



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.2784 OF 1995

SWEATA INVESTMENTS LIMITED.....1ST PLAINTIFF

RATI INVESTMENTS LIMITED.....2ND PLAINTIFF

VERSUS

PAN AFRICAN CREDIT & FINANCE LTD (IN LIQUIDATION)....DEFENDANT

JUDGMENT

1. The plaintiff through a further Re-amended plaint dated 26th November 2012 filed pursuant to leave of court issued on 12th November 2012 filed on 27th November 2012 sued the defendant seeking judgment for:-

- a) An order that the Defendant do execute a Discharge of Charge of the Charge dated 23rd August 1983 and deliver the same to the First Plaintiff.
- b) An order for an accounts to be taken to ascertain the amount due and payable to the First Plaintiff by the Defendant and the judgment be entered for the First Plaintiff.
 - i) For the said amount together with interest thereon and
 - ii) An order that the Defendant do execute a Discharge of Charge of the Charge dated 7th June 1882 and deliver the same to the First Plaintiff together with the title deeds of the said property, under the said charges including account of the rents collected by the Receiver.
- c) The payment of the sum of Kshs.4,700,000/- and/or refund of the proceeds of sale as damages together with interest thereon at bank rates under paragraph 14A above.
- d) A declaration that the sale of the Plaintiff's properties (Land Reference No. 209/8954 and 209/8951 by the Defendant was irregular and unlawful hence the Defendant should compensate the Plaintiff in damages equivalent to the market value thereof.
- e) Issue of an injunction restraining the Defendant whether by its agent or servants or otherwise from selling the properties known as Land Reference Number 209/8954 and known as Land Reference Number 209/8951 whether by auction or otherwise until the determination of the suit.
- f) Cost of this suit together with interest thereon at Court rates.
- g) Any other or further relief that this Honourable Court may deem fit to grant.

2. The defendant in defence to the plaintiff's claim filed Re-Amended defence and counterclaim dated 13th December 2012 praying for dismissal of the plaintiff's suit and entry of judgment of Kshs.557, 492,649.40 together with costs and interest at the rate of 24% for 31st August 2005 until payment in full.

3. The plaintiff in response to the defendant's defence and counterclaim filed Reply to defence and defence to counterclaim dated 20th December 2012 praying that the Re-amended defence and counterclaim of the defendant be dismissed with cost and praying for judgment as prayed in the further Re-amended plaint.

Introduction and background

4. The claim in this suit arose out of series of loan facilities extended to the plaintiffs after executing various legal charges in favour of the Defendant to secure sums of money advanced to the 1st plaintiff as set out in paragraphs 6-9 of the further Re-amended plaint.

5. That by a registered letter dated 13th August 1987 (*on page 66 Exhibit D-2*) by the advocate of the defendant the 1st plaintiff was requested to pay to the chargee principal monies owing under charges dated 7/6/1982; 19/10/1983 and further charges dated 23/8/1983 registered in the land Registry at Nairobi as numbers **L.R. 32107/2; 31984/3 and 32107/3** respectively with interest owing on the date of payment within 3 months from the service thereof in default the chargee to exercise the power of sale. That by a letter of 16th September 1987 (*on page 68 exhibit D-2*) the defendant appointed Mr. Charles Levitan under its power under legal charge and further charge to be a receiver of rents, profits and to manage and take possession of the whole or any part of the properties comprised in the charge and further with effect from 16th September 1987 (*see page 79 – 80 of plaintiff's list of bundle of documents P-21*).

6. The steps taken resulted to a meeting between the defendant's representative including Mr. Mohammed Aslam, the chairman and Managing Director and the plaintiff's representatives Mr. Ranjnikant Khetashi Shah (**PW1**). The parties reached amicable settlement and did reduce their restriction down in writing through a letter dated 6th October 1987 (*see page 86 of Exhibit P-2*) and *page 71 of Exhibit D-2*) and *page 71 of Exhibit D-2*).

7. It is averred by the plaintiff the matter rested there for seven (7) years from 1988-1994 during which period the plaintiff continued being a customer of the defendant and different transactions continued as between them. That apparently the receiver remained in place and continued to collect rents from the charged property from which the plaintiff urge no proper accounts have been rendered to date.

8. Upon the defendant being placed under liquidation by the Central Bank of Kenya on 19th August 1994 (*see pages 87 – 108 of Exhibit P-2*), the Deposit Protection Fund Board through its Advocates through a letter dated 8th August 1995 claimed, that there were amount of Kshs.136,021,726/- that remained outstanding. That M/s Marchet Auctioneer, were instructed to sale the charged properties and the plaintiff urged, that even if the said amount had been owing the interest rate application under the charge was 16% and not 18% as demanded by the Deposit Protection Fund Board.

9. The plaintiffs contend, that the Receiver so appointed on 16th September 1987 has never rendered full and accurate accounts disclosing the amount of rent and profit received from the fully developed properties situated in Nairobi's Industrial Area and that the rent and profit would amount to far much more than the amount claimed by the Deposit Protection Fund Board to have remained outstanding.

10. That while this suit was still pending before the court, the Defendant without any notice and demand had the charged properties, sold by private treaty even without the leave of the court as per the plaintiff at under value (*see further Re-amended plaint*).

Defendant's case

11. The Defendant's case is that the charges created by the plaintiffs are not denied, and their details are well set out in the plaintiffs' further Re-amended plaint filed on 27/11/2012 and the Re-Amended Defence and counterclaim. It is defendant's case, that it gave the statutory notice to realize the security by the letter of Rustam Hira Advocate dated 13th August 1987 in accordance with section 69 of the Transfer of Property Act. That on expiry of the statutory notice the defendant on 16th September appointed a Receiver under the charge under section 69 of the Transfer of Properties Act.

12. I have very carefully considered the pleadings herein, parties witnesses statements, counsel rival submissions and as the parties have not agreed on issues for determination, considering all the above, I am of the view that the following issues have arisen for consideration.

a) Whether any outstanding debt due and payable by the plaintiffs to the Defendant as at 6th October 1987 was settled through set off by way of adjustment in various accounts held by the first plaintiff with the Defendant and its sister Bank – Pan African Bank Limited?

b) Whether the sale of the plaintiff's properties (L.R. No.209/8954 and 209/8951) by the defendant was irregular and unlawful and whether the plaintiffs are entitled to compensation in damages equivalent to the market value and whether the sale of charged properties breached lis pendens Doctrine?

c) Whether the alleged sale was undervalued?

d) Whether the plaintiffs were supplied with the Receiver's account and whether the court can order for such accounts to be taken?

e) What was the proper rate of interest applied?

f) Whether the Defendant's counterclaim is time barred?

A) Whether any outstanding debt due and payable by the plaintiffs to the Defendant as at 6th October 1987 was settled through set off by way of adjustment in various accounts held by the first plaintiff with the Defendant and its sister Bank – Pan African Bank Limited?

13. During the hearing of this suit the plaintiffs called Rajnikant Khetashi Shah, **PW1**, who adopted his witness statement (**Exhibit P-1**) as his evidence in chief and further relied on the plaintiff's Bundle of document (**Exhibit P-2**) dated 8/3/2012; Supplementary bundle of documents (**Exhibit P-3**) dated 26/11/2012; plaintiff's further documents dated 7th November 2018 (**Exhibit P-4**).

14. The defendant called Cecilia Nduku Nzioka, **DW1**, who is an Assistant Liquidator Agent, who adopted her witness statement dated 7th December 2018 as her evidence in chief (**Exhibit D-1**) and further relied on Bundle of documents (**Exhibit D-2**) filed on 27/3/2012; (**Exhibit D-3**) filed on 16th May 2012; (**Exhibit D-4**) filed on 27/9/2013.

15. The plaintiff contention is, that any outstanding debt as at 6th October 1987 was settled through a set off by way of adjustment in various accounts held by the first plaintiff with the Defendant and its sister Bank – Pan African Bank Limited. The plaintiff relies on the defendant's letter dated 6th October 1987 allegedly signed by Defendant's own Managing Director and Chairman on the Defendant's letter head. The said letter is as follows:-

"Ref: HO: MA: 1:3:87

Date"6TH October 1987

Mr. A.L.R. Shah

Advocate & Commissioner for Oaths

P.O. Box 44983

NAIROBI

Dear Sir,

Please refer your letter of 24th September 1987 regarding the demand notes on Sweata Investments Ltd, Nichu Investments Ltd and Plaza Investments Ltd. The matter has been amicably settled between the parties and the bank is not proceeding legally against Sweata Investments Ltd and others. The arrangements have been made to adjust the outstanding in various accounts, amicably.

Yours faithfully,

Mohammed Aslam

Managing Director."

16. The plaintiffs in their further Re-Amended plaint under paragraph 10A has in summary pleaded as follows:-

- a) The accounts existing between the first plaintiff and the defendant were settled on 6th October 1987.
- b) The amount owed by Mohamed Aslam to the first plaintiff should be set off against the moneys owed by the first plaintiff to the defendant under further charge dated 23rd August 1989.
- c) It was agreed money, lent and advanced to the first plaintiff under the charge dated 7th June 1982 should be recovered from the rents collected by the receiver.
- d) By a letter dated 6th October 1987, written by Pan African Bank Limited the defendant agreed not to proceed legally against the first plaintiff and discharged the legal effect of the said notice of 13th August 1987 rendering it unenforceable in law.
- e) The settlement discharged the plaintiff from the liabilities.

The above averments are also found in paragraph 7 of the **PW1**'s statement dated 27th November 2012.

17. The plaintiffs allegation are denied as per defendant's Re-Amended defence and counterclaim filed on 13th December 2012 and urges, that the defendant is not aware of the late Mohamed Aslam's indebtedness to the first plaintiff and was not a party to it and urges the late Mohamed Aslam acted in his private individual capacity and did not bind the defendant in any agreement as alleged or at all. It is further alleged that there has been no agreement, as the same was not supported by any considerations. The existence of the alleged agreement as set out under paragraph 10A of the further Re-Amended plaint was denied by Cecilia Nduku Nzioka, **DW1**, in her statement of evidence under paragraphs 48 and 49 urging the said Mohamed Aslam, is and was not the defendant and further that the defendant is not aware how the debt arose and that the same was not taken by the defendant as it was not for defendant's benefit. **DW1**, in her evidence before court clearly stated, there was no trace of the defendant's file, of the alleged letter of 6th October 1987, which the plaintiffs have relied upon.

18. Section 107 of the Evidence Act provides as follows:-

"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

19. The burden of proof lies on the plaintiffs to prove the contents of the letter dated 6th October 1987. **PW1** in his evidence in cross-examination stated his agreement was with Mr. Aslam, the chairman of the defendant, who was very careful with his business transactions and he died before the filing of this current suit.

20. The defendant upon referring to the three letters dated 6th October 1987, and from **PW1's** evidence, noted the correct spelling of the first name of Mr. Aslam is "*Mohamed Aslam*" as appears in **PW1's** statement and in all correspondences written by the plaintiffs' then Advocate to Mr. Aslam. It is noted that the first letter dated 6th October 1987 (**Exhibit P-2**) at page 86 filed by the plaintiffs on 8th March 2012 is on the notepaper of Pan African Bank Limited but not that of the defendant M/s Pan African Credit & Finance Limited and the same is addressed to Mr. A.L.R. Shah who was then an Advocate acting then for the first plaintiff. Part of the contents of the letter states;

"...The bank is not proceeding legally against sweata Investments Ltd and the others"

The letter is purportedly signed by "*Mohammad Aslam*" as chairman and Managing Director of Pan African Bank Limited. The first name of Mr. Aslam is spelt as "*Mohamed*" and not as "*Mohammed*" in the letter on page 86 Exhibit P-2. The second letter of 6th October 1987 is found in The Plaintiffs' Further list of Bundle of documents filed on 8th June 2012, which is on the notepaper of Pan African Bank Limited addressed to Nichu Investment Limited as the first plaintiff, on the top left hand corner under the bank's logo is the name of "*Mohammad Aslam*". It is evident that there are two different spellings on the same page none of which is correct as compared with spellings in the **PW1's** statement (**Exhibit P-1**) under paragraph 7 where the correct spelling is "*Mohamed Aslam*"

21. The second letter refers to accounts and securities with "**PAB & PACG**". The last paragraph states:-

"This second letter refers to accounts and securities with "PAB & PACF" which is clearly a reference to both Pan African Bank Limited and the first plaintiff. The last paragraph is of great significance."

22. The 3rd letter still of 6th October 1987 appears in (**Exhibit P-4**) documents filed by the plaintiffs on 9/11/2018 on the notepaper of the plaintiffs. It is exactly in the same terms as the 2nd letter with same signature, date, reference, format and spelling. The letter in issue was not produced till in November 2018 and of great concern is failure to mention the same in **PW1's** statement of evidence.

23. Considering all the letters, they appear to give an impression that the money, borrowed by the first plaintiff and for which security was given were advanced or borrowed by Mr. Aslam personally. The letters appear in my view to be dealing with private transactions of Mr. Aslam, which such transaction cannot bind the defendant herein.

24. Further in considering this matter and considering the letters relied upon, especially letters written by A L R Shah on 11/9/1987 and 24/9/1987 at pages 81 to 85 (**Exhibit P-2,**) being two demands for money lent to first plaintiff, two for Nichi Investments Limited for money lent, and another being refund of moneys provided for the purchase of shares which failed; I find from the same there appears to be no transactions which could be set off in the books of the defendant herein.

25. It is trite, that a set-off can be enforced between a bank and its customers where there is existence of the credits and debits between them in the same capacity. The debt which the plaintiffs are seeking to set off are due from a third party, Mr. Aslam and this is not possible. Further where is the consideration passing from the plaintiffs to the defendant so as to give legal effect to the purported discharge of the debts due for the plaintiff to the defendant. In this matter I find none. **PW1** in his evidence averred in reference to the letter of 6th October 1987, the debts were settled and the plaintiff owed the defendant no money but **PW1** on being cross-examined he could not explain the inconsistency between that assertion of no money was owed and the continued collection of rent and profit by the receiver. I further find inconsistency in the assertion, that by letter of 6th October 1987 the plaintiffs were discharged and that the notice of 13th August 1987 was rendered unenforceable in law, as no receiver could be appointed under the charge without making the statutory demand as provided under section 69(1), 69 f (1) and 69 g (1) of the Transfer of Property Act. The statutory notice in this case was issue on 13th August 1987 which then authorized appointment of a receiver and had it been withdrawn as purported by the plaintiffs, the receiver could not have continued to collect the rent as the receiver could not execute his duties if there was no debt due.

26. In this matter there are two letters written by **PW1** on pages 72 and 73 of (**Exhibit D-2**) in the defendants Bundle of documents. The letter on page 72 dated 6th October by **PW1** is appointing Mr. C. Levitan, the receiver herein, to **sell L.R. 209/8954** the property charged by the first plaintiff to the defendant at a price of Kshs.15,000,000/-. On page 73 is a letter by first plaintiff signed by **PW1** dated 17th November 1987 addressed to the defendant. **PW1** acknowledges existence of a receiver and went on to state "*on 6th October 1987 I have requested several Estate Agents that I want to sell the property so that I can pay up your loan*" the property is indicated in the letter as "*Godown plot No.209/8954*", one of the charged property. He went on to state "*on 3rd November 1987 I have received a letter saying of unilateral action taken by us. So do we want to sell this property and clear the debt or WHAT?*"

27. I have considered the two letters written by **PW1** herein above, as well as paragraph 10A of the plaintiffs Further Re-Amended plaint alleging an agreement was made on 6th October 1987, and the allegation the plaintiff being unaware of Receiver as late as 15th October 1987. I find from **PW1's** letters herein above, to be completely inconsistent with the agreement the plaintiffs are asserting to enforce. Had

there been such an agreement, as alleged by the plaintiffs **PW1** will not have authorized such letters and **PW1** would not have talked of paying the loan and clear the outstanding debt several weeks after 6th October 1987. I further find this issue of the letter of 6th October 1987 and at the time of filing this suit thus 1st September 1995 the plaintiffs never raised nor objected to the demand of the unpaid loan. The issue was not raised until Mr. Aslam passed on. Further since 6th October 1987 the plaintiffs never sought and obtained a discharge of the charge and sought to have the titles to the securities back, giving an inference that they had not been discharged from their liabilities.

28. The plaintiffs in this matter have contested the defendant's denial of the letter of 6th October 1987. The plaintiffs have not sufficiently linked the defendant with the letter of 6th October 1987 nor have they demonstrated that the said Mr. Aslam was acting for the benefit of the defendant. The plaintiffs did not prove that the letter was authorized by Mr. Mohamed Aslam, of the defendant Bank as the name Mohammed Aslam is not the same as Mr. Mohamed Aslam. Secondly the notepaper used is not that of the defendant.

29. The defendant relied on the case of **Nairobi High Court Civil Case No.4054 of 1993 Pan African Bank Ltd vs Nichu Investments & 3 others**, where the letter dated 6th October 1987 was relied upon and attracted similar arguments from the plaintiffs. The case can be distinguished as the said case was brought by Pan African Bank Limited which is different from the present defendant herein M/s Pan African Credit & Finance Limited (*in liquidation*) and was decided on its own peculiar and particular facts and the evidence adduced before Hon. Justice Warsame, as he then was. I have considered the evidence adduced in this case and several documents pointing to a different position and find in view of the same, that this suit is totally different and the decision thereto is not relevant to the present suit. The evidence produced by **PW1** of the alleged discharge of the debt is in variance with the pleadings; inconsistent and unreliable, that I find no reliance can be placed on it. I have been unable to find that the plaintiffs proved existence of any agreement for the discharge of the charges as alleged.

30. In view of the above findings, I am satisfied that the plaintiffs have failed to demonstrate that as at 6th October 1987 they had settled their debt with the defendant through a set off by way of adjustment in various accounts held by the first plaintiff with the defendant and its sister Bank – Pan African Bank Limited.

B) Whether the sale of the plaintiff's properties (L.R. No.209/8954 and 209/8951) by the defendant was irregular and unlawful and whether the plaintiffs are entitled to compensation in damages equivalent to the market value and whether the sale of charged properties breached *lis pendens* Doctrine?

31. The plaintiff witness **DW1**, testified that the charged properties were sold by the defendant and produced Agreements for sale dated 14th December 2010 and 11th July 2011 in respect of the charged properties by private treaty while the same were subject of the court proceedings. It is the plaintiffs contention that no party is ordinarily permitted to sale and transfer such properties, while subject of court proceedings, by private treaty except with the leave of the court. It is further the plaintiffs contention that the sale was conducted privately, secretly and contrary to the provisions of the Transfer of Property Act and as such the defendant's action was meant to clog the plaintiffs' equity of redemption and recovering of the properties through the court proceedings; which act was an act of bad faith and unlawful as it intended to defeat or frustrate the court process and cause injustice.

32. In the case of **MAWJI VS US International University & another [1976] KLR 185** the court held;-

"This passage is enthusiastically quoted by both Mulla and Gour in their treatises on the Indian Transfer of Property Act: Mulla (5th Edn) page 245; and Gour (7th Edn) volume 1, page 579. With respect, Turner L J's words are prudent. Gour also says (at page 579) that story explains the same rule from another stand point:

Every man is presumed to be attentive to what passes in the courts of justice of the State or Sovereignty where he resides. Therefore, purchase made of property actually in litigation, pendent lite, for a valuable consideration, and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit."

33. The Defendant urges on that part of the alleged arrangements of 6th October 1987 could not set aside the statutory notice of 13th August 1987 as the statutory notice was also the basis for the appointment of the official receiver, which continued. It is further urged the Defendant issued further statutory notice on 18th March 2002 and send warnings of the instructions to the customers on 8th August 1995. The defendant submitted that it met the requirements of section 69(1) and 69(A) (1) of the Transfer of Property Act.

34. The present suit was filed on 1st September 1995, in which the plaintiff applied for and obtained an injunction order preventing the sale of the charged properties, which application for injunction pending determination of the suit was subsequently dismissed on 13th June 2003. **DW1** in her witness statement under paragraph 39 confirmed that the interim orders which had been issued were vacated. She further averred as there were no orders preventing the defendant from exercising its statutory power of sale, the defendant commissioned Acumen valuers to undertake a current valuation of the property. That by sale agreement dated 18/12/2003 the defendant sold property known as **L.R. No. 209/8951** belonging to the 2nd plaintiff for Kshs.4,700,000 and further by agreement dated 10th December 2010 sold the first plaintiff's property **L.R. No.209/8954** at a price of Kshs.62,500,000/-.

35. On the alleged breach of the rule of *Lis pendens*, under then section 52 of the Transfer of Property Act, the defendant denies having been in breach. **Section 52 of the Transfer of Property Act** provides;

"During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except

under the authority of the Court and on such terms as it may impose."

36. The defendant urges the rule of *Lis Pendens* only applies "during the active prosecution" of the case and as the first sales took place in 2003, and second one in 2010 it is urged that at that time the plaintiffs were doing nothing to actively prosecute the case. The defendant referred to the case of **Kinsman vs Kinsman 39 ER 236** where it was stated;

"The Lord Chancellor [Lyndhurst], after stating the circumstances of the case, observed that the single question was not whether *lis pendens* was notice to a purchaser, for of that there could be no doubt but whether there was or was not a *lis pendens* in this case? He took it to be perfectly clear that, in order to constitute *litis pendentia*, there must be a continuance of *litis contestatio*; and without going so far as to say with Lord Bacon that there must be a constant and vigorous prosecution of the suit, still something should be done to keep it alive and in activity."

37. It is further urged the section provides for sale under the authority of the court and that the dismissal of the injunction application by the court cleared the way for realization of the charged properties and sales were therefore with the authority of the court. It should be noted in the instant suit, statutory notice was initially issued on 13th August 1987 before the filing of the sit on 1/9/1995.

38. I have very carefully considered the facts of this case and authorities relied upon by the parties in their rival submissions. **Section 52 of the Transfer of Property Act**, makes it clear that it applies to suit on proceedings which is not collusive and in which any right to immovable property is directly and specifically in question and states such property cannot be transferred or otherwise dealt with by any party to the suit on proceeding so as to affect the right of any other party thereto under any decree or order which may be made thereon except under authority of the court and on such terms as it may impose. The pendency of a suit or proceeding shall be deemed to commence from the date of presentation of the plaint and to continue until the suit or proceeding have been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution through by any law for the time being in force.

39. In the instant suit; the suit commenced by way of presentation of a plaint on 1st September 1995. This was after the issuance of statutory notice on 13th August 1987. The suit is yet to be heard and disposed of, hence it is still pending. The suit was however after dismissal of the application inactive. The dismissal of the application for injunction though do not in my view amount to inactive prosecution nor doing nothing as regards active prosecution of the case, in a situation as is in this case where statutory notice was issued before filing of the suit **section 52 of Transfer of Property Act** may not be applied to deny the chargee exercising its power of sale; however where suit is filed and statutory notice is issued after the filing of the suit the court leave or authority to dispose of the property becomes necessary and injunction that may be issued or denied after do not give automotive authority to sale as a party is supposed, if it intends to dispose of the property seek leave or authority of the court. In view of the facts of this case I find the defendant was not in breach of the rule of *Lis Pendens* at the material time of the sale of the charged properties. The sale of the charged properties was not conducted privately, secretly and contrary to the provisions of **section 52 of the Transfer of Properties Act**. The defendant action was not intended to clog the plaintiff's equity of redemption and recovery of the properties through the court proceedings.

40. I therefore find and hold that the sale of the plaintiff's properties (**L.R. No.209/8954 and L.R. No. 209/8951**) by the defendant was not irregular and unlawful and in view of my finding, I find the plaintiffs are not entitled to compensation in damages as sought.

C) Whether the alleged sale was undervalued?

41. The plaintiffs position is that the charged properties which were sold on 18th December 2003 (**L.R. No.209/8951**) at Kshs.4, 700,000/- and 10th December 2010 (**L.R. No.209/8954**) at 62,500,000/- were undervalued. The plaintiffs urged the plaintiffs produced a valuation Report dated 13th July 2011 showing the property was valued at Kshs.115,000,000 which is much higher than Kshs.62,500,000/-.

42. The defendant countered the plaintiffs averments urging the sales took place under the old legislation, when there was no requirement to sell at a particular percentage of the valuation. It is of great interest to note though both the plaintiffs and the defendant produced Valuation Report none of them called any valuer to give evidence, all what this court is left with, is only a proof that valuation were done, while without calling the valuers, the valuation reports are not proof of the actual value of the charged property. The plaintiffs alleged the charged properties were undervalued so the burden of proof is on the plaintiffs to prove so. The plaintiffs having not called the valuer, I find they have failed to satisfy the court that indeed the charged properties were undervalued. I find no basis to find and hold the charged properties were sold at an undervalue without evidence having been adduced by the valuer.

43. It is of great importance to note L.R. 209/8951 was sold at Kshs.4,700,000 on 18th December 2003 in which the forced value at the time was 4,200,000/- whereas L.R. 209/8954 was sold on 10th December 2010 at 62,500,000; the forced sale value at that time being put on Kshs. 42,000,000/- although the valuer stated the investment value might be 70,000,000/-. The plaintiffs on their part produced a valuation done in July 2011 giving a value of Kshs.115, 000,000/-. The difference between the two valuation being that the valuer for the defendant and the plaintiffs is, that the defendant's valuer took into account the problem of the protected tenants which is of relevance to the value but plaintiffs valuer did not nor does his report give a forced value, resulting in ignoring the lower price that is obtained when property is put for auction by a chargee. That looking at the two valuation Reports, I find that in absence of oral evidence by the valuers in this matter, it would be hard for the court to state which of the two valuations would guide court on the actual value of the charged properties. I find the plaintiffs have not discharged the burden of proof placed on them and as such, I find the plaintiffs have failed to prove the sale was at an undervalue.

D) Whether the plaintiffs were supplied with the Receiver's account and whether the court can order for such accounts to be taken?

44. The plaintiffs through **PW1's** statement, Rajnikant Khetshi Shah under paragraph 6, avers that the defendant by its letter dated 16/9/1987 under purported powers contained in the said charges appointed one Charles Levitan, as the Receiver of the said mortgage properties with powers, *inter alia*, to collect rents and profits of the said mortgaged properties. That the said Receiver remained in place as the **DPFB** took over in August 1994 and that it is not clear whether all rents collected from 16th September 1987 till 2012 when the

properties were sold have been properly accounted for. The plaintiffs contend the so called accounts produced by the defendant cannot be taken seriously, noting that it is only petty sum that seem to have been remitted to the loan accounts as per testimony of **DW1**.

45. The defendants in response averred that the receivership accounts are set out at pages 111 to 192 of (exhibit P-2).

46. I have perused the receivership accounts as set out at pages 111 to 192 of (exhibit P-2) I am not satisfied that the plaintiffs have pointed out the errors or shortcoming of the Receivership report to call for any orders. The Receivership accounts are not said not to be genuine nor is it challenged in any particular manner or in the way it is prepared. The accounts in respect of the rents collected has been tabled from pages 111 to 192 as of exhibit. The plaintiffs who have had opportunity to point out errors or mistakes and omissions has not done so. I therefore found no basis to order furnishing of fresh accounts.

E) What was the proper rate of interest applied?

47. The plaintiffs contend that if any debt amount was outstanding, there was a contractual interest rate of 16% and the defendant cannot be permitted to apply 18% per annum or 24% per annum as per its letter dated 8th August 1995 on counterclaim herein. The defendant through paragraph 24 of statement by **DW1**, Cecilia Nzioka, confirm the rate of interest as per security document was at a rate of 16% per annum, however urges notice of higher interest rate could be issued. It is urged the defendant received notice from the Deposit Protection Fund Board to charge interest at a rate of 18% per annum for all outstanding loan, which the defendant applied. It is urged the plaintiffs never objected despite being notified and despite the plaintiffs receiving monthly statements. It is urged as at 8th August 1995, the plaintiffs owed the defendant a sum of Kshs.136, 021,176 together with interest at a rate of 18% p.a from 31st July 1995. I find however the money lent and advanced to the first plaintiff by the defendant are contractual and the parties having agreed on the rate of interest, the rate of interest could only be charged as per terms of the contract and not at the whims of a third party.

F) Whether the Defendant's counterclaim is time barred?

48. The defendant in its amended defence and counterclaim dated 13th December 2012 counterclaim from the plaintiffs jointly and severally the sum of Kshs.55, 492,649.40 the sum claimed is reflected at pages 18 – 23 of D-4. The Defendant relies on the statements of account at pages 93 – 110 in (exhibit D-2) and pages 18-23 of (Exhibit D-4.)

49. The plaintiffs on their part aver that the letter of demand was served by the defendant on 1th August 1987 and the defendant went quiet from then until 13th December 2012, 25 years later when it filed this counterclaim. The limitation period for contractual is 6 years by notice of section 4 of the Limitation of Actions Act. The plaintiff therefore submits that the counterclaim should therefore be struck out or dismissed.

50. It is submitted on behalf of the defendant the counterclaim is not time-barred as the plaintiffs suit was filed on 1/9/1995. That by virtue of section 35 of Limitation of Actions Act the counter-claim is deemed to have commence on the same date when the plaint was filed, thus on 1st September 1995.

51. **Section 35 of the Limitation of Actions Act** provides:-

"For the purposes of this Act and any other written law relating to the limitation of actions, any claim by way of set-off or counterclaim is taken to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded."

52. The defendant further urges any fresh accrual of right of action arises following acknowledgement or part payment of a debt. **Section 23(3) of the Limitation of Actions Act** provides:-

"(3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment: Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt."

53. It is further urged that under **section 69 G (2) of the Transfer of Property Act** the receiver appointed under the chargee shall be the agent of the mortgagor, in the instant case of the plaintiffs. Section 69 G (2) of the transfer of Property Act provides:-

"A receiver appointed under the mortgagee's power of appointment of a receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the mortgage instrument otherwise provides."

54. In the instant suit, the defendant has demonstrated that the receiver as an agent of the plaintiffs made many payments to the defendant including and upto 23rd March 1995 as reflected on the Receiver's account at page 191 (Exhibit D-2) and statement of account at page 18 (Exhibit D-4). This was before the filing of the counterclaim following the filing of the plaintiff's suit on 1/9/1995.

55. The counter-claim in this suit arose out of series of loan transactions whereby the plaintiffs exercised various legal charges in favour of the defendant to secure the sums now subject of the counterclaim. The charges herein being valid and there being unpaid balance and the plaintiffs having not been discharged from the charges, it is my view that the plaintiff cannot rely on the Limitation of Actions Act, to deny the chargee recovery of the outstanding loan as long as there exists a valid charge. I therefore find the counter-claim to have been filed

within time and decline to declare the counter-claim as time barred.

56. Having considered the pleadings and the evidence by **DW1**, and statements of account at pages 93 – 110 in (Exhibit D-2) and pages 18 – 23 of (Exhibit D-2) and there being no rebuttal of the same by the plaintiffs, I am satisfied that the defendant has proved on balance of probabilities that is entitled to the sum counter-claimed of Kshs.557,492,649.40.

57. The upshot is that;

a) Plaintiffs claim under prayers numbers 1, 2, 3,3A and 4 of the Further Re-Amended plaint is without merit and is dismissed with costs.

b) I enter judgment for the Defendant's counter-claim of Kshs.557,492,649.40 with interest at a rate of 16% from 31st August 2005 until payment in full.

c) Costs of the counter-claim to the defendant.

Dated, signed and delivered at Nairobi this 4th day of April, 2019.

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J .A. MAKAU

JUDGE