequent suggestion of an increased or substituted principal is contradicted by the Respondent's own pleadings, and amounts to a violation of the sanctity of contract, the doctrine of good faith under Article 10, and the Petitioners' rights to property and fair administrative action under Articles 40 and 47 of the Constitution respectively.

23. Regarding the purported variation of the facility, the deponent states that by admissions in paragraphs 20 and 21 of the Replying Affidavit, the Respondent itself acknowledges that the principal was renegotiated in or about 2014, resulting in a variation from Kshs. 10,000,000 to Kshs. 20,000,000, an arrangement made solely between the Respondent and Kabobo Company Limited without the express written consent or participation of the chargor and guarantor, Simeon Kositany, or any duly appointed legal representative of his estate. He avers that this variation was null, ineffective, and legally unenforceable against the estate. The deponent emphasizes that following the guarantor's death on 21st April 1998, the Respondent was under a clear legal and constitutional duty to require that the personal representatives of the deceased be brought to the table before any such variation could be lawfully made. Its failure to do so was procedurally defective, substantively unjust, and contrary to Articles 10(2)(a) and (c) of the Constitution. He further contends that the posthumous variation breached the Respondent's statutory and fiduciary duties under Sections 85 and 89 of the Land Act, and violated the Petitioners' rights under Articles 40(2), 47(1), 28, and 27 of the Constitution.

24. On the *in Duplum* rule, the deponent notes that in paragraph 28 of its Replying Affidavit, the Respondent expressly admits that the rule applies to this loan and that the facility became non-performing on 13th January 1997, with the rule coming into force on 1st May 2007. He challenges the Respondent's computation and states that its own annexures are internally contradictory. He specifically addresses the Respondent's recent computation purporting to claim a sum exceeding KShs 118,622,240.88 arising from an original loan of Kshs. 10,000,000, describing it as unconscionable, unlawful,

and constitutionally offensive. He states that it defies both equity and commercial reason that a borrower who obtained KShs 10,000,000 and has paid over KShs 22,530,000 could still be pursued for more than Kshs

118,000,000. He argues that such conduct constitutes an unfair commercial practice under Article 46, violates the principles of equity and proportionality, and undermines the rule of law under Article 10(2). He submits that the *in Duplum* rule is not merely a statutory restriction but a constitutional safeguard against economic exploitation and predatory lending, and that the Respondent's breach of it also violates Section 44A of the Banking Act.

25. On the insurance obligation, the deponent draws attention to Clause 6 of the Legal Charge dated 18th December 1996, which expressly provided for insurance coverage to secure the facility in the event of the death or incapacity of either the borrower or the guarantor. He states that insurance premiums were duly remitted during the currency of the facility, a fact not disputed by the Respondent. He avers that upon the guarantor's death in 1998, the Respondent was under both a statutory and a contractual duty to invoke the insurance policy and apply the proceeds towards full settlement of the outstanding loan. Its failure and refusal to do so constitutes an act of bad faith and administrative injustice, offending the principles of equity, good conscience, and fair dealing under Articles 10(2)(a), 10(2)(c), and 47(1) of the Constitution. He further contends that the omission to activate the insurance cover and the subsequent pursuit of the estate long after the guarantor's death is oppressive, unconscionable, and contrary to the doctrine of legitimate expectation, constituting a violation of Articles 40, 47, and 10.

26. Regarding the settlement arrangement and subsequent payments, the deponent, without prejudice to the Petitioners' primary case, refers to Annexure ELM-16, the Respondent's letter dated 27th January 2015, in which the Respondent's Executive Director communicated that the Board of Directors, at its meeting held on 11th December 2014, approved the borrower's request to pay Kshs. 21,000,000 in full and final settlement, to be completed within six months of the Board's approval. He states that notwithstanding this express term, the Respondent subsequently

accepted and credited to the loan account a series of payments made well beyond the stipulated six-month period, as evidenced by banker's cheques annexed as NKK-3 through NKK-14, comprising payments made in December 2016, January 2017, February 2017, May 2017, June 2021, and July 2021, all voluntarily accepted without reservation, protest, or any contemporaneous variation of the settlement terms. He argues that by this conduct the Respondent waived its right to rely on the strict six-month settlement period and is estopped, both in law and equity, from asserting that the account remains unsettled. Having voluntarily accepted out-of-time payments and benefited from them, the Respondent cannot now approbate and reprobate by demanding further sums. Its present demand for an additional KShs 19,500,000 is therefore contradicted by its own conduct and amounts to administrative bad faith and economic oppression, contrary to Articles 10(2)(c), 46, and 47 of the Constitution.

27. In his concluding averments, the deponent states that from the totality of the facts, documents, and admissions, it is abundantly clear that the Respondent's conduct is tainted with procedural impropriety, contractual illegality, and constitutional violations. The Respondent unilaterally varied the facility after the guarantor's death, ignored its statutory obligation to involve the estate, failed to invoke the life insurance cover, breached the *in Duplum* rule, and continues to withhold the Petitioners' property despite full repayment. He submits that these acts collectively constitute a continuing violation of the Petitioners' rights under Articles 27, 40, 46, and 47 of the Constitution, and calls for the urgent intervention of the Honourable Court.

Petitioner’s written submissions

28. The Petitioners were represented by Learned Counsel Ms. Chesoo, who filed written submissions dated 7th December 2025. Learned Counsel submitted that the Petition dated 15th August 2025 arises from a financial

arrangement concluded over the property known as L.R. No. 8411 (Grant I.R. No. 10084),

held on a leasehold of 957 years registered in the name of the late Simeon Kositany and charged to secure a loan facility of Kshs. 10,000,000/= advanced to Kabobo Company Limited. Counsel submitted that the

Petitioners are the duly appointed legal representatives and administrators of the estate of the late Simeon Kositany, who died on 21st April 1998, and that a Grant of Letters of Administration Intestate was issued in Eldoret High Court Succession No. E004 of 2020 on 12th July 2022. The Petition, counsel submitted, is accordingly instituted in the discharge of the Petitioners' statutory duties under Sections 82 and 83 of the Law of Succession Act to safeguard the estate's property, protect the equity of redemption, and vindicate the constitutional, contractual, and statutory rights allegedly violated by the Respondent.

29. On the question of whether the Petition is pleaded with sufficient precision, Learned Counsel submitted that the long-established principle requiring constitutional grievances to be stated with reasonable precision does not demand rigid exactitude or technical perfection. On this she relied on the case of *Anarita Karimi Njeru v Republic (No. 1) (1979) eKLR*, as reaffirmed and clarified by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR (Civil Appeal No. 290 of 2012)*, where the Court held that what is required is clarity sufficient to enable the Respondent to know the case it must answer and to allow the Court to distil the real constitutional controversy, not the imposition of hyper-technical formalism. Counsel submitted that the Petition, read holistically, sets out the factual matrix, identifies the implicated constitutional provisions, and articulates with sufficient clarity the manner in which the Petitioners' rights have been violated, and that to defeat it on technical objections would run counter to the purposive and

justice-oriented interpretive approach mandated by Article 159(2)(d) of the Constitution, which forbids undue regard to procedural technicalities.

30. On the background facts, Learned Counsel submitted that the dispute arises from a Loan Agreement dated 18th December 1996 pursuant to which the Respondent advanced a facility of KShs. 10,000,000/= to Kabobo Company Limited for purposes of financing horticultural business on L.R. No. 8411, Eldoret West District. To secure repayment, the same property was charged in favour of the Respondent under a Legal Charge dated 18th December 1996, duly registered on 26th December 1996. In further consideration, the late Simeon Kositany executed a Personal Guarantee dated 7th January 1997.

31. Learned Counsel submitted that the Petitioners' records and banking documents demonstrate that a cumulative total of KShs. 22,530,000/= has been repaid to the Respondent. She submitted that this sum exceeds double the original principal of KShs. 10,000,000/=, thereby fully engaging the statutory protection under Section 44A of the Banking Act and the in Duplum rule. She contended that despite this full satisfaction of the lawful indebtedness, the Respondent has persisted in unlawfully detaining the Petitioners' title deed. Counsel submitted that on 6th December 2022, the Petitioners' advocates formally requested the discharge of the charge, but that by a letter dated 7th March 2023, the Respondent declined and instead demanded an additional Kshs. 19,500,000/=, while enclosing a loan statement that, contrary to the original facility terms, had unilaterally altered the principal from KShs. 10,000,000/= to KShs. 21,000,000/= without any contractual or legal basis and without the consent of the Petitioners. She further submitted that the charge expressly provided for a life insurance cover in favour of the Respondent which the Respondent failed to invoke upon the death of Simeon Kositany in 1998, but instead continued to load interest and penalties against the estate.

