National Bank of Kenya Ltd & 2 others v Asam-Con Limited (Civil Appeal E806 of 2023) [2025] KECA 504 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 504 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E806 OF 2023

PO KIAGE, K M'INOTI & FA OCHIENG, JJA

MARCH 21, 2025

BETWEEN

NATIONAL BANK OF KENYA LTD ..... 1ST APPELLANT

ANDREW DOUGLAS GREGORY ..... 2ND APPELLANT

ABDUL ZAHIR SHEIKH ..... 3RD APPELLANT

AND

ASAM-CON LIMITED ..... RESPONDENT

(An appeal from the judgment and order of the High Court of Kenya at Nairobi (Mabeya, J.) dated 16th June, 2023 in Commercial & Tax Division Suit No. 174 of 2003)

JUDGMENT

1. The respondent herein, Asam-Con Limited, sued the appellants vide an amended plaint dated 9th December 2003. The respondent sought orders to restrain the 2nd and 3rd appellants from acting as receivers; the appellants be restrained from selling and disposing of the respondent's properties and machinery; the 2nd and 3rd appellants be ejected from the respondent's premises and properties; a declaration that the sum of Kshs.102,939,542.75 was not recoverable under the debentures; the appointment of the 2nd and 3rd appellants as receivers and managers was illegal; the 2nd and 3rd appellants be compelled to account for all the sales and expenses incurred during the receivership; a declaration that the sum of Kshs.30,000,000 had already been recovered and the mortgage exhausted; general damages for trespass and receivership; a declaration that the interest charged was illegal and not recoverable; and an order for accounts.

2. The respondent's case was that it had been a customer of the 1st appellant for more than 25 years, during which period, the 1st appellant afforded it various financial facilities through loans and overdrafts. On 19th April 1994, the 1st appellant and the respondent agreed on a supplementary debenture for

Kshs.30,000,000 together with interest. This amount was further secured by a mortgage over L.R. No. 455/21, Nakuru, and L.R. No. 21692, Nairobi.

3. The respondent stated that the 1st appellant was not entitled to recover more than the aggregate amount of Kshs.30,000,000 inclusive of interest. The respondent was also offered other banking facilities, which were not guaranteed by the debenture.

4. The respondent stated that in 1991, the Central Bank of Kenya revoked Gazette Notice No. 1617 of 1990, meaning that the 1st appellant was not permitted to increase interest rates without the permission of the minister. Therefore, the increase of interest rates by the 1st appellant after 23rd July 1991 was illegal and the monies paid in respect thereof ought to be refunded. The respondent stated that the failure by the 1st appellant to reduce interest rates caused it to default in servicing the facilities it had been offered.

5. The respondent pointed out that the 1st appellant had charged it an excess of Kshs.23,047,341.28 through unauthorized debits and penalties. The respondent claimed that the 1st appellant was in breach of the terms of the agreement, by charging interest at excessive rates, and by appointing the 2nd and 3rd appellants as receivers of the respondent.

6. The respondent alleged that, as a result of the 1st appellant's actions, its reputation suffered irreparable injury and damage, which led to the loss of business, production, sales, and dealership with General Motors. The respondent claimed that the appellants had since sold the respondent's assets at a gross undervalue, and depleted the said assets, instead of continuing the business.

7. At the trial, PW1 stated that the respondent's directors executed continuous personal guarantees. When the securities were executed, he was not a director. He was appointed a director in 1994. He told the court that, having read and understood the nature of the guarantee he signed, the aggregate sum recoverable under the debentures was Kshs.30,000,000.

8. PW2 informed the court that he had been instructed by the respondent to recalculate interest on the two loan facilities it had with the 1st appellant. He then prepared the report dated 9th December 2002, which indicated that the respondent had been overcharged interest in the sum of Kshs.23,047,341.28.

9. On cross-examination, PW2 stated that he relied on the documents provided by the 1st appellant, including bank statements, and correspondences, in preparing his report. He informed the court that he worked with the 1st appellant's opening balance of 1992, as he did not have any information prior to 1992.

10. PW2 testified that he worked with a rate of 24% from 1985, which had changed to 23%. In 1998, the rate changed to 28% and then dropped to 24%. He stated that his report did not include penal interest, since the facility document letter of 1999 did not have a provision for the same.

11. Opposing the suit, the appellants responded through their amended statement of defence dated 16th January 2004. They denied the allegation that the amount recoverable under the debenture was Kshs.30,000,000. They stated that the respondent had defaulted in repaying both the loan and the overdraft accounts, and the respondent had approached the 1st appellant to restructure the accounts.

12. The appellants pointed out that the securities by guarantors were of a continuing nature. They denied that the facilities were subject to the provisions of the Central Bank of Kenya (Amendment) Act, 2000. They were of the view that, after the revocation of Gazette Notice No. 1617 of 1990, the 1st respondent's dealings with customers were based on mutual contracts, prevailing market conditions, and customs and usages of the banking industry.

13. They refuted the claim that the interest charged was illegal and irrecoverable. They claimed that the 1st appellant had lawfully demanded the sum of Kshs.102,939,542.75, and the appointment of receivers was regular and proper.

14. DW1 who testified on behalf of the appellants stated that he was appointed by the 1st appellant as one of the receiver managers of the respondent. He stated that although he did not file a report on receivership, the 1st appellant was notified of the progress.

15. He informed the court that the 1st appellant had been in possession of the respondent's premises since 2003 even after the respondent's business assets were sold and the business was closed in 2006. He stated that he was not aware of the revocation of his appointment as a receiver.

16. He told the court that the receivers collected Kshs.10,286,016 between July and August 2004. From the amount, they paid themselves Kshs.6,687,785. He acknowledged that the maximum amount secured by the debenture was Kshs.30,000,000, and the word 'penalty' was not in the debenture, even though penalty charges were based on agreements between the bank and the customers.

17. DW1 observed that the debenture had not been updated to reflect additional lending in the letters of offer and penal interest was charged. He stated that the 1st appellant only received Kshs. 11,000,000 as the rest of the money was used to settle debts.

18. Upon evaluating the evidence before the court, the learned Judge, when determining the issue of whether or not the securities given were of a continuing nature, observed that, the respondent was advanced credit facilities secured by debentures dated 17th March 1977 for Kshs.200,000; 6th September 1977 for Kshs.700,000; 15th September 1981 for Kshs.2,900,000; 28th March 1984 for Kshs.2,200,000; and 19th March 1994 for Kshs.24,000,000. The learned Judge noted that the aggregate sum for all the debentures was Kshs.30,000,000, and the only securities which were under contention.

19. As it was trite that 'continuing security' could only be interpreted within the meaning specified in the guarantee documents, the learned Judge referred to paragraph *1* and Clause 15 of the first debenture which expressly provided that the 'debenture shall be a continuing security notwithstanding any settlement of account', despite each debenture stating the maximum amount to be secured therein.

20. The learned Judge held that the debentures were a 'continuing security', and as parties are bound by their pleadings, the debenture was to be a continuing security in respect of the monies secured or any part thereof and not the subsequent advances. The learned Judge held that there was no provision in the debentures expressly stating that they were intended to secure both current and future advances. Therefore, what was secured were the amounts expressly stated in the debentures, with interest at the agreed rate.

21. The learned Judge referred to the letters of offer dated 1st September 1995, 4th November 1998, and 30th November 1998, in holding that the respondent intended to use the debenture for Kshs.30,000,000 as security for those facilities together with interest. He further noted that there was no evidence that the said debentures were up-stamped for additional advances. The learned Judge held that the sum of Kshs.30,000,000 was the maximum sum recoverable under the debentures.

22. On the issue of interest rate, the learned Judge noted that three debentures provided for a minimum annual rate of 10%, 13%, and 15%. He also noted that the debenture dated 19th March 1994, provided for interest at the current rate of interest. The learned Judge observed that, although it was not clear what the "current rate of interest" was, the rate of interest charged from 1977 to 1991, fluctuated between 24%, 23%, 22%, and 28%, from 1991.

23. The learned Judge pointed out that Kenya was governed by Section 39 of the *Central Bank of Kenya Act* and Section 44 of the *Banking Act*, which capped interest rates at 19% per annum on loans and advances, vide Gazette Notice No. 1617 of 1990. He noted that, after 1991, the applicable interest was subject to the Minister's approval. The learned Judge held that in light of the foregoing, the rate of interest applicable would be the one that banks were charging as at the date of the revocation of Gazette Notice No. 1617 of 1990.

24. The learned Judge held that it was only upon the repeal of Section 39 in 1997, that the rate of interest was liberalized, so that it could be agreed between the lenders and the borrowers. The learned Judge noted that the debentures in question did not state the exact rate of interest to be charged, and only provided for the minimum rates. The learned Judge believed that this was so because the debentures were prepared during the time when the interest rate was capped at 19%.

25. As regards customs and usages in the banking industry, the learned Judge held that it was trite law that they be proved by cogent and consistent evidence, and it must be shown that a particular way of events was so notorious and had been used consistently to have acquired the norm of custom or usage. In the circumstances, the learned Judge held that the rate of interest applicable between 1991 and 1997 when Section 39 was repealed remained at 19% per annum.

26. The learned Judge pointed out that a Court of law cannot rewrite a contract between the parties while determining the issue of the alleged penalty interest charged by the 1st appellant. The learned Judge held that the contracts entered into by the parties, as crystallized in the debentures, were clear as to the interest to be charged, and nowhere in the contracts was penalty interest provided for. Therefore, to the extent that the 1st appellant levied penalty interest which was neither agreed upon by the parties nor provided for in the security documents, the same was unlawful and irrecoverable. The learned Judge held that it was the penalty interest which greatly contributed to the respondent's inability to service the facilities.

27. As regards the alleged overcharged interest of Kshs.23,047,731.28 and the demand for Kshs.102,939,542.75, by the 1st appellant on 15th January 2003, the learned Judge observed that PW2 produced a report in which the 1st appellant was given leave to file evidence in rebuttal, but the 1st appellant neither denied nor challenged the said report despite having been given the report in 2002. The learned Judge held that in the circumstances, the available evidence proved that the 1st appellant did overcharge the respondent, interest in the sum of Kshs.23,047,731.28.

28. The learned Judge noted that the 1st appellant did not produce the bank statements from 1977 to the time of the dispute in support of the claim for Kshs.102,939,542.75, but they instead produced two account statements for the periods between 20th February 2002 to 31st July 2003 with an opening balance of 20,000,000 and the other from 4th January 1999 to 31st January 2003, with an opening balance of Kshs.61,781,728.60. The learned Judge found that these statements of accounts were never proved and verified as provided for under Section 117(2) of the *Evidence Act*. DW1 did not mention the statements or verify the contents thereof. Therefore, the learned Judge held that the demand for Kshs.102,939,542.75 had no basis.

29. The learned Judge held that the admission by the respondent of being indebted to the 1st appellant was done before the interest recalculation by IRAC, and as such, that admission was negated by the recalculation report by IRAC.

30. The learned Judge held that there was no admission of indebtedness, on the part of the respondent, in the amended plaint. He observed that if it were true that any such amount was due to the 1st appellant, they ought to have counterclaimed it in their amended defence.

31. On the issue of the appointment of receivers, the learned Judge held that the basis for the appointment of the 2nd and 3rd appellants was that there was default, and their appointment was under the five debentures. The learned Judge held that the appointment of receivers on an unexplained sum of Kshs.102,939,542.75 was actuated by malice, and it therefore was illegal and unlawful.

32. As regards the conduct of the receivers, the learned Judge noted that at the time the respondent was placed under receivership, the 1st appellant had assessed its book value at Kshs.31,900,000 in 2001. Four years after the appointment of receivers, the respondent was making handsome profits as was indicated by the 2nd and 3rd appellants in the memorandum of sale. However, the learned Judge noted that instead of continuing with the business, the 2nd and 3rd appellants stripped the respondent's assets and sold them, and thereafter, they sold the entire business for about 10% of its book value.

33. The learned Judge noted that the recoveries made as of 14th May 2003 were in excess of Kshs.125,000,000, but according to DW1, the total recoveries were only Kshs.69,078,601.30 which constituted Kshs.11,256,149.20 given to the 1st appellant, whilst Kshs.57,822,452.15 was used for the receiver's expenses. The learned Judge held that the 2nd and 3rd appellants did not act in the best interests of either the 1st appellant or the respondent.

34. The learned Judge made the following findings: that the respondent's book value as of 21st February 2002 was Kshs.314.9 million; it made a profit of Kshs.23,129,000 in the year 2000; between January and August 2003, the 2nd and 3rd appellants collected Kshs.54,238,368.37 from the respondent's debtors; and the 1st appellant had two other securities valued at Kshs.80 Million and 37 million respectively as of 26th April 1996. In the result, the learned Judge held that the respondent suffered extreme loss and damage due to the actions of the appellants, yet the receivership was never terminated for over 20 years.

35. The learned Judge held that the respondent was entitled to the various declarations prayed for and damages of Kshs.562,150,220.10. However, the learned Judge found that there was no basis for punitive damages.

36. Accordingly, judgment was entered in favour of the respondent against the appellants, jointly and severally.

37. Being dissatisfied with the judgment, the appellants lodged the present appeal vide a memorandum of appeal dated 14th September 2023 in which they raised 21 grounds of appeal. However, at the hearing of the appeal, they condensed the grounds into six as follows:

    "a) Whether the 1st appellant had a right to recover interest at the rate indicated in each debenture; and whether each debenture specified an interest rate chargeable from time to time, which was charged by the bank subject to a minimum rate, leaving the bank at liberty to set the maximum interest rate chargeable.

    b. Whether the High Court erred in its interpretation of the Gazette Notices 1617 of 1990 and 3348 of 1991, and hence holding that the 1st appellant overcharged interest.

    c. Whether the High Court erred in holding that bank statements relied on by the appellants offended Section 117 of the *Evidence Act*.

    d. Whether the High Court ignored the 1st appellant's contractual right to consolidate all securities held against the respondent, and to make them inter-available for liabilities guaranteed by the respondent.

e. Whether the High Court erred in awarding special damages that were neither specifically pleaded nor strictly proved, and which were excessive.

f. Whether the 1st appellant could be held liable for acts of mismanagement, if any, by the 2nd and 3rd appellants."

38. When the appeal came up for hearing on 28th October 2024, Mr. Gatonye, Senior Counsel, with Mr. Saddam appeared for the appellants. The respondent was represented by Mr. Sheth, learned counsel. Counsel relied on their respective written submissions, which they orally highlighted.

39. Mr. Gatonye submitted that the court was wrong to conclude that the interest rates were unclear, stating that the debentures specified a minimum interest rate of 10%. He contended that the 1st appellant had the right to determine the maximum rate, as reflected in the report by IRAC, showing interest rates varied between 22% and 28%.

40. Counsel addressed the finding that the 1st appellant overcharged interest, arguing that the revocation of Gazette Notice No. 1617 of 1990 freed interest rates from regulation.

41. Counsel faulted the trial court for holding that the bank statements relied upon by the 1st appellant offended Section 117 of the *Evidence Act*, yet the respondent used these statements for recalculations. Mr. Sheth later clarified that the 1st respondent's witness never testified to verify the records.

42. Counsel referred to the right of set-off within the loan documents, which he submitted, allowed the 1st appellant to consolidate securities.

43. Counsel further submitted that there was no basis for the substantial damages awarded, as no special damages were claimed or particularized in the amended plaint.

44. Counsel submitted that the receivers were agents of the respondent (borrower), hence, the 1st appellant could not be held liable for acts of mismanagement. Counsel was of the view that the respondent should be liable for the receivers' actions unless it is proved that the 1st appellant gave improper instructions to the receivers.

45. Counsel submitted that the cross-appeal had no merit because special damages were not pleaded, and whatever damages were awarded, if any, should attract interest from the date of judgment. He submitted that the respondent had not laid the basis for seeking a multiplier of 25 years.

46. In their written submissions, the appellants submitted that they had the right to recover interest at a rate indicated in each debenture, subject to a minimum rate, which allowed the bank to set the maximum interest rate chargeable. They were of the view that the deregulation of interest rates allowed banks to set rates based on market forces.

47. The appellants asserted their contractual right to consolidate all securities held against the respondent and make them inter- available for liabilities guaranteed by the respondent. They faulted the trial court for awarding special damages that were neither specifically pleaded nor strictly proved. They claimed that there was insufficient evidence of the alleged book value and of the alleged loss of profits.

48. The appellants prayed that the cross-appeal be dismissed, and their appeal be allowed. They relied on the case of Heinz Broer v Buscar (K) Ltd & others [2019] eKLR which discussed the court's discretion in awarding interest, in support of their submissions, in that respect.

49. Opposing the appeal, Mr. Sheth submitted that it was the minister, not the governor, who decided interest rates. He further submitted that it was the 1st appellant's responsibility to produce its books and have an officer testify to their accuracy, which did not happen.

50. Counsel submitted that special damages were pleaded in paragraph 36 of the plaint, and the 1st appellant admitted to the book value of the respondent's business being 314 million. He pointed out that the receivers had also stated that the respondent was making a profit.

51. Counsel submitted that where the demand was not justified, the receiver became the bank's agent.

52. Submitting on the cross-appeal, counsel stated that the amount of the respondent's book value was stated in 2001, hence interest should have commenced from the date of filing the suit, and not from the date of judgment. Counsel was of the view that the respondent was a very old company and a money multiplier of 10 was too low. He submitted that because the respondent was a limited liability company, the multiplier for the loss of profits should not have been below 25 years.

53. This Court sought clarifications about the reliance on objected documents, special damages, and the independence of the appointed receivers. Counsel responded that the documents were only used to compute interest and not for the values, as the respondent was disputing the debt. Counsel further submitted that the 1st appellant having accepted the amount sought in special damages, this was an exception and it justified the award for special damages.

54. Counsel submitted that where a bank directs the receivers on how to go about their tasks, the receivers are no longer independent agents of the company.

55. In its written submissions, the respondent stated that the 1st appellant charged interest over and above the prescribed maximum applicable interest under Gazette Notices No. 3348 of 1991 and Gazette Notice No. 1617 of 1991, which provided a maximum interest of 19% per annum from 23rd July 1991. The respondent submitted that the learned Judge properly analyzed the law and various Gazette Notices regulating interest rates. The respondent claimed that the 1st appellant could only increase the rate of banking charges with the Minister's approval, as stipulated under Section 44 of the *Banking Act*.

56. The respondent submitted that the 1st appellant charged penalty interest on arrears, which were neither contractual nor based on custom or trade usage, in the banking industry.

57. The respondent further submitted that the statements from accounts No. 020-389-2260 and No. 301-020-116 were neither proved nor verified as required under Section 117 of the *Evidence Act*.

58. The respondent claimed that the appellants never pleaded the right of set-off or consolidation of securities. The respondent contended that damages were specifically pleaded in the amended plaint, in paragraph *36*, regarding damage to credit and reputation, injury to business, and loss of business. The respondent further pointed out that it was the 1st appellant who placed the book value of the respondent's business at Kshs. 314,900,000/-.

59. The respondent submitted that the appointment of receivers for the alleged outstanding amounts was unlawful, and that the 2nd and 3rd appellants mismanaged the accounts, and they should therefore, be held accountable for their actions.

60. The respondent submitted that the cross-appeal was justified and should include interest on the excess recovered amount of Kshs. 40,297,561.50 from 2003; interest on the book value of the respondent, of Kshs. 314,900,000/-; and a multiplier of at least 25 years for annual profits.

61. The respondent relied on the case of Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014]eKLR, in which the court held that any increase in the rate of interest by the banks without the approval of the Minister under Section 44 of the *Banking Act* was unlawful and irrecoverable by the banks, and the banks bear the evidentiary burden, to prove compliance.

62. This is a first appeal. Rule 31(1)(a) of the Court of Appeal Rules provides that:

> "(1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power— Power to reappraise evidence and to take additional evidence. (a) to re- appraise the evidence and to draw inferences of fact;"

63. The primary role of this Court as a first appellate court is to re- evaluate and reassess the evidence presented to the trial judge and to draw our own conclusions based on that evidence. However, we recognize that the trial court had the advantage of observing and hearing the witnesses, and we therefore take that into account in our evaluation. In the case of Peters v Sunday Post Ltd [1958] EA 424, at P 429 O'Connor P. stated thus:

> "An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand".

64. We have carefully considered the record, the rival submissions by counsel, the authorities cited, and the law. The issues for determination are:

i. whether the 1st appellant had the right to set interest rates chargeable on debentures, subject to minimum rates;

ii. whether the bank statements were admissible in evidence;

iii. whether the 1st appellant had a contractual right to consolidate securities;

iv. whether the respondent was entitled to an award of special damages;

v. whether the appointment and conduct of the receivers was lawful; and

vi. whether the cross-appeal is merited.

65. The appellants argued that each debenture specified a current interest rate from time to time, which could be charged by the bank, subject to a minimum rate, leaving the bank at liberty to set the maximum interest rate chargeable. The respondent contended that the 1st appellant charged interest over and above the prescribed maximum applicable interest under Gazette Notices No. 3348 of 1991 and Gazette Notice No. 1617 of 1991, which provided a maximum interest of 19% per annum from 23rd July 1991.

66. Although the 1st appellant had the right to set interest rates on the debentures, subject to the minimum rate therein, the question that begs to be answered is whether the 1st appellant exceeded the permissible maximum interest rate as per existing regulations. It is noted that Gazette Notices No. 3348 of 1991 and No. 1617 of 1990 were central to this determination. We acknowledge that Gazette Notice No. 1617 of 1990 prescribed a maximum interest rate of 19% per annum, while the subsequent Gazette Notice No. 3348 of 1991 effectively removed this cap.

67. The ability of a company to set interest rates on debentures is typically governed by the terms and conditions specified in the debenture agreement. However, such action would generally be lawful, subject to any statutory limits. In the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Limited [2001] eKLR, this Court emphasized that interest rates on debts must be fair and reasonable, within the boundaries set by contractual terms and applicable laws.

68. We find that prior to 1997, Kenya was governed by the controlled interest rate regime, by virtue of Section 39 of the *Central Bank of Kenya Act*, and Section 44 of the *Banking Act*. The debentures in issue did not state the exact rate of interest to be charged, they only provided the minimum rates to be applied.

69. Having considered the provisions of the repealed section 39 of the *Central Bank of Kenya Act* and the *Banking Act*, particularly Section 44, as well as Gazette Notices 1617 of 1990 and 3348 of 1991, and the case of Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited, (supra), we find that the 1st appellant was obligated to adhere to the prescribed maximum rate during the regulation period.

70. As regards the admissibility of bank statements, the appellants argued that the respondent used these statements for recalculations. The respondent submitted that the statements from accounts No. 020-389-2260 and No. 301-020-116 were neither proved nor verified as required under Section 117 of the *Evidence Act*.

71. Section 177 of the *Evidence Act* requires a bank officer to testify to the accuracy of bank records. Although this was not done, the respondent used these documents to its advantage, by using them to recalculate interest. This is clearly deducible from the evidence of PW2, where he confirmed that in preparing the IRAC report, he relied on the statements of accounts prepared by the 1st appellant.

72. A cursory look of the IRAC report also revealed that the calculations relied on therein, were not different from what the 1st appellant had sought to rely on in the said statements. Additionally, the respondent having relied on the statements as provided by the 1st appellant, did not challenge their contents during hearing, but instead, the respondent relied on the figures contained therein, to advance its case that the interest charged was over and above the agreed amount.

73. In the circumstances, we find that while the ideal procedure under Section 177 was not strictly followed, the respondent's partial reliance on these documents waived its right to object to their admissibility. more probable than the other. Lord Denning J. in Miller v Minister of Pensions (1947) 2 ALL ER 372, stated that:

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

74. It is thus clear that the respondent's account with the 1st appellant was overcharged as per the IRAC report. In the circumstances, we find no reason to interfere with the trial court's finding that based on the available evidence, and the failure by the appellants to challenge the IRAC report produced by the respondent in evidence, the 1st appellant overcharged the respondent the interest of Kshs.23,047,731.28.

75. The ability to consolidate securities depends on the specific terms outlined in the loan agreement or debenture documents, which may allow for such consolidation under certain circumstances. In the

persuasive case of Diamond Trust Bank Kenya Limited v Prime Bank Limited & Another [2020] eKLR, the court held that:

> " Banks are entitled to enforce their contractual rights as stipulated in the loan and security agreements, provided such enforcement is consistent with the terms agreed upon by the parties and the applicable law. Equity cannot rewrite a contract for the parties."

76. In the instant case, the debenture agreement included a "right of set-off," allowing the bank to consolidate securities held on any account to cover liabilities guaranteed by the borrower which amounted to Kshs.30,000,000 all inclusive.

77. The general rule is that a secured creditor is not obliged to resort to his security. He can claim repayment by the debtor personally and leave the security alone. He can sell the charged securities or set off or combine accounts. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all. In the circumstances, we find that the 1st appellant had a contractual right to consolidate securities.

78. Concerning special damages, the appellants faulted the trial court for awarding special damages that were neither specifically pleaded nor strictly proved. The respondent contended that damages were specifically pleaded in the amended plaint, in paragraph *36*, regarding damage to credit and reputation, injury to business, and loss of business.

79. In the case of Bangue Indosuez v DJ Lowe and company Ltd [2006] 2KLR 208 this Court held inter alia that;

> " It was trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and probability of proof required depends on the circumstances and the nature of the acts themselves."

80. We note that although the amended plaint contained declarations of loss and damage, no specific figures were included. Even though the 1st respondent's letter of offer placed the book value of the respondent's business at Kshs. 314,900,000, it is trite law that the special damages must be specifically pleaded and strictly proved. In this case, we find that the special damages were neither specifically pleaded, nor strictly proved.

81. The appellants claimed that the receivers appointed should act as agents of the company, making the respondent liable unless improper instructions were given by the 1st appellant. The respondent was of the view that the appointment of receivers for the alleged outstanding amounts was unlawful because the 2nd and 3rd appellants acted as agents of the respondent and should be held accountable for their actions.

82. It is trite law that the receivers are agents of the borrower. The law allows the appointment of receivers where the terms of a debenture agreement or security document permit it. However, the conduct of the receivers must align with the law and the terms of the agreement.

83. The law regarding the liability of a receiver has been well captured in the following extract from Halsbury's Laws of England Third Edition volume 6 at paragraph 975, which was relied upon by the appellant:

> " Liability of receiver. A receiver or manager of the property of a company appointed under the powers contained in any instrument (a), is, notwithstanding that he may be an agent

of the company and able to bind it by his contracts, to the same extent as if he had been appointed by order of the Court (b), personally liable on any contract entered into by him

in the performance of his functions except in so far as the contract otherwise provides and is entitled in respect of that liability to indemnity out of the assets; but nothing in this provisions is to be taken as limiting any right to indemnity which he would have apart therefrom, or as limiting his liability on contracts entered into without authority or as conferring any right to indemnity in respect of that liability."

84. The same principle was captured in "The Law and Practice as to Receivers appointed by the High Court of Justice or Out of Court" by William Williamson Kerr, 9th edition at page 298 -301 as follows:

> "Persons contracting with a receiver and manager who is carrying on the business of a company and are cognizant of his appointment, must be taken to know that he is contracting as principal, not as agent for the company, whose powers are paralyzed; ... Receivers and managers appointed by the court (except the so called receivers appointed in lunacy (c), and probably receivers and managers of statutory undertakings (d), are personally liable to persons dealing with them in respect of liabilities incurred, or contracts entered into by them in carrying on the business (e), unless the express terms of the contract exclude as they may do, any personal liability (f); but subject to a correlative right to be indemnified out of the assets in respect of liabilities properly incurred,
>
> (g) for receivers are not agents of any person but principals (h) and are therefore assumed to pledge their personal credit...
>
> Similarly, receivers and managers appointed by debenture holders or mortgagees under the powers of an instrument are personally liable to persons dealing with them with knowledge of their position; for they are agents for the mortgagor or mortgagee according to circumstances..."

85. Thus, the general legal position, simply put, is that the receiver or manager of a company under receivership acts as a principal in entering into any contracts in the performance of his functions, and is therefore personally liable on the contracts entered into by him in his capacity as receiver, unless the contract provides otherwise.

86. In this case, the 1st appellant appointed one of its own officers as receivers of the respondent. This raised significant concerns about the receivers' independence. However, given that there was no evidence adduced of the 1st appellant providing improper instructions to the said receiver, and the fact that the said receiver was not a party to the suit, we find that the 1st appellant was not liable for the 2nd and 3rd appellants' conduct. The 2nd and 3rd appellants would have been personally liable for their actions of mismanagement.

87. As regards the cross-appeal, having made a finding on the issue of special damages, we find that interest should be calculated from the date of the judgment. We find no reason to interfere with the finding by the trial court of 10 years multiplier, as the respondent did not lay a basis for increasing the multiplier to 25 years.

88. Consequently, the appeal is partially allowed, and we make orders as follows:

a. The 1st appellant was obligated to adhere to the prescribed maximum rate during the regulation period, when setting the maximum interest rate chargeable.

b. The 1st appellant overcharged the respondent interest in the sum of Kshs.23,047,731.28.

c. The bank statements relied upon by the appellants offended Section 177 of the *Evidence Act*, but the respondent waived its right to object to their admissibility having relied on the same statements to prepare the IRAC report.

d. The 1st appellant had the right to consolidate the respondent's loan accounts.

e. The award for special damages is set aside as the same was not specifically pleaded, nor strictly proved.

f. The 1st appellant could not be held liable for the acts of mismanagement, if any, by the 2nd and 3rd appellants.

g. Interest, if any, to be calculated from the date of the judgment at court rates

h. The cross-appeal is dismissed.

i. Each party will bear its own costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar