

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO.781 OF 2021

ZACHARIA MOENGA MAANGI.....
....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD.....
DEFENDANT

JUDGMENT

1. This is a Judgement in respect of the Plaintiff's claim as against the Defendant. It arises out of a Customer/Bank Relationship.

Background Facts

2. The Plaintiff filed the Plaint dated 30th August 2021 and averred that by an offer to advance a loan dated 25th August 1993 and a Charge dated 24th September 1993; the Defendant advanced to the Plaintiff the sum of Kshs.300,000 repayable in 15 years. The said Charge secured the property known as LR.NO. MOLO/Sachangwani Block 1/79 owned by the Plaintiff as security for the said loan.

3. The loan was advanced in October 1993 and by 30th December 2006 the Plaintiff had repaid Kshs. 629,910/=,

thereby fully settling the loan and overpaying by Kshs. 329,910/=. Yet the Plaintiff claims that the Defendant issued a Statutory Notice dated 16th April 2007 claiming Kshs.557,011.60 as an outstanding balance. The Plaintiff asserts that this amount arose from unlawful and non-contractual penalty charges, default charges, and interest on arrears. That following this Statutory Notice, the Defendant advertised the Plaintiff's property for sale in November 2007. This led the Plaintiff to file **HCCS No. 598 of 2007 Zachariah Moenga Maangi vs Housing Finance Company (K) Ltd** at the **Milimani Commercial Courts**. An injunction was granted in favour of the Plaintiff on 22nd February 2008. It was on condition that Kshs.204,974.23 be deposited in Court within ten (10) days.

4. **HCCC No. 598 of 200 Zachariah Moenga Maangi vs Housing Finance Company (K) Ltd** was dismissed for want of prosecution on 21st April 2012 in the presence of the Defendant and absence of the Plaintiff. That after this period the Defendant made no communication with the Plaintiff for

nine years until serving a 45-day Redemption Notice dated 10th June 2021.

5. The Plaintiff contended that due to this prolonged delay, the Doctrine of Laches and **Sections 4 and 19 of the Limitation of Actions Act** bar the Defendant from relying on the Statutory Notice of 16th April 2007. That it is now invalid. That the Defendant is precluded from pursuing foreclosure, especially since the charge indicates a foreclosure date of 8th October 1993. That this date is well beyond the statutory 12-year limitation period, and any claim for interest is also time-barred. That the demand for Kshs. 1,372,826.90 is further unlawful as it violates the *in duplum rule* under **Section 44 of the Banking Act**, given that the principal sum of Kshs.300,000/= was fully repaid. Lastly, that the Defendant has failed to justify how the claimed amount, comprising purely interest, was arrived at after years of silence.

6. The Plaintiff prayed for the following orders;

a) *A declaration that the intended auction sale of the Plaintiff's property known as LR. Molo/Sachangwan*

Block 1/79 by the Defendant as Chargee is wrongful and invalid.

- b) A Declaration that the Defendant is barred by the Statute of Limitations and the Doctrine of Laches from demanding further mortgage payments from the Plaintiff.*
- c) An Order for the Taking of Accounts between the Plaintiff and the Defendant;*
- d) A Declaration that the Plaintiff does not owe any money to the Defendant;*
- e) A Declaration that the Defendant is barred by Statute law from making any further claim from the Defendant in respect of the Charge dated 24th September 1993;*
- f) A Declaration that the Defendant's Statutory Notice dated 16th April, 2007 is invalid due to effluxion of time.*
- g) A Declaration that the Defendant's claim is in breach of section 44 of the Banking Act Cap 488 Laws of Kenya.*
- h) An Order that the Defendant do deliver to the Plaintiff a Discharge of the Charge over L.R. No. Molo/Sachangwani Block 1/79 failing which the*

Registrar of the High Court be authorized to execute the necessary Discharge.

i) An Order that the Defendant do deliver to the Plaintiff the Title of L.R No. Molo/Sachangwani Block 1/79.

j) A Temporary and/or Permanent injunction restraining the Defendant by itself, its servants or agents or otherwise howsoever from selling, alienating, transferring or in any manner whatsoever from disposing of the property known as Molo/Sachangwani Block 1/79.

k) Any further or other relief which this Honourable Court may deem fit to grant.

l) Costs of this suit be (sic) interest therein.

7. In reply to the Plaintiff's claim, the Defendant filed the Defence dated 15th June 2023 and stated that the facility was advanced to the Plaintiff for purposes of completion of construction of his house. The Defendant denied the Plaintiff's allegation that the loan was fully repaid. It averred that the Plaintiff frequently defaulted in repaying his loan facility, a fact which he readily admitted. That the Defendant

Bank indulged him by a loan Rescheduling Agreement dated 12th April 2006.

8. The Defendant admitted that a statutory notice was issued after Plaintiff failed to comply with Loan Rescheduling Agreement dated 12th April 2006. This was pursuant to Clause 4 of that agreement and Clause 11(iv) of the Charge in Instalments dated 24th Sept 1993.
9. Further, the Defendant disputed the allegation that there was no communication between 21st April 2012 and 10th Jun 2021. It maintained that there was communication between 21st March 2012 and 10th Jun 2021, and served a 45-day redemption notice dated 10th June 2021.
10. The Defendant denied the Plaintiff's allegations and maintained that a fresh Statutory Notice dated 27th October 2020 was duly issued and served. Thus, rendering the Plaintiff's reliance on the 16th April 2007 notice and the doctrine of laches misplaced. It further averred that the Limitation of Actions Act does not apply while the secured sum remains unpaid. **Section 19** allows exemption where the mortgagee is in possession. Further, **Section 23** permits

a fresh accrual of action upon acknowledgment or part payment. The Defendant claims this occurred through the Plaintiff's email of 3rd August 2021, acknowledging the debt and promising to pay Kshs. 1,000,000.

11. Additionally, the Defendant contended that the claim of Kshs.1,372,862.90 does not breach Section 44 of the Banking Act or the *in duplum rule*, as the loan was merely in arrears. That the amount claimed comprises the outstanding balance and recovery expenses. The Defendant asserts that there was ongoing communication since 22nd February 2008. It disputes the Plaintiff's claim of full repayment in light of the alleged acknowledgment of debt.

12. The Defendant averred that the Plaintiff is not entitled to any of the reliefs sought in the Plaint dated 30th August 2021 and prays that the suit against it be dismissed with costs.

Plaintiff's case

13. The Plaintiff, **Zacharia Moenga (PW1)**, adopted his witness statement and produced his documentary evidence.

He testified that he obtained a loan of Kshs. 300,000 in 1993 at an interest rate of 21%. The loan was secured by a registered charge over his property, which he read and understood. That he made irregular and insufficient repayments from inception. He defaulted on the first instalment, paid only a few instalments in the early years. That he later sought and obtained a loan restructure in 2006 that extended the repayment period, reduced the interest rate to 14.75%, and granted him a substantial rebate of Kshs. 500,146/40. Thereafter, he made only four payments and ceased repayment altogether. He further confirmed that he filed **HCCS No. 598 of 2007 Zachariah Moenga Maangi vs Housing Finance Company (K) Ltd** to restrain the Bank's from exercising its statutory power of sale. That he failed to comply with court-ordered payments. He confirmed he was to pay Kshs. 204,974/23. That this suit was later dismissed in 2012. He admitted that in August 2021 he offered to settle the loan by paying Kshs. 1,000,000.00 as a concession against the Bank's demand of Kshs.

1,333,496.00. He disputed being in default and did not recall making a later payment of Kshs. 42,640.00.

14. He maintained that the Court in its earlier Ruling in **HCCS No. 598 of 2007 Zachariah Moenga Maangi vs Housing Finance Company (K) Ltd** had found that he had paid usurious interest on the bank loan. He claimed to have paid more than double the loan of Kshs.300,000/=. He acknowledged that he was given a rebate of Kshs. 465,000/= in 2006. That it was more than the loan borrowed. He stated that he wrote a letter to the bank acknowledging the loan and seeking time to repay as his property was about to be sold. He was scared. That he was asked to add the Auctioneers fees of Kshs 100,000/= which he did not have. For that reason, he did not pay.

Defendant's case

15. The Defendant called one witness, **Emmanuel Kiprono Yebei (DW1)**, a Debt Recovery Officer who adopted his statement and produced the Defendant's documentary evidence. He testified that the charge was a continuing one.

