IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, GATEMBU & J. MOHAMMED, JJ. A)

CIVIL APPEAL NO 223 OF 2018

BETWEEN

NATIONAL BANK OF KENYA LTD.....APPELLANT

AND

MWANIKI WA NDEGWA.....RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya

at Nairobi (Tuiyott, J) dated 3rd May 2018

in

HCCC No 313 of 2016)

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JUDGMENT OF THE COURT

BACKGROUND

1. This is an appeal from part of the judgment and decree of the High Court at Nairobi (Tuiyott J.) in HCCC No. 313 of 2016 delivered on 3rd May, 2018 in which the learned Judge held that suspended interest was not recoverable for want of notification and supply of accounts to the principal debtor and guarantor.

2. The brief background to this matter as can be gleaned from the plaint dated 2nd August, 2016 is that **Mary Mbuki Distributors Ltd** (the Principal Borrower) borrowed money from **National Bank of Kenya** (the appellant) and a charge and further charge were registered against **LR No 3734/198** (the charged property) in favour of the appellant. The charged property was registered in the name of **Mwaniki wa Ndegwa** (the respondent). The respondent (also referred to as the principal debtor and guarantor) in addition signed a personal guarantee in favour of the appellant. From the record, the respondent deposited the Title in respect of **Title No. Konyu/Baricho/780** (the suit property) with the appellant. The suit property was registered in the respondent's name and was not charged in favour of the appellant. The appellant's witness, **Moses Sumbwa Tiema**, claimed that the title in respect of the suit property was handed over to the appellant as an additional security. On the other hand, the respondent in his evidence at the trial court claimed that the title to the suit property was deposited with the appellant with a view to charging the suit property in favour of the appellant in lieu of **LR No 3734/198**. The respondent denied depositing the title to the suit property with the appellant as additional security.

3. The principal borrower defaulted in repayment of the sums under the charge and further charge and the appellant served a statutory notice of sale dated 16th July, 2008 on the respondent demanding Kshs 21,332,434.00. Subsequently a 45-day Notification of Sale was issued to the respondent as chargor. The charged property was sold by public auction on 22nd May, 2005 to **Wamwa Trading Co. Ltd** (the purchaser) for Kshs 47,000,000.00. The charged property was transferred in favour of the purchaser on 10th March, 2014.

4. The respondent filed suit in the High Court by way of a plaint dated 2nd August, 2016 seeking the following orders:

a) Payment of the sum of Kshs 25,438,437.00 being the difference between the Auction Price of Kshs 47 million and the outstanding loan of Kshs 21,561,563.00 together with interest at 18% p.a from 28th May, 2009 until payment in full;

b) Release of (the suit property) held by the appellant to the respondent;

c) Damages for wrongful detention of the suit property from the date of auction and transfer of the charged property until the date of the release thereof; and

d) Costs of the suit and such further relief as the Court deems just and expedient to grant.

5. Vide a statement of defence dated 26th August, 2016, the appellant opposed the claim and denied owing any money to the respondent. It was the appellant's claim that the Statutory Notice dated 16th July, 2008 demanded payment of Ksh 21,332,434.00 and did not include suspended interest which amounted to Kshs 26,605,569.40 and which was due and recoverable. It was the appellant's further claim that as at the date of the sale of the charged property the total outstanding amount including suspended interest was Kshs. 47,983,003.40 which amount had increased to Kshs. 51,338,846.40 as at the date of the sale of the charged property. It was the appellant's further claim that the principal borrower had other outstanding obligations to the appellant amounting to Kshs. 6,984,554.32 and that the total loan which the appellant had been unable to recover from the respondent and the principal borrower amounted to Kshs. 12,444,384.72.

6. The appellant denied that there was any surplus of sale proceeds due to the respondent under the charge as alleged and pledged to render a final account at the hearing of the suit. The appellant denied the respondent's claim for the sum of Kshs. 25,438,437.00 and interest thereon or any other sum. Further, the appellant denied that it was unlawfully holding the respondent's title to **Land Title No. Konyu/Baricho/780** and claimed that it was entitled to hold the title to the suit property as security until further recovery of the liabilities thereby, was secured.

7. The trial court considered the effect of the statutory notice dated 16th July, 2008 that had been issued under the now repealed **Section 69 of the Transfer of Property Act** which demanded the sum ***of Kshs 21,332,434 'together with interest thereon'.***

8. On the legal effect of the Statutory Notice dated 16th July, 2020, the trial court held as follows:

> ***"17. Whilst there may be a good reason for suspending interest on non-performing loans in the Books of the Bank, a fundamental issue is how the suspended interest is to be treated when the Bank is making a formal demand against a Borrower or Guarantor to the Debt.***
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> ***21. An essential of a Notice under Section 69 is that it informs the Chargor of the amount to pay so as to avoid the consequence of a Sale. The amount in the Demand is critical because once it is paid then the Chargor can redeem the property. Unless it can be established or proved that the amount demanded was erroneous and that the Chargor would have known of that error, a Chargee will not be permitted to insist on more than has been demanded.***
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> ***26….While the increase in interest may well be meagre, how is the Bank to insist on more than this sum when:***
>
> ***a) There is no formal communication form the Bank that the amounts demanded are exclusive of suspended interest.***
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> ***b) There is no proof that Statements which included the suspended interest were sent out to the Customer."***

9. The High Court allowed the suit in the following terms:

> ***"35.3 Prayer (a) is allowed to the extent that the difference between the Auction price of Kshs.47 million and Kshs. 21,561,563 together with interest thereon (not being suspended interest) from 17th April 2008 to 28th May 2009 and costs of the Sale shall be paid to the Plaintiff with interest thereon at Court rates from the date of filing of this suit.***
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> ***35.4 Parties to agree on the interest and costs referred to in 35.3 above failing which the same to be worked out by an accountant to be agreed upon by parties or appointed by Court.***
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> ***35.5 Costs of the suit to the Plaintiff."***

10. Being partly dissatisfied by that decision, the appellant filed a notice of appeal dated 7th May, 2018 against the decision of the learned Judge ordering the appellant to recover Kshs. 21,332,434.00. This was the amount indicated in the Statutory Notice of 16th July, 2008, with interest thereon to the date of sale, being 22nd May, 2009 and excluding recovery of suspended interest in excess of Kshs 26 million. The learned Judge held that the payment of suspended interest was irrecoverable for want of notification and supply of accounts to the principal debtor and guarantor.

11. The appellant raised the following grounds of appeal in its Memorandum of Appeal: that the learned Judge erred in awarding the respondent a sum in excess of Kshs 26 million as alleged refund of excess of the sale proceeds on the basis of a misconceived, narrow and technical interpretation of a Statutory Notice; that the learned Judge ignored critical admissions made by the respondent on the outstanding debt, the default and the escalation of the debt due to application of interest between the years 2000 and 2008 which had been statutorily suspended under the Central Bank of Kenya Prudential Guidelines. It was the appellant's further contention that the learned Judge erred: in treating the suspension of interest as a contractual issue disentitling the applicant to debt recovery when it was merely a statutory debt management initiative by the Central Bank of Kenya and did not amount to a debt or interest waiver; in treating the suspended interest as having been waived or the debt as having been capped on the amount stated in the statutory notice; in holding that it was necessary for the respondent to have been notified of suspension of interest, when there was no dispute on accounts nor did the respondent seek an order for the taking of accounts, and in the face of the respondent's express admission of awareness that interest continued to accrue during the pendency of the injunctive suits filed by the respondent.

12. Further, the appellant claimed that the learned Judge erred: in granting a refund to the respondent in effect rewriting the contracts of

lending and excluded sums recoverable by the appellant; and in awarding the claim for a refund which constitutes an award of unjust enrichment, and a reward which was into a flagrant abuse of the court process by the respondent.

13. The appellant seeks the following orders: that the judgment/decree of the High Court dated 3rd May, 2018 be set aside; that the respondent's suit be dismissed with costs to the appellant; and that the appellant be awarded costs of the suit.

SUBMISSIONS BY COUNSEL

14. During the plenary hearing of the appeal, **Mr. Luseno**, learned counsel for the appellant referred us to the witness statements with respect to the suspension of interest on non-performing loans. He contended that the suspension of interest was in line with the Central Bank of Kenya (CBK) Prudential Guidelines, and that the suspension of such interest did not waive the interest, and did not discharge the borrower's obligation to pay. Referring to the amount due, **Mr. Luseno** submitted that the amounts contained in the statutory notice are not conclusive as regards the redemption amount and leaves room for the parties to interrogate the total amounts due.

15. Counsel further faulted the trial court for ordering that an account be taken in the absence of a prayer of such an order. Counsel submitted that by dint of **Orders 20 and 28** of the **Civil Procedure Rules, 2010** the jurisdiction of the court to direct the taking of accounts would only apply where there is a special prayer for accounts in which case a formal application would have to be made to the court. Counsel urged us to allow the appeal with costs.

16. Opposing the appeal on behalf of the respondent, learned counsel **Mr. K'Opere** submitted that the statutory notice issued to the respondent was succinct and the basis on which the appellant could recover money that was owed to it under its statutory power of sale. Counsel contended that the trial court did not err in its finding, as the statutory notice clearly indicated the amounts due and payable by the chargor. Counsel submitted that any suspended interest should have been disclosed to the chargor and the principal borrower. Counsel further submitted that it was not in dispute that the sale of the charged property realized in excess of the amount demanded on the face of the statutory notice, and it therefore fell on the appellant to submit a statement detailing the amounts due, but it failed to do so. **Mr. K'Opere** submitted that in the circumstances, the trial court did not err in ordering the appellant to refund the amounts received beyond the amount indicated in the statutory notice. Counsel further submitted that the trial court did not err in ordering the parties to take an account to determine the amounts due to the parties. Counsel urged us to dismiss the appeal with costs.

DETERMINATION

17. We have considered the grounds of appeal, the submissions, the authorities cited and the law. The duty of the first appellate court was as set out in ***Selle v Associated Motor Boat Company Ltd*** **[1968] EA 123** by **Sir Clement De Lestang** as follows:-

> ***"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though***
>
> ***it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif)***

18. From the record, by a consent order of 19th June, 2018 it was agreed by the parties; that the appellant pays party and party costs agreed at Kshs. 1,500,000.00 to the respondent's advocates within 30 days; that there be a stay of execution of the decree pending the hearing and determination of this appeal on condition that the appellant provides a bank guarantee from an independent and reputable financial institution securing settlement of the decretal sum of Kshs.24,906,82.20 together with interest thereon at 12% p.a from 3rd August 2018 until the final determination of the appeal; that in default of the above 2 conditions, execution to issue without notice. From the record, vide a letter dated 23rd May, 2018, counsel for the appellant released the original title in respect of **Title No. Konyu/Baricho/780** to counsel for the respondent. Counsel for the respondent submitted that the appellant has procured a bank guarantee of Kshs.30 million from Co-operative Bank to secure the decretal sum.

19. We take cognizance of the fact that the appellant vide the Notice of Appeal dated 7th May, 2018 appealed against the part of the judgment of the High Court which bound the appellant to recover only Kshs. 21,332,434.00 which was the amount indicated in the Statutory Notice dated 16th July, 2008 with interest thereon to the date of sale being 22nd May, 2009 and excluding recovery of the suspended interest in excess of 26 Million.

20. Counsel for the respondent submitted that the prayers in the appellant's memorandum of appeal do not tally with the notice of appeal. In so far as the contents of the Notice of Appeal are concerned, **Rule 75 (3)** of this Court's rules is clear. It provides in part that;

> **"Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal only against a part of the decision, shall specify the part complained of…"**

21. In effect, it is a requirement that where it is intended that a part of a judgment or ruling is to be appealed against, then, that part of the judgment or ruling must be specifically particularized. It is notable that the requirement is spelt out in mandatory terms. The rationale behind the requirement was explained in the case of **Kenya Revenue Authority vs Doshi Iron Mongers and another [2016] eKLR,** in the following terms;

> **"This provision is not restrictive at all and allows a party to appeal against an entire judgment/decree. A party aggrieved by**

an entire judgment of the court must nonetheless state so.

Likewise, a party who is aggrieved only by a part of a judgment is at liberty to pinpoint that part of the judgment that aggrieves him/her. When a party specifies the part of the judgment it wishes to appeal against, and files a notice of appeal to that effect, then it cannot thereafter be allowed to ambush the other parties by including aspects of the judgment which were hitherto deemed to have caused no grievance to the party.

This is because principles of justice and fairness demand that no party should ambush the other at the hearing".

In the circumstances, we shall restrict ourselves to the issues raised in the Notice of Appeal in the determination of this appeal.

22. On the issue of the legal effect of the statutory notice dated 16th July, 2008, we are guided by the provisions of Section 69 of the now repealed Transfer of Property Act which has been the subject of consideration by various courts. In ***Trust Bank Limited V George Ongaya Okoth*** **[2000] eKLR (Civil Appeal No 177 of 1998)** this Court stated as follows**:**

> ***"As indicated at the beginning of this judgment, the object of a statutory notice under section 69A. (l)(a) of the Act is to protect the rights of the mortgagor and that notice may be in the form of demand for immediate payment, with an intimation that if the mortgage-money is not paid before the expiration of three months from the date of service, the mortgagee will proceed to sell the mortgage-property. Such notice would equally be effective if it required the mortgagor to pay the mortgage- money at the end of a period of three months. Short of the foregoing, such notice would be ineffective as it would not be in conformity with the aforementioned subsection, the result whereof being that the exercise of the mortgagee's statutory power of sale would not have accrued".***

23**.** Similarly, in ***Trust Bank Ltd V Eros Chemists Limited & Another [2000] eKLR (Civil Appeal No. 133 Of 1999***) a five Judge bench of this Court was considering conflicting authority as to the time period to be given in a statutory notice of sale. The Court stated that the period of three months must be expressly given, and where it is not, then the statutory right of sale could not be said to have arisen. The Court held that:

> ***"In our judgment, the notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor's equity of redemption would be extinguished. This would be a serious matter. The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue the statute provided for a three months' period to lapse after service of notice."***

24. **Trust Bank Ltd V Eros Chemists Ltd** (supra) specifically speaks to the time period that ought to be given to a borrower by a lender before the latter moves to realize the security given. This position has been cited by the respondent to demonstrate the importance of a lender giving a complete statutory notice, with all the information required to enable the borrower to know the extent of his indebtedness, a position we too agree with.

25. In the dispute before us, the statutory notice dated 16th July, 2008 is not challenged. It is not contested that where a charged property is disposed of by a lender, then the proceeds from the sale must be apportioned and where there is a balance beyond what was due, should be remitted to the borrower.

26. From the record, the accrual of interest of Kshs.26,605,556.40/-had been suspended from the year 2000 until 2009 when the property was eventually sold. The appellant's witness, **Mr. Morris Sumbwa Tiema** indicated that it was not possible to include the accrued interest in the statutory notice issued on 16th July, 2008 as the Central Bank of Kenya Prudential Guidelines required the omission of accrued interest in the absence of a sale; and that the interest be omitted from computation until the point of actual realization of the security.

27. The appellant posited that the real issue in controversy was whether there was a sale surplus or not. However, to our minds, the main issue arising for our determination in this appeal is whether the appellant gave the respondent proper notification of suspended interest due before deducting the amount from the sale proceeds.

28. Contending that it properly applied the sale proceeds in offsetting suspended interest that was due and recoverable, the appellant submitted that it's right to suspend interest does not discharge the borrower's obligation to pay and that in the statutory notice the chargor and chargee have a right to interrogate the amounts due.

29. In ***Nicholas Mahihu Muriithi v Barclays Bank Kenya Limited [2018] eKLR, Civil Appeal 340 of 2012***, this Court stated as follows:-

> ***"From the evidence presented by the respondent in the form of the Central Bank of Kenya Prudential Guidelines, we are indeed persuaded that in banking terms, debts are classified into categories depending on their performance. They are either: normal debts, watch debts, substandard debts, doubtful debts or loss. The latter, in which the appellant's debt fell, constitutes, as the name implies, a loss to the bank, which are considered uncollectible or of such little value that their continued recognition as assets is of no use to the bank.***
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> ***Because the debt in this dispute was a loss to the respondent, at that stage it wrote it off. Was the appellant absolved from his obligation under the charge or loan agreement? A bad debt that has been written -off does not suggest the absence of a legitimate claim against the debtor whose debt is being written-off. It is done for purposes of taxation and bookkeeping and only if there are no or only slim chances of recovering the debt. See Mohammed Gulamhussein Farzal Karmali and Another V C.F.C. Bank Limited and Another (2006) eKLR. But if the debtor's financial status improves, nothing stops the creditor from pursuing and recovering the debt."***

30. Be that as it may, the key issue was whether the appellant notified the respondent of the amount of suspended interest due. In this regard, it is our considered view that although the CBK guidelines required the omission of suspended interest in the appellant's books, it did not prevent them from notifying the chargor of the amount of suspended interest due. The appellant did not offer any explanation as to why they failed to indicate on the statutory notice that in addition to the sum indicated, there was an amount of accrued interest which was suspended pursuant to the CBK Prudential guidelines.

31. In ***Leonard Jefwa Kalama & another v Consolidated Bank of Kenya & 3 others [2014] eKLR, Petition No. 23 of 2012*** the High Court (Muriithi, J.) on the purpose of the CBK Guidelines stated as follows:-

> ***"In any event, it is doubtful whether the Guidelines relied upon are of legal force affecting the loan contract between the 1st respondent bank and the 1st petitioner borrower. Indeed, the Guidelines, which are attached to the 1st petitioner's written submissions appear to be policy instructions for the accounting standards to be required of banks in the preparation and maintenance of their books rather than as affecting the contractual relationships between the banks and their customers."***

32. In the present case, the learned trial Judge similarly observed at paragraph 17 of the impugned judgment that:- ***"17. Whilst there may be a good reason for suspending interest on non-performing loans in the Books of the Bank, a fundamental issue is how the suspended interest is to be treated when the Bank is making a formal demand against a Borrower or Guarantor to the Debt."***

33. On our part, we note that it is on record that the appellant's witness, **Mr. Tiema** produced bank statements capturing the suspended interest prepared by a loan officer named **Samuel Kiura**. **Mr. Tiema** stated that the said statements were not in the usual format sent out to customers.

34. On the other hand, the respondent denied receiving the said statements. He stated that he was familiar with the practice of suspension of interest and that between the years 2000-2008, he did not pay any instalment yet he knew that interest was accruing but denied being notified of the suspended interest or the amount thereof. In the circumstances, this raises doubt whether the respondent was aware of the amount of suspended interest due.

35. On these facts, the learned Judge found that although the appellant produced statements which captured the suspended interest, the respondent denied receipt thereof. In arriving at his decision on this issue, the learned Judge cited the case of ***Trust Bank Ltd vs. Eros Chemists Ltd and Another (supra)***. The learned Judge, expressing the view that the appellant should have specified the amount of suspended interest, observed as follows:-

> ***"Although the Court of Appeal discussed the period of the Notice, it makes critical remarks on the objective of the notice.***
>
> ***22. The Bank does not plead an error or mistake. Its case is that although it did not specify the component of suspended interest it would be implicitly included."***

36. The question that is now before us is whether the appellant, based on the statutory notice upon which the sale of the respondent's charged property was anchored, was entitled to deduct what it called suspended interest from the sale proceeds. We have noted the submissions made by counsel for the appellant that the total amount that was due and owing from the appellant was to include suspended interest. We have also considered the argument by counsel for the appellant that interest was suspended pursuant to guidelines issued by the Central Bank of Kenya. As noted at the beginning of this judgment, the initial loan taken was in the amount of Kshs 5,000,000.00 but due to default, at the time the final statutory notice was issued, the amount due and owing was 21,332,434.00. There clearly was an interest element factored into this figure from the point at which there was default.

37. The CBK Prudential Guidelines are issued under **Section 33(4)** of the Banking Act and are aimed at providing guidance to financial institutions in order to maintain a stable and efficient banking and financial system. Section 3.6 of guidelines in force as at 2008 when the statutory notice was issued to the appellant did require that for non-performing loans, ***"…all interest on non-performing loans and advances will be suspended … and should not be treated as income…."*** It is clear however, that those guidelines apply to financial institutions with a view to managing their liquidity.

38. It was the appellant's contention that because of these guidelines that it did not state the amount of interest owed to it in the statutory notice of 16th July, 2008. We have also considered **Mr. Luseno's** submission that the statutory notice indicated (even though it was not in express terms) that there was to be interest paid on the amount due, and that the respondent at all times knew that the interest was due and owing. We note that the respondent in his evidence stated that while he did know that interest was continuing to accrue on the outstanding amount, he was never afforded a statement of accounts, and there was no evidence led before the trial court that there were accounts delivered to him. The trial court noted that the only accounts rendered were prepared specifically for the purpose of the suit before the court. That being the case, we find it difficult to accept the appellant's assertions that the suspended interest was due and owing, and that the respondent ought to have known that the interest was indeed being applied. We find that there was a basis for which the trial court held that:

> ***"28. A Statutory Notice is a serious matter. It is a warning to a Mortgagor that he/she may lose his property in the event the debt is not paid and so an accurate and faithful statement of the debt to be paid is a crucial element of the Notice. So grave is the matter that in the Statute that succeeded some of the Provisions of The Transfer of Property Act, the legislature found it necessary to provide that the amount to be paid must be explicitly set out in the Statutory Notice. The Land Act requires that, where a Chargor defaults in payment of any money due under the Charge, the Statutory Notice must inform the Chargor of the amount that must be paid to rectify the default (Section 90 (2)(b) of The Land Act).***
>
> ***29. While there may be laudable reasons for suspending interest on bad Bank loans, a Statutory Notice by the Chargee is so momentous that if suspended interest forms part of the mortgage money then it must be included in the Notice or it be made clear that it shall be included at the point of sale or payment. As the Statutory Notice of 16th July 2008 stated Khs.21,332,434 and***

interest thereon form 16th April 2008 as the mortgage money, the Bank could not and cannot insist on more."

39. While the appellant called on us to consider this appeal in line with accounting principles and in line with the contracts entered into by the parties, we note that the question of the appellant exercising its statutory power of sale was pursuant to the power given to it to do so by law. By that law, it fell on the appellant to ensure that the notice was complete in all respects. Any interest, even if suspended as per the lender's books, must be explicitly stated so that the borrower is fully informed of the extent of his indebtedness.

40. As previously highlighted, the inconsistencies in the evidence indicate that there was insufficient evidence that the respondent was served with the statements specifying the amount of the suspended interest.

41. It is a well-founded principle that in a civil suit, he who asserts must prove. In this respect, ***Section 107 (1) of the Evidence Act*** provides that:-

> ***"whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***

42. Expounding on this principle, this Court in the case of ***Jennifer Nyambura Kamau v Humphrey Mbaka Nandi*** **[2013] eKLR,** stated as follows:-

> ***"We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side."***

43. Accordingly, in light of the above, we are satisfied that the learned Judge came to the right conclusion that the appellant did not produce sufficient evidence to prove that the respondent was served with the statements indicating the amount of suspended interest that was claimed to be due. We therefore find that the learned Judge did not err in awarding the respondent the difference between the auction price of Kshs. 47 million and Kshs. 21,561,563.00 together with interest thereon (not being suspended interest) from 17th April 2008 to 28th May 2009 and costs of the sale with interest at Court rates from the date of filing of the suit.

44. The upshot is that this appeal is bereft of merit and we dismiss it with costs.

Dated and delivered at Nairobi this 7th day of August, 2020.

M. KOOME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR