REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC N0.96 OF 2017

SAMUEL KAMAU KAIRU.....1ST PLAINTIFF

SAMMY MAINA KANGANGI t/a

SAKAMA ENTERPRISES.....2ND PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....1ST DEFENDANT

PETER N GICHUKI t/a

SPOTLIGHT INTERCEPTS AUCTIONEERS.....2ND DEFENDANT

JUDGMENT

1. The 1st Plaintiff claims an ownership right over all that parcel of land known as LOC9/KANYENYAINI/1417(the suit land) encumbered by a charge in favor of the 1st Defendant.

2. The charge was in relation to a loan facility advanced to the 2nd Plaintiff's business in the name of SAKAMA Enterprises and guaranteed by the 1st Plaintiff's title to the suit land.

3. The 1st Plaintiff claims that his right to redeem the title has accrued by dint of having fully paid the loan lend and even surpassed the statutory limit.

4. By a plaint dated 11/10/ 2016 and filed on the same day the Plaintiffs seek the following reliefs;

a. A declaration that the Defendants' action to foreclose and realize the 1st Plaintiff's property will occasion the said 1st Plaintiff and others dependent on the land irreparable loss and damage.

b. A declaration that the 1st Defendant's right to realize the security charged to it has not accrued nor is it exercisable in the circumstances.

c. A declaration that the Plaintiffs right under the doctrine of redemption has accrued by dint of their having fully repaid the sum lent and even surpassed the statutory limit.

d. A permanent injunction against the realization of all that land comprised in the title no. LOC 9/KANYENYAINI/1417.

e. Damages for breach of statute and loan agreement.

f. Costs of the suit.

5. The 1st Plaintiff claims he is the registered proprietor of all that parcel of land known as tittle No. LOC 9/KANYENYAINI/1417 measuring 0.49 hectares and that he lives with his extended family in that land.

6. The 2nd Plaintiff states that it begun off its borrowing history against the suit land in the year 1994 when they borrowed kshs. 150,000/- from the 1st Defendant secured by a charge over title to the suit land which was serviced fully. In 1995 they applied for an overdraft facility of kshs. 250,000/- payable in 12 months which they fully paid. Thereafter in 1997 they applied for a further facility of kshs.250,000/= secured by a further charge over the suit land to which they enhanced the security by a supplementary charge of kshs. 100,000/-. This last facility was to be serviced with monthly instalments of kshs. 14,792.80 for 24 months upon disbursement.

7. Thereafter the Plaintiffs' business collapsed in 2003 causing them to default in servicing the loan. They reached out to the bank from time to time to enable them rebuild their capacities, which was allowed. That the 2nd Plaintiff continued to make payments from time to time between the years 1998 and 2014 amidst the challenges, totaling to Kshs. 702,020/-

8. That in 2012 the 1st Defendant issued a letter to the 2nd Plaintiff asking him to collect the title used to secure the loan from their offices, when he availed himself he was issued with another letter dated 26/10/2012 recalling the initial letter. Thereafter the 1st Defendant issued several letters of intention to realize the security.

9. The Plaintiffs challenge the notices issued by the 1st Defendant on basis that there is no outstanding balance after payment of a total of kshs. 702,020/- cumulatively, they allege that the costs and penalties being levied on the loan account violates section 44A of the Banking Act which caps the amount recoverable from a defaulter of a loan to double the sum due at the time of default, the 1st Defendant breached the statutory capped interest rates at 14.5%and that it is unfair to sell a property charged for a fully redeemed facility.

10. The 1st Defendant in its defence avers that the title to the suit land was surrendered by the 1st Plaintiff to secure a loan facility advanced to the 2nd Plaintiff at an aggregate amount of kshs. 355,026/- to be repaid in 24 months, secured by a legal charge of kshs. 250,000/- . The 2nd Plaintiff continued servicing the loan but thereafter fell into arrears and despite several demands for payment from the 1st Defendant, he failed to pay forcing the 1st Defendant to embark on the redemption process by issuing the relevant statutory notices. That it was a term of the legal charge that the 1st Plaintiff risked losing his property if the debt remained unpaid. That the exercise of the 1st Defendant's power of sale was well within the law having issued all the statutory notices and the outstanding balance remained unpaid. That the 2nd Defendant had as late as 2003 acknowledged the existence of the debt when he wrote to the 1st Defendant requesting to pay kshs. 5,000/- per month. That the outstanding loan continued to accrue interest and bank charges for the periods it remained unpaid.

11. Pw1 testified that he is the owner of the suit land and conceded that he had charged the title to the 1st Defendant as security for a loan. He claimed that they had repaid the loan in full for that reason he was opposed to the intended sale of his land by the 1st Defendant.

12. PW2 set the Plaintiffs borrowing history with the 1st Defendant since the year 1994, 1995, 1997 and the conversion of the overdraft of 1997 to a normal loan in 2002. He admitted that his business was faced with challenges around the year 2003 causing him to fall into arrears on the loan, that he informed the bank of the challenges he was facing but struggled to repay the loan, which he claims to have completed paying by the year 2014. That the full, amounts he paid to the bank totaled 705,000/-. In addition, he pointed out the inconsistency in the amounts claimed through the notices and the actual balance as per the bank statement.

13. DWI adopted his statement and list of documents. He amended the list of documents to read letter of offer instead of charge document. He confirmed that the balance owed is Kshs 340,035.55 as reflected in the statement. He claimed that the suit land was charged but he did not produce any charge document, only the letter of offer. He stated that he was not aware of any amounts paid by the Plaintiffs between 1997 and 2002. That the letter of 30/08/2012 was written in error, which was corrected vide the letter of 26/10/2012. That there was also a mistake on the notification of sale. He was also not aware if there were any deposits not reflected in the statement and if there were the bank would give a credit note.

14. The Plaintiffs submitted that despite having obtained other credit facilities from the 1st Defendant before and paying fully the one that became contentious is the overdraft facility they obtained in the year 1997 of kshs. 250,000/- that was later restructured into a normal loan in the year 2002. That before the year 2002 the Plaintiffs had paid an aggregate amount of 341,380/- as per the bundle of receipts produced and a further payment of kshs. 200,000/- paid to the initial overdraft on 23/08/2001. In total the Plaintiff's claim to have paid a sum of kshs. 702,020/-. That having paid a sum of kshs. 702,020/- against an initial loan amount of kshs. 250,000/- the 1st Defendant is estopped from making any further demands for payments by dint of section 44A of the Banking Act. That inclusive of the additional amount demanded by the 1st Defendant it would mean that the total sum payable to the 1st Defendant would be over a million which is more than four times the amount of the principal loan amount.

15. The Plaintiffs further argued that the issue of payments done being at the core of the dispute herein, the only way to resolve would have been through provision of complete statement of account, which the 1st Defendant has failed to provide despite being ordered to do so. That the 1st Defendant has admitted to have lost the previous records. They fouled the 1st Defendant loan system and records management due to their failure to provide complete records of account of the Plaintiffs loan and their admission that they had lost the old records. They also blame the poor record keeping by the 1st Defendant for recanting their letter of 30/08/2012 addressed to the 2nd Plaintiff on grounds that there was an outstanding debt. They also find it improper that there was a mistake on the amount being proclaimed by the 2nd Defendant on behalf of the 1st Defendant. They are amazed that the 1st Defendant also seems to be uncertain on the amounts owed and appears to be relying on guess work. They relied on the case of **Scholastica Nyaguthi Mututri vs. Housing Finance Co. of Kenya Ltd & another [2017] Eklr** where the Court held that

> "if the Defendant cannot explain why it would grant such a rebate , then it is also arguable that the 1st Defendant did not keep reliable accounts from which it could with certainly know what the Plaintiff owed to it. It is therefore true that the amount alleged to be due by the 1st Defendant is as a result of guesswork. A Court of law cannot determine issues of accounts based on guesswork, and any bank which fails to keep proper records of account cannot make a calculable claim against a customer. Banks must keep proper

records of account. It is on the basis of such records that a claim for or against a bank can be determined. Since between the bank and the borrower it is the bank who is obligated to keep proper records and to avail statements of account, a bank, which cannot avail proper records of account, will be disqualified from making any claims against a borrower and would be hard to discharge any such claims by a borrower."

16. The Plaintiffs reiterated that they do not owe the 1st Defendant any money in form of outstanding loan or arrears and that the intended proclamation and sale are intended to unfairly benefit the 1st Defendant.

17. The 1st Defendant submitted that the loan facility that is in dispute between the parties herein is the one evidenced in the letter of offer dated 10/05/2002 for an amount of kshs. 355,026.95, whose statement of account since then has been provided. That it is common ground that the 2nd Plaintiff defaulted in payments of the loan since the year 2003 and has remained to be in default to date therefore the 1st Defendant is entitled to realize the security. There appears to be inconsistent statements in respect to the letter issued by the 1st Defendant on 30/08/2012 and the explanation on the variance in the amounts demanded by the 1st Defendant in the submission and oral testimony of DW1. The oral testimony was very clear.

18. In regard to the breach of section 44A of the banking Act the 1st Defendant argued that considering the amounts paid by 2006 when the Plaintiffs fell into arrears was 87,000/- the balance owing was 268,026.55 therefore the 1st Defendant as per the rule would be entitled to recover interest to the tune of the same amount in which case the outstanding balance would be 536,053.10 whilst the outstanding balance as per the statement is 340,035.55.

19. They are opposed to the Plaintiffs' being granted the injunctive orders because they have failed to prove that they have repaid the loan in full and have failed to prove that the intended sale is illegal.

20. The parties did not draw any issues for the Court to determine. Having considered the pleadings, the evidence and the submissions of the parties, the Court has taken the liberty to draw the issues that would dispose the case for its determination.

Have the Plaintiffs proved that they have fully settled the loan?

21. It is commonly acknowledged by the Plaintiffs and the 1st Defendant that the Plaintiffs enjoyed various loan facilities from the 1st Defendant. According to the Plaintiffs' evidence, the 1st and 2nd Plaintiffs are brothers. In 1994 the 1st Plaintiff through his business name namely Sakama Enterprises obtained banking facilities in the sum of Kshs 150,000/- which was secured by a charge over the suit land. This loan was fully serviced. In 1995, the 2nd Plaintiff was granted the 2nd overdraft in the sum of Kshs 250,000/- payable over 12 months. According to the Plaintiffs this facility was fully repaid. However, it would appear that there were defaults in repayment of the overdraft facility as seen in the letter addressed to the borrower dated the 6/8/2001 in which the 1st Defendant acknowledged the receipt of Kshs 200,000/- on 23/7/01 leaving a balance of Kshs 174,207/55.

22. Vide a letter dated the 2/4/02 the borrower applied for the restructuring of the overdraft facility into a term loan which the 1st Defendant obliged culminating into the letter dated the 9/5/02 restructuring the facility on certain terms. The irregular overdraft facility converted into a loan was Kshs 309,767/05. Together with existing loan balance of Kshs 45,259/90 the total restricted facility stood at Kshs 355,026/95. The purpose was to service the loan liabilities smoothly. The repayment rate was at Kshs. 14,792/80 plus interest over a period of 24 months. The security; a) guarantee for Kshs 250,000/- by Samuel Kamau Kairu supported by Registered Land Act charge for Kshs 150,000/- over the suit land valued at Kshs 350,000/-, valuation dated the 9/1/97 and b). a supplementary charge for Kshs 100,000/- over the suit land.

23. The Letter of offer is accepted by the 2nd Plaintiff as signified by his signature on the document. It would appear that the defaults on the part of the Plaintiffs continued as shown in the demand letter from the 1st Defendant demanding Kshs 442,294/55 as at 11/4/2003.

24. On the 18/6/2003 the 2nd Defendant pleaded with the bank to allow him to repay Kshs 5000/- monthly from July 2003 with provision for lumpsum payments. He also decried the high interest rate being charged on the account and asked the bank to waive the interest rates. He attributed the default in repaying the loan to interalia illness on the part of both Plaintiffs.

25. On the 18/6/03 the bank issued by registered post a statutory notice under section 74 of the Registered Land Act of intention to sell the suit land on account of Kshs 450,210/- outstanding loan on expiry of 90 days. On 21/4/2004 the 1st Plaintiff wrote to the bank requesting for one month to enable dispose of a plot to enable him settle the loan. On 27/5/2004, he again sought another one month. Another letter dated the 17/7/2004 sought for more indulgence from the bank. On the 21/7/2004, the bank responded and threatened to proceed with the realization of the security. On the 28/9/2004 the 1st Plaintiff in his letter pleaded for more time from the bank. A similar notice of 90 days was issued under section 65(2) of the Registered Land Act on 19/11/04, this time the o/s amount is Kshs 515,599/-. It would appear that little took place between 2004 and 2013 (a period of close to 10 years) in terms of loan repayment. On the 3/9/13 the bank gave the 1st Plaintiff 40 days notice to settle the amount which now stood at Kshs 470,539/-. This elicited a response from the 1st Plaintiff who responded on 5/10/13 and proposed the repayment of the loan in the sum of Kshs 20,000/- starting from the month of October 2013. This is reflected on the account statement wherein a total of kshs 195,730 seem to have been received between the October 2013 -October 2014.

26. On the 26/8/16 the bank through the 2nd Defendant issued a notice of sale by public auction of the suit land on 28/10/16. Together with the notice the bank also issued a notice to redeem addressed to the 2nd Defendant in which the sum of Kshs 505,035/55 was demanded. This seems to have broken the camels back forcing the Plaintiffs to file suit on the 11/10/16.

27. From the preceding paras it is clear that the Plaintiffs kept acknowledging their indebtness to the bank and requested the bank for various indulgence and accommodations. The bank reciprocated many times but the Plaintiffs did not come through with their proposals to repay the

bank.

28. It is clear that the facilities letter consolidated and restructured all the o/s facilities into a term loan in the sum of Kshs 355,026/95. I have perused the account statement produced by the bank through its witness and note that the Plaintiffs banked the sum of Kshs. 315,730/- between the period dated the May 2002 – October 2014. This is a simple addition from the credits on the bank statement without having the benefit of how it was applied by the bank. According to the bank the balance stands at Kshs 340,035/55. The Plaintiffs have not challenged this amount by producing evidence of payment or in any other way.

29. The Plaintiffs have averred that they have fully paid the bank and in particular that they have paid Kshs 702, 020/- which in their view is the full and final amount payable in settlement of their obligations to the bank. The Plaintiffs did not table any evidence to support this payment. The bank through its witness undertook to give credit to the Plaintiffs if indeed they have evidence of payment. The borrowers have admitted severally through the correspondences by the Plaintiffs that they owe the bank monies. They also claim to have faced challenges both in their business and social life in the year 2003 causing them to fall back in servicing the loan but continued servicing the loan amidst the challenges until the year 2014 when they claim to have fully paid.

30. The official search of the suit land dated the 4/10/2016 produced by the Plaintiffs shows there was an initial charge of Kshs. 150,000/- and a subsequent charge of Kshs. 100,000/-. Although the charge document was neither produced by any of the parties, it is not in dispute. Both parties including the Plaintiffs have admitted to the existence of a charge document. The Court has not been afforded the opportunity to peruse the terms of the charge between the parties.

31. The Plaintiffs did not single out any payments made in that period that were not reflected in the bank statement provided. The Plaintiff referred to the letter of 30/08/2012 which asked the 2nd Plaintiff to collect the title to the property, that letter did not state that the loan had been cleared, the Plaintiffs continued making payments towards the loan until the year 2014 which speaks into acknowledgement of an outstanding loan.

32. **Section 3(4**) of the Evidence Act, Cap 80 Laws of Kenya which provides as follows:

> **"A fact is not proved when it is neither proved nor disproved."**

33. The aggregate amount of 702,020/= claimed to have been paid by the Plaintiffs was not supported by any payment receipts by the Plaintiffs. It could appear to include the payments made before the restructure of the loan in 2002 which loan documentation were not produced by either of the parties. The restructuring done in the year 2002 took into account all the outstanding loans to which the 2nd Plaintiff executed in acceptance. To my mind this was the opportunity the 2nd Plaintiff would have utilized to dispute any contentious amounts paid before the year of restructure. The loan statement from the year 2002 has been produced and it shows an unpaid balances that is still outstanding.

34. The Court holds that the Plaintiffs have therefore not proved that they have fully paid the outstanding amount.

Is the failure to offer proper books of account fatal to the 1st Defendants right to exercise its statutory power of sale?

35. The 1st Defendant has been variously accused of failing to provide proper book of accounts by the Plaintiffs. There is also an admission by Counsel for the Defendant's through mail that the 1st Defendant could not trace the records before the year 2002. It is however commonly accepted that the outstanding loan by the year 2002 was an overdraft which was restructured to a normal loan and to that effect the 1st Defendant produced the offer letter executed by both parties and a statement of the account from date of restructure onwards. The 1st Defendant excused themselves for having made clerical errors in both the letter dated 30.08.2012 and the notification of sale which are excusable. In the absence of evidence to the contrary, I am satisfied the 1st Defendant has provided proper statement of account for the loan since the year of restructure and the balance of 340,035.55/- is still unpaid.

36. The 1st Defendant failed to produce the charge document and the guarantors document however an official search reveals that there was an initial charge in favour of the 1st Defendant in 1994 of kshs. 150,000/- and a further charge in 2002 of kshs. 100,000/-. The existence of the charge and guarantor relationship was admitted by both Plaintiffs in their pleadings and conceded in oral testimony. The offer letter clearly states that the restructured loan was to be secured by a charge of kshs. 250,000/- over the suit land. I find that the 1st Defendant has satisfactorily established the existence of the charge upon which the 1st Defendant anchors its right to exercise its statutory power of sale.

Is the 1st Defendant in breach of section 44A of the Banking Act?

37. **Section 44A** of the **Banking Act** that imports the **in duplum rule**, the same came into force on 1st May, 2007. The **Section 44A** came into operation. **Section 44(1) and (2)** states as follows:

> "(1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2)
>
> (2) The maximum amount referred to in subsection (1) is the sum of the following-
>
> (a) the principal owing when the loan becomes non-performing;

(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes nonperforming; and

(c) expenses incurred in the recovery of any amounts owed by the debtor."

38. **Subsection (6)** has a retrospective effect in that it covers even loans that were advanced before the section came into operation. It states as follows:

(a) **"(6)** This section shall apply with respect to loans made before this section comes into operation, including loans that have become non-performing before this section comes into operation:

Provided that where loans became non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following-

(a) the principal and interest owing on the day this section comes into operation; and

(b) interest, in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and

(c) expenses incurred in the recovery of any amounts owed by the debtor."

39. Having found that the documented loan is that of the restructure in 2002, which shall form the basis of the findings herein, on the face of it appears that the amount due is not more than double the outstanding amount at the date of default, in fact it appears from the statement that the interest was stopped for several years. However, the provisions of section 44 must be factored in the computation of the outstanding amount, in the event that the amount payable is in excess, the 1st Defendant shall adjust the sum accordingly.

40. The restructure of the loan was done way before the capping of interest rates, and from the statement, there is no interest charged in the period after the capping of the interest rates.

Are the Plaintiffs' entitled to the prayers sought?

41. In view of the above I disallow the Plaintiff's claim.

42. I make no orders as to costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 25TH DAY OF JULY 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Plaintiffs: 1 – Present in person

Advocate is absent

2 – Present in person

Ms Wambui HB for Karinga for the 1st Defendant.

2nd Defendant – Absent

Irene and Njeri, Court Assistants