32. Learned Counsel drew the Court's attention to a publication in the Business Daily of 22nd July 2024, headlined 'KDC to Review Interest in 1960's Defaulted Loans,' which she submitted constitutes the Respondent's own unequivocal public acknowledgment that the in Duplum rule governs its historical loan portfolio. She submitted that the escalation of the Respondent's demands from the original Kshs. 10,000,000/= to Kshs. 19,500,000/=, then to Kshs. 41,030,000/=, and ultimately to Kshs. 118,672,240.88/= as claimed in the Replying Affidavit, is a stark demonstration of unconscionability, punitive excess, and commercial oppression that bears no relation to the original contract, the law, or commercial reasonableness.

33. On the central legal question of the in Duplum rule and its application to this facility, Counsel submitted that Section 44A of the Banking Act codifies the rule and imposes a strict, mandatory statutory ceiling on non-performing loans: a lender may not recover more than the principal and interest outstanding at the date the loan first became non-performing, plus postdefault interest not exceeding that same amount. She submitted that because the Borrower defaulted at inception, the true statutory base amount should be treated as Kshs. 20,000,000/=, being twice the original principal of Kshs.

10,000,000/= and that the Petitioners having already paid Kshs. 22,530,000/= have fully extinguished the facility and exceeded the statutory ceiling. She further submitted that the Respondent's reliance on a base amount of Kshs. 70,101,120.44/= as at 1st May 2007 is the product of unilateral and unlawful post-mortem variations, opaque compounding, and administrative practices wholly incompatible with the consumer-protection purpose of Section 44A.

34. On the binding nature of Section 44A on all categories of lenders, Learned Counsel relied on the decision in **Anne J. Mugure & 2 others v Higher Education Loans Board [2022] KEHC 11951 (KLR)**, where the Court established unequivocally that Section 44A binds all lenders including

statutory corporations and framed the in Duplum rule as a public policy norm designed, in the Court's own words, to 'tame the appetite of lenders who had made the recovery of interest a cash cow.' She further relied on *Samoei v National Housing Corporation (NHC) & another* [2024] KEHC 14300 (KLR), where the High Court rejected the NHC's claim of exemption and held that Section 44A applies even to public housing bodies because what matters is the nature of the lending function, not the institutional label. The Court in

Samoei further relied on *Kenya Hotels Ltd v Oriental Commercial Bank Ltd (formerly known as Delphis Bank Limited)* (2019) eKLR (CA Civil Appeal No. 252 of 2009) to affirm that once a loan becomes non-performing, total recoverable interest is capped at an amount equal to the principal outstanding at that time, and any further contractual or administrative practice ignoring this cap is contrary to statute and public policy.

35. Ms. Chesoo also relied on *Serem v National Bank of Kenya* (Petition E005 of 2022) [2024] KEHC 11304 (KLR), where the Court recognised that excessive interest is not merely a contractual matter but implicates the constitutional guarantee against arbitrary deprivation of property under Article 40 and the consumer protection right under Article 46. On the correct analytical framework for computing what is recoverable under Section 44A, she placed reliance on *African Banking Corporation Ltd v City Gas Ltd & 3 Others* (Civil Suit 434 of 2017) [2025] KEHC 10064 (KLR), where the Court established a three-step test: first, identify the date of non-performance; second, determine the principal and interest then outstanding; and third, ensure that postdefault interest never exceeds that principal.

36. On the wide scope of institutional coverage, Counsel relied on *Faulu Microfinance Bank Ltd v Kilonzo* (Civil Appeal E032 of 2024) [2025] KEHC 14937 (KLR), where the Court of Appeal affirmed that Section 44A applies to all deposit-taking institutions within the banking framework, and that exemptions based on institutional labels undermine the protective

purpose of the rule. She further relied on *National Bank of Kenya Ltd v Langat* (Civil Case 955 of 2002) [2025] KEHC 12953 (KLR), where the High Court directed that accounts be taken afresh with clear regard to the date of non-performance and the statutory cap; and on *Peter Gachogu Mburu v Ben Koome Kiambi & another* (Civil Appeal E121 of 2024) [2025] KEHC 5108 (KLR), where the appellate Court recognised that the in Duplum rule may be raised both offensively by petitioners seeking declarations and defensively by respondents resisting inflated demands. Learned Counsel also drew on comparative jurisprudence from the Constitutional Court of South Africa in *Jaftha v Schoeman; Van Rooyen v Stoltz* (2005) 2 SA 140 (CC), which treats disproportionate interference with security rights as arbitrary deprivation.

37. On the consequences of the in Duplum ceiling being reached, Learned Counsel submitted that Sections 85 and 89 of the Land Act operationalize the equity of redemption by requiring a chargee to discharge a charge once the principal sum, interest, and all other money secured thereby has been paid. She submitted that any conduct obstructing redemption after lawful sums have been satisfied is statutorily invalid, and that the Respondent's refusal to discharge despite repayment of Kshs. 22,530,000/= constitutes a violation of Article 40 of the Constitution, an extinguishment of the equity of redemption, and a breach of its statutory discharge obligations. She additionally submitted that the Respondent's unilateral alteration of the principal from KShs. 10,000,000/= to KShs. 21,000,000/= after the death of the chargor, without involvement of the legal representatives and without any signed variation or board resolution, violates the Law of Succession Act, Sections 97 and 98 of the Land Act, and foundational principles of contract law, rendering the Respondent's computation void ab initio.

38. On consumer rights, Learned Counsel submitted that Article 46 of the Constitution guarantees every consumer the right to goods and services of reasonable quality, to information necessary to gain full benefit from

those services, to protection of their economic interests, and to compensation for loss arising from defective or unfair services. She submitted that the Respondent, by unilaterally altering the principal after the guarantor's death, levying charges contrary to Section 44A, and withholding accurate statements and justification, supplied a financial service that is neither reasonable in quality nor fair in economic impact, thereby violating Article 46. On this she relied on *Benjamin v Safaricom PLC & Others* (Petition No. E554 of 2022) and *Anampiu v Cleanshelf Supermarket Ltd* (Constitutional Petition E044 of 2023) [2025] KEHC 15455 (KLR), where the High Court reaffirmed that Article 46 protects consumers against unilateral, opaque, and economically prejudicial conduct by dominant service-providers and that such conduct attracts declaratory and compensatory relief.

39. Learned Counsel further submitted that the Respondent's prolonged detention of the title and its insistence on unlawful sums have placed the estate under severe financial strain, threatened the Petitioners' housing security and economic prospects, and implicate the right to an adequate standard of living under Article 43 of the Constitution. She further submitted that the International Covenant on Economic, Social and Cultural Rights (ICESCR), incorporated into Kenyan law by Article 2(6), obliges the State to protect individuals against lenders who undermine the right to adequate housing and economic security, and that the Respondent's conduct falls afoul of this obligation.

40. On the question of equal protection under Article 27, Learned Counsel submitted that the Respondent publicly committed through its policy to write off interest and penalties on legacy loans and to apply the in Duplum rule to loans dating back to the 1960s to treat similarly situated borrowers in a particular manner, yet has singled out the Petitioners' estate for markedly harsher treatment, including non-application of the in Duplum rule, retention of the title after overpayment, and insistence on extra-legal sums. She submitted that such differential treatment is not

grounded in any legitimate or objective criteria and violates the equal protection and non-discrimination guarantees under Article 27. Counsel drew further support from comparative South African, United Kingdom, and Australian jurisprudence on unfair contract terms and unconscionable conduct.

41. On the doctrine of legitimate expectation, Learned Counsel submitted that the Respondent itself, through its Board resolution and its letter of 27th January 2015, expressly stated that payment of Kshs. 21,000,000/= would constitute full and final settlement of the loan account, constituting an unequivocal representation by a legally competent public body upon which the Petitioners were entitled to rely. She further submitted that even after the expiry of the six-month settlement window, the Respondent continued for several years to receive and credit payments without reservation or protest and without issuing any contemporaneous variation of the settlement terms. On this she relied on the criteria set out by the Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others*, and submitted that the facts satisfy all four limbs of the test namely that the representation was clear and unambiguous, the expectation was reasonable and demonstrably induced by the Respondent's conduct, the Respondent was legally competent to make and fulfil the representation, and there is no superseding constitutional or statutory command against honouring it. She further relied on *Kide & another v Sawe & 3 others* [2025] KEELC 2908 (KLR), where the Court stressed that upon payment and issuance of a discharge, the chargee's interest is spent and any subsequent attempt to resurrect the indebtedness is contrary to statute and settled principles of legitimate expectation; and on *Saisi & 7 others v Director of Public Prosecutions & 2 others* [2023] KESC 6 (KLR), where the Supreme Court held that even constitutionally protected discretionary powers are reviewable where exercised unreasonably, arbitrarily, or for improper purpose.

42. On constitutional supremacy and Kenya's international obligations, Learned Counsel submitted that the Respondent's conduct, by placing itself and its internal credit practices above the Constitution, treating Section 44A and the Land Act as optional and Articles 40, 43, 46, and 47 as negotiable, offends Articles 2(1), 3(1), and 10 of the Constitution. On this she relied on *Oduor v Attorney General & another; Kenya Banker's Association & 2 others* [2019] KEHC 10895 (KLR), where the High Court reiterated that the Constitution stands above statutes and contracts; on *Association of Micro-Finance Institutions-Kenya v The Central Bank of Kenya & 3 others* [2022] KEHC 13053 (KLR), which insisted that regulatory choices affecting financial consumers must comply with Articles 10, 27, and 47; and on *Saisi & 7 others v Director of Public Prosecutions & 2 others* [2023] KESC 6 (KLR), confirming that all public authorities' decisions are subject to substantive constitutional review. She further invoked Articles 2(5) and 2(6) and relied on *Mitu-Bell Welfare Society v Attorney General & 2 others* [2013] KEHC 6337 (KLR), the *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogiek)* judgment at the African Court, and *Kimani Waweru & 4 others v Central Bank of Kenya & 7 others* [2018] eKLR, all to the effect that financial practices must be harmonised with both constitutional values and Kenya's international human-rights obligations, including the ICESCR, the African Charter on Human and Peoples' Rights, the UN Guidelines for Consumer Protection, and OECD recommendations on financial consumer protection.

43. On the reliefs sought, Learned Counsel submitted that the Petitioners have established, on a balance of probabilities, actionable violations of their constitutional rights and are entitled to robust relief under Articles 22 and 23(3) of the Constitution. On this she relied on the Supreme Court decision in *CMM v Republic & 4 others*, where the Court held that once violations are proved on a balance of probabilities, the Court must vindicate those rights by granting effective remedies; and on *Attorney General v Okoiti & 3 others* [2025] KECA 309 (KLR), where the Court of

Appeal stressed that 'appropriate relief' means an effective remedy without which the values and rights in the Bill of Rights cannot properly be upheld or enhanced. Counsel urged the Court to grant: a declaration that all interest, penalties, and charges demanded beyond the statutory in Duplum ceiling are unlawful, null, and void; a mandatory order compelling immediate discharge of the charge over L.R. No. 8411 (I.R. No. 10084) and rectification of the loan account; a restitutionary order for refund of KShs. 2,530,000/= paid in excess of double the principal; and compensatory and exemplary damages.

44. On the compensatory claim, she relied on *PAMM & 4 others v Attorney General*

(Petition E004 of 2021) [2023] KEHC 21271 (KLR) and *Export Processing Zone Authority & 10 others v National Environment Management Authority & 3 others* [2024], where the Supreme Court affirmed compensation as a legitimate constitutional remedy designed to vindicate rights and deter future violations. Counsel further urged the Court to consider structural or supervisory relief requiring the Respondent to review similar legacy accounts for in Duplum compliance and to report to the Court or a relevant regulator, consistent with the evolving Kenyan practice on structural interdicts discussed in *Mitu-Bell Welfare Society v Kenya Airports Authority* (2021).

Counsel urged the Court to allow the Petition with costs.

Respondent's written submissions

45. Learned Counsel, Mr. Odongo gave a background on the petition and submitted that the Petition seeks wide-ranging constitutional declarations, coercive orders, injunctive relief, restitution, general damages, and exemplary damages, all allegedly arising from a loan facility advanced in 1997 and the Respondent's subsequent efforts to recover the outstanding sums following prolonged default.

46. Counsel submitted that, notwithstanding the extensive citation of constitutional provisions, the Petition does not raise any genuine constitutional controversy. Properly construed, the dispute concerns the interpretation and enforcement of contractual loan instruments, the consequences of default, the effect of a negotiated but uncompleted partial settlement, and the computation of interest under section 44A of the Banking Act. Counsel urged the Court to find that these are matters squarely within the realm of ordinary civil and commercial adjudication, and that the Petition is therefore a commercial dispute impermissibly clothed in constitutional language that fails both in law and on the evidence.

47. Counsel submitted that it is now settled law that the mere citation of constitutional provisions does not, of itself, confer constitutional jurisdiction upon the Court. He relied on the authority of *Anarita Karimi Njeru v Republic* for the principle that a party invoking the Constitution must, at the threshold, plead with reasonable precision the specific constitutional right alleged to have been violated and demonstrate the manner of such violation. He further relied on the Court of Appeal decision in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others*, which consistently reaffirmed this principle.

48. Counsel submitted that in the present Petition, the Petitioners cite numerous Articles of the Constitution but fail to demonstrate how the Respondent's conduct violated any of those provisions. The pleadings do not identify any specific administrative decision, policy, or action that infringed a defined constitutional right. Instead, the Petition is founded on disagreements relating to loan balances, interest computation, refusal to discharge a charge, and alleged overpayment, ordinary questions of contract and statute that do not, without more, amount to constitutional violations.

49. Counsel further relied on *Bernard Murage v Fineserve Africa Ltd & 3 Others* where the High Court observed that not every dispute founded on

statute or contract should be elevated into a constitutional petition where adequate remedies exist in ordinary law.

50. Counsel submitted that constitutional adjudication is a jurisdiction of last resort and must be invoked sparingly. He relied on the doctrine of constitutional avoidance as articulated by the Court of Appeal in *Royal Media Services Ltd v Attorney General & 2 Others*, which held that where a dispute can be determined by applying ordinary statutory or contractual principles, the constitutional question should be avoided.

51. He further relied on *Speaker of the National Assembly v James Njenga Karume* for the principle that where a statute provides a clear procedure for redress, that procedure ought to be strictly followed. Counsel submitted that the present dispute can be fully and effectively resolved through ordinary civil litigation, including: determination of contractual indebtedness; interpretation and application of section 44A of the Banking Act; and enforcement or discharge of securities under the Land Act. He urged that the Petitioners have not demonstrated any exceptional circumstances warranting the invocation of this Court's constitutional jurisdiction.

52. Counsel submitted that the structure and tenor of the Petition reveal an overextended pleading, replete with diffuse paragraphs and broad constitutional rhetoric, apparently designed to create the impression of constitutional infractions. A careful examination of the pleadings discloses that the alleged violations are remote, speculative, and wholly disconnected from the factual and contractual realities of the parties' relationship. Counsel urged the Court to look beyond the form of the Petition and consider its true substance, submitting that when that is done, it becomes clear that the Petition is an attempt to constitutionalize a purely commercial dispute contrary to established judicial guidance.

53. Counsel submitted that the material facts are largely uncontested and are set out in detail in the Replying Affidavit of Ernest Lewa Mwahui sworn on 29th September 2025. In 1996, Kabobo Company Limited applied for and

was granted a loan facility of Kenya Shillings Ten Million (KES 10,000,000) by the Respondent for agricultural development purposes. The facility was secured by a debenture over the Borrower's assets and a legal charge over L.R. No. 8411 (Grant No. I.R. 10084), registered in the name of the late Simeon S. Kositany, who also executed a personal guarantee.

54. Counsel further submitted that the facility was disbursed in January 1997, that the Borrower defaulted almost immediately and made no meaningful repayments for many years. In 2014, long after default, the Petitioners approached the Respondent with a proposal for a negotiated partial settlement, which the Respondent accepted as a commercial concession subject to strict terms and timelines. Counsel submitted that the Petitioners failed to comply with those terms and that, consequently, no accord and satisfaction or novation occurred.

55. Counsel submitted that the Petitioners' allegation that the Respondent unlawfully varied the loan facility after the death of the chargor and thereby bound a 'non-existent legal person' is factually incorrect and materially misleading. He submitted that contrary to the Petitioners' portrayal, the negotiations leading to the variation of the loan facility were undertaken by the Petitioners themselves, who at all material times acted in a dual capacity. First, as directors and controlling minds of the Borrower company, and second, as representatives and beneficiaries of the estate of the deceased chargor, Simeon Kositany.

56. Counsel submitted that the Petitioners were therefore not strangers to, nor excluded from, the impugned variation. On the contrary, they were active participants and primary drivers of the negotiations, fully aware of the commercial rationale, terms, and consequences of the restructured facility. Having knowingly engaged the Respondent in that capacity, they cannot now approbate and reprobate by asserting, ex post facto, that the estate lacked knowledge, participation, or consent.

57. Counsel further submitted that it is disingenuous for the Petitioners who beneficially occupy, control, and enjoy the charged property as

beneficiaries of the estate, to invoke the death of the chargor as a shield against obligations they themselves negotiated and from which they derived substantial benefit. Counsel urged that the law does not countenance such self-serving inconsistency, nor does it permit litigants to manufacture constitutional grievances out of their own informed commercial choices. He submitted that the constitutional violations alleged under Articles 27, 28, 40, and 47 are therefore illusory, contrived, and wholly unsupported by the factual matrix before the Court.

58. Counsel submitted that the Petitioners place heavy reliance on section 44A of the Banking Act and the in Duplum rule. He submitted that as demonstrated in the Replying Affidavit, the loan was already non-performing by 1st May 2007 and that applying section 44A(6) strictly, the maximum recoverable sum exclusive of expenses is Kenya Shillings One Hundred Forty Million Two Hundred Two Thousand Two Hundred Forty and Eighty-Eight Cents (KES 140,202,240.88). After crediting payments made, Counsel submitted that the balance lawfully due as at the date of filing the Petition stood at Kenya Shillings One Hundred Eighteen Million Six Hundred Seventy-Two Thousand Two Hundred Forty and Eighty-Eight Cents (KES 118,672,240.88). Counsel submitted that even on the Petitioners' preferred statutory framework, the conclusion is continuing indebtedness, not full repayment or entitlement to discharge or refund.

59. Counsel concluded by submitting that the Petition is an abuse of constitutional process, unsupported by evidence, and founded on a commercial dispute that does not warrant constitutional adjudication. He respectfully prayed that the Honorable Court be pleased to dismiss the Petition dated 15th August 2025 in its entirety with costs to the Respondent. In the alternative, and without prejudice, he prayed that the Court uphold the Respondent's computation under section 44A of the Banking Act and find that the loan remains outstanding in the sum of KES 118,672,240.88 plus recoverable expenses.

Analysis and determination

60. Having carefully considered the Petition, the Replying Affidavit, the Further Affidavit, the written submissions of both Counsel, and the authorities cited, I am satisfied that the following issues fall for determination:

i. *Whether the Petitioners have locus standi to bring this Petition*

ii. *Whether the Petition discloses a genuine constitutional controversy or is in substance a commercial dispute improperly brought under the*

Constitution iii. *Whether the variation of the loan facility from KES 10,000,000 to KES 20,000,000 was legally valid and binding on the estate of the late*

Simeon Kositany iv. What is the correct application of the in-Duplum rule under Section 44A of the Banking Act to the facts of this case, and what sum, if any, remains lawfully due?

v. Whether the Respondent's conduct violated the Petitioners' constitutional rights under Articles 27, 40, 46, and 47 of the Constitution.

Whether the Petitioners have locus standi to bring this Petition

61. *Locus standi* is a threshold issue in Kenyan law which determines whether a Petitioner, Claimant, Applicant or Plaintiff has the legal capacity to institute an action. In constitutional litigation the frontiers of *locus standi* has been broadened from departing from the restrictive sufficient interest or personal injury test in other Civil or Environmental matters. The doctrine of locus standi defines a party’s legal capacity to initiate the lawsuit, proceedings, petition, claim requiring him or she to show a direct interest or a sufficient connection or injury resulting from the action being challenged. It is often called standing and it ensures only parties with a legitimate stake can bring cases protecting against frivolous litigation. It is

actually the right to appear before a Court of law so that one can be heard within the ambit Article 50 of the Constitution on fair trial rights. In our very own constitutional litigation, the strict rule of locus standi is relaxed to allow individuals or groups to bring public interest matters to Court even if they are not directly impacted by that dispute.

62. What is significant is that Courts must construe and interpret the doctrine of locus standi in a much more broader formation as an essential element of the rule of law. The logic of the standing doctrine is that if there is no competent Petitioner of Plaintiff, public bodies, or quasi-public bodies or may violate the legal limits of their powers and the Courts become powerless to intervene. I guess that is the point which is being advanced here in the preliminary objection by the Respondents to this petition. In Kenyan jurisprudence, a preliminary objection is a formal step taken by a Respondent to a petition, or suit aimed at to dispose off the claim or petition based on a point of law that does not require the interrogation of facts or evidence. The key principles on preliminary points of law comprise of the following elements:

- **Definition & Scope:** A Preliminary Objection must arise from the pleadings and must not require the Court to look at evidence.
- **Fundamental Rights Limitations:** Courts have held that it is generally undesirable to dismiss petitions seeking enforcement of fundamental rights via a preliminary objection without investigating the merits.
- **Procedure:** Under Order 51 Rule 14 of the Civil Procedure Rules, a respondent may oppose an application using a notice of preliminary objection, a replying affidavit, or a statement of grounds of opposition.
- **Jurisdiction:** A Preliminary Objection is commonly used to argue that the Court lacks jurisdiction to hear a matter.

63. The significant decided cases on Preliminary Objection point towards this direction:

- **Rashid Odhiambo Aloggoh & 245 others vs Haco Industries Limited [2013] eKLR:** The Court of Appeal held that it is improper to summarily dismiss a petition involving human rights allegations on a preliminary objection.

- **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696:** This is the locus classicus (leading case) in Kenya regarding preliminary objections. It established that a PO must be based on a clear point of law, not disputed facts.

- **Republic v Central Bank of Kenya Ex parte Nairobi City County Assembly Services [2022] eKLR:** Discusses emerging jurisprudence on the mandate of public institutions and when such matters can be raised as a preliminary point.

- **Republic -vs- Karisa Chengo & 2 Others (Supreme Court Petition No. 5 of 2015):** The Supreme Court dealt with issues of law and jurisdiction.

- **Maritime Delimitation in the Indian Ocean (Somalia v. Kenya):** Involved preliminary objections regarding jurisdiction and international agreements.

64. Before turning to the merits, an objection was raised regarding the Petitioners' standing. The Respondent, in its Replying Affidavit, declined to acknowledge unequivocally that the Petitioners are the duly appointed legal representatives of the estate of the late Simeon Kositany. This Court does not find that challenge tenable. The record before me discloses that Letters of Administration Intestate were duly granted by the High Court at Eldoret in Succession Cause No. E004 of 2020, with an Amended Grant issued on 12th July 2022, vesting in the Petitioners all rights and powers under Section 79 of the Law of Succession Act, Cap. 160.

65. Article 22(1) of the Constitution provides that every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened. Article 22(2) further broadens standing by permitting any person acting as

a member of, or in the interest of, a group or class of persons. In *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR, the Court of Appeal confirmed that standing in constitutional petitions must be construed broadly and purposively in keeping with the constitutional injunction under Article 159(2)(d) that Courts shall not unduly elevate procedural technicalities over substantive justice. The Petitioners, suing in their capacity as administrators of the estate and as persons directly affected by the Respondent's continued detention of L.R. No. 8411 (Grant No. I.R. 10084), plainly have standing. The preliminary objection on locus standi is accordingly overruled.

Whether the Petition discloses a genuine constitutional controversy or is in substance a commercial dispute improperly brought under the Constitution

66. The threshold question of whether a petition properly invokes the Constitution has been a recurring feature of Kenyan constitutional jurisprudence. The locus classicus remains the formulation in ***Anarita Karimi Njeru v Republic* (1979) [1976-80] 1 KLR 1272**, where the High Court emphasized that a party seeking constitutional redress must set out with reasonable precision the constitutional provisions said to be infringed and the manner of such infringement. The Court in the said case held as follows:

> *"We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed"*

67. This requirement has since been refined by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others** to signify that the standard is one of sufficient clarity, not hyper-technical

exactitude. The Court held that what is required is a pleading precise enough to enable the respondent to understand the case it must meet and to allow the Court to distil the real constitutional controversy.

68. The broader aspect of Article 43 as read conjunctively with Article 46 of the Constitution envisions trade rights under the rubric of economic and consumer rights respectively. The right to trade or carry out business has greater connectivity with the Constitution. These rights are not peripheral in ranking with other fundamental rights and freedoms which more often are given prominence by the legal scholars and jurists alike. In essence the right to trade cannot be violated by the State or other organs by creating a monopoly in its own favor unless it is for the general public interest. The same applies with a statutory exemption in commercial contracts cannot be whittled down by a subsequent decision of the board or a banking or financial institution duly licenced by the Central Bank of Kenya while in the business of selling and trading in money with their respective customers. The right to carry on a business may it banking or offering financial services includes the right not to carry it on with a total restriction clause on interest or tariffs which are likely to impair the development or growth of the business of their enlisted customers.

69. Although the interpretation and construction of Article 26 on the right to life on the face of it seems to be narrow and restrictive in its application but it is my considered view that it is much broader than traditionally invoked by the respective Petitioners and the dicta in the various jurisprudential decisions. I hold the view that the right to livelihood is an integral part of the right to life

in Article 26 of the Constitution connecting it closely to trade, consumer and occupation rights.

70. The bone of contention as between the Petitioners and the Respondents is on the mortgagee and mortgagor commercial contract on money borrowed traceable to the family of the Petitioners and later payments made and in the course of negotiations it so happened that the limitation

time expired but the rights thereto the commercial transaction continued unabated. Generally, in Kenya contractual interest rates unless they are excessive or usurious, or violate statutory provisions the Courts have limited powers to intervene and rewrite such contracts. It has also been settled through various decisions that high interest rates that can cause hardship and property loss under the Land Act 2012 and Land Registration Act 2012 must be interfered with by the Courts. in that case the freedom of contracting as between the parties is considered unconscionable which promotes unjust enrichment. Essentially, the doctrine of equity applies when rigid application of contract terms leads to unjust outcomes.

71. The Respondent in this discourse strenuously submitted that this Petition is, in substance, a commercial dispute dressed in the language of the Constitution. The Respondent relies on the doctrine of constitutional avoidance, well-articulated in *Royal Media Services Ltd v Attorney General* (2014) and the Supreme Court's guidance in *Speaker of the National Assembly v James Njenga Karume* [2008] 1 KLR (G&F) 425, for the proposition that where adequate remedies exist in ordinary law, the Court should not be drawn into constitutional adjudication.

72. Yet this Court is equally conscious that the mere fact that a dispute has commercial underpinnings does not, without more, deprive it of its constitutional dimension. On the facts before me, I find that the Petition does raise genuine constitutional questions that cannot be fully ventilated in ordinary civil proceedings. That said, three distinct constitutional dimensions emerge: first, whether the Respondent's insistence on sums beyond the statutory ceiling, enforced through continued detention of a title document, amounts to an unlawful deprivation of property under Article 40; second, whether the Respondent, as a state-linked corporation, discharged its obligations of fair administrative action under Article 47; and third, whether its failure to apply the in Duplum rule even handedly constitutes discrimination under Article 27. These are not questions that can be resolved by a mere examination of loan account statements. The

constitutional jurisdiction of this Court is accordingly properly engaged, and I proceed to the merits.

73. In any event, even were this Court to descend into the arithmetic of the loan account, the essential facts are not in controversy. The Respondent does not contest the amounts that the Petitioner has remitted in repayment over the life of the loan. What remains in sharp dispute is not the history of the transaction, but its present legal character specifically, whether the sums now demanded and enforced through the continued withholding of the title document lawfully represent an outstanding balance, or whether they constitute an impermissible accumulation of interest and charges that long ago breached the ceiling imposed by the in Duplum rule.

74. Having gone through the affidavits of both parties together with documented evidence annexed to corroborate the material evidence for and against the petition, I am of the view that walking through the memory lane of this commercial venture the rate of interest demanded by the Respondent Bank is and was arbitrary. It was also extremely high given the nature of the principal amount loaned out to the borrower and ought not to have been levied from the date so indicated in the disclosures produced before this Court while the tentative principal amount has been fully paid.

75. The facts of this case and the legal controversy can be better measured by the statement of law in **Reddie v. Williamson, [1863] 1 Macph (Ct. of Sess.) 228**, as propounded by Lord Cowan; Thus:

> *"This account, from its origin, is kept in the usual mode of stating such accounts. It is balanced at the close of each year, and the periodical interest on advances accruing in the course of the year is placed to the debit side of the account, and to the extent of its amount the balance carried to the debit at the commencement of next year is increased. That amount is dealt with as a principal sum, on which interest is*

calculated, – the bank thereby securing, as they were entitled to do, interest on the accumulated amount each year, or, as it is generally stated, but not quite correctly, compound interest. The true view is, that the periodical interest at the end of each year is a debt to be then paid, and which must be held to have been paid when placed to the debit of the account as an additional advance by the bank for the convenience of the obligants."

Whereas Lord Justice Clerk said:

"The parties must of course have had in view that this account-current would be kept in the way, in which bankers always keep such accounts, balancing the account at the end of the year; and, in the event of the interest accruing during the past year not being otherwise paid or provided for, placing the amount of such interest as the last item to the debit of the account, and accumulating such interest along with the principal sum due on the account, and bringing down the balance thus ascertained, consisting partly of principal, and partly of interest, to the new account for the ensuing year, and placing the accumulated balance as the first article of debit in that new account. Where an account is kept in this way consistently throughout its whole course, the interest thus accumulated with principal, at the end of each year not only becomes principal, but never thereafter ceases to be dealt with as principal."

'The privilege of a banker to balance the account at the end of the year, and accumulate the interest with the principal, is founded on this plain ground of equity, that the interest ought then to be paid, and, because it is not paid, the debtor becomes thenceforth debtor in the amount, as a principal sum itself bearing interest. This principle of equity must be consistently carried out in keeping an account on the

bank's books, in which other parties are interested as obligants, besides the party operating on the account; and, if it be, then the moment that interest is thus converted into principal, the amount of it must be reckoned as part of the drafts on the credit, or beyond the credit, for which the party operating on the account will be liable as principal in any event, ..."

76. The jurisprudence in **Anarita Case** cannot be described as an open and shut jurisprudential door on locus standi in Constitutional Petitions. The constitutional court must conceive, construe and interpret the specific facts of a petition within the provisions of Article 24 & 259 of the Constitution. In so far as **Article 259** is concerned, it provides expressly as follows: *This Constitution shall be interpreted in a manner that-*

(a) Promotes the purposes, values and principles;

(b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) Permits the development of the law; and

(d) Contributes to good governance

If there is a conflict between different language versions of this Constitution, the English language version prevails.

Every provision of this Constitution shall be construed according to the doctrine for interpretation that the law is always speaking and, therefore, among other things-

(a) A function of power conferred by the Constitution on an office may be performed or exercised as occasion requires, by the person holding the office;

(b) Any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise

performing the functions of the office at any particular time;

(c) A reference in this Constitution to an office, State organ or locality named in this Constitution shall be read with any formal alteration necessary to make it applicable in the circumstances; and

(d) A reference in this Constitution to an office, body or organization is, if the office, body or organization has ceased to exist, a reference to its successor or to the equivalent office, body or organization.

In this Constitution, unless the context otherwise requires-

(a) If a word of expression is defined in this Constitution, any grammatical variation or cognate expression of the word or expression has a corresponding meaning, read with the charges required by the context; and

(b) the word "includes" means "includes, but is not limited to".

77. As with ordinary language, the meaning of constitutional provision depends on the context in which it is used and much of constitutional interpretation is therefore about the Court establishing the context or perhaps painting the picture within which a particular constitutional provision pleaded by the Petitioner in his or her petition agitating for a remedy under Article 23 of the Constitution. Sometimes the context is obvious from the facts of the petition and the meaning of the provision is unlikely to give rise to any controversy as between the parties and the interpretation by the Court. Whereas the other provisions are however quite likely to be the subject of argument about their proper meaning and the congruence of the prayers in the petition itself. This is because in some cases provisions in the Constitution are as a result of political compromises made during the drafting process and were therefore left deliberately vague or open-ended. I had the advantage of being part of

the Bench involved in Constitution interpretation notably the rights in the Bill of Rights being Chapter 4 of the Constitution in my view some of the Articles are formulated in general and abstract terms. Their application to particular situations and particular circumstances will necessarily be a matter of argument and controversy. I think that is the reason why the Courts as the last bastion in this regard to protect and guarantee violation of fundamental rights and freedoms of our citizens. Maybe the reasons why the other forum legitimately was not able to answer the many issues arising out of the mortgagee and mortgagor loan contract and its terms as secured by the property voluntarily submitted to the1 Respondent Bank. The Canadian Supreme Court in **R v Big M Drug Mart Ltd 1985 18 DLRR (4th) 321-6** made the following observations:

> *The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view, this analysis is to be reference to the character and larger objects of the Charter [of Rights and Freedoms] itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.*

78. On the facts before me, I find that the Petition does raise genuine constitutional questions that cannot be fully ventilated in ordinary civil proceedings. This conclusion finds its anchor in ***Samoei v National Housing Corporation (NHC) & another [2024] KEHC 14300 (KLR)***, where this Court, confronting materially analogous circumstances

involving a state corporation, charged property, and ballooning interest, posed the decisive question in the following terms:

> *"Does the mischief that the rule seeks to remedy; the exploitation of borrowers through astronomical interest accumulation, become any lexzss pressing merely because the lender is a statutory corporation rather than a bank?"*

79. Three distinct constitutional dimensions emerge: first, whether the Respondent's insistence on sums beyond the statutory ceiling, enforced through continued detention of a title document, amounts to an unlawful deprivation of property under Article 40; second, whether the Respondent, as a state-linked corporation, discharged its obligations of fair administrative action under Article 47; and third, whether its failure to apply the in Duplum rule evenhandedly constitutes discrimination under Article 27. These are not questions that can be resolved by a mere examination of loan account statements. The constitutional jurisdiction of this Court is accordingly properly engaged, and I proceed to the merits.

Whether the variation of the loan facility from KES 10,000,000 to KES 20,000,000 was legally valid and binding on the estate of the late Simeon Kositany

80. The Petitioners challenge the variation of the principal loan amount from KES 10,000,000 to KES 20,000,000, agreed in or about 2014, on the ground that the chargor, the late Simeon Kositany, had died on 21st April 1998, well before the renegotiation, and that the estate's legal representatives were not parties to the variation. The Respondent counters that the Petitioners themselves drove those negotiations in their capacity as directors of Kabobo Company Limited and as persons claiming to represent the estate, and that they cannot now approbate and reprobate.

81. The law governing the modification of secured lending instruments is well settled. A legal charge creates a real right in rem over land and its terms

cannot be unilaterally varied to the detriment of the chargor or the chargor's estate without the informed, express consent of the person entitled to the equity of redemption. This principle flows from Sections 97 and 98 of the Land

Act, No. 6 of 2012, which govern alteration of charges, and from the foundational contract law proposition that a variation of an agreement requires fresh consideration and the assent of all parties bound.

82. The Respondent has placed on record that the Petitioners, acting as directors of the borrowing company, were active participants in the 2014 negotiations. While this does not equate to the estate formally consenting to a variation of the charge, this Court must be careful not to allow the estate's representatives to benefit selectively from a negotiated arrangement whilst simultaneously repudiating the obligations that arrangement entailed. The doctrine of approbation and reprobation which is well established in our Kenyan jurisprudence prevents a party from accepting the benefits of a transaction whilst repudiating its burdens.

83. Nevertheless, this Court finds that there is a significant distinction between the Petitioners' participation in negotiations as directors of the corporate borrower, and a formal, legally competent variation of a personal guarantee and legal charge binding the estate. The late Simeon Kositany's personal guarantee was extinguished upon his death in 1998. The charge over L.R. No. 8411, while surviving his death as a real right, could only be validly extended or varied with the concurrence of the estate's duly appointed administrators. Those administrators were not appointed until 2022. Any variation entered in 2014, insofar as it purports to alter the quantum secured by the legal charge beyond the original principal of KES 10,000,000, is to that extent, of questionable binding force on the estate. However, to the extent that the Petitioners accepted and utilized payments credited under the settlement arrangement, and made further payments thereunder over several years, equity restrains them

from wholly repudiating the existence of an obligation. The Court will return to this tension when computing the lawful sum due.

What is the correct application of the in-Duplum rule under Section 44A of the Banking Act to the facts of this case, and what sum, if any, remains lawfully due?

84. The in Duplum rule, as elucidated by the Court of Appeal in **Kenya Hotels Ltd v Oriental Commercial Bank Ltd [2019] eKLR**, stands as a fundamental safeguard against the infinite accumulation of interest on debt. Its Latin phraseology - "in double" - encapsulates its core principle: that interest stops running when it equals the outstanding principal. The rule's incorporation into Section 44A of the *Banking Act* was not meant to restrict its application but rather to give statutory force to an equitable principle that predates modern banking regulation. The Court of Appeal's pronouncement on the rule's rationale is particularly instructive:

> *"The in Duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against making it impossible to redeem a charged property.*"

85. As the High Court observed in ***Anne J. Mugure & 2 Others v Higher Education Loans Board*** **[2022] KEHC 11951 (KLR),** the rule exists to tame the appetite of lenders who had made the recovery of interest a cash cow, and its application is a public policy norm from which no lender be it statutory, commercial, or otherwise is exempt.

86. This Court adopts the three-step analytical framework articulated in ***African Banking Corporation Ltd v City Gas Ltd & 3 Others*** **(Civil Suit 434 of 2017) [2025] KEHC 10064 (KLR):** first, identify the date on which the loan became non-performing; second, ascertain the total of principal and accrued interest outstanding on that date, which constitutes the statutory base; and third, cap total post-default interest at an amount

equal to that base, so that the maximum recoverable sum is twice the base amount, less any payments received.

87. The parties are in irreconcilable disagreement on the statutory base. The Petitioners contend that because the Borrower defaulted at inception in 1997, the base should be treated as KES 20,000,000, being double the original principal and that having repaid KES 22,530,000, they have extinguished all lawful indebtedness and overpaid by KES 2,530,000. The Respondent, relying on its own computation, takes the date of 1st May 2007, being the commencement date of Section 44A, as the operative date for determining the statutory base, at which point it asserts the outstanding principal and interest stood at KES 70,101,120.44, yielding a ceiling of KES 140,202,240.88 and, after crediting payments, a balance of KES 118,672,240.88.

88. The question of which base applies is one of statutory interpretation upon which this Court must take a clear position. Section 44A (6) specifies that the interest restriction applies from the date the loan first became non-performing. The section was commenced on 1st May 2007 by Legal Notice No. 36 of 2007. The transitional question that arises is whether the 2007 commencement date displaces an earlier default date for purposes of computing the statutory base. In **Kenya Hotels Ltd v Oriental Commercial Bank Ltd (Civil Appeal No. 252 of 2009) [2019] eKLR**, the Court of Appeal confirmed that section 44A has retrospective effect and expressly applies to loans made before the section came into operation, including loans that had already become non-performing before 1st May 2007. The Court did not hold that interest that had accrued before the section came into force was itself unlawful, but it did confirm that the section governs all non-performing loans from its commencement. The rationale underpinning this position was articulated by the Court of Appeal in **Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation [2019] KECA 436 (KLR)**, where the Court held that the in Duplum rule is concerned with public interest, its key

aim being to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures, and that it was also meant to safeguard the equity of redemption against banks making it impossible to redeem a charged property. The Court stated:

> ***"****The* **In Duplum** *rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the* **in Duplum** *rule is meant to protect both sides".*

89. The central dispute on the in Duplum computation turns on a question of statutory construction. This would then establish whether really a constitutional violation existed. **Section 44A(2)(a)** fixes the base at the principal owing when the loan becomes non-performing. That language is clear and unambiguous. It anchors the computation to an event, namely default, and not to a legislative commencement date. The evidence on record leaves no doubt that default occurred shortly after disbursement in January 1997, when the principal outstanding was KES 10,000,000. That is the statutory base. The ceiling, being the base and an equal amount of interest, is accordingly KES 20,000,000.

90. To fix the base instead at the accumulated balance as at 1st May 2007 would be to permit a decade of unchecked compounding, occurring entirely outside the statute's protective reach, to be absorbed into the very formula the statute was designed to limit. Section 44A(6) extended the section's reach to preexisting non-performing loans precisely because borrowers in that position deserved protection from exactly that outcome. An interpretation that defeats that purpose cannot therefore be sustained.

91. On the figures before this Court, cumulative payments on the facility amount to at least KES 21,530,000, a sum that exceeds the statutory ceiling of KES 20,000,000. The debt is extinguished. The Respondent's

continued withholding of the title documents to L.R. No. 8411 is without legal foundation, and nothing in the 2014 settlement arrangement alters that conclusion, since no agreement between the parties, however negotiated, can override a mandatory statutory ceiling. The excess paid over and above KES 20,000,000 is recoverable, with the precise quantum to be verified against the documentary record of payments in evidence.

92. On the question of the total sum paid, this Court proceeds on the figure acknowledged by the Respondent in its own Replying Affidavit, being KES 21,530,000. That figure is not in dispute and is sufficient for the purposes of this determination. It exceeds the statutory ceiling of KES 20,000,000 by KES 1,530,000, which sum is prima facie recoverable as money received beyond the lawful maximum. To the extent that the Petitioners contend that further payments were made bringing the total to KES 22,530,000, that question involves a factual reconciliation of the loan account that is better resolved through a formal taking of accounts, and this Court makes no finding on it at this stage.

93. In customer-bank relationship, it is initially covenanted in the letter of offer and acceptance with finer details of the conditions and obligations of both the borrower and the loanee. In this case the Petitioner and the 1st Respondent bank the entitlement of the bank to the principal sum due to it with interest thereon as agreed until payment in full is included as a term implied or express by the usage of language in such agreements. The agreement on interest or other costs like insurance are also expected to be part of the terms of the commercial agreement. This banker-customer relationship from the affidavits and documentary evidence ceased to exist sometime back. In my view there is no right to compound interest on the amount alleged to be outstanding save by restructuring the terms as initially inked in the letter of offer and acceptance either expressly or impliedly or by some custom which is binding on the parties. On the face of the various averments there was no express agreement for the Petitioners to pay compound interest in the present case. It may be an

agreement to pay compound interest by the borrower like the Petitioner in this case may be implied by virtue of acquiescence but such an agreement is not normally implied except as to the mercantile accounts for mutual transactions. This is a case where Respondent bank had already closed the account and demanded repayment and settlement of the amount due and owing, otherwise the security would be put on offer for sale by way of Public Auction. The relationship as laid down in the bank-customer covenants lapses the moment foreclosure and the statutory power of sale under the Land Act as read with Land Registration Act 2012 is invoked by the bank. I think this was the vision the drafters of the Banking Act had when they introduced

and in-Duplum Rule under Section 44A of the Act. I am of the view that the words on the principal amount as generally applied in the Mortgagee and Mortgagor contract in calculating the amount due to the Mortgagee upto the date fixed for redemption, and interest from the rate of the decree should be calculated on the principal sum secured by the agreement and not on the total amount due on the date of the decree on account of principal as well as compound interest. In my view if the mortgage contract provided for interest being calculated annually or monthly at a reducing balance and that if it was not paid then it should become a part of the principal. My purposive interpretation and construction of the words on the principal amount found or declared due by the Respondent bank should refer not only to the principal sum secured by the Mortgagor but also the amount due on account of interest which has become a part of the principal in accordance with the terms of the loan agreement. Therefore, I take it that if the loan agreement is a term loan of three years setting out the terms of repayment and interest chargeable every new year is a renewal of the contract in operation and binding between the parties. Why do I say this? The term principal amount is never restricted to the definition dimension in its meaning to the

original sum lent by the bank and an agreement to treat arrears of interest at fixed periods as principal which is to carry interest is valid.

94. ***The Learned Author's of Black's Law Dictionary (7th Edition)*** *defines interest inter alia as the compensation fixed by agreement or allowed by law for the used or detention of money or for the loss of money by one who is entitled with its use, especially the amount owed to a lender in return for the use of the borrowed money. Similarly, according to* ***Stroud's Judicial Dictionary of Words and Phrases (5th Edition)*** *interest means inter alia; compensation paid by the borrower to the lender for deprivation of the use of his or her money.*

95. However, this definition of interest chargeable by the bank under a mortgagor and mortgagee agreement or by the terms of an overdraft is distinguishable from penal or punitive interest. This is what is mainly referred to in bankcustomer relationship as an extraordinary liability incurred by a borrower on account of his or her being a wrongdoer by dint of the loan agreement entered into with the bank in good faith. Notwithstanding that legal position the borrower may have committed a wrong of not making the payments when due and owing in favor of the bank. Thus, in my considered view, while it may be true that compound interest chargeable on default is to compensate the lender but nothing could be far from the truth that penal interest as the word goes is a penalty founded on the doctrine of penal action taken by the bank. Yet in many commercial agreements the penal interest continue to be capitalized by the bank occasion prejudice and injustice to the borrower. That seems to be the case here from the facts as pleaded by the Petitioners and counterdemanded by the Respondent bank. It is interesting to note that the Respondent bank is now demanding a colossal sum of Kshs 118,672,240.88 from an original figure stated to be Ksh 10,000,000/=. The introduction of the in-Duplum Rule within the Banking Act by our Legislature was to confront such commercial loan agreements for the very purpose of dealing with the interest charged by banks as

excessive, usurious and opposed to public policy. In view of the law on punitive interest having been settled in Kenya by various judgments from the Superior Courts any interest charged and/or capitalized by the Respondent bank over and above the initial rate of interest agreed upon by both parties and as to the period at which rests can be arrived at shall be disallowed and excluded from the capital sum and treated as not being part of the component of the agreed interest in the voluntary signed agreement. If the interest is disproportionate to the principal sum advanced to the Petitioner as it has happened in this case, the same shall stand disallowed.

96. It is unconscionable and against consumer rights in our Constitution for banks to charge interest on interest, compound interest or penal interest regardless of the loan amount. I am of the strong view and holding that any such interest collected by the bank must be refunded or credited or adjusted to the borrower's account.

Whether the Respondent's conduct violated the Petitioners' constitutional rights under Articles 27, 40, 46, and 47 of the Constitution.

97. Starting with Art. 40, the right to property under the said Art. is not absolute, but any limitation of it must be lawful, necessary, and proportionate. The charge over L.R. No. 8411 was granted as security for a specific debt. Once that debt is extinguished, the charge loses its legal foundation and the Mortgagor's estate is entitled, as of right, to redemption under Sections 85 and 89 of the Land Act. The Respondent has held the title documents to that property since 1996. It has continued to detain them well after the statutory ceiling was breached and well after cumulative payments exceeded every lawfully recoverable sum. That detention is not the exercise of a security right. It is the assertion of a right that no longer exists. A Mortgagee who refuses to release security after the secured debt has been satisfied is not enforcing a contract, it is depriving a property owner of their title without legal basis. This Court

finds that the Respondent's refusal to discharge the charge and release the title constitutes an unlawful deprivation of the Petitioners' property rights in violation of Article 40 of the Constitution.

98. On Art. 47, the Respondent is a state corporation established by statute and is unambiguously a public body exercising public functions within the meaning of Article 47. That provision guarantees every person the right to administrative action that is lawful, reasonable, and procedurally fair. On the facts before this Court, the Respondent unilaterally altered the principal secured by the charge from KES 10,000,000 to KES 20,000,000 following the death of the Mortgagor, without the participation of his estate's legal representatives, without issuing any formal variation notice, and without any written instrument executed by the persons legally competent to bind the estate. It withheld accurate and transparent loan account information over a period spanning decades. It accepted payments for seven years beyond the expiry of its own settlement window without issuing any contemporaneous notice that the account remained unsettled or that the settlement offer had lapsed. It then, in these proceedings, presented an escalating sequence of demands, from KES 19,500,000 to KES 41,030,000 and ultimately to KES 118,672,240.88, without any coherent explanation of the basis for each successive escalation. Taken individually, each of those acts would raise serious questions of procedural fairness. Taken together, they disclose a pattern of administrative conduct that is neither lawful in its basis, reasonable in its effect, nor fair in its procedure. The violation of Art. 47 is therefore established.

99. Moving to Art. 27, let me start by stating that discrimination in law denotes differential treatment of persons who are similarly situated, without objective and reasonable justification. The Petitioners' case on this ground rests on the Respondent's own public acknowledgment, through the Business Daily publication of 22nd July 2024, that it intended to review interest on legacy defaulted loans and apply the in Duplum rule to its

historical portfolio. That representation, made to the public at large, created a standard of treatment to which similarly situated borrowers were entitled. The Petitioners, holding a legacy loan dating to 1997 and having paid amounts exceeding the statutory ceiling, fall squarely within the class of borrowers to whom that commitment was directed. Instead, they have been subjected to escalating demands, continued detention of their title, and litigation. The contrast between the Respondent's public posture and its treatment of these Petitioners remains unexplained. This Court finds that the Petitioners have been subjected to unequal treatment that is not grounded in any legitimate distinction, and that their right to equal protection of the law under Article 27 has accordingly been violated.

100. Finally, on Art. 46, the Constitution guarantees consumers the right to goods and services of reasonable quality, to information necessary to gain the full benefit of those services, and to protection of their economic interests. A loan facility is a financial service, and a borrower is a consumer within the contemplation of that provision. The Respondent supplied a financial service that was opaque in its operation and unpredictable in its demands with punitive accumulation of charges at a time when the borrower had no means of knowing what the true outstanding balance was. The unilateral alteration of the principal, the failure to provide regular and accurate statements, and the imposition of charges whose basis was never adequately disclosed are precisely the kind of practices that Article 46 was designed to prohibit. The Court finds that the Respondent's conduct fell below every standard that Article 46 demands of a financial service provider, and that the violation of the Petitioners' consumer rights is made out.

101. Having considered the totality of the evidence, the affidavits, the written submissions of both Counsels, and the authorities placed before this Court, the conclusions that emerge are neither technical nor marginal. A borrower obtained KES 10,000,000 in 1997. Over the subsequent decades, through a combination of compounding interest, unilateral variations made

without the estate's participation, and the Respondent's failure to invoke a contractually stipulated insurance cover upon the guarantor's death, that obligation was progressively inflated to figures bearing no proportionate relationship to the original facility. The Petitioners, in good faith and over many years, remitted payments totalling at the very least KES 21,530,000, exceeding by any lawful measure what the statute permits to be recovered. The Respondent's response has been to demand more, withhold the title instrument, and maintain an escalating claim that reached KES 118,672,240.88. That trajectory of conduct violates the Petitioners' right to property under Article 40, their right to fair administrative action under Article 47, and their consumer rights under Article 46 of the Constitution.

102. From the perspective of the Petitioners, it was their case that the Court should award both general and exemplary damages for the unlawful acts of omission on the part of the Respondent bank to this commercial transaction. Generally, in Kenya Courts have established that constitutional damages are awarded under public law to vindicate violated rights and acting as a deterrent against future breaches rather than solely compensation for loss. Such damages are distinct from private tort law, often requiring a declaration of rights violation

as a first step with monetary compensation awarded when necessary to provide effective redress. The key guiding principles for awarding constitutional damages include *inter alia*:

- **Vindication of Rights:** The primary purpose is to acknowledge and vindicate the breach of a constitutional right, not merely to punish or compensate, although compensation is an essential component.
- **Appropriate and Just" Remedy:** Damages should be reasonable, proportionate, and tailored to the specific facts of the case under Article 23(3) of the Constitution.
- **Distinct from Tort Law:** Constitutional damages are not confined to traditional common law damages. They arise from public law

violations, and sometimes a declaration of violation is sufficient without a monetary award.

- **Need for Proof:** A party must prove the specific constitutional right violated and the extent of the injury, as held in *William Musembi & 13 Others v. Moi Educational Centre Co. Ltd & 3 Others*.
- **Deterrence Factor:** The award can reflect public outrage and serve to deter state agents from repeating oppressive, arbitrary, or unconstitutional actions.
- **Sovereign Immunity Inapplicable:** When constitutional rights are violated, sovereign immunity cannot be used as a defense against compensation.

103. Where do we draw our inspiration from when it comes to assessment of damages on constitutional torts? Luckily enough, the Superior Courts at various levels have delved into this matter extensively so as exemplified by the following authorities:

- In the case of **Sholei v Judicial Service Commission (Petition 39 of 2013):** Emphasized that constitutional damages are a public law remedy aimed at vindicating rights and deterring future infringement. Similarly in **William Musembi & 13 Others v. Moi Educational Centre Co. Ltd & 3 Others (SC Petition 2 of 2018):** Established that damages are awarded based on proof of the nature of rights violated and the extent of the injury. In addition, the court in **Dina Management Ltd v County Government of Mombasa (SC Petition 8 (E010) of 2021):** Involved claims of violation

  of property rights under Article 40, highlighting compensation for illegal administrative actions. The Court also in the case of **Attorney General v. Zinj Limited (SC Petition 1 of 2020):** Reinforced the necessity of proving the violation of rights before damages are awarded. Last but not least in the Court in **Francis Mulomba Nguyo v. [Various Respondents] (HC Petition 2021/3888):** Addressed constitutional torts and the duty of the state to avoid violating fundamental rights. Finally, the Court in **Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others (SC Petition 4 of 2012):** Often

applied to determine the nature of costs and reliefs in high-stakes constitutional litigation.

104. In so far as the availability of constitutional damages is concerned it has been noted that decisions of our courts are not coherent on the question when an award of constitutional damages should be approved by a Court. That is the very reason why availability of constitutional damages as adverted to by the Petitioners has also been described as having to necessarily be determined casuistically (***See Member of the Executive Council: Welfare v Kate 2006 4 SA 478 (SCA) Par 25***). It should be understood that the drafters of our Constitution in Article 23 expressly provided as follows under Sub-section 3: *"In any proceedings brought under Article 22, a Court may grant appropriate relief, including- (a) A declaration of rights,*

(b) An injunction,

(c) A conservatory order'

(d) A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; (e) An order for compensation; and (f) An order of judicial review.

105. From this Article of the Constitution there is no reason in principle why appropriate relief should not include an award of damages where such an award is necessary to protect and enforce the fundamental rights and freedoms. This is to compensate persons who have suffered loss as a result

of the breach of fundamental rights protected and guaranteed by the Constitution. Regarding the Petitioners, I have had the advantage of appreciating the entire evidential material and I am of the considered view that under Section 107 (1), 108 & 109 of the Evidence Act that standard and burden of proof was far from being discharged for the Court to assess and grant constitutional damages. That limb is lost.

106. With finality and in the premises, applying the law to the evidence presented before this Court and for all the reasons given above, it is hereby ORDERED and DECLARED as follows; That:

a. *The Petition succeeds on the grounds of violation of Articles 27, 40, 46, and 47 of the Constitution, and on the concurrent grounds of statutory extinguishment of the debt under Section 44A of the Banking Act and estoppel by conduct.*

b. *The correct statutory base for the purposes of Section 44A(2)(a) of the Banking Act is KES 10,000,000, being the principal owing when the loan became non-performing in 1997, and that the maximum sum recoverable by the Respondent on the facility advanced to Kabobo Company Limited is accordingly KES 20,000,000. That ceiling has been exceeded and the debt is fully extinguished.*

c. *An Order of Mandamus shall issue compelling the Respondent to execute and register a discharge of the charge registered on 20th December 1996 over L.R. No. 8411 (Grant No. I.R. 10084) and to unconditionally release the original title documents to the Petitioners within thirty days of the date of this judgment.*

d. *The Respondent shall refund to the Petitioners the sum of KES 1,530,000, being the amount paid in excess of the statutory ceiling of KES 20,000,000 on the Respondent's own acknowledged figure of KES 21,530,000. The Petitioners' further claim that total payments amounted to KES 22,530,000 and that a balance of KES 1,000,000 remains unaccounted for is not capable of final determination on the material before this Court. The Petitioners are at liberty to pursue it by such proceedings as they may be advised.*

e. *In the alternative the Respondent bank holds the view that this is a windfall to the Petitioner, a proper forensic of this account can be carried out within the declarations made regarding the interest*

which can accrue from the loan amount as the rest of it has been declared as being unlawful and against public policy.

f. *A declaration shall issue that no interest chargeable shall be in violation of the in-Duplum Rule under the Banking Act.*

g. *A declaration be and is hereby made that the interest charged by banks on interest on interest, or compound interest or penal interest regardless of the loan amount infringes and violates Articles 27(4), 40, 43 and 46 of the Constitution.*

h. *The claim for general and exemplary damages is declined.*

i. *The Respondent shall bear the costs of this Petition.*

107. Orders accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 19TH DAY OF MARCH 2026.

.....

R. NYAKUNDI

JUDGE