Criticos v National Bank of Kenya Limited (as the successor in business to Kenya National Capital Corporation Limited "Kenyac") & another (Appeal 80 of 2017) [2022] KECA 870 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 870 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

APPEAL 80 OF 2017

RN NAMBUYE, W KARANJA & PO KIAGE, JJA

APRIL 28, 2022

BETWEEN

BASIL CRITICOS ..... APPELLANT

AND

NATIONAL BANK OF KENYA LIMITED (AS THE SUCCESSOR IN BUSINESS TO KENYA NATIONAL CAPITAL CORPORATION LIMITED "KENYAC") ..... 1ST RESPONDENT

KENYA NATIONAL CAPITAL CORPORATION . ..... 2ND RESPONDENT

(Appeal against the Judgment of the High Court of Kenya at Nairobi (Kariuki, J.) and delivered by (Sewe, J.), dated 10th February, 2017 in MCC Civil Suit No. 757 of 2009)

JUDGMENT

1. By this appeal, the appellant Basil Criticos, who was the plaintiff in Milimani Commercial Court Civil Suit No. 757 of 2009, challenges the judgment and orders of Kariuki, J. by which his claims as articulated in the suit were dismissed.

2. The appellant had sought a number of reliefs in the suit including;

   (a) A declaration that the plaintiff is discharged and released from all liability under the legal charge dated 29th January, 1991 and guarantee dated 22nd January, 1991;

   (b) A declaration that the defendants did not have any legal right to exercise the statutory power of sale in respect of the L.R No. 5865/2 and that the agreement for sale and transfer dated 5th September 2007 were executed in contempt of the injunctive orders issued in Milimani HCCC No. 270 of 2007 Amos Mutuki Mutungi & Anor. v Basil Criticos, Agro Development Company Ltd, National Bank of Kenya Limited and the Registrar of Titles

and Milimani HCCC No. 108 of 2006 Agro Development Company Ltd & Basil Criticos v National Bank of Kenya Limited;

(c) A declaration that the sale of L.R No. 5865/2 for the sum of Ksh. 55,000,000 to the 2nd defendant was at a gross under value;

(d) A mandatory injunction compelling the defendants to pay to the plaintiff the sum of Ksh. 55,000,000 or in the alternative pay the sum of Ksh. 35,000,000 being the surplus realised from the sale of L.R No. 5865/2 and upon payment credit be given for this amount in the final computation of damages in the event that the amount or any part thereof is paid before the final assessment of damages;

(e) Damages for Ksh. 3,028, 890,000 or such sum as may be found lawfully due for the unauthorised, improper and irregular power of sale to be assessed at the market value of the property L.R No. 5865/2 together with interest at court rates thereon from the date when the property was wrongfully sold by private treaty on 5th September 2007 until payment in full."

3. A brief background to the suit is that in the year 1991, a limited liability company called Agro Development Company (the borrower) in which the appellant was a director and shareholder, borrowed the sum of Ksh. 20,000,000 from Kenya National Capital Corporation Limited (KENYAC) with interest at the rate of 19% per annum, and with discretion to the bank to vary the rate of interest. The appellant in his capacity as guarantor executed a legal charge dated 29th January, 1991 in favour of KENYAC over a property owned by him and Her Excellency Mama Ngina Kenyatta as tenants in common. Liability however lay exclusively with the appellant. The property comprised a massive 15,994.5 acres or thereabouts.

4. According to the legal charge, the chargor would pay KENYAC the mortgage debt by 54 consecutive instalments, with the first instalment being paid from the date of drawdown, provided that a late payment charge at the rate of 1% would be levied from the date of default. The appellant also executed a guarantee dated 22nd January, 1991 in favour of KENYAC, in the sum of Ksh. 20 million together with interest and other charges, in consideration of the bank granting credit to the borrower.

5. The borrower defaulted in making payment and the bank issued demand notices; one dated 24th April, 1997 to the borrower; two dated 16th April, 1997 and 24th April, 1997 respectively, to the appellant; and another dated 24th April, 1997 to a third party. The demand notices were in respect of a debt of Ksh. 66,477,929, together with interest, which continued to accrue at the rate of 35% per month.

6. The appellant complained that the statutory demand notices were never issued to him but instead they were issued to the borrower who was not the owner of the charged property. Further, the respondents sold the charged property, L.R No. 5865/2, illegally in contravention of injunctive court orders. The appellant contended that he had made several attempts to redeem the charged property but the same was rejected.

7. The respondents denied the appellant's claims, arguing that since February 1996 when the loan was supposed to have been repaid in full, they had been faced with multiple injunction applications by the appellant and the borrower, which in effect considerably delayed recovery of the loan and escalated the debt on application of interest. They asserted that upon the sale of the security in 2007, they remained with a large unsettled balance from the borrower in the sum of Ksh. 106,636,945 as at February 2009. Through Milimani HCCC No. 132 of 2009, they sued the principal debtor for the outstanding sum, and the appellant for the sum guaranteed under the independent deed of guarantee.

8. The judgment of the High Court aggrieved the appellant and, after filing a notice of appeal, he followed it up with a memorandum of appeal containing a prolix 25 grounds, which he condensed in his submissions to 7 grounds. The appellant complained that the learned Judge erred by failing to;

> Evaluate and consider the evidence on record by Justices Kimondo and Gikonyo, and the plaintiff's submissions.
>
> Find that the plaintiff's liability as guarantor was limited to Ksh. 20 Million in HCCC No. 132 of 2009, National Bank of Kenya Ltd v Agro Development Co. Ltd & Others, and his liability was discharged.
>
> Find that the bank failed to account for the sale proceeds and refund the surplus to the plaintiff.
>
> Find that the bank was in contempt because injunctive orders were in force at the time the charged property was sold by private treaty.
>
> Find that the bank breached the duty of care, acted in bad faith and was liable to compensate the plaintiff for all losses suffered.
>
> Evaluate expert testimony and the consequence of lack of rebuttal of evidence.
>
> Award costs in favour of the defendants in HCCC 132 of 2009 National Bank of Kenya Ltd v Agro Development Company Ltd & 2 others after striking out the suit for being incompetent.

9. In consequence, the appellant prayed that; the learned Judge's judgment and order be set aside, this appeal be allowed with costs, and he be awarded costs in Milimani HCCC No. 132 of 2009.

10. Conversely, the respondents filed a notice of cross-appeal dated 18th April, 2017 seeking a variation of the High Court decision on grounds that the learned Judge erred by;

> Holding that the respondent had no locus standi to institute a counterclaim in Milimani HCCC No. 132 of 2009 in recovery of the principal debt and the guaranteed sum.
>
> Holding that the consolidated suit, Milimani HCCC No. 1420 of 1997 was abandoned and spent.
>
> Wrongly exercising his discretion not to grant costs of the dismissed suit to the respondents.

11. In the end, the respondents prayed that; dismissal of the counterclaim in Milimani HCCC No. 132 of 2009 be set aside, judgment be entered for it as prayed in that suit; or, in the alternative, as prayed in Milimani HCCC No. 1420 of 1997; and costs of the suit in the High Court and this Court together with interest at court rates.

12. The parties filed written submissions which were highlighted by counsel at the hearing of the appeal.

13. For the appellant, learned counsel Mr. Gachuhi submitted that the dispute was about severe economic loss suffered by the appellant who had guaranteed the borrower to the tune of Ksh. 20 million only. Counsel faulted the learned Judge for failing to consider and evaluate the evidence on record, specifically, the evidence of Yakub Hussein to the effect that he joined the appellant in a joint venture and planted new sisal over 1,200 acres consisting of 4,560,000 plants whose value, at USD 1 per plant, came to about USD 4,560,000. The sisal was to mature in 2009. He also blamed the Judge for failing to consider that the bank frustrated the appellant by declining to accept his redemption offer of Ksh. 63 million even when evidence of availability of funds was given.

14. Counsel criticised the trial court for failing to find that the appellant's liability could not be the same as that of the borrower, and thus he was not liable for the outstanding balances claimed from the principal

borrower. To illustrate the extent of a contract of guarantee, the appellant referred to an excerpt from *The Law of Guarantees* Geraldine Andrews & Richard Millet 2nd Edition at page 156 as cited by Waki, Nambuye and Maraga JJ.A in *LALJI KARSAN RABADIA & 2 OTHERS VS COMMERCIAL BANK OF AFRICA* [2015] eKLR, where it was stated;

> A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the creditor upon the happening of a contingency, namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependent upon the default of the principal and which does not arise until that point".

15. To buttress the argument that a guarantor's liability is only limited to the guaranteed amount and not the entire debt, the appellant cited the persuasive decision in *RAJNIKANTKHETSHI SHAH VS HABIB BANK A.G ZURICH* [2016] eKLR, where the High Court expressed itself as follows;

> 28. [...] However, the twinning of the guarantor and the principal debtor is usually problematic especially where the principal debtor is a corporate entity with limited liability and which in law is separate from its directors and shareholder. More trouble arises where the guaranteed sum is of a specific sum and the principal debt is for a larger sum. In such situation, the law is that, unless otherwise provided, where a guarantee limits the guarantor's liability to a fixed sum, the guarantors will be liable to the extent of the guarantee only and not to the entire debt of the principal debtor. This is due to the nature of guarantee whose terms are normally interpreted strictly. Therefore, in such case it will not make any legal sense to merge the principal debtor and the guarantor into one person or merge the guarantee with the borrower's contract of the debt. The guarantee is quite separate from the principal debtor's contract for the debt and it is desirable they are kept separate. In the case before me, the guarantee was given in form of a Legal Charge and was for a fixed amount of money Kshs. 5,000,000 together with interest. As such, whether the chargor is a guarantor, or both guarantor and principal debtor, his liability is to sum fixed in the Charge".

16. Notably, the above decision was overturned on appeal to the effect that the plaintiff was ordered to pay the loan guaranteed. However, the scope of a guarantor's liability as described remained unchallenged.

17. To counsel, the appellant's liability as guarantor was limited to Ksh. 20 million, and he was discharged from the same after the charged property was sold for Ksh. 55 million. In support of this argument counsel cited *GURBUX SINGH BHOGAL VS FINA BANK LIMITED & 3 OTHERS* [2016] eKLR, where this Court stated;

> We cite with approval the learned authors' views in "The Law of Guarantees" by Geraldine Andrews & Richard Miller, 3rd Edition or para 9.01 on page 274 where they state;
>
> > Since the purpose of a guarantee is to secure the performance of the principal's obligations towards the creditor, the surety will be discharged from his liability under the guarantee if the principal pays the debt or performs an obligation which the surety has guaranteed...payment of the principal debt by the principal will discharge the surety".

18. It was further contended that the appellant was also discharged from liability as guarantor through the inequitable conduct of KENYAC by selling the charged property by private treaty during the pendency of the status quo court orders.

19. Counsel took issue with the learned Judge's disregard of the fact that there was no basis for the bank imposing an interest rate of 35% per month which amounted to 420% per annum, when there was no provision for interest to be computed monthly. He contended that the bank having sold the suit property at Ksh. 55 million, it had a statutory duty to account and pay to the appellant the surplus of Ksh. 35 million with interest from the date when the purchase price was paid in full. Reference was made to *HOUSING FINANCE CORPORATION OF KENYA VS J.N WAFUBWA* [2014] eKLR and section 69C of the *Transfer of Property Act [repealed]*, for the argument that the residue of the money received by a mortgagee arising from a sale under a statutory power of sale should be remitted to the owner of the mortgaged property.

20. Next, it was asserted that the charged property was sold during the pendency of court injunctive orders, and the trial court was wrong in dismissing this claim on grounds that; the appellant had failed to commence contempt proceedings and there was no proof of service of the orders upon the respondents. Since the bank's counsel was present when the orders were issued, it was argued, there was no need for service. Moreover, the sale of the charged property at Ksh. 55 million, comprising of 15,994.5 acres with all the developments on it including the sisal cultivation, was an extreme gross under value. Jhe judge was chastised for dismissing the plea for loss of future income or loss of profits arising from sisal sales in the face of uncontroverted evidence proving loss. Consequently, placing reliance on a number of decisions, Mr. Gachuhi contended that the learned Judge ought to have awarded the appellant damages.

21. Next, the learned Judge was faulted for failing to consider the evidence of the appellant's valuer, Mr. Mwaka Musau and his valuation report which proved that the suit property was sold at a gross undersale. The report gives a breakdown of a claim for Ksh.3,028,890,000. It was urged that the evidence of Mr. Mwaka Musau remained uncontroverted because the respondent did not do a valuation in 2010 to counter the figures therein. Maintaining that an expert report can only be rebutted by another expert report, counsel cited *STEPHEN KININI WANG'ONDU VS THE ARK LIMITED* [2016] eKLR, where the High Court laid out the criteria that a court ought to use in weighing the probative value of expert evidence, namely;

> While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. [Huntley (also known as Hopkins) (a protected party by his litigation friend, McClure) v. Simmons [2010] E.W.C.A. Civ 54]. Four consequences flow from this.
>
> Firstly, expert evidence does not "trump all other evidence". [Abringer v Ashton {1873} 17 LR Eq 358 at 374]. It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision. [Evan Bell, Judicial Assessment of Expert Evidence, Judicial Studies Institute Journal, 2010 Page 55]
>
> Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing. [Jakto Transport Ltd. v. Derek Hall [2005] E.W.C.A Civ. 1327]
>
> A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will

assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones. [Jakto Transport Ltd. v. Derek Hall [2005] E.W.C.A Civ. 1327]

A further criteria for assessing an expert's evidence focuses on the quality of the expert's reasoning. A court should examine each expert's testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In Routestone Ltd. v. Minories Finance Ltd. and Another [Same v. Bird and others [1997] B.C.C. 180] Jacob J. observed that what really mattered in most cases was the reasons given for an expert's opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented "[i]f the reasons stand up the opinion does, if not, not." A court should not therefore allow an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion. Where there is a conflict between experts on a fundamental point, it is the court's task to justify its preference for one over the other by an analysis of the underlying material and of their reasoning".(Emphasis given)

22. Further, it was urged, in exercising the power of sale, a chargee is under a duty to act in good faith and to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it. For this proposition reliance was placed on *MBUTHIA -VS- JIMBA CREDIT FINANCE CORPORATION & ANOTHER* [1988] eKLR where this Court had recourse to the dicta of Lord Denning M.R in *STANDARD CHARTERED BANK -VS- WALKER* [1982] 3 ALL ER 938.

23. In opposition to the cross-appeal, it was submitted that the appellant should have been awarded costs upon dismissal of the suit. The trial court's finding that there was no privity of contract between National Bank of Kenya and the appellant was affirmed as proper. Counsel resisted the respondents' alternative prayer that judgment be entered in Milimani HCCC No. 1420 of 1997, arguing that the respondents having elected to proceed with Milimani HCCC No. 132 of 2009, the alternative failed. To counsel, the counterclaim in HCCC No. 1420 of 1997 also failed for not distinguishing between the lawful amounts owed by the borrower and by the guarantor. Further, no evidence was adduced by the bank to prove how the claim of Ksh. 70,538,997.70 was arrived at. Ultimately, counsel urged that the cross-appeal be dismissed with costs.

24. Resisting the appeal, learned counsel Ms. Matunda submitted that the legal charge and the guarantee executed by the appellant are separate securities. Whereas the appellant executed a personal guarantee for Ksh.20 million, clause 12 of the charge incorporated a personal indemnity by the appellant to take full responsibility for payment of the entire mortgage debt. According to counsel, therefore, the two contracts entitled the respondents to recover the entire debt from the appellant. Concerning the appellant's assertion that the respondents frustrated his equity of redemption, counsel affirmed the trial court's finding on that issue as correct. The court found that the respondents were not bound by the plaintiff's offers and counter-offers as they were below the outstanding debt, which was over Ksh. 160 million. Further, whereas the appellant offered 60 million to fully discharge the land and guarantees, the respondents wanted Ksh. 80 million to be applied to discharge all obligations.

25. With respect to the claim that the charged property was sold in contempt of court orders, Ms. Matunda agreed with the trial court's determination in the matter to the effect that there was no proof that there was contempt of court, or that the sale was illegal. The trial court also determined that the injunction issued by the High Court on 20th August 1997 was reversed by the Court of Appeal in Nairobi Civil Appeal No. 242 of 1997. Counsel also contended that HCCC No. 270 of 2007 was unconnected with the statutory power of sale as the parties, the subject and the nature of reliefs therein were different.

26. On the claim for refund of the alleged surplus of Ksh. 35 million, counsel urged this Court to uphold the finding of the trial court to the effect that the appellant had not been discharged as the borrower was still owing Ksh. 106 million and counting, and therefore he could not validly claim to be entitled to a surplus of Ksh. 35 million. Concerning the validity of the sale of the suit property, counsel submitted that it was common ground that there was default in the payment of the loan, resulting in clause 7 of the charge setting in, as held by the learned Judge. The clause provided that the chargee's statutory power of sale became exercisable without any further notice to the charger upon occurrence of some events, including but not limited to breach of any of the covenants and agreements. To counsel, since there had been a substantial exchange of correspondence concerning default from 1991 to 2007, the sale was valid.

27. Ms. Matunda next countered the claim that the appellant had not been served with the statutory notice, submitting that receipt of service had been admitted in pleadings in HCCC No. 108 of 2006 and HCCC No. 1420 of 1997. Regarding the contention that the suit property was sold at an undervalue, it was asserted that the property was valued by at least 4 different valuers on different occasions. In particular, on 11th September 2006, before the sale and at the request of the appellant and respondent, a government valuer assessed the property at Ksh. 55 million. Counsel contested the appellant's reliance on the valuation conducted by Mr. Mwaka Musau at his request, arguing that it was conducted 3 years after the sale, on 9th January 2010, and it gave large values for non-existent items.

28. The valuation rated the property to be worth Ksh. 3,028,890,000. In the view of counsel, it was not necessary for the respondents to conduct a new valuation in 2010 to contradict that of the appellant's valuer as what was required by law was for them to demonstrate that before the sale in 2007, a current valuation was undertaken to ensure that the price attained was reasonable.

28. With respect to the counterclaim, it was submitted for the respondent that the trial court's finding that the 1st respondent had no locus standi to institute a claim under the personal guarantee on behalf of the second respondent, was erroneous. The reasons were that the 2nd respondent was a direct party to the suit in the High Court, and the pleadings in HCCC No. 132 of 2009 disclosed that the 1st respondent instituted the claim on behalf of the 2nd respondent, KENYAC, having been taken over by National Bank of Kenya. In the end, counsel urged us to dismiss the appeal with costs, and allow the cross-appeal.

29. In reply to those submissions, Mr. Gachuhi maintained that the appellant's liability was limited to Ksh. 20 million and not Ksh.106 million, asserting that the respondents had not countered any of the authorities he had cited.

30. We have given due consideration to the arguments made and authorities cited, and carefully analysed the entire record before us, bearing in mind the mandate of this Court under Rule 29(1) of the Rules of this Court, and consistent with a long line of authorities on the duty of a first appellate court. In our view the following germane issues arise;

    a) What is the nature and extent of the appellant's liability under the charge and the guarantee?

    b) Was the sale of the charged property illegal by virtue of existence of injunctive court orders?

c) Was the suit property sold at an undervalue?

d) Was the appellant entitled to an award of damages for loss of income/profits?

e) Was the appellant entitled to costs in HCCC No. 132 of 2009?

f) Is the counter-claim valid?

31. Beginning with the question of the nature of liability of the appellant under the legal charge and the guarantee, the appellant insisted that his liability was limited to Ksh. 20 million as stipulated in the guarantee. The trial court evaluated this issue while highlighting the salient features of both the charge and the guarantee and made the following finding;

> The court therefore makes a finding that the guarantee constituted a separate security in addition to others held by KENYAC. The lender had a right to any amounts held to the credit of the plaintiff as long as the principal debt remained unpaid. Any variation in the disbursement of the loan to the Principal debtor or indulgences granted from time to time was not to affect the guarantee. The guarantee was not to be affected by the change in constitution of KENYAC. The court is bound to go by the contents of the terms of the charge and the guarantee".

32. To the trial court therefore, the liability of the appellant under the legal charge was separate from that held under the guarantee. To appreciate the depth of the relevant provisions of both contracts we deem it fit to rehash them herein below, starting with the charge;

> "12. It having formed part of the terms upon which the Chargee agreed to advance to the Borrower the mortgage debt that Basil Criticos should offer an irrevocable and continuing personal guarantee for the payment of the mortgage debt, interest, costs and other moneys hereby secured; Basil Criticos in consideration of such agreement hereby covenants with the Chargee that if and... [not legible] debt or any part thereof, interest or instalment of mortgage debt interest or costs and other monies due to the Chargee under the provisions of this Charge, Basil Criticos shall pay the amount thereof to the Chargee at the expiration of seven (7) days after demand in writing thereof shall have been served upon the Borrower and if amount is not then fully paid, will pay interest thereon at the rate specified hereinabove until payment in full and that neither the giving of time to the Borrower for the payment of the mortgage debt, interest costs and other moneys hereby secured nor the making of any further advance or advances nor any other indulgence which may be shown to the Borrower shall in any way release or discharge Basil Criticos's liability under the aforesaid foregoing covenant and rule of law or equity to the contrary notwithstanding". (Emphasis ours)

33. The guarantee on the other hand provided;

> "1. [...] we the undersigned hereby (jointly and severally if more than one) guarantee to you the due payment of and undertake on your demand in writing to pay to you, all sums including interest, which now are or may hereafter from time to time become owing to you by the Principal either solely or jointly with any others whether as Principal debtor or otherwise upon any account whatsoever...provided that our total liability under this guarantee shall not exceed the sum of Ksh. 20,000,000.....and interest thereon and other charges and expenses as aforesaid both before and after demand and so that interest and other charges and expenses as aforesaid shall be payable as well after as before any judgment obtained hereunder.

> 2. This guarantee shall be in addition to and shall not be affected by any one or more other securities or guarantees which you may now or hereafter hold from or on account of the Principal whether given by us or not and you are to be at liberty at any time and without reference to us to refuse further credit to the Principal...".

34. The interpretation that lends itself to us with regard to the above provisions in the context of the two legal instruments is that it is by way of guarantee that the appellant undertook to pay the loan amount together with interest, costs and any charges thereof upon the borrower defaulting. The same undertaking by the appellant was restated in the charge instrument. This deduction is further informed, and logically so, by the fact that the loan amount and the guaranteed amount was the same, that is, Ksh. 20 million. We find the decision in *RAJNIKANTKHETSHI SHAH* (supra) quite decisive it this regard, that is, unless otherwise provided, where a guarantee limits the guarantor's liability to a fixed sum, the guarantor will be liable to the extent of the guaranteed sum only and not the entire debt. Further, a guarantor's liability is secondary to that of the principal debtor. See *LALJI KARSAN RABADIA* (supra). Consequently, we hold the view that the appellant's liability rested with the guarantee only.

35. The question that then arises is, to what extent was the appellant liable? The statutory demand notices sent to the appellant in 1997 claimed Ksh. 66,477,929 at an interest rate of 35% per month. After sale of the suit property in 2007, and as at February 2009, the respondents were demanding from the borrower the sum of Ksh. 106,636,945. The appellant contends that there was no basis for the bank imposing an interest rate of 35% per month, which amounted to 420% per annum whereas there was no provision for interest to be computed monthly. The charge instrument provided for interest to be charged at 19% per annum, with a penalty of 1% to be levied on each late payment. While we note that the charge had a condition granting the respondents the exclusive right to vary the rate of interest at any time without advising the chargee, we find it unconscionable and morally wrong that the bank would raise the interest rate from 19% per annum to the impossibly high rate of 35% per month, amounting to 420% per annum! That was on the face of it grossly unfair. Indeed, as testified by the appellant, this compounded interest largely contributed to the heavy indebtness. In cross-examination the appellant agonised, "I adhered with terms for a few years until the rates went to over 35% and I was unable to cushion the difference". The situation was aggravated by the fact that the appellant made attempts to redeem the charged property but the same were declined by the respondents. We concur with this Court's reasoning in *PIUS KIMAIYO LANGAT - VS- CO-OPERATIVE BANK OF KENYA LIMITED* [2017] eKLR, [Per Waki, Makhandia & Ouko, JJ.A] which is worth citing in extenso;

> 42. The conduct of the bank as summed up above mirrors the conduct of another bank in the case of Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited [2014] eKLR. On the issue of charging interest, (increased from 14% to 45% in that case) this Court examined comparative jurisprudence and came to the conclusion that, even where a lending institution has a written clause permitting it
>
> 'in its sole discretion from time to time to charge different rates for different accounts and such interest to be calculated on daily balances and debited monthly by way of compound interest and together with commission, commitment charges, and other usual bank charges and other costs and expenses incurred or to be incurred by the Bank in relation to the customer', the discretion was not absolute. It cannot be exercised willy nilly to charge exorbitant interest. It was held:

"the discretion on the respondent in the present case was not completely unfettered, and applying those sentiments to the appeal now before us, we find it objectionable that the lender can vary interest to its benefit, without any recourse to or passing such information to the borrower, especially where such interest rises up to an exorbitant level. There does not appear to be any notice to the appellant in this case as to what the rate of interest would be. As stated earlier, the right or discretion given under the contract to vary interest was not unfettered and the contract must be construed reasonably. It must be shown or at least be self-evident that at the time the interest was being changed, it was brought to the attention of the borrower".

[...]

44. This Court has never shied away from interfering with unconscionable contracts. *In Kenya Commercial Finance Company Ltd vs Ngeny & Another [2002] 1KLR* it stated:

> "The court will not interfere where parties have contracted on arms-length basis. However, by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional terms upon the other party. Equity can intervene to relieve that party of such conditions".

45. Halsbury's Laws of England Volume 22 (2012) 5th Edition at Paragraph 298 states of unconscionability:

> "Even in the absence of duress of persons or undue influence, there has long been jurisdiction to interfere with harsh and unconscionable transactions in several different areas of the law: for instance, in respect of salvage agreements; or against contractual penalties, of forfeiture of mortgages, loans expectant extortionate or heirs. ... The jurisdiction of the courts to set aside is based on unconscientious conduct by the stronger party; relief will not be granted solely on the grounds that the transaction is unfair or improvident".

46. Finally on unconscionability, this Court in the Margaret Njeri Muiruri case (supra) stated:

> Courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to a procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case. (See Black's Law Dictionary, 9th Edition, Gardner, Ed.)"".

36. Being of the same opinion as restated above, we cannot possibly enforce the oppressive interest rates as claimed by the respondents. Nor should any court lend its support to such onerous, unconscionable and plainly usurious conduct by lenders.

37. Next is whether the sale was illegal by virtue of existence of injunctive court orders. The appellant claimed that there were court orders in various cases prohibiting the disposal of the suit property by

the respondents. The record bears court orders in Milimani HCCC 270 of 2007 issued on 24th July, 2007 for the status quo to be maintained until 17th October, 2007. On 5th November, 2007 interim orders were extended until 3rd December, 2007. On 19th February, 2008 interim orders were further extended. Whereas the defendants disputed the tenor of those orders, the trial court observed that the content of the interim orders was not known and neither was there evidence of their extraction and service. However, contrary to the court's finding, the orders indicate that counsel for the parties herein were present when the orders were issued. Accordingly, the respondents ought to and are deemed to have been aware of their nature. Besides, the parties herein were defendants in that matter. It appears to us, therefore, that the sale of the suit property that took place on 5th September, 2007 was in violation of valid court orders.

38. As to whether the suit property was sold at an undervalue, the appellant placed heavy reliance on the evidence of his valuer, Mr. Mwaka Musau. The respondents on the other had disputed that evidence, asserting that prior to the sale of the suit property in 2007, a valuation had been done by a government valuer, by which the property had been assessed at Ksh. 55 million and sold at the same price. The learned Judge analysed the valuer's evidence and observed;

> "The plaintiff testified and left the burden of prove of the amount pleaded on the valuer PW3 one Mwaka Musau who made valuation report on 9/1/10 for the purposes of the instant case. The component of the report entails the various values for buildings, land, sisal, quarry and road network cumulatively totalling to Ksh. 3,028,890,000".

39. The Judge upon citing some of the particularised components of Mr. Mwaka Musau's valuation report however, proceeded to state, "The pleaded damages were not proved to the standard required by law. They were literally thrown to court and the plaintiff sought to be granted the same". The learned Judge made this finding even after the valuer had testified in court and been cross-examined on the same. As we ponder about what the Judge meant by, "the pleaded damages were not proved to the standard required by law" we think the learned Judge fell into error in making such a finding, noting that he had earlier alluded to the detailed nature of that report. The report was elaborate, breaking down the various values of the land, buildings, sisal, quary and road network totalling Ksh. 3,028,890,000. Further, the credibility of the valuation report was subjected to the test in the cross-examination of Mr. Mwaka by the respondents. Significantly, the report was supported by photographic evidence indicating the developments on the suit land, that is, sisal plantations, farm buildings, water catchment region and quarry. The same is not demonstrated in the other valuation reports on record. There is also no substantive rebuttal of Mr. Musau's valuation report based on a similar valuation undertaken in the year 2010. As properly held in *STEPHEN KININI WANG'ONDU* (supra), expert evidence can only be challenged by another expert. We also associate ourselves with the criteria for assessing an expert's evidence as outlined in the same decision, rehashed herein below for emphasis.

> A further criteria for assessing an expert's evidence focuses on the quality of the expert's reasoning. A court should examine each expert's testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In Routestone Ltd. v. Minories Finance Ltd. and Another [Same v. Bird and others [1997] B.C.C. 180] Jacob J. observed that what really mattered in most cases was the reasons given for an expert's opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented "[i]f the reasons stand up the opinion does, if not, not."
>
> (Emphasis ours)

40. In the result, subject to what we shall shortly state with regard to the crops, we find the appellant's valuation report to be solid in content and uncontroverted. It was not to be merely wished away. And we are on balance persuaded by the appellant's contention that the suit property was sold at an undervalue.

41. In the circumstances, is the appellant entitled to an award of damages for the sale of the suit property at an undervalue and for loss of future profits? In addressing this question, we are guided by the recent decision of the Supreme Court in *ATTORNEY GENERAL -VS- ZINJ LIMITED* [2021] eKLR, where the apex Court upheld the trial court's reliance on the valuation report of a private valuer in assessing the quantum of special damages. The Court held;

> "30. Having determined that the respondent's right to property had been violated by the Government, the Trial Court, and later the Appellate Court, made orders for compensation in favour of the respondent. Both Courts granted special and general damages. As we have arrived at a similar conclusion, we see no reason to interfere with the findings of the two superior Courts in this regard. We take note of the appellant's submission to the effect that in arriving at the quantum of special damages, the Trial Court placed reliance upon a Valuation Report by a private valuer. Such Report, in the view of the appellant, was not only unreliable, but could very likely have been tailored to support the respondent's claim. However, in answer to this Court's question as to whether, the appellant had tabled in court, a Government Valuation Report to counter the contents of the impugned one, Counsel for the appellant stated that no such Report was ever tabled at the Trial Court. The main basis upon which special damages can be granted for the deprivation of property, is the market value of the said property. In case of general damages, a court of law exercises discretion guided by the circumstances of each case. In granting special damages, the Trial Judge was guided by the Valuation Report tabled by the respondent. In the absence of a contrary report on record, we have no basis upon which to interfere with the award. Even if there had been one such other report, our jurisdiction to interfere would still have been largely circumscribed, unless the award had clearly ignored the fundamental principles of valuation as demonstrated by the counter-report". (Emphasis ours)

42. Based on that authoritative pronouncement by the apex court, we find that the appellant having been deprived of his property under the circumstances we have addressed, he was entitled to the proven value of his property as special damages. These were required to be specifically pleaded and strictly proved. In the amended plaint the value of the property is indicated as Kshs.3,028,890,000. The foundation and proof of that sum is the report by Mweka Musau Consultants and it was testified to by its maker, E. M. Musau.

43. Having ourselves carefully considered and analysed the report together with the testimony of its maker, we observe that whereas it is fully detailed and contains clear workings on how the values of the various parts of the property in land and buildings, with their actual physical state described, it is not as detailed with regard to the crops. The report places the value of crops - the old and new sisal plantation at Kshs.768,000,000 and Kshs.614,000,000, respectively which would total Kshs.1,382,000,000. We think, however, and in line with the case law referred to in *STEPHEN KININI WANGONDU -VS- ARK LIMITED* (Supra), there is a deficit of justification especially considering that at p.39 the report states that "At the time of inspection all farming activities had ceased. Parts of the sisal plantation had been uprooted. (See photographs)."

44. The photographs do show remnants of a sisal crop same having evidently been uprooted. The appellant and his witness had testified that at the time of the sale the sisal plantation was full. Given that state

of the evidence, and being mindful that we are not inflexibly bound by an expert's opinion which we must consider alongside all the other evidence, we think that the value attached to the sisal crop should be discounted by 50%. In the result, we would reduce by Kshs. 691,000 to Kshs.2,537,890,000.

45. Recognizing further that the valuation by Mweke Musau was over two years after the sale, and being mindful that compensation should relate to the time of the deprivatory sale, we would discount that sum by a further 10% leaving a reasonable and fair value of Kshs.2,284,101,000 as special damages.

46. This is further in keeping with section 99(4) of the *Land Act*, 2012 which states;

> A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power".

47. Our foregoing analysis leads to the inescapable conclusion that the appellant was treated by the respondents in a shabby and wholly unacceptable if not tyrannous manner in the entire transaction. In particular, the respondents conduct of charging the appellant manifestly excessive interest rates, declining his offers to redeem the debt and then proceeding to sell the property at less than the amount he offered, and at a gross under sale, was a plain breach of a bank's duty to act with care and in good faith. He may not have been a model guarantor but, like Shakespeare's King Lear, he definitely was a man more sinned against than sinning. And he was entitled to the aid of the law. It follows that the recovery suit instituted by the respondents in Milimani HCCC No. 132 of 2009 was misguided. We therefore find the counter-claim to be without basis.

48. We have said enough to show that this appeal is for allowing. We set aside the Judgment and decree of the High Court, save for the dismissal of the counterclaim which we leave undisturbed, substituting therefor an order that the amended plaint is allowed in the following terms;

    (a) A declaration that the plaintiff is discharged and released from all liability under the Legal Charge dated 29th January, 1991 and Guarantee dated 22nd January, 1991.

    (b) A declaration that the Defendant did not have any legal right to exercise the statutory power of sale in respect of the LR No. 5865/2 and that the Agreement for sale and transfer dated 5th September, 2007 were executed in contempt of the injunctive orders issued in Milimani HCCC N. 270 of 2007 Amos Mutuki Mutungi & Another vs Basil Criticos, Agro Development Company Limited, National Bank of Kenya Limited and the Registrar of Titles and Milimani HCCC No. 108 of 2006 Agro Development Company Limited & Basil Criticos vs National Bank of Kenya Limited.

    (c) A declaration that the sale of LR No. 5865/2 for the sum of Kshs. 55,000,000 to the 2nd Defendant was a gross under value.

    (d) A mandatory injunction compelling the 1st Defendant to pay to the Plaintiff the sum of Kshs.35,000,000 being the surplus realised from the sale of LR No. 5865/2.

    (e) Damages of Kshs.2,284,101,000 for the unauthorised improper and irregular sale assessed at the market value of the property LR No. 5865/2 together with interest at court rates thereon from the date of this judgment until payment in full.

    (f) Costs of the suit.

49. The cross-appeal is dismissed for want of merit.

50. We make no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022

R. N. NAMBUYE

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR