IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ALNASHIR VISRAM, KARANJA & MWILU, JJ.A)

CIVIL APPEAL NO. 171 OF 2010

BETWEEN

DAIMA BANK LIMITED (IN LIQUIDATION)……..……. APPELLANT

AND

PROF. DAVID MUSYIMI NDETEI.……..…….....……..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi, Milimani Commercial Courts (Honourable Lady Justice Mary Kasango) dated and delivered on the 11th day of October 2005

in

HCC NO. 2198 OF 2000

****

JUDGMENT OF THE COURT

1. This is an appeal by Daima Bank Kenya Limited (in liquidation), hereinafter the appellant, from the judgment and decree of the High Court of Kenya at Nairobi issued on 11th October, 2005 by Lady Justice Mary Kasango allowing the claim by Prof. David Musyimi Ndetei, the respondent herein.

The respondent filed suit by way of plaint against the appellant before the High Court at Nairobi seeking judgment for the liquidated sum of Shs.15,359,072.82, declaratory reliefs challenging the statutory notices of sale issued to him, reimbursement of certain debits made to the respondent's account, the method used to calculate the penalty and interest charges and a prohibitory injunction restraining the appellant from exercising statutory power of sale or otherwise in respect of Land Reference Number 1504/13 Athi River (the suit property).

2. In its defence, the appellant disputed the claim arguing that it had at all times acted within the law and the contract by way of charge perfected as security to secure the advances. The appellant also filed a counterclaim seeking Shs.6,888,718.95 from the respondent. The respondent disputed the amount sought in the counterclaim and averred that he had already paid the amounts due and further that the amounts sought in the counterclaim were illegal un-contracted and unconscionable interest and penalties which contravene the banking law.

3. The matter was fully heard by the trial judge both through witnesses and submissions by advocates. The respondent testified in person and also availed two other witnesses. The first witness was **William Abincha Onono** from Interest Rates Advisory Centre (IRAC) and the other witness was **Alfred Nyaoma**, a director of Bank Supervision at the Central Bank of Kenya. The appellant had **Solomon Kitavi Musimba** testify on its behalf. **Solomon** was the appellant's Credit Control Manager between the years 1998 to 2003 during which time he dealt with the respondent's accounts.

4. Dissatisfied with the decision of the trial court, the appellant filed this appeal. The memorandum of appeal contained in the record of appeal filed on 15th July, 2010 contains eleven grounds of appeal. In the written submissions, the appellant clustered and argued the appeal under the following heads:-

a) **Evidential burden of proof,**

b) **Whether the court can re-write a contract for parties,**

c) Consolidation of accounts,

d) Failure to consider the counterclaim and submissions,

e) Grant of an injunction, and

f) Interference with the trial judge's discretion.

The respondent in his written submissions also addressed himself along the above headings.

5. The parties through their respective counsel highlighted their submissions before us. **Chacha Odera** Advocate appeared with **Jill Barasa** Advocate for the appellant while **Kyalo Mbobu** Advocate appeared for the respondent.

6. In support of the appeal learned counsel **Chacha Odera** for the appellant adopted the submissions and list of authorities filed on 21st April, 2016 and 26th May, 2016 respectively. Counsel drew our attention to the provisions of **section 44** of the Banking Act requiring banks to obtain the Minister's approval before increasing bank charges. The trial judge was faulted for interchanging the provisions of **section 44** of the **Banking Act** and **section 39** of the **Central Bank Act** and that the respondent had not led evidence on the provisions of **section 44** above. He argued that the interest rates applied in the circumstances of the dispute were contractual and were contained in the charge and the further charge. Counsel referred us to **section 52(1)** of the **Banking Act** to support his argument that where parties have agreed, the contractual relations are not to be invalidated. The appellant was therefore entitled to charge interest, charge all costs and expenses including advocate fees as per the contract between parties made by way of charge, added counsel.

7. On the issue of combining and consolidation of the accounts, counsel submitted that this was permitted under the charge and the further charge. Counsel faulted the trial judge's order discharging the suit property on the basis that no debt was owing to the bank. Learned counsel pointed out that the judge having criticized the report by IRAC on the recalculation of figures as claimed by the opposing parties, it was imperative for the judge to determine the figures conclusively in light of the provisions of **section 52** of the **Banking Act**. In urging us to allow the appeal, counsel submitted that the trial judge did not consider the appellant's evidence.

8. In response, **Kyalo Mbobu** Advocate for the respondent urged us to sustain the judgment of the superior court. Counsel heavily relied on the IRAC report from which, he pointed out, the trial judge had drawn value. The appellant had not applied for approval of charges and the itemized impositions onto the account were thus illegal and unauthorized, having been made without the Minister's approval, added counsel.

9. Mr. Kyalo Mbobu also submitted that it was wrong for the appellant to consolidate accounts because the accounts belonged to two different parties. Counsel submitted that the accounts had already been paid and this was not rebutted by the appellant. In effect, counsel adopted the submissions filed on 17th June, 2016 and list of authorities filed on 20th June, 2016.

10. In reply, Mr. Chacha submitted that the expert witness from IRAC had conceded to not having seen the charge or the further charge which comprised the security documents. According to counsel, the witness was therefore not in a position to make a sensible conclusion. In any event, submitted counsel, the rates never increased and the need for application for approval from the Minister did not therefore arise.

11. Having considered the record, respective submissions as filed and argued by learned counsel on both sides and all the authorities cited, we are now in a good position to render our decision on the matter. This being a first appeal, our mandate is spelt out in **Rule 29 (1)** of this **Court's Rules**, namely to re-appraise the material availed to the court below and to draw our own conclusions on the facts emerging from the material. A caution was however, sounded in **Peters – vs- Sunday Post Limited [1958] EA 424**, where the predecessor of this Court stated:

> ***"Whilst an appeal court has jurisdiction to review the evidence to determine whether the conclusions of the trial Judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide. Watt –v- Thomas [1947] 1 AII E.R. 58; [1947] A.C. 984, applied."***

12. Our role is akin to subjecting the whole case to a retrial – see ***Selle v Associated Motor Boat Company Ltd [1968] EA 123***. The only Limitation is interference with the trial court's exercise of judicial discretion which we would leave intact unless we are satisfied that the judge misdirected self in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise. Further, empowered by the provisions of **Rule 3** of this **Court's Rules**, this Court has power to confirm, reverse or vary the decision of the High Court appealed against to remit the proceedings to the High Court with such directions as may be appropriate.

13. The circumstances under which this Court will therefore interfere with the exercise of discretion by the trial court are circumscribed and for a guide what **Madan J.A**., (as he then was), stated in **United India Insurance Co. Ltd. –vs-East African Underwriters (Kenya) Ltd., [1985] E.A. 898**, is relevant. The learned Judge rendered himself as follows:

> ***"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: First, that the Judge misdirected himself in law; secondly, that he misapprehended the facts, thirdly, that he took account of considerations of which he should not have taken account of; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

(See also **Mrao Ltd. –vs- First American Bank of Kenya Ltd. & 2 Others [2003] KLR 125.**

13. To enable us effectively discharge our mandate, we find it necessary to contextualize the dispute as pleaded by the parties. The relationship between the appellant and respondent dates back to 7th March, 1994 when the respondent opened a current account with the appellant bank. The respondent was allowed to overdraw his account to the tune of Shs.1,316,268.90 through July 1994 when the appellant issued an offer letter dated 18th July ,1994, for an overdraft of Shs.1.5 million to Oasis Mineral Water Company and Shs.1.5 million to guarantee the operations of Tausi Exporters. The offer was available for acceptance till 26th July, 1994 and was due for repayment on 31st December, 1994. The facilities were to be secured by a first legal charge for Shs.3million over the suit property. The applicable rate of interest was Base rate (33% at the time) + 5% equivalent to 38% floating calculated on overnight balances. The excess over the limit attracted an additional 4%per month as penalty.

14. A further offer letter dated 24th July, 1995 was issued in respect of an overdraft of Shs.3 million to Oasis Mineral Water Company and a term loan of Shs.1.6 million. These facilities were to be secured by a further charge for Shs.2 million over the suit property. The term loan was to be repaid within 12 months ending 30th September, 1996. The facilities were availed at the interest rate of 29%p.a. floating with any excess attracting a penalty of 4%per month. Clause 6 of this letter provided that no drawdown was allowed before perfection of security and in the event drawdown was made, then a rate of 40% p.a. was applicable till security documentation was finalized and registered. Impliedly, the second offer letter superseded the first offer letter. This indeed formed the basis of the enquiry by the respondent vide his letter dated 28th August, 1998 for clarification which however seems not to have elicited any specific response.

15. All the above offer letters were duly accepted by the respondent. A charge dated 30th May, 1996 was executed and perfected by way of registration on 12th June, 1996 to secure the principal sum of Shs.5,000,000 (the first charge). The first charge did not specify the applicable interest rate but only reserved the appellant's rights to determine the applicable rate and/or vary the same without reference to the respondent.

16. The respondent approached Housing Finance Company of Kenya (HFCK) to take over the facilities from the appellant. A second charge dated 19th August 1999 was perfected and registered on 20th August, 1999 to secure a sum of Shs.3million (the second charge). The second charge was subject to a first charge over the suit property in favour of HFCK. The second charge specified that the applicable interest rate was 37% p.a. revisable at the appellant's discretion. On 24th September, 1999, HFCK remitted a sum of Shs.6,445,080.00 to the appellant.

17. The issue that arises at this juncture is what the status of the accounts was. The appellant contends that the remittance by HFCK left a debit balance of Shs.5,381,757.65 while the respondent contends that the remittance from HFCK left his account in credit of Shs.4,385,163.01. This state of affairs led to the respondent's suit in HCCC no. 438 of 2000. On 30th March, 2000 the appellant sought to exercise its statutory power of sale and issued a statutory notice which was amended by another notice dated 31st March, 2000 demanding payment of Shs.6,888,718.95 being the amount allegedly owing as at 29th February, 2000. This was followed by a 45day notice to sell the property by M/S Garam Investments, an auctioneer.

18. From the facts above, it is clear that the main dispute relates to what is outstanding to what party and the consequences thereof. The respondent claims a credit balance of Shs.6,326,109.42 as per the Further Re-Amended Plaint filed on 28th June, 2004 while the appellant counterclaimed for shs.6,888,718.95 with interest at the rate of 3% per month from 1st March 2000 from its Further Amended Defence filed on 29th June, 2004.

19. From the record, there is the appellant's letter dated 3rd November 1994 which advised of a reduction of interest rate on the overdraft to 31% p.a. with excess drawings attracting the rate of 48% p.a. with effect from 16th November, 1994. There is also another letter advising of the increase in interest rates by 5% to 34% p.a. and 36%p.a. on the overdraft and term loan respectively with effect from 8th August 1995. On 3rd June 1998, the appellant informed the respondent that the outstanding amount of Shs.6,706,978.15 attracted interest at the rate of 4.1% per month from 31st May 1998. A letter from the respondent dated 11th October, 1995 from Oasis Mineral Water Company acknowledged that the applicable interest rate for the TAUSI loan and the overdraft was 36% and 30% respectively which the respondent was requesting the appellant to reconsider.

20. The one question that comes to mind in the circumstances is, what was the applicable interest rate at the various levels the facilities were outstanding? It is the appellant's case that it had discretion to determine the applicable interest rate from time to time in line with the terms of the charge. The respondent's claim was largely derived from the computation by IRAC which by admission of the expert relied on the capped rate of 16.5%. Our consideration of the documents on record leads us to distinguish the facilities at two levels. The first level is the period between the respondent's opening of the account in March 1994 to the issuance and acceptance of an offer letter dated 19th July1994. In our view, prior to this offer letter being issued, the operating standard terms of the bank applied. Every time the respondent was allowed to overdraw his account, it was subject to the prevailing market rates issued by the bank from time to time which the respondent had no control over. Only the bank at this juncture determined the applicable rates which were in any event based on penalty charges as there was neither a facility nor security in place.

21. Upon issuance of the offer letter dated 19th June ,1994, the parties were now in a position to formalize their relationship relating to the facilities. It became clear that the applicable interest rate was 38% floating with any excess over the limit being penalized at 4% per month and levied daily. A facility fee of 1.5% on the overdraft limit was also recoverable on acceptance of the offer letter equivalent to **Shs.22,500** with a further Shs.7,500 recoverable annually.

22. It is this offer letter that was supposed to form the basis for the creation of any charge over the suit property including the minimum terms. For some reason, no charge was created as no registration was done despite the instrument being prepared. The appellant explained that the reason for the delay on the perfection of the charge was as a result of the then appellant's advocate, Mr. Philip Waki ,being appointed a judge. We were however not privy to this charge document which in any event never saw the light of day. We nevertheless took note of the fees aggregating to **Shs.101,300** that was demanded by the then advocate through his firm Waki & Co. Advocates.

23. The re-preparation of the charge instrument was subsequently done by the appellant's new advocates, Messrs. Wagereka N.N. & Company Advocates. Notably, in July 1995, a new offer letter for facilities aggregating Shs.4.6 Million was issued and accepted. This new charge was made in May 1996 to secure a principal sum of Shs.5,000,000 without specifying what facilities were being secured and without making reference to any offer letter. As per this second offer letter, the overdraft was available for the period until 31st August, 1996 when it fell due for review. At this juncture, we agree with the respondent that the property had already been charged to the appellant pursuant to the previous offer letter despite the appellant not having perfected the security. Indeed this new offer letter recognized the existence of a charge for shs.3 million whilst proposing an additional charge of Shs.2million. It is apparent that these charges were aggregated into the charge for Shs.5 million that was made and eventually perfected in 1996.

24. Upon takeover of the facilities by HFCK, it is trite that the charges were discharged ending the contractual relation and replaced by a second Charge, the first charge being made in favour of HFCK. This second charge dated 19th August, 1999 can only have effect from that day in respect of facilities of Shs.3million secured thereunder.

25. From the foregoing, it is clear that the different applicable interest rates can be summarized in the following manner. First, the un-contracted interest on the overdrawing prior to any formal contract from inception of the account to 19th June, 1994. This is in essence the prevailing market rates for any unsecured lending. Second, the interest rate specified in the offer letter dated 19th June ,1994 on the facilities aggregating to Shs.3million including any penalties on excess amounts chargeable from the said date of the offer letter. Third, the interest charged under the terms of the second offer letter dated 24th July, 1995 aggregating to shs.5million which were incorporated in the charge document. Lastly, the interest chargeable under the 2nd charge for shs.3million with effect from 19th August 1999 to the time the statutory notices were issued and the cases filed before the court. We agree with the respondent on the charging of penalties on any drawdown pending the perfection of the further charge. The second offer letter presumed that the suit property was already charged to the appellant. Any perfection of securities thereafter was beyond the control of the respondent and he should not suffer for such delay. Any such drawdown made after the issuance of the second offer letter and prior to perfection of further charge should not therefore attract penalties penalized but considered under the applicable interest rates.

26. As all these involve reconciliation and tabulation, we are not in a position to establish how much is owing between the parties taking into account the payments made. Having established the basis for the calculation of the interest as above, it is incumbent upon the parties to reconcile the position in order to tabulate the exact figures conclusively. This reconciliation should take into account the various advices on interest changes advised by the appellant from time to time as noted above. The IRAC report does not offer much assistance in this regard as it did not take into account the above situation involving the contract between the parties. Mr. William from IRAC did concede as much during his testimony before the trial court. In any event, sufficient cause has not been shown that the respondent experienced any difficulties to reconcile the accounts to necessitate the involvement of IRAC. Any request to IRAC was purely at a personal level and the respondent should remain liable for the costs of engaging IRAC.

27. The bank statements on record only help to identify the entries made without specifying whether the charges related to interest or penalty or both and what rate was applicable. As we did not take any evidence in this regard, we would be reluctant to endorse any figures presented both by the appellant or the respondent.

28. We are also mindful that the course of action arose out of events that occurred between the years 1994 and 2000 during which time the financial services industry was characterized by high lending rates without much legal intervention to reign in on the lenders' discretionary and unilateral power to vary interest rates and generally lend on unconscionable terms. We find it necessary to point this out owing to the fact that there have been developments in the law since that time including the promulgation of the Constitution in 2010 and the enactment of what is commonly known as the new Land laws and prominence given to consumer protection. We have considered the law as it obtained at the time. The court of appeal in **Nancy Kahoya Amadiva v Expert Credit Limited & another [2015] eKLR** has taken this position in relation to the situation obtaining in the late 1990s, around the same time as the one subject to this dispute.

29. As the respondent does not dispute the loan and acknowledges that he experienced difficulties meeting his repayment obligations from time to time, it is clear in our minds that the court has a duty to uphold the rights of parties who have negotiated in a commercial transaction and as a result one party acquires or achieves some benefits which he/she/it does not wish the other party to recover or enforce through the instrument that created the relationship. In this regard we are guided by this court's previous decision in ***Aiman vs Muchoki (1984) K. L. R. 353*** where it was held as follows;

> ***"In the field of the civil law, it is of utmost importance that the courts uphold the rights of parties to commercial transaction. It is the firm tradition of common law court to do so and if the tradition is departed from the nation will suffer".***

30. As at the time of instituting the suit, the second charge remained in force. The respondent did not persuade us that the second charge was invalid for whatever reason. It is clear in our mind that the respondent as the borrower had obtained facilities from the appellant and had pledged the suit property as security for the advance. The respondent made further arguments based on the existence of the charge including the delay in its perfection and the fact that the amount secured by the second charge being Shs.3million was sufficient to demonstrate the level of indebtedness.

31. From the description of the suit premises in the amended plaint, our perusal of the record and in particular the copies of title and the charge document in respect of the suit premises, it is apparent that the proper regime governing the suit property is the RTA. **Section 2** of the RTA defines a "***charge***" to mean any charge created on land for the purpose of securing the payment of money and also the instrument by which the charge is created. Registration of charge is conclusive including its execution in light of the provisions of **sections 58 and 100** of the Registration of Titles Act and **section 69** of the **Indian Transfer of Property Act** on charges. The respondent's contention that the charge document was not explained to him despite his voluntary signature of the same before an Advocate is not only contradictory but is not persuasive to us at all. The underlying consideration is that the appellant intended to secure his borrowings from the appellant by offering the suit premises. The respondent in our view is a person who is well educated and exposed and could not have been duped into offering the suit premises as security as he now wants us to believe. This being so, we reiterate that the charge was valid and its terms applicable in the circumstances. (See the case of **Nancy Kahoya Amadiva v Expert Credit Limited & another [2015] eKLR**)

32. From the record, the respondent's accounts were consolidated on 21st May, 1998 when a transfer of Shs.2,040,694.65 was made from account number 125859. Our perusal of both charge instruments confirms that the appellant reserved the right to consolidate the accounts. The necessary clause on consolidation is found in clause (f) at page 21 of the charge instrument dated 30th May, 1996 in the following words:-

> ***" (f) That the Lender may at any time and without notice to the chargor combine or consolidate all or any of the chargor's accounts with and liabilities to the Lender and set off or transfer any sum or sums standing to the credit of any one or more of such accounts or towards satisfaction of any of chargor's liabilities to the Lender on any other accounts or in any other respect whether such liabilities be actual or contingent primary or collateral joint or several and whether such account and liabilities be one or more branches of the Lender."***

The above clause is replicated in material respect in clause (g) at page 15 of the second charge. As rightly pointed out by counsel for the appellant, the right to consolidate existed and was open to the appellant at any time in light of the charge instrument above which was in force as at May 1998, when the appellant exercised it. This right was not impeded by the fact that the accounts were operated in different names considering that the suit property secured all the facilities being consolidated.

33. In the same breadth, and having found that the charge instruments were valid and applicable, we find that the respondent was obliged to meet any expenses associated with the facilities. This is clearly spelt out in the two charge instruments which define expenses to include legal costs and disbursements paid or incurred by the lender under the charge. These expenses therefore cover fees for professional or technical advisors of the lender such as the appellant. The expenses as tabulated in clause 15.12 (iii) of the Further Re-Amended Plaint were therefore recoverable from the respondent in so far as they were made during the tenure of the contracted facilities under the charge instrument. The respondent has not demonstrated that any such deductions were made without basis.

34. During the trial the appellant's witness explained that the figure of Shs.101,400 debited to the respondent's account on 11th November, 1994 though indicated as 'arrangement fees' could as well relate to legal fees. We have taken note that a deposit request note for Shs.101,300 dated 10th November, 1994 from the appellant's advocates Waki & Company Advocates was processed for settlement on the said date. The respondent has neither pleaded nor demonstrated that he was made to pay for the legal services twice for which he would be entitled to reimbursement. We however took note from the trial court's judgment that legal fees to Kibuchi & Company Advocates of Kshs.201,277.00 were due to be refunded to the respondent. Unfortunately as it was not pleaded or even raised by the respondent on appeal, we are unable to apply ourselves on the issue.

35. As held in **Blay v Pollard and Morris [1930] 1 KB 628,** cases must be decided on issues on record and if it is desired to raise other issues they must be placed on record by amendment. In **Charles C. Sande v Kenya Co-Operative Creameries Limited Civil Appeal No. 154 of 1992** the Court underscored the need for parties to have notice of issues in an action when it stated that:

> ***"All the rules of pleading and procedure are designed to crystallize the issues a judge is to be called upon to determine and the parties themselves made aware well in advance as to what the issues between them are."***

36. Our perusal of the offer letter dated 19th July, 1994 indicates that a facility fee equivalent to 1.5% of the overdraft limit of Shs.1.6 million applied. The statement indicates that an amount of Shs.24,000 was recovered from the respondent's account on account of arrangement fees. Again it was upon the respondent to demonstrate that the debit made was erroneous in the absence of which we have to affirm that debit as rightful.

37. The positions we have taken above in determining the appeal before us are premised on the provisions of **section 107** of the Evidence Act relating to the burden of proof. Accordingly, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. This is a well settled legal principle that we need not belabour at the moment. In the present context, the burden at all times rested with the respondent as the party who instituted proceedings before the trial court.

38. The respondent challenges the appeal on the grounds that the appellant violated the provisions of **section 44** of the **Banking Act**. This section provides that:-

> ***"No institution shall increase its rate of banking or other charges except with the prior approval of the Minister."***

In support of this argument however, the respondent appreciates that the appellant reserved the right to vary the interest upwards. The respondent with the help of the witness from Central Bank of Kenya did not indicate which rate had been approved and which the appellant violated by an increase. Instead, the respondent's submissions hinged on the equitable doctrine that the rate applied by the appellant was unconscionable.

39. The appellant on its part brought to our attention the provisions of **section 39** of the **Central Bank of Kenya Act** and **section 52** of the **Banking Act**. **Section 39** (which has since been repealed by **section 4** of **Act No.8** of 2004) provided as follows:-

> ***"The Bank may, from time to time, acting in consultation with the Minister, determine and publish the maximum and minimum rates of interest which specified banks or specified financial institutions may pay on deposits and charge for loans or advances:***
>
> ***Provided that the Bank may in consultation with the Minister determine different rates of interest—***
>
> ***a. for different types of deposits and loans; and***

b. for different types of specified banks and financial institutions"

This provision aptly confirms that banks such as the appellant had the latitude to determine the minimum and maximum rates of interest. It is very unlikely that a bank in operation would do so and grant loans and facilities without having set such parameters on the applicable interest rates. It is thus convincing that the offer letters issued indeed confirmed such applicable rates at the time. The respondent even with the help of his witness from the Central Bank of Kenya did not address us to any prevailing minimum and maximum interest rates applicable for loans granted by the appellant. This would have assisted the court in determining any breach of the statutory provision.

40. **Section 52** of the **Banking Act** on the other hand validates any contractual obligation between an institution and any other person notwithstanding any contravention of the provisions of the Act or the **Central Bank of Kenya Act**.

As discussed earlier, the charge instruments were valid and their respective terms applicable to the lending arrangement between the parties. The terms of the charge are in our view the contractual obligations contemplated under the provision of **section 52** of the **Banking Act**.

41. Again, it was incumbent upon the respondent to indicate how the provisions of **section 44** of the **Banking Act** applies to him. With respect, and guided by the equitable doctrine that equity follows the law, we do not find it logical why we should resort to an equitable remedy in the abundance of express statutory provisions dealing with the situation at hand. The mere invocation of the section is not enough. The legal burden of proof at all times remained that of the respondent. In the absence of any other evidence apart from the IRAC report whose evidential value is questionable, the respondent did not discharge the burden of proof successfully to warrant the orders sought.

42. Turning to the orders granted by the trial court and those sought in the appeal, we appreciate that the orders sought were discretionary in nature. We also appreciate our limited role as an appellate court to interfere with discretion of a trial judge as was laid down in the celebrated case of **Mbogo v Shah [1968] EA 93**. A bank's exercise of its statutory power of sale is the cornerstone of any normal lending transaction involving a registered charge as security. If courts readily diminished the banks' rights under the charge, then the very concept of accepting a charge as security would be in serious jeopardy and access to financing would be limited as per Pall J, in **Muhani and Another v National Bank of Kenya Limited [1990]KLR 73**).

43. Before we conclude, we have to mention that the gist of the case is dependent on the reconciliation of accounts. The success of the respondent's case before the trial court in so far as overpayment is concerned is mutually exclusive to the counterclaim. The result of this situation is that both cannot succeed as success by one of the parties inevitably implies loss by the other. This being a mathematical exactitude, the counterclaim largely dependent on calculations, it matters not that the judge considers the counterclaim separately once the principle basis for the calculations subject to the dispute is established. The other orders of injunction restraining the disposal of the suit premises in exercise of the power of sale and discharge of charge are also dependent on the tabulation and reconciliation conclusion of which will establish which party owes the other one and to what extent.

44. The upshot of the appeal is that we make the following findings and refer the matter to the trial court for final disposal:-

a) The appellant did not violate the provisions of **section 44** of the **Banking Act** in light of the provisions of **section 52(1)** of the **Banking Act** and **section 39** of the **Central Bank of Kenya Act** (now repealed);

b) The charge instruments dated 30th May 1996 and second charge dated 19th August 1999 were valid and the terms thereof contractually enforceable and applicable;

c) The appellant was entitled to make the deductions made in the account on account of expenses incurred in connection with the facilities;

d) The appellant was entitled to consolidate the respondent's facilities and accounts secured by the charge instruments.

e) The case be and is hereby remitted back to the high court at Milimani Commercial Court before any judge for purposes of reconciliation of accounts by the parties and final disposal of the case based on the following applicable interest rates:-

i) the prevailing market rates for any unsecured lending for the period from inception of the account to 19th June, 1994;

ii) The interest rate specified in the offer letter dated 19th June, 1994 on the facilities aggregating to Shs.3 million including any penalties on excess amounts chargeable from the said date of the offer letter to the 24th July, 1995 when a second offer letter was made; This should also take into account the reduction of interest on the overdraft facility to 31% per annum with effect from 16th November 1994 and excess charged at 48%per annum as advised by the appellant vide its letter dated 3rd November, 1994;

iii) The interest charged under the terms of the second offer letter dated 24th July, 1995 for facilities aggregating shs.5million which were incorporated in the charge document for the period between 24th July, 1995 to 19th August ,1999. This should take into account the revised interest rate of 34% and 36% on the overdraft and term loan respectively with effect from 8th August,1995 as advised by the appellant through its letter dated 4th September, 1995.

iv) The interest chargeable under the second charge for shs.3million with effect from 19th August ,1999 to the time the statutory notices were issued and the cases filed before the court to the date of the judgment of the High Court. These are the orders of this Court. This judgment has been signed under **Rule 32(3)** of this Court's Rules the Hon. Lady Justice Mwilu having been elevated to the Supreme Court of Kenya. We apologise sincerely for the delay in issuing this judgment which

arose on accord of the departure of one member of the Court.

Dated and delivered at Nairobi this 9th day of February, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

……..…

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR