



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wangoma v Equity Bank Limited & another (Commercial Case  
18 of 2018) [2025] KEHC 729 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 729 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
COMMERCIAL CASE 18 OF 2018  
RE ABURILI, J  
JANUARY 30, 2025**

**BETWEEN**

**GEORGE OSURA WANGOMA ..... PLAINTIFF**

**AND**

**EQUITY BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JAMES ONYANGO JOSIAH T/A NYALUOYO AUCTIONEERS .... 2<sup>ND</sup>  
DEFENDANT**

**JUDGMENT**

**Introduction**

1. The plaintiff herein George Osura Wangoma sued the defendants jointly and severally vide a plaint dated 25<sup>th</sup> January 2017 in which he sought the following orders:
  - a. A permanent injunction directed at the defendants either by themselves, their agents, servants or any of them from staging a public auction selling, disposing and alienating the property SOuth Barkowino/5885.
  - b. A declaration that the defendants intended public auction of the property South Barkowino/5885 is illegal, null and void for lack of legal backing.
  - c. An order for taking accounts of the outstanding loan.
  - d. Costs of the suit together with interest.
  - e. Any other or further remedy this Honourable Court deem fit and just to grant in the circumstances.



2. The plaintiff averred that sometime in 2013, he borrowed a loan of Kshs. 5,000,000 from the 1<sup>st</sup> defendant and secured it with a charge over land parcel number South Barkowino/5885 and that in the year 2014, he further charged the suit property for a loan of Kshs. 3,000,000.
3. The plaintiff pleaded that in July 2015, at his request, the two loan accounts, No. 0290561738020 and 0290562571651 were consolidated by the 1<sup>st</sup> defendant and a new loan account number 0290564577663 opened with an opening balance erroneously indicated as Kshs. 6,632,000 instead of Kshs. 6,049,394.
4. The plaintiff averred that he had been up to date in the repayment of the loan and had no outstanding arrears as alleged by the 1<sup>st</sup> defendant. It was the plaintiff's case that vide the Daily Newspaper of 16<sup>th</sup> January 2017, the 2<sup>nd</sup> defendant Auctioneer on instructions of the 1<sup>st</sup> defendant, advertised the suit property for sale by public auction on the 7<sup>th</sup> February 2017 for recovery of the alleged outstanding loan of Kshs. 7,625,294.11.
5. The plaintiff averred that the alleged outstanding loan was an exaggeration and outrageous and arose due to excessive interest rates charged by the 1<sup>st</sup> defendant over and above the rates recommended by the Central Bank of Kenya, failure by the 1<sup>st</sup> defendant to reflect payments that he had made and erroneous debiting of the plaintiff's account by the 1<sup>st</sup> defendant.
6. The plaintiff further faulted the intended public auction as being null and void as he was never served with the mandatory notice under the registered land act neither was there compliance with the provisions of the Auctioneers Act.
7. The defendants entered appearance and filed a joint statement of defence dated 4<sup>th</sup> April 2017 in which they partially admitted contents of the plaintiff's claim.
8. The defendants admitted that the plaintiff was the registered owner of the suit land which had been charged to the 1<sup>st</sup> defendant for an aggregate sum of Kshs. 8,000,000.
9. The defendants further averred that due process was followed prior to the suit property being advertised for sale and that the plaintiff was truly and honestly indebted to the 1<sup>st</sup> defendant to the tune of Kshs. 7,822,103.16 as at 10.2.2017 and it had the right to sell the property to recover the amount.
10. The defendants admitted that the two loan accounts, No. 0290561738020 and 0290562571651, were consolidated and a new loan account number 0290564577663 opened. They however denied that the balance therein was Kshs. 6,049,394 as alleged by the plaintiff and put him to strict proof.

### **The Plaintiff's Oral Evidence**

11. The plaintiff testified as PW1 adopting his witness statement dated 25<sup>th</sup> January 2017 as his evidence in chief and his list of documents similarly dated 25<sup>th</sup> January 2017 produced as his exhibits P. Exhibit 1 – 6.
12. It was his testimony that there were 2 major problems with his loan account opening balance, that the closing balance compared to what was in the offer letter were different. He testified that his savings account had a problem. The plaintiff testified that there were 2 overdrafts not applied for so the Bank was taking up all monies that he deposited in the account.
13. The plaintiff testified that the interest he was charged in the consolidated account was 18% whereas the CBK recommended interest rate was 17% which was later reduced to 13% after consolidation of the accounts but that the Bank did not reduce to 13% and instead retained 18%.



14. It was his testimony that consequently, the loan kept soaring. He testified that he took a total loan of 8 million, an initial 3 million then 5 million. The plaintiff testified that he had so far cleared the principal sum with interest yet the Bank was still claiming for more. He testified that he had paid over 11.4 million as per the audit report.
15. The plaintiff testified that the Bank told him verbally that it wanted him to pay over 4 million. He testified that instead of taking his money to the loan account, they took the overdraft accounts yet he never had any overdrafts. It was his testimony that he reported to CBK when he suspected fraud and investigations were done and subsequently the Bank Manager was sacked.
16. In cross-examination, PW1 testified that he had no letter or document showing the fraud caused the sacking of the Bank Manager, Mr. Ogolla. The plaintiff admitted that he signed the letter of offer having taken the first loan in 2013 for Kshs. 5,000,000. He testified that the base lending rate was 17% p.a. and that he was to repay in 60 monthly instalments of Kshs. 126,968.
17. The plaintiff testified that he was also to pay for insurance and that the bank gave him the loan less the insurance sum. He further admitted that there was a penalty interest of 6% on default, which penalty was to be added to the loan balance. The plaintiff further admitted that there were times he defaulted in repayment of the loan but still insisted that he had paid the entire loan and interest though the Bank had not cleared him.
18. The plaintiff testified that he had no current statement of his loan account but that the Bank told him verbally that he owed them Kshs.4 million. The plaintiff further testified that sometime in 2019 or 2020, he went back to the bank for reconciliation of his account. The plaintiff denied receiving any notices of sale and admitted that his postal address was what he gave to the Bank in the letter of offer. The plaintiff admitted that his accountant informed him that the interest he was charged was far and above what he was to be charged though he had no document from Central Bank.
19. The plaintiff stated that he had filed receipts showing that he had paid Kshs. 11,436,000.
20. In re-examination, the plaintiff testified that the Bank gave him Kshs.5 million less insurance fee. He testified that he had not seen the Bank filing a document on his loan balance. It was his testimony that he filed suit after the Bank wanted to sell the land where he had a building and his application was allowed with the Bank being advised to follow the right procedure which they had not done.
21. PW2 John Okumu an accountant and a private practitioner testified that he prepared a financial report on the loan advanced to the plaintiff by the 1<sup>st</sup> defendant and that he was interrogating the loan repaid by the Plaintiff to Equity Bank. PW2 testified that the 2 loans were consolidated when the plaintiff had repaid Kshs. 2,234,008 while the 2<sup>nd</sup> loan of 3 million he had paid Kshs. 1,606,877.94.
22. PW2 testified that the loans were consolidated on 31<sup>st</sup> July 2015 as Kshs. 6,632,000 which was not correct as it ought to have been Kshs. 6,049,594 thus the variance of Kshs. 582,404 was unaccounted for. He testified that the total loan plus interest should have been Kshs. 10,104,600 and that there were deposits made of Kshs. 7,894,765 towards loan repayment. He testified that the interest rates were to be revised downwards due to interest rates cap on 14<sup>th</sup> September 2016 by CBK and that the rate was to be 13% p.a but this was not effected whereas if it had been complied with, the financial burden would have been lesser.
23. PW2 testified that the interest charged on the overdraft were without disclosure to the plaintiff and that the plaintiff repaid the loan with interest in excess of Kshs. 3,436,551. It was his testimony that all Kshs. 11,436,551 loan was paid. PW2 testified that they asked the Plaintiff to ask the Bank to give him



information on how they charged interest on different loans but this was not forthcoming and that it is only then that he can calculate the excess or if less loan is available. PW2 produced his Report dated 17<sup>th</sup> September 2024 as P. Exhibit 7.

24. In cross-examination, PW2 testified that he was sure the loan was fully paid but there was need for revision of interest rate as directed by CBK. He testified that the report was based on information from the Bank, the plaintiff and his workings which he had not filed. He testified that he had not attached any document on interest capping in 2016 though capping gives Banks the liberty to operate within the range given.
25. It was his testimony that the consolidated loan was Kshs.8 million and that the Plaintiff informed him that he defaulted. He reiterated that even if the plaintiff defaulted, the loan remained 8 million. He admitted that penalty and interest are charged to the account and the loanee must pay. It was his testimony that as per the statement, the loan was outstanding.
26. In re-examination, PW2 testified that he had not been served with any response disputing his report. He further testified that interest capping is statutory and the CBK only gives communication to the public and the Banks. He further testified that the Bank is the custodian of Bank Statements but a request can be made. PW2 informed the court that he only filed a witness statement giving the summary of workings.

### **The Defendants' Oral Evidence**

27. DW1, Steve Biko, the 1<sup>st</sup> defendant's Credit Manager adopted his witness statement dated 3<sup>rd</sup> July 2019 as his evidence in chief and his filed documents dated 2<sup>nd</sup> June 2017 were produced as D. Exhibit 1 – 13 respectively.
28. DW1 testified that he knew the plaintiff who is the 1<sup>st</sup> defendant's client and as per D Exh.9, the Bank statement with the last date of 2017, the plaintiff owed the 1<sup>st</sup> defendant Kshs. 7,822,103.16.
29. It was his testimony that the statement of 31<sup>st</sup> April 2015 filed by the Plaintiff showed that he owed the Bank Kshs. 3,865,628 on account 0290561738020. He further testified that the second account, 0290564577663 was the consolidated account.
30. DW1 testified that the plaintiff's claim was not justified as no credits are made into the bank and that they give statements showing balances. It was his testimony that the plaintiff had only been going to collect Bank Statements which he had been receiving and that as late as a week prior to the hearing, the plaintiff requested for statements which were given to him.
31. In cross-examination, DW1 testified that the Bank wanted to sell the charged property prior to the suit being instituted but that the court directed them to restart the process of sale afresh which directions they complied with and that after that Ruling, they issued fresh notices.
32. It was his testimony that the interest rate according to the letter of offer was 20% p.a as at 8<sup>th</sup> October 2013, that for the 2<sup>nd</sup> loan, the interest rate was still 20% p.a as at 14<sup>th</sup> May 2014. He testified that he was aware that in 2015, the 2 loan accounts were consolidated via an offer letter of 25<sup>th</sup> July, 2015. DW1 testified that the loan balance in the first loan account was Kshs. 3,865,628 while the loan balance in the second account of Kshs.3 million was Kshs. 2,183,766. He testified that after consolidation, the interest rate was 18% whereas the total loan as consolidated was Kshs. 6,632,000.
33. DW1 testified that interest rates vary from time to time and are given on offer letters though he could not retrieve interest rates charged subsequently. He testified that he was aware of the CBK interest



capping in 2016 and that the loan in question was given in 2015 before the interest capping. DW1 testified that the capping only applied to future loans not past loans such as the plaintiff's.

34. It was his testimony that they stopped further interest. He testified that they only provided the loan statements as and when required by the customer and that he was not aware of any financial audit report showing that the Plaintiff had fully repaid the loan as the loan had not been settled to date. He testified that the Bank makes provision for loan loss because of the period it has taken to clear it as well as the pending suit.
35. Parties also filed written submissions.

#### **The Plaintiff's Written Submissions**

36. It was submitted that according to the loan statements produced by both parties, the cumulative loan advanced to him was Kshs. 8,000,000 and that following the consolidation of the two loan accounts on the 31.7.2015, the new loan balance upon consolidation was Kshs. 6,049,594.
37. The plaintiff submitted that as at 31.12.2019, the total loan plus interest he had paid was Kshs. 13,113,636.32 which meant that the interest he had paid amounted to Kshs. 5,113,636.32 and by then the balance of interest payable amounted to Kshs. 926,138.54 based on the exaggerated interest rate of 18% that was contrary to the capped rate of 13%.
38. The plaintiff thus submitted that the court issues an order for taking of accounts to determine how much loan he had paid taking into consideration the new interest rates applicable on various loan periods. It was submitted that as a result of the aforementioned, the plaintiff merits grant of the orders sought as well as costs of the suit.

#### **The Defendants' written Submissions**

39. It was submitted that the plaintiff's claim of irregular or erroneous debit and excessive interest rates charged have been sufficiently explained by the defendants and further that the dispute as to accounts cannot form the basis of grant of a permanent injunction where there is clear default on the part of the party seeking it. Reliance was placed on the case of Hyundai Motors Kenya Limited v East African Development Bank Ltd [2007] eKLR as well as the Court of Appeal decision in Fina Bank v Ronak Ltd [2001] 164.
40. The defendants submitted that parties are bound by their contract or agreement and therefore by the plaintiff stating that the interest therein was high, he is inviting the court to rewrite the parties' agreement which is unacceptable and contrary to the holding of the Court of Appeal in the case of Pius Kimaiyo Langat v Cooperative Bank of Kenya Ltd (2017) eKLR.
41. It was submitted that he who seeks equity must come to court with clean hands. That the plaintiff had not come to court with clean hands, having admitted in cross-examination that at the time of filing the suit, he was in arrears and truly owed the bank. Reliance was placed on the case of Francis J.K. Ichatha v Housing Finance Co. of Kenya Limited [2014] eKLR.
42. The defendants submitted that the plaintiff had not led evidence of an overdraft facility issued without his consent and thus it was difficult for both the court and themselves to believe these assertions.
43. Regarding the interest rate, it was submitted that as per the consolidated offer letter, the agreed upon interest rate was 17% plus 1% hence the effective rate was 18% and thus the additional 1% was within the range set by the CBK at 4% and section 33B (2) of the [Banking Act](#).



44. It was submitted that the plaintiff admitted in cross examination that there were instances where he defaulted in making the payment which according to the agreement was a default interest of 6% above the rate specified in the letter of offer.
45. The defendants further submitted that the Kshs. 284,000 which he alleges was omitted was on account of commission and insurance to process the consolidated loan as stipulated in the letter of offer dated 24.7.2015.
46. It was submitted that the plaintiff was not entitled to the orders of permanent injunction sought as the plaintiff admitted to be in default of the loan advanced to him, that the plaintiff's allegation that the intended public auction was null and void for lack of legal backing was stale as no auction has taken place or is intended until a repeat of the notices is done afresh as ordered by court.
47. The defendants submitted that the suit was brought in bad faith to frustrate the 1<sup>st</sup> defendant from exercising its statutory power of sale as per the charge documents.
48. The defendants submitted that they were entitled to costs as the plaintiff failed to prove his case and thus his suit ought to be dismissed.

### **Analysis & Determination**

49. I have considered the pleadings filed by the respective parties, the oral testimonies as well as their submissions. The only issue for determination is whether the plaintiff warrants grant of the orders sought.
50. The first prayer was an injunction to permanently restrain the defendants from selling the plaintiff's property South Barkowino/5885 given as security for the loan advanced as consolidated. From the evidence on record, the plaintiff obtained an initial loan of Kshs. 5,000,000 from the 1<sup>st</sup> defendant vide an offer letter dated 9.10.2013 that was secured by a charge over the suit property. The plaintiff subsequently obtained a further loan amount of Kshs. 3,000,000 from the 1<sup>st</sup> defendant vide a letter of offer dated 14.5.2014 which was secured by a further charge over the same suit land.
51. The court record further reveals that vide a letter of offer dated 24.7.2015, the two loans advanced to the plaintiff were consolidated into one following the plaintiff's application dated 22.6.2015 into one loan for Kshs. 6,632,000.
52. The plaintiff subsequently was in default in the repayment of the loan and the 1<sup>st</sup> defendant Bank initiated the process of exercising its statutory power of sale.
53. The plaintiff moved this court seeking a permanent injunction barring the defendants from selling the suit land by public auction.
54. It is important to note that a permanent Injunction fully determines the rights of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the defendant in order for the rights of the Plaintiff to be protected.
55. This Court has power to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the [Civil Procedure Act](#), 2010 if it finds that the right of a Party complaining has been infringed, violated and/or threatened to be violated as the Court cannot just sit, wait and watch under the given circumstances.
56. Drawing from the principles in *Kenya Power and Lighting Company vs Sheriff Molana Habib* [2018] eKLR and *Ngurumani Limited v Jan Nielsen* [2014] eKLR, for the court to grant a permanent injunction, an applicant must pass the four-step test.:



- a. That the applicant has suffered an irreparable harm or injury.
  - b. That the remedies available at law such as monetary damages are inadequate to compensate for the injury.
  - c. That the remedy in equity is warranted upon consideration of the balance of hardships between the applicant and the respondent.
  - d. That the permanent injunction being sought would not hurt public interest.
57. Unlike Temporary Injunctions which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunctions are perpetual and issued after a Suit has been heard and finally determined.
58. In this case, the plaintiff seeks for permanent injunction to restrain the defendant from exercising its statutory power of sale over the charged property. In *Stars and Garters Restaurant & Another v National Bank of Kenya Ltd* [2019] eKLR, W. Korir J (as he then was in the High Court) stated that:
- “The applicants also gave the impression that the amount owed to the respondent is in dispute. That is not a ground for stopping a sale. This was stated long ago in *Lalvuna & Others V Civil Servant Housing Co. Ltd* [1995] LLR 336 (CAK) as quoted in *James Juma Muchemi & Partners Ltd Vs Barclays Bank Ltd* 2011 eKLR where Kwach JA stated:
- “A court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage.”
59. In *Mrao Ltd v First American Bank of Kenya and 2 others* [2003] KLR 125 the court expressed itself as follows:
- “The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgage has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.” (Emphasis added). There is no dispute in this case that Mrao Ltd, (the appellant) borrowed more than Kshs 50m from First American Bank of Kenya Ltd, the first respondent, (First American) on the security of a legal charge over Plot No.714 Section IV Mainland North, Mombasa (the suit land) and a debenture dated 27<sup>th</sup> July, 1999 over its assets to cover the debt which at the time demand for repayment was stood at Kshs88m, but was by mutual consent reduced to Kshs 68m. Under a timetable agreed between the appellant and First American the sum of Shs 5m was to be paid within 4 weeks after the execution and registration of the security thus reducing the ceiling under the debenture to Shs 63m.”
60. Further, the Court of appeal in the case of *Jay Super Power Cash and Carry Ltd v Nairobi City Council and 20 others* [CA 111/2000](#) held that: -
- “This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass



are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it”.

61. In the instant case, it is clear that the plaintiff defaulted on the loan advanced to him by the defendant. There is no evidence that the entire loan amount together with the contractual interest as charged together with default interest has been cleared. In essence, therefore, what the plaintiff seeks from this court is to permanently injunct the defendant from recovering any loan amount due from the plaintiff or selling the property charged.
62. Can this court grant such a permanent injunction in such circumstances? It is common knowledge and sense that when one borrows money from another, that money will be paid back at a certain agreed time and terms. In default, the lender has remedies in law and this court cannot cripple the powers of the lenders in favour of borrowers who are unable to repay the loans advanced to them. What this court would however, expect of the lenders is that they follow the law and procedure for recovery of the loan facility as stipulated in law.
63. As was held in *Joseph Okoth Waudi v National Bank of Kenya*, Civil Application No. 77 of 2004, the Court of Appeal in dismissing an appeal quoted from Halsbury’s Laws of England Vol. 32, 4<sup>th</sup> Edition page 752, stated that:

“It is trite law that the court will not restrain a mortgagee from exercising its power of sale merely because the amount due is in dispute or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained however, if the mortgagor pays the amount claimed in court, that is, the amount which the mortgagee claims to be due to it unless on the terms of the mortgage, the claim is excessive.”
64. In the case of *Francis J. K. Icatba v Holding Finance Co. Ltd. Kenya HCCC No. 414 of 2004* the honourable court held that

“A Plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his own wrong, for the plaintiff seeks this court to protect him from the consequences of his own default. He who seeks equity must do equity. The plaintiff should not be protected or given advantage by virtue of his own refusal to make payments to the defendant/respondent a debt which he expressly undertook to pay.”
65. In the circumstances, I am not persuaded that the plaintiff warrants grant of the orders sought of permanent injunction. The defendant would be at liberty to exercise its statutory power of sale of the charged property subject to the valuation of the property as at the time of such sale and the valuation report should not be older than 12 months. It will also be at liberty to exercise its statutory power of sale subject to issuing all statutory Notices stipulated in law. Further, the lender should not breach the in duplum rule and must adhere to Central Bank Regulations in charging interest. It is for that reason that the court cannot permanently injunct or restrain the 1<sup>st</sup> defendant Bank from exercising its statutory power of sale of the charged property where it is clear that the loan advanced has not been repaid in full by the plaintiff/ borrower. Disputes over the balance cannot be a ground for granting a permanent injunction.
66. Further to the above, I note that where the Plaintiff freely and voluntarily charges the suit property and was clearly aware that the facility advanced attracted interest as well as default interest which was quantified in percentage, and that in the event of default in servicing the debt, the default interest



stated would apply and that properties would be liable to be sold, then the plaintiff is bound by the agreement entered into with the Defendant on the interest that was to be paid on the loan amount that was advanced to him by the Defendant, as well as the default interest and unless it is shown that other unlawful charges were levied, this court would not interfere.

67. In case of *Andrew Muriuki Wanjohi v Equity Building Society Ltd* [2006] eKLR the court held as follows:

“Whenever the Applicant offered the suit property as security, he was conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the chargee, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had the property evaluated in monetary terms. He had then told the chargee that he knew the property to be capable of providing the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable even if the borrower did not pay it.”

68. Thus, the law is that by offering the suit property as security, the chargor was equating them to a commodity which the chargee may dispose of, so as to recover the loan together with interest thereon. Therefore, if the chargee were to sell off the suit properties, the chargor’s loss could be calculable on the basis of the real market value of the said property.

69. It was also the Plaintiff’s averment and submission that the Defendant had unilaterally charged illegal and unconscionable interest, against the dictates of the Letter of offer and Charge document. To this end, the plaintiff called PW2, John Okumu, an accountant to corroborate his assertions that the 1<sup>st</sup> defendant charged illegal interest.

70. I have perused the Letters of Offers dated 9.10.2013, 14.5.2014 and the subsequent restructure Letter of Offer dated 24.7.2015 wherein at clause 4, it provides that interest is charged at the rate of 17% p.a. plus 1% and a default rate of 6% p.a. above the rate specified herein. There is no evidence of illegal interest charged. Additionally, the 1<sup>st</sup> defendant did indicate that it had stopped interest from running upon the default. This was necessary to address the in duplum rule.

71. The position in law with regard to the binding nature of a contract executed willingly by the parties is now well settled. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & another* [2011] eKLR, the Court was categorical that:

“It is clear beyond para-adventure, that save for those special cases where equity might be prepared to re-leave a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.”

72. In *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR, after reviewing case law on the subject, The Court reiterated as follows:

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

73. The issue as to whether the concept of levying default/penalty interest is part of Bank trade usage and custom in Kenya is now settled. There are two schools of thought. One holds that it is and the case



of National Bank of Kenya Limited v Beth Ngonyo Ngenji & Another [2012] eKLR in which the Judge stated;

“I have my own doubts on application of penalty interest for breach of commercial contracts. However, I am aware that it is a known trade usage and custom within the banking industry to charge penalty when a borrower defaults. In this case I need not rely on the implied terms as it was expressly provided for. In my understanding whether or not a charge applied is a ‘penalty’ in a Commercial Contract is a determination of the court notwithstanding the fact that the charge applied is styled penalty interest.”

74. Then another slightly different position is that the imposition of penalty interest/default rate is a contractual matter which must be expressly provided in a contract before it can be implemented. See for example the decision by Odunga J (as he was then) in Francis Joseph Kamau Ichacha v Housing Finance Company Limited [2014] eKLR in which he expressed himself as follows:

“Can it therefore be said that a practice in which the Banks unilaterally decide to load the customer’s account with penalties at their own discretion whose rates are only known to the Bank is such a certain practice that it can be said to amount to trade usage? In my view that would amount to stretching the word “certain” too far. For one to say that the penalty is certain not only ought there be certainty as to the levy of the interest but since the rate is not contained in any contractual document, the rate also must be certain and must be known in the market otherwise such levying of interest would violate the provisions of Article 46(1) (b) of *the Constitution*. To argue otherwise would in my view open an avenue in which the right of redemption may easily be clogged or fettered. I would apply the same reasoning to the case of Maithya vs. Housing Finance Co. of Kenya and Another [2003] 1 EA 133 and the other decisions which in any case are not binding on this Court.”

75. I concur with the above holding by Odunga J, though persuasive. Thus, if a Bank seeks to impose certain charges or interest, then it must make that intention clear in the contract it enters into with the customer. There must be clarity on what the charges and interest are and how they are to be imposed.
76. That being said, and as stated earlier, it is an established legal principle that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts, in the absence of fraud, mistake or misrepresentation. In National Bank of Kenya Ltd v Pipe Plastic Samkolit (supra), the Court of Appeal at page 507 stated that:

“A court of law cannot rewrite a contract between the parties as the parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

77. The settled law at sections 108 and 109 of the *Evidence Act* is that he who alleges must prove the allegation with credible evidence. In this case, the terms of the Letter of Offer dated 24.7.2015 provided at clause 4 that the interest is charged at the rate of 17% p.a. plus 1% (hence an effective interest rate of 18%) variable and further provided for an interest default rate of 6% per annum.
78. In the absence of any evidence by the plaintiff, of manifest error, fraud, mistake or misrepresentation on the part of the 1<sup>st</sup> defendant, this court cannot vary that contract as it has not been demonstrated that the interest rate and default interest rate charged were beyond what was in the letter of offer as executed by both parties.
79. The plaintiff having agreed to the terms of the Letters of Offers dated 9.10.2013, 14.5.2014 and the subsequent restructure Letter of Offer dated 24.7.2015 and the subsequent charge document, he is



- bound to honour them. The plaintiff has not adduced any evidence of coercion, fraud or undue influence on the part of the defendant to warrant this court interfering with the aforementioned contracts.
80. Accordingly, the prayer for a permanent injunction was not proved to the required standard of balance of probabilities and the same therefore fails.
  81. Consequently, the second prayer seeking for a declaration that the defendants intended public auction of the property South Barkowino/5885 is illegal, null and void for lack of legal backing can also not issue.
  82. The evidence on record is that the intended public auction by the defendants was termed illegal by the court in ELC Case No. 45 of 2017 wherein the defendants were told to ensure that a proper notification by the auctioneer is issued and served upon the plaintiff. The effect of the aforementioned order is that the 1<sup>st</sup> defendant was to commence the process of exercising its statutory power of sale and thus to make an order of declaration as prayed by the plaintiff would be to pre-empt the process. Accordingly, this prayer cannot issue. It is declined and dismissed.
  83. It was the plaintiff's further assertion that the court ought to order for accounts to be taken to determine the exact money owed to the defendant, if any, for settlement and an order that the defendant owed the plaintiffs and should refund the surplus.
  84. From the evidence on record, it is clear that the plaintiff is in possession of all bank statements issued to him by the defendant covering the period 2013 to 2017 when this suit was instituted. It was the uncontroverted testimony of the 1<sup>st</sup> defendant that the plaintiff would constantly ask for bank statements which he was issued with even as late as some days prior to the filing of the suit. The plaintiff was entitled to contest the statements and to seek for reconciliation of the loan account by producing evidence of repayment by way of a schedule.
  85. It is the same statements which the plaintiff used to hire a private independent auditor to reconcile the accounts which resulted in what the plaintiff believes to be an overpayment of the loan advanced.
  86. There is no evidence that the plaintiff requested for statements of accounts, besides what he had for reconciliation of the account and were denied by the defendant.
  87. At this point, this court reminds every loatee that they are under a duty to monitor their loan repayment and keep a monthly record of statements from the financial institutions, faithfully, so that in the event of alleged imagined default, they can put the financial institutions to account. The loanees should not wait until many years after the default to raise issues of not having statements from the Banks or financial institutions and or alleged illegal interest levied by the Banks. The loanees should equally personally and meticulously read the long small prints of those letters of offer and understand them. They should not just be interested in seeing money being credited into their bank accounts and fail to know the terms and conditions applicable and the consequences of default. This appears to be the norm in nearly all the cases I have handled in this court where loanees leave the work of reading the documents to their conveyancing advocates and are awakened only after they default to claim that the interest charged were illegal.
  88. I thus find that this prayer is not merited as it will not be of any additional benefit to the plaintiffs and neither is it prejudiced by refusal to grant the order as the plaintiff already has the statements. The prayer is therefore declined and dismissed.
  89. In the end it is my finding that the plaintiff has failed to prove his case on a balance of probabilities against the defendants The suit is hereby dismissed.



90. On costs, it is trite that costs follow the event. However, this case has been in court for a while, having been commenced in the Environment and Land Court before it was transferred to this Court. I find that it will not be in the interest of justice to order for costs to be paid by the plaintiff who still has an outstanding loan to repay to the 1<sup>st</sup> defendant.
91. I therefore order that each party shall bear their own costs of the suit herein.
92. The file is closed.
93. Judgment to be uploaded.

**DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 30<sup>TH</sup> DAY OF JANUARY, 2025 VIA MICROSOFT TEAMS**

**R.E. ABURILI**

**JUDGE**

