IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), GATEMBU & KANTAI, JJ.A)

CIVIL APPEAL NO. 252 OF 2009

BETWEEN

KENYA HOTELS LTD.....APPELLANT

AND

ORIENTAL COMMERCIAL BANK LTD

***(Formerly known as THE DELPHIS BANK LIMITED)*.....RESPONDENT**

(Appeal from the Judgement/Decree of the High Court of Kenya at Nairobi (Mr. Justice Luka Kimaru) dated the 28th August 2009

in

HCCC No. 195 of 2005 (OS)

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JUDGMENT OF W. OUKO (P)

At the centre of this dispute is a Memorandum of Equitable Mortgage by Deposit of Documents of Title dated 3rd April, 2001 and registered on 5th April, 2001 in favour of Delphis Bank Limited, the predecessor of the respondent in respect of a bridging loan facility of Kshs. 60,000,000 advanced to the appellant by the latter. To secure the facility, the appellant deposited with the respondent a certified copy of title to Land Reference Nos. 6291/1 and 6901. When the appellant defaulted in the repayment, the respondent took out an Originating Summons pursuant to the provisions of **Order XXXVI Rules 3A** and **7** of the repealed Civil Procedure Rules to;

> **"…be granted leave….to sale** (sic) **Land Reference Nos. 6291/1 and 6901 registered in the name of the respondent in exercise of the right conferred to the applicant pursuant to the memorandum of equitable mortgage dated 3rd April 2001".**

At the time the originating summons was taken out, the appellant's claim as outstanding debt was expressed to be Kshs. 155,627,612.08.

In opposing the originating summons, Ketan Somaia, a director of the appellant swore two affidavits in which he insisted that the application was incompetent for two reasons; that contrary to the rules the originating summons, like all summons under **Order 4 Rule 3(2)** of the repealed Civil Procedure Rules ought to have been signed by the Judge or an officer of the court but was not so signed; and secondly, that the matters in dispute between the parties being contentious and complex were unsuitable for resolution by way of an originating summons.

Apart from these technical challenges, the plunk of the appellant's argument was that there was no valid equitable mortgage that would entitle the respondent to exercise a statutory power of sale to recover the amount allegedly owed; that the transaction was incurably defective as the original title deeds of the suit properties were not deposited with the respondent at the time the memorandum of equitable mortgage was executed; and that it was irregular to register the memorandum of equitable mortgage on the basis only of certified copies of the title documents.

The second argument was that the sum of Kshs. 60,000,000 purportedly secured by the equitable mortgage was in fact advanced to Block Hotels Ltd and not to the appellant, hence there was no consideration from the appellant.

Upon considering the submissions filed pursuant to court's directions, the learned Judge (Kimaru, J) asked himself these two broad questions: was the applicant in breach of the rules of procedure by filing the originating summons instead of a plaint in the circumstances of

the issues in controversy and was there a valid equitable mortgage?

In answer to the first limb of the first issue, the Judge noted that **Order XXXVI** of the repealed Civil Procedure Rules did not require that an originating summons be signed by a judge or an officer of the court; that that procedure only obtained in England and not here. On the second limb of the first issue, the Judge held that the aforesaid **Order XXXVI Rule 3A** allowed the respondent to apply for the reliefs it sought in the manner it did by an originating summons. The Judge was of the view that a determination of the matters in dispute could be reached without the necessity of calling *viva voce* evidence since they were not complex; that the court was simply being asked to construe the documents presented by the respondent, which exercise did not require parole evidence to be called as the documents were "capable of speaking for themselves" through their contents. Finding no merit in the two objections, the learned Judge dismissed them.

Turning to the merit of the claim as incapsulated in the second issue, the Judge was convinced that the sum of Kshs. 60,000,000 was advanced by the respondent to the appellant; that the directors of the appellant met on 28th February, 2001 and passed a resolution authorizing the appellant to deposit with the respondent the title deeds of the suit properties, comprised in Lake Naivasha Country Club, as security and to create an equitable mortgage for the advance of the sum of Kshs. 60,000,000; and that a memorandum of equitable mortgage was executed by the directors of the appellant, the Judge was satisfied that a valid equitable mortgage was created. He went on to opine that the funds in question, though secured by the properties of the appellant, were in fact channeled to the account of Block Hotels Ltd; that this was done following an express request by the appellant; that at the time the memorandum of equitable mortgage was executed, the appellant had misplaced the original titles of the suit properties, which were in the form of indentures issued under the Government Lands Act; that even as at the time of the trial they had not been traced; and that as a result of this, only copies of the indenture, duly certified by the Registrar of Government Lands were deposited with the Registrar of Companies.

Ultimately, he came to this conclusion, reproduced below *in extenso* due to its relevance and importance to this appeal. He said;

> **"The memorandum of equitable mortgage by deposit of documents of title was registered by the Registrar of Companies and Certificate of Registration of Mortgage pursuant to Section 99 of the Companies Act was issued on 5th April, 2001.**
>
> **In the present suit, there is no dispute that the directors of the respondent met, discussed and passed a resolution authorizing the respondent to deposit the titles in respect of the suit properties by way of equitable mortgage to Delphis Bank Ltd with a view to securing a loan of Kshs. 60 million. The said sum of Kshs.60 million was disbursed to the respondent but was later transferred to Block Hotels Ltd, a company associated with the major shareholder of the respondent. Although the original titles of the suit properties were not deposited with Delphis Bank Ltd at the time the memorandum of equitable mortgage by deposit of documents of title was executed, upon evaluation of the facts of this case, I hold that the respondent intended and in fact did create a valid equitable mortgage in favour of Delphis Bank Ltd. The bank fulfilled its part of the bargain by disbursing the said sum of Kshs. 60 million upon the directors of the respondent executing the memorandum of equitable mortgage. The respondent cannot use the excuse of the absence of the original titles of the suit properties to avoid being held liable on account of a security that it had created in favour of the applicant. The absence of the original titles was satisfactorily explained by the respondent when its directors executed the memorandum of equitable mortgage. The respondent informed the bank that the original documents of title had been lost. In its place, the certified copies of the indentures were deposited…..**
>
> **…..It would be unconscionable for the court to declare invalid a security which the respondents created and which the respondent obtained a benefit when the sum of Kshs.60 million was advanced to it. It did not escape this court's notice that the respondent did not deny liability in respect of the said sum that was advanced to it. In fact, subsequently thereafter, the respondent made proposals to repay the amount advanced to it. At one time, on 12th March, 2004, the respondent proposed to pay to the applicant the sum of Kshs.105 million in full and final settlement of the amount owed. However, todate, the respondent has not made good the payment.**
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> **.....I hold that the applicant has proved, to the required standard of proof on a balance of probabilities, that a valid security capable of being enforced by this court was created when the respondent executed the memorandum of equitable mortgage by depositing the certified copies of the title documents in respect of the suit properties. I hold that the respondent had the intention, and indeed it did create a security in favour of the applicant, when its directors executed the memorandum of equitable mortgage which was duly registered and a certificate of registration duly issued.**
>
> **The upshot of the above reasons is that the prayers sought in the applicant's originating summons are hereby allowed.**
>
> **The applicant is granted leave to sell the suit properties i.e. L.R. Nos.6291/1 and 6901 registered in the name of the respondent in exercise of its rights conferred under the memorandum of equitable mortgages dated 3rd April 2001 and which was registered on 5th April 2001. The applicant shall the** (sic) **sell the suit properties to recover the sum of Kshs. 69,112,319.17 that was owing as at 9th October 2001 together with the accrued interest at the rate of 22% per annum until payment in full. The applicant shall have the cost of the suit".**

The appellant was dissatisfied and brings this appeal to challenge the above determination on a whopping 30 grounds which in my humble judgment can simply be summarized and paraphrased as follows; that the court below had no jurisdiction to determine the originating summons on such a complex matter and without the signature of the judge or officer appointed by the judge as required by **Order 4 Rule 3(2)** of the repealed Civil Procedure Rules; that the court ignored binding decisions of the Court of Appeal in **Kenya Commercial Bank V. Osebe** (1982) [1982] KLR 296 **Standard Chartered Bank Kenya Limited V. Intercom Services Limited and 4 others,** Civil Appeal No. 37 of 2003, and **Floriculture International Ltd V. Central Kenya Ltd and Others** (1995-1998) 1 EA 61 on when originating summons may be used to commence an action; that the learned Judge failed to appreciate that for a Memorandum of Equitable Mortgage to be valid, the deposit of the actual original title was a must and therefore certified copies of the title deposited in the transaction did not suffice under the Equitable Mortgages Act; that in any case the transaction was contrary to the Banking Act and the Equitable Mortgages Act; that no money was advanced to the appellant and instead the documents were deliberately manipulated to advance the Kshs. 60,000,000.00 to Block

Hotels Limited, a separate entity from the appellant; that the principle of public policy, *ex dolo malo actio oritur* (no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act) ought to have been applied; that **section 11(h)** of the Banking Act prohibited the respondent from granting any advance or credit facility or giving guarantee or incurring any liability or entering into a contract or conducting business in a fraudulent or reckless manner; that this was a case of an insider lending in breach of the Banking Act; and that the respondent was obliged in law to prove the amount claimed since it was a combination of an alleged principal amount, interest and bank charges.

It is on these very grounds that the appellant's written submissions were premised and highlighted. It is not necessary to recapitulate them here. Suffice, however to state that the appellant has asked the Court in those submissions to determine the following six questions.

a. Whether it was proper for the suit to proceed by way of originating summons;

b. Whether a valid equitable mortgage was created under the provisions of the Banking Act, the Equitable Mortgages Act and the Land Control Act;

c. Whether the transaction, the subject matter of the suit in the superior court, was tainted with illegality as a matter of public policy and thus an unenforceable transaction;

d. Whether the Equitable Mortgage created was enforceable;

e. Without prejudice to the foregoing, whether the loan was advanced to Kenya Hotels Limited, the appellant herein, and;

f. Whether the respondent calculated the interest accrued on the alleged loan in accordance with **Section 44A** of the Banking Act.

The respondent is opposed to the appeal and maintains that it does not lie.

On the procedure of originating summons, the respondent is in agreement that indeed it is intended for simple and straightforward matters, but maintains that what was in dispute before the court below was a relatively straightforward and uncomplicated enforcement matter. On whether there was necessity in the Judge or court officer signing the originating summons, the respondent's position was that, unlike summons under **Order IV Rule 3** there was no requirement in **Order XXXVI** of the repealed Civil Procedure Rules for a judge or a court officer to sign the originating summons.

Turning to the substance of the appeal, the respondent has insisted that it granted to the respondent, and no other party a bridging loan facility in the sum of Kshs. 60,000,000 in 2001, for which an Equitable Mortgage by deposit of deeds over two properties was created; that the appellant defaulted in repaying the sum in question which on 28th February 2005 stood at Kshs. 174,768,990.74 and continues to accrue further interest at the rate of 22% per annum from that date until payment in full. The respondent further avers that the fact of the indebtedness has never been in dispute as the appellant, through Ketan Somaia, offered to pay a sum of Kshs. 105,000,000 by two equal instalments in final settlement; that in addition, there are e-mail and other correspondence produced in court, the most recent one being that of the 17th September 2018 that further demonstrate the indebtedness. For those reasons the respondent has urged the Court to find, like the court below that the equitable mortgage was lawful and enforceable.

I reiterate that this is a first appeal and that it is the duty of this Court in such appeal to reconsider the evidence recorded by the court whose decision is challenged; to evaluate it and draw our own independent conclusion. See **Kenya Ports Authority V. Kuston (Kenya)Ltd,** (2009) 2 EA 212.

In this case no oral evidence was presented. Instead the parties relied on the originating summons, affidavits and submissions, written and oral highlights.

The first challenge to the decision of the High Court on the procedure of originating summons is two pronged; whether that procedure was suitable for the resolution of this dispute and whether it was valid without the signature of the judge or a court officer.

In its application before the High Court the respondent cited the repealed **Order XXXVI Rule 3A** and **7** of the Civil Procedure Rules (now **Order 37).** Rule 7 of the former deals with the form of presenting the application. It is Rule 3A that is relevant here. It provides that;

> **"Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before the judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require; that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee".** (Our emphasis)

This provision is unequivocal that the medium for the enforcement of sale, redemption or foreclosure of a mortgage, legal or equitable, is by way of an originating summons. Though this may be so, the courts have given guidance that the procedure of originating summons should not be employed in complex matters. For example, in **Kenya Commercial Bank V. Osebe** (1982) LLR page 66 this Court said;

> **"The procedure of originating summons is intended for simple matters and enables the court to settle them without the expense of bringing an action. The procedure is not intended for determination of matters that involve serious questions. The procedure should not be used for the purpose of determining disputed questions of fact.**

The procedure of originating summons is designed for the summary or *ad hoc* determination of points of law, construction or certain specific facts for obtaining of specific directions of the court such as trustees, administrators or the courts execution officers".

While the appellant found the issues in controversy unsuitable for determination in an originating summons, the respondent and the learned Judge thought the issue involved was straightforward.

My view of the matter is that the procedure of originating summons is not limited only to matters in respect of which facts are not in dispute. If it turns out that the issues raised in the originating summons are complex and may require the calling of *viva voce* evidence, that does not invalidate the application. That explains why under **Order XXXVI Rule 10,** a matter may be commenced by an originating summons, but should it;

"(1) appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of those affidavits.

….

(3) This rule applies notwithstanding that the cause could not have been begun by filing a plaint."

Upon so converting originating summons, *viva voce* evidence may be presented as the court may direct. See **Jaswantkumarba Benesingh Jethwa V. Postal Corporation of Kenya** [2015] eKLR.

Because of this mechanism, an originating summons cannot therefore be defeated merely because the dispute is highly contentious, complex or involving serious questions of law.

Secondly, **" Any party to a suit commenced by originating summons may apply to a judge in chambers for directions".** See **Rule 8A. Rule 9** expresses this neatly and is the answer to the appellant's concern. It provides that;

"9. On the hearing of the summons, if the parties do not agree to the correctness and sufficiency of the facts set forth in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon, and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties"

As a matter of procedure and long practice, directions are invariably taken in actions commenced by originating summons. It is at that point that parties and the court have the opportunity to decide whether the summons can be determined on an affidavit evidence, written or oral submissions, or by calling *viva voce* evidence. This case was no exception. Although on 10th July, 2006, Mr. Ochieng Oduol representing the appellant intimated to the learned Judge at the initial stages of the matter his intention to **"call evidence to avoid cross-examination on affidavit"**, the record from 4th October, 2006 to 16th July, 2007, when the originating summons was finally heard shows a consistent intention to have the matter disposed of by affidavit evidence and written submissions. Indeed, in the end those were the directions taken, clearly by consensus. It is not only absurd but also too late in the day to claim that the procedure was unsuitable. That objection is overruled.

I turn to the second technical objection to the effect that the originating summons was not signed by either the judge or by someone nominated by the judge. I understand the argument to be based on the provisions of the repealed **Order IV rule 3 (2)** of the Civil Procedure Rules which required that:-

"3. (1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.

(2). Every summons shall be signed by the judge and shall be sealed with the seal of the court without delay and in any event not more than thirty days from the date of filing suit"

The answer to this ground is found in the Court's decision in **Harith Sheth T/A Harith Sheth Advocate V. K.H Osmond**, [2011] eKLR, where it was clarified that this Rule has no application to proceedings brought by originating summons; that the old **Order XXXVI** sets out the entire procedure for bringing suits by originating summons complete with standard Forms to guide litigants and counsel on how to draw an originating summons; that according to that form the plaintiff or his advocate, and not the judge, is required to sign the originating summons; and that an originating summons being a means of commencing a suit is itself, at the same time a summons to enter appearance.

I agree entirely and think myself that even if no summons under **Order IV rule 3 (2)** aforesaid were issued, the appellant did not suffer any prejudice. It entered appearance on 29th November, 2004, responded to the originating summons timeously and fully participated in the hearing. Accordingly this ground is for rejection too.

The appellant has raised two other matters which the respondent objected to as being improperly included in this appeal as they were not pleaded and canvassed before the trial court. The first one relates to the rate of interest charged and awarded on the loan; that by **section 44A** of the Banking Act, the respondent was limited in what it could recover as interest, being an amount not exceeding the principal owing when the loan became non-performing; and expenses incurred in the recovery of any amounts owed by the debtor. This is what has come to be

known as the *'in duplum'* interest rule. I will consider this ground at the end of this judgment because that is where it belongs.

The other challenge which in my assessment is a simple one and can swiftly be disposed of is the submissions by the appellant that **section 6 (1)** of the Land Control Act that requires that consent be obtained from the land control board in transactions affecting agricultural land was not complied with. While it is conceded that this issue was not before the court below, the appellant submitted that the issue of whether or not the land is controlled is a question of law which can be raised at any time.

It must be reiterated that this complaint was raised for the very first time in the appellant's written submissions before us. The issue was not one of the grounds upon which the appellant resisted the originating summons. Neither is it one of the grounds of appeal before us. Alive of the provisions of **Rule 104** of the Court of Appeal Rules, that it could not raise or argue any grounds that were not specifically raised in the memorandum of appeal without leave of the Court, the appellant made an application to be granted leave to amend its memorandum of appeal to introduce the grounds that the Land Control Act was not complied with in the transaction. By a ruling made on 23rd February, 2018 the single Judge (M'Inoti, JA) dismissed the application. A reference to a full bench was likewise dismissed on 25th January, 2019. That should have closed the chapter of this matter. Despite this, the appellant went ahead and still raised in its submissions the very matter of those two rulings.

As this Court in **Republic V. Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto** [2018] eKLR emphasised, submissions must be founded on the issues before the court and the evidence on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage. I may add that the philosophy behind the appellate system, which save in exceptional cases, restricts the appellate court to consider only those issues that were canvassed before (and perhaps determined) by the trial court. See **North Staffordhire Railway Co. V. Edge** [1920] AC 254). Of course if a matter is raised at the trial and the trial court does not determine it, it may be made the subject of an appeal.

The matter of consent of the land control board is of no substance in the appeal and is accordingly rejected.

Turning now to the main thrust of the appellant's case as argued before the High Court and this Court, it is clear that that case is built mainly around the construction of the provisions of the Banking Act, the Equitable Mortgages Act, the Transfer of Property Act, the Governments Land Act and the Land Titles Act. The last three statutes have been repealed. Reference will be made only to those that may have a bearing in this appeal.

For instance, the appellant submitted that **section 2** of the Equitable Mortgages Act requires that the original document(s) of title to immovable property be deposited in order to create charge upon any immovable property; and that a certified copy of title, as was the case here, was not a title in law and the intention of the parties in itself is not sufficient ground to create an equitable mortgage. Though he found as a fact that the original titles were not deposited, the learned judge was, nonetheless of the view that there was no such requirement that only the original title must be deposited; that in the instant case a certified copy was sufficient; and that that fact, coupled with the clear intention of the appellant to create a charge was all the respondent needed to demonstrate.

The answer this ground seeks is whether an equitable mortgage over L.R. No. 6291/1 and 6901 was created by the deposit of a certified copy as opposed to original of the titles to those two properties. Below is reproduced the very **section 2** of Equitable Mortgages Act that the respondent is relying to argue that the title must be original. It states that;

> **"2. (1) Subject to the provisions hereinafter contained, nothing in section 59 of the Transfer of Property Act, 1882, of India, as applied to Kenya, shall render invalid mortgages or charges made in Kenya by delivery to a person or his agent of a document or documents of title to immovable property, with intent to create a security thereon"**. (Our own emphasis).

The highlights envisage "document" or "documents" of title to immovable property. The presumption of the law is that only valid and proper documents of title can be delivered pursuant to a mortgage. It is, however common factor that, in this case certified copies of title to the two properties were deposited. Under the cited Act it is the act of depositing a document to immovable property and the intent with which it is accompanied that constitutes the security. It is in evidence that a memorandum of equitable mortgage by deposit of documents of title was executed on 3rd April, 2001 and registered at the Government Lands Registry on 5th April 2001 on the strength of those certified copies of title documents. The mortgage was thereafter registered at the Companies Registry. The memorandum was duly signed by a director of the appellant on the same day the Certificate of Registration of Mortgage was issued. The memorandum, I believe, constituted a written contract which became an integral part of the transaction and was itself an operative instrument.

Furthermore, and as proof of the authenticity of the documents submitted in the transaction, the appellant, through George Cohen, its director, in his letter of 27th August, 2001 undertook that;

> **"The original title of the property mortgaged to the bank is unfortunately missing. A search carried out at the lands office has established that the title was not pledged to any other party before it was pledge to the Delphis Bank.**
>
> **We are in the process of making an application for another title document, which will be forwarded to you as soon as we receive it."**

Secondly, by a letter dated 12th March, 2004 and signed by Ketan Somaia who was described in the letter as the appellant's chairman, the appellant offered an explanation to the respondent about the delay in settling the loan and made the following offer;

> **"We refer to our outstanding account with your bank.**

……

Our offer for repayment to your bank is as follows:

1. A total repayment principal amout of Kshs. 105 million.

2. Repayment to be made in two equal installments by July, 2004 and July, 2005. We anticipate clearing the outstanding account within the next 16 months.

3. As we have demonstrated, our intention to clear the debt, we request the Bank to kindly consider a waiver of any further penalties and interest on our account other than normal interest on the above proposed revised principal.

We look forward to your positive response and acceptance of this proposal".

Thirdly, still on the question of certified copies of the documents of title, under the Equitable Mortgages Act, delivery of title is subject to the provisions of the Government Lands Act, the Land Titles Act, the Registration of Titles Act, or the Registration of Documents Act, all of which recognize the use of copies and certified copies of the original. Just as an example, **section 109** of the repealed Government Lands Act donates discretionary powers to the Registrar to effect registration of an authenticated copy of a document if he is satisfied that the original is lost or destroyed and he has no reason to believe that a fraud has been or is about to be committed. What is critical under **section 100(1)(b)** of Government Lands Act in the creation of mortgage or charge (other than those created in favour of the Government) is that such mortgage or charge be created by an instrument in writing and the instrument be registered. This command was complied with following the registration of the instruments creating the equitable mortgage in this dispute.

Next, **section 30** of the Land Titles Act requires the Recorder of Titles, upon payment of the fee to furnish to any person applying for it, a certified copy of a certificate of title, while **section 23(2)** the Registration of Titles Act, on the other hand acknowledges that a certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, may be received in evidence in the same manner as the original.

Finally, on this ground, **section 67** of the Evidence Act provides that documents must be proved by primary evidence except in the circumstances outlined by the Act. **Section 67** is the basis of what historically and universally been referred to as **"the best evidence rule"**. In other words, proof of a document must be by the document itself.

Secondary evidence, as a general rule is admissible only in the absence of primary evidence and upon fulfilling specific conditions. Those conditions include;

"68. (1) (c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time;

……

(e) when the original is a public document within the meaning of section 79 of this Act;

(f) when the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence".

Certified copies, as secondary evidence under **section 66** may be produced in place of the original so long as a proper basis has been laid. See **Jane Wambui V. Stephen Mutembi & Another** Succession Cause No. 691 of 1995.

I may add here that, as the name implies an equitable mortgage arises where the formalities to create a legal mortgage may not have been completed but the transaction is nonetheless recognized as a mortgage by equity. Equitable mortgages may, for the reason that they are equitable, lack some legal formalities that must be present in a legal mortgage.

It is apposite at this point to link the law on equitable mortgage to its origin in order to appreciate the arguments presented in this dispute, especially regarding formalities of creating an equitable mortgage. **Section 2 (2)** of the Equitable Mortgages Act provides that the delivery of title will have the same effect on the immovable property sought to be charged as a deposit of title deeds in England at the date of the Act.

At an early date, the severity of the common law mortgage led to interference by Chancery, by giving the debtor an equity of redemption. Gradually Chancery extended its jurisdiction to include situations where the debtor had given a written instrument, too defective to be enforced as a mortgage at law, holding that such a transaction constituted an equitable mortgage, provided that the agreement manifested an intention to create a lien on the land. See **W. D. Rollison's *English Doctrine of Equitable Mortgages by Deposit of Title Deeds or Other Muniments of Title.* The Notre Dame Law Review, Article 6.**

In most cases in England the deposits were made entirely without writing. **"Other Muniments of Title"** used and underlined in the above article is a legal term derived from the Latin noun *munimentum* for a document, title deed or **other evidence,** that indicates ownership of an asset. Any other evidence of ownership was sufficient. See **Russel v. Russel,** 1 Brown Ch. C. 269.

In Kenya the Equitable Mortgages Act demands that the deposit of title documents be accompanied by a written memorandum. This is

important for the memorandum states the purpose for which the deposit is made.

The deposit of any form of proof of ownership to the property, just as the intention for depositing it is paramount.

What I have said is enough to illustrate that an equitable mortgage may in circumstances such as that obtaining here can be created by the deposit of certified copy; that a certified copy, being a true copy of the original, a primary document, its endorsement or certification is a confirmation of the existence of the primary document.

There was plausible explanation from the appellant itself that the original was misplaced, to justify the use of certified copies.

This ground, for those many reasons must similarly fail.

In the next set of grounds, the appellant contends that the transaction in question was in breach of **section 11** of the Banking Act. Specifically, that no money was advanced to it; and that there was a deliberate manipulation of documents to try to secure the advanced sum of Kshs. 60,000,000 for the benefit of Block Hotels Limited. In short, that the respondent and the other companies were engaged in insider lending. **Section 11** aforesaid, among other things, prohibits an institution from granting or permitting to be outstanding any advance or credit facility against the security of its own shares or to give any financial guarantee or incur any other liability to, or in favour of, or on behalf of, any company in which the institution holds, directly or indirectly, or otherwise has a beneficial interest in, more than twenty-five percent of the share capital of that company; or conducts its business or part thereof in a fraudulent or reckless manner or otherwise than in compliance with the provisions of the Banking Act. I intend to consider all these grounds together.

But at the onset it must be stated that there was no proof that the funds were advanced to Block Hotels Limited and that through manipulation of documents the appellant became the victim or that the respondent and the other companies associated with it were engaged in insider lending. It must be apparent from what I have outlined in the previous paragraphs that the loan facility was extended to the appellant. What it did with it is immaterial in considering its indebtedness to the respondent. Narhari Prabhashankar Thaker, the respondent's Managing Director swore an affidavit on 4th July, 2006 in which he explained the circumstances under which funds were subsequently transferred to the account of Block Hotels Limited; that Ketan Somaia exerted pressure on him to do so because Block Hotels Limited was indebted to Kenya Commercial Bank Limited. In my considered view Block Hotels Limited was a third party to the transaction.

When all the facts in this dispute are considered, it is common factor that an application for a bridging financial facility in the sum of Kshs. 60,000,000 was made on the letterhead of the appellant and signed by G.M Kimiti, Director on 1st March, 2001. Security for the facility, according to that letter was Lake Naivasha Country Club, valued in 1997 at Kshs. 190,000,000.

An affidavit sworn on 2nd June, 2006 by Ketan Somaia, as a Director of the appellant confirmed at paragraph 7 that the Club was standing on the two properties in question, LR 6291/1 and 6901, and that they belonged to the appellant.

There was a meeting of the appellant's Directors on 28th February, 2001 at 09.00 Hours at which a resolution was made to authorize the deposit of the Club's title as a security with the respondent for a loan of Kshs. 60,000,000 to be repaid by 21st March, 2001. Both the minutes of the meeting and the resolution are part of the record. The respondent accepted the application for the facility and went ahead to disburse the amount sought **"to the account of Kenya Hotels Limited domiciled in Head Office".** The statement of the appellant's account is proof that funds were indeed deposited. In the memorandum which I have made reference to earlier, it was acknowledged by the appellant that the documents of title to the two properties were deposited with the respondent by way of equitable mortgage in consideration of the loan, the receipt of which was also acknowledged in writing. I reiterate that the memorandum was signed on behalf of the appellant by a director and a secretary. It is not clear why, but another confirmation of receipt of funds was conveyed by G.W. Nyugutu, of Delphin Management Services Kenya Limited. It is a statement of fact that G.W. Nyugutu was in attendance at the meeting of directors of the appellant where the resolution to borrow was made. Against his name in the minutes of that meeting are the remarks, "Area Manager, DMS", which I suppose is the abbreviation for Delphin Management Services.

It has been shown that through, Ketan Somaia, the appellant offered on 12th March 2004 to pay a sum of Kshs. 105,000,000 by two equal instalments, in the months of July 2004 and July 2005 and to settle the facility with finality within 6 months from the date of the letter. The appellant implored the respondent to consider a waiver of any further penalties and interest. The respondent has argued, without contradiction by the appellant that not a single coin has be paid by the latter. From the correspondence exchanged, there has been no denial of indebtedness. All the appellant has been pleading for through and through from the respondent is indulgence.

The irresistible conclusion that I must arrive at is that the appellant applied and was granted a bridging loan facility in the sum of Kshs. 60,000,000 to be **"repaid in one amount inclusive of interest and principal on or before 21st March, 2001".** With respect the learned Judge properly applied his mind to the relevant law and fact in allowing the originating summons.

It is the order directing the appellant to pay to the respondent the decretal sum with interest at the rate of 22% per annum on the sum owed until payment in full that I now turn to.

The appellant's grievance that both the claim and the order by the learned Judge on the interest rate was contrary to the provisions of **section 44A** of the Banking Act, the *in duplum* interest rule, which I have alluded to at the beginning of this judgment.

"*In duplum"* is a Latin phrase derived from the word *"**in duplo"*** which loosely translates to ***"in double"***. Simply stated, the rule is to the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced. Since the introduction of this principle on 1st May, 2007 it has been applied by the courts with reasonable degree of consistency. See **Lee G. Muthoga V. Habib Zurich Finance (K) Limited & another** [2016] eKLR, **Mwambeja Ranching Company Limited & another V. Kenya National Capital Corporation** [2019] eKLR, along a host of many others where it has been invoked. The rationale for this rule was elucidated in the latter decision by this Court in the following passage.

> **"The *In duplum* rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the *in duplum* rule is meant to protect both sides".**

See **Mwambeja Ranching Company Limited & another V. Kenya National Capital Corporation [2019] eKLR**

Like the ground about the consent of the land control board which we have disposed of, the respondent has objected to this ground for the reason that it was not before the court below, not in the grounds of appeal; and that **section 44A** enacted well after the transaction giving rise to this dispute was not intended to apply retrospectively.

It will be noted that the appellant did not include this ground in the application where it had sought to amend the memorandum of appeal to introduce the question of consent of the land control board. It will also be recalled that the application was rejected. **Section 44A** was not included in the rejected application and we turn to consider the merit of the argument that it ought to have been considered and applied by the court below. As a general rule, by Rule 104 Court of Appeal Rules only a ground **"specified" or "implicit"** in the memorandum of appeal or in a notice of cross-appeal can be argued at the hearing of an appeal. Again, with the leave of the Court, a ground not so specified or implicit in, say, memorandum of appeal, may be argued. Where leave is granted the Court must afford;

> **"104. (c) …. the respondent, or any person who in relation to that ground should have been made a respondent, or the appellant, as the case may be, an opportunity of being heard on that ground".**

Though in the memorandum of appeal no specific reference has been made to **section 44A** in paragraphs 27, 28 and 29 the appellant has **"implicitly"** complained about the award of Kshs. 69,112319.17 with accrued interest of 22% per annum. We may add that the last issue addressed by the appellant in its submissions (paragraphs 4.1,4.2,4.3,4.4 and 5.0) before the trial court was about the interest rate. As an example, in paragraph 4.3 the appellant submitted that;

> **"4.3 The appellant, My Lord, is of the opinion that this purported escalation of the credited amount payable as interest over and above the advanced amount cannot and should not be demanded in view of the fact that its legality or otherwise does affect the validity of the facility".**

Notwithstanding this invitation to consider the effect of the interest on the credit amount, the learned Judge did not give his opinion on the matter. The appellant was justified to regurgitate this point before us. In any case at the hearing of the appeal both sides had equal opportunity to submit in writing and orally on the question.

The appellant's two pronged submission on this ground can be summarized thus: Since there was no reference to interest chargeable in the memorandum of equitable mortgage it could not be said to have secured the sum of Kshs. 60,000,000 together with interest and penalties. **"It was Kshs. 60,000,000, no more, no less".**

On the second limb the appellant argued that, in any event, if interest were to be charged, the appropriate interest rate calculation should be based on the Commercial Banks Weighted Average Rates between 31st March 2001 when the alleged loan became due and owing and 1st May 2007 when **section 44A** became operational; that;

> **"..a calculation of the said interest on the alleged amount advanced to the appellant from 1st March 2001 to 31st July 2007 brings the total principal and interest allegedly due and owing by the appellant to the respondent as at July 2007 to Kshs. 159,370,502. From here, any interest chargeable by the Respondent should not exceed the principal and interest due and owing as at July 2007 by dint of section 44(6)(b) of CAP 488. Thus, the correct total amount due and owing, if at all, should be Kshs. 318,741,004 as opposed to Kshs. 643,665,981 which is now being claimed by the Respondent".**

I have not seen in the entire record where the respondent has claimed that it is entitled to Kshs. 643,665,981. Both the appellant and the respondent had the opportunity to address the Court on this issue. Infact the latter argued that even if the *in duplum* rule was to be applied the amount due to it from the appellant would be Kshs. 464,697,050.00.

I have answered the first objection that the appellant was not ambushed by the submissions on the application of **section 44A.** The second objection was that **section 44A** could not apply retroactively to a transaction that had been concluded before it was enacted. At this stage it is important to bear in mind that an award of interest is discretionary and as the Court said in **Dipak Emporium V. Bond's Clothing** [1973] EA 553:

> "The court's right to award interest is based on Section 26(1) of the Civil Procedure Act which states that where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on

the aggregate sum so adjudged"

When *in duplum* rule was introduced in Kenya in 2007, the appellant had already been in default for 6 years. **Section 44A(6)** answers the questions;

whether as a result of this the rule could not apply retrospectively to the transaction.

Sub-section 6 states that;

> **"(6) <u>This section shall apply with respect to loans made</u> <u>before this section comes into operation</u>, including loans that have become non-performing before this section comes into operation:**
>
> **Provided that where loans become non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following—**
>
> **(a) the principal and interest owing on the day this section comes into operation; and**
>
> **(b) interest, in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and**
>
> **(c) expenses incurred in the recovery of any amounts owed by the debtor".**

Clearly from the foregoing and as this Court found in **<u>James Muniu Mucheru v National Bank of Kenya Limited</u>** Civil Appeal No. 365 of 2017, **section 44A** was intended to and indeed does apply retroactively. It is designed to apply in two situations; interest on non-performing loans from the date of the amendment of **section 44** of the Banking Act and in respect of loans made before the introduction of **section 44A**, including loans that had become non-performing before that section came into operation.

In the result, I reject the appellant's first argument that there was no reference to interest in the memorandum of equitable mortgage and therefore the respondent was entitled only to the loan advanced "no more, no less". Upon a holistic consideration of the pleadings, correspondence and submission there is no doubt in our mind that the facility was advanced at an interest rate of 22% per annum. That is explicit in the appellant's letter of acceptance of the loan and also in the one where it proposed a repayment plan of Kshs. 105,000,000, in final settlement, among others.

The respondent, for its part insists that, even applying the *in duplum* rule under the above cited subsection, the amount due to it from the appellant would be Kshs. 464,697,050.00 **"and not Kshs.318,741,004 as presented by the appellant".**

Both parties, we are afraid, have not offered any assistance to the Court in the manner they respectively presented their computations of the figures under the *in duplum* rule. Theirs was a classic case of "plucking figures from the air and throwing them at the court". Below is a demonstration of how they did this.

The respondent sought, in the originating summons payment from the appellant the sum of Kshs.69,112,319.17 with interest accruing at the rate of 22% p.a. from 9th October, 2001 in respect of a facility of Kshs.60,000,000 granted to the appellant in March 2001.

The offer letter, though I have not seen evidence of its acceptance by the appellant on record, sets out the terms of the borrowing. The facility of Kshs.60,000,000 was to be repaid on or before 21st March, 2001.

According to a copy of the statement of Account relied by the appellant Kshs. 67,884,813.57 was outstanding as at 31st August, 2001. This statement ends at 31st August, 2001 and no further statement has been attached to demonstrate how that outstanding amount as alleged continued to accrue.

When the demand letter was issued by the bank's advocates on 22nd November, 2001 it stated that the indebtedness stood at Kshs. 69,112,319.17 as at 8th October, 2001.

By a letter dated 26th September, 2001 to the respondent's advocates, Cheptumo & Co. Advocates demanded from the appellant immediate payment of Shs.64,537,343.25 which he alleged was outstanding amount.

The appellant then issued a letter dated 12th March, 2004 by which it made to the respondent a proposal to pay, what it considered the principal amount of Kshs. 105,000,000

In paragraph 9 of the supplementary affidavit of R.N. Patnaik, the respondent's General Manager filed in the originating summons he averred that the outstanding debt as at 31st August, 2004 was Kshs. 155,627,612.08, which figure had grown to Kshs. 174,768,990.47 as at 28th February, 2005. These last figures were said to be extracted from the appellant's statement of account which was not annexed to the affidavit.

The incongruence in the figures did not stop with the pleadings and proceedings in the High Court but continued even before us. In the submissions before us, for instance, the appellant insisted that **"the correct total amount due and owing, if at all, should be Kshs.**

318,741,004 as opposed to Kshs. 643,665,981 which is now being claimed by the Respondent". Again, we have not seen where the respondent claimed **Kshs. 643,665,981**. Similarly, the appellant has not explained how **Kshs. 318,741,004** it relied on was reached.

The respondent for its part submitted that, even assuming that the *in duplum* rule applied, the amount due to it from the appellant would be **"Kshs.464,697,050.00 and not Kshs.318,741,004.00 as presented by the appellant"**. The figure of Kshs. 464,697,050 is both hypothetical and speculative.

This maze of numbers and figures should explain my difficulty, and that of the learned Judge.

The Judge merely adopted Kshs. 69,112,319.17 which is the figure the respondent had presented in its originating summons and awarded it to the respondents without any attempt to break it down. All the figures presented by either side did not clarify whether penalty accrued was factored in. Whereas the rate of 22% p.a. (being a margin of 2% p.a. and the Bank's Base Rate of 20% p.a at the time) is uncontested, it is not easy to tell, as far as we can discern from the record, whether the applicable interest rate was flat, simple, reducing balance, compounded or a combination of the rates.

Furthermore, the offer letter makes reference to a commitment fee of Kshs. 50,000 and arrangement fee of up to Kshs. 1,000,000 payable in the event of default. It is also unclear whether these formed part of the amount claimed by the parties.

So, Iam in very same situations courts often find themselves when figures are plucked from the air and thrown at them. I throw them back to the parties or the court from which the appeal came to reconcile the accounts or adjust the sum awarded or calculate the figures afresh as was the case in the judgments of the following appeals.

In **Daima Bank Limited (In Liquidation) V. David Musyimi Ndetei** [2018] eKLR Civil Appeal No.171 of 2010 the Court directed that;

> **"26. As all these involve reconciliation and tabulation, we are not in a position to establish how much is owing between the parties taking into account the payments made. Having established the basis for the calculation of the interest as above, it is incumbent upon the parties to reconcile the position in order to tabulate the exact figures conclusively. This reconciliation should take into account the various advices on interest changes advised by the appellant from time to time as noted above".**

In a similar situation the Court said;

> **"26. It is therefore evident that in computing the actual amount that is due and payable by the appellant to the respondent, the provisions of Section 44A of the Banking Act must be borne in mind and factored in the computation. It is not for this Court to do the calculation. The respondent must adjust the sum payable in accordance with the law. To that extent only this appeal succeeds".** See **James Muniu Mucheru V. National Bank of Kenya Limited** [2019] eKLR

In those circumstances the ultimate order that commends itself to us is to dismiss this appeal, save for the question of interest. In that regard I hold that **section 44A** of the Banking Act is applicable to the transaction herein. Therefore, parties will compute interest due on the sum advanced strictly in accordance with **section 44A (6),** namely;

> **(a) the principal and interest owing on the 1st May, 2007, the day this section came into operation; and**
>
> **(b) interest, in accordance with the contract between the appellant and the respondent, accruing after 1st May, 2007, not exceeding the principal and interest owing on that date; and**
>
> **(c) expenses incurred in the recovery of any amounts owed by the appellant.**

I award the costs of this appeal to the respondent. As Kantai, JA is in agreement with this result, it is so ordered.

Dated and delivered at Nairobi this 25th day of October, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR

JUDGMENT OF KANTAI, JA

I have had advantage of reading in draft the judgment of my brother Ouko, P. and I entirely agree with the reasoning and conclusions the learned Judge has reached. I really have nothing useful to add.

Section 44 of the **Banking Act** which came into operation in 2007 did various things including introduction, by **Section 44A,** of the "in duplum" rule. That Section that speaks to the subject of loans offered by commercial banks has retrospective effect and applies to loans made before the Section came into effect including loans that had become non-performing before the said **Section 44A** came into operation. I understand that provision of law to be concerned with the public interest – it protects the lender and borrower and disallows the practice witnessed in commercial transactions before 2007 where loans could balloon to such astronomical figures that borrowers had no capacity or ability to repay. It safeguards the equity of redemption so that borrowers who have difficulty meeting their obligations after borrowing loans have a reasonable opportunity to repay and redeem properties charged to banks as security for loans.

On the facts of the case subject of the appeal the loan facility was advanced by the respondent to the appellant with interest at 22% per annum. The appellant did not meet its obligations and the respondent was entitled to recover the loan sum with interest.

The appeal is dismissed as proposed by Ouko, P.

Dated and delivered at Nairobi this 25th day of October, 2019.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

DISSENTING JUDGMENT OF GATEMBU, J.A

1. In my view, this appeal is wholly lacking in merit and should be dismissed, without qualification, with costs to the respondent. My brother Judges, the majority in this appeal, have a different view. They hold that the appeal should be dismissed, "*save for the question of interest*." In that regard, the majority view is expressed by the Hon. ***Mr. Justice Ouko, J.A***, the President of the Court as follows:

> ***"In those circumstances the ultimate order that commends itself to me is to dismiss this appeal, save for the question of interest. In that regard I hold that section 44A of the Banking Act is applicable to the transaction herein. Therefore, parties will compute interest due on the sum advanced strictly in accordance with section 44A namely; the principal and interest owing on the 1st May, 2007, the day this section came into operation; and interest, in accordance with the contract between the appellant and the respondent, accruing after 1st May, 2007, not exceeding the principal and interest owing on that date; and expenses incurred in the recovery of any amounts owed by the appellant."***

4. In the circumstances of this case, I am, with respect, unable to agree that the question whether the interest charged by the respondent on the loan advanced to the appellant was in accordance with ***Section 44A*** of the ***Banking Act*** can properly be raised for the first time in this appeal when it was never an issue in the lower court. Here is why.

5. The background to this appeal is well set out in the judgment of ***Ouko, J.A (P)*** and I need not repeat it here. Suffice to state that the principal prayer by the respondent in its originating summons before the lower court, was for leave of the court to sell properties registered in the name of the appellant. Those properties where the subject of an equitable mortgage dated 3rd April 2001 in favour of the respondent securing a loan advanced to the appellant.

4. In support of the originating summons, the General Manager of the Bank, R. N. Patnaik deposed in his supporting affidavit as well as his supplementary affidavit that the Bank had advanced a loan facility of Kshs.60 million to the appellant; that the loan was secured by memorandum of equitable mortgage over the said properties; that the appellant had defaulted in the repayment of the loan; and that the Bank wished to sell the mortgaged properties to recover the outstanding debt of Kshs.155,627,612.08 together with accrued interest.

5. Included in the documentation annexed to the affidavits was the letter of offer dated 20th March 2000 providing under clause 7 that, "*interest shall be calculated at the aggregate of a margin of 2% p.a. and the Bank's Base Rate in force from time to time currently 20% p.a., effectively 22% p.a.at present on a daily basis*…". The demand letters sent to the appellant by the respondent before action, which were exhibited, without exception referred to "*interest rate at 22% p. a*.".

6. Subsequent to those demands, the appellant made a repayment offer to the respondent by a dated 12th March 2004 in the following terms:

> ***"****RE: REPAYMENT PROPOSAL*

We refer to our outstanding account with your bank.

Due to various disputes including Kenya Commercial Bank Limited (KCB), we regret not having submitted an earlier repayment proposal to your Bank.

We are now in a position to present to you this proposal as a result of the ruling delivered by Justice Ebrahim against the KCB appointed receiver manager of KHL on 6th March 2004. It was established by the ruling that the receiver manager was trespassing and was hence instructed to handover the hotel back to KHL. This was successfully done on 14th February 2004.

Our offer for repayment to your bank is as follows:

(g) A total repayment principal amount of Kshs. 105 Million.

(h) Repayment to be made in two equal instalments by July 2004 and July 2005. We anticipate clearing the outstanding account within the next 16 months.

(i) As we have demonstrated our intention to clear the debt, we request the Bank to kindly consider a waiver of any further penalties and interest on our account other than normal interest on the above proposed revised principal.

We look forward to your positive response and acceptance of this proposal.

Thank you.

Yours faithfully,

Ketan Somaia

*Chairman.***"**

7. In light of the contents of that letter, it is not surprising that in the affidavits that were filed in opposition to the originating summons, the appellant did not complain about the interest or that there was no compliance with ***Section 44*** of the ***Banking Act*** regarding the interest charge. Indeed, counsel for the appellant in the submissions before the trial court framed 8 issues none of which raised the question of interest. The issues as framed by counsel for the appellant in submissions before the trial court were as follows:

"*ISSUES FOR DETERMINATION*

2.0 The following issues arise for determination out of the pleadings outlined above.

(d) Whether the Honourable Court has got jurisdiction to determine the Originating summons dated 26th October 2004 as drawn and filed.

(e) Whether the summary procedure provided under Order 36 of the Civil Procedure Rules is a suitable method for resolution of the dispute herein.

(f) Whether there was in Law a valid equitable mortgage.

Whether the transaction sought to be enforced was contra statute and or tainted with illegality.

Whether the Equitable Mortgage sought to be enforced was created in a manner that was contra-statute or was created in a manner contrary to public policy.

Whether the Equitable Mortgage is enforceable in a court of Law.

Whether the amount claimed by the Applicant in the sum of Kshs.174,768,990.47 as at 28th February 2005 is recoverable through summary process.

*Whether the Originating summons dated 26th October 2004 is an abuse of the process of the Honourable Court.***"**

8. It is therefore clear that the issue of interest was not a matter before the trial court. Had interest, or the manner of its calculation been an issue, no doubt evidence would have been required to demonstrate how interest on the loan had been computed. Understandably therefore, the trial Judge did not address the question of interest in his judgment. The Judge, quite rightly, confined his decision to the two pertinent questions arising from the originating summons and the affidavits, namely whether the proper procedure had been invoked in pursuing the matter by way of an originating summons, and whether the equitable mortgage in favour of the respondent was valid.

9. Given that background, ***Mr. S. Khagram***, learned counsel for the respondent was right in my view in objecting to introduction by learned

counsel for the appellant ***Mr. J. Nyiha***, for the first time during the hearing of this appeal, the question of alleged noncompliance with ***S. 44A*** of the ***Banking Act*** which Mr. Nyiha framed in this way: "*whether the respondent calculated the interest accrued on the alleged loan in accordance with Section 44A of the Banking Act CAP 488*". As I have already stated, and it bears repeating, that was not a matter that was before the trial court.

10. This was not the first time that the appellant attempted a technical knockout, as it were, of the respondent's otherwise admitted claim. The first unsuccessful attempt was through an application to strike out the suit on basis that a winding up petition had been filed over the same matter. That was rejected by ***Ransley, J.*** in a ruling delivered on 8th November 2005. Secondly, the issue of procedure in this matter preoccupied the trial court as it has this Court.

11. Before this Court, the appellant unsuccessfully sought to introduce, through an amendment to its memorandum of appeal, the complaint that the transaction was void by reason of section 6 of the Land Control Act. That attempt was rejected in a ruling delivered by ***M'Inoti, J.A*** in this matter on 23rd February 2018 with which the full court in a reference concurred in a ruling delivered on 25th January 2019. In rejecting the proposed amendment, the learned Judge expressed that:

> ***"if the applicant is merely introducing a ground of appeal that is properly founded on the evidence that was adduced and canvassed before the trial court, which it is alleged the trial judge ignored or misapplied, the Court will more readily allow the amendment. Different considerations will however apply if the applicant is seeking to introduce a totally new ground of appeal that was not pleaded, evidence adduced, canvassed and determined by the trial court."***
>
> [Emphasis added]
>
> And later,
>
> ***"Where the applicant seeks to introduce an entirely new point, there are well known strictures that seek to ensure firstly, that an appellate court does not, in disguise, metamorphose into a trial court and make first instance determinations without the benefit of the input of the court from which the appeal arises."***

12. The learned Judge concluded that the appellant's intended new ground of appeal was not pleaded before the High Court, no evidence was led on it, the parties did not address the court on the matter and the trial Judge did not pronounce himself on the issue and dismissed the motion to introduce the new ground of appeal. There are past decisions on this point, including ***Openda vs. Ahn [1982] KLR 165***; ***Kenya Commercial Bank Limited vs. Osebe [1982] KLR 292***; ***Nyang'au vs. Nyakwara [1986] KLR 712***; ***Securicor (Kenya) Ltd vs. E.A. Drapers Ltd & another [1987] KLR 338***.

13. Affirming those decisions, in this very matter *in* ***Kenya Hotels Limited vs. Oriental Commercial Bank Ltd [2019] eKLR***, the full court in the reference from the decision of ***M'Inoti, J.A*** to which I have referred reiterated that:

> ***"…the Court will not consider or deal with issues that were not canvassed, pleaded or raised at the lower court; and that for a matter to be a ground of appeal it has to have been sufficiently raised and succinctly made an issue at trial."***

14. I see the belated attempt by the appellant to raise the matter of ***S 44A*** of the ***Banking Act*** in precisely the same light. To compound the situation, there is absolutely no reference to this complaint in the appellant's memorandum of appeal and neither did the appellant apply for leave of the Court under rule 107 of the Rules of this Court to argue that ground. It is plainly an ambush. The circumstances in this case are different from those in ***Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited [2014] eKLR*** where this Court considered the import of ***S 44A*** of the ***Banking Act*** as the issue of interest in that case had arisen and was a matter the trial court had addressed.

15. For those reasons I am unable to agree with the majority that the question "*whether the respondent calculated the interest accrued on the alleged loan in accordance with Section 44A of the Banking Act"* is a matter within the province of this appeal. I would accordingly have made an unqualified order for the dismissal of this appeal with costs to the respondent. Mine, though, is a lone voice.

Dated and delivered at Nairobi this 25th day of October, 2019.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR