



REPUBLIC OF KENYA



Transaftric Timber Limited v National Bank of (K) Ltd (Civil Case 42 of 2019) [2025] KEHC 14939 (KLR) (22 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14939 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 42 OF 2019
JM NANG'EA, J
OCTOBER 22, 2025**

BETWEEN

TRANSAFTRIC TIMBER LIMITED PLAINTIFF

AND

NATIONAL BANK OF (K) LTD DEFENDANT

JUDGMENT

1. By Plaintiff dated 20th November 2019 and amended on 15th July 2021, the Plaintiff Company seeks reliefs as hereunder against the defendant company.
 - a. Permanent injunction enjoining and injuncting against both Defendants jointly and severally and their servants not to interfere with the suit properties namely, Nakuru Municipality Block 1/917 Langalanga, Nakuru Municipality Block 7/3 and Nakuru Municipality Block 2/299 situated in Nakuru howsoever and not to trespass on the suit land, not to survey, demarcate, take possession, sell, erect any building, convey or transfer the suit land or portions thereof or adversely deal with the suit property in any way.(sic)
 - b. An order directing the 1st Defendant to supply the 1st Plaintiff with its loan account statements. (sic)
 - c. Refund of all monies fraudulently withdrawn by the plaintiff's agent together with interest. (sic)
 - d. Refund of all monies paid to the plaintiff account and which the defendant failed to credit together with interest.(sic)
 - e. Damages for breach of contract.
 - f. Costs of this suit.



- g. Any other order this Honourable Court may deem fit to grant.
- h. Refund any rental income channeled to the defendant at the conclusion of the suit.(sic)
2. The Plaintiff avers in the suit that the Defendant had advanced to it a sum of Kshs. 3,500,000/= secured by a charge dated 1st July 1996 registered over property known as Nakuru Municipality Block 1/917 Langalanga. Further loan facilities in the sums of Kshs. 500,000/= and 6,800,000/= secured by a charge over the same property were also extended to the Plaintiff.
 3. The Plaintiff accuses the Defendant and/or its agents of fraudulently making false entries in the loan accounts and declining to provide Statements of Account for verification. Instead, the Defendant on 6th November, 2019 demanded from the Plaintiff purported loan arrears in the sum of Kshs. 522,830,603.17 outstanding as at 29th October 2019 and accruing interest at the rate of 13% p.a. In default, the charged property was threatened to be sold by public auction.
 4. The Plaintiff disputes the indebtedness as incorrect and the consequence of fraud and breach of contract, particulars of which breach are set out in the amended plaint.
 5. It is contended inter alia that the question of how much is owed to the Defendant could only be addressed by provision of Statements of Account.
 6. The Defendant traverses all the material particulars of the amended plaint. While confirming advancing the stated loans to the Plaintiff, the latter is said to have only partially serviced the same, and as at 3rd December 2019 it owed Kshs. 258,217,524.
 7. According to the Defendant the Plaintiff offered three properties to wit; Nakuru Municipality Block 1/917, Block 7/3 and Block 2/299 as securities for the loan facilities.
 8. The Defendant further denies the allegations of fraud and/or breach of contract. It, however, concedes that some of its staff were prosecuted vide Nairobi Chief Magistrate's Court Criminal Case Number 1604 of 2017 Republic v George Jabe & 2 Others for fraudulent false accounting purporting to show that the Plaintiff had cleared part of the loan obligation. It is observed that the Plaintiff stood to benefit from the said fraudulent accounting.
 9. The Defendant asserts that it regularly supplied the Plaintiff with all Statements of Account. It is also contended that the Plaintiff had admitted the debt in various correspondences and deeds.
 10. The allegations of fraud and/or breach of contract are therefore denied. For the stated reasons inter alia the court is urged to dismiss the suit with costs.

The Parties' Evidence

11. Part of the evidence in this long pending matter was recorded before my brother (H. M. Nyaga J) who was transferred to another court station. This court took over the case on 4th December 2024 and directed hearing to continue from the point the previous court left off.
12. The Plaintiff through its two witnesses reiterate the averments in the amended plaint. Relying on his statement dated 25th November 2019 and the defence bundles of documents filed herein, PW1 claims to have received reports about some staff of the defendant who were tampering with the Plaintiff's accounts. A newspaper story reported about some senior bank officials engaged in the malpractice. Some of the suspects were charged and arraigned in Court as per charge sheet exhibited. According to PW1, a Director of the Plaintiff, it became impossible to tell the exact amount owing on the loans in question. He testifies to making several repayments that were not reflected in the loan accounts.



For instance, PW1 tells the court that despite authorizing his Insurer (APA Insurance) in writing to remit an amount of Kshs. 81,000,000/= in insurance refunds to the defendant to repay the loans, the latter's records did not evidence the payment. In proof of this claim, a discharge voucher executed by the Plaintiff's Insurer was tendered and admitted in evidence. The witness refutes a claim that the defendant paid him Kshs. 20,000,000/= out of the Kshs. 81,000,000/= received from his Insurer. Owing to the state of affairs, the Defendant is said to be unable to state the loan balance but keeps adding interest to the loan accounts. The witness, however, acknowledges that the Plaintiff owes the defendant on the loan facilities.

13. The court was told that there were attempts to settle the dispute out of the Court and in the negotiations between the parties the Plaintiff agreed to pay a sum of Kshs. 600,000,000/= to the defendant in full settlement of the loan debt. Apparently, the sum was not paid and the Plaintiff now stands by the averments in the suit.
14. Among documentary exhibits produced by PW1 are various bank slips purportedly showing repayment of the loan.
15. PW2 is a Forensic Auditor the Plaintiff appointed to look into its accounts in relation to the loans in question. After analyzing Bank Statements, deposit slips and Letters of Offer among other documents availed to him, he made a report dated 16th May 2021. Among findings therein, was lack of clarity as to whether the various loan facilities provided to the Plaintiff were amalgamated. According to the expert witness, if the loans were merged, then the previous loans ought to have been cleared first. It was not clear to the Auditor if entries in the relevant bank records were in respect of the same account. As a result of the inconsistencies, PW2 stated that the Plaintiff could not tell the actual loan balance.
16. PW2 also asserted that the maximum legal rate of interest allowable at the material time was 14% but the agreed rate of interest on the loan in question was 17.5% which was applied in a substantial period of the loan.
17. The witness further alluded to variance in the Principal loan figures. Whereas the defendant's Letter of Offer dated 14th August 2017 showed an amalgamated loan of Kshs. 447,682,035.30, the loan advanced as at February 2017 was Kshs. 453,715,172.80 that represented a variance of Kshs. 6,000,000,000/=. The court is told that this variance which is to the disadvantage of the Plaintiff is unexplained.
18. PW2 continued to tell the court that bankings in repayment of the loan amounting to over Kshs. 1,000,000/= were also made by the Plaintiff but are not shown on the Bank Statements, based on banking slips reviewed. A debit of Kshs. 21,000,000/= in the Plaintiff's account towards the loan repayment is not also allegedly acknowledged in the loans account.
19. The Defendant called one witness, its Senior Credit Manager at their Head Office. He adopted his witness statement dated 8th November 2023 filed herein as his evidence. The witness tendered the defendant's bundles of documents dated 8th November 2023, 25th March 2024 and 3rd December 2024 in support of their case.
20. The Plaintiff is accused of producing bank statements showing fraudulent entries. The former is alleged to have declined to avail original banking slips for the defendant's perusal. Fueling the Defendant's suspicion of fraud on the part of the plaintiff are purported banking slips whose serial numbers "suspiciously" follow each other yet deposits they relate to were purportedly made on different dates.



21. The defence witness acknowledges the defendant's receipt of a sum of Kshs. 81,000,000/= from the Plaintiff's Insurer which he states was applied towards repayment of the loan as instructed save for 20,000,000/= paid out to the Plaintiff at his request.
22. The Defendant's witness further explained that the Plaintiff's loan arrears were amalgamated, hence some reversals noticeable in the relevant bank statements.
23. The Plaintiff's evidence about some staff of the Defendant found to have been involved in fraudulent handling of the loan accounts in issue is confirmed by the defence witness. The culpable officials were charged and also dismissed from the Defendant's employment as per the defence evidence.
24. By making proposals for payment of the loan arrears as per correspondence dated 16th February 2024 and 8th March 2024 among others exhibited by the defence, the Plaintiff is said to admit the debt. As at March 2025 the Plaintiff owed in excess of Kshs. 822,000,000/=, adds the defence witness.

Submissions

25. Learned Counsel for the parties filed their final written submissions. It is common ground as deduced from the pleadings, evidence and submissions that the Plaintiff did obtain the loan sums in issue from the Defendant. The Plaintiff also concedes that he is in loan arrears and only contests the amount owing.
26. The parties further agree that some staff of the Defendant were charged in Nairobi Chief Magistrate's Court in Criminal Case Number 1604 of 2017 (Republic v George Weka Jabe & 2 Others) with false accounting offences in relation to the Plaintiff's loan accounts in issue. The case does not appear to have been determined at the time of hearing of this suit.
27. The Plaintiff's advocates submit that the Defendant breached the contract between the parties. Reference is made to Black's Law Dictionary for the definition of "breach of contract" as quoted here below:-

"Violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or is unable to show such loss with sufficient certainty he has at least a claim for nominal damages."

28. Counsel further submit that in law once fraud is pleaded and proven it vitiates all transactions. The court is urged to find that fraud on the part of the defendant and/or its agents has not been established to the required legal standard as noted in similar circumstances in the case of *Ndolo v Ndolo* (2008) 1KLR (G & F) 742 the Plaintiff relies on.
29. Learned Counsel for the Plaintiff therefore think that the Defendant should not be allowed to benefit from its fraudulent conduct and/or breach of contract in the exercise of Statutory Power of Sale of the charged properties. In *Mea Limited v Echuka Farm Limited & 2 Others* (2007) eKLR on which Counsel further pitch tent, it was observed as follows concerning breach of contract:-

"...However, the central question is whether the court should allow a party to benefit from its own default and his lack to fulfil his part of the bargain to the detriment of the other side. I think a court of equity cannot allow that to happen. I cannot accede to Mr. Ohaga's argument that a Defendant can deprive a Plaintiff of his right when it has not performed



its part of the transaction and at the same time wants to obtain the full benefits of the subject transaction. That would mean equity aiding a fraudulent conduct which would be dangerous to justice and equity.”

30. Further reliance is placed on the case of *Housing Finance of Kenya Limited v Gilbert Kibe Njuguna* Nairobi HCCC No. 1601 of 1999 where it was held;

“If it appears to the court that one party varied terms of a contract with another without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the court will say no to the enforcement of such contract.”

31. According to the Plaintiff the court should ensure strict performance of a contract, and not only substantial compliance thereof (see Lord Atkin’s opinion in the English Case of *Arcos Limited v EA Ronaasen & Sone* (1933) AC 470 also relied upon by the Plaintiff’s Advocates).

32. In light of the alleged breach of the loan contract, the Plaintiff prays for compensatory damages among the other reliefs as per the amended plaint. In this regard, Counsel for the Plaintiff sought to explain the nature of damages and loss that may be claimed for breach of contract by quoting the words the Court in *Photo Production Limited v Securicor Transport Limited* (1980) AC 827,848 – 849 as follows;-

“... The Contract, however, is just as much the source of secondary obligations as it is of primary obligations. Every failure to perform a primary obligation on the part of the contract breaker to which it gives rise by implication of common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach...”

33. The Plaintiff therefore inter alia submits that because of the alleged fraudulent activities of the Defendant it is difficult to verify veracity of the loan statements the latter supplied to it. Forensic evidence of the Plaintiff’s Auditor (PW2) is said to reveal gross interference with its loan accounts in question thereby negatively affecting the integrity of the claimed loan balance, hence the orders sought in this suit.

34. Learned Counsel for the Defendant retort inter alia that disputes over interest rates or accounts reconciliation don’t warrant judicial interference with a Chargee’s Statutory Power of Sale unless fraud is demonstrated (see Judicial determination in *Mrao Limited v First American Bank of Kenya Limited* (2003) eKLR and *Joseph Okoth Wandu v National Bank of Kenya Limited* (2006) eKLR cited by Counsel). According to the Defendant it complied with the provisions of Section 44 of the [Banking Act](#) by obtaining approval of the Central Bank of Kenya before change of the rate of interest charged on the Plaintiff’s loans, which change was communicated to the Plaintiff.

35. The Defendant maintains that it provided the Plaintiff with all the requisite bank statements. According to the Defendant, the Plaintiff did not even have to obtain bank statements at it also had access to the banks Real Time Gross Settlement (RTGS) slips, bank slips and deposit slips to prove payments. I was referred to *Advocates v Advocates* Miscellaneous Civil Application No. E386 of (2020) [2021] (Ruling) in support of the proposition. It is contended that, in any case, the Plaintiff failed to prove that it asked for but was denied bank statements.

36. Through a letter dated 16th February 2024, the Defendant reiterates that the Plaintiff admitted owing Kshs. 600,000,000/= which it undertook to pay in lieu of the Defendant foregoing its claim for Kshs. 778,430,992.42.



37. It is pointed out that the Plaintiff had failed to comply with the court's directions as to taking of accounts. The defendant therefore stated that the plaintiff does not come to the court of equity with clean hands.
38. The Court is accordingly urged to allow the defendant to exercise its statutory power of sale. Alluding to the judicial determination in *Uhuru Highway Development Limited v Central Bank of Kenya Limited & 2 Others* (1996) KECA 102 KLR, the defence Counsel submits that the court can only stop exercise of this power "if circumstances warrant". It is the defendant's contention that the facts and circumstances of this case do not merit restraining exercise of the defendant's Statutory Power of Sale of the charged properties.
39. On the basis of these submissions inter alia the defendant argues that the Plaintiff failed to prove its claim on a balance of probability.

Analysis and Determination

40. The following points are identified for the court's determination:-
 - a. Whether the defendant acted fraudulently in its dealings with the Plaintiff's loan accounts and thus breached its contractual obligations towards the latter.
 - b. Whether the Plaintiff's actual indebtedness to the defendant cannot be ascertained.
 - c. Whether the Defendant ought to be allowed to exercise its Statutory Power of Sale of the charged properties.
 - d. The orders that commend themselves to the court on the facts and in the circumstances of the case.
41. It is trite law that fraud in Civil Cases is required to be proven to a standard beyond a balance of probability but not beyond reasonable doubt as in criminal cases. The Court of Appeal in *Central Bank of Kenya Limited v Trust Bank Limited & 4 Others* (1996) eKLR observed that fraud is a very serious and requires more than a prima facie proof. The legal position is underscored in *Christopher Ndaru Kagina v Esther Mbadi Kagina & Another* (2016) eKLR. As provided in Section 109 of the [Evidence Act](#) the burden of proof is on the Plaintiff who alleges the fraud in handling of its loan accounts by the defendant herein.
42. The Plaintiff's Advocates in their submissions correctly restate the law relating to proof of fraud in civil cases.
43. The defence evidence indicates that it was established that some staff of the Defendant tampered with the Plaintiff's loan accounts among others with the result that it appeared the loans were being serviced when in actual fact there was default. The implicated staff were charged in court over the alleged fraud and also dismissed from employment. There is no evidence that the criminal case has been determined and, if so, the result thereof.
44. Despite asserting that it applied 60,000,000/= out of Kshs. 81,000,000/= from the Plaintiff's Insurer towards the loans repayment, no such evidence is offered. Neither does the Defendant tender evidence of payment of Kshs. 20,000,000/= out of the sum of Kshs. 81,000,000/= to the Plaintiff as claimed.
45. The variance of Kshs. 6,000,000/= or thereabouts between the amount of the loan applied for and what was disbursed as alluded to by the Plaintiff has not also been explained by the Defendant. PW2's forensic report in this regard has not been challenged by more superior expert evidence.



46. As pointed out in the Defendant's submissions, the parties were directed to reconcile their accounts in the court's Ruling of 30th July 2020. The Plaintiff was to "share the reconciled accounts with the Defendant/Applicant within 14 days from the date of the ruling."
47. It is not shown whether the court's orders were complied with to help narrow down the dispute between the parties regarding the contentious loan accounts. It is instructive that the Plaintiff confirms in its evidence that it was willing to pay a sum of Kshs. 600,000,000/= to the defendant in full and final settlement of the debt following negotiations. Its communication with the defendant through the letters exhibited by the latter is not, however, unequivocal admission of indebtedness.
48. Clearly, the Defendant has not accounted for the Kshs. 81,000,000/= received from the Plaintiff's Insurer for use to pay down the debt and further failed to explain the variance of over Kshs. 6,000,000/= in the loan disbursement to the disadvantage of the Plaintiff: This could be the consequence of criminal acts and/or omissions of the Defendant's employees for which they are being prosecuted. It is not, however, shown that the acts or omissions of the accused employees was to the detriment of the Plaintiff given the Defendant's position that the effect was to falsely show that there was no default on the loans.
49. I don't think in the circumstances that the apparent fraudulent acts of the Defendant and/or its agents meet the legal threshold of proof of fraud in civil cases. The Plaintiff is not also blameless for failing to follow through on the court's directions as to reconciliation of its accounts with the Defendant.
50. The court accordingly finds that there was some fraud on the part of the Defendant and/or its agents but it is not proven to the required legal standard. Whether the Defendant therefore breached its contract with the Plaintiff is moot.
51. Owing to the above findings and/or observations I cannot ascertain the Plaintiff's actual indebtedness to the Defendant on the material placed before the court. The parties will need to engage in good faith in taking of accounts between them.
52. The Plaintiff admits owing some loan arrears although it disputes the amount claimed by the Defendant. The Defendant cannot in law be restrained from exercising its Statutory Power of Sale in such a situation. The Plaintiff took a huge loan and a substantial part is said to remain unpaid. As observed hereinabove, the Plaintiff had even offered to pay a substantial amount in full and final settlement of the debt. Issue (c) as framed above is therefore determined in the affirmative.
53. In light of the Plaintiff's admission of some indebtedness to the defendant, the court declines to order the refunds claimed under prayers c), d) and h) of the amended plaint.
54. The Plaintiff also claims damages, presumably general damages, for breach of contract. The law is that general damages are not usually awardable for breach of contract (see Case Law in Provincial Insurance Co. EA Kisumu Court of Appeal 179 of 1993 among many other superior court decisions). The claimant has to plead and prove actual loss suffered unless exceptional circumstances warranting grant of general damages are shown. The Plaintiff has not demonstrated exceptional circumstances meriting such an award. Besides, the Plaintiff concedes at least partial liability for the defendant's loan claim.
55. The court shall not grant general damages in the premises.

Determination

56. In the result, the court finds and holds that the Plaintiff failed to prove its claim on a balance of probability and the suit is dismissed. Considering that the defendant has not handled the Plaintiff's accounts in a transparent manner as found, the parties shall bear their own costs of the suit.



57. Judgement accordingly.

J. M. NANG'EA, JUDGE.

JUDGEMENT DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OCTOBER, 2025.

In the presence of:-

Mr. Wafula Advocate for the Plaintiff

Mr. Kiburi Advocate for the Defendant

Court Assistant (Jeniffer)

J. M. NANG'EA, JUDGE.

