



Githuthu v Kenya Deposit Insurance Corporation (Sued on Behalf of Trust Finance Limited, Under Central Bank of Kenya Statutory Management & Under Liquidation of the Deposit Protection Fund) & another (Civil Case 813 of 1999) [2025] KEHC 7331 (KLR) (Commercial and Tax) (30 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7331 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
CIVIL CASE 813 OF 1999
FG MUGAMBI, J
MAY 30, 2025**

BETWEEN

ISAAC S. GITHUTHU PLAINTIFF

AND

KENYA DEPOSIT INSURANCE CORPORATION (SUED ON BEHALF OF TRUST FINANCE LIMITED, UNDER CENTRAL BANK OF KENYA STATUTORY MANAGEMENT & UNDER LIQUIDATION OF THE DEPOSIT PROTECTION FUND) 1ST DEFENDANT

AJAY SHAH 2ND DEFENDANT

JUDGMENT

1. The plaintiff (hereinafter Mr. Githuthu), instituted this suit through a further amended plaint dated in August 1999, alleging fraud and recklessness on the part of the 1st and 2nd defendants. He seeks, inter alia, a permanent injunction restraining the defendants from selling, mortgaging, or otherwise interfering with his and Mutune Investment Trading Company's ownership, title, and interest in L.R. No. Nyeri Municipality Block 111/92 and L.R. No. Nyeri Municipality Block 111/20 (hereinafter the Nyeri properties).
2. Githuthu also seeks an order compelling the 1st defendant (hereinafter KDIC) to render a true and proper account of all monies due, including debits and the applicable rate of interest; a declaration that he is not indebted to KDIC; and a finding that he is entitled to the unconditional discharge of his properties. He also seeks a declaration that no valid or enforceable loan agreement exists between him and the Bank due to the absence of an acceptance of the letter of offer on the amounts in issue.



Additionally, Githuthu prays for an injunction restraining KDIC from demanding payment of Kshs. 67,822,477.10.

3. Based on the pleadings, evidence, and testimony, three financial facilities form the subject matter of the dispute between Githuthu and KDIC.
4. The first facility was a personal short-term loan of Kshs. 3,000,000/= advanced to Githuthu by the Bank. The offer was communicated through a letter dated 1st October 1994, with the loan attracting an interest rate of 36% per annum, repayable within five months. As security, Githuthu provided amongst others, a charge over L.R. No. Nyeri Municipality Block 111/20. The said charge is dated 18th November 1994.
5. Githuthu avers that he repaid the loan in full. However, despite the full settlement, the Bank failed and refused to discharge the charge or release the title deed. He further claims that unauthorized debits were made to his account.
6. The second facility relates to a corporate borrowing arrangement allegedly involving Batian Grand Hotel Ltd (hereinafter Batian), a company in which Githuthu and his wife were directors and shareholders. On 17th March 1995, Mutune Trading Company Ltd (hereinafter Mutune), another company associated with Githuthu, executed a charge over L.R. No. Nyeri Municipality Block 111/92 to secure a loan of Kshs. 15,000,000/=, which was purportedly intended for the benefit of Batian Hotel. Githuthu asserts that no funds were ever disbursed to Batian, notwithstanding the existence of a perfected charge.
7. The third facility concerns an overdraft of Kshs. 30,000,000/= purportedly offered to Githuthu by the Bank through a letter of offer dated 10th July 1998. The proposed securities for the facility included a charge over L.R. No. Nyeri Municipality Block 111/92 (registered in the name of Mutune Ltd), a credit agreement, and a personal guarantee by Ms. Florence Githuthu for the full loan amount. Githuthu maintains that he never accepted the offer, yet the Bank proceeded to disburse the funds to the 2nd Defendant (hereinafter Ajay), under the pretext that the facility was extended to Githuthu.
8. According to him, it had been agreed between themselves that Ajay would service the facility from the proceeds of various commercial transactions which did not materialize as anticipated as follows:
 - a. Account No. 01-22 held with Finance Management Limited (Kshs. 66,000,000/=);
 - b. Account No. 011-040-513 held at National Bank of Kenya in the name of Metro Trading Company Limited (Kshs. 135,854,522.55);
 - c. Sale of L.R. Nos. 11354, 1640, 7277, and 7278 belonging to Metro Company Limited to the Office of the President; and
 - d. Sale of L.R. No. 330/69 (Hatheru Road), the latter of which did not materialize due to the 1st defendant's refusal to provide further advances necessary to make the property marketable.
9. Githuthu further asserts that Ajay had promised to avail further advances. He adds that the disputes between him and Ajay were the subject of litigation in HCCC Nos. 1986 of 1994 and 5469 of 1993.
10. He states that following the placement of the Bank under statutory management, CBK issued letters dated 25th September 1998 and 20th October 1998, indicating that all contracts between himself and the Bank stood terminated and any outstanding advances were to be recalled immediately. On 20th April 1999, the Bank, through the firm of Kiplagat and Associates, issued him with statutory notices for sale by public auction of Title No. Nyeri Municipality/ Block 111/20.



11. Githuthu disputes the debt claimed, which was then stated as Kshs. 57,822,477.10. He avers that the dispute was settled through negotiations and the sale of the Lavington property from which the Bank received Kshs. 10,000,000/= in full and final settlement of the outstanding amounts.
12. He contends that KDIC continued demands and threats to sell the suit properties are malicious and made in bad faith. He asserts that the facilities were never meant for his personal use but were extended to or for the benefit of Ajay, and that the agreed source of repayment, transactions involving Ajay, have not materialized and remain the subject of pending court proceedings.

Defence and Counterclaim:

13. KDIC filed its defence and counterclaim dated 14th July 1999 and subsequently amended on 18th June 2019. It avers that on various dates between 1994 and 1999, the Bank extended financial facilities to Githuthu which were secured through charges over the Nyeri properties. The charges created were continuing securities intended to cover all liabilities owed by the plaintiff to the Bank.
14. KDIC denies that Githuthu fully repaid the facilities. It asserts that he defaulted on his obligations despite receiving reminders. While admitting that Mutune Ltd charged L.R. No. Nyeri Municipality Block 111/92 on 17th March 1995 to secure Kshs. 15 million allegedly for Batian Hotel, KDIC disputes Githuthu's claim that the facility was never disbursed.
15. KDIC also denies Githuthu's claims that the charge over the Lavington property was created as a temporary security for Ajay's borrowings or that funds were not disbursed to him. It distances itself from any private dealings between Githuthu and Ajay, maintaining that it is not bound by any informal or side arrangements between them.
16. KDIC insists that the overdraft facility of Kshs. 30,000,000/= offered under the letter dated 10th July 1998 was duly disbursed to Githuthu as the primary beneficiary and that he remained liable for its repayment. It further asserts that repayment was never agreed to be sourced from the Lavington property proceeds.
17. As at 31st May 1999, KDIC submits that Githuthu was indebted to the Bank in the sum of Kshs. 69,531,680.80/=, which continued to accrue interest at 21% per annum. It also confirms that the sale of the Lavington property was the subject of litigation in HCCC No. 622 of 2007, Isaac S. Githuthu v Kenya Deposit Insurance Corporation, where the plaintiff's case was dismissed. It admits that Githuthu instituted this suit after CBK placed the Bank under statutory management in 1999 and denies any merger with Trust Bank Ltd.
18. While confirming that the Lavington property was sold, KDIC denies that the proceeds of Kshs. 10,000,000/= constituted full and final settlement of the plaintiff's debt or that Githuthu was entitled to the release of the charged titles.
19. Accordingly, KDIC prays for the dismissal of the suit and for judgment against Githuthu as follows:
 - i. A sum of Kshs. 69,531,680.80 as at 31st May 1999, together with interest at 21% per annum (subject to variation) to be liquidated as follows:
 - a. Proceeds from the sale of the securities to be first applied towards the debt;
 - b. The plaintiff to pay any outstanding balance thereafter;
 - ii. Costs of the suit;
 - iii. Damages.



Reply and Defence to Counterclaim:

20. Githuthu filed a reply and defence to the counterclaim dated 9th August 1999, amended on 16th January 2018. He denied KDIC's claims and maintained that he relied on representations made by Ajay, who held himself out as acting on behalf of the Bank. He contends that even if such representations are unenforceable, they constituted a breach of the Bank's duty of care. He reiterates that the Bank's own ledger entries support his claim that the loans were repaid in full.
21. The trial commenced on 26th February 2024 with Githuthu testifying as the plaintiff's sole witness. KDIC called one witness, Micah Nabori, a certified public accountant and former employee. Both of their testimonies align with their witness statements and the bundles of documents produced.

Analysis and Determination

22. The parties filed their respective final written submissions, which I have carefully considered. I do not propose to reproduce the evidence and submissions in detail, as they are largely aligned with the summary of the case already set out. However, I shall refer to them as necessary in the course of my analysis. Before turning to the substantive issues for determination, it is appropriate to address certain preliminary issues that have arisen.

Claim Over L.R. No. 330/69 Hatheru Road Lavington and the Defense of Res judicata:

23. KDIC contends that Githuthu's claim in respect of the Lavington property is barred by the doctrine of res judicata, the matter having been conclusively determined in HCCC No. 622 of 2007.
24. The principle of res judicata is codified under Section 7 of the *Civil Procedure Act*, which bars a court from trying any suit or issue that was directly and substantially in issue in a former suit between the same parties, or parties claiming under them, and which was heard and finally determined by a court of competent jurisdiction.
25. I have carefully reviewed the Judgment rendered by Tuiyott J (as he then was) on 9th November 2018, in HCCC No. 622 of 2007. Githuthu had sought, among other reliefs, a declaration that the sale of the Lavington property was illegal, invalid, and void, as well as special damages arising from the alleged unlawful sale. The Court found that Githuthu had consented to the sale of the property by private treaty. Tuiyott J observed as follows:

“How then will Githuthu deserve the following prayers which he seeks?...

- (a) A declaration that the sale of L.R. No. 330/69 Lavington Nairobi was illegal and invalid.

Githuthu had hoped to draw that benefit and should not be allowed to approbate and reprobate about the validity of the sale... If, as I think, the real controversy was that DPF did not keep its word by accepting the purchase price in full settlement of Githuthu's account, then that was the controversy that should have been placed before the Court for determination. That however is not the question before me!”

26. Although the Learned Judge acknowledged a lack of full disclosure by the Deposit Protection Fund (DPF) concerning the liquidation timelines, he nonetheless found that Githuthu had actively participated in and consented to the transaction. Consequently, the Court declined to grant injunctive



relief or to invalidate the sale. It is clear, therefore, that the legality and effect of the sale were conclusively determined.

27. In the circumstances, I find that Githuthu's current prayers for injunctive or declaratory relief in relation to the Lavington property are wedged by the doctrine of *res judicata* and are, therefore, not justiciable before this Court.

Locus Standi in Respect of Charged Properties Registered in the Name of Mutune Ltd:

28. KDIC contends that Githuthu lacks the locus standi to challenge the sale or creation of charges over the suit properties, on the ground that the titles are registered in the name of Mutune Ltd and not in his personal name. However, it is not in dispute that Githuthu was the principal party to the loan agreements, personally negotiated the terms of settlement with the Bank, and actively engaged in the discharge of the alleged liabilities. The evidence further shows that the Bank consolidated the various loan facilities into a single account for purposes of recovery and consistently treated Githuthu as the borrower. Indeed, DW1 confirmed during his testimony that the consolidation was premised on the understanding that "the borrower is one for purposes of liquidation".
29. The Bank cannot be permitted to approbate and reprobate by engaging and dealing directly with Githuthu over a prolonged period in relation to the loan facilities and securities, only to later deny his standing in the very transactions it consistently treated him as central to. Having acknowledged him as the borrower, negotiated repayment terms with him, and pursued recovery against him, the Bank is estopped from now disavowing his locus standi in an attempt to shield itself from accountability.
30. The fact that some of the securities were registered in the name of a corporate entity does not preclude him from asserting rights or mounting a challenge in respect of those properties under the circumstances. I therefore find that Githuthu has established a sufficient and legitimate interest in the subject matter and has the necessary locus standi to bring this suit.

Allegations of Fraud by Githuthu:

31. Githuthu's claim against the defendants is grounded on allegations of fraud. It is trite law that fraud, being a quasi-criminal allegation, must be pleaded with particularity and proved to a standard higher than the ordinary balance of probabilities. In *Vijay Morjaria v Nansingh Madhusingh Darbar & Another*, [2000] eKLR, the Court emphasized the principle as follows:
- "It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."
32. Githuthu pleads fraud in the Bank's failure to act in good faith, including failure to furnish him with regular or any statements of account or credit/debit advices; charging exorbitant, excessive, and unconscionable interest rates; and unilaterally holding him liable for funds allegedly disbursed to Ajay.
33. Additional allegations include KDIC's threats to advertise and sell his property in a manner alleged to be unreasonable and oppressive, the purported exercise of the statutory power of sale in bad faith, and the continued demand for interest after the Bank had been placed under liquidation, conduct which he asserts is contrary to Section 35(6) of the *Banking Act* and Section 83 of the Companies and Insolvency Regulations.



34. Githuthu further alleges that the loan agreements were entered into under duress, exerted by Ajay, who was then the Executive Chairman and a director of the Bank.
35. In response, KDIC contends that Githuthu cannot benefit from equitable relief where his own cause of action is tainted with illegality, submitting that he voluntarily participated in the very conduct he now impugns.
36. The principle that a court will not enforce an illegal contract is well established. However, there exists an exception where the plaintiff alleges more than mere illegality, such as duress or undue influence. In *Nathalal Raghavji Lakhani v H.J. Vaitha & Another* [1965] EA 452, the Court of Appeal held:

“... a plaintiff is not entitled to relief in a court of equity on the ground of illegality of his own conduct. In order to obtain relief, he must prove not only that the transaction was illegal, but something more: he must prove either pressure or undue influence...”
37. In the present case, Githuthu did not tender any credible or cogent evidence demonstrating that Ajay exercised coercion or undue influence over him. Nor is there any evidence to suggest that the Bank was aware of or complicit in any alleged misconduct by Ajay.
38. He also confirmed that he signed the Charge documents voluntarily and that there existed agreements between himself and Ajay regarding how the facilities would be serviced. No evidence was produced to demonstrate coercion or misrepresentation. In any event, Githuthu was categorical that any such alleged misconduct was attributable to Ajay and not to the Bank.
39. In light of the foregoing, I find that Githuthu has not established any acts of duress against either the 1st or 2nd defendant. I will deal with the aspect of fraud later in my analysis of the facts and evidence.

The Charges Over the Nyeri Properties:

40. It is not disputed that the Nyeri properties remain charged in favour of the Bank, a fact acknowledged by all parties. Githuthu, now seeks to restrain the Bank from exercising its statutory power of sale over the said properties.
41. With respect to the first facility secured by a Charge over L.R. No. Nyeri Municipality Block 111/20, I have reviewed the statements for loan account number 0003115. The statement confirms that the amount of Kshs. 3,000,000/= was disbursed on 3rd October 1994 to Githuthu. He contends that he subsequently made a payment of Kshs. 25,348,171.25 on 31st December 1996 towards settlement of the loan, the funds having originated from the partial proceeds of a Kshs. 50,000,000/= property sale. He avers that after the credit was applied to accrued interest, only a balance of Kshs. 672,293/= remained, which he did not receive as it too was applied to settle outstanding interest.
42. Indeed, the final entry on the statement produced by Githuthu, located at page 123 of his bundle, shows that as at 31st December 1996, the loan account had a zero balance. The Bank, however, disputes the nature of the entry of Kshs. 25,348,171.25, denying that it constituted a credit toward the outstanding loan. It maintains that the amount was merely a transfer from its Kimathi Branch to its headquarters. The Statement of Account for the same loan account, as presented by the Bank and running up to 29th August 1997, supports this assertion. Ultimately, the Bank's statement reflects that as at 29th August 1997, Githuthu was in default in the sum of Kshs. 39,579,707.60.
43. In this regard, Section 176 of the *Evidence Act* provides that a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transaction and accounts therein recorded. A duly certified bank statement, therefore, enjoys a presumption of



authenticity and accuracy unless its veracity is credibly challenged. Accordingly, in the absence of cogent evidence to the contrary, the Bank's certified statement of account must be taken as a true reflection of the status of the loan account as at 29th August 1997.

44. From the testimony presented, this figure represents the outstanding liability on the consolidated loan account. The Bank has confirmed that all three facilities were indeed consolidated. This would account for the existence of only one loan account, for which a statement has been produced. None of the parties has produced or alluded to any other loan account or statement.
45. It is also evident that both Githuthu and the Bank were aware of this mutual understanding. Support for this position is found in a letter dated 15th March 1995, found at page 90 of Githuthu's bundle, which further reflects Githuthu's express intention to treat the borrowings as a single obligation. The relevant portion of the letter reads as follows:
- “Although we had agreed to repay this loan earlier and separately, we would now propose to repay it together with the current loan being advanced to Batian Grand Hotel Ltd after the sale of the property or if funds are received from other sources.”
46. The consolidation of the facilities further explains the consistent reference in the parties' correspondence to the proposed sale of the Lavington property by private treaty, with the understanding that the proceeds would be applied to the loan account. The repeated reference to a single “loan account” in the course of the parties' dealings and written communications supports the conclusion that both parties treated the borrowings as consolidated and acted accordingly over time. It is therefore inconsistent and untenable for Githuthu to now resile from that position in an attempt to challenge the consolidation.
47. A further issue in dispute is whether the Bank agreed that the sum of Kshs. 10,000,000/=, being the proceeds from the sale of the Lavington property, would constitute full and final settlement of the debt. This issue is addressed by the evidence on record.
48. It is not in dispute that the Lavington property was sold for the sum of Kshs. 10,000,000/=. However, the evidence on record demonstrates that, despite numerous letters from Githuthu raising the issue, the Bank remained non-committal on whether the said amount would constitute full and final settlement of the outstanding loan. Notably, in its letter dated 12th August 2003, the Bank stated in part:
- “We refer to the previous correspondence on the above matter and wish to confirm that we have no objection to your selling the above property for Kshs. 10 million which is the open market value as per Ms Highland Valuers valuation report dated 30th January 2002, provided the total sale proceeds go towards redeeming your account with us.” (emphasis added)
49. According to Black's Law Dictionary (11th Ed), the term “redemption” refers to “the payment of a defaulted mortgage debt by a borrower who does not want to lose the property”. It is therefore apparent that the Bank's deliberate use of the term “redeeming” the account signified that the proceeds were to be applied in reduction of the outstanding debt, but not necessarily in full satisfaction of the entire obligation. Had it been the Bank's intention that the sum of Kshs. 10,000,000/= would discharge the debt in full, it would have expressly and unambiguously communicated that position. I therefore find that there was no consensus or binding agreement between the parties that the said amount would constitute full and final settlement of the outstanding debt. This ground therefore fails.



50. This brings me to the final issue under this heading. Githuthu contends that although the second security was duly perfected, the funds secured thereby, namely, the facility of Kshs. 15,000,000/= to Batian Grand Hotel and the overdraft facility of Kshs. 30,000,000/=, were neither disbursed nor utilized.
51. In support of his claim, Githuthu relied on the loan statement produced by himself and the Bank. Upon careful scrutiny, I agree with his position that indeed, there is no indication therein of the specific disbursement of the amounts alleged. Once this assertion was raised, the evidential burden shifted to the Bank to demonstrate that the sum of Kshs. 15,000,000/= had in fact been disbursed and that the overdraft facility of Kshs. 30,000,000/= had been drawn down. No such evidence was tendered, despite it being undisputed that the underlying property had been charged as security in respect of the facilities.
52. The most plausible explanation for the irregularities surrounding the disbursement of the funds, an explanation which Githuthu himself concedes, is that the monies secured by the second charge were, in fact, advanced to a third party, one Ajay, who was neither a party to the loan agreement nor privy to the security arrangements. This admission significantly weakens Githuthu's position, particularly his assertion that he had no knowledge of, or involvement in, the transaction's improprieties.
53. In the ordinary course of banking and commercial transactions, it is inconceivable that a borrower would execute a charge over valuable immovable property to secure substantial financial facilities, fail to receive the funds, and yet remain silent. It defies logic and common business sense that a party would relinquish proprietary rights to secure obligations for which he receives no benefit and make no immediate or contemporaneous inquiry, demand, or objection.
54. Significantly, Githuthu has not produced a single letter, email, or formal communication addressed to the Bank protesting the alleged non-disbursement of the funds. The absence of any such contemporaneous protest or objection raises serious doubt as to the credibility of his claim. At the very least, it suggests passive acquiescence; at worst, it points to active participation in a transaction that may have been deliberately structured to circumvent standard banking procedures, potentially for an improper or fraudulent purpose.
55. This is further evidenced by his testimony during cross-examination, where he expressly acknowledged that his property was used as security by Ajay for purposes of covering himself in an audit by CBK. He stated:
- “The security was meant to show that the debt was secured. The purpose of the charge was to cover the requirement of CBK and fulfil the need for temporary security due to the CBK audit... Ajay Shah told me that his reason for creating the security was for CBK purposes.”
56. He further admitted that they had agreed Ajay would ultimately settle the facilities for which security was registered. However, the anticipated funds the payment did not materialize.
57. In light of this, the Court must infer that Githuthu was not an innocent or uninformed party but one who knowingly participated in a scheme to secure financing for another party using his own property, and who now seeks to disavow the transaction only after its consequences have become adverse to him.
58. As was aptly stated by Lord Mansfield CJ in *Holman v Johnson*, [1775–1802] All ER 98 at 99:
- “No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act... The court says he has no right to be assisted—not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.”



59. Guided by this principle, and upon a consideration of the totality of the evidence, Githuthu cannot invoke the equitable jurisdiction of this Court to shield himself from the consequences of an illegitimate arrangement. Equity does not aid a party who comes to court with unclean hands. Accordingly, he is not entitled to any relief from this Court with respect to the suit properties and in any case, the Court has made a finding as to his outstanding liability to the Bank.

Rendering of Accounts by the Bank:

60. KIDC produced in its bundle of documents, bank statements for account number 0003115-0060, covering the period from 21st December 1995 to 29th August 1997 (pages 1-3 of the 1st defendant's documents). However, during cross-examination, DW1 candidly admitted that the statements do not indicate the date on which the loan became non-performing, nor do they specify the applicable interest rates over the relevant period, contrary to what is ordinarily required for a proper and complete account.

61. In the circumstances, I find that Githuthu's prayer for a true and accurate statement of account, disclosing all debits and the specific interest rates applied from inception of the facilities is well founded and merited.

Analysis and Determination of KDIC's Counterclaim:

62. By way of counterclaim, KDIC contends that the Bank extended banking facilities to Githuthu, which were secured by the suit properties. It asserts that Githuthu defaulted on the loan obligations. Accordingly, KDIC seeks judgment against him in the sum of Kshs. 69,531,680.80 as at 31st May 1999, together with interest at the rate of 21% per annum, subject to variation, in addition to general damages and costs. The counterclaim is defended on pretty much the same grounds as detailed in the suit.

63. Having already found that Githuthu was indebted to KDIC in the sum of Kshs. 39,579,707.60 as at 29th August 1997, and further having held that the Lavington property was sold, by agreement, for the purpose of redeeming the loan account, the remaining question is whether KDIC is entitled to the sum of Kshs. 69,531,680.80 as claimed in the counterclaim, being the alleged outstanding amount as at 31st May 1999. I do not think so. The loan statements produced in evidence clearly reflect the outstanding amount as at 29th August 1997. The figure now claimed is not supported by any subsequent or supplementary statements of account. In the absence of such documentation, the claim for the higher amount remains unsubstantiated.

64. Furthermore, Githuthu challenges the basis for the interest claimed. Crucially, the statements relied upon by KIDC do not indicate the date on which the loan became non-performing, nor the applicable interest rates at various stages of the loan period, thereby weakening the case for an award of interest. DW1 acknowledged in cross examination that:

“The records of the date when the loan became non-performing and records of interest charged are not part of the record. We have not complied with the ruling [of Mutava] dated 22nd November 2012.”

65. In *Margaret Njeri Muiruri v Bank of Baroda (K) Ltd*, [2014] eKLR, the Court of Appeal emphasized the duty of financial institutions to furnish clear, accurate, and comprehensive statements of account, particularly in cases where interest is contested. This includes disclosing the applicable rates of interest and the methodology used in computing such interest.



66. In the absence of such material particulars, KDIC's claim for interest remains unsupported. It is settled law that the amount recoverable by a lender on a non-performing loan should not exceed the principal outstanding as at the date of default. Any claim for interest must therefore be strictly proved, both in terms of contractual basis and quantum.
67. With regard to the proceeds of sale from the Lavington property, while there was no agreement that the sum of Kshs. 10,000,000/= would constitute full and final settlement of the outstanding liability, it is nevertheless evident that the funds were intended to be applied towards the repayment of the loan facilities. Notably, KDIC's own witness (DW1) admitted during cross-examination that the said amount, realised from the sale of the Lavington property, was not credited to the plaintiff's account, and no corresponding entry appears in the loan statements produced before the Court. This omission remains unexplained, despite the undisputed fact that the sale was undertaken by KDIC and the proceeds were received.
68. In the absence of any justification for failing to apply the sale proceeds to Githuthu's account, the Court cannot countenance a scenario in which KDIC realizes a charged property and fails to reflect the resulting credit in the borrower's account. To allow this would be to unjustly enrich them and subject the plaintiff to double recovery. While Githuthu has not proved that the Kshs. 10,000,000/- was accepted in full and final settlement, he has sufficiently established that the amount should have been credited to the loan account, a fact that KDIC has not disputed.
69. I therefore find that Githuthu remains liable to repay the balance of the loan as substantiated, which is Kshs. 39,579,707.60 but is entitled, as a matter of equity and accounting fairness, to a credit of Kshs. 10,000,000/- against the principal sum.
70. KDIC has also claimed general damages. However, it is well-established that general damages are not recoverable in cases of breach of contract, as contractual remedies are confined to what was within the contemplation of the parties at the time of contracting. (See *Dharamshi v Karsan*, [1974] EA). In the absence of any special circumstances warranting such an award, the claim for general damages lacks legal foundation and is accordingly dismissed.

Conclusion and Final Orders

71. In view of the foregoing, the plaintiff's suit partially succeeds. The following orders are issued:
- i. The 1st defendant shall render to the plaintiff a true and accurate statement of account within forty-five (45) days from the date of this judgment, showing amongst others, the applicable interest rates at each period, the date when the loan became non-performing and the total interest charged after the loan became non-performing.
 - ii. In default of compliance with order (i) above, the plaintiff shall stand discharged from any further claim for interest by the 1st defendant.
 - iii. The other prayers in the plaint are hereby dismissed.
 - iv. The 1st defendant's counterclaim is partially successful to the extent that judgment is entered for the 1st defendant against the plaintiff in the sum of Kshs. 29,579,707.60, to be liquidated as follows:
 - a. The proceeds of sale of the charged securities shall first be applied towards the outstanding sum;



- b. The plaintiff shall be liable to pay any balance remaining after the application of the sale proceeds.
- v. As both parties have partially succeeded in their claims, each party shall bear their own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF MAY 2025.

F. MUGAMBI

JUDGE