That the Plaintiff had been in arrears from inception due to irregular payments. That although the loan was never classified as non-performing, a Statutory Notice dated 27th October 2020 was issued demanding Kshs. 1,333,496.90. He confirmed that there was no communication between the parties for over eight years after the dismissal of **HCCC No. 568 of 2007** in April 2012. However, stated this was not required as the Plaintiff was aware of the arrears. That interest on the principal had ceased being computed in April 2010. That in 2021 the Plaintiff acknowledged the debt and offered to settle it by paying Kshs. 1,000,000.00. He made a part payment of Kshs. 42,640.00. That the Plaintiff declined the Bank's counter offer. The bank did not agree to pay for the Auctioneers costs of the Auction. He stated that the earlier suit was dismissed on 21st April, 2012. That for a period of eight (8) years and four (4) months the Bank had no contact with their customer. He denied that the 12-year limitation period applied to a mortgagee who was in possession. He stated that the charged property was the Plaintiff's matrimonial home. He maintained that once a

customer skipped the monthly repayments the account went into arrears. Once an account is in arrears for a period of time, it goes into the non-performing status.

Issues for determination

16. The Court has considered the Plaintiff's and the Defendant's case as well as their written submissions. The Court frames the following issues for determination;

- a) *Whether the **in duplum** rule applies in this case.*
- b) *Whether the exercise of statutory power of sale is defeated by limitation of actions.*
- c) *Whether the intended auction sale of the Plaintiff's property, known as LR. Molo/Sachangwan Block 1/79 by the Defendant as Chargee is wrongful and invalid.*
- d) *Whether the Plaintiff has made out a case for the grant of the orders sought.*

Analysis

17. It is not in dispute that the Plaintiff obtained a loan of Kshs.300,000 from the Defendant pursuant to a letter of offer dated 24th September 1993. It is also not contested that the Plaintiff did pay the sum of Kshs.629,910/= and that this was paid as at 30th December 2006. The Plaintiff's position is

that at the time he filed HCCC 598 of 2007, he had fully repaid the loan.

18. In contrast, the Defendant submitted that the Plaintiff defaulted. After the default, the loan was restructured by a Reschedule Contract dated 12th April 2006, in which the Plaintiff acknowledged an outstanding balance of Kshs.985,126.40 as at 30th April 2006, inclusive of arrears. He agreed to repay the loan through monthly instalments of Kshs.8,000 while receiving an immediate rebate of Kshs.485,126.40. The Defendant further contends that following a notification of sale, the Plaintiff again acknowledged the debt in a letter dated 3rd August 2021 by offering to settle the outstanding amount with a payment of Kshs.1,000,000, and only filed the present suit after being asked to pay auctioneers' costs. Based on these admissions, the Defendant argued that the Plaintiff is estopped from denying liability for the outstanding loan amounts.

19. It is noteworthy that prior to the bank exercising its statutory power of sale, the Plaintiff filed **HCCC No. 568 of 2007** on 14th November 2007 seeking an injunction to

restrain the sale of L.R. No. MOLO/SACHANGWANI BLOCK 1/79. Although the Court granted a conditional injunction on 22nd February 2008 requiring the Plaintiff to deposit Kshs.204,974.23 within ninety days, the Plaintiff failed to comply, causing the orders to lapse and the suit to be dismissed for want of prosecution on 21st April 2012. Consequently, the Plaintiff's loan account remained in arrears, prompting the Defendant to issue a fresh statutory notice on 27th October 2020.

20. DW1 confirmed that there was no communication between the parties for over eight years after the dismissal of HCCC No. 568 of 2007 in April 2012. Further, the Defendant submitted that the Plaintiff's account remained in arrears and, as a result, on 27th October 2020, the Defendant issued a fresh statutory notice.

21. On one hand the Plaintiff claims to have fully repaid the loan. Nothing would have been easier for the Plaintiff to do that to present receipts of these payments before this Court.

22. The Defendant did not explain why it did not pursue the amount owed after the expiry of the 90 days and over the

period of eight years. One can only conclude that the Defendant allowed and waited for the interest to grow.

a) Whether the in duplum rule applies in this case.

23. Does the *in duplum rule* apply in the present suit? The *in duplum rule* basically limits the amount a bank or financial institution may recover from a non-performing loan. It stems from **Section 44A of the Banking Act**, which provides that: -

“44A.Limit on interest recovered on defaulted loans.

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

2. The maximum amount referred to in subsection (1) is the sum of the following—

a. the principal owing when the loan becomes non-performing;

b. interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and

c. expenses incurred in the recovery of any amounts owed by the debtor”

24. The Rule is intended to protect borrowers from oppressive accumulation of interest, as is the case herein. In **Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation [2019] KECA 436 (KLR)**, the Court stated as follows on the role of the *in duplum* rule: -

“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.”

25. **In Jelangant & another v Mwananchi Credit Limited & another [2023] KEHC 19922 (KLR)**, the Court held that:

“This court reiterates the foregoing here. In its opinion, the in duplum rule was a principle that was imported into our laws to address a social and public interest issue wherein lenders would

target defaulters as profit making machines. The rule is an answer to the need to have a reprieve for borrowers by doing away with exploitation through ensuring that lenders, be they banks, unregulated institutions or private lenders, are motivated to recover debts owed at the earliest opportunity and are limited in what they can recover.”

26. 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 duplo*” which translates to “*in double*” - or *double the amount*, 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.”

27. The Court takes note that in the earlier interlocutory Ruling in **HCCC No. 568 of 2007 Zachariah Moenga Maangi vs Housing Finance Company (K) Ltd** in April 2012 there was a specific finding that the Defendant had charged usurious interest rates on the Plaintiff’s loan.
28. So, when did this loan fall into arrears? DW1’s evidence was that once a borrower skips a payment, the account falls into arrears. Non-payment has the effect of pushing the loan account into an arrear’s status.
29. As to what constitutes a non-performing loan, DW1 maintained that this was a loan still outstanding, ninety (90) days after it went into arrears. **The Central Bank of Kenya’s Prudential Guidelines No. 4** states as follows;

“1.4.8 ,non-performing loans and advances’ - for purposes of Sections 20, 31 and 44A of the Banking Act means:

1.4.8.1 In respect of loan accounts and other credit extensions having preestablished repayment programs, when any of the following conditions exist:

- principal or interest is due and unpaid for 90 days or more; or***
- interest payments for 90 days or more have been re-financed, or rolled-over into a new loan.”***

30. According to the Defendant, the Plaintiff was unable to pay even the first instalment on time. Generally, the accounts provided show sporadic repayments of the loan by the Plaintiff. Between the years 2000 and 2003 no payments were made into this account. The last payment of Kshs.8,000/= was on 29th November, 1999. The account was in debit at Kshs.333,168.56. As per the Statements availed by the Defendant, as at 2nd January, 2000 the balance brought forward on the original loan account was

Kshs.295,664.06 while the Arrears brought forward were at Kshs.52,052.99. The account stood at Kshs.347,717.05 in debit arrears.

31. To this Court the Bank cannot run away from the fact that this account was not performing. All the restructuring and rebates given to the Plaintiff support the position that the loan account was in arrears.

32. Once a loan account is in non-performing state, the *in duplum rule* comes into effect.

33. The Plaintiff claims to have paid the sum of Kshs.629,910/= and hence paid more than double the advanced sum. That what is currently outstanding is Kshs.1,372,862.90, which the Defendant claims to be due, is more than double the sum loaned. This claim is excessive and oppressive, the Plaintiff's admission of the debt notwithstanding.

34. The Court is persuaded by the decision of **Ado J. in Mbobu & another v Hypac Investments Limited & another [2025] KEHC 16564 (KLR)**. The Learned Judge in

his holding upholding the application of the *in duplum* rule stated as follows;

*“Moreover, the Court is persuaded by the Plaintiffs' argument that the in duplum rule, though only codified in **Section 44A of the Banking Act**, embodies a principle of public policy that applies across lending transactions. The Rule is intended to protect borrowers from oppressive accumulation of interest, as is the case herein. In **Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation [2019] KECA 436 (KLR)**, the Court stated as follows on the role of the In duplum rule:*

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“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.”

*In **Jelangat & another v Mwananchi Credit Limited & another [2023] KEHC 19922 (KLR)**, this Court (Mabeya J), while applying the principle in **Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation (supra)**, held that the in duplum rule is not only applicable to banks and financial institutions under the Banking Act, but it extends to all lenders. The Court stated that:*

“This court reiterates the foregoing here. In its opinion, the in duplum rule was a principle that was imported into our laws to address a social and public interest issue wherein lenders would target defaulters as profit making machines. The rule is an answer to the need to have a reprieve for borrowers by doing away with exploitation through ensuring that lenders, be they banks, unregulated

institutions or private lenders, are motivated to recover debts owed at the earliest opportunity and are limited in what they can recover.

In this regard, I hold that the rule is not only applicable to banks and financial institutions under the Banking Act but it extends to all lenders. A narrow interpretation of the application of the rule will defeat justice. It will be discriminatory in that, those who borrow from banks will enjoy greater protection leaving those borrowing from elsewhere exposed. Borrowing is borrowing and it would be inequitable for one group in society to be treated differently.”

*In the present case, the Plaintiffs invoked the in duplum rule, arguing that they have repaid a total of Kshs. 22,000,000/- against a principal sum of Kshs. 11,000,000/-, and that the facility is therefore fully satisfied. I associate with the reasoning in **Mwambeja Ranching Company Limited & another v Kenya National Capital***

Corporation (supra), and find that the *in duplum* rule applies to the transaction in question.

The Plaintiffs' evidence that they have repaid Kshs. 22,000,000, twice the principal amount, was not controverted. Accordingly, any claim for interest or penalties beyond the principal sum is unenforceable in law."

35. Having evaluated the evidence and the applicable legal principles, the Court is satisfied that the interest levied by the Defendant, having already surpassed the principal sum, is subject to capping in line with the *in duplum* rule. The Defendant could not recover interest that surpassed double the amount due when the loan became non-performing. This is a proper and a justifiable case for the application of the *in duplum* rule.

b) Whether the exercise of statutory power of sale is defeated by limitation of actions.

36. **Section 4 of the Limitations of Actions Act** states as follows;

4. Actions of contract and tort and certain other actions

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

37. **Section 19** of the same Act dealing with charges and mortgages states as follows;

19. Actions to recover mortgage money or proceeds of sale of land

(1) An action may not be brought to recover a principal sum of money secured by a mortgage

on land or movable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued.

(2) A foreclosure action in respect of mortgaged property may not be brought after the end of twelve years from the date on which the right to foreclose accrued:

Provided that—

(i) if after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession does not accrue until the date on which his possession discontinued;

(ii) this subsection does not apply to a foreclosure action in respect of mortgaged land, but instead the provisions of this Act relating to actions to recover land apply to such an action.

(3) The right to receive a principal sum of money secured by a mortgage and the right to foreclose

on the property subject to the mortgage does not accrue so long as that property comprises any future interest or any life insurance policy which has not matured or been determined.

(4) An action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears, may not be brought after the end of six years from the date on which the interest became due:

Provided that—

(i) where a prior mortgagee or other encumbrancer has been in possession of the property mortgaged, and an action is brought within one year of the discontinuance of such possession by the subsequent encumbrancer, the subsequent encumbrancer may recover by that action all the arrears of interest which fell due during

the period of possession by the prior encumbrancer, or damages in respect thereof, notwithstanding that the period exceeded six years;

- (ii) where the property subject to the mortgage comprises any future interest or life insurance policy and it is a term of the mortgage that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage, interest does not become due before the right to receive the principal sum of money has accrued.**

(5) This section does not apply to a mortgage on a ship.

38. The Court is persuaded that from the reading of the charge document; this was a continuing Charge and the Chargor was a mortgagee in possession. Further, Section 19 of the Limitation of Actions Act, excludes a mortgagor in possession from the application of the provisions of the Law of Limitations Act.

39. This question has been answered by the Court of Appeal in the negative in the case of **Habib Bank A.G. Zurich v Rajnikant Khetshi Shah [2018] KECA 774 (KLR)**. The Court of Appeal held as follows;

“The first issue is whether the claim by the respondent seeking the discharge of charge was time barred, the legal charge being a contract. Counsel cited the provisions of section 4 (1) (a) and 4(3) of the Limitation of Actions Act which provide that any action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. The case of Iga vs Makerere University [1972] EA 65 was cited where the predecessor of this Court held that a court of law has no power to grant any relief where a remedy is time-barred. We find the learned Judge interrogated this issue and appreciated that both parties made very robust arguments that each other’s case was time barred by the limitation of statute. The Judge held and

rightfully so that as long as the legal charge was not discharged, it was a continuing security and as long as the debt it secured remained unpaid a suit can be filled either to recover the debt or to discharge the charge. The learned Judge was spot on this issue and we find ourselves agreeing that as long as the contract is tied to a legal charge that is a continuing security; until the debt is paid and the security is discharged none of the parties claim can be time barred. A cause of action under a continuing security never dies or lapses."

- c) **Whether the intended auction sale of the Plaintiff's property, known as LR. Molo/Sachangwan Block 1/79 by the Defendant as Chargee is wrongful and invalid**

40. The Court in determining whether or not to grant an injunction follows the decision in **Giella v Cassman Brown & Co**

Ltd (1973) EA 358 which laid out the Three (3) ingredients upon which an injunction may issue.

41. There is a clear dispute on the loan paid back as well as the usurious calculation of interest applied to the loan account. The Bank failed to apply the *in duplum Rule* to the loan account. Accumulation of interest ought to have stopped once it hit double the amount when the loan went into arrears. Should the property be sold the Borrower would will suffer irreparable loss and damages. As to the balance of convenience, this Court finds that it is in the interest of justice to grant this injunction rather than have the property sold by the Bank in exercise of its statutory power of sale. At the heart of this dispute is the unravelling of the accounts between the Plaintiff and the Defendant.

42. It would be a gross travesty of justice for this Court sit by and watch the Bank sell attached property, solely on the reason that the Bank as a wealthy institution has the capacity to repay the Plaintiff in the event the sale was invalidated. It is not lost to this Court that this is a Judgement, long after the interlocutory injunction was issued in this matter. As matters stand the issue

the application of the *in duplum* rule brings into sharp focus the disparity in the accounts.

d) Whether the Plaintiff has made out a case for the grant of the orders sought.

43. The Court is persuaded to grant an injunction. The Court is also persuaded to grant the remedy of accounts. In doing so the Court is guided by the decision in the case of **Keziah Wambui Ndirangu v Equity Bank (Kenya) Limited [2021] KEHC 5666 (KLR)** where it was held;

“In the case of Christopher Mutuku Ndolo & Another v Stanbic Bank Ltd [2014] eKLR it was held;

“The court is supposed to make such inquiries as are necessary in taking accounts under the said rule. Those inquiries involve other mechanisms and experts in the subject of account. One way of doing it would be for the court to appoint an umpire who professes expertise but with the consent of the parties to carry out the exercise and file a report on the accounts and what is due to any party.”

12. The defendant's case was that the instant application is intended to assist the applicant evade settling the debt that she owes the bank.

13. My finding is that the nature of the orders sought by the applicant herein will not prejudice the defendant in any way but will assist the court, and the parties, in arriving at the true status of the applicant's loan accounts.

14. I am also of the view that the taking of the accounts should be carried out by an accountant who will be better placed to understand the workings of the banks in as far as tabulating the loan accounts is concerned.

15. Consequently, I allow the application dated 21st January 2020 in the following terms:

1. The accounts as between the parties herein relating to Equity Bank Account numbers [...],[...][...], [...],[...] and [...]be examined by the Deputy Registrar, High Court Nairobi Commercial Division) to determine the amount of loan or loans taken by the plaintiff, the repayments made by the plaintiff, the interest and penalties imposed and the legality of such interest and penalties and determine any over payment by the plaintiff.

2. The Deputy Registrar in taking accounts be at liberty to summon, at the applicant's expense, and examine such expert witnesses as may be necessary and to receive, peruse, study and adopt documents or reports as may be necessary."

44. The Criteria the Court is to use in granting the remedy of Accounts is as follows;

a) That the Deputy Registrar of the High Court, Nairobi Commercial Division, do take and scrutinize the accounts between the parties concerning the Defendant, with a view to establishing the total loan facility or facilities advanced to the Plaintiff, the repayments effected by the Plaintiff, the interest and penalties levied, the lawfulness of such interest and penalties, and to ascertain whether any overpayment has been made by the Plaintiff.

b) That in undertaking the taking of accounts, the Deputy Registrar shall have liberty, at the Applicant's cost, to summon and examine any expert witnesses deemed necessary, and to receive, review, analyse and rely upon such documents or reports as may be required for a proper determination.

38. As to costs the Court is of the view that it is only fair that each party do bear his or its own costs of the suit. Though the Plaintiff has succeeded, he too is guilty of laying on his laurels. He waited for 9 years before coming to Court to seek a remedy.

Determination

39. The Court finds in favour of the Plaintiff and proceeds to enter Judgement as against the Defendant in the following terms;

a) A declaration is HEREBY issued that the intended auction sale of the Plaintiff's property known as LR. Molo/Sachangwan Block 1/79 by the Defendant as Chargee is wrongful and invalid.

*b) A Declaration is HEREBY issued that the Defendant's claim is in breach of **Section 44 of the Banking Act Cap 488 Laws of Kenya.***

c) A temporary injunction is HEREBY issued restraining the Defendant by itself, its servants or agents or otherwise howsoever from selling, alienating, transferring or in any

manner whatsoever from disposing of the property known as Molo/Sachangwani Block 1/79 pending the taking of accounts.

d) Each party to bear his or its own costs of this suit.

40. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS 27TH
DAY OF APRIL, 2026.**

NJOROGE BENJAMIN K.

JUDGE

In the presence of:

Mr. Oigara for the Plaintiff.

Mrs. Maina for the Defendant.

Mr. John Paul - Court Assistant.