IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 233 OF 2016

BETWEEN

HABIB BANK A.G. ZURICH...........................APPELLANT

VERSUS

RAJNIKANT KHETSHI SHAH.................. RESPONDENT

(Being an Appeal from the judgment and Decree of the High Court at Nairobi (Gikonyo J.) dated 10th February, 2016 and delivered on 26th February, 2016 in High Court of Kenya at Milimani Commercial &Admiralty Division

in

Civil Case No. 246 of 2011)

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JUDGMENT OF THE COURT

[1] Rajnikant Khetshi Shah (respondent) was the registered proprietor of Land Reference No. 7785/201 (Original Number 7785/10/197 (suit property). On or about 4th October, 1982 he executed a legal charge in favour of Habib Bank A.G Zurich (appellant) as security for a loan of Ksh 5,000,000 that was advanced to Pop In Limited (borrower) to which the respondent was one of the directors. The respondent was both a chargor and guarantor with another director by the name Hasmukh Sumaria. The respondent claimed that the said loan was supposed to be disbursed to the borrower's current account No 836 held by the appellant which was never done. The borrower ceased active business in November, 1982 and it never operated the said account.

[2] By letters dated 10th July, and 30th November, 2007 the respondent's advocate requested the appellant for bank statements relating to the company's current account. Some computer generated statements were forwarded by the appellant's counsel to them but were lacking particulars of the transactions. Upon further requests two more sets of statements were forwarded but they bore different and inconsistent entries and balances which made the respondent conclude that the statements were concocted to make it look like the company owed them a lot of money.

[3] The respondent therefore filed suit before the High Court being HCCC No 246 of 2011 claiming that the loan was never disbursed to the company and there was no evidence of disbursement; as no demand was made against the company for the said loan, such a demand was time barred under the Limitation of Actions Act; it was not payable by the company thus the respondent sought to be discharged by operation of the law. The respondent therefore had inter alia two specific prayers to wit;-

> 1. A declaration that the plaintiff does not owe the defendant any money and the continued holding of a legal charge dated 8th October, 1982 registered against Land Reference Number 7785/201(Original Number 7785/10/197 by the defendant is unlawful and unequitable.
>
> 2.The defendant do forthwith execute and handover to the plaintiff an instrument of discharge of the legal charge dated 8th October,1982 registered against Land Reference Number 7785/201(Original Number 7785/10/197 and in default of executing such instrument, the deputy registrar of the court do execute the same on behalf of the defendant.

[4] The suit was resisted by the appellant who admitted the facts about the creation and registration of a charge over the suit premises but denied that the loan proceeds were to be channelled through the company's current account no 836. The appellant contended that the creation

of the charge was preceded by correspondence and verbal communications between the borrower on one hand and the appellant that culminated with a letter of offer dated 2nd March, 1982 which contained the following terms;

I. The Ksh 5,000,000 advanced would be in the nature of

II. The interest would be charged monthly at the rate of 14% per annum

III. The security for the advance would be a legal charge to be created in favour of the defendant over the suit property

IV. IV. The defendant's statement and records would constitute conclusive evidence of indebtedness in a court of law

V. Any failure or delay on the part of the defendant in exercising any of its rights or powers would not be construed as a waiver of such a right or power.

[5] The defence also made reference to key provisions in the charge regarding the liability of the respondent and his co- guarantors which was joint and several; in the event of default by the company as the borrower, the plaintiff as the guarantor and chargor undertook to pay the amount advanced as per the terms and conditions as there existed a good working relationship the company was indebted to the appellant to the tune of Ksh 9,284,269 on account of overdrafts thus it requested the facility limit of Ksh 5 million be converted to an overdraft and an additional Ksh 4 million be placed in the excess of 3 months; this was done vide a letter dated 23rd August, 1982 addressed to the appellant. That is how the appellant claims it converted the LBD facility into an overdraft facility; although the charge contemplated an indebtedness of Ksh 5 million, the debt owing was much more and the charge was to operate as security for both the monies advanced and to be advanced to the company from the date of the charge.

[6] Upon hearing the parties the learned trial Judge allowed the claim by the respondent. In doing so, he summarized his final findings in the following words;-

> **"…The truth of the matter is that the conduct of the bank was inconsistent with any legitimate exercise or enforcement of the right to realize the security in the charge herein. The bank even refused to be enjoined or to participate in proceedings which related to acts of fraud on the suit land. I thought a chargee exercising its mind properly would be interested in ensuring that the charged property is not under any threat of dissipation or loss. But the bank in this case categorically stated that it holds the original title and so it was not worried about fraud that was being committed on the property. What is the interest of such a bank? The least is (sic) should say is that the decision by the bank to keep this account open for as long as they wish was an act comparable to illegal foreclosure; it defeated all prudence and reasonableness. I do not think prudence would call such account active one or performing one. The bank kept a dark ominous cloud hovering upon the chargor. This is not only a source of anxiety and uncertainty as to when the property will be redeemed but is contrived, malicious, stealth and oppressive; a complete negation of the law and equity of redemption. In such cases, the court will not hesitate to strike down anything or conduct that threatens the integrity of equity of redemption, and anything that restricts or clogs the right of the mortgagor to redeem the mortgaged property. The position does not change simply because the defendant claims that the charger (sic) also slept on his right to redeem his property especially in a case as this where the opportunity to redeem did not arise as the chargee just deliberately restrained itself from asserting on its rights to realize the security; yet on the other hand, by passage of time fruits are born, the debt was swelling to very satisfying digits in excess of over Ksh 150,000,000. That conduct is loathed by law. The duplum rule was designed by common law and now statutory law in Kenya to oviate (sic) such circumstances as these ones. Judicial prophesy many not be avoided when cases of this nature show up. It is about time Parliament clears the clutter in the statutory expression of the in duplum rule in our Banking Act; there is need for courageous enactment here so that courts will apply the rule for its full effects and extent. But that is for another day. For now I grant the relief to the plaintiff as follows;-**
>
> > **a) I issue a declaration that continued holding of the legal charge dated 8th October, 1982 over Land Reference Number 7785/201(Original Number 7785/10/197 by the defendant is unlawful and unequitable and unconscionable**
> >
> > **b) I direct the defendant to forthwith and not later than days execute and handover to the plaintiff an appropriate instrument of discharge of charge on Land Reference Number 7785/201(Original Number 7785/10/197 and**
> >
> > **c) In default of execution of the instrument in (b) above, the deputy registrar shall execute one in favour of the**

plaintiff"

[7] Indeed these are the bold orders that seemed to have caused a complete paradigm shift in commercial lending by introducing delay and laches as a ground of denying a mortgagor the right to sell the property charged to recover a debt. It also provoked the instant appeal that is predicated on some twenty grounds of appeal which are, repetitive and not up to the requirements of ***Rule 86(1)*** of the ***Court of Appeal Rules***. The Rule stipulates in mandatory terms thus;

> ***"A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection to the decision appealed against, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make."*** Emphasis added.

[8] We will summarize the grounds as the learned Judge erred in law and fact by finding the respondent's claim was time barred; by ordering that the legal charge over the suit premises be discharged when the debt secured by the same charge was not paid, thereby vesting a benefit upon the chargor who was in default of a contractual obligation and depriving the appellant their chose in action and remedies available under the charge; failing to find a corresponding duty to repay the outstanding amount under the charge; failing to find that the charge was a continuing security and the appellant was entitled to exercise its rights and remedies as long as the loans remained outstanding; failing to appreciate the respondent was a guarantor to the appellant and thus had distinct obligations; failing to take heed of the provisions of the law and the pending litigation that impinged upon the appellant's ability to realize the security; rewriting the contract for the parties and finding there was waiver or acquiescence on the part of the appellant; by making a negative inference against the appellant for not lodging a counter-claim before the High court; failing to appreciate that proper accounts had been rendered and generally issuing orders which were against statutory provisions and principles of equity.

[9] During the plenary hearing, Mr Njoroge Regeru learned counsel teaming up with Ms Kamau appeared for the appellant relied on their client's written submissions and made some oral highlights. After reciting a brief factual background of how the charge was created, counsel submitted that the orders appealed against contained grave errors of important points of law. On the remedy available to a chargee under a continuing security we were referred to the clause 1(b) of the charge document that expressly provided that the charge was a continuing security for the due repayment of the facility together with interest accrued thereon. It is common ground that there was no interaction between the appellant and respondent from 1982 to 2007 (a period of about 25 years) when the respondent started writing to the appellant demanding for bank statements. The respondent demanded for the discharge of the charge while alleging that the loan was never disbursed. On the other hand, the appellant contended that the loan facility was committed to pay local bills as discounted by the respondent from time to time, was not disbursed to the borrower in a lump sum but was actually disbursed from time to time as the borrower traded and discounted various bills of exchange. The disbursement was supported by various statements of accounts to prove more than Ksh 5 million which was initially contracted was disbursed.

[10] On the ground of appeal that the respondent's claim in the High Court was time barred by virtue of the provisions of the Limitation of Actions Act which provides that any action founded on contract may not be brought after the end of six years from the time the cause of action accrued. For this proposition counsel cited the case of **Iga vs Makerere University [1972] EA 65** where the court held that the limitation of Actions Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time-barred, the court cannot grant the remedy or relief. The respondent's claim was that the loan was never disbursed; since the facility was for 12 months the period of six years which ended in October 1988; nonetheless the respondent started demanding for statements after 25 years.

[11] On the application of the doctrine of laches, delay and acquiescence to defeat statutory rights under the charge; counsel cited the provisions of sections 47 of the Registration of Titles Act, (now repealed), section 85 and 102 of the Land Act (2012) which provide that a discharge of charge can only be effected when the money secured shall cease to be payable. Thus an order for the discharge of the title was an affront to the mandatory provisions. Counsel further submitted the respondent admitted in evidence that the charge was to secure the debt by his company and it remained so for as long as the debt was owing; in the circumstances the doctrine of laches could not nullify enforcement of accrued rights. The learned Judge was faulted for applying double standards. In as much as the appellant was faulted for not exercising their power as chargees, the respondent who also slept on his rights for 25 years was not faulted which is against the provisions of Article 27 (1) of the Constitution that bars differential treatment to different persons attributable to their description.

[12] Counsel referred to proceedings that were pending in Nairobi HCCC No. 462 of 2006 and HCCC No 174 of 2011 which touched on the suit premises. In view of the provisions of Section 52 of the Indian Transfer of Property Act (now repealed) and section 103 of the Land Act, 2012 the learned Judge failed to take into account that the appellant could not deal in the charged property on account of pending proceedings. The case of **FESTUS OGADA vs HANS MOLLIN [2009] e KLR** where this Court discussed the effect of the above provisions was cited;

> **"…On section 52 of the Transfer of Property Act. That section deals with the doctrine of lis pendens… The doctrine of lis pendens is meant to maintain the status quo over the property which is the subject matter of a pending suit until after the final determination of the suit or until the suit is in any other manner terminated"**

Moreover, the learned Judge failed to recognize that the respondent was liable to the appellant at two separate levels; firstly as a chargee who had charged his property to secure a debt due to the appellant and secondly as a guarantor alongside with another by the name Sumaria. According to clause 7 (f) of the charge both guarantors are deemed as principal debtors. The two guarantors could only be discharged upon payment of the sum guaranteed.

In view of the above submissions counsel urged us to allow the appeal.

[13] On the part of the respondent Mr Isindu, learned counsel for the respondent opposed the appeal, he relied on his written submissions both before the High court and in this Court and made some oral highlights. Counsel supported the impugned judgment which he stated was well reasoned out and supported by evidence that there was no disbursement made of the alleged Ksh 5 million; he criticized the statements that did not show how the said sum was disbursed to the borrower. The appellant was accused of generating fake computer generated statements; after November, 1982 when the last entry on the statement was made there were no other transactions that took place therefore no money was owing; the appellant also concealed some entries in the course of photocopying; failure to show how the specific account was opened and operated the learned Judge was right to hold that an arbitrary figure of Ksh 5 million cannot be used to calculate interest for a period of 32 years was an exercise in bad faith on the part of the appellant, The fact that no money was disbursed explains why the appellant never sent any demand notice or institute any recovery process either invoking the chargees power of sale or by filing recovery proceedings.

[14] On limitation of period, counsel submitted that it did not arise whatsoever because of the legal charge that remained undischarged for all the years while the appellant did not make any demand whatsoever to the principal borrower for the repayment of any money. The respondent withheld official bank statements and even concealed entries on the last statement so that one could not tell how much money came into the account thereafter; instead, the appellant prepared excel sheets with contradictory entries which was contrary to banking practice. On the applicability of the doctrines of equity that the same was justified because the appellant waited for over 30 years. There were no demonstrable reasons why the appellant failed to make demand or exercise the chargees rights; the only plausible reason was that there was no debt outstanding and a court of equity was entitled to relieve the respondent from the unnecessary burden. Counsel urged us to dismiss the appeal with costs

[15] We have taken time to appreciate the above background albeit in summary as this is a first appeal and our role is to re-evaluate the evidence on record and draw our independent conclusion as to whether the learned Judge's decision was properly arrived at. The only caveat however is that we must always bear in mind that unlike the trial court we neither saw nor heard the witnesses testify, and give allowance for that. This was succinctly propounded by this Court in the case of **Kenya Ports Authority** v **Kuston (Kenya) Ltd, (2009) 2 EA 212** in the following words;

> **"This being a first appeal to this Court, the duty of the court, is to *r*econsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect…".**

[16] We have considered the record of appeal and the very elaborate submissions made by counsel in support of their respective positions. From that we identify five broad issues which we think fall for our determination that is;

a. whether the appellant disbursed the sum of Ksh 5,000,000 million as per the letter of offer and the charge registered over the suit premises which was the basis of the contract between the parties;

b. if so did the respondent honour the repayment, what was the effect of the guarantee executed by the respondent and his co-guarantor;

c. what was the legal ramification for the delay or laches on the part of the appellant who slept on their rights for 30 years and also the respondent who claims no money was disbursed from 1982 but made the demand for the discharge of charge after until 20 years later;

d. was the claim either to recover the sum secured by the charge or the allegations of want of consideration that the sum was never advanced caught up by the provisions of the Limitation of Actions Act.

e. To what extent can the principles of equity apply in a contract especially a continuing charge

[17] As all the issues cut across the entire spectrum of the claim by the respondent that no loan was disbursed and for that reason they were entitled to an equitable relief of discharge of charge; we think we should address all the issues conjunctively. First we shall highlight the un disputed facts in this contractual relationship that is founded on a letter dated 10th March 1982 addressed to the borrower which contains the offer by the appellant to lend a sum of Ksh 5 million the nature of the facility is indicated as LBD, the purpose was to promote business for a period of 12 months although it was subject to renewal or recall; the interest chargeable was 14% per annum and the bank statements and records would constitute conclusive evidence of indebtedness. The security for the facility was a legal charge over the suit premises to secure the foresaid sum. This was followed by a legal charge over the suit premises dated the 8th October, 1982 and registered on the 4th October 1982. The charge has four parties that is the appellant as the chargor, the respondent as the chargee, Pop–In Limited as the Borrower and one Hasmukh Sumaria and the respondent who were the guarantors. The liability of the guarantors was joint and several and in the event of

default by the borrower, the respondent and Sumaria were to be regarded as principal debtors; the borrower covenanted to repay the aforesaid loan.

There was also inordinate delay on the part of the appellant it took them 33 years while the respondent took about 25 years to demand the discharge of the suit premises.

[18] From the above documentation everything else was disputed; there is denial by the respondent that the loan was disbursed as per the contract; that the bank statements issued to the respondent were genuine, according to the respondent the statements were fictitious computer generated from excel sheets as the respondent was supplied with different statements of accounts in respect to the borrowers single account. The appellant was blamed for the delay or laches that was taken by the respondent as acquiescence due to the fact that the appellant never disbursed the loan proceeds and therefore entitled the respondent to an equitable remedy which is a discharge of charge. Therefore the central issue as aforesaid is whether the loan proceeds were disbursed and whether the respondent was entitled to an equitable relief of discharge of charge. There was dearth of documentation on this banking relationship as to whether it was an overdraft, an LBD or a term loan or a merger of debt and the intention of the parties can all be gathered from the documents that they signed and the evidence they adduced in court.

[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 case of **Iga vs Makerere University [1972]** EA 65 was cited where the predecessor of this Court held that a court of law has no power to grant any relief where a remedy is time-barred. We find the learned Judge interrogated this issue and appreciated that both parties made very robust arguments that each other’s case was time barred by the limitation of statute. 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 filled 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.

[20] This now takes us to the more contentious issues of whether the loan was disbursed. Unfortunately the learned Judge did not address this issue as his judgement focused on the delay, laches, waiver acquiescence on the part of the appellant. Apparently saying nothing about the respondent who had also slept on his rights for over 20 years. We shall advert to that later on. First we examine the documents that were admitted and the evidence adduced in court by both parties. It is clear to us just like it was to the learned Judge that there existed a banking relationship in regard to borrowing of money either as overdraft to begin with which was for purposes of Local Bills discounted which was later converted to a term loan. This was a contract between the appellant, the respondent and the borrower as evidenced by a letter of offer, and the legal charge executed to secure the borrowing. What is more revealing is a letter written by the respondent on 23rd August, 1982 on behalf of the borrower in the following words;-

> “**RE; OVERDRAFT FACILITIES IN POP IN LIMITED’S ACCOUNTS.**
>
> **Kindly please convert LBD limit of shillings 5 million**
>
> **into overdraft limit shillings 4 million in excess for 3**
>
> **months**
>
> **Thanking you,**
>
> **R. Shah”**

When testifying in cross examination the respondent admitted how he used to deal with the appellant as follows;

> “**…we started dealing with defendant since they were incorporated in Kenya. We had current accounts, overdraft, local bank discount facilities etc LBDF operates like this; we give goods on credit and we want to cash (sic) it we issued credit promissory notes for 30-60 days and then we take promissory note to the bank who would give us credit facilities at a value agreed. The bank would credit my account with the amount of the promissory sum. I endorse the promissory note to the bank. There was an agreed maximum sum. In October 1982 I did not owe the bank any money. He (sic) charges at October, 1982, my account was already owing 9,000,000/-. At page 1 of the defendants’ bank we negotiated with the bank for Ksh 5,000,000 loan. It was for LBD. It was limited to 12 months. Security was LR 7785/201 in my personal name. Statements contain indebtedness. Waiver or inaction (sic) form being used against the bank. Clause 19 is important. I saw the letter. When I wrote on 23/8/1982, the LBD was existing and I wanted it converted into overdraft limited of Ksh 4 million…”**

[21] The loan and its interest was not paid and the evidence on record, does not show a great variance as both witnesses said the facility was for local bills discounting which existed as an overdraft before the legal charge was registered to secure the facility; the only difference is the respondent who claimed that the bills were not discounted. Which argument does not stand legal scrutiny as one would ask why he wrote the above letter, signed the letter of offer and a legal charge. Moreover, the respondent swore an affidavit sworn on 22nd May, 2006 in another matter being Nairobi HCCC No462 of 2006, where he was defending the same suit premises that had been transferred to a third party fraudulently and he stated as follows on paragraph 10;-

> **"THAT I had charged the property in favour of HABIB BANK A-G ZURICH but the said charge has never been discharged, as I still owe the bank money"**

Considering that the documents of contract being the legal charge and the letter of offer were largely not disputed except for the bank statements; and even if the statements were wrong, a court of law cannot declare the legal charge null and void; what parties can be ordered to do is recalculate the outstanding loans. See **National Bank of Kenya vs Pipeplastic Sankolit (K) Ltd & Another [2001]** which restated the courts primary duty as that of interpreting contracts and not rewriting them for the parties;

> "**A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of the contract unless coercion, fraud or undue influence are pleaded and proved**"

We therefore agree this was a straight forward contract of interpreting whether the loan was taken; if so whether it was paid; on our part we are not persuaded that the loan proceeds were not disbursed by way of local bills discounting.

[22] It is necessary to state from the onset that the learned Judge did not address the contractual issue of the legal charge and the fate of the guarantee by the respondent and the co-guarantor. The issue that was hammered so much by the respondent that the loan was not disbursed and that the bank statements adduced in evidence were invalid were left hanging. This is what the learned Judge stated in a pertinent paragraph of his judgement as the entire judgment did not touch on the issue of the loan disbursement;-

> **"it is doubtful the bank rendered any credible periodic statements to the borrower or the guarantor. If the bank treated the plaintiff as both guarantor and principal debtor, it ought to have provided credible statements of account. The statements tendered in court have been seriously challenged as a concoction by the bank. Indeed, the statements filed in court contain serious flaws which the bank witness tried to explain as computer errors or simple omissions of leap years etc. That aside what effect will the conduct of the bank have on the defence they may have in this"**

The learned Judge did not make a determination of the said effect of what he referred to as 'flawed statements' and more significantly the relationship between the legal charge and the letter of offer signed by the appellant and respondent that stated that the appellants statements and records would constitute conclusive evidence of indebtedness in a court of law and that any failure or delay on the part of the appellant in exercising any of its rights or powers would not construed as a waiver of such right or power.

[23] We agree from the factual background information that the appellant was guilty of delay in recovering the outstanding loan, they slept on their rights for far too long; but so did the respondent sleep on his rights if indeed the loan was not disbursed to the borrower where he was a director, he too waited for close to 25 years to challenge his indebtedness and to demand for discharge of his title if there was a failure of consideration. The learned Judge devoted considerable time in discussing legal principles of laches, delay, estoppel, waiver and acquiescence. These issues were not pleaded. We agree in civil matters a case is decided according to the matters pleaded. Nonetheless there are situations where issues emanating from pleadings become germane and it becomes imperative for the interest of justice to make a determination. See also the case of ***Odd Jobs vs Mubia*, 1970 EA Page 47**6, where it was held:

> **"(i) a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision;**
>
> **(ii) On the facts, the issue had been left for decision by the court as the advocates for the appellant led evidence and addressed the court on it."**

The respondent's claim was predicated on the fact that he did not owe the appellant any money and the bank statements were fictitious. We somehow agree the claim by the respondent was not predicated on the said principles but broadly speaking the issue of inordinate delay arose in the course of the proceedings.

[24] Where we part company with the learned Judge is in the manner in which he applied those principles only in respect of the appellant while the respondent who had not taken any steps or action for nearly 25 years (1892 to 2007) to challenge the legal charge over the suit premises from the appellant if indeed he did not owe any money the bank, judgment was made in his favour. Making an adverse finding against the appellant only gave credence to the submissions by counsel for the appellant that the appellant was given differential treatment contrary to the provisions of **Article 27 (1)** of the Constitution that stipulates that every person is equal before the law and has the right to equal protection and equal benefit of the law. What consequences were visited upon the respondent for the delay on his part; none as judgment was entered in his favour. Moreover the learned Judge failed to observe that parties to a suit are entitled to equal treatment. It was common ground that both parties slept on their rights; the appellant stated that they held on the legal charge which was a continuing security. The appellant's securities under both the charge and guarantee were invalidated and rendered null because the bank sat on their rights and which the Judge found unconscionable especially to demand for a whooping Ksh 150 million; the respondent became a

beneficiary of his own default to pay the loan both under the charge and guarantee. We find the order to discharge the charge in the circumstances of this case went contrary to the provisions of section 47 of the Registration of titles (repealed) section 85 (1) and 102 of the Land Act which provide that a discharge of charge can only be effected when the money secured shall cease to be payable.

[25] The learned Judge also ignored relevant evidence adduced by the appellant which was not controverted that the appellants had challenges because there were court proceedings over fraudulent transfer of the suit premises in Nairobi HCCC No. 174 of 2011. By virtue of the provisions of section 52 of the Indian Transfer of Property Act (now repealed) and section 103 of the Land Act the appellant could not deal with the charged property on account of pending proceedings. The Judge also made adverse findings against the appellant on account of its failure to file a counter-claim. Whereas the appellant asserted in its pleadings that it reserved their rights and remedies against the guarantors, including the respondent, in the event that there was any shortfall upon realization of the suit property; in the case of **Said Abdallah Azubedi –vs- Trust Bank Ltd [2016] e KLR** this Court held;

> **"The bank had the option to maintain and exercise its statutory power of sale after successfully defending the suit without making any counterclaim. But it chose to file a counterclaim after the exercise of the statutory power of sale was blocked by the court. Both options are legal and the bank would be an (sic) abuse of the court process to pursue them concurrently"**

Also the doctrine of *lis pendens*, restrains any party from dealing with property during the pendency of litigation so as not to prejudice the other party.

[26] It is apparent that there was unexplained delay by both sides from 1982 to 2006 when proceedings were filed in another civil suit over the suit premises. Soon thereafter the respondent started demanding for bank statements which the learned Judge found were flawed, largely because the appellant continued charging interests and penalties for 33 years when the account was dormant. On the other hand the respondent did not pay the loan and did not also pursue his claim for the failure by the appellant to disburse the loan for almost 25 years. Both are guilty of laches but the appellant alone cannot bear the brunt while the respondent walks away with the loan and the title fully discharged. The respondent must pay the loan secured under the charge and guarantee. However as the bank slept on their rights it would be unconscionable for the bank to demand interests and penalties for 33 years. Even if the charge was a continuing security, and there were other court proceedings that impeded the appellant's ability to realize the security surely that happened in 2006 which was after 25 years.

[27] As we proceed to allow this appeal, we have addressed our minds to the orders that commend themselves in the circumstances of this matter. As aforesaid, there is no explanation why the appellant did not take steps to recover the loan immediately the respondent defaulted or at least within a reasonable time. We appreciate the charge was a continuing security however there was no justification for a mortgagee to wait for 33 years and then calculate interests and charges for 33 years and demand a sum of Ksh 150 million from a loan of 5 million. This is what the learned Judge described in very strong language as;-

> **"Again, the conduct of the defendant bank-deliberate restraint not to assert on its right- and its explanation of this grave lapse or omission is reminiscent of stealth acquiescence, contrived design calculated at foreclosing the equity of redemption of the chargor. A safe inference may be drawn from these circumstances that, the defendant must have anticipated that the debt will grow so huge that it will be impossible for the plaintiff to redeem his property"**

Although we agree with those sentiments to a large extent, we have also said the respondent was not entirely innocent because he too did not pay the debt and he equally waited for many years perhaps to benefit from what the Judge described as implied waiver of rights.

[28] We must say all the parties are caught flat footed because on our part we think each side must bear the brunt of their actions. Equity follows the law and as the respondent did not pay the loan, we find that the learned Judge fell in error by entering judgment in his favour. He should pay the loan he guaranteed. We however find the interest cannot be calculated for 33 years or more as urged by counsel for the appellant; we find a period of 3 years was within a reasonable range that was sufficient for a serious lender to have instituted recovery process by way of realizing the charged property or whichever method of recovery they would have deemed fit. Although the charge is a continuing security we agree with the learned Judge that it would be contrary to public policy for courts to allow lenders to sleep on their rights while the debt snowballs into an impossible sum that clogs the borrowers' ability to re pay. This is exactly what happened in this case and to that extent we find the appellant cannot be allowed to recover interest beyond 3 years from date of the charge document.

29] On the other hand the respondent cannot be allowed to benefit from his own default. In this regard we order the outstanding loan should be calculated for the sum of Ksh 5 million that was loaned according to the legal charge, the letter of offer and guarantee. The applicable interest should be at the rate of 14% as indicated therein for a period of 3 years. That is the loan the respondent should pay within 60 days from the date of this judgement. Upon payment, the appellant shall issue a discharge of charge failure by the respondent to pay, the appellant will be at liberty to realize the security.

[30] Consequently we find merit in this appeal which we allow in the above terms. For obvious reasons explained in this judgment, we order each party to bear their own costs

Dated and delivered at Nairobi this 23rd day of February, 2018.

ALNASHIR VISRAM

....

JUDGE OF APPEAL

W. KARANJA

....

JUDGE OF APPEAL

M.K. KOOME

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR