



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, WARSAME & KIAGE, J.J.A)

CIVIL APPEAL NO. 30 OF 2018

BETWEEN

MWAMBEJA RANCHING COMPANY LIMITED.....1ST APPELLANT

PROJECT ADVISORY SERVICES LIMITED.....2ND APPELLANT

VERSUS

KENYA NATIONAL CAPITAL CORPORATION.....RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya at Nairobi (Tuiyot, J.) dated 29th November, 2017*

*in*

*MCC Civil Suit No. 566 of 2013)*

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**JUDGMENT OF THE COURT**

This appeal arises from the Judgment of Tuiyot J. delivered on 29th November, 2017.

The background to the appeal is that on 10th July, 1992, the 1st appellant, **Mwambeja Ranching Company** executed a legal charge over L.R. No. 16659 (C.R No. 22939) Taita Taveta (the suit property) in favour of the respondent, **Kenya National Capital Corporation** to secure the sum of Kshs.30,000,000. The 1st appellant was a guarantor to the 2nd appellant, (**Project Advisory Services Limited**) who was the principle debtor.

Upon default of payment, the 1st appellant filed diverse suits to prevent the bank from exercising its statutory power of sale. A compromise of the debt was reached in **Milimani HCCC No. 225 of 1998** on 22nd July 1998, and parties agreed by consent that the appellant would pay the respondent Ksh.22,083,908 in three installments, the last of which was to be paid by 31st December 1998.

In default of payment of any installment on its due date, the Respondent was at liberty to execute for sums payable without further application to the court.

It is the appellants' case that the sum of Kshs.22,083,908 recorded in the consent order was based on the total drawdown by the principle debtor out of a facility of Kshs.30 million and that the Order had not been varied to date as regards the sum of Kshs.22,083,908 ergo pursuant to **Section 4 (4)** of the Limitations of Actions Act any outstanding balance became time barred on or about 1st January 2011 following the end of 12 years after the defaulted sum was due and payable by 31st December, 1998. Moreover, pursuant to **Section 4 (4) and 19 (4)** of the Limitations of Actions Act the respondent was not entitled to charge any arrears of interest for more than 6 years on the sum of Kshs.22,083,908.

The appellant contends that during the pendency of **HCCC No. 468 of 2011** where it sought inter alia to redeem the charged property, the respondent secretly sold the suit property by private contract to Shimbaland Ranching Company without due notice for the sum of Kshs.256,159,660. According to the appellants, the sale of the suit property was at a gross undervalue given that the valuation report by its valuers Lloyd Masika Limited, assessed the open market value at Kshs.550 million and the forced value at Kshs.350,000,000.

The respondent opposed the appellants' claim vide an amended defence and counterclaim dated 26th February, 2014. According to the

respondent, the principal debtor completely defaulted in servicing the loan which stood at Kshs.151,430 207.65 as at 30th November, 1997. Consequently, the respondent attempted to put up the suit land for sale on several occasions in exercise of its statutory power of sale but the applicants instituted multiple injunctive suits on various grounds including that there was no statutory notice, the legal charge was invalid, the power of sale had not arisen, the right of redemption had been denied, the call up of the debt was premature and the debt was statute barred.

In response to the multiple injunctive suits, the respondent called up the corporate guarantees executed by Majani Mingi Sisal Estate, and Lomolo (1962) Limited; and the individual guarantees by directors which stood at Kshs. 307, 327,455.15 as at May 2001.

According to the respondent, the consent judgment of 22nd July 1998 lapsed due to deliberate non-performance by the appellants and that they were statute barred from enforcing or rearguing the consent order after a lapse of 18 years. Moreover, the respondent emphasized that it had commissioned several credible and independent valuations showing forced sale and market values of between Kshs.120 to 180 million and Kshs.320 to 365 million respectively. The sale was for Kshs.305 million but the purchaser was allowed certain deductions including land rent and rates arrears, land occupied by squatters and the short remainder term of unexpired lease.

By way of counterclaim, the respondent claimed Kshs.30 million from all the guarantors, an additional Kshs.1,694,676,615.13 with interest from the 1st Appellant and Kshs.307,327,455.15 less the sale proceeds of Kshs.305 million from the principal debtor.

The suit was heard on its merits and on 29th November, 2017 and Justice Tuiyott framed six issues for determination as follows:

- a) Did the plaintiff and the defendant compromise the Plaintiff's indebtedness under the charge in suit No. 225 of 1998 at shillings 22,083,908 pursuant to the consent recorded on 22 July 1998?**
- b) If the answer to (a) is in the affirmative, does the in duplum rule apply?**
- c) Was the property lawfully sold?**
- d) If the answer to c is in the negative, what damages is the Plaintiff entitled?**
- e) Is there any surplus due to the Plaintiff?**
- f) Is the claim by the lender against the Defendants in the counterclaim time-barred?**
- g) If the answer to (f) in the negative (sic), how much is due from each of the Defendants to the counterclaim?**

The Judge found that the consent of 22nd July, 1998 only compromised the principal debt to Kshs. 22,083,908. The defendant was entitled to levy the contractual rate of interest as the plaintiff had breached the consent. On the applicability of the *in duplum* rule, the court found that the respondent did not violate Section 44 (A) (6) of the Banking Act and that there was no proof that the respondent's claim is founded on such infraction. In so finding, the court stated:

***"It is common ground that the loan that was granted to the Plaintiff became non-performing way before the coming of the rule. It being so subsection (6) finds relevance to the capping of the interest of the debt herein. What the Court was unable to find was a demonstration by the Plaintiff that the defendants breached this provision. What the Plaintiff had to prove was the lender sought to recover more than double the amount that was owed in principle and interest on 16th May 2007 (the date the Section came into operation). Yes the Plaintiff has requested for an order of accounts in which the provision of this rule would be applied. But an order for accounts is not sought in vacuum. A party seeking accounts must provide a basis for that request. The Plaintiff has been well aware of the claim by the Defendant before the filing of this suit."***

On the legality of the sale of the charged property the court held that the sale was valid, however the Judge stated that the respondent had an obligation to exercise a duty of care to the chargor by obtaining the best price at the time of sale. (Section 97(1) of the Land Act). In relying on a valuation that was more than a year old at the date of sale, a requirement under Rule 11 (1) (x) the respondent breached a statutory duty. The Court consequently relied on the expert opinion's value of the suit property as provided by the plaintiff. However, given that the valuer did not discount for the area occupied by the squatters, the court applied a pro rata rate and found that the area would be worth Kshs.88,062,000 and that the true open market value would be Kshs.461,938,000. The learned judge awarded damages for the breach as the difference between the price at which the property was sold and the Market price and declared that the sale of the suit property was at an undervalue, and ordered the respondent to indemnify the 1st appellant for the difference being Kshs. 156,938,000 with interests at court rates.

Regarding the counterclaim, the court found that as against the principal debtor and the guarantor by way of charge (the 1st appellant), the time for recovery by way of civil action started running from the date of sale (15th November, 2012). The counterclaim for the outstanding debt was mounted on 31st January, 2014 which was within the 6-year bar for actions founded on contract.

With regards to other guarantors, the court held that time for the purposes of the statute of limitation started to run on the expiry of the Demand Notice issued on 27th September, 1994 consequently, the counterclaim mounted against them 20 years later was time barred.

Lastly on whether the respondent can counterclaim the sum of Kshs. 1,694,676,618.13 from the 1st appellant but a lesser sum of Kshs. 307,327,455.15 from the principal debtor, the court held that the lender would not be entitled to more than the pleaded sum of

Kshs.1,694,676,618.13 from the plaintiff. The court held that the respondent was only entitled to Kshs.307,327,455.15 as at 1st May, 2001 with further interest at reserved commercial rates up to 1st December, 2012 less the sale proceeds of Kshs. 305 million and further interest on court commercial rates.

Both parties were aggrieved by the determination of the Judge on the pertinent issues that were set forward for his determination.

On the part of the appellants, they filed a joint Memorandum of appeal dated 8th February, 2018 against the whole decision citing fourteen (14) grounds of appeal. In short, the grievances of the appellants are as follows:

*i. Whether the trial court erred in law by failing to find that the 1st Appellant's debt was limited to the sum stated in its guarantee of Kshs.30 million together with interest from the date of call up of the guarantee.*

*ii. Whether the learned Judge erred in his interpretation of the effect of consents dated 14th July, 1988 and 22nd July, 1998 and if the same compromised the debt.*

*iii. Whether the Judge erred in law by failing to order the taking of accounts to determine the amounts that the appellants were obligated to pay and determine whether the principle of in duplum was applicable to the debt herein.*

*iv. Whether the learned Judge erred in law by entering judgment to grant prayers that were not pleaded or failing to consider that the counterclaim was time barred as against the appellants.*

On the other hand, the respondent filed a notice of cross-appeal dated 23rd February, 2018, seeking to set aside the decision of the High court declaring the sale invalid and limiting recovery of the debt. The respondent raised 8 grounds of appeal which were summarized as follows:

*i. Whether the counterclaim under separate and continuing corporate guarantees were stale*

*ii. Whether the learned Judge was correct in finding that the sale price of the suit price was below market value and directing a refund of the surplus*

*iii. Whether the learned Judge erred in limiting recovery of the resultant shortfall to Kshs.1,694,676,615.13/=*

Upon the appeal coming up for hearing before us, the parties confirmed having filed skeleton submissions. **Mr. Allen Gichuhi** appeared for the appellants and **Mr. Victor Odhiambo** appeared for the respondent.

It is the case of the appellants as submitted by Mr. Gichuhi that the amount guaranteed by the 1st appellant could not exceed the amount borrowed. In his view, it was incomprehensible for the respondent to claim Kshs. 1.6 billion from the 1st appellant yet claim a lesser amount of Kshs. 307,327,455.15 from the principle borrower.

On whether the learned Judge erred in his interpretation of the effect of the consents dated 14th July, 1998 and 22nd July 1998, counsel maintained that the amount agreed upon was Kshs.22,083,908 and that the consent judgment was never set aside or varied. In his opinion, the maximum amount recoverable was about Kshs.42 Million where interest accrued was up to 6 years from the date the guarantee was called. Lastly, counsel stated that the respondent was in breach of their statutory duty to sell the suit property at market value.

On the other hand, Mr. Odhiambo, opposed the appeal and urged the court to allow the cross appeal. He stated that the appeal was an abuse of court process as it involved the misdeeds and inequitable conduct of the appellants on borrowing Kshs.30 Million. According to counsel, the consent order of 22nd July, 1998, was unenforceable given that the terms of redemption were not honoured. With regard to the *in duplum* rule counsel's position was that it was wrongly invoked and that the appellant was trivializing the narrative of the appeal given that only a sum Kshs.500,000 had been paid by the 2nd appellant since 1992. Lastly, counsel submitted that prior to the sale, the respondent had caused various valuations to be conducted on the property by credible valuers the last of which was undertaken as at 25th October, 2011. In his opinion, the valuation reports for both parties were actively prepared for the sale and valid as per that period of time. He emphasized that the property was sold for Kshs.305 million and urged this court to set aside the decision of the trial court on limitation which had the effect of rewarding an abuse of the judicial system.

In a brief rebuttal, **Mr. Gichuhi** emphasized that the market value of the suit property was assessed by Premier Valuers Limited for the Respondent at Kshs.365,000,000 in its report of 25th October, 2011 and that the respondent had not placed any evidence before the court to rebut the appellants' valuation report of Kshs.550,000,000 assessed by Lloyd Masika.

We have keenly considered the appeal and cross appeal and the grounds submitted by the parties. In our view the issues in the appeal and cross-appeal are largely based on 5 issues, with the common thread running through being the rights and responsibilities arising under the charge; the amount owing and the extent of legal the parameters of the parties to the dispute. We say so because we have to take into account the obligation of the principal debtor and the extent of the liability. Be that as it may, we intend to address the main issues as follows:

*a. Whether the corporate and individual guarantees were time barred.*

*b. Whether the 1st appellant's debt was limited to 30 Million plus interest as stated in its guarantee.*

*c. The effect of the consent and the rights and liabilities of the parties*

**d. The applicability of the in duplum principle to the debt herein**

**e. Whether the suit property was sold at an undervalue**

Our mandate as the Court of first appeal is to re-appraise the evidence, to draw inferences of fact and law and to draw our own independent conclusion. In answering the first issue on whether the case against corporate and individual guarantors securing the loan were time barred. It must be stated that the extent of the liability of a Guarantor is always dependent on the contract between the parties. The deed of Guarantee and Indemnity dated 15th May, 1992 and signed by the appellants and its co-guarantors (Majani Mingi Sisal Estate Limited, Lomolo (1962) Limited and Harris Horn Junior) state that the guarantees should not exceed 30,000,000 with interest.

Clause 1 states:

**“Payment under this guaranteed shall be free of any set-off or counterclaim PROVIDED ALWAYS that subject to Clause 4 hereof the total liability ultimately enforceable against the Guarantor under this guarantee should not exceed the sum of Shillings 30 MILLION together with interest at the maximum rate allowed by law to be charged or if there is no such maximum rate then at the rate payable by the Borrower from the date of demand for payment ...”**

Upon default by the 2nd appellant, the guarantees were called in against all the personal and corporate guarantees in separate letters dated 13th September, 1994. Unfortunately, the suit in the High court was filed in the year 2013, which was 20 years after notices of default were issued. This was contrary to **Section 4** of the Limitation of Actions Act which bars any cause founded on contract from being brought after the lapse of 6 years from the date when the cause of action accrued. The law is clear that this Court has no discretion to extend the period of limitation (see Court of Appeal in *Divecon vs. Samani [1995-1998] 1 EA 48*) neither does it have the powers to grant any relief where a remedy is time-barred. (*Habib Bank A.G. Zurich vs. Rajnikant Khetshib Shah, Civil Appeal No. 233 of 2016*). We ardently agree with the observations by Potter, JA in *Gathoni vs. Kenya Cooperative Creameries Limited, Civil Application No. 122 of 1981* where he stated:

**“The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”**

We find that the Judge in upholding this position rightfully upheld the 2nd, 3rd and 4th defendants’ defence on statutory limitation against the counterclaim. The 1st appellant faced no such luck. It is trite law that as long as a contract is tied to a legal charge there is a continuing security; until the debt is paid and until the security is discharged, none of the parties can claim a cause of action based on a charge to be time barred. A cause of action under a continuing security never dies or lapses. (See the case of *Habib Bank A.G. Zurich (supra)*).

This leads us to the second issue on whether the 1st appellant’s debt was only limited to Kshs.30,000,000 plus interest. The 1st appellant’s argument is that its liability was established under the guarantee and as such is not liable for the outstanding balances claimed by the defendant to the tune of Kshs.1.6 Billion.

We believe that the learned Judge was explicitly clear on his finding that the 1st appellants debt was established under the subsisting charge. To quash any ambiguity, we shall restate the following parts of the judgment that buttress this point:

**“Under the Provisions of section 67 of the repealed Transfer of Property Act, the mortgagee has a right to sue the mortgagor for the mortgage money where the mortgagor binds himself to repay (subsection 68(a). The Land Act has similar provisions (section 91 (1). Under clause 1 of the charge instrument the plaintiff bound itself to repay the mortgage sum.”**

**“The Plaintiff herein guaranteed the principal debt by way of a charge and a Deed of Guarantee and Indemnity. In the Charge the Plaintiff made a commitment as follows:-**

**1) The Borrower do hereby covenant and agree with the lender to pay the Lender”**

**(a) On the 30th day of August One Thousand nine hundred and Ninety Two next (hereinafter called “the Legal Date of Redemption” ) to pay to the Lender such sum not exceeding Kenya Shilling THIRTY MILLION ONLY (Kshs.30,000,000/=).**

**Then be due and owing by the Borrower to the Lender whether in respect or(sic) moneys advanced or paid to or for the use of the lender or charges incurred on the account of the Lender for any moneys whatsoever which then be due and owing by the owner to the Lender either as principal or surety and either solely or jointly with any other person or persons in partnership or any company society or corporation or in any other matter whatsoever or otherwise however or for any actual or contingent liability together with commission and other usual bank charges law and other cost charges and expenses and together with interest at such rate or rates (subject to a minimum of Twenty (21%) per centum as the Lender shall in its sole discretion from time to time decide with full power to the Lender to charge different and penal rates...”**

The judge further stated:

**“The Plaintiff herein guaranteed the principal debt by way of a charge and a deed of guarantee and Indemnity....The Plaintiff was described as the borrower and covenanted to pay a sum not exceeding Kshs. 30,000,000/= together with Bank charges, other cost, charges, expenses and interests.”**

We have also considered the charge registered over the suit property which clause 1(c), clearly provides that the Borrower is obligated to pay all moneys owed including interest. It states:

***“ON DEMAND in writing made to the Borrower by the lender to pay to the lender all moneys which shall or may be for the time being owing as aforesaid by the borrower to the Lender together with interest at the rate for the time being payable...”***

The same provision further states that:

***“AND PROVIDED ALSO that the total moneys for which the charge constitutes a security (hereinafter called “the charge debt”) shall not at any one time exceed the sum of Kenya Shillings THIRTY MILLION ONLY (Kshs. 30,000,000/=) only together with interest at the rate aforesaid from the time of the charge debt becoming payable until actual payment.”***

We respectfully disagree with the appellants’ line of argument and find that the appellant voluntarily signed the security documents, specifically the guarantee by way of charge and must be taken to have been fully aware of the conditions upon which the security was given. As stated in the case of ***Robert Njoka Muthara & Another vs. Barclays Bank of Kenya Limited & Another [2017] Eklr, Civil Appeal No. 18 of 2014:***

***“A guarantee by definition is a pledge by a person (guarantor), other than a party upon whom the contractual or other legal obligation is imposed, to the effect that if the party so bound (principal) fails to perform the act in question, the guarantor, will either perform or make good any loss or claim arising from the non-performance.”***

Using the above reasoning, the court was therefore justified in limiting the extent of the liability of the 1st appellant and the principle debtor. The sum recoverable from the principal debtor is not Kshs.307,327,455.15 as claimed by the 1st Appellant, but Kshs.307,327,455.15 as at 1st May 2001 with further interest at commercial rates until payment in full, up to 1st December 2012, less the proceeds of the sale. Given that the 1st appellant guaranteed a sum equal to the borrowed sum, logic dictates that the sum owed by the principal debtor should be equivalent or less than the sum pleaded by the respondent once the relevant calculations are completed as directed by the trial Judge.

The consent entered by the parties on 22nd July 1998 is a clear manifestation that the appellant was indebted to the respondent but had taken no steps to repay the sum borrowed and the subsequent interest. The Chamber Summons application filed by the appellants leading to the consent order dated 10th June, 1998, sought an injunction to restrain the respondent from exercising their statutory power of sale over the charged property. One of the grounds stated for the injunction was that the appellants had made arrangements to pay the respondent the proper amount owing. This was a façade to entice the respondent and the Court!

The respondent in a bid to recover some return from their unpaid investment agreed to the payment of Kshs.22,083,908 in three installments, and in default of any instalments they were at liberty to execute for sums due and payable.

The sum Kshs.22,083,908 was premised on the drawdown sum out of a facility of 30,000,000. The letter offer of 3rd April 1992 clearly states the terms of the release of the loaned sum under clause 8 on availability which states:

***“(a) The facility will be drawn in stages and against documentary evidence acceptable to KENYAC showing that the funds are applied to the intended purpose and***

***(b) upon satisfactory registration of our security herein contemplated.***

***The dates and sum of the amount withdrawn, are evident on record and amount to Kshs.22,083,908/=”.***

Under the Civil Procedure Act, a decree means:

***“the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties (emphasis ours) with regard to all or any of the matters in controversy in the suit.”***

The consent did not determine the entire issues between the parties. As rightly stated by the trial court:

***“There will be an occasion when an interlocutory consent is capable of determining the issues in a suit with finality. But if the finality of such a consent has to be accepted, then its terms must brook of no ambiguity. This is because of its significance to the dispute between the parties. Looking at the consent, it does not seem unequivocal one way or the other.”***

The circumstances surrounding the consent clearly indicate that the consent was premised on the payment of the drawdown sum in order to stop the auction. It similarly did not preclude payment of the contractual interest or exercise of the respondent’s power of statutory sale upon default. That being our view, we find no merit in this issue.

With regard to the application or non-application of the *in duplum* rule which is the third issue, **Section 44A (6)** of the Banking Act, allows for retrospective application with respect to non-performing loans made before the section came into operation on 1st May, 2007. We however do not agree with the appellant’s interpretation of the section that the maximum that the respondent could recover was twice the compromise sum in the consent. The *in duplum* principle came into operation 15 years after the appellants took the loan from the respondent and after the interest applied to the debt had accrued. The rule could only apply on the sum due as at that date of effect. **Section 6 (a) and (b)**

of the Banking Act are very precise. We shall reproduce them here for emphasis:

***“Provided that where loans become non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following—***

***(a) the principal and interest owing on the day this section comes into operation; and***

***(b) interest, in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and” ...***

The *In duplum* rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the *in duplum rule* is meant to protect both sides. Ironically, in this case the creditor was the one facing exploitation through numerous legal proceedings and unnecessary delays by being kept out of reach from its money. The calculation of interest at 21% per annum on the loaned sum of Kshs.30 Million and the interest on the guarantee over the years has been painstakingly outlined in the record before us. This has been enumerated for both appellants yet as rightly observed by the trial Judge, no evidence has been tendered to rebut the sums due were double the amount that was owed in principal and interest from the date the section came into operation. We therefore find that in the circumstance of this case it is not applicable.

On the last issue, it is undisputed that upon default of the appellants to settle the sums as agreed, the respondent rightly exercised its statutory power of sale by private contract in November 2012. This was after a long and persistent attempt to recover the loaned sum and to ensure that value for money was derived from the suit property. Again, it is our view that the moment the suit property was charged, it was susceptible to be sold in satisfaction of any accrued debt and that is exactly what the bank did! It sold the suit property to Shimbaland Ranching Company Limited for Kshs.305,000,000. The sale value was premised on the valuation report by Premier Valuers undertaken as at 25th October, 2011 and which assessed the value of the suit property at Kshs 365,000,000. It is a fact the respondent failed to carry out a current valuation as required by law. The appellant on the other hand produced before the court a valuation report by Lloyd Masika Limited prepared on 8th April, 2013 assessed as at 30th June, 2012 at Kshs.550,000,000 as the true market value.

The evidence tendered in Court revealed that the appellants’ valuer did not take into consideration that 13,000 acres of the 81,182 acres of the suit property was occupied by squatters. The learned Judge in exercising his discretion applied a pro rata value and found that the area would be valued at Kshs. 88,062,000. This consequently reduced the market value to Kshs.461,938,000.

Despite the reduction in the market value, the sum still did not meet the requirement that the selling price should not be less than 25% of the property’s market value. The relevant provision when exercising the power of sale, are set out in **section 97 (1)** of the Land Act, 2012 which provides;

***“(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.***

***(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.***

***(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—***

***(a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and***

***(b) the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1).”***

In our view the Court exercised its discretion correctly in determining the market value and came to a correct decision given that the respondent did not produce any evidence before it to rebut the appellants’ valuation which was current. Once a statutory power of sale is legally activated, any anomaly in the sale which prejudices the rights of the chargor is remediable with damages under **section 99 (4) of the Land Act**. It was therefore fitting for the respondent to indemnify the appellant for the difference of Kshs.156,938,000 and we fully agree with the Judge’s determination.

Having expressed ourselves conclusively on the matters before us as herein above, we would like to add that the sum of KShs.30 million borrowed by the appellants almost 27 years ago was a colossal amount at that time. The borrowed sum was envisaged to earn interest and benefit the bank and shareholders. This money did not and does not belong to the bank. It belongs to shareholders and depositors who are entitled to benefits and interest from investments like the one extended to the appellants. It is not in dispute that since the money was borrowed the Appellants have only paid a meagre Kshs.500,000 and have made no attempts to settle the debt in full despite making pledges to refund the money. It would be unjust for the respondent to be denied of their investment.

Given our analysis above and having so found on the relevant issues, we are convinced and entirely agree with the decision of the High Court. It is our humble view that no basis was laid to make us interfere with the sound decision of the trial court. We therefore find no merit in the appeal and cross appeal, we accordingly dismiss the same and make no orders as to costs.

Orders accordingly.

*Dated and Delivered at Nairobi this 6th day of August, 2019.*

**M. KOOME**

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**JUDGE OF APPEAL**

**M. WARSAME**

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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**