



Consolidated Bank of Kenya Ltd v Ndung'u & 5 others (Environment and Land Appeal E053 of 2022) [2024] KEELC 4456 (KLR) (29 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4456 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E053 OF 2022**

CK NZILI, J

MAY 29, 2024

BETWEEN

CONSOLIDATED BANK OF KENYA LTD APPELLANT

AND

MONICA WANGARI NDUNG'U 1ST RESPONDENT

JOEL K. NJERU 2ND RESPONDENT

THE LAND REGISTRAR MERU CENTRAL DISTRICT 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

FINA BANK LTD 5TH RESPONDENT

GUARANTY TRUST BANK LIMITED 6TH RESPONDENT

*(Being an appeal from the judgment from Hon. T.M. Mwangi
– PM delivered on 1.09.2022 in Meru ELC No. 30 of 2018)*

JUDGMENT

1. The appellant, as the plaintiff at the lower court, commenced this suit at this court by a plaint dated 28.7.2014 against four defendants, the 1st - 4th respondents. The appellant had claimed that whereas LR No. Ntima/Igoki/7408, belonging to the 1st respondent, had been charged with it to secure a loan facility in favour of the 1st respondent and her husband, the 2nd respondent; the two forged a discharge of charge form without its knowledge and or repaying the outstanding loan. Further, the appellant averred that the 1st and 2nd respondents colluded with the 3rd respondent to register the discharge of charge, yet the original title deed was still held as security with the bank. Additionally, the 1st and 2nd defendants illegally or fraudulently proceeded to register a fresh charge in favour of the 5th & 6th respondents by a forged title deed to the suit land as security or disclosing the existing loan agreement



- or obligations with the bank. The appellant blamed the 5th and 6th respondents for complicity in the fraud, illegality and or negligence.
2. Further, the appellant sought a declaration that the discharge of charge was illegal; invalidation of the entry to register to discharge the discharge of charge and the subsequent registration of a fresh charge, reinstatement of the initial charge as per entry number 5 and in the alternative, the 1st – 2nd respondents to pay Kshs.8, 923, 994.65/= the loan balance as of 23.7.2014 with interest at the default rate of 36% p.a.
 3. By an order dated 1.8.2014, an inhibition order was issued against the title. The initial defendants filed written statements of defence dated 28.8.2014 and 15.9.2015. It appears that by an order dated 31.1.2018, the suit was transferred from this court to the Chief Magistrate Court Meru for hearing and determination.
 4. Following the discovery of an impending public auction of the suit land by the 5th and 6th respondents, an application was filed to join the 5th and 6th respondents as parties to the suit. The two filed a preliminary objection on account of jurisdiction and time limitation. Meantime, the trial court issued a temporary injunction to forestall the auction sale on 2.5.2019.
 5. By a ruling dated 10.9.2019, the trial court held it lacked jurisdiction and declared that the cause of action was statute-barred. The appellant filed appeal No. Meru ELC No. 113 of 2019 before this court by the appellant. The court set aside the lower court ruling and allowed the application dated 2.5.2019 seeking to join the 5th and 6th respondents as parties to the suit and issued a temporary injunction and inhibition against the title pending the hearing and determination of the suit.
 6. Consequently, the appellant filed an amended plaint dated 10.6.2021, formally bringing on board the 5th and 6th respondents as the 5th and 6th defendants. The appellant, in paragraph 10A thereof, complained that the 5th and 6th respondents were party to the fraudulent activities of the 1st, 2nd, 3rd and 4th respondents as per paragraph 9 thereof and were beneficiaries to the fraudulent action of the 1st - 4th respondents. Additionally, the appellant blamed the 5th and 6th respondents for fraudulently or negligently creating and registering a charge over the earlier charge, failing to procure an original charge and dealing with the land against its interest. Earnest Kubania Manyara, General Manager Meru Branch, signed the verifying affidavit.
 7. Summons to enter appearance were therefore issued dated 15.6.2021 to Guaranty Trust Bank Ltd formally, Fina Bank Ltd. Even though no memorandum of appearance was filed, the 5th and 6th respondents filed a joint status of defence dated 20.8.2021, admitting the descriptive parts of the amended plaint.
 8. The 5th and 6th respondents denied any prior knowledge of a legal charge over the suit property in favour of the appellant or of an alleged forged discharge of charge. On the contrary, the 5th and 6th respondents averred that by a letter of offer dated 21.6.2013, the 5th respondent, as succeeded by the 6th respondent, offered a loan facility of Kshs.8,000,000/= secured by LR No. Ntima/Igoki/7408 to the 1st and 2nd respondents. They denied knowledge of the alleged fraud committed by the 1st – 4th respondents as per paragraphs 9, 10 and 10A or having been party to it or for any negligence. The 5th and 6th respondents averred that they held a proper, valid and lawful legal charge over the property done lawfully in full compliance with the law.
 9. The 5th and 6th respondents averred that they were in possession of the original title deed for LR No. Ntima/Igoki/7408, or at the time of the registration of the legal charge and an official search certificate



- at the time, showed no record of encumbrances as alleged or at all. They termed the claim by the appellant as bad in law, improperly filed, incompetent and statutorily time-barred.
10. Through a reply to statements of defence dated 7.9.2021, the appellant insisted a legal charge in its favour for Kshs.13,600,000/= was in existence and had not been lawfully discharged by the time that the 1st respondent colluded with the 2nd and 3rd respondents, illegally discharged the charge, and proceeded to fraudulently create a fresh charge in favour of the 5th and 6th respondents who participated in the fraud and illegal actions to discharge the appellant's charge, and created another charge in favour of the 5th & 6th respondents, despite the fact that the appellant still held the original title.
 11. The appellant filed a list of witnesses and documents dated 20.12.2021 and 10.2.2022, while the 5th and 6th respondents filed a list of documents dated 8.2.2022 and witness statements dated 8.2.2022.
 12. At the trial, Earnest Kubania Manyara testified as PW 1 and adopted his witness statement dated 8.12.2021 as his evidence in chief. He told the court that the 1st and 2nd respondents made a request to the bank for a loan facility, which was offered for Kshs.13,600,000/= and a charge dated 28.8.2012 registered against the title on 5.9.2012, following a surrender of the original title for LR No. Ntima/Igoki/7408 is still under its custody.
 13. PW 1 said that the 1st and 2nd respondents failed to service the loan facility, and a land valuer was instructed to value the land in order to realize the security only for the bank to realize a discharge of charge was filed on 14.5.2013. He said that a new charge was allegedly created in favour of the 5th & 6th respondents on 22.7.2013, for Kshs.8,000,000/= which charge was executed by one John Munge Mwaniki, a purported attorney of the appellant, yet he was not among the designated persons in the list held by the land registrar at the time.
 14. Again, PW 1 said that this occurred out of collusion between the 1st and 2nd respondents and, who issued a fake title deed and the 3rd respondent, who maintained a register for the appellant's authorized attorneys, in which John Munge Mwaniki was not among them. The appellant told the court that a demand letter dated 21.5.2019 was sent to the respondents, and on 29.4.2019, they found out the suit property was due for a public auction, to which they successfully applied to the lower court for an injunction.
 15. PW 1 produced as exhibits a letter of offer dated 24.7.2012 a charge dated 28.8.2012, a copy of the register, a discharge of charge dated 14.5.2013, a demand letter dated 21.5.2014, a decree in Meru HCCA and list of attorneys dated 10.2.2022 as P. Exh No's. 1-10, respectively.
 16. In cross-examination, PW 1 said that the negotiations between the 1st respondents occurred in 2012 following which a charge was registered as to P. Exh No. (5) PW 1 said that the discharge of charge was drawn by Mamaria Barasa Harriet advocate, who was never an advocate for the bank. He said he was not aware of any criminal complaint preferred against John Munene Mwaniki, the lawyer who drew the discharge of the charge and the land registrar who registered the discharge of the charge.
 17. PW 1 said that the bank made no enquiries from the 5th and 6th respondents in 2014 and 2015 about how they charged the suit land before filing the suit and joining them to the suit when they put the suit property on auction sale. PW 1 said that the bank became aware of the fraud on 21.5.2014 even though it only joined the 5th and 6th respondents to the suit in 2019. PW 1 admitted that had they conducted an official search on the title in 2013, they would have known about the charge.
 18. In re-examination, PW 1 said that the loan was not repaid within five years and that it was not possible to alert all the banks about a charge against a title due to the doctrine of confidentiality unless with leave of court. PW 1 said that had the land registrar conducted due diligence; he would have known



- that the person who presented the power of attorney was an imposter. PW 1 said that the suit was filed to protect the interest of the bank since the 1st charge takes precedence over subsequent ones. There being no representation by the 1st - 4th respondents, their defence was marked as closed paving the way for the 5th and 6th respondents' defence.
19. Josephine Gachuru testified as DW1. As a legal officer of the 6th respondent, DW 1 told the court that the 6th respondent acquired 70% shares of the 5th respondent, making the two the same entity. She adopted her witness statement dated 5.2.2022 as her evidence in chief. The 5th and 6th respondents told the court that by a letter dated 21.6.2013, the 5th respondent advanced Kshs.8,000,000/= to the 1st respondent, secured through a merge over LR No. Ntima/Igoki/7408 as per a letter of offer and the charge. She said that the title had no encumbrances at the time in favour of the appellant following due diligence that was conducted before and after the registration of the charge in favour of the 5th respondent.
 20. DW1 produced the offer letter, title deed, valuation report, ID card and PIN, letter of consent from the land control board, application for land control board consent, certificate of official search dated 27.6.2013 and 22.7.2013, charged and loan statement as D. Exh No. 1-11. DW 1 said that after the 1st respondent defaulted in paying the loan, a valuer was engaged to value the suit land in 2019, and in an attempt to exercise their statutory power of sale, they realized there was a pending dispute in court. She denied the allegations of fraud and collusion in the amended plaint for the bank has an original title deed in its custody and had conducted due diligence.
 21. In cross-examination, DW 1 said that due diligence entailed ascertaining the true identity and status of the suit property by confirming the title holders as per D. Exh No. (4). She admitted that as per P. Exh No. (4), the charge was entered in favour of the appellant in September 2012, and a discharge of charge was entered in May 2013, following which the 5th and 6th respondents came into the picture from 22.7.2013 following due diligence going by D. Exh No. (2), (4) & (8). DW 1 admitted that there cannot, in law be in existence two original title deeds over the same property.
 22. In Re-examination, DW 1 said that the bank was not privy to the events before 22.7.2013 and that the 5th and 6th respondents were under no obligation to produce the original title deed before the court for inspection save for a copy.
 23. By a memorandum of appeal dated 30.9.2022, the appellant faults the trial court judgment delivered on 1.9.2022 for
 - i. Failing to grant prayer (c) of the amended plaint as a matter of course following proof of prayers (a), (b) and (d).
 - ii. Finding that the 3rd respondent needed to testify, yet it had sufficiently produced the list of powers of attorneys as P. Exh No. (10).
 - iii. If it failed by exonerating the respondents from the fraud.
 - iv. It overturned a high court finding that the suit was time-barred based on the doctrine of relating back.
 - v. It erred in juxtaposing the 5th and 6th respondents' charge over the appellant's charge, thereby creating unnecessary mix-up and confusion.
 24. With leave of court, parties agreed and were directed to canvass the appeal through written submissions to be filed by 23.3.2024. The appellant relied on written submissions dated 12.3.2024. It was submitted that prayer (c) of the amended plaint should have been allowed after partially allowing prayers (a),



- (b) and (d) by making a finding that entry number (6) in the register of title was forged, null and void and should be reinstated. The appellant submitted that failing to allow prayer (c) meant that the reinstatement of the appellant's charge would remain along with the forged charge by the 5th and 6th respondents, which was an impossibility in law.
25. The appellant submitted that it was interesting and, at the same time, unlawful for the trial court to, instead of finding that the 3rd and 4th respondents were guilty of fraud, for lack of rebuttal evidence, fault it for not calling the same 3rd respondent to give evidence that the discharge of charge was fraudulent, more so when the appellant had produced P. Exh No. (10) that the attorney who signed the discharge of charge was an imposter. Reliance was placed on *Black's Law Dictionary* definition of fraud (Edition not indicated), *Kuria Kiarie & others v Sammy Magera* (2018) eKLR, *Kinyanjui v George Kamau* (2015) eKLR and *Raila Amolo Odinga v IEBC & others* (2017) eKLR.
26. The mandate of an appellate court of the first instance is to rehearse, re-analyze and re-appraise the lower court record to come up with independent findings as to facts and law while giving credit to the trial court that had the benefit of hearing and seeing the witnesses first hand. See *Peters v Sunday Post Ltd* (1958) EA 424.
27. Section 78 of the *Civil Procedure Act* provides that an appellate court such as this court has powers to determine a case finally and refer it for trial, take additional evidence or require the evidence to be taken and order a new trial. Further, the section provides that an appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act, on courts of original jurisdiction in respect of suits instead therein.
28. In this appeal, what commends the court for determination are the following issues:
- i. If the appellant pleaded and proved fraud, illegality and negligence against the respondents jointly and severally.
 - ii. If the failure by the 1st and 2nd respondents to file and serve an amended defence to the amended plaint and specifically deny paragraphs 6, 7, 8, 9, 10 and 10A was fatal to the 3rd – 6th respondents defence and or amounted to admission of the claim.
 - iii. If the failure by the 3rd and 4th respondents to file and serve an amended defence to the amended plaint and specifically deny the contents of paragraphs 6-7, 8, 9, 10 and 10A was fatal or amounted to an admission of liability.
 - iv. If the 5th & 6th respondents' statement of defence was filed by a law firm properly on record.
 - v. If the failure by the 1st – 4th respondents to offer any evidence or documents in support of their statements of defence was fatal.
 - vi. If the 5th and 6th respondents were innocent lenders for value without any notice of fraud, illegality and collusion with the 1st - 4th respondents.
 - vii. If the claim by the appellant was statute barred and or disclosed no cause of action against the 5th and 6th respondents.
 - viii. If the appellant was entitled to all the reliefs sought in the amended plaint.
 - ix. What is the order as to costs?
29. It is trite law that parties are bound by their pleadings, and issues flow therefrom. The primary pleadings in this appeal are the amended plaint filed on 10.6.2021, the 1st and 2nd respondents'



- statement of defence dated 28.8.2014, the 3rd and 4th respondents' statement of defence dated 15.9.2015 and the 5th and 6th respondents reply of defence dated 20.8.2021, and a reply to defence by the 5th and 6th respondents dated 7.9.2021.
30. The appellant's claim was based on forgery of a discharge of charge, its registration, creation of a fresh charge, its registration, and the placement of the same security by the 1st and 2nd respondents when they had not cleared their loan obligations or indebtedness with it, or without knowledge, consent or approval of the appellant in collusion with the 3rd - 6th respondents, to perpetuate the illegalities, fraud, collusion and making it suffer loss or damage.
 31. Fraud, as per Black Law's Dictionary 6th Edition, consists of some deceitful practice willful devise, resorted to with intent to deprive another of his right or in some manner to do him an injury. It is a knowing misrepresentation of the truth or concealment of material fact to induce another to act to their detriment. In *Kibathi t/a Osoro Chege Kibathi & Co. Advocates v Musti Investments Ltd* (Civil Appeal E 134 of 2022) (2024) KECA 270 (KLR) (8th March 2024) (Judgment), at issue was a professional undertaking given by the appellant to the respondents to pay to the respondent the price upon registration of the properties in the name of the purchasers. Upon the professional undertaking, the respondents released to the appellant the relevant documents who registered the documents. On request to honour the professional undertaking and pay Kshs.26,000,000/=, the appellant failed, and the respondent took out proceedings to enforce it under Order 52 Rule 7 (b) of the *Civil Procedure Rules*, which the appellant opposed on the basis that upon audit, the bank established that there was collusion of its employees and valuers in a fraudulent scheme by inflating the value of the sold properties which allegations the trial court dismissed.
 32. Citing *Lazarus Estate Ltd v Beasley* (1956) ALL ER 314, the court said that it is trite law that no court should allow a party to benefit from his fraud and that fraud must be distinctively pleaded and proved, and once it is proved, all the contracts and all the transactions stand vitiated. The court observed that the standard of proof in civil disputes was an intermediate one, not as high as beyond reasonable doubt but higher on a balance of probabilities. The court cited *R.G Patel v Lalji Makanji* (1957) EA 314 that allegations of fraud must be strictly proved. The court also cited *Richard Akwesera Onditi v Kenya Commercial Finance Co. Ltd* (2010) eKLR, that fraud and collusion are serious accusations requiring very high standards of proof. In *Virjay Morjaria v Nansingh Darbar & another* (2000) eKLR, the court said fraud cannot be inferred from facts.
 33. In *Kenya Pipeline Co. Ltd v Glencore Energy (UK) Ltd* (2015) eKLR, the court observed that the law seeks to deny a perpetrator of fraud or illegality from benefitting from his fraud or illegal conduct. It is not in dispute that the 1st and 2nd respondents took out a loan facility with the appellant and surrendered an original title deed as security. The 1st and 2nd respondents did not plead that they cleared all their loan obligations with the appellant; the appellant lawfully discharged that title, and the original title deed was surrendered to them.
 34. The appellant pleaded and testified that the loan facility with the 1st and 2nd respondents was not cleared at all. P. Exh No. (1) was executed by the 1st and 2nd respondents, who bound themselves to honour their obligations to the appellant and comply with the law as per clauses 6.21, 6.22, 6.23 and 7. The 1st and 2nd respondents also agreed to clauses 8, 9, 10, 11, 14, 17, 18, 21, 23, 37 of the charge. While aware of all these binding obligations, the 1st and 2nd respondents knowingly represented to the 3rd and 4th respondents a discharge of charge for registration on 14.5.2012 and caused it to be registered. After this, the 1st and 2nd respondents took a fake title deed to the 5th and 6th respondents, while they knew that the original was with the appellant and requested a loan facility, which led to a letter of offer dated 21.6.2013. The 1st and 2nd respondents also offered the same property as security and signed the offer



- letter on 1.7.2013. The 1st and 2nd respondents attended a land control board meeting after signing an application form produced as P. Exh No. (7). Eventually, the 1st and 2nd respondents signed D. Exh No. (10) and were advanced a loan of Kshs. 8,000,000/= as per D. Exh No. (11).
35. In *Teresia Kamene Kingoo v Harun Edward Mwangi* (2019) eKLR, the court held that upon the respondent tendering evidence of corroborating items, the evidentiary burden shifted to the appellant to rebut to repudiate the performance of the terms of the sale agreement.
 36. In this appeal, the 1st and 2nd respondents failed to tender any evidence to substantiate their defence dated 28.8.2014 that they did not owe the appellant any monies, having fully repaid the loan, secured a discharge of charge and obtained the original title deed from it so that they could legally and regularly charge the same property to the 5th and 6th respondents. The same case applied to the 3rd and 4th respondents. They failed to come to court and substantiate their statement of defence dated 15.9.2015, that the discharge of charge represented to the 3rd respondent was duly executed and signed by an authorized attorney of the appellant, was therefore legal and regular for the 3rd and 4th respondents to be said to have exercised lawful statutory duties and obligations in registering the discharge of charge and the subsequent charge in favour of the 5th and 6th respondents.
 37. A party who fails to attend court to ventilate their defence risks the pleading being treated as mere probative value. In *M'Mugwika M'Bugongo v Settlement Fund Trustee & another* (2022) eKLR, the court said that once the genuineness and authenticity of documents are questioned, it is incumbent upon a party to call the witness from whom the documents were allegedly obtained, as held in *Philomena L. Wambua v Gaitano Lusitsa Mukofu & others* (2019) eKLR.
 38. The 1st and 2nd respondents knew that the loan had not been repaid and the appellant still held their original title deed. Instead, they presented another title to the 5th and 6th respondents and obtained a loan facility. The 1st and 2nd respondents concealed and withheld material facts from the 5th and 6th respondents. They used deceit and misrepresented the facts to the 5th and 6th respondents without disclosing an existing loan obligation with the appellant. The 1st and 2nd respondents knew or ought to have known that the discharge of charge was fraudulent and illegal. The discharge of charge used was a forgery. The 1st and 2nd respondents appear to have had no intention of repaying the appellant's loan with the appellant. They have also defaulted on the second loan. The 1st and 2nd respondents had also given personal guarantees to repay the loan. See *Jonathan Namulalu Nyongesa v Multi Business Shooter Investors Ltd & another* (2017) eKLR.
 39. The 1st and 2nd respondents executed the initial charge and acknowledged the remedies and the effects of the *Land Act*, the appellant's rights and the restrictions under the Act that were noted against the title. The spouse signed the spousal consent and unconditionally and irrevocably granted the appellant right to the land, including the imposition of restrictions against the title as per Sections 82 and 83 of the *Act*, that the charge shall rank in priority to any subsequent charge was consented to, by the 1st and 2nd respondents in writing.
 40. The 1st and 2nd respondents failed to disclose to the 5th and 6th respondents that there was an active charge against their title. There was no endeavour to seek clearance from the appellant that their loan obligation had been met. Other than the discharge of charge, the 1st and 2nd respondents failed to plead as to when they cleared the bank loan and requested for the release of the security documents held by the appellant. The 1st and 2nd respondents produced no evidence that upon clearing the loan facility, the appellant released and discharged them from the deed of indemnity and or personal guarantee for the loan.



41. In *Surya Holdings Ltd and others v C.F.C Stanbic Bank Ltd* (2014) eKLR, the court observed that a letter of offer and any other pertinent document in the bargain of a loan that eventually leads to a charge binds the parties and such documents preceding the charge are pertinent in ascertaining the intentions of the parties. The implications of the 1st and 2nd respondents signing the charge are that they accepted the concept of tacking.
42. The 5th and 6th respondents pleaded that the suit against them was time-barred. The 1st and 2nd respondents did not plead time limitation. It was only the 5th and 6th respondents who pleaded that the claim against them was statutorily time-barred.
43. The appellant produced P. Exh No. (6) dated 21.5.2014, showing that the loan balance owed was Kshs.8,596,544.65/=. The said letter was written to the 1st – 4th respondents. The appellant's claim was filed on 28.7.2014 through an application brought under a certificate of urgency dated 28.7.2014. The appellant attached annexures marked MM 8" and a bank statement in the name of the 1st respondent showing the outstanding balance as Kshs.8592,994. Summons to enter appearance to the 1st – 4th respondents were issued on 6.8.2014. The alternative prayer in the initial plaint dated 28.7.2014 was for Kshs.8,923,994.65/= plus interest. The alleged forged discharge of charge was made on 14.5.2013, and a new charge was registered on 22.7.2014.
44. A claim for a bank debt that attracts interest on contractual terms does not lapse since every time interest is indebted to a borrower's account, a new case of action arises. See *Deposit Protection Fund v Rosaline Njeri Macharia and another*. In *Shire v Thabiti Finance Co. Ltd* (2002) eKLR, the court said any acknowledgement or part payment not only extends the limitation period but also revives an otherwise statute-barred action.
45. A cause of action is an act on the part of the defendant which gives the plaintiff a cause of action. See *D.T Dobie and Co. Ltd v Muchina* (1982) KLR. In this appeal, the appellant had pleaded that it was holding the security documents, that the 1st and 2nd respondents were still indebted to it, and that the 5th and 6th respondents had colluded or were negligent in taking away its rights secured by way of encumbrances over the title to the land still in its possession. The appellant had pleaded that in so far it was concerned, no valid discharge of charge was in existence, and therefore the 2nd charge was a nullity in law, for its consent was not sought or obtained given the loan was still outstanding. In other words, the appellant was alleging that its charge and the indebtedness to it were still valid regardless of the relationship between the 1st and 2nd respondents and the 5th and 6th respondents.
46. It is trite law that in the absence of repayment of a debt, the statutory and or contractual remedies to the creditor remain valid, and the right to recover remains. A right to recover money based on a contract is valid for six years, while a cause of action based on fraud is valid for three years from the date of discovery of the fraud.
47. Regarding fraud, the discovery is said to have become known to the appellant when they wrote the letter dated 21.5.2014. The suit was filed in 2014. The charge by the 1st and 2nd respondents in favour of the appellant was signed on 28.8.2012. Clause (5) thereof required a charge to be created, a mortgage protection cover, a personal guarantor's letter, of deposit of securities, a letter of self and a risk insurance policy. Six years from the date of the charge based on the contract would have been up to 28.8.2018. The loan was to be repaid within a period of one twenty months from 28.8.2012
48. Section 26 (a) 7 (b) of the *Limitation of Actions Act* states that time in an action based on fraud runs upon discovery, upon reasonable diligence. Section 4 thereof provides that in an action founded on contract, the limitation is six years. In *Gathoni v K.C.C. Ltd* (1982) KLR 104 the court said Cap 22 is



- intended to protect the defendant against stale cases or from unreasonable delays. In *Iga v Makerere* (1972) EA, the court said that limitation does not extinguish a case or an action but acts as a bar to the claim or the remedy sought.
49. The appellant had pleaded a multiclaim covering forgery, fraud, illegality, contract, bank/lender relationship, conversion, right to interest to property, breach of statutory and fiduciary duties, breach of the law, negligence, tort and lack of due diligence. See *Consolidated Bank of Kenya Ltd v Monica Wangari Ndungu & others* (2021) eKLR.
 50. There is no dispute that the loan taken out by the 1st and 2nd respondents was to be repaid within 120 months. Ten years from September 2012 would have expired in September 2022. The alleged forged discharge of charge occurred on -6.5.2013, which was barely eight months while the fresh charge was registered barely three months after the discharge of charge that is on 22.7.2013. These events are the ones which triggered the cause of action in favour of the appellant. All of them were interrelated and formed part of the facts in the issue.
 51. In *Consolidated Bank Ltd v Monica Wangari* (supra), the court cited *Yusug Abdallah Gtiau v The Building Centre (K) Ltd* (2007) eKLR that the lifespan of a cause of action arising from a contractual relationship is six years and therefore, all persons whose activities contribute to the action and claiming through the defendant were covered by the action and were unaffected by the period of limitation. The court said that the doctrine of related back, as held in *Liff v Peasley & another* (1980) ALL ER 63, was distinguishable from the Kenyan situation. The court found that the doctrine of related back was applicable in favour of the appellant since the suit was filed on 28.7.2014 and all it was doing was seeking to bring on board additional parties who contributed to the cause of action.
 52. I wish to add further that the appellant's claim was within the time limitations set under Sections 4 (1) (a) (b) (2) (e), 6, 7, 9, 11, 14, 18 & 19 of the *Limitations of Actions Act* in the *Central Bank of Kenya Act* Cap 488 its regulation on prudential banking. The decision by this court, which led to the joinder of the 5th & 6th respondents as parties and by Know Your Client (K.Y.C) extension, the amended plaint was never appealed against.
 53. The 5th and 6th respondents did not contest the issue before a superior court to this court. The trial court seemed to second-guess the holding of this court, which is binding on it. The trial court narrowly looked at the appellant's suit as if it was merely based on fraud. The suit, as framed, was broad and multifaceted. The lifespan of the initial bank-lender relationship between the appellant and the 1st and 2nd respondents was still active when the discharge of charge was allegedly forged and a new charge placed against the title in favour of the 5th & 6th respondents. Therefore, the question of whether the initial contract could be abruptly brought to a stop through illegality and fraud occasioned by the acts of the 1st – 6th respondents were live issues requiring determination by the trial court.
 54. The onus was upon the 5th and 6th respondents to demonstrate how the appellant's claim against them was stale and or time-barred in the above circumstances, especially when it was apparent that the 1st & 2nd respondents had not settled their loan obligations with the appellant, for one to say that the title documents held by the appellant as lien and for that matter, the suit land was available or accessible to be offered as collateral to third parties. In my considered view, therefore, the appellant's suit was not time-barred as against any of the respondents.
 55. Coming to whether the appellant proved indebtedness to it by the 1st and 2nd respondents, the appellant testified through PW 1 and produced exhibits to show that the 1st and 2nd respondents took out a loan with the bank and surrendered securities in terms of clause No. 5 of the letter of offer dated 24.7.2012. The charge was registered on 3.9.2012, and in clause two, the 1st and 2nd respondents covenanted to



- pay the loan and interests. Under clause no. 31, it was only upon full repayment of the loan that the bank was to release and discharge to the charger of the charged property.
56. The 2nd respondent, on page 32 of the charge dated 28.8.2012, agreed to the contents of Sections 90, 82, 83 & 87 of the *Land Act* and the entry of the encumbrances registered on 5.9.2012 against the title. Under clause number. 6.10 of the charge, the chargor bound herself not to take up any other loan by offering the land as security without consent from the bank or to create an overriding interest in relation to the property. Similarly, under clause number 6.13 thereof, the 1st respondent appointed the appellant as her sole banker. Additionally, under clause number 7.2 thereof, the 1st and 2nd respondents agreed that the bank could sue upon breach for the repayment of the loan and to enforce its rights under clause number 10.1 the 1st and 2nd respondents agreed that there would be a continuing security and for the payment of the secured obligation.
 57. Under clause number 15 of the 1st and 2nd respondents bound themselves to indemnify the bank over any loss out of breach of the charge. Under clause number 18, the parties bound themselves that any release or discharge of the charge shall be conditional upon no security or payment to the bank by the chargor being avoided or reduced and that the bank shall have a lien over the property. Under clause number 23 the consent had to be procured from the bank. All these were obligations which the 1st & 2nd respondents had to the bank.
 58. In the charge with the 5th and 6th respondents the 1st & 2nd respondent misled them under clause no. 44 that there were no outstanding promises or representation. In the affidavit sworn on 9.7.2013 the 1st respondent swore a false affidavit that she had disclosed all the information relating to the property. The same applied to the 2nd respondent, who swore a false affidavit on the same day. The two caused the 3rd respondent to enter an encumbrance to the title on 22.7.2013 in favour of the 5th and 6th respondents.
 59. The 1st and 2nd respondents knew that the original title deed they were offering as security was already with the appellant. Other than filing the statement of defence; the 1st and 2nd respondents did not file any witness statements or list of documents to demonstrate how, when and by which means they cleared their loan obligations with the appellant. In *Estate Sonrisa Ltd & another v Samuel Kamau Macharia & others* (2020) eKLR, the court observed that the existence of two documents of title in respect of one parcel of land is not only highly irregular and nonchalant but is also forbidden by law. There is evidence that the 1st and 2nd respondents deposited their original title with the appellant to secure a loan in 2012.
 60. It is doubtful that the 1st and 2nd respondents would offer another original title to the 5th and 6th respondents without collecting the one held by the appellant. It is the 1st and 2nd respondents who pleaded that the loan with the 5th and 6th respondents was lawful and regular. The burden is on he who asserts to prove the veracity or existence of those facts.
 61. Interests appearing in the title register rank in priority according to the order in which they were represented under Section 36 (5) of the *Land Registration Act*. The 1st and 2nd respondents had bound themselves that the discharge or release of the security by the appellant was upon repayment of the loan. No evidence of repayment has been produced or tendered by the 1st and 2nd respondents.
 62. The law is that a banker has a lien to retain the subject matter of the lien until an indebtedness of the customer is paid or discharged. See *Halsbury's Law of England* 4th Edition, paragraph 78. Other than the discharge of charge, the 1st and 2nd respondents have not produce any evidence that they repaid the outstanding loan, which is claimed as Kshs.893,974.65/= as of 23.7.2014



63. In *Soy Developers Ltd and others v Cyrus Jirongo and others* (2019) eKLR, the court said that fraud in principle is not proved by documentary evidence and viva voce evidence is tested through cross-examination. The court said that it is not the duty of a court to evaluate the veracity of the contents of disputed documentary evidence that has not been tested through cross-examination. The appellant has said that it did not consent to the discharge of charge, nor was it the signatory.
64. In *Sidian Bank Ltd v Ngungi & others* (civil suit No. 40 of 2020) (2024) KEELC 3238 (K.R.) (14th March 2024) Judgment, at issue was whether the land registrar Meru had acted within the law in cancelling entry number (3) in the encumbrances section and entry number 7 in the proprietorship sections of title LR No Nyaki/Kithoka/1914 and registering the respondents as owners without prior notice to the bank that had an existing charge over the property and without discharge of charge.
65. The court found that the act of the land registrar was against the law and the rules of natural justice and was an affront to Article 40 of the *Constitution*, especially when the bank had the original title deed. The court held that consent of the bank ought to have been sought before the charge was discharged and that the property transferred for it had priority over the suit property as long as the property remained charged under Sections 37 & 88 (1) (g) of the *Land Act* and Section 59 of the *Land Registration Act*. The court ordered the rectification of the register, reinstatement of the charge and cancellation of all other entries subsequent to the cancellation of entry number 3 & 17 in the encumbrance section and entries in the proprietorship section.
66. In this appeal, the 1st – 4th respondents failed to substantiate their statements of defence. In the absence of testimony, a statement of defence remains a mere statement with no probative value. Therefore, my finding is that the evidence tendered by the appellant that the loan obligations by the 1st and 2nd respondents was not discharged and that any purported discharge of charge was not signed or authorized by it was not refuted. In the absence of evidence to the contrary, I find that the 1st and 2nd respondents presented to the 3rd and 4th respondents a discharge of charge which they knew was false, illegal and or forged.
67. As to whether the 5th and 6th respondents were innocent lenders without notice of fraud, illegality and an existing charge, it is not in dispute that a charge was in existence in favour of the appellant until it was discharged on 14.5.2013. The 5th and 6th respondents denied knowledge of the same since an official certificate of search made before and after the charge was registered returned no encumbrance to the title held by the 1st respondent. The 5th and 6th respondents denied any wrongdoing on their part individually and or together with the 1st – 4th respondents. The appellant averred that the 5th and 6th respondents were negligent.
68. In *Patrick Kivai Nduva v Noah Moneria Ole Kurrarru & others* (2021) eKLR, the 2nd respondent relied on the central bank of Kenya's prudential guidelines on due diligence. At issue was whether the 1st respondent was an innocent chargee without notice of defence in the title. The court cited *Alice Chemutai Too v Nickson Kipkurui Korir and others* (2013) eKLR, where the court held that although a title is protected, protection is removed and can be impeached if procured through fraud, misrepresentation, illegality, unprocedurally and or through corrupt scheme. The court further cited *Elijah Makeri Nyangwara v Stephen Mungai Njuguna and another* Eldoret ELC Case No. 609B of 2012, where a charge in favour of the bank was cancelled based on fraudulent transactions to deny the applicant their rightful inheritance. The court said the bank's remedy was to pursue their customer for the recovery of the funds.
69. In this appeal, other than the official search certificates, the 5th and 6th respondents did not tender any other evidence to show what more they did to ascertain that the 1st – 2nd respondents' credit rating



- was beyond reproach. The 5th and 6th respondents insisted in their statements of defence and evidence that the 1st and 2nd respondents had no loan obligation with the appellant and that the title was free of encumbrances. Even after the appellant raised red flags that it was holding the original title documents to the suit property still, the 5th and 6th respondents remained unperturbed and were not worried up to the hearing that there was a need to seek an indemnity against the 1st and 2nd respondents.
70. In *Esther Ndegi Njiru & another v Leonard Gatei* (2014) eKLR, the court observed that due to rampant cases of fraudulent transactions, a certificate of official search was not enough due diligence. In *Daniel Kipruto Meto v Chase Bank (K) Ltd Eldoret ELC NO. 137 of 2015*, the court observed that in the digital age, banks should be ahead in innovative ways to curb any foreseeable compromise of their systems and must be extra diligent when dealing with properties to be charged or mortgaged.
 71. In *Gichinga Kibutha v Caroline Nduku ELCA 16 of 2007*, the court said fraud, though not defined under the *Land Registration Act*, involves deceit or willful device to deprive another of his right to take advantage and to conceal information in order to deceive. In *Galana Oil (K) v Longonot Place Ltd* (2019) eKLR, the court said that if a party affects and signs a written document knowing it to be a contract that governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract unless the signature is shown to be obtained through fraud or misrepresentation.
 72. The signature appearing on the discharge of charge did not emanate from any of the appellant's designated attorneys held in the records at the lands office P. Exh No. (10) was not refuted by the 1st – 4th respondents. Whoever the 1st – 2nd respondents designed to the discharge of charge from the appellant's office was not brought to testify. It is the 1st and 2nd respondents, and 3rd – 4th respondents who alleged the legality of the discharge of charge.
 73. The 1st and 2nd respondents wanted the court to sanitize their immoral and illegal acts. It is the 1st – 4th respondents who want to stand on an immoral or illegal ground. See *Kenya Ports Authority v Fadhil Juma Kisuwal* (2017) eKLR. By extension, the 5th and 6th respondents want to stand on the pedestal of the innocent lender for value without notice. The 5th and 6th respondents failed to produce a forensic report that the discharge of charge was a genuine document from the agents of the appellants. It is the respondents who alleged legality and regularity in the documents presented by the 1st and 2nd respondents.
 74. The 1st and 2nd respondents have not demonstrated through evidence that the discharge of charge was signed after they had discharged their loan obligations with the appellant. A statement of account is a prima facie evidence of its contents. See *Khan & another v Habib Bank A.G. Zurich and another* (2022) KEELC 130 (K.L.R.).
 75. The 2nd respondent did not state whether he was discharged as a guarantor. In *Simon Nyoro Ngugi v John Baptista Irungu Kariuki & another* (2018) eKLR, the court termed maintenance of parallel register in respect of the same parcel of land as not only criminal but also the abdication of statutory duty on the part of land registrars.
 76. In *Wambui v Mwangi & others* (2021) KECA 144 KLR, the court observed that if by any chance the register of the title was inaccurate by reason of misfeasance by land registry officials, any party deprived of their property by such inaccuracy may sue the state for recovery of damages.
 77. A contract for a guarantee is an accessory contract as held in *Robert Njoka Muthara & another v B.B.K. & another* (2017) eKLR. The 5th and 6th respondents dealt with the suit property held by the appellant in a manner inconsistent with its rights. That act gives rise to the appellant's claim not only against the



- 1st and 2nd respondents but also against whoever has sought to derive benefit from their wrongdoing or acts of commission.
78. In *Fanikiwa Ltd & 3 others v Sirikwa Squatters group and 17 others* (Petition 32 E036, 35 (e038) and 36 (E039) of 2022 (consolidated) (2023) KESC 105 (KLR) (15th December 2023) (Judgment), the Supreme Court of Kenya observed that financial institutions joined in the suit were not innocent purchasers but lenders. The appellant had pleaded that the 5th and 6th respondent were negligent in undertaking due diligence; otherwise, they would have been established that the suit property was encumbered.
79. Guideline 4.3 of the Central Bank of Kenya's Prudential Guidelines obligates Banks to indemnify and verify the identification documents of their customers. In *Beyond (K) Ltd & another v Gulf African Bank (K) Ltd* (2019) eKLR and *Standard Chartered Bank Ltd v Interim Services Ltd & another* (2004) eKLR, the court observed that in all cases of conversion, the bank's duty to act without negligence is to be given a reasonable construction and that the standard of care required is that to be derived from the ordinary practice of bankers.
80. In *Equity Bank (K) Ltd v Don Ogallob Riario & another* (2019) eKLR, the court found liability and obligation of the appellant to a bank a third party out of common law duty of care owed by a bank to a third party. In *Marfani & Co. Ltd v Midland Bank Ltd* (1968) 2 ALL ER 573, the court said it had to look at all the circumstances at the time of the acts complained of and ask itself were those circumstances such as would cause a reasonable bank to possess such information about his customer as a reasonable bank would possess to suspect that his customer was not the valid owner of the cheque.
81. In *Standard Chartered Bank Ltd v Intercom Services Ltd and another* (2004) eKLR, the court held that the onus of establishing circumstances, showing absence of negligence was on the banker and the extent of inquiry must be measured by what in the circumstances a fair-minded banker paying due regard to the exigencies of banking business in relation to the person depositing the cheque would consider prudent to do in order to protect the interest of the valid owner. See *Kenya Grange Vehicle Industries Ltd v Southern Credit Banking Corporation* (2014) eKLR and *Printwell Industries Ltd v B.B.K. Ltd* (2013) eKLR.
82. Customer due diligence in the act of performing background checks and other screening processes on a customer is provided by law. Regulations 2 of Central Bank of Kenya Prudential Regulation for Banking institutions require, among other things, audited financial statements for sole traders and written consents from the customer's prior bank attesting to the customer's identity and history of account relationship.
83. The legal burden of proof rests typically upon the party desiring the court to take action and establish that specific facts are more probable than not. See *Mbuthia Macharia v Ann Mutava Ndwiga & another* (2017) eKLR. In *Katede v Harindar and Co. Ltd* (2008) 2 EA 173, the court observed fraud could be participatory which means the party participates in fraudulent dealings. It said that fraud could be imputed on a person who was aware of the fraud and condoned it or, benefited from it or used it to deprive another person of his rights. In *Silayo v CRBD (1966) Ltd* (2002) 1 EA 288, the court said the elements of gravity of an issue were part of the range of circumstances that have to be weighed when deciding as to the balance of probabilities. See *Standard Chartered Bank (K) Ltd v Intercom Services Ltd and others* (supra). *William Kabogo Gitau v George Thuo & others* (2010) 1 KLR 526 and *Evans Nyakwara v Cleopas Bwana Ongaro* (2015) eKLR.
84. A fact is not proved if it is neither proved nor disapproved. See *Gadhi Brothers v H.K Njage t/a H.K Brothers Enterprises* Milimani HCC NO. 1330 of 2001. The 5th and 6th respondents were explicitly



- blamed by the appellant for negligence in paragraph 10A of the amended plaint. The particulars of negligence were creating a charge on top of another, registering a charge without an original title deed, failing to procure an original title deed and dealing with the land against the interests of the appellant.
85. Asked about the whereabouts of the original title deed D.W. 1 a lawyer by profession told the court that her evidence was restricted to events after 22.7.2013 and had not been requested by the court to avail the original title deed. Further, as to due diligence, DW 1 told the court that the basis of their due diligence was the pre-registration and post-registration official certificate of search and the valuation report produced as D. Exh No. 1 (4) & (8). DW 1 said she owed no duty to the court to avail the original title deed that the 5th and 6th respondents used to charge the property, and therefore, D. Exh no. (2) was enough evidence.
86. Paragraph 6 of the 5th and 6th respondents' statement of defence did not address itself to the pleading on negligence and the particulars of negligence pleaded by the appellant. The 5th and 6th respondents evaded the plea of negligence and merely responded to the plea of fraud only. Again, DW 1 did not address herself to the Central Bank of Kenya Prudential Guidelines on due diligence and let the court know what else the 5th and 6th respondents did to ensure that the concept of customer due diligence (C.D.D.) and Knowing Your Customer (KYC) was applicable to the 1st and 2nd respondents.
87. The burden was on the 5th and 6th respondents, who invoked the aid of the law to affirmatively prove that they did all that a reasonable banker would do to ensure that the 1st and 2nd respondents disclosed to them and availed all the relevant information regarding the status of the suit land. Had the 5th and 6th respondents insisted on their part one-year banker's details of the 1st and 2nd respondents, they would have established that the two had pending loan obligations with the appellant.
88. The standard of proof in civil liability as set in *Mumbi M'Nabea v David M' Wachira* (2016) eKLR is that the court will assess the oral documentary and objective evidence advanced by each party and decide which case is more probable. See also *Maria Ciabaitura M'Mairanyi & others v Blue Shield Insurance Co. Ltd* (2005) IEA 280.
89. In *Mwangi James Njebia v Janetta Wanjiku Mwangi & another* (2021) eKLR, the court observed that having come across several cases of manufactured title deeds in backstreets where fraudsters had upped their game with the collusion of officers in the land registry, there was a need to be extra diligent. In *Alberta Mae Gacide v A.G. & others* (2006) eKLR, the court warned that the curse would be the day when such a crook would have the legal capabilities or competence to pass to a third party innocent or otherwise a land interest that he did not have.
90. In *Daudi Kiptugen v Commissioner of Lands and Others* (2015) eKLR, the court said the acquisition of a title was not an end result since the process of acquisition was material. In *Wambui v Mwangi & others* (supra) the court said the title was tainted with nullity for it was anchored on nullity and should be declared null and void ab initio.
91. Applying the preceding case law to this appeal, I have no hesitation in finding that the 1st and 2nd respondents presented a fake discharge of charge to the 3rd and 4th respondents in order to escape their loan obligations with the appellant. As if that was not enough, the 1st and 2nd respondents misrepresented themselves to the 5th and 6th respondents based on illegalities and procured another loan on the same suit land or security already given to the appellant and obtained a second loan which they also defaulted in repayment.



92. The 1st and 2nd respondents used deceitful means and misrepresentation the true facts to the 3rd – 6th respondents. In *Macfoy v United Africa Ltd Co.* (1961) 3 ALL ER, a nullity was termed as a nullity. The discharge of charge was a nullity and all the subsequent events or transactions thereto.
93. The upshot is that I find the appellant had proved its case to the required standards on account of fraud, illegality, and negligence to be entitled to the main reliefs in the amended plaint. The appeal is allowed with costs.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 29TH DAY OF MAY, 2024

HON. C K NZILI

JUDGE

In presence of

C.A Kananu

Kirimi for 5th and 6th respondent

Nyaga for appellant

