



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. E012 OF 2024

—BETWEEN—

STANDARD CHARTERED FINANCIAL SERVICES LIMITED.....APPELLANT

-AND-

MANCHESTER OUTFITTERS (SUITING DIVISION) LIMITED NOW CALLED KING WOOLEN MILLS LIMITED.....1ST RESPONDENT

GALOT INDUSTRIES LIMITED.....2ND RESPONDENT

A.D GREGORY & C.D. CAHILL.....3RD RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal at Nairobi (Makhandia, Kantai & Nyamweya, JJ.A.) delivered on 16th December, 2022 in Civil Appeal No. 88 of 2000

Representation:

Mr. George Oraro, SC, Ms. Radhika Arora, and Ms. Kateline Mang'ich for the Appellant
(Oraro & Company Advocates)

Mr. Philip Nyachoti and Ms. Jeretina Mayega for the 1st and 2nd
Respondents
(Nyachoti & Company Advocates)

Mr. Paul Chege for the 3rd Respondent
(*Amolo & Gachoka Advocates*)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This appeal arises from a chequered history that has engaged the courts for nearly 35 years. The appeal is premised on Article 163(4)(b) of the Constitution. The Court of Appeal (*Warsame, M'I noti & Mativo, JJ.A.*), in its ruling of 23rd February 2024 in Civil Application No. E001 of 2023 certified this matter as raising three issues of general public importance. However, by a ruling of this Court dated 30th August 2024, in ***Manchester Outfitters (Suiting Division) Limited Now Called King Woolen Mills Limited & Another Vs Standard Chartered Financial Services Limited & Another*** [2024] KESC 49 (KLR), we reviewed, varied and certified the following two issues for our determination:

- i. Whether a financier holding securities in a charge or debenture is required to register fresh securities whenever a subsequent advance is made, even if the securities for the previous advances have not been discharged.*
- ii. Whether there is a correlation between a security instrument drawn in favour of a lending institution, and the right of recovery under a facility advanced by the same lending institution. In particular, the Court is to determine whether a borrowing which has not been secured (whether as contemplated by the parties or otherwise) discharges a borrower from its obligation to repay a loan.*

B. FACTUAL BACKGROUND

[2] By a Euro Currency Loan Agreement dated 2nd March 1982, Standard Chartered Merchant Bank, London (SCMB), advanced to the 1st respondent 1,300,000 in Deutsche Marks and 1,050,000 in Swiss Francs. The facility was to be repaid in eleven equal semi-annual instalments. As security, the appellant

executed an unlimited guarantee of even date in favour of SCMB. In turn, the 1st respondent created securities in favour of the appellant by way of a debenture dated 5th April 1982, which comprised a specific charge over all its immovable property, fixed and book assets, and a floating charge over its other property. Additionally, the 1st respondent executed a first legal charge in favour of the appellant over two parcels of land, namely LR No. 12867/2 Grant No. I.R. 36265 and LR No. 12867/2 Grant No. I.R. 36266.

[3] Subsequently, by a facility letter dated 7th October 1986, and with the consent of the 1st respondent, the appellant took over the Euro Currency loan and settled the outstanding amount due to SCMB. The facility was thereafter converted into a local currency loan of Kenya Shillings 9,000,000/- (the localised loan), repayable by the 1st respondent in 54 monthly instalments of Kshs. 166,667/- with effect from 31st July 1987.

[4] The 1st respondent, however, fell into arrears. Consequently, by a letter dated 9th February 1989, the appellant demanded payment of Kshs. 14,272,198.85/- together with interest. A further demand was made, followed by a letter dated 5th September 1990, this time for the sum of Kshs. 19,024,522.05/-. On the same date, the appellant, pursuant to the debenture, appointed the 3rd respondent as joint receivers and managers of the 1st respondent. This action was met with resistance by the 1st and 2nd respondents, culminating in a court action.

C. LITIGATION HISTORY

i. Proceedings at the High Court

[5] The 1st and 2nd respondents instituted proceedings in the High Court, being **HCCC No. 5002 of 1990**, principally to challenge the appointment of the 3rd respondent under the debenture. The gravamen of their case was that, prior to the execution of the guarantee by the appellant, the scope and extent of that guarantee had been expressly delineated in a letter dated 27th November 1981 issued under

the appellant's hand which stipulated the terms of the loan; and that the 1st respondent had, on 30th November 1981, signified its acceptance of the terms by executing a copy of that letter. On this basis, the 1st and 2nd respondents argued that the guarantee was intended solely as security for the repayment of the Euro Currency loan and not the localised loan. They further maintained that the debenture and the legal charge executed thereafter were confined strictly to securing such sums, if any, as would become payable by the appellant pursuant to its guarantee in favour of SCMB, and no more. In other words, the securities could not lawfully extend to cover the localised loan subsequently advanced by the appellant, nor could they be relied upon to justify the appointment of receivers.

[6] Moreover, the 1st and 2nd respondents contended that certain critical terms of the localised loan were set out under Clause 11(a) of the General Terms and Conditions annexed to the facility letter. Those terms were that, *“the Facility Letter and the Terms and Conditions supersedes any previous agreement(s) whether written, oral or implied between the appellant and 1st respondent in relation to the facility offered hereby and contains the entire agreement of the appellant and the 1st respondent with respect to the facility. Any variation or amendments to this letter may only be made in writing signed by or on behalf of each party hereto.”* On the strength of this clause, the 1st and 2nd respondents argued that the facility letter and the annexed terms constituted the sole and exclusive agreement governing the localised loan. Consequently, any reliance on earlier arrangements, including the debenture and the legal charges that had secured the Euro Currency loan, was, in their view, misplaced and without legal foundation.

[7] They further asserted that, under the terms of the facility letter, the 1st respondent was required to provide fresh security for the localised loan. This was to be in the form of a legal charge, a debenture, and a “negative pledge,” namely, a contractual covenant prohibiting the debtor from creating further security interests over specified property or assets. It was their case that no such securities

were ever executed in respect of the localised loan. Accordingly, the 1st and 2nd respondents maintained that the appellant could not lawfully invoke the earlier debenture and charges to enforce repayment of the localised loan, nor to justify the appointment of receivers over the 1st respondent.

[8] The 1st and 2nd respondents further maintained that the execution of the localised loan had the effect of terminating the Euro Currency loan; and that once the appellant settled the outstanding liability with SCMB, the guarantee it had furnished was never called in and was thereby discharged. Consequently, they argued, the subsequent localised loan constituted a fresh facility, governed by different terms and conditions altogether. By parity of that reasoning, the 1st and 2nd respondents contended that the debenture, which they insisted was executed solely as security for the appellant's guarantee in favour of SCMB, was likewise discharged once the Euro Currency loan was extinguished.

[9] The 1st and 2nd respondents further impugned the debenture on account of the circumstances of its preparation and execution. They contended that the instrument had been drawn by the appellant's advocates, M/s Kaplan & Stratton, who, at the material time, also acted for them. In their view, this created a conflict of interest since the firm only pursued the interests of the appellant. They did this by inserting into the debenture certain statements and provisions which impermissibly extended its agreed scope, without authority, involvement, and disclosure to the 1st respondent, it was pleaded.

[10] It was the 1st and 2nd respondents' argument that, in executing the debenture, the 1st respondent did so under the belief

that it served only as consideration for the guarantee issued in respect of the Euro Currency loan, thereby invoking the plea of '*non est factum*'; that the execution of the instrument was occasioned either by a mutual mistake between the appellant and the 1st respondent, or, in the alternative, by a unilateral mistake on the part of the latter. On that basis, the 1st

and 2nd respondents maintained that the debenture was entirely *ultra vires*, or at the very least, unenforceable to the extent that it purported to exceed the terms agreed upon in the appellant's letter of 27th November 1981, or to confer security beyond what had been contemplated therein.

[11] The appointment of the 3rd respondent was also challenged on the ground that upon service of the demand letter dated 9th February 1989, the 1st and 2nd respondents, by a letter dated 16th February 1989, requested time to restructure the financial facilities with their bankers, Kenya Commercial Bank (KCB). Pursuant thereto, the 1st and 2nd respondents claimed that discussions were held between themselves, the appellant, and KCB, at which it was agreed that the 2nd respondent, the 1st respondent's sister company, would sell its parcels of land to KCB and part of the sale proceeds in the sum of Kshs. 38,000,000/- would be employed by the 1st respondent as working capital, and the appellant would grant the 1st respondent a moratorium of one year, as well as a period of three years, to settle the debt; that the appellant, however failed to keep its end of the bargain insisting that it would only do so if KCB gave an undertaking to service the interest on the localised loan during the moratorium, a demand KCB rejected and instead proceeded to exercise a banker's lien over the sale proceeds.

[12] Subsequently, the 2nd respondent gave an undertaking that the sale proceeds of another parcel, named Galot Industrial Park, which was at the time being developed, would be disbursed to pay off the 1st respondent's outstanding loan. As far as the 1st and 2nd respondents were concerned, since the appellant had not

communicated its approval or rejection of this last undertaking, the 1st and 2nd respondents believed that the offer had been accepted. As such, they contended that it came as a surprise when the appellant served the second demand notice and appointed the 3rd respondent. They argued in that regard that the appellant's conduct was not only malicious but that the appellant was estopped from

appointing the 3rd respondent on the basis of the aforementioned agreement and conduct.

[13] Finally, the 1st and 2nd respondents have submitted that the appellant, which was originally known as East African Acceptances, was not registered as a bank under the Banking Act, yet, pertaining to the transactions in issue, it had transacted banking business and described itself as a bank, as evinced by the guarantee and debenture. For the foregoing reasons, the 1st and 2nd respondents prayed that the transactions in question between the appellant and the 1st respondent up to 1st November 1989, when the Banking Act was amended, be declared illegal and *ultra vires*.

[14] Based on the foregoing, the 1st and 2nd respondents claimed that the appellant's conduct had occasioned them loss and damage; furthermore, that the 3rd respondent had committed wrongful acts with respect to the 1st respondent's assets and property; that they had closed down the 1st respondent's factory and dismissed skilled labourers; that they had failed to sell finished products; and that they had failed to prevent theft of machinery or stock. In the end, by the 'Re-Re- Amended Plaint' the 1st and 2nd respondents sought the following orders:

"As against the appellant and the 3rd respondent;

- a) A declaration that the appointment of the 3rd respondent by the appellant as receivers and managers was invalid and/or in breach of contract, and is null and void and should be revoked.*
- b) A declaration that the appointment of the 3rd*

respondent by the appellant is voidable on the grounds that it was made in bad faith and should be set aside.

c) An injunction be granted restraining the 3rd respondent and/or the appellant by themselves or their servants and/or

agents or otherwise from interfering with the operation by the 1st respondent of its day-to-day business in its premises.

d) Costs

e) Interest”

As against the appellant alone;

f) A declaration that the debenture and all securities given therefore are and always have been unenforceable against the 1st and 2nd respondents with respect to any rights conferred by the excess security, and should be wholly set aside or alternatively, rectified so as to eliminate the terms conferring the excess security and, in any event, should be discharged.

g) Such order for rectification as the court may think just and expedient.

As against the 3rd respondent;

h) An order for delivery of possession of all monies, assets and property of the 1st respondent in their possession, power or control and an account of all monies of the 1st respondent received by them.

i) Damages and enquiry of such damages.

[15] While the suit was pending, *Dugdale, J* issued an *ex parte* interlocutory injunction on 27th September 1990, restraining the appellant and the 3rd respondent from selling the 1st respondent's assets, which order was subsequently discharged. A second

interlocutory injunction was issued on 18th October 1990 by *Bosire, J* (*as he then was*), restraining the 3rd respondent from continuing to exercise any powers of a receiver or manager over the 1st respondent and its assets pending the determination of the suit.

[16] In response, the appellant and 3rd respondent filed a joint Defence to the 'Re- Re- Amended Plaintiff' and a Counterclaim, the combined effect of which was that they denied the claims by the 1st and 2nd respondents; and instead maintained that the plea of *non-est factum* was barred by the Limitation of Actions Act; and in the alternative, that if there was any contravention of the Banking Act, all the transactions pertaining to the parties would be rendered valid by dint of Section 52 of the Banking Act, which is to the effect that, no contravention of the provisions of the Banking Act will affect or invalidate any contractual obligation between an institution and any other person. It was their position that the extension of the debenture to cover all the facilities offered by the appellant to the 1st respondent, other than the guarantee for the Euro Currency loan, was discussed and approved by the 1st respondent. As for the Counterclaim, the appellant sought an order directing the 1st and 2nd respondents to pay to it the sum of Kshs. 24,837,999/-, being the outstanding loan, and a declaration that the debenture is valid and a subsisting security for the 1st respondent's indebtedness. On their part, the 3rd respondent sought the sum of Kshs. 2,337, 161.75/- being moneys expended in the performance of their duties as receivers and managers; and a declaration that their appointment was valid.

[17] By a judgment dated 30th July 1999, the High Court (*E.M. Githinji, J*) (as he then was) found that the suit turned on 11 issues: *was the drafting and execution of the debenture in the present form authorised and approved by the 1st respondent?; is the 1st respondent estopped from asserting that the said debenture was executed without its authority or from denying that debenture did not cover excess security?; is the plea of non-est factum, mutual mistake, unilateral*

mistake, ultra vires, and rectification barred by the Limitation of Actions Act?; did the appellant breach the Banking Act, and does such breach, if any, invalidate the debenture?; was the debenture, legal charge and guarantee discharged by the localisation of the Euro Currency loan?; was there any breach of any existing

agreements or existence of malice in the appointment of receivers and managers?; was the other security (legal charge) given by the 1st respondent to the appellant enforceable?; did the receivers and managers (the 3rd respondent) breach the duty of care owed to the 1st and 2nd respondents?; were the 1st and 2nd respondents entitled to the relief sought in the plaint?; were the appellant and 3rd respondent entitled to the reliefs sought in the counterclaim?; and what was the appropriate order for costs?

[18] On the first question, the trial court found that the advocates in question, while sharing the draft debenture with the appellant and 1st respondent, also brought to their attention that it covered any other facilities which the appellant may agree from time to time to make available to the 1st respondent. The 1st respondent's Board of Directors, for their part, sanctioned the granting of the debenture and authorized Mr. Mohan Galot, the Chairman, to settle its terms and execute the same. Moreover, the 1st respondent's articles of association gave power to the chairman to exercise this and other functions on behalf of the directors. It was also not in dispute that Mr. Mohan Galot and the 1st respondent's company secretary read the draft debenture and, eventually, Mr. Galot approved the same. It was for this reason that the court dismissed the 1st and 2nd respondents' contention that the 1st respondent was not aware of the effect of the debenture and that it had not authorised the execution of the instrument or that it executed it as a result of a unilateral or mutual mistake.

[19] According to the court, the assertion that the debenture was invalid for providing excess security was raised for the first time in

the 'Re-Re Amended Plaintiff' filed on 24th February 1992, nearly ten years later, while the debenture was executed on 5th April 1982. The court further found that the cause of action arose either immediately upon execution of the debenture or when the 1st and 2nd respondents became aware of the contents thereof. Based on the foregoing reasoning, the court held that the cause of action had arisen ten years before the

suit was filed, and as such, the claim about the invalidity of the debenture, as well as the reliefs sought in that regard, were all time-barred by dint of Section 4 of the Limitation of Actions Act.

[20] On breach of the Banking Act, the court found that there was no evidence to suggest that the appellant had carried out banking business during the period in issue. As a result, the court held that the relevant transactions were neither illegal nor unenforceable. In any event, the 1st respondent was nonetheless bound by its contractual obligations under Section 52 of the Banking Act, which provides that no contravention of the Act will affect or invalidate any contractual obligation between an institution and any other person.

[21] On the issue of the localised loan, the court found that it was not a fresh loan, but rather, that the appellant, through the localised loan, merely took over the Euro Currency loan. As such, the court was of the view that to require parties to execute a fresh debenture and legal charge would have defeated the conversion of the Euro Currency loan into a local currency loan and gone against the express intention of the parties. In the court's view, a re-execution would not have been possible without the 1st respondent paying the Euro Currency loan in full and obtaining a fresh loan from the appellant. In the circumstances, the court held that localisation of the Euro Currency loan merely rendered the guarantee inoperative but left the debenture and legal charge as valid securities for the localised loan. In the alternative, the court found that the appellant, having paid the outstanding Euro Currency loan, was entitled to enforce the security given by the 1st respondent in consideration of the guarantee.

[22] The court furthermore observed that it was conceded that the 1st

respondent had fallen into arrears, which alone was a justification for the appointment of the 3rd respondent in line with the debenture. On the 3rd respondent's conduct, the court noted that the 3rd respondent allowed the 1st respondent's factory to run from

5th September 1990 until they closed it down on 25th September 1990. The court found that the 3rd respondent's decision to close the factory and sell it as a going concern was sound, in the circumstances. More so because the 1st respondent was insolvent, there was no yarn or market for its products, and KCB had declined to inject further capital. Additionally, the 3rd respondent complied with the interlocutory orders issued by the court and handed over the property to the 1st respondent. All in all, the court found that there was no evidence to demonstrate any wrongful acts or misconduct on the part of the 3rd respondent.

[23] Concerning the alleged agreements on a moratorium by the appellant as well as the 2nd respondent's undertaking to apply the sale proceeds of Galot Industrial Park, the court observed that the 1st and 2nd respondents appeared to have abandoned that claim. Ultimately, the High Court dismissed the 1st and 2nd respondents' suit and allowed the appellant and 3rd respondent's Counterclaim with costs.

ii. Proceedings at the Court of Appeal

[24] The 1st and 2nd respondents, being dissatisfied with the above outcome, lodged in the Court of Appeal **Civil Appeal No. 88 of 2000**, anchored on a whopping 48 grounds of appeal. However, the parties agreed to condense them into the following issues:

- a) Whether the debenture was valid and enforceable;*
- b) Whether the appointment by the appellant of the 3rd respondent as receiver managers on 5th September, 1990 was proper, regular, and valid;*
- c) Whether the 1st and 2nd respondents were entitled to damages, and if so, the quantum thereof; and*

d) Whether the appellant and the 3rd respondent were entitled to the relief sought in the Counterclaim.

[25] On their part, the appellant and the 3rd respondent filed notices of grounds affirming the trial court's judgment. They maintained that the debenture dated 5th April 1982, to which all the other securities were made subsidiary, by its specific terms covered all future borrowings and liabilities of the 1st respondent, whenever and however arising, and secondly, that the debenture and the securities were therefore valid security for the sums owing by the 1st respondent

[26] The Court of Appeal (*Asike-Makhandia, Kantai & Nyamweya, JJ.A*) rendered its judgment on 16th December 2022. *On the validity of the debenture*, the court, relying on Section 65 of the repealed Registered Land Act and Section 96 of the repealed Companies Act, found that there was no charge or debenture registered in respect of the localised loan, and that as a result of that omission, there were no securities in place to secure the loan. Unlike the High Court, the appellate court found that the facility letter for the localised loan had prescribed a clear procedure for securing the same. In particular, it required that a fresh charge and debenture be executed and registered. Besides, the facility letter expressly stated that it superseded all previous agreements in respect of the facility offered and that the letter contained the entire agreement between the parties. Accordingly, the court held that the appellant had no valid or legal instrument upon which it could appoint the 3rd respondent as receiver/manager of the 1st respondent. In the circumstances, the appellate court declared that the appointment of the 3rd respondent was invalid, illegal, null, and void.

[27] Based on the foregoing, the court held that the 1st and 2nd respondents were entitled to damages. While noting that the High

Court had failed to assess the quantum of damages, the appellate court referred the matter back to the High Court for assessment of damages. The court, on the other hand, found no merit in the appellant's and the 3rd respondent's counterclaim and declared that they were not entitled to the reliefs granted by the trial court. Ultimately, the court issued the following orders:

- i. The appeal be and is hereby allowed.*
- ii. The notices of grounds affirming the High Court decision have no merit and are dismissed.*
- iii. The matter be remitted to the High Court for assessment of damages only.*
- iv. Costs of the appeal and the court below be awarded to the 1st and 2nd respondents.*

iii. Proceedings at the Supreme Court

[28] Dissatisfied with the above determination and upon certification by the Court of Appeal under Article 163(4)(b) of the Constitution that a matter of general public importance is involved, the appellant filed the instant appeal. In certifying this appeal in the ruling dated 23rd February 2024, the Court of Appeal delineated three issues as involving matters of general public importance. However, by a ruling dated 30th August 2024, in ***Manchester Outfitters (Suiting Division) Limited Now Called King Woolen Mills Limited & Another Vs Standard Chartered Financial Services Limited & Another*** [2024] KESC 49 (KLR), this Court reviewed and varied the issues of general public importance in the following terms:

- i. Whether a financier holding securities in a charge or debenture is required to register fresh securities whenever a subsequent advance is made, even if the securities for the previous advances have not been discharged.*
- ii. Whether there is a correlation between a security instrument drawn in favour of a lending institution, and the right of recovery under a facility advanced by the same lending*

institution. In particular, the Supreme Court will be called upon to determine whether a borrowing which has

not been secured (whether as contemplated by the parties or otherwise) discharges a borrower from its obligation to repay a loan.

[29] The appellant seeks that we grant the following reliefs as we answer the above questions:

- a) An order setting aside the judgment of the Court of Appeal dated 16th December 2022.*
- b) An order re-instating the judgment of the High Court dated 30th July, 1999.*
- c) Any other order that this Honourable Court may deem fit.*
- d) Costs of the appeal.*

[30] In opposing the appeal, the 1st and 2nd respondents have filed a replying affidavit sworn on 8th April 2024 by *Mr. Mohan Galot*, the Chairman of the Board of Directors of the said respondents, wherein they restate their case in the superior courts below.

[31] In a rejoinder, the appellant filed a further affidavit sworn on 18th April 2024 by *Dr. Davidson Mwaisaka*, the Head of its Legal Department, wherein he reiterates arguments in support of the appeal. He specifically stresses that Clause 1 of the terms of the debenture amounted to a continuing security provision; that, the 1st respondent accordingly perfected a security in the form of a debenture in favour of the appellant, which debenture was a security not only for the guarantee but for any advances made by the appellant to the 1st respondent, whether in the appellant's capacity as a guarantor or as a principal lender.

D. PARTIES' SUBMISSIONS

i. The appellant

[32]The appellant filed its submissions dated 20th May 2024 and 1st July 2024 in support of the appeal and in response to the 1st and 2nd respondents' submissions.

On the issue of the alleged illegibility and incompetence of the record, the appellant contends that the judgment of the Court of Appeal was rendered in the absence of Volume 5 of the record of appeal. This omission, they argue, deprived them of their constitutional right to a fair trial as guaranteed under Articles 25 and 50 of the Constitution. In their view, this Court ought to lay down a definitive standard to be applied in circumstances where a record of appeal is defective under the Court of Appeal Rules, the matter being one of general public importance.

[33] On the question of whether a financier holding securities under a charge or debenture is required to register fresh securities upon advancing subsequent facilities, even where the earlier securities remain undischarged, the appellant submits on the strength of Section 101 of the repealed Companies Act (now Section 887 of the Companies Act, 2015), as well as Sections 81 and 82 of the repealed Registered Land Act, that a debenture or charge subsists until it is formally discharged by the registration of a memorandum of satisfaction or discharge, as the case may be.

[34] In line with these provisions, the established practice within the banking sector has been that securities furnished by a borrower continue to secure all subsequent facilities advanced, unless and until the entirety of the borrower's indebtedness is settled and the securities formally discharged. In support of this position, reliance is placed on the Court of Appeal's decision in ***Robert Njoka Muthara & another Vs Barclays Bank of Kenya Limited & another*** [2017] KECA 685 (KLR), where the Court of Appeal determined that charges act as continuing securities to a series of transactions, and the

liability thereunder remains until the transactions contemplated by the parties and covered thereunder are exhausted. Similarly, in ***Habib Bank A.G. Zurich Vs Rajnikant Khetshi Shah*** [2018] KECA 774 (KLR), the Court of Appeal affirmed that, so long as a legal charge remains undischarged, it continues to operate as a continuing security; and for as long as the debt secured thereby remains unpaid, proceedings may properly

be instituted for recovery of the debt. It is only when the debt is fully settled that the charge will be formally discharge in accordance with the law, it is submitted.

[35] The appellant further contends that, it would be impracticable, if not wholly untenable, to conduct banking business in a regime where securities are deemed automatically discharged upon repayment of a facility and must be freshly registered for every subsequent advance. Such an arrangement, in their view, would plunge the banking sector into disorder, with countless existing facilities instantaneously rendered unsecured at the mere stroke of a pen.

[36] In conclusion, the appellant, relying on ***National Bank of Kenya Limited Vs Anaj Warehousing Limited*** [2015] KESC 4 (KLR), submits that to uphold the judgment of the Court of Appeal would be to sanction unjust enrichment on the part of the 1st respondent, who, notably, does not dispute the existence of the loan in question.

ii. The 1st and 2nd respondents

[37] The 1st and 2nd respondents contend, at the outset, that the appeal essentially challenges the merits of the impugned judgment and does not, in their view, raise any question of general public importance. They further argue that certain issues, that is, the ineligibility and incompetency of the record of appeal and their right to fair hearing, now advanced by the appellant, were never canvassed or determined in the superior courts below. In the circumstances, the respondents reiterate the positions they took before the superior courts below and urge this Court to affirm the impugned judgment.

iii. The 3rd respondent

[38] The 3rd respondent did not file any pleadings, but before us during the hearing of the appeal orally indicated their support for the appeal.

E. ISSUES FOR DETERMINATION

[39] From the pleadings and submissions, the issues for the Court's determination remain those framed by the Court in the ruling of 30th August 2024, in addition to a preliminary question and the final relief, which are:

- i. Whether the appeal before this Court is competent.*
- ii. Whether a financier holding securities in a charge or debenture is required to register fresh securities whenever a subsequent advance is made, even if the securities for the previous advances have not been discharged.*
- iii. Whether there is a correlation between a security instrument drawn in favour of a lending institution, and the right of recovery under a facility advanced by the same lending institution. In particular, the Supreme Court will be called upon to determine whether a borrowing which has not been secured (whether as contemplated by the parties or otherwise) discharges a borrower from its obligation to repay a loan.*
- iv. What reliefs should issue*

F. ANALYSIS AND DETERMINATION

- i. Whether the appeal before this Court is competent.***

[40] Under this issue, two subsidiary questions arise: first, whether an appeal may properly introduce matters that have not been certified as raising issues of general public importance; and secondly, whether the 1st and 2nd respondents can, at this stage, contest the certification on grounds that the appeal does not, in fact, raise matters of general public importance.

[41]To begin with, the appellate jurisdiction of this Court is circumscribed by Article 163(4) of the Constitution, a provision whose import has been the subject of a long line of this Court's decisions. It bears repeating, however, that not every decision of the Court of Appeal is amenable to further appeal to this Court. Article 163(4), therefore, serves as a deliberate filtering mechanism, ensuring that only

those cases which properly fall within the narrow ambit of the two categories therein prescribed are admitted for this Court's consideration. See ***Nduttu & 6000 others Vs Kenya Breweries Ltd & another*** [2012] KESC 9 (KLR). Besides, the two avenues under which this Court can hear appeals from the Court of Appeal are distinct, and cannot be invoked at the same time in one matter, as expressed in ***Twaha Vs Abdalla & 2 others*** [2015] KESC 20 (KLR).

[42]In the instant appeal, the issue of illegibility or incompetence of the record as raised by the appellant is outside the ambit of this Court's jurisdiction under Article 163(4)(b). More particularly, the grounds of appeal therein and the submissions thereto, as set out, go beyond the scope of the specific issues certified by the Court of Appeal and subsequently reviewed by this Court. In that ruling, the Court ordered that:

“[14] a. The Originating Motion dated 5th March 2024 is partly successful to the extent that the third question certified by the Court of Appeal as a matter of general public importance, to wit, Whether this Court can proceed to enter judgment on its own discernment and interpretation of a Record of Appeal which is inconsistent, illegible, incomplete and/or portions of the same are missing and whether an incomplete record of appeal which obscures evidence denies a party a right to fair hearing (as protected by Article 25 of the Constitution) and access to justice (as protected by Article 48) of the Constitution) is not a matter of general public importance. In the result this question is struck off the record of issues to be

determined by this Court.

b. For the avoidance of doubt, we uphold the certification of and determination of the following two issues as matters of general public importance:

- i. Whether a financier holding securities in a charge or debenture is required to register fresh securities whenever a subsequent advance is made, even if the securities for the previous advances have not been discharged;*
- ii. Whether there is a correlation between a security instrument drawn in favour of a lending institution, and the right of recovery under a facility advanced by the same lending institution. In particular, as submitted by the applicant, the Supreme Court will be called upon to determine whether a borrowing which has not been secured (whether as contemplated by the parties or otherwise) discharges a borrower from its obligation to repay a loan;...”*

[43] From the foregoing, it is evident that the question of the illegibility or incompetence of the record, at first, certified by the Court of Appeal as a matter of general public importance, was, upon review by this Court, struck out. It is therefore imperative to emphasize that in the certification process, the careful formulation and delineation of issues as matters of general public importance serves a dual purpose. It not only ensures that litigants remain within the proper scope of the certified questions but also provides a clear benchmark for determining whether an appeal lodged under Article 163(4)(b) of the Constitution has remained within, or has strayed beyond, the parameters of certification. Equally, the contention that they were deprived of their constitutional right to a fair trial as guaranteed under Articles 25 and 50 of the Constitution as a result of

the absence of Volume 5 of the record of appeal was neither the basis of certification nor can it now be a matter that would require our attention. See ***Steyn Vs Ruscone*** [2013] KESC 11 (KLR).

[44] Secondly, the 1st and 2nd respondents cannot, at this juncture, be heard to contend that the appeal merely assails the merits of the impugned judgment and does not, in their view, raise any question of general public importance. We must underscore the fact that the jurisdiction of this Court to entertain the present appeal was conclusively settled at the certification stage, and it is not open to the 1st and 2nd respondents to re-litigate that determination under the guise of a jurisdictional objection. The Court has also repeatedly settled this question in such cases as ***Muriithi (Representative of the Estate of Mwangi Stephen Muriithi) Vs Janmohamed SC (Executrix of Estate of Daniel Arap Moi) & another*** [2023] KESC 61 (KLR), and ***Dhanjal Investments Limited Vs Kenindia Assurance Company Limited*** [2018] KESC 16 (KLR). The Court, having therefore ruled on 30th August 2024, that two of the three questions framed by the appellate court meet the test under Article 163(4)(b) of the Constitution, it was not open to the 1st and 2nd respondents to raise the very issue already determined in that ruling again.

[45] We must restate that certification is not a casual procedural step. It is a jurisdictional gateway. The party seeking certification before the Court of Appeal must frame with precision what constitutional or legal question of general public importance arises from the intended appeal. General claims that a matter is “important” or has “public” significance are insufficient. If the Court of Appeal finds merit in the application, it must, similarly, outline with clarity and certainty what questions this Court would be called upon to determine in order to satisfy Article 163(4)(b) of the Constitution. Once the court grants certification, only those issues identified for determination will form

the jurisdictional boundary of the appeal, and parties will not be permitted to smuggle in other grounds or issues.

[46] To specifically answer the question under this head, constituting a preliminary issue, we state that no question will be introduced outside those certified as raising issues of general public importance. The question about the

missing Volume 5 of the record and the alleged violation of the appellant's rights cannot be the subject of this appeal; and secondly, the 1st and 2nd respondents cannot also, at this stage, contest the certification on grounds that the appeal does not, in fact, raise matters of general public importance.

ii. Whether a financier holding securities in a charge or debenture is required to register fresh securities whenever a subsequent advance is made, even if the securities for the previous advances have not been discharged.

[47] One of the considerations for certification of an appeal as involving a matter of general public importance is when there is uncertainty or inconsistency in the application of the law, resulting in conflicting decisions in the courts, which would require the Supreme Court to provide authoritative guidance.

[48] In certifying the present appeal under Article 163(4)(b) of the Constitution, the Court of Appeal noted the existence of two schools of thought on this subject. The first school, according to the appellate court, posits that the original securities must first be discharged and fresh ones registered in respect of any new advance. The other school favours accommodating the fresh advance within the limits of the securities already held. In our second ruling of 30th August 2024, we respectfully agreed with the Court of Appeal that indeed this question has elicited divergence of opinion and conflicting decisions. Some of the examples identified in this regard included **Habib Bank A.G. Zurich Vs Rajnikant Khetshi Shah** (*supra*), **Robert Njoka Muthara & another Vs Barclays Bank of Kenya Limited & another** (*supra*), and **Mwambeja Ranching Company Limited &**

another Vs Kenya National Capital Corporation [2019] KECA 436 (KLR).

[49] Unlike ordinary appeals, arguments under Article 163(4)(b) are laser-focused and tethered to the jurisdictional entry point framed question of general public importance. The parties are not free to re-argue the whole case but must

necessarily confine their submissions to the precise question or questions framed

and certified since the Court's jurisdiction is hinged on this.

[50] It is important to reiterate this principle because, in its ruling of 23rd February 2024 certifying the appeal as involving a matter of general public importance, the Court of Appeal, on the authority of this Court's decision in *Steyn Vs Ruscone (supra)*, identified a state of uncertainty in the law, arising from contradictory precedents as the ground for admitting the appeal. According to the Court of Appeal, and this bears repeating, two schools of thought exist in the courts on this issue. The first school argues that the original securities should be discharged first, where fresh facilities are to be advanced, and that the new facility has to be perfected by fresh securities. The other school of thought favours accommodating the fresh advance within the limits of the securities already perfected and in the possession of the lending institution. The court explained that it was critical for this Court to settle these inconsistencies.

[51] Given the well-trodden path on the approach to an appeal brought under Article 163(4)(b) of the Constitution, we expected parties to confine their submissions and authorities to the two framed questions and not to re-argue the whole case. When the appeal came up for oral hearing on Wednesday, 23rd July 2025, Mr. George Oraro, learned counsel for the appellant, focused on the two framed issues, while Mr. Nyachoti, learned counsel for the 1st and 2nd respondents, spent the entire fifteen (15) minutes allocated to him addressing all aspects of the appeal but the two critical questions forming the matters of general public importance. He only addressed those issues when the Court expressly sought his views at the conclusion of his

submissions.

[52] We recap the first issue for determination: *whether a financier holding securities in a charge or debenture is required to register fresh securities whenever a subsequent advance is made, even if the securities for the previous*

advances have not been discharged. The two judgments of the trial court and the appellate court confirm the divergence of opinions on this subject. The High Court was persuaded that the debenture, earlier executed, continued to operate as a valid and enforceable continuing security. In its view, since the debenture had not been discharged in law, it remained available to secure the subsequent localised facility. The trial court underscored the fact that securities of this nature are not extinguished merely upon repayment of a particular facility, but endure until they are formally discharged in the manner prescribed by statute. In the passage below, in its judgment, the trial court explained the question in some detail as follows:

“The present dispute has not been triggered by the enforcement of the guarantee by SCMB [Standard Chartered Merchant Bank, London] or by the enforcement of the debenture as security for the guarantee became inoperative by the subsequent localization of the Eurocurrency loan. Indeed plaintiffs contend that the debenture was discharged by the localization agreement. No disputes have arisen regarding the enforcement of the debenture as security for the guarantee. It seems to me that the issue of excess security in the debenture is a non issue in the present dispute, as no occasion has arisen for the construction of the debenture in relation to the guarantee and Eurocurrency loan.

Consequently, regarding issues nos. 1 3 and 7 I find that the debenture in its present form was authorized and approved by MOSD (Manchester Outfitters (Suiting Division)

Limited) ***and that the Debenture and the legal charge are valid documents. I further find that the claim based on invalidity of the debenture and the reliefs sought and based on the invalidity of the debenture are barred by S.4 of the Limitation of Actions Act...***

....

So, in respect of the 5th issue, I conclude that the localization of the Eurocurrency loan merely rendered the guarantee in operate (sic) but left the debenture and legal charge as valid securities for the localized loan. Alternatively, the transaction can be viewed from a different perspective. At the time of localization MOSD was in arrears of the Eurocurrency loan to the tune of Kshs. 4,524,985.70 (EX A.P. 150) There was no possibility of MOSD honouring the eurocurrency loan unless the recovery programme was successfully effected. First defendant paid the arrears of Kshs. 4,524,985.70 and eventually the entire Eurocurrency loan to honour its obligations under the guarantee. In that case, the first defendant was entitled to enforce the securities given by MOSD in consideration of the guarantee.

....

Lastly, I have found that the re-execution of the securities was not intended by the parties and that it would not have in any case been possible considering the nature of the transaction. It is true that as a matter of form the debenture and legal charge do not reflect the altered position of the parties. Perhaps some form of amendment deed or rectification deed should have been executed to alter the recital and reflect the changed position of the parties. But even without such a document the parties considered the debenture and legal charge as valid

securities for the altered transaction.”

[53] The views of the second school of thought were expressed by the Court of Appeal, that the original securities should be discharged, and fresh ones perfected as regards a future advance. In the context of this appeal, the appellate court took the position that the subsequent localised facility constituted a distinct and independent transaction, separate from the original Euro Currency loan agreement, for which it was incumbent upon the appellant to register fresh debentures and charges. The court maintained that the original securities were confined exclusively to the Euro Currency loan and could not, without compliance with the formal requirements of Section 65 of the Registered Land Act (repealed) and Section 96 of the repealed Companies Act, extend to secure subsequent advances. The Court of Appeal stated that:

“19. Section 65 of the repealed Registered Land Act (this is Section 56 of the new Land Registration Act) allowed a proprietor of land to, in a prescribed form, charge his land, lease or charge to secure the payment of an existing or a future or contingent debt or other money. The charge had to be executed, stamped and registered at the Registry of Lands to have legal effect and there was provision at Section 81 of the said Act on how that charge would be discharged upon repayment of the sum secured by the charge....

No charge or debenture was stamped or registered in respect of the credit facilities issued in 1986 and the provisions of the Companies Act (section 96) were not followed at all. There were therefore no securities in place

to secure the local loan...

20. There was a clear procedure in 1986 when the local loan was granted for securing the same. It was required that a charge and debenture be created, executed, stamped and be registered in

accordance with the provisions of the Registered Land Act and the Companies Act. The 1st respondent did not follow that procedure. The Credit Facilities document executed by the parties could not replace that procedure required in law. That document stated in clear terms that it superseded all previous agreements in respect of the facility offered and that it contained the entire agreement between the parties. The 1st respondent had no valid or legal instrument on which it could appoint the 2nd respondent as receiver/manager. The appointment of the 2nd respondent to manage the affairs of the appellant was invalid, it was illegal, null and void.”

[54] It is needless to say that the answers to the framed issues necessarily entail the construction of all the cited provisions of the repealed laws and the two facility documents so as to discern the intention of the Legislature and the parties. This is how a similar construction was explained by the Supreme Court of India in the case of ***Reserve Bank of India Vs Peerless General Finance and Investment Co. Ltd. and Others*** (1987) 1 SCC 424:

“Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important... A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the

context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses

provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act”.

[55] We start with Section 92(3) of the repealed Companies Act, which is substantially replicated in Section 878 of the current Companies Act, and provided that:

“(3) Where a company has either before or after the commencement of this Act deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.” (Emphasis added).

[56] This Section was the enactment of the concept of continuing security; that debentures deposited to secure facilities that were likely to fluctuate from time to time, would remain valid and enforceable as continuing security, even if the account was at the time in credit. In other words, the debentures would essentially remain valid security until they were formally withdrawn or discharged, even if there was no debt owing to the financier. This eliminated or reduced the need to create fresh securities for every new advance.

[57] Section 101 of the repealed Companies Act, which has found its parallel in Section 887 of the current Companies Act, on the other hand, provided how the Registrar would deal with a discharged security:

***“101. The registrar on evidence being given to his satisfaction
with respect to any registered charge-***

(a) that the debt for which the charge was given has been paid or satisfied in whole or in part; or

(b) that part of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking, may register a memorandum of satisfaction in whole or in part, or of the fact that part of the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking, as the case may be, and where he registers a memorandum of satisfaction in whole he shall, if required, furnish the company with a copy thereof. (Emphasis added).

[58] The import of this section was that a registered charge subsisted and continued to bind the company until it was formally discharged by the registration of a memorandum of satisfaction. Once that was done, the borrowing in respect of which the charge was created ceased to exist, and no further borrowing would be permitted on the same security. Conversely, if no memorandum of satisfaction was registered, the charge was presumed to continue as a valid encumbrance on the company's assets as a continuing security.

[59] Moving away from the Companies Registry under the repealed Companies Act to the Lands Registry in the repealed Registered Land Act, Section 81 of the latter, which is substantially reproduced under Regulation 74 of the Land Registration (General) Regulations, provided that:

"81. (1) A discharge, whether of the whole or of a part of a

charge, shall be made by an instrument in the prescribed form, or (if of the whole) the word “Discharged” may be endorsed on the charge or the duplicate or triplicate and the endorsement executed by the chargee and dated.

(2) A discharge shall be completed by cancellation in the register of the charge, or part thereof as the case may require, and filing the instrument of discharge or the endorsed charge. (Emphasis added).

[60] Under this Section, a charge could not be presumed to have been discharged even where the loan was repaid in full or the payment informally acknowledged by the bank. A discharge would only be complete by effecting a two-step process, first by the execution and lodgement in the registry of an instrument in the prescribed form, and second, by cancellation of the charge in the register, marking the final and decisive discharge.

[61] While Section 101 of the repealed Companies Act required a *memorandum of satisfaction* to be registered to signify the release of a property from the charge, Section 81 of the repealed Registered Land Act, on the other hand, provided for *registration of an instrument of discharge and cancellation of the charge*.

[62] Finally, Section 82 of the Registered Land Act reiterated by affirming the provisions of Section 81(2) aforesaid that:

“82. Upon proof to the satisfaction of the Registrar -

(a) that all money due under a charge has been paid to the chargee or by his direction; or

(b) that the event or circumstance has occurred upon which, in accordance with the provisions of any charge, the money thereby secured ceases to be payable, and that no money is owing under the charge, the Registrar shall

order the charge to be cancelled in the register, and thereupon the land, lease or charge shall cease to be subject to the charge.” (Emphasis added).

[63] Once the obligation under a charge was fulfilled and the Registrar was satisfied, the charge would be cancelled, and the security therefore ceased to be subject to it. The significance of the above provisions is, first, it established a dual registration system under the Registered Land Act and the Companies Act, both repealed. The system requires registration of documents, whether a charge or discharge, both in the Companies Registry as well as in the Land Registry. The second significant aspect of these provisions was their recognition of the concept of continuing security; that, unless the instrument of discharge or memorandum of satisfaction is filed and cancellation entered in the register, there is no automatic discharge of a charge.

[64] Proprietary rights are so important that the Constitution recognizes them as a fundamental human right save in instances where those rights are found to have been unlawfully acquired. A purchaser intending to buy land is bound not only by the principles of *caveat emptor* (buyer beware) or *nemo dat non quod non habet* (that no one can give what one does not have), but also by the Torrens principles on due diligence. By looking into the details in the register, one would see the status of a charged property.

[65] We believe it is safe to state without qualification, based on our reading of the foregoing provisions of the repealed statutes and the cited authorities in a long line of several others on this subject, that the Kenyan courts have recognized, adopted, and applied the concept of continuing security as clearly established in Kenyan banking practices. While the courts are generally in agreement about the concept, they have produced different outcomes on whether a later

advance can be secured by an earlier charge and whether fresh registration and fresh securities are required.

[66] Whether or not a transaction constitutes a continuing security will depend on the interpretation of and the descriptions in the security documents; whether

the documents contain clauses that reflect the parties' contemplation of flexibility in the facility's structure, allowing adjustments and rollovers to accommodate business needs, as and when required.

[67] The Court of Appeal's widely cited judgment in ***Habib Bank A. G Zurich Vs Rajnikant Khetshi Shah*** (*supra*) adopted this position, where it held that:

“[19] The first issue is whether the claim by the respondent seeking the discharge of charge was time barred, the legal charge being a contract. Counsel cited the provisions of section 4 (1) (a) and 4(3) of the Limitation of Actions Act which provide that any action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued.... The Judge held and rightfully so, that as long as the legal charge was not discharged, it was a continuing security and as long as the debt it secured remained unpaid a suit can be filed either to recover the debt or to discharge the charge. The learned Judge was spot on this issue and we find ourselves agreeing that as long as the contract is tied to a legal charge that is a continuing security; until the debt is paid and the security is discharged none of the parties claim can be time barred. A cause of action under a continuing security never dies or lapses.”

(Emphasis added).

[68] In the above case, the court found as a matter of fact that the

charge document expressly provided that the charge was a continuing security for the due repayment of the facility together with interest accrued thereon. In an earlier case, **David Kamau Gakuru Vs National Industrial Credit Bank Ltd** [2002] KECA 274 (KLR), the court found that the Charge over L.R. No. 3734/750:

“...contained what is called Recital B Clauses 1(a) (b) and (c) which, in effect, stipulated that the security provided by the appellant was to be: "a continuing security for all sums advanced to the borrower (appellant) from time to time." And so when the appellant completed repayment of the first loan of Shs. 7 million and was advanced the second loan of Shs. 4.6 million there was no need to discharge the existing Charge in order to create a fresh Charge”.

[69] Where, however, the court found on record that the document constituting the contract between the parties being a letter of offer; and that the letter of offer did not have a continuing security clause, it declared that ***“any claim of a term that was not agreed by consent in the contract between the parties cannot be imposed on any one party”*** and therefore a continuing security was not established. Similarly, in ***African Banking Corporation Limited Vs Dokoria*** [2024] KEHC 4550 (KLR), where the facility was expressly temporary in nature with a fixed repayment date, the court held that it would not treat the arrangement as a continuing security that extended enforcement indefinitely. See also ***National Bank of Kenya Ltd & 2 others Vs Asam-Con Limited*** [2025] KECA 504 (KLR) and ***Jane Wangui Kinuthia Vs Barclays Bank of Kenya*** [2007] KEHC 1302 (KLR).

[70] The five cases outlined in the above paragraph, alongside other decisions of superior courts, demonstrate that a continuing security cannot be assumed. Its application depends squarely on the facts, the construction of the terms contained in the security documents, and the intention of the parties. This is based on the principle that courts

cannot rewrite contracts for parties who, on the other hand, are bound by the terms of their contract. It follows, therefore, that a bank cannot enforce a contract beyond the terms of the security. The courts, for their part, will

not imply continuing security where the terms are ambiguous or the security is silent.

[71] How do these principles apply to the dispute now before the Court, focusing on the sole question under consideration, namely, whether the appellant was required, having taken over the Euro Currency loan from its sister company, SCMB to register fresh securities based on the facility letter of 7th October 1986? Was the debenture automatically discharged upon the localisation of the Euro Currency loan? Did the facility letter discharge the right of the appellant as a debenture holder by virtue of clause 11(a) of the facility letter, which provided that *“the facility letter and terms and conditions supersede any previous agreement(s) whether oral or implied between the company and the borrower in relation to the facility offered hereby...”* or was the debenture a continuing security for the localized loan?

[72] The answer to these questions will invariably depend on the intention of the parties as expressed in the security documents and the construction of those documents. We reiterate that a court of law will not rewrite a contract for parties; they are bound by the terms of their agreement unless coercion, fraud, or undue influence is specifically pleaded and proved. See ***National Bank of Kenya Ltd Vs Pipeplastic Samkolit (K) Ltd & another*** [2001] KECA 362 (KLR).

[73] The 1st respondent in the above regard contends that the subsequent agreement of 1986, which localised the Euro Currency loan, had the effect of discharging the earlier securities. In its view, the localised facility created a wholly fresh contractual relationship,

distinct from the eurocurrency loan, which could only be supported by securities specifically executed for that purpose. This transaction, in our view, was a simple one. The localisation of the Euro Currency loan simply meant that the appellant was taking over the 1st respondent's loan in Eurocurrency, which the latter owed to the appellant's associate company, SCMB,

London. The outstanding Eurocurrency loan amounting at the time to the equivalent of Kshs. 9,000,000/- is what the appellant took over, as explained in the document, “*mainly to ease the burden of MOSD arising from currency fluctuations*”. The debenture and legal charge, therefore, constituted a continuing security. That security was not confined to the original advance, which in any case had ceased to exist.

[74] Parties were clear about the transition. Clause 1 of the Debenture covered the guarantee and all costs, claims and expenses incurred by Acceptances in connection therewith and hereunder

“ TOGETHER with such other sum or sums or so much thereof as may be due and owing by the Company to Acceptances whether in respect of monies advanced or paid to or for use of the Company or charges incurred on its account or for any moneys whatsoever which may become due and owing by the Company to Acceptances as principal or surety and either solely or jointly with any other company, society, corporation, person or accounts”.
(Emphasis added).

[75] It was on this understanding that the appellant constructively advanced to the 1st respondent the Kenya shillings loan, which the latter applied to offset the Eurocurrency loan. What securities did the appellant offer as consideration for the localisation of the Eurocurrency loan? The letter of offer dated 7th October 1986 explicitly stipulated that they were:

“SECURITIES HELD

- (i) Legal charge over L.R. No. 12867/1 and 2 stamped to secure advances of Kshs. 12 Million. These properties were professionally valued on 17th July 1986 for a total**

sum of Kshs, 23 Million by Bageine Karanja Mbuu Limited.

(ii) All assets debenture stamped to secure advanced of up to Kshs. 12 million ranking par-passu with the Supplementary Debenture held by Kenya Commercial Bank for Kshs. 27 million which excludes property L. R. 12867/1/2 charged to us. Machineries and equipment were valued at Kshs. 105.070.217.60 on 4th August 1986 by Bageine Karanja Mbuu Limited.....”

[76] If there was ever any doubt on this question, Mr. Shadrack Ombimo, the finance manager of MOSD, who testified on behalf of the 1st and 2nd respondents, provided the answer. Making reference to the above clause and providing the meaning the 1st respondent ascribed to the phrase “Securities Held”, the witness explained that the securities were “*the debenture, legal charge, guarantee*” that existed and that “*The debenture and legal charge were in situ*”. The 1st respondent had guaranteed the Euro Currency loan on those securities, and since it was not getting a fresh loan from the appellant but the latter merely taking over an existing loan, converted into a local currency loan, there was no need to execute fresh securities. We have no doubt that the parties understood that by localisation of the original loan, the appellant in effect replaced SCMB London as the lender, on the same terms. Indeed, as a matter of form, the debenture and legal charge did not reflect the altered position of the parties, because it was a continuation. No additional or new securities were provided or necessary.

[77] The fact that, upon the appellant settling on behalf of the 1st respondent, the Eurocurrency loan, the guarantee was discharged, which, *per se*, did not affect the status of the debenture. There is a clear distinction between guarantees and debentures. In the case of the former, liability will only arise when the principal

debtor defaults. A debenture, on the other hand, is a security instrument issued by the borrower, creating a charge over the borrower's assets. The primary obligation to pay rests with the borrower and does not depend on a third party's default. The Court of Appeal in ***Karuri Civil Engineering (K) Limited Vs Equity Bank Limited*** [2019] KECA 866 (KLR) also described guarantees as follows:

“...guarantees fall into two broad categories. The traditional guarantee or surety on one hand, and “on demand” guarantee on the other. “On demand” guarantees are also known as performance guarantees, performance bonds or demand bonds. (See Vossloh AG v Alpha Trains (UK) Limited [2011] 2 All ER (Comm) 307 at [24]- [28]). “On demand” guarantee is distinguishable from the traditional guarantee as liability is primary not secondary and payment by the guarantor is to be made in response to demand and is not dependent whether there has been a default under the principal contract.”

[78] We, therefore, respectfully agree with the conclusion of the trial court on this point that the localisation of the Euro Currency loan merely rendered the guarantee inoperative but left the debenture and the legal charge as valid securities for the localised loan.

[79] Was the 1st respondent admitting the contents of the debenture when they advanced the plea of ‘*non est factum*’ in executing the debenture, under the mistaken belief that it would only serve as a consideration for the guarantee issued in respect of the Euro Currency loan? Immediately the appellant served on the respondents

the demand letter of 9th February 1989, the latter, by a letter dated 16th February 1989, sought more time to restructure the loan with their bankers, KCB, with the objective of the appellant granting the 1st respondent a moratorium to settle the debt. Though this request fell through, it demonstrates that the 1st

respondent acknowledged the terms of the debenture and was pursuing this course to forestall the appointment of a receiver under the debenture.

[80] By its conduct subsequent to the localisation, during, and prior to the negotiations, the 1st respondent cannot deny that, without equivocation, through its directors and legal advisors, the terms of the debenture and legal charge were explained to them and that they fully endorsed those terms. It is on record that, while sharing the draft debenture with the appellant and 1st respondent, the advocates who then represented both parties brought to their respective attention the fact that the debenture would also cover any other facilities which the appellant would, from time to time, agree to advance to the 1st respondent. In a letter dated 17th March 1982, the advocates, M/s Kaplan & Stratton advised the parties that:

“We are enclosing for your respective approvals the draft debenture to be issued to Acceptances by MOSD to secure the sums payable under the guarantee given by Acceptances. The debenture is also drafted to cover any other facilities, which Acceptances may agree from time to time to make available to MOSD.” (Emphasis added).

[81] Upon receipt of this letter, the 1st respondent’s Board of Directors authorised the granting of the debenture and permitted Mr. Mohan Galot, its Chairman, to settle its terms and execute the same. Mr. Mohan Galot and the 1st respondent’s company secretary read the draft debenture and eventually approved it.

[82] Clause 6 of the Debenture is instructive:

“This Debenture and the First Legal Mortgage or Charges to be executed in accordance with the provisions of Clause 5(a) hereof shall be continuing securities for the payment of all sums secured as aforesaid as may from time to time be owing by the Company to Acceptances together with

interest and other moneys hereinbefore covenanted to be paid by the Company notwithstanding any settlement of account or other matter or thing whatsoever and shall be without prejudice and in addition to any other security whether by way of pledge, legal or equitable mortgage or charge or otherwise howsoever which Acceptance now or at any time hereafter hold on any part of the property and assets of the Company fee or in respect of all or any party of the indebtedness of the Company to Acceptances or any interest thereon. (Emphasis added)

[83] We have also considered the import of the letter of 27th November 1989 in which the 1st respondent confirmed to the appellant that the former's bankers, KCB, would be seeking the consent of the appellant in the process of updating their own security documents. The following day, KCB wrote to the appellant reiterating the request by the 1st respondent and explained that:

"We are in the process of restructuring our above mutual clients' facilities in our books. To enable us to do so, we need to un-stamp our securities by registering a Supplemental Debenture and second legal charge over the assets already charged to both yourselves and ourselves on pari-passu basis. ...To enable us register further securities, we require your consent as co- chargees. We therefore enclose the Supplemental debenture and the second further legal charge, both documents in triplicate, and

kindly request you to append your consent on the appropriate pages, and thereafter return the documents to us for our further action ..” (Emphasis added).

[84] Why, we may ask, was it necessary three years later, in 1989, after the localisation loan for the 1st respondent or KCB, to seek the consent of the appellant if the securities in the possession of the appellant had been discharged, as alleged upon termination of the Eurocurrency loan?

[85] We are of the considered view that the appellant executed a traditional guarantee, undertaking to satisfy the debt owed to SCMB in the event of default by the 1st respondent. By so doing, the appellant assumed considerable financial risk. To mitigate that risk, it was both logical and prudent that the appellant should hold securities in the form of a debenture and a legal charge. The object of these securities was to ensure that, in the event of default, as was ultimately the case, the appellant would have enforceable recourse to the property and assets of the respondent.

[86] Were securities provided under the Eurocurrency loan discharged? The 1st and 2nd respondents have submitted that all earlier arrangements between the parties to the Eurocurrency loan had been “*abandoned*” and replaced by the terms and conditions set out in the Facility Letter. The legal charge or debenture could not simply be “*abandoned*.” We have shown earlier that the law prescribes a clear and specific procedure for the discharge of securities. Unless discharged in accordance with the law, securities remain valid, binding, and enforceable to secure subsequent obligations. To hold otherwise, as did the Court of Appeal would not only run contrary to express statutory provisions which preserve the validity of continuing securities, but would also impose unwarranted procedural burdens upon financiers, requiring fresh securities for

each advance, irrespective of the subsistence of instruments. A debt being a legal obligation binds the borrower to make repayment in accordance with the terms agreed upon with the lender. The only way of getting out of indebtedness is for the borrower, if he desires to redeem the securities, to pay the principal debt, the interest thereon, all proper costs, charges, and expenses incurred by the lender in relation to the debt. There is no

shortcut. Even after settling the debt fully, that fact must be registered. In the present appeal, the parties did not contemplate or intend a re-execution of fresh securities after the Eurocurrency loan was settled. Rather, the debenture was intended to be, and indeed operated as, a continuing security, extending to and encompassing local currency loan.

[87] In our view, the rationale underpinning this position is twofold: first, to uphold certainty and predictability in commercial transactions by protecting lenders from the impractical burden of re-executing securities with each new advance; and second, to prevent borrowers from escaping their contractual obligations by arguing that repayment of one facility automatically extinguishes the security altogether.

[88] To answer the first question and based on the foregoing analysis, together with the judicial precedents we have relied on, it is our considered position that a bank or financier is not required, as a matter of law, to register fresh securities every time a new advance is made, where existing securities remain valid and undischarged, unless the terms provide otherwise. A debenture will only formally be discharged by the filing and registering a memorandum of satisfaction, while in the case of charges, through execution of the appropriate instrument and cancellation in the register. Absent these formalities, the securities subsist with their full legal effect, providing continuing assurance to the lender that advances made, whether original or subsequent, remain secured.

[89] With that determination it must follow that the debenture dated 5th April 1982, together with the legal charge, constituted valid and enforceable securities; and that the appointment of the 3rd respondent

as receiver/manager was proper, regular, valid and in accordance with the terms of the debenture, the 1st respondent having defaulted in the repayment of the localised loan. The appellate court was therefore in error in its determination that the charge and debenture in respect of

the credit facilities issued in 1986 ought to have been registered; and that in the absence of registration, there were no securities for the local loan, as a result of which there was no foundation upon which the 3rd respondent could be appointed receiver/manager.

iii. Whether there is a correlation between a security instrument drawn in favour of a lending institution, and the right of recovery under a facility advanced by the same lending institution. In particular, whether a borrowing which has not been secured (whether as contemplated by the parties or otherwise) discharges a borrower from its obligation to repay a loan.

[90] According to the record of appeal, this is one of the three original grounds of appeal. As presently framed, it may feel a mouthful, yet we believe it seeks to answer two related questions. The second part, from the grounds of appeal, faults the learned appellate court Judges for erroneously finding that a borrowing which has not been secured (whether as contemplated by the parties or otherwise) discharges a borrower from liability and obligation to pay the outstanding loan. The first limb seeks to establish the legal link between the security instrument and the debt or facility it secures. While there can be no doubt that the security instrument and the loan agreement are related, they are distinct contracts. Simply stated, the lender's recovery rights under the security depend entirely on the terms of the security instrument. It must, however, be remembered that the security is only an accessory. It exists because the debt exists. This principle is expressed in Latin as *accessorium sequitur*. So that, should the debt be settled, the security is extinguished. Conversely, if the security is invalid, the debt survives as an unsecured obligation.

[91]It is an elementary principle of contract law that a binding and enforceable agreement rests upon the essential elements of offer, acceptance, and

consideration. See **William Muthee Muthami Vs Bank of Baroda** [2014] KECA 591 (KLR). These principles apply with equal force to loan agreements. The UK Supreme Court, in **RTS Flexible Systems Ltd Vs Molkerei Alois Müller GmbH** [2010] UKSC 14, reaffirmed that the existence of a binding contract is not determined by the parties' subjective intentions, but by an objective assessment of their words and conduct, and whether the words and conduct point to an intention to create legal relations. Accordingly, in banking, the lending by a bank or other money lending institution and the borrower's acceptance of funds, looked at objectively, must establish a binding contract of lending, irrespective of whether security was created.

[92] The United Kingdom Supreme Court in **Barton and others Vs Morris and another** [2023] UKSC 3, underscored, with an analogy of a sale of goods transaction, the principle that where parties have stipulated in their contract the conditions that must give rise to an obligation to pay, such conditions must govern them. It held:

“97. It is true that if a buyer is entitled to reject goods he has bought because they are not of the specification ordered but instead decides to accept the goods, he must pay their value to the buyer? (sic) - he cannot get them for free despite the seller's breach of contract...”

[93] In the dispute before us, we hold the view that a contract such as the one here imposed reciprocal obligations: on the one hand, the appellant undertook to and did in fact advance funds to the 1st respondent, who, on the other hand, accepted the funds on condition that it would repay them. The existence of security for the funds was

therefore ancillary. The security was only required to, one, cushion the appellant against the risk of default on the part of the 1st respondent, and two, to provide an additional avenue of recovery should there be default. Even if there was

no form of security in respect of the localised loan, the 1st respondent was nonetheless legally bound to repay.

[94] To the first question, therefore, the fact that a borrowing is not secured, even if the parties contemplated that it would be, does not discharge the borrower from the obligation to repay the loan. The loan agreement creates a personal obligation to repay the money advanced. That obligation exists independent of any security, whether a charge, debenture, or guarantee, and security only provides the lender with additional protection, a reassurance that the borrower undertakes to pay. It also acts as a remedy in case the borrower defaults. Equity will not treat the debt as extinguished simply because the security was defective or incomplete, or that none was furnished; the right to repayment survives even if the security fails. See ***National Bank of Kenya Ltd Vs Pipeplastic Samkolit (K) Ltd & another*** (*supra*). Therefore, failure to secure a loan does not affect the enforceability of the repayment covenant. The only time when the absence of security may affect the obligation to repay is if the loan contract expressly made the advance conditional upon execution of security, making security mandatory before the grant of a loan.

[95] The 1st respondent concedes that it obtained money from the appellant, it had given its property as security, and it never made any payment to the appellant. Indeed, it is not in dispute that at the time the appellant appointed the receiver managers, the 1st respondent's localised loan account was in debit of Kshs. 24,837,999/-, together with interest, the amount sought by the appellant in its counterclaim.

[96] It is for the foregoing reason that we come to the conclusion that the appellate court committed an error of law when it found that

without registration of the legal charge and debenture for the localised loan no securities were created; and by that omission the 1st respondent was excused from its obligation to repay the debt, while the appellant was precluded from realizing the securities by appointing the 3rd

respondent. The effect of the determination by the Court of Appeal allowing the 1st respondent to keep both the money and securities was to unjustly enrich the 1st respondent.

[97]In *Chase International Investment Corporation and Another Vs Laxman Keshra and 3 others* [1978] KECA 7 (KLR), Madan, Wambuzi (as they then were) & Law, JJ. A, Madan, JA, citing with approval, Goff and Jones in their treatise, *Law of Restitution* (page 11), made the point that:

“Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment. There are many circumstances in which a defendant may find himself in possession of a benefit which, in justice, he should restore to the plaintiff.

Obvious examples are where the plaintiff has himself conferred the benefit on the defendant through mistake or compulsion. To allow the defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff's expense, and this, subject to certain defined limits, the law will not allow ... The principle of unjust enrichment presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit”.

[98] Similarly, the Court of Appeal in the case of *National Bank of*

Kenya Ltd Vs Pipeplastic Samkolit (K) Ltd & Another (supra)
endorsed this passage from the judgment of the High Court as the
correct statement of the law on unjust enrichment:

“This is a clear case in which the plaintiffs borrowed some money from the bank and defaulted in payment. They made use of this money and must surely pay back. They have enjoyed these facilities since 1992. They cannot escape liability. They are however now saying that they borrowed only 21 million but the bank is now demanding almost 100 million. The bank has shown by its statement that the figure shot up because in the first place the plaintiffs made no efforts to repay and secondly, this was due to interest and other penalties.”

[99] In conclusion, we stress that borrowing money, whether as a friendly loan or from a financial institution, creates a legal and moral obligation to repay, regardless of whether or not the money was secured. One cannot, in good conscience, in good faith, and in law, enjoy the benefit of borrowed money and later evade repayment, citing the lack of security.

iv. What reliefs should issue

[100] The appellant seeks from this Court an order to set aside the judgment of the Court of Appeal dated 16th December 2022 and an order reinstating the judgment of the High Court dated 30th July 1999 and costs of this appeal. The High Court in its aforementioned judgment allowed the appellant’s and 3rd respondent’s counterclaim in terms of Paragraphs A and B but directed the question of costs be dealt with *“separately due to the complicated nature of the case”* and was therefore *“reserved until after full arguments”*. The effect of this was that under Paragraph A, judgment was entered for the appellant against the 1st respondent in the sum of Kshs. 24,908,418/- plus

“interest thereon at 19% per annum accrued daily interest compounded monthly from 1st February 1992 until payment in full”.

[101] Under Paragraph B the 3rd respondent had sought, and the court awarded

to them Kshs. 2,337,161.75 *“with interest thereon at 19% per annum accrued daily*

interest compounded monthly from 1st February 1992 until payment in full". In addition to these orders, the trial court also declared the debenture as a valid security, and further that the appointment of the 3rd respondent was lawful.

[102] Having arrived at the conclusion set out in this judgment, we find merit in the appeal which we hereby allow and declare, pursuant to our answers to the two framed issues, that the judgment of the Court of Appeal dated 16th December 2022 be and is hereby set aside.

G. COSTS

[103] Bearing in mind the circumstances of the matter at hand and the principles on the award of costs enunciated in ***Rai & 3 others Vs Rai & 4 others*** [2013] KESC 20 (KLR), we find, in light of the protracted nature of this litigation and the public interest it has engendered, that the just and equitable order on costs is that each party shall bear its own.

H. FINAL ORDERS

[104] Consequently, upon our conclusion above, we issue the following orders:

- i. A declaration do hereby issue that the Debenture dated 5th April 1982, which comprised a specific charge over all its immovable property, fixed and book assets, and a floating charge over its other property and the legal charge in favour of the appellant over two parcels of land, namely LR No. 12867/1 Grant No. I.R. 36265 and LR No. 12867/2 Grant No. I.R. 36266 constituted a continuing, valid and***

enforceable securities for the advance made to the 1st respondent.

ii. The Petition of Appeal dated 22nd November 2024 is hereby allowed.

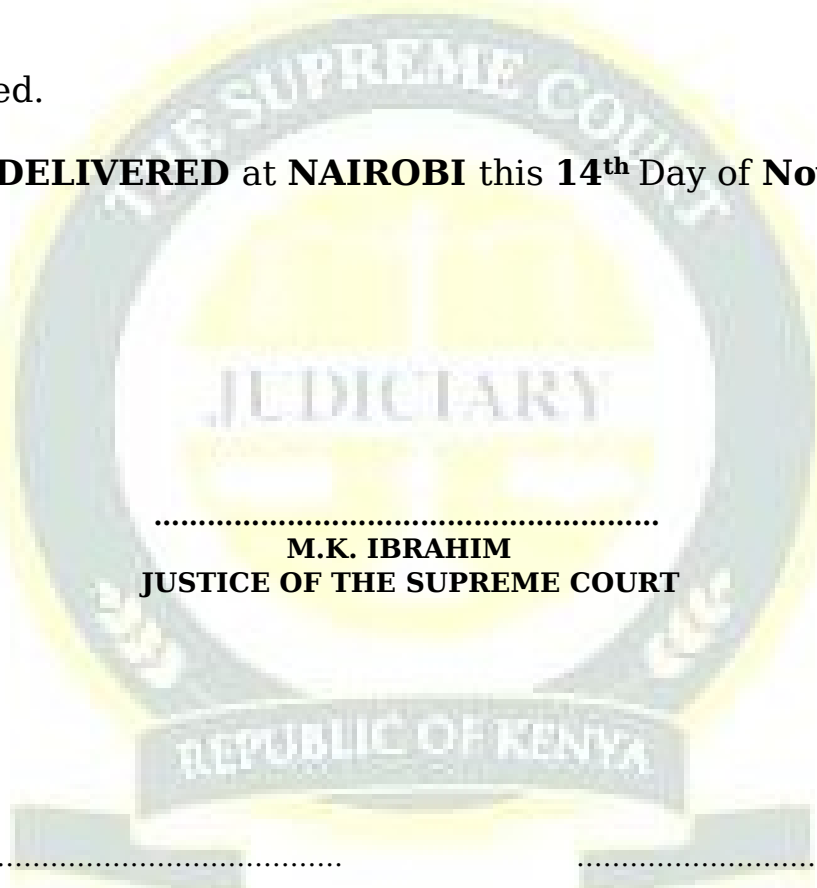
iii. The Judgment of the Court of Appeal dated 16th December 2022 is hereby set aside and the judgment of the High Court reinstated.

iv. Each party to bear their own costs.

v. We hereby direct that the sum of Kshs. 6,000 deposited as security for costs upon lodging of this appeal be refunded to the appellant.

It is so ordered.

DATED and DELIVERED at NAIROBI this 14th Day of November 2025



.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

I. LENAOLA
JUSTICE OF THE SUPREME COURT

W. OUKO
JUSTICE OF THE SUPREME COURT

**I certify that this is a true copy
of the original**

**REGISTRAR
SUPREME COURT OF KENYA**

