



Fuji Auto Trading Company Limited v National Bank of Kenya Limited (Civil Appeal 383 of 2019) [2021] KECA 168 (KLR) (19 November 2021) (Judgment)

Neutral citation: [2021] KECA 168 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 383 OF 2019
MSA MAKHANDIA, HA OMONDI & M NGUGI, JJA
NOVEMBER 19, 2021**

BETWEEN

FUJI AUTO TRADING COMPANY LIMITED APPELLANT

AND

NATIONAL BANK OF KENYA LIMITED RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (F. Tuiyott, J) dated 1st day of March, 2019 in HC. Civil Case No. 3459 of 1995)

JUDGMENT

1. Fuji Auto Trading, the appellant, prefers this appeal against the judgment and decree of the High Court at Nairobi delivered by Tuiyott (J), dismissing the appellant's suit.
2. The appellant's claim as projected in the Amended Plaintiff was for alleged losses suffered on account of alleged improper settlement by the defendant of some three (3) Letters of Credit. That the respondent was not entitled to make the payments pursuant to those letters of credit as the documentation it relied upon in doing so was fraught with discrepancies. The appellant further complained that a debit for a sum of Kshs.1,526,911.00 made on its account number 021083282 by the respondent was so made irregularly and finally that the sale of its director's property known as LR. No. 209/1211 "the suit property" was unlawful. The respondent purported to sell the property which was a charged security, on account of the appellant's default in servicing its financial obligations owed to the respondent. The alleged losses were pleaded as special damages.
3. The appellant sought the following reliefs:
 - a. Special Damages in the sum of Kshs.43,129,946 together with interest at commercial rates.
 - b. General Damages for breach of contract.



- c. Costs of the suit.
 - d. Any other relief that the Honorable Court may deem just to grant.
4. The background to the claim was that the appellant dealt in the importation of used vehicles and spares into Kenya, for sale to the local market. In order to facilitate the importation of certain vehicles, the appellant would apply for Letters of Credit (LOC) from the respondent, National Bank of Kenya Limited in favour of the sellers of those imported vehicles who were domiciled outside Kenya. In this particular instance these were letters of credit dated; 22nd March, 1994 in favour of M/s J&M Trading Co. Ltd for the purchase of 5 vehicles valued at US\$ 29,650, 15th May, 1994 in favour of Aro Cargo and Clearing Co. Ltd at US\$25,800 for 5 vehicles, and 23rd May, 1994 again in favour of Aro Cargo and Clearing Co Ltd for 6 vehicles at US\$ 21,000.
 5. The appellant claimed that it was a condition of the contract that the respondent would only honour the letters of credit upon receipt of certain importation and shipping documents including an original certificate of clean reports of finding as to quality and quantity inspection and price comparison conforming to exchange control requirements of the Central Bank of Kenya.
 6. The appellant's grievance was that the respondent, in breach of the contract, made payments to the third parties against incomplete, inconsistent, and contradictory documents as the original certificate of clean reports of finding were missing, and the shipment dates on the bills of lading were inconsistent with instructions. That as a result of the said breach, the appellant lost some of the vehicles through sales by the customs department, incurred huge port and demurrage expenses, suffered great expenses on repairs of uninspected vehicles and expended additional and operational costs, and lost anticipated profits at an aggregate sum of Kshs.43,129,946/=.
 7. The appellant was also aggrieved by the debit of Kshs.1,526,911 made in its account number 021083282, that the debit was irregular, made without authority and consent and for unknown purposes and further that the respondent unlawfully sold the appellant's director's property LR. No.209/12111.
 8. In defending the claim, the respondent stated that the letters of credit did not constitute an agreement between it and the appellant, and that the conditions in the letters of credit were an agreement between it and the beneficiaries and were standard form applicable in financing import transactions. Further, that the conditions were capable of being varied at the instance of any of the interested parties.
 9. It contended that the payments made to the beneficiaries were not improper, as it noted some discrepancies in the import documentation and informed the appellant, who elected to accept the goods as shipped and expressly instructed the respondent to release payment to the beneficiaries.
 10. The respondent denied making any unauthorized and/or irregular debit on the appellant's account and an unlawful sale of the charged property and filed a counter-claim that at the appellant's request, it duly paid the suppliers and other charges to the tune of Kshs.8,132,770.40 being an import credit facility which the appellant was to repay within 60 days of utilization. That the appellant defaulted on this and ought to pay the said sum together with interest at 30% p.a. from November 1995 until payment in full.
 11. The matter proceeded to hearing with each side calling one witness. The appellant's witness, Ali Mohammed Mwanzia reiterated the position that the respondent effected payments to the beneficiaries against incomplete, inconsistent and contradictory documents. As regards the discrepancies pointed out by the respondent in the letters of credit, the witness claimed that there appeared to be some alterations amounting to forgery, and although he claimed to have made a report to the police, he did



- not provide any evidence. Further, that he noticed unauthorized debiting of the appellant's account and wrote to the respondent to clear the entry, but it elicited no response.
12. John Kibet Tarus, the respondent's current Credit Officer at Westlands Branch, dealt with the appellant when he worked at the respondent's Kenyatta Avenue branch as a clerk. He testified on behalf of the respondent, basically reiterating what we have set out as the respondent's defence, the gist of it being that the payments were all authorized by the appellant who never complained about lack of documentations. While admitting that there was a transfer of Kshs.1,526,911 out of the appellant's account, the witness explained that the bank acted following a request by the appellant by a letter dated 23rd August, 1994, for a facility of Kshs.2,000.000 to enable it pay duty, inspection fees and port and warehouse charges.
 13. The respondent thus gave overdraft facilities which enabled the appellant to buy bankers cheques. The respondent then debited the appellant's account with the contested sum, being the total value of the cheques issued for a facility of Kshs.2,000,000/-, and the validity of this payment was confirmed by the appellant on 12th September, 1994. The respondent's case therefore was that the amount debited in the appellant's account was lawful on the basis of the authority and consent of the account holder.
 14. Upon considering the pleadings, testimony, and evidence on record, the trial court, by a judgment dated 1st March, 2019, found in favour of the appellant's claim to the extent of Kshs.22,080.00 together with interest at court rates from the date of suit until payment in full. The rationale in awarding the sum of Kshs.22,080/- being the local inspection fees, was that there was discernable proof of the said inspection fees. The trial court, however, held that the appellant did not plead forgery in its main claim, nor in the defence to the counter-claim, and it did not bother to adduce evidence in support of the alleged forgery.
 15. The court further held that the appellant had failed to prove the rest of its claim on a balance of probabilities as there was no proof of payment and there had been no effort by the appellant to point out the additional element of fees with clarity, which additional element was critical as it was only the additional sum that the bank would be liable to pay. Accordingly, it dismissed the rest of the claim.
 16. The respondent's counter-claim was however allowed in the sum of Kshs.8.132,770.40 together with interest at the contractual rate with effect from November, 1995 until payment in full. There was evidence that the facilities were granted to the appellant, and there was evident default. The reason for this finding was that there was a sale as a result of the default where Kshs.4,000,000/= was realized and after deduction of certain charges a balance of Kshs.4,132,132/=was credited to the appellant's account, and it was this credit that reduced the appellant's exposure to the bank from Kshs.12,251,895.40 to Kshs.8,120,763.40 as at 14th March, 1997. The court found that there was no evidence of this balance having been paid to the respondent, and as such the respondent was deserving of judgment as prayed for in the counterclaim. Costs of the counter-claim were also awarded to the respondent while each party was to bear its own costs in relation to the appellant's claim.
 17. Aggrieved by the decision of the trial court, the appellant filed its memorandum of appeal challenging the judgment seeking that the appeal be allowed, the judgment dated 1st March, 2019 be set aside, and in lieu thereof an order be made allowing the appellant's suit as prayed in the plaint and dismissing the respondent's counter claim.
 18. There are 18 grounds of appeal which can be condensed into the following: that the debit entries made in its account were irregular and illegal, the sale of the suit property was irregular and illegal, the respondent did not comply with the terms and conditions of the LOC it had issued, the dismissal of the claim for extra costs and losses incurred as a result of the respondent's actions was erroneous, there



was no basis for allowing the counterclaim and in failing to consider the application of the induplum rule under Section 44 and 44A of the *Banking Act*; there was error by failing to invalidate alleged unauthorized debits in the sum of Kshs.1,526,911.00 and Kshs.1,140,973.55 made on its account number 021083282, and by taking into consideration irrelevant and extraneous matters.

19. With regard to illegal debit entries made on Account No.021083282, the appellant contends that the debit entries of Kshs.1,526,911 and Kshs.1,140,973 made in its account were irregular and illegal and that there was no evidence that the amounts were applied for, disbursed and/or authorized by the appellant to be debited.
20. The appellant argues that it was not possible for the respondent to have paid duty on its behalf as the appellant had already paid the same using company cheque Nos. 898305 dated 21st June, 1994 for Kshs.735,1177 and 898320 dated 25th August, 1994 for Kshs.370,000/= and cash of Kshs.400,000/= and had further produced receipts to that effect. That the respondent debited its account before the actual disbursement was made, and that the appellant's account was also debited with the travelling charges for the appellant's officers.
21. The appellant contends that the respondent owed it a duty of care in maintaining its account; the illegal debits ought to be reversed, and the appellant should be compensated for loss incurred as a result of the illegal debits. In support of its argument, the appellant refers to the case of *Fidelity Commercial Bank Limited v Italian Market Kenya Limited [2017] eKLR*, where this Court upheld the decision of the High Court in ordering a reversal of entries notwithstanding that the customer had not complained about the debits.
22. The appellant submits that the trial court was wrong in disregarding the claim based on the illegal and unexplained debits taking into consideration the fact that the appellant had questioned the debits.
23. As concerns the sale of the suit property, the appellant argues that the purported exercise of the respondent's statutory power of sale was not against any existing credit facilities, and that the loan amount was in respect of an amount paid for vehicles the appellant did not receive. Thus the sale of the suit property against the disputed irregular accounts was illegal.
24. In relation to the settlement of Letters of Credit, the appellant submits that all three letters of credit were opened and settled before the conditions therein were met, and that these LOC were issued under the Uniformed Customs and Practice for the Documentary Credit (UCPDC), publication number 5000 of 1993, in which Article 13 states that the banks must examine all the documents to ascertain whether or not they appear to be in compliance with the terms of the LOC. It is the appellant's case therefore that the respondent did not comply with the terms and conditions of the LOC it had issued.
25. The appellant maintains that the respondent relied on forged and/or altered documents to unfairly justify its contention that the appellant authorized payment before the conditions set out in the LOC. Further, that the respondent unilaterally changed the transaction that was originally a letter of credit to a collection or telex transfer, thus denying the appellant the safeguards and protection accorded by the LOC, and that at no given time did the appellant waive its protection and cover under the LOC. That in fact, it was the respondent who assumed the responsibility for the loss incurred and advised the appellant to proceed with local inspection and seek reimbursement.
26. The appellant contends that it demonstrated the illegality perpetrated by the respondent in settling the LOC as a result of which its accounts were debited before the respondent received and verified the mandatory documents cited. That as a result of the respondent's actions the appellant was unable to timely clear the vehicles docked at the port as its accounts continued to be inflated with default interest.



27. The appellant reiterates that it incurred extra charges costs and expenses in local inspection including the extra duty and travelling costs for its agents, and laments the dismissal of its claim for extra costs and losses incurred. It is pointed out that the vehicles took a considerable amount of time before clearance and costs were incurred, therefore the special damages were as a result of the direct natural or probable acts of the respondent. The appellant further contends that the trial court erred in holding that a claim of special damages can only be proved by way of receipts and relied on several authorities to buttress this point. It contends further that at the hearing, its evidence strictly proving the special damages was uncontested. Further, that in June 1994, it is not disputed that the duty on imported vehicles was increased. Additionally, duty arose directly from delayed clearance of the vehicles.
28. The appellant also pokes holes into the counterclaim, contending that it comprised illegal/unexplained debit on Account No. 021083282, the amount paid in respect of LOC KA LC 27/21 and LC 27/22, the amounts paid without the mandatory documents provided in the LOC, the amount already recovered by sale of the charged suit property and L.R. No. 9042/227/1, the amount paid for in customs duty and the amounts incurred by the respondent's agents in travelling.
29. It is the appellant's submission that these accounts were contested and it had demonstrated that the accounts contained non-contractual debit and additional costs arising from the respondent's actions, as such allowing the counterclaim was erroneous.
30. That in any event, there was no proof of disbursement of the debit entries of Kshs.1,526,911 and Kshs.1,140,973.55 and authorization thereof, and that the trial court entered judgment for a non-existent facility, which the appellant is now stuck with despite never applying for it nor receiving the disbursement for the same.
31. The appellant argues that the trial court's holding that the appellant did not allege fraud or adduce evidence to that effect was erroneous, as there was evidence establishing fraud.
32. The appellant therefore prays that the appeal be allowed.
33. In opposing the appeal, the respondent submits that in relation to the alleged unauthorized debits made on its account number 021083282, the appellant never raised any complaint in its amended pleadings in relation to the sum of Kshs.1,140,973.55, and the trial court was not bound to make any determination.
34. The respondent points out that its pleadings clearly stated that the appellant duly authorized it to make payment pursuant to the letters of credit in issue, yet the appellant's reply to the amended defence did not plead the alleged fact of forgery, and the learned trial judge appropriately held that forgery was not pleaded. Further, that the trial court nonetheless considered whether the appellant had led any evidence to prove the alleged forgery and was entitled to find that the allegation had not been proved to the required standard of proof.
35. The respondent also submits that the complaint relating to application of the *induplum* rule is predicated on a vacuum as the appellant did not plead the same. That the trial judge was in fact alive to the possible application of Section 44 of the *Banking Act* and gave clear directions in that respect.
36. As to the debit of Kshs.1,526,911 .00, the respondent submits that the conclusion by the trial judge that this was a lawful entry backed by the evidence which confirmed that this was an overdraft created by way of issuance of banker's cheques to the appellant to facilitate payment of import duty on the various vehicles it had brought into the country and paid for by way of the letters of credit in issue cannot be faulted.



37. With regard to the sale of the suit property which had been offered as security, the respondent points out that it was registered in the name of the appellant's director who had created the charge over the same and not the appellant. That as a consequence therefore, on application of the legal principle of privity of contract the appellant, lacked the capacity to challenge the exercise of the respondent's statutory power of sale over the suit property. In support of this proposition, the respondent relies on the High Court decision in *Nairobi Mamba Village v National Bank of Kenya* [2002] 1 EA 197.
38. With regard to the alleged liability arising from payments made pursuant to the letters of credit, the respondent submits that it is not contested that the appellant received 11 motor vehicles imported on the strength of the said letter of 6th June, 1994 the appellant's failure to give contrary instructions as to payment even after becoming aware of the discrepancies disclosed in the letters of 30th June, 1994 can only be deemed to be a waiver of the requirement for the outstanding documents. It was thus estopped from alleging any culpability on the part of the respondent arising from its payment pursuant to the letters of credit. In support of this limb of the submissions, we are urged to consider and adopt the decision of the Supreme Court of Nigeria in *Nasaralai Enterprises limited vs Arab Bank Nigeria Limited* [1987] LRC (Comm) where this principle of waiver and estoppel in commercial letters of credit was extensively discussed and affirmed.
39. As for special damages, the respondent contends that the appellant merely threw around figures without any tangible evidence to show that the alleged loss was indeed incurred.
40. In reference to the counter-claim, the respondent argues that other than the recovery realized upon the sale of the suit property leaving a deficit on the account, it is clear from the statement of account that the appellant did not make any repayment to regularize the overdrawn account. That the evidence therefore confirmed the appellant's indebtedness to the respondent and the trial court cannot be faulted for making a finding that the counterclaim had been proved to the required standards.
41. The respondent urges us to dismiss the appeal on grounds that it is without any merits.
42. This being a first appeal and as has been reiterated in several decisions of this Court, it is this Court's primary duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per Rule 29(1)(a) of the [court of Appeal Rules](#). This duty has been reiterated in [Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Company Advocates](#) [2013] eKLR.
43. The main issues for determination in our view in this appeal are: whether payment under the LOC was made without proper documentation and that as a result, the appellant suffered loss; whether the debit entries made in its account were irregular and illegal; whether the sale of the suit property was unlawful; and whether there was justification in allowing the respondent's counterclaim.
44. In relation to the first issue, the crux of the appellant's case is that the respondent effected payment against incomplete, inconsistent and contradictory documents leading to the appellant incurring losses.
45. Under LOC KA/27/14 the appellant requested for a LOC facility to import 7 motor vehicles at Kshs.1,900,000 (\$ 29,650), which request the respondent acceded to. As already alluded to by the appellant, the terms of the LOC were that all the documents were to be in the possession of the respondent before the respondent paid out to the beneficiaries. The respondent nonetheless went ahead to pay out to the beneficiaries without the benefit of the complete documentation which subsequently led to delays and losses incurred by the appellant as particularized in the plaint. The respondent admits that the documentation was not complete when it made the payout.



46. The other 2 LOC were the documentation as well as the debits signed for by the appellant. The appellant contends that it only signed for one debit for Kshs.1,452,306 for the LOC 2 & 3. That the other debits were not negotiated for and the appellant never requested for these debits.
47. The respondent concedes that it had noted some discrepancies in the importation documents but only paid out to the beneficiaries after getting express instructions from the appellant to do so. Vide letter dated 30th June, 1994, the respondent notified the appellant that there were some discrepancies in the documents but nonetheless the appellant gave the go ahead to settle the LOC notwithstanding the discrepancies. The appellant's witness, however, contends that he only signed the letter dated 30th June, 1994 under reference KA 27/23, but not the letter dated 30th June, 1994 under reference which seems altered from KA/27/23 to KA/27/21. Further that the words at the bottom of the said letter 'I accept the documents despite the noted discrepancies.' were a forgery.
48. The respondent maintains that the said words were express instructions from the appellant to honor the 3 LOC notwithstanding the shortcomings on the documentation, as there is a similar circumstance in respect of LC 29/22.
49. From the proceedings in the High Court, we take note that the appellant had indeed alleged forgeries. A reading of the trial court's judgment, as well as the appellant's evidence, discloses that the learned Judge acknowledged that allegations of forgeries were raised, but pointed out that the appellant did not amend its pleadings to include allegations of the forgeries nor did it lead any concrete evidence of the same. That the appellant only alluded to making a report to the CID in June 2009 (that was 15 years later!). The appellant claimed that the police had taken action but gave no proof of the alleged report and/or outcome and/or charge sheet. We also note that no one was arrested and charged with the alleged offence of forgery.
50. In the case of *Demutilla Nanyama pururmu v Salim Mobamed Salim [2021] eKLR*, quoting *Vijay Morjaria v Nansingh Maddhusing Darbar & Another [2000] eKLR*, Tunoi JA. as he then was stated:
 'it is well established that fraud must be specifically pleaded and the particulars of the fraud alleged must be stated on the face of the pleading. It is also settled law that fraudulent conduct must be distinctly alleged and distinctively proved and it is not allowable to leave fraud to be inferred from the facts.'
51. As regards the standard of proof, this court has in the case of *Kinyanjui Kamau v George Kamau [2015] eKLR* stated that any allegations of fraud must be pleaded and strictly proved. In *Ndolo v Ndolo (008) I KLR (G&F) 742* the court stated:
 '...since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.'
52. We find that the trial court has given a proper analysis on the alleged overwriting of the letter 1 over 3 on the second letter of the respondent. We agree with the trial court when it rightly stated that KA LC/27/21 was for US \$ 25,800 and further that there was no KA LC 27/23 and so a correction of the error would not be unexpected. That indeed the appellant made an unproven allegation of forgery, claiming that the alteration was unlawful and came after the document was signed.
53. We note with approval that the trial court also gave a nexus on the relationship between the appellant (Fuji) and Ferari, the long and short of which is that Ferari is a sister company to Fuji, and that Ferari would be used as an agent of Fuji for the importation of 6 vehicles and letters of credit KA 27/22



was issued accordingly, in which Ferari was the applicant. The upshot of this relationship is that the appellant did duly authorize the respondent to pay beneficiaries under KA LC 27/21 and LC 27/22 despite being fully aware that the same was on the basis of incomplete documents. We are in agreement with the findings of the trial court that the appellant is estopped from blaming the respondent for any losses that resulted from the payment on LC 27/21 and 27/22.

54. On LC KA 27/14, the trial court gave the details under this letter of credit, and noted that payment under this LOC was definitely made notwithstanding the missing documents. The terms of this LOC were unequivocal, that it would only be honored upon receipt of the shipment accompanied by the document as per the terms of the agreement, and at least two documents were missing i.e. certificate of origin and certificate of clear report of findings. Of course there is evidence that the respondent did make payment, but the critical question is, on what basis when crucial documentation was missing?
55. The evidence of the appellant is that as a result of incomplete documentation there was a long delay in clearing 4 vehicles resulting in the appellant paying for local inspection, additional duty, additional port charges, additional port warehouse rent and late registration penalties. The trial court was in agreement with the appellant on this, that any loss caused by the delay is definitely attributed to the respondent. However, the court found that the appellant had not specifically pleaded and proved the additional charges, the same being in the nature of special damages. That the only special damage that had been specifically pleaded and proved was that of the inspection fees which was awarded.
56. It is trite law that special damages must be pleaded and strictly proved. Chesoni J, quoting Bowen L.J.'s judgment at pages 532-533 in *Ratcliff v Evans [1892] QB 524*, an English leading case on pleading and proof of damage, stated:

‘the character of the acts themselves which produce the damage and the circumstances under which those acts are done, must regulate the need of certainty and particularity with which the damage ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principle. To insist upon more would be vainest pedantry.’
57. From the foregoing, we hold the view that the nature of the damage and the acts that caused the damage were very capable of being specifically pleaded and proved, something the appellant neglected to do. These damages (additional duty, additional port charges, additional port warehouse rent and late registration penalties) were capable of being assessed with certainty, vide proof of payment.
58. The appellant in its evidence contends that the fraudulent payment of Kshs.1,526,911/=, Kshs.1,140,974.50 for LC 27/11 and Kshs.1,452,306.65 for LC 27/21 created an oppressive and overdrawn state of its account. The appellant contends that the respondent contributed to the financial problems of the appellant and as such the appellant was unable to service the facility.
59. We note that the trial court held that the disputed payments were lawfully and properly made, save for the premature payment of LC 27/14 in which the appellant only managed to prove Kshs.22,080/= in respect of inspection fees. Again, we are unable to find any error on the part of the trial court in finding that the payments alluded to did not drastically alter the financial situation of the appellant to make the appellant unable to pay its obligations.
60. On the issue of the alleged illegal debit of Kshs.1,526,911, from the appellant's account number 021083282 on 30th August, 1994, the appellant argues that it did not authorize the transfer and asked the respondent to clear the entry on 12th September, 1994 which request did not elicit any response.



Vide letter dated 23rd August 1994 the appellant revisited the issue and denied making the request for Kshs.2,000,000/=, and the request for the said amount and further avers that the letter of 23rd August, 1994 is a forgery.

61. The respondent argues that on 23rd August, 1994 the appellant requested for a facility of Kshs.2,000,000/= to enable it pay duty, inspection fees, port and warehouse charges. The respondent then gave the appellant an overdraft to enable it buy bankers cheques dated 26th August, 1994 to pay for the various charges. The respondent then debited the appellant's account with the sum of Kshs.1,526,911/=, being the total value of cheques issued.
62. Despite the appellant's insistence that the letter dated 23rd August, 1994 was a forgery without providing concrete proof thereof, it admits that the letter dated 12th September, 1994 requesting that the sum of Kshs.1,526,911/- be cleared from its account as it was accruing interest was authentic. It is therefore clear to us from the evidence proffered at the trial that the debit of Kshs.1,526,911/= was not unlawful.
63. The next issue for consideration is whether the sale of the suit property was unlawful. From the evidence, a charge over the suit property was created and registered in favour of the respondent to secure the appellant's debt. The appellant never met the terms of the facility furnished to it as conceded in their letter of 12th September, 1994. Indeed, the trial court correctly pointed out that the money secured by way of the charge over the said property had indeed been incurred by the respondent on the authority of the appellant and the same had not been repaid.
64. Consequently, in exercise of its statutory power of sale, the respondent issued a statutory notice, and the due process was followed to the letter, leading to the subsequent sale of the suit property to a third party and a transfer was duly effected. We are in agreement with the finding of the trial court that the respondent cannot be faulted for exercising its power of sale.
65. In relation to the counterclaim, the evidence is clear that facilities were given to the appellant, and thereafter the appellant was in default. It is not in contention that after the sale of the charged property, Kshs.4,400,000/- was realized. After deduction of some charges, Kshs.4,132,132 was credited to the appellant's account on 14th March, 1997. We note that the authenticity of the bank statement, which shows that the payment of the Kshs.4,132,132/= reduced the appellant's exposure to the bank from Kshs.12,251.895.40 to Kshs.8,120,763.40, has not been challenged. The appellant also did not show evidence of payment of the deficit in its account. We hold that the trial court did not err in granting the respondent's counterclaim.
66. Consequently, in our re-evaluation of the evidence presented at the trial, we do not detect consideration of irrelevant and or extraneous matters by the trial court, and the upshot is that this appeal fails and the same is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL



MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

