IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, OUKO, KIAGE JJ.A)

CIVIL APPEAL NO. 340 OF 2012

BETWEEN

NICHOLAS MAHIHU MURIITHI.................................APPELLANT

AND

BARCLAYS BANK KENYA LIMITED......................RESPONDENT

(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mutava, J.) dated 27th September, 2012

in

HCCC No. 604 of 2006)

****

JUDGMENT OF THE COURT

The appellant filed suit against the respondent for:

> **"(a) a declaration that the debit entries made on the Plaintiff?s Plus Account Number [Particulars Withheld] with the Defendant at the Defendant?s Barclays Plaza Business Centre Branch and the transfers in respect thereof to loan account numbers [Particulars Withheld] and [Particulars Withheld] on 23rd October 2006, were unauthorized, unlawful and void.**
>
> **(b) a permanent mandatory injunction directing the Defendant whether by itself, agents, servants or otherwise howsoever to reverse or correct the debit entries made on the Plaintiff?s Plus Account Number [Particulars Withheld] with the Defendant at the Defendant?s Barclays Plaza Business Centre Branch and the transfers in respect thereof to loan account numbers [Particulars Withheld] on 23rd October 2006, and credit the Plaintiff?s said account with the sum unlawfully debited together with interest thereon at the Defendant?s prevailing commercial rate of 15 per centum per annum from 23rd October 2006, until the date of reversal or correction.**
>
> **(c) A permanent injunction restraining the Defendant, whether by itself, agents, servants or otherwise howsoever, from making any further unauthorized debit entries on the Plaintiff?s Prestige Plus Account Number [Particulars Withheld] with the Defendant at the Defendant?s Barclays Plaza Business Centre Branch in settlement of alleged outstanding loans due to the Defendant from Kirinyaga Supply Stores (K) Limited or any other entities.**
>
> **(d) Special damages for breach of contract in the sum of Kshs. 35,017,521.88 as pleaded in paragraph 34 above**
>
> **(e) general and exemplary damages for breach of contract, conversion and emotional distress and interest at the Defendant?s prevailing commercial rate of 15 per centum per annum from 23rd October 2006, until payment in full.**
>
> **(f) The 3 charges dated 10th September 1988, 23rd July, 1994 and 3rd November, 1994 on the plaintiff?s 3 propertiesKiiwe/Gacharo/869, Iriaini/Gatundu/663/23 and Iriaini/Kaguyu/733 respectively, to the defendant be discharged and the defendant directed to execute discharges of charge in respect of the 3 charges and deliver the title Dees and Certificate of Lase in respect the 3 properties to the plaintiff."**

The court below found no merit in the action and dismissed it with costs, prompting this appeal.

By way of background, the appellant, who is a businessman, operated two loan accounts at the respondent's Karatina Branch, into which loans and overdraft facilities were advanced to Kirinyaga Supply Stores, a sole proprietorship through which the appellant traded. Apart from this account, the appellant also held a trading account No. **[Particulars Withheld]** with the respondent also in the name of Kirinyaga Supply Stores. At the point the parties disagreed, the appellant's various loan accounts during the period in question looked like this;

i. Kshs. 562,500 under Loan agreement and offer letter dated 11th August, 1995;

ii. an overdraft of Kshs. 800,000 under the same letter of offer;

iii. Kshs. 1,000,000 under a Loan Agreement dated 22nd January, 1996 and a cheques guarantee dated 23rd January, 1996 by the respondent to East Africa Portland Cement; and

iv. Kshs. 100,000 as set out in a letter of offer dated 6th June 2001.

All the loan agreements were executed by the appellant on the basis of his sole proprietorship of Kirinyaga Supply Stores. These loans were secured by a charge over the appellant's three properties Iriani/Gatundu/668/23; Kiiwe/Gacharo/869 and Iriani/Kaguyu/733. According to the respondent, the appellant failed to fully settle the facilities and the former's attempts to realize the securities were unsuccessful, because the appellant had made a proposal on how he would settle the facilities but failed to honour it and also due to the low bids. Faced with this reality and convinced that the debt would not be recoverable, the respondent decided to write-off the debt in its books.

Subsequent to this, the respondent, through its internal systems, discovered that the appellant, without disclosing to it, had in fact opened and was operating a Prestige Plus personal account number 077 1220266 at the respondent's Barclays Plaza Branch. The discovery precipitated the respondent's fresh demand from the appellant to settle the amounts due under the Karatina accounts. Since payment was not forthcoming and the appellant had funds in his prestige account, the respondent proceeded to set off the debts outstanding in the Karatina accounts by debiting the prestige account. But even after the set off, the respondent insisted that the appellant remained indebted to it.

In a suit instituted in the High Court, the appellant complained that the respondent, in breach of general banking practice, and in violation of bank-customer relationship, debited his account with a total sum of Kshs. 2,263,2388.55 and transferred the amount to loan accounts numbers 30-8012162 and 001-8012162 in the name of Kirinyaga Suppliers Stores without instructions from him; that as a result, the cheques he had issued to third parties to the tune of Kshs. 3,393,610 had been dishonoured due to insufficient funds in the account; that he was not indebted to the respondent; that as a result of the debits, he suffered special damages amounting to Kshs. 35,017,521.88.

Apart from the aforesaid alleged breach of contract, the appellant contended that the respondent was barred by the Limitation of Actions Act from recovering the debt; and that Kirinyaga Supply Store (K) Limited had taken over the loans of Kirinyaga Supply Stores thereby absolving him from personal liability.

Although the application dated 6th November, 2006, the ruling delivered on 19th January, 2007 and the consent recorded on 5th November,2009 are not on record, the learned Judge in the impugned judgment confirmed that, with the suit the appellant took out an application for injunction which was allowed in a ruling delivered on 19th January,2007 on condition that the appellant would maintain a credit balance of at least KShs. 1,000,000 in his prestige account until the determination of the suit. Further to this, parties consented to the grant of interlocutory injunction orders restraining the respondent from taking any action towards recovery of the debt until the hearing and determination of the suit. The appellant was allowed to continue remitting monthly installments of Kshs. 20,000 until determination of the suit.

The respondent denied any wrongdoing and asked the High Court to find that the appellant's claim lacked merit; that the appellant was truly indebted to the respondent; that the appellant trading as Kirinyaga Supply Stores, a sole proprietor, was liable to the respondent, being the person who opened the bank account; that in breach of the bank/customer relationship, the appellant opened another account without notifying the respondent even after the respondent had written-off the loan after declaring it doubtful and irrecoverable; that the appellant was fully aware of the failed efforts to sell the mortgaged properties after he defaulted in the repayment; that having acknowledged the debt by two letters dated 3rd and 25th October, 2006 the appellant cannot claim that the respondents was barred from demanding the repayment; and that under the banking law and practice it was entitled to combine the appellant's accounts and set-off the debt.

Upon hearing both parties, the learned Judge isolated 8 issues for determination and arrived at the following summarized conclusions: That the appellant was indebted to the respondent in the sum of Kshs. 3,300,359.80; that this amount was written-off by the respondent on 22nd July, 2005 and transferred to the suspense account; that the appellant was found to have failed to disclose to the respondent that Kirinyaga Supply Stores had been wound up and taken over by an incorporated entity, Kirinyaga Supply Store (K) Limited; and that Kirinyaga Supply Store Ltd did not assume liability for the debts owing to the respondent since no loans or other facilities were extended to the company. Accordingly, liability for repayment was never transferred to it.

The learned Judge also concluded that the respondent was entitled to exercise its right of combination and set off conferred by the terms of the facilities. For that reason, he accepted as proper the decision of the respondent to debit the appellant's prestige account even though the debt had been written-off.

On whether the debt was barred by the statute of limitation, the learned Judge concluded that under **Section 19(1)** of the Limitation of Actions Act, the recovery of a debt secured by a mortgage may be brought within 12 years from the date of accrual; that in this dispute, the date of accrual of the debt was 16th March, 1999, being the date of the 1st auction. He further noted that the debits were made on 23rd October, 2006 which was 7 years from the date the debt became payable, hence within the limitation period. Secondly, the Judge relied on **Section 23(3)** of the Limitation of Actions Act to demonstrate that where a debtor acknowledges the debt, computation of the limitation period commences from the date of the last acknowledgement, which in the context of the case before him was 3rd October, 2006 when the

appellant acknowledged his indebtedness by a letter. Subsequent debits were made on 23rd October, 2006 which was 20 days later, once again well within time. Lastly, he relied on the case of **Deposit Protection Fund V. Rosaline Njeri Macharia & Another,** HCCC No. 399 of 2005, to demonstrate that in a claim for a bank debt that attracts interest on contractual terms, the time for initiating an action did not lapse upon the lapse of the statutory period as every time interest is debited on the debtor's account, a new cause of action arises. This, he opined, had the effect of moving the date of computation forwards to the date when the respondent stopped accruing further interest on the debt which is when the account was closed upon write-off on 22nd July, 2005. This was a period of 15 months from the debit date of 3rd October, 2006. For these reasons, the learned Judge dismissed the appellant's suit with costs as explained earlier.

The appellant now challenges that decision contending that it was in error to conclude that the appellant operated the Karatina accounts without proof; that there was no evidence that the appellant was advanced loan facilities on the Karatina accounts; that there was no basis for finding that the appellant never repaid the loan facilities amounting to Kshs.2,263,238.55; that the Judge found in error that the appellant failed to disclose the prestige account to the respondent; and that there was no justification for a set-off, the facility having been written-off.

When the appeal came up for hearing on 13th February, 2018, both sides, respectively represented by Miss Namwoli for the appellant and Miss Muthee for the respondent, made oral arguments since they had not filed submissions in accordance with the directions of the Court.

In support of the appeal, Ms. Namwoli reiterated that, in terms of **Section 176** of the Evidence Act, the respondent did not prove that the appellant operated two accounts at its Karatina branch as no documents nor statements were exhibited to prove that fact. Instead she insisted that the two accounts belonged to Kirinyaga Supply Stores which changed its status from a business name to a limited liability company; that the loan was not recoverable as it was brought after 12 years and therefore time barred by **Section 19(1)** of the Limitation of Actions Act because the 1st charge was on 10th September 1988; 2nd charge on 23rd August 1994; and the 3rd charge on 3rd November 1994. Drawing support from ***Halsburys Laws of England***, 4th Edition, Reissue, Vol 28, and the case of **Parr?s Banking Company Limited V. Yates** (1898) 2 QBD 460, counsel argued that in an action for money lent the time is determined by the time stipulated for repayment. For that reason, it was the case for the appellant that the respondent acted *ultra vires* when it transferred funds from the former's personal account to that of Kirinyaga Supply Stores. It was submitted that the respondent was aware of the change of status of Kirinyaga Supply Stores; and that after the loan was written off it was incapable of being recovered.

Ms. Muthee, in expressing her opposition to the appeal, submitted that the appellant could not argue that respondent was barred by statute of limitation. Secondly, she contended that there was no denial that the appellant was advanced the facilities which were never repaid; that in his amended plaint, the appellant conceded that he operated the two accounts; and that by writing off the debt, the respondent did not absolve the appellant from liability.

In our view, these submissions seek to answer the questions whether the appellant was indebted to the respondent and the extent of his indebtedness; whether Kirinyaga Supply Stores (K) Limited took over the liabilities of Kirinyaga Supply Stores; whether the respondent was justified in exercise of its option of setting off the debts; whether by writing off the facility, the appellant was absolved from liability; whether the respondent was barred from recovering the debt by the statute of limitation; and finally, whether the respondent was entitled to damages for conversion for debiting the appellant's prestige account. As we consider these questions, we are conscious of our duty as a first appellate court to re-evaluate the evidence on record and to draw our own independent conclusions, bearing in mind that we neither saw nor heard the witnesses and should make due allowance in that respect. See **Kenya Ports Authority V Kusthon (Kenya) Limited** [2009] 2EA 212.

Purely from the record and testimonies, the appellant's account number 1068287 had a debit balance of Kshs. 2,288,599.80 as at 27th November, 1996. The appellant acknowledged this. He however led no evidence in support of his contention that he had repaid the sum and did not owe the respondent any money. Instead, he relied on the fact that the respondent, having written off the debts could not turn around after over 15 years to revive them. In the next paragraphs we shall be considering the implications of a write - off, but for the time being we cannot find any fault in the conclusion by the learned Judge that indeed the respondent was indebted to the defendant. As to the extent of the indebtedness and going by the evidence, we respectfully agree with the learned Judge that at the time the appellant's debt was written off, the sum outstanding was Kshs. 3,300,359.80.

On whether liabilities of Kirinyaga Supply Stores were taken over by Kirinyaga supply Store (K) Limited, it is important to note that the appellant did not draw the attention of the respondent to this critical fact. The only thing he did was to exhibit the Certificate of Incorporation as well as the Memorandum and Articles of Association of Kirinyaga Supply Store (K) Limited and the board's resolution authorizing borrowing of Kshs. 5,000,000. This evidence without any other nexus with Kirinyaga Supply Stores is of no value and was incapable of advancing the appellant's argument. The appellant did not expect the respondent or any other person to assume that, merely because of the similarities in the names of the two entities, that the latter one had replaced the earlier one and taken over the assets and liabilities of Kirinyaga Supply Stores. Not a word was said to the respondent by the appellant that Kirinyaga Supply Store (K) Limited would on a specified date take over the financial facilities from Kirinyaga Supply Store, yet in such an arrangement the respondent, being the lender, was a vital party. Apart from not being specific as to which banking institution the appellant was authorized to borrow from, neither the Board resolution nor the memorandum or articles of association of the company prescribed that it was formed to, *inter alia*, take over the assets and liabilities of Kirinyaga Supply Stores. We reiterate the words of Lord Macnaghten on the principle flowing from corporate personality of a company in the celebrated case of **Salmon Vs Salmon & Co. Limited** (1897) A.C where at page 51 he said;

> "**The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act**".

Because a company is not a physical person, its decisions and actions are reached by resolutions of its members in general meetings and conveyed through its directors and other officials. No resolution was exhibited to demonstrate that indeed the company had taken over the assets and liabilities of Kirinyaga Supply Stores. Like the court below, we are left in no doubt that the loan and overdraft facilities were extended to the sole proprietorship, Kirinyaga Supply Stores, with whom liability remained. The appellant executed the charge on behalf and

in favour of Kirinyaga Supply Stores.

Turning to the question of set off of the appellant's debts by the respondent, the answer is in the loan agreements and the charge instruments executed by the parties. The loan agreement stipulates that;

> **"The Bank is authorized by the borrower to apply at any time any credit balance of the borrower with the bank in reduction of any sum due under this agreement from time to time."**

Likewise clause 18 of the charge provides as follows;

> **"The bank may at any time and without notice to the charger combine or consolidate all or any of the chargor?s accounts with the bank and set off or transfer any sum standing to the credit of any one or more of those accounts in or towards satisfaction of any sum standing to the credit of any one or more of those accounts in or towards satisfaction of any moneys; obligations or liabilities of the charger to the bank whether those be present, future, actual, contingent, primary, collateral, joint or several and the charger expressly waives, so far as it permitted by law, all rights of set off which he may not or hereafter have against the bank."**

This Court has had occasion in the case of **<u>Barclays Bank of Kenya Ltd V</u> <u>Kepha Nyabera & 191 Others</u>** , Civil Appeal No. 169 of 2007, to explain, in the passage below the bank's right to set off a debt owed to it by a customer who maintains more than one account with it;

> "**34. At paragraph 29.16 of Pagets Law of Banking, 13th Edition, it is stated that the banker may combine two current accounts at any time without notice to the customer even though the accounts are maintained at different branches.**
>
> **35. We are also guided by the passage in Pagets Law of Banking, supra, paragraph 29.13 where it is stated thus:**
>
> > **"Right of bankers of set-off which is right of combination or of consolidation of accounts is but the manifestation of a right analogous to the exercise of the banker?s right of lien, a right which is of general application and not in principle limited to account or other similar accounts.?**
>
> **……**
>
> **38. Thus, in circumstances where a bank has a loan account and also a current account in credit with the same customer and holds security for the ultimate balance, the banker is at liberty to combine and consolidate the accounts and set off the accounts. In the instant case, it is very clear that the 2nd respondent had given the right to the appellant to consolidate and set off any sum standing to the credit of any one or more of those accounts in or towards the satisfaction of any liabilities due to it".**

We conclude on this ground that the respondent was entitled to exercise its right of combination and set off in terms of the charge and the loan agreement. That right we further conclude could properly be exercised even after the respondent had written off the loan.

From the evidence presented by the respondent in the form of the Central Bank of Kenya Prudential Guidelines, we are indeed persuaded that in banking terms, debts are classified into categories depending on their performance. They are either: normal debts, watch debts, substandard debts, doubtful debts or loss. The latter, in which the appellant's debt fell, constitutes, as the name implies, a loss to the bank, which are considered uncollectible or of such little value that their continued recognition as assets is of no use to the bank.

Because the debt in this dispute was a loss to the respondent, at that stage it wrote it off. Was the appellant absolved from his obligation under the charge or loan agreement? A bad debt that has been written -off does not suggest the absence of a legitimate claim against the debtor whose debt is being written-off. It is done for purposes of taxation and bookkeeping and only if there are no or only slim chances of recovering the debt. See **<u>Mohammed Gulamhussein Farzal Karmali and Another V C.F.C. Bank Limited and Another</u>** (2006) eKLR. But if the debtor's financial status improves, nothing stops the creditor from pursuing and recovering the debt.

The Supreme Court of India in **<u>Salim Akbarali Nanji V Union Of India & Ors</u>** , Civil Appeal No. 6715 of 2004 has explained this banking concept thus;

> **"It is no doubt true that amounts advanced by banks must be recovered. Such debts should not be permitted to become none (sic)-performing assets. However, one cannot lose sight of the realities of the situation. Having regard to the nature of banking business, it is possible that the bank may commit an error of judgment in advancing funds to a particular party or industry…..The write-off is only an internal accounting procedure to clean up the balance sheet and it does not affect the right of the creditor to proceed against the borrower to realise the dues**."

It follows therefore that by writing- off the debt owed to it by the appellant, the respondent did not absolve the former from liability and the respondent was not barred from following up recoveries.

Finally, was the respondent statutorily barred from demanding the debt from the appellant?

Section 19(1) (4) of the Limitation of Actions Act provides as follows respectively:

"(1)An action may not be brought to recover a <u>principal</u> <u>sum</u> of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land, <u>after the</u> <u>end of twelve years from the date when the right to receive the money accrued</u>."

…

(4) An action to recover <u>arrears of interest payable</u> in respect of any sum of money secured by a mortgage or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears, <u>may not be</u> <u>brought after the end of six years from the date on which the interest became due</u>…" (Emphasis added)

From the record, the first attempt by the respondent to recover the amount was on 16th March 1999 but the attempt was unsuccessful due to low bids. Further to this, the appellant had made proposals on how to settle the outstanding amounts but failed to do so hence necessitating the write-off by the bank.

Upon realization that the appellant had operated a new account, the respondent made fresh demand of the outstanding amount. The appellant acknowledged this on 3rd October 2006 and 25th October 2006. In light of **section 19(1)** aforesaid, the date of accrual of the debt is the date when the respondent sought to recover the amount through sale by public auction on 16th March 1999. Since the debt was secured by charge over the respondent's properties **section 19(1)** applied. Twelve (12) years from this date is 16th March 2011. The respondent debited the appellant's account in 2006 well within the limitation period.

With regard to **section 23(3)** of the Limitation of Actions Act as relied on by the learned Judge, this section falls under the Part III of the Act dealing with extension of the limitation period. This section would only be invoked if the respondent's limitation period expired under **section 19(1)** necessitating an extension of the period. No necessity arose. But to be clear on this and as an alternative argument, **Section 23(3)** provides that:

"(3)Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the <u>right accrues on and not before the date of the acknowledgement or the last payment</u>:

Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt."

See **<u>Afrofreight Forwarders Limited V African Linear Agencies</u>**, Civil Appeal No.25 of 2007, where this Court in dealing with the issue of limitation relying on **section 23(3)** of the Limitation of Actions Act, held that the suit was not time barred, based on the date of acknowledgement of indebtedness by the debtor which was within the limitation period of 6 years.

The appellant acknowledged his indebtedness on 3rd October 1996 when time began to run. Debits were made from the appellant's prestige account on 23rd October 2006 which was 20 days later to set off the debt. This was well within the limitation period as was rightly observed by the learned Judge.

There is authority for saying that every time interest is debited on a defaulting borrower's account, a new cause of action arises. In the case of **<u>Shire</u> <u>V. Thabiti Finance</u>** [2000] LLR 1455 (CAK), this Court stressed that the effect of acknowledgment of a debt is to give rise to "fresh accrual of the right of action" in computation of limitation; that,

"[These words] leave no doubt that the legislature intended that any acknowledgement or part-payment not only extends the limitation period but also revives an otherwise statute-barred action falling within that provision."

The respondent was at liberty to recover the amount owed to it by the appellant.

For these reasons there was no basis to claim damages.

In the result the appeal is bereft of any substance and we accordingly dismiss it with costs.

Dated and delivered at Nairobi this 11th Day of May, 2018.

D.K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR