REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYAAT NAIROBI.

MILIMANI COMMERCIAL & ADMIRALTY COURTS

CIVIL CASE NO. 246 OF 2011

RAJNIKANTKHETSHI SHAH …… PLAINTIFF

VERSUS

HABIB BANK A.G. ZURICH ..... DEFENDANT

JUDGMENT

Plaint and Defence

[1] The Plaintiff's claim is for

(a) A declaration that the Plaintiff does not owe the Defendant any money and continued holding of a legal Charge over Land Reference Number 7785/201 (original number 7785/10/197) by the Defendant is unlawful and unequitable.

(b) The Defendant do forthwith execute and handover to the Plaintiff an instrument of discharge of the legal Charge dated 8th October, 1982 registered against Land Reference Number 7785/201 (original Number 7785/10/97 and in default of executing such instrument, the Deputy Registrar of the court do execute the same on behalf of the Defendant.

(c) Costs of the suit.

(d) Any other relief or order that the Honourable Court may deem just to grant.

See the plaint dated 15th June, 2011. I will analyze at appropriate time, the evidence presented by the Plaintiff as well as all legal arguments made in support of the Plaintiffs claim.

[2] The Defendant filed defence dated 8th August, 2011 and denied all claims and averments in the plaint. Similarly, I will analyze the evidence adduced by Defendant as well as arguments made in support of the defence.

The Plaintiff's claim and evidence

[3] The Plaintiff was the only witness who testified in support of his claim against the Defendant. His main contention is:

(a) That, as a guarantor he was entitled to be told by the Defendant of the default of the Principal Debtor (borrower) to pay the debt so that he can take action to ensure the debt is repaid;

(b) That he is entitled to be told and to information that the Defendant disbursed the money to the borrower ifany liability was to arise on the guarantee.

(c) That no demand or default to the Borrower that was ever issued by the Defendant. He claimed that indeed there was no disbursement of the mortgage debt of Kshs. 5,000.000 and so he is not liable.

(d) That despite repeated demands for statements of accountDefendant failed to supply any accurate accounts on the alleged debt. That even when it did supply statements in 2007, it sent incomplete and contradictory statements of accounts. See all statements in the Defendants list of documents from page 29-59.

(e) That the Defendant failed to take legal action to recover the alleged debt whichis an act of acquiescence for which equitable remedy of estoppel will issue. This is despite the fact that the Principal debtor ceased business operations in 1982 and the Defendant were aware of this fact.

Plaintiff's submissions

[4] The Plaintiff filed two sets of submissions on 7th November 2014 and 24th August 2015. In those submissions, the Plaintiff reinforced his arguments and testimony offered to the court. His major arguments are on laches, acquiescence, equitable relief and injustice which he alleged was being caused by the continued presence of the Legal Charge on his property given the circumstances of this case. The Plaintiff argued that there was no actual disbursement of Kshs. 5,000,000 secured by the Legal Charge herein. Therefore, he cannot be liable for money that was never disbursed to the borrower. The Charge has no legal and factual foot on which to stand. Secondly, if indeed the borrower was indebted to the Plaintiff, the guarantor shall never be liable unless the borrower has defaulted and the lender has called upon the borrower to repay the debt but in vain. He argued that, since 1982 to date, no demand of default was issued to the borrower with a copy to him in order to justify any claim against the guarantor- this is over 32 years. Similarly, the Plaintiff urged that the Defendant has never taken action against the borrower to recover the debt. To make matters worse, they did not even file any suit against the Plaintiff as the guarantor to realize the security. He was surprised that the Defendant did not even file a counter-claim for the debt allegedly owned herein.

[5] The Plaintiff did not stop there. He said that it was surprising to see that when some fraudster attempted to grab the Charged property and sell it to other third parties, the Defendant was not concerned about these events. They did not even seek to be joined in the proceedings that the Plaintiff filed against the fraudsters i.e. NBI HCCC. No. 462 of 2006 and NBI ELC.No. 174 of 2011. According to the Plaintiff, the conduct of the Defendant constitutes waiver, laches and acquiescence on their right, and was only intended to hold the Plaintiff at ransom; enable the Defendant to sell the Charged property. He said that this long waiting was for purposes of charging interest and making it most unconscionable, unreasonable and onerous bargain; equity will frown upon such bargain and the court should issue the equitable relief under its equitable jurisdiction. The Plaintiff related this conduct to what the Defendants witness arrogantly stated; that the bank was not demanding any money from the Plaintiff but the borrower. Yet no suit has been filed or demand made for 33 years.

On limitation

[6] The Plaintiff stated that its claim is not time barred for two manifest reasons; (1) that he has moved the court pursuant to the court's jurisdiction in Equity which is not caught up in the

trappings of limitation of actions. They referred to Section 36 of the Limitations Act which provides that:

> ***"36. Nothing in this Act affects any equitable jurisdiction to refuse relief on the grounds of acquiescence or otherwise."***

Further, the Plaintiff submitted that, as long as the Charge subsists, the Charger's cause of action remains alive. He compared his cause of action to continuous trespass to the land where time starts to run afresh every time an act of trespass is committed. On Clause 7 (g) of the Legal Charge, the Plaintiff submitted that the clause cannot assist the Defendant as no time or indulgence was ever extended to the borrower. Not even demand in writing for default was ever issued as required under clause 5 (b) of the legal Charge or notice of dishonor on CBD herein as per the provisions of the Bills of Exchange Act. Therefore, the Defendant cannot rely on Clause 7 (5) of the Legal Charge.

[7] According to the Plaintiff parol evidence or the letter of offer cannot be adduced to contradict the legal Charge. See the case of ***Bank of Australia vs Palmer (1897) AC 540 at 545.*** The Plaintiff submitted that, contrary to the Defendants submissions, he never acknowledged any indebtedness to the Defendant. What he did was to demand for genuine bank statements to be provided by the Defendant but in vain; only varied bank statements with some omissions during photocopying have been produced in court. He specifically stated that the statements running from pages 39-45 on the borrower's actual account are incomplete. He submitted that complete statements on the borrower's account would have shown activities on repayment but the bank failed to produce authenticated complete statements. Instead, they produced computer-generated statements which only show the charging of interest. These are calculated at concealing the fact that the borrower repaid the existing loan and no money was ever disbursed to the borrower for which the Charge was registered.

Of Affidavits in other proceedings

[8] The Plaintiff argued that the affidavits sworn in the other proceedings were for the purposes of those proceedings and were not made to the Defendant as required by Section 23 of the Limitation of Action Act and therefore, cannot amount to acknowledgment of Defendant for purpose of these proceedings. In any event, the Defendant has not pleaded estoppels as per Order 2 Rule 4 (1) of the Civil Procedure Rules. On this – see ***Captain Harry Gandy vs Casper Air Charters [1956] 23 EALA 139 at 140.***

According to the Plaintiff: these are the Questions to ask

[9] In summing up, the Plaintiff submitted that the court should consider the following matters:-

> (**1) Whether it is usual or reasonable for a bank to remain silent for 33 years without any explanations whatsoever and fail to pursue a debtor for such a huge sum of money allegedly owed.**
>
> (**2) Effect of failure by Bank to demand the payment of the debt from the borrower, or to exercise its statutory power of sale or appoint a receiver or even file a counterclaim for 33 years now.**
>
> **(3) Why is it difficult for the Bank to disclose the status of the account by availing accurate accounts?**
>
> **(4) Whether it is equitable for the Bank to maintain the legal Charge upon the mortgaged property herein for 33 years thus inhibiting the Plaintiff's opportunities to use the property as security for a loan in the circumstances of this case.**

(5) Whether a Charge could be maintained on a property in the absence of proof of indebtedness.

The Plaintiff is convinced the facts of the case show that it is unconscionable, unreasonable and therefore inequitable to maintain the Charge herein and the court should exercise its equitable jurisdiction and order discharge of the Charge. They cited the case of ***KCB vs Kipng'eno Arap Ng'eny CA NO. 10 of 2001 (Nairobi)*** where the Court of Appeal stated that the court can resort to its equitable jurisdiction to set aside any bargain which is found tobe harsh, unconscionable, and oppressive or where a party imposes additional terms upon the other.

Defendant's case

[10] The Defendant filed documents in court and called one witness, one MOHAMMED ALI HUSSAIN. His testimony is already recorded by this court *in extenso*. He adopted his statements and the documents filed in support of the Defendant's case. In a nutshell, Mohammed told the court that he has worked for Defendants since 1994. He confirmed that he was familiar with the facts of this case. He started by correcting the error in the documents filed; the 1998 statement was missing at page 30, and the leap year was not taken into account in the statements. He referred to statements from page 42 - 51, which he said related to 'liabilities account'. He stated the actual outstanding amount as at 4th October 1982 to be Kshs. 9, 00,000 and not Kshs. 5,000,000. He referred to page 57 of the Defendant's bundle of documents. He stated that the sum of Kshs. 5,000.000 at page 42 is the sum that was Charged. He told the court that had he used Kshs. 9,000.000 to calculate interest, they would be claiming a sum in excess of Kshs. 150,000,000/-.

[11] Mohammed also talked about statements appearing at pages 52-58 and said that according to the said statements, the outstanding debt as at November, 1982 was Kshs. 9,436,836.95. He surprisingly said that the Plaintiff does not owe the bank anything but the company did. He also contended that their claim is made of sums calculated at the agreed interest of 14% per annum. He went further to state that the Plaintiff only guaranteed the company's debt- Pop In Ltd and gave his property as security for the debt of Kshs. 5,000,000 owed by the company. The said Charge was a continuing security for other facilities advanced to the borrower. He testified that the Plaintiff was also a director of the company. He said that the Plaintiff was fully aware of the debt, as the effect of the Charge and his rights was explained to him. He continued to give evidence to the effect that, since Pop in Ltd owed the bank money, the bank was justified in maintaining the legal Charge. He told the court to dismiss this case.

[12] On cross-examination, Mohammed said that the company stopped running its account in November 1982 and so they opened a separate account through which the Bank has been calculating interest. He told the court that the customer was to be given only a statement showing the interest and ledger fees. He said that, nonetheless, when a customer stopped operating an account, the Bank would issue the customer with a statement after six (6)months. He said that the company owes the bank over Kshs. 150,000,000. He said that they may have written to Pop in Ltd demanding for the debt repayment but they had not provided a copy of the letter to court. He said also that the bank has never inquired asto why Pop in Ltd stopped operating the account.

[13] Mr.Mohammed further stated that from 1982-2008, the Bank had done nothing about the account although the Bank's interest in recovering the debt was still there. In addition, Mohammed told the court that Isindu & Co. Advocates wrote to the bank on 1.7.2007 asking to be told of the status of the account of the borrower and also informing the bank of the fraud that was being committed on the Charged property by a person named Njoroge. But the bank did not participate in the proceedings on the fraud because they had the original title. To them, there was no need of participating in those proceedings at all.

[14] When asked about the errors in the statements, he said he had explained to the Customer and that those were revised accounts showing current status of loan. He again said that the bank intends to pursue Pop in Ltd for the recovery of the loan. He was confident that the claim the bank

will not be time barred when it is ultimately filed.

[15] In re-examination, Mohammed said that they were corresponding with the Plaintiff's advocates. To support this claim, he referred to the letters at page 26,27,28,29,35,36,37,38,39,40 & 41 as evidence of that communication. He stated that the Plaintiff was therefore aware of what was happening. He also stated that Pop In Ltd collapsed in 1985. He clarified that in their defence at paragraph 5 (b) (vii) the bank talked of a counter claim and that it reserved the right to file suit. He explained the bank's stand on the other proceedings where it was not a party; that the bank did not intend to engage in a multiplicity of suit and their comfort was in the fact that they had the original title deed in their custody. He was quick to say that if the title is in the name of other people, a discharge herein will not, therefore, help the Plaintiff. The files for these other proceedings namely, No NBI HCCC NO 462 of 2006 and 174 of 2011 were produced in and form part of these proceedings. The defence thereafter closed its case.

Defendant's submissions

[16] The Defendant filed very elaborate submissions dated 29th January, 2015 and others dated 28thAugust, 2015. They admitted that the suit property had been duly Charged to secure a debt of the company in the sum of Kshs. 5,000,000. They argued that contrary to the Plaintiffs claim the amount of Kshs. 5,000,000 was on account of Local Bill Discounts (LBD's) with interest Charged on a monthly basis at the rate of 14% per annum. There was no direct cash credit that was to be disbursed as alleged by the Plaintiff. The Charge was also to cover the existing company's indebtedness. See Clause 2 and 3 of the Charge. The Charge was given as guarantee of the company's debts to the Defendant. The letter of offer dated 10th March 1982 confirms the manner the debt emerged and was signed by the directors of the company. Therefore, the company owes the Defendant. The Defendant also argued that it provided the company with statements of accounts and it did not concoct Account Statements as alleged by the Plaintiff. According to the statements filed in court, the outstanding debt as at March 2011 was Kshs. 150,638,121. The Defendant insisted this debt lawfully owes and so the guarantors are liable for the debt as long as it remains unpaid.

[17] The Defendant provides further information in their submission to the effect that, due to the good working relationship between the company and the bank the company already owed a sum of Kshs. 9,284,269 on LCD account as at the registration of the Charge. See page 57 of Plaintiff's documents. And on 23rd August, 1982, the company requested that LCD facility limit of Kshs. 5,000,000 be converted into an overdraft limit of the same amount with an additional overdraft facility of Kshs. 4,000,000 being placed in excess for 3 months. See letter dated 23rdAugust, 1982. The request was accepted and acted upon on good faith by the Defendant. The Plaintiff signed the said letter. See page 5 of the Defendant's bundle of documents. Therefore, although the Charge contemplated an indebtedness of Kshs. 5,000,000, the company's indebtedness was already much higher but the bank reserves the right to file suit on the excess against the company. The Defendant therefore finds it to be quite disingenuous the argument by the Plaintiff that the letter dated 23rd August, 1982 was not authentic because it was printed on Pop in Kenya Limited letter head; in fact the word *"Kenya"* on the letter head was struck through and countersigned against. The reference is clearly *"overdraft facilities in Pop in Limited Account"*.

[18] According to the Defendant, the Plaintiff admitted that he duly executed the Charge and understood its contents and implications. The Charge clearly recognizes the existing company's indebtedness to the Defendant. Therefore, the Plaintiff cannot make a declaration to the contrary. He cannot also deny the company's indebtedness for which he executed the Charge. The Defendant also contended that the Plaintiff was aware that the guarantee he was giving was for existing debt as well as those to be advanced. They cited Section 2 of the Registration of Titles Act, (Cap 28, Laws of Kenya (Repealed) on what a Charge is. They also cited the case of ***Ebony Development Co. Ltd vs. Std Bank Ltd [2008] eKLR*** **and** ***Commercial Bank of Africa Ltd –vs-Sunny Auto Parts (K) Ltd & 3 Others. [2014] eKLR.*** The 2nd case is on principal debtor's

liability. The Defendants posits that the guarantee is valid because:

(a) It was made in recognition of a debt.

(b) It is in writing

(c) There was consideration and

(d) The parties were competent to contract.

[19] Additionally, the Defendant urged that, the fact that the company ceased operations since November, 1982 is irrelevant. They stated that there may have been no activities in the company's bank account after 1982 but the client still owed and so the debt continued to attract interest. Further, insolvency of the principal debtor does not absolve the guarantor from liability. See ***Bukerbridge and Others vs Mercantile Ltd [1981] 147 CLR*.** The Defendant also interpreted the silence by the Plaintiff for 28 years to be an admission of indebtedness. They also referred the court to the Replying Affidavit sworn by the Plaintiff on 22nd May, 2006 in NBI HCC. NO 462 of 2006 where he acknowledged indebtedness to the Defendant. They were of the view that these admissions on the Plaintiff's own documents are *prima facie* evidence of indebtedness. See the case of ***Karmali vs Shah[2000] 2 EA 392***. According to the Defendant the Plaintiff also admitted indebtedness during cross-examination. They urged the court to hold the Plaintiff to his admissions.

[20] Of statements, the Defendant argued that the omission of the year 1988 in the statements at page 30 -34 of the Plaintiff's bundle of documents was sheer computer error which the Plaintiff should not be allowed to take advantage of. Also it was by inadvertence that leap year dates were not also reflected in the statements. All the statements sent to the Plaintiff' were genuine and not concocted as alleged. Statements at page 41 of the Plaintiff's documents are statements of liability not statements of account. In any event, the correct statements are those at pages 42-51 and they supersede all the earlier ones. These are entries in banker's books which are *prima facie* evidence of all matters, transactions and accounts herein. See ***Halisbury's Laws of England, 4th Edition V3 at page 125.*** Therefore, the Defendant submitted, contrary to Plaintiffs assertion the statements are reliable evidence of indebtedness to the Defendant.

[21] The Defendant also addressed in great detail the question of limitation of its action. They contended that their claim is not time barred. The letter of offer expressly provided that failure or delay by the Defendant to exercise its rights or powers in respect of a debt owed by the company would not be construed to be a waiver of any such right or power. See Clause 13 of the letter of offer at page 3 of the Defendant's burden of documents. They were of the view that time did not start to run until 4thFebruary, 2011 when the Plaintiff's advocates wrote to the Defendant denying indebtedness. See letter dated 4th February 2011 at page 39 of Plaintiff's bundle of documents. See also Section 23 (3) of the law of Limitation of actions act as well as the case of ***Afro Freight Forwarders Ltd vs. African Liner Agencies[2009]eKLR.*** In any case, the Defendant urged that Limitation of Actions Act applies to suits and not to holding of security in land or disposing of such security. Again, they asserted that the statute on limitation cannot be used to compel a discharge of Charge. The Charge in question was a continuing Charge and therefore, enforceable. As such, a cause of action in a continuing Charge does not lapse or die. See ***Llyods & Baker Ltd*** and definition of a cause of action in the case of ***D.T. Dobie & Co. Ltd vs MUCHINA [1982] KLR 1*** as per Madan JA

> ***"A cause of action is an act on the part of the Defendant which gives the Plaintiff the cause of complaint."***

According to the Defendant, in the absence of a repayment date, the debt becomes payable upon demand and default thereof. This is the case here. All statutory remedies for the Charger are exercised without limitation. The Chargee is not obligated to demand payment from the principal

debt before its right to recover the debt owed from the guarantor. And should the security be insufficient to cover the debt,the bank may file suit against the company or the guarantor for the deficit. Accordingly, the Plaintiff's claim that the bank's claim is time barred is a gimmick to avoid liability. See the case of ***Trust Bank Ltd (in liquidation) vs Amalo Industries Ltd & 2 others [2012] eKLR.*** To the Defendant, the Plaintiff become a principal debtor and is liable.

[22] In any event, the Defendant submitted that, it is in fact the Plaintiff's suit that is incompetent for being time barred as per sections 4(1) (a) and 4 (3) of the Limitations Act. They posit that the Plaintiff would only have a claim for accounts or founded on contract. And so the longest the limitation is six(6) years which has lapsed..But, despite these limitations, the Plaintiff has not acted to redeem his property for over 28 years now. He is, therefore, prevented from claiming relief. They beseeched the court to so hold. They also asked the court to reject the argument by the Plaintiff that his claim is based on equitable jurisdiction under Section 3 of the Limitations of Actions Act as the Defendant is not guilty of laches and acquiescence. It is the Plaintiff's lethargy that should deny him remedy. For all the foregoing reasons, the Defendant urged that there is no justification whatsoever for the Plaintiff to claim discharge of his property. The debt remains unsatisfied todate and he is liable to the last coin. See section 47 of the RTA (repealed) on when a change is discharged. See also S.8501 and 102 of the Land Act. Thus the Plaintiff should be denied relief with costs to the Plaintiff.

DETERMINATION

Issues

[23] I have considered all the pleadings filed, the issues raised by the parties, the evidence tendered as well as the arguments by counsels. I decipher therefrom that the ultimate issue that I must determine is:-

1) Whether the Charge herein should be discharged.

However, for the court to reach there it must determine the following too:

(a) Whether this claim is time barred. Under this issue the court shall also determine two things:

(i) Whether the Defendants cause of action is caught up by the trappings of limitation of time; and

(ii) Whether the Defendant is guilty of laches, acquiescence or has waived its right to claim the debt herein. Arguments around the Legal Charge being a continuing security, and as such, the causes of action by both parties never lapse shall also be determined. I will also not forget the Plaintiff's argument that, as long as the Charge subsists, as a Chargor he has a perpetual right to seek for a discharge of Charge.

(b) Whether statements of account were provided to the principal debtor and the status of those statements.

(c) Whether the Plaintiff is a guarantor or principal debtor or both. Here the status of guarantor and principal debtor in law and the extent of liability under the Charge shall be discussed.

The Charge still subsists

[24] Needless to state that, up to now the Plaintiff is the registered owner of L.R. 7785/201 (original number 7785/10/197 (hereafter the suit property). This is not indispute. Similarly, it is

not in dispute that a Legal Charge dated 8/10/1982 was registered upon the suit property in favour of the Defendant. And that the said Legal Charge has not been discharged. In fact, from the evidence adduced before court there has been no delivery by the Chargee to the chargor of;

a) a discharge of Charge in the prescribed form and

b) all instruments and documents of title held by the Charge in connection with the Charged land (suit land).

In these circumstances, could this claim be said to be time barred?

Limitation of Actions

[25] Both parties made copious submissions on limitation. There is a dichotomy here; on the one hand, the Defendant argued that the Plaintiff's claim is time barred. On the other, the Plaintiff canvassed with a lot of force that the Defendant bank's claim against the company and the Plaintiff is time barred. The Plaintiff argued that the Bank cannot claim, if at all, against the Plaintiff for a principal debt which the bank has not sought to recover since November 1992 when the account of the principal debtor became dormant. They said that the period the Defendant has been in slumber is over 32 years now. Therefore, they said that, by virtue of Section 19 (1) of the Limitation the Bank's cause of action has been extinguished. To add insult to injury, the Plaintiff stated that the bank has not even filed a counter claim in these proceedings. But, the Defendant bank was of the contrary view: that it reserves its right to sue under the Charge and that as long as the debt is unpaid and the Charge subsists as a continuing charge, their cause of is still alive. In the same breath, however, the Defendant asserted that the Plaintiff's cause of action is time barred.

[26] These arguments are quite robust and useful, but one matter stands out and is agreed by both parties: That the Charge herein still subsisting on the suit property. In my considered opinion, as long as the Charge is subsisting and has not been discharged, the cause of action consisting in a discharge of charge is unaffected. Similarly, unless there exist circumstances to the contrary, as long as the debt for which such charge was given as security or guarantee remains unpaid, the cause of action to recover the debt through lawful realization of the security or enforcement of the guarantee thereof is also alive. I note, however, that the bank has not filed any suit or cross-action against the Plaintiff or the company. Therefore, considering arguments hinged on the anticipated suit by the Bank will be speculative- something a court of law should never do for it must resolve real disputes before it. Except it suffices to state that, limitation of any such anticipated suit will be dealt within such suit if it is ultimately filed. For the purpose of this judgment, based on my above re-statement of the law, I find that this suit is not timebarred at all as it relates to a Chargor who is seeking to have a a discharge of Charge on his property. Accordingly, I do not agree with the Defendant that the Plaintiff's claim should only be for accords or based on contract. This is a suit for redemption of mortgaged property: and the cause of action thereof does not die until the chargor's equity of redemption is extinguished in accordance with the law. The issue of limitation is settled. I move on to the other issues.

Plaintiff: Guarantor and or Principal debtor

[27] The Charge herein is the primary source of the kind of relationship there is among the parties thereto. According to the Charge dated 8th October, 1982 the "*borrower*" is POP IN LIMITED and the Chargor is the guarantor of the borrower debts for a sum not exceeding Kshs. 5,000,000 together with interest. This constituted the mortgage debt. In law, the said company is the principal debtor. The Plaintiff is also sufficiently described as the guarantor and chargor, except at clause 7(f) of the Charge provided:

"AND IT IS HEREBY AGREED AND DECLARED that the guarantors shall (without prejudice to their rights against the borrower) be deemed under the foregoing

agreement principal debtors and not merely guarantors and neither giving of time to the Charger or the borrower for the payment of the mortgage debt interest costs and other money's hereby secured nor the making of further advance or advances nor any other indulgence which may be shown to the Charger or the borrower shall in any way release or discharge the guarantors or any of them from the liability under the foregoing agreement any rule of law or equity to the contrary notwithstanding."

[28] It is permitted in law that a deed may designate a person to be both a guarantor and a principal debtor. This is what the legal Charge herein has done; described the Plaintiff was both a guarantor and principal obligor. However, the twinning of the guarantor and the principal debtor is usually problematic especially where the principal debtor is a corporate entity with limited liability and which in law is separate from its directors and shareholder. More trouble arises where the guaranteed sum is of a specific sum and the principal debt is for a larger sum. In such situation, the law is that, unless otherwise provided, where a guarantee limits the guarantor's liability to a fixed sum, the guarantors will be liable to the extent of the guarantee only and not to the entire debt of the principal debtor. This is due to the nature of guarantee whose terms are normally interpreted strictly. Therefore, in such case it will not make any legal sense to merge the principal debtor and the guarantor into one person or merge the guarantee with the borrower's contract of the debt. The guarantee is quite separate from the principal debtor's contract for the debt and it is desirable they are kept separate. Inthe case before me, the guarantee was given in form of a Legal Charge and was for a fixed amount of money Kshs. 5,000,000 together with interest. As such, whether the chargor is a guarantor, or both guarantor and principal debtor, his liability is to sum fixed in the Charge.

The Legal Charge: Realization of Security

[29] Of great significance here, the guarantee was effected through a Legal Charge, thus, it is strictly governed by the law on mortgages. The rights, remedies and obligations of both parties are governed by the law on mortgage. I will, therefore, proceed to determine the rights, obligation and relief of the parties before me in light of the applicable law. Clause 7 (a) of the Charge is instructive; it provided that the Chargee's statutory power of sale became exercisable without any further notice to the Chargor upon occurrence of some events including but not limited to:

(i) If the charger shall commit a breach of any of the covenants and agreements (including any covenants and agreements for the payment of the mortgage debt in the interest thereto on the part of the Charger herein contained or implied;

(ii) If the Charger shall stop payment of any payment required to be made under the terms thereof . . .

Under the Charge, in the event of default by the borrower or the Chargor, the security would became enforceable and the bank was required to do all such acts and things as reasonably required to facilitate the realisation of security of guarantee herein. The bank was also at liberty o exercise all the powers conferred on it by law to realize the security herein. It is not in dispute that the account for the principal debtor became dormant in November 1982. The borrower ceased operations. The evidence showed that the Defendant was all along aware of this unsatisfactory state of affairs. But the Defendant did not seek to exercise any of its rights or remedies provided in law. The bank only opened another account to which it continuously and promptly kept on charging interest upon interest on the sum due from the borrower. The Defendant's witness told the court that when they realized that the borrower owed more than the mortgage date, they recalculated the sum due using the mortgage debt of Kshs. 5,000,000 which has now swollen to Kshs. 150,638,121 as at March 2011. Yet the Defendant has not sought to realize the security. The witness arrogantly stated that the bank reserves its right to sue the guarantor or the principal debtor for the debt in question. Their reason for not acting was summarized in the submission that:

"… the Charge is a continuing security and is therefore enforceable given the present circumstances. Notably, <u>a cause of action under a continuing security never dies or lapses. It is alive through and can betaken up and prosecuted at anytime, provided that the debt secured remains unsatisfied."</u>[underlining original]

[30] Notably, the principal borrower's account became dormant in November 1982. The Defendant was aware of this fact. Again, the Defendant confirmed that it did not receive any further payments of the debt either from the company or from any of the guarantor since November 1982. The evidence showed that the bank took no action in law to exercise any of its rights or remedies including its statutory power of sale under the applicable law (the ITPA and RTA) now repealed. Arguments were made by the Plaintiff that a demand was necessary for his liability to arise. The Defendant argued otherwise; that the charge did not provide for a demand of payment to be a prerequisite for liability. On my part, and I have stated this before, this transaction is governed by the law on mortgages. As such, and as a matter of law, where default occurs, the chargee must issue a formal notification and demand; this is the basis for liability and exercise of the chargee's statutory remedies provided in law. Therefore, it does not matter whether the chargor is a guarantor or the principal obligor. I would state that the statutory notification of default and demand is *sine qua non* liability and basis for seeking payment of the debt. The bank did not make any demand for payment of the debt from the plaintiff or the company. Similarly, the bank did not seek to exercise any of its rights or remedies under the charge and the law including sale of the charged property either by private treaty or public auction. See section 69 of the ITPA. The bank only kept on heaping interest upon the principal sum and interest – it is still doing this even now. It is doubtful the bank rendered any credible periodic statements to the borrower or the guarantor. If the bank treated the Plaintiff as both the guarantor and the principal debtor, it ought to have provided credible statements of account. The statements tendered in court have been seriously challenged as a concoction by the bank. Indeed, the statements filed in court contain serious flaws which the bank's witness tried to explain as computer errors or simple omissions of leap years etc. That aside, what effect will the conduct of the bank have on any defence they may have inthis suit?

Claim of waiver, acquiescence

[31] The Plaintiff has argued that failure by the bank to demand payment from him or the borrower through an independent suit or a counterclaim in this suit amounts to waiver, laches and acquiescence; thus, it is wholly inequitable to hold the Plaintiff at ransom for over 33 years now. To them, keeping this legal Charge alive for over 33 years is most unreasonable, unconscionable and onerous. The Plaintiff claims that by the banks conduct, it should be estopped from maintaining the Legal Charge over his property. The Defendant on the other hand maintained that the Charge is a continuing security and debt has been acknowledged by the Plaintiff who has also been aware of the Charge and the debt all along. The Defendant cited and relied upon the averments by the Plaintiff in some other suits namely NBI HCCC.NO. 462 of 2006 and NBI HCCC. NO. 174 of2011 to show that the Plaintiff acknowledged the debt; was aware of it and also knew the Charge was still subsisting. Both parties cited judicial authorities and literary works to support their respective stand points on this subject. The authorities are part of the record and I have considered all of them. I need not multiply or reproduce them.

[32] On my part, upon consideration of all relevant material, submission and evidence of the parties, I take this view. In law waiver of a right or relief may be express or implied. Almost no difficult arises where the waiver is made expressly by consent and the party benefiting from it has acted on upon it: that is sufficient consideration. Where waiver is not express and is to be implied from the conduct of the parties, the court has to consider the entire circumstances of the case to establish conduct which is inconsistent with the continuance of the right. See ***The Laws of England***, **eds**.**Viscount Simonds, Vol.14,London: Butterworth & Co. [1956] para 1175.**That is the law on waiver. I will now re-state the concept of acquiescence. According to the ***Laws of England*** (ibid) para 117:

> ***"The term "acquiescence" is used in two senses. In its proper legal sense it implied that a person abstains from interfering while a violation of his legal rights is in progress; in another sense it implies that he refrains from seeking redress when availation of his rights, of which he did not know at the time, is brought to his notice. Here the term isused in the former sense; in the second sense acquiescenceis an element in laches".***

[33] As I stated earlier, the Charge delineates the rights, obligations and remedies of the parties to the Charge. I must repeat once again that, as long as the Charge subsist the chargor's equity of redemption is intact. I say so because redemption of the charged property isof the very nature and essence of a mortgage in equity. It is inherent in the mortgage itself and it cannot be clogged or impeded upon by design, or contrivance, or default or be left to the whims of the Chargee. On this, I am content to cite the powerful words of Lord Mc-Naghton in ***Noakes Co. Ltd vs Rice [1900-3] All ER 34***that:

> ***"Redemption is of the very nature and essence of a mortgage as mortgages are regarded in equity. It is inherent in the thing itself and it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption."***

Equity of redemption is a doctrine and a dear of equity; it is as old as mortgage institution itself. It has always applied in Kenya by virtue of the reception clause in the Judicature Act. It is until 2012 when it gained statutory expression in Section 89 of the LandAct where any rule of law; written or unwritten, entitling a Chargee to foreclose the equity of redemption is completely prohibited. The actions by the Defendant; not to exercise its statutory or legal remedies under the Legal Charge, yet it continued to pile interest on the loan herein for over 33 years resulted into a humongous debt upon the charged property. The guarantee was not to exceed Kshs. 5,000.000 together with interest. Despite the realities that the borrower had ceased business; its account became dormant in November 1982, for over 33 years the Defendant has never demanded any payment of its alleged debt from the Plaintiff or the principal debtor. Indeed from evidence, there is doubt on the debt owed. As such, liability of the guarantor or of principal obligor does not arise where the debt to the principal debtor does not exist or cannot be contemplated or is obscure. See **Halsbury's Laws of England, 4th Edition, Vol. 20 (i) para 101**. Besides, the Charges failure to exercise its rights under the Charge and realize its security, through one or more of the various remedies provided under the Chargee and the law, including but not limited to exercise of mortgagees statutory of power of sale of the mortgaged property for 0ver 33 years todate is a classic example of a suitor who has literally slept on his rights of which he has fully aware of. Again, the conduct of the Defendant bank- deliberate restraint not to assert on its right- and its explanation of this grave lapse or omission is reminiscent of stealth acquiescence, contrived design calculated at foreclosing the equity of redemption of the Chargor. A safe inference may be drawn from these circumstances that, the Defendant must have anticipated that the debt will grow so huge that it will be impossible for the Plaintiff to redeem his property. The amount of debt being claimed is whooping over Kshs. 150 million yet the mortgage debt was meager Kshs. 5,000,000.Going by the endorsement of splendid jurisprudence in the case of ***KCB –vs Kipngeno Arap Ngeny, CACIVIL APPL. NO. 100 of 2001*** (unreported), the bank's demand for payment of such amount of money that they consciously allowed to so accrue is like proposing a harsh, unconscionable and oppressive bargain to the Plaintiff; it blows away the sanctity of contract.

Laches and estoppels

[34] In the final analysis, I find that the conduct of the Defendant bank was contrived to defeat the law and particularly, the equity of redemption of the Plaintiff. In fact the conduct of the bank was inconsistent with the very right of the bank under the Charge to realize the security given in the Charge. It caused prolonged delay – which is deliberate and inconsistent with its pretentious pronouncement that it reserved the right to institute suit anytime. Nothing prevented the Defendant from filing any such suit. It is surprising, that it did not even file a counterclaim in this case which would have acted as a cross-action. Their explanation on their anticipated suit is not

really useful as it is made merely as a defence. In such scheme of things, the court cannot even make any finding on the would-be suit. All these things portray the Defendant as an indolent suitor who has abstained from asserting its legal and statutory rights under the Charge for over 33 years with the sole aim of clogging the chargor's equity of redemption. There is complete acquiescence; laches catches up with the Defendant in the whole transaction. And as acquiescence is an element of laches, estoppel would arise. The Defendant bank was truly aware of its rights but it has deliberately refused to enforce them, if at all, such that in the circumstances of this case, it will be inequitable to allow them to enforce or set it up against the plaintiff now or later. Implied waiver arises. Estoppel also operates against the Defendants bank; and its right against the plaintiff would be lost. Therefore, in this case, all ingredients are present for the invocation of estoppel against the Defendant bank to enforce its rights as against the Plaintiff in this case. This is a matter of law and equity.

The Upshot

[35] The upshot of all the above analysis is this. The Plaintiff has proved its case against the Defendant on a balance of probability. His right of redemption of his property and equity of redemption subsist for as long as the Charge is subsists. At least the Plaintiff confirmed the Charge still subsists and it has not been discharged. Accordingly, this cause of action is not time barred. I do not think in the circumstances of this case, the right to redeem the charged property or equity of redemption could be extinguished just because the chargor did not seek for discharge of charge earlier. Even going by the bank's arguments, the charge subsisted and so was the right to redeem. Therefore, limitation of actions may not be set up against the chargor. The Defendant bank cannot avail itself the relief in Clause 7 (9) of the legal Charge because it's conduct is **…** ***neither giving of time to the chargor or the borrower for payment of the mortgage debt interest costs and other moneys hereby…nor any other indulgence...*** The truth of the matter is that the conduct of the bank was inconsistent with any legitimate exercise or enforcement of the right to realize the security in the Charge herein. The bank even refused to be enjoined or to participate in proceedings which related to acts of fraud on the suit land. I thought a chargee exercising its mind properly would be interested in ensuring that the charged property is not under any threat of dissipation or loss. But the bank in this case categorically stated that it holds the original title and so it was not worried about fraud that was being committed on the property. What is the interest of such bank? The least is should say is that the decision by the bank to keep this account open for as long as they wish was an act comparable to illegal foreclosure; it defeated all prudence and reasonableness. I do not think prudence would call such account active one or performing one. The bank kept a dark ominous cloud hovering upon the chargor. This is not only a source of anxiety and uncertainty as to when the property will be redeemed but is contrived, malicious, stealth and oppressive; a complete negation of the law and equity of redemption. In such cases, the court will not hesitate to strike down anything or conduct that threatens the integrity of equity of redemption, and anything that restricts or clogs the right of the mortgagor to redeem the mortgaged property. This position does not change simply because the Defendant claims that the Charger also slept on his rights to redeem his property especially in a case as this where the opportunity to redeem did not arise as the Chargee just deliberately restrained itself from asserting on its rights to realize the security; yet on the other hand, by passage of time fruits are born, the debt was swelling to very satisfying digits in excess of over Kshs. 150,000,000. That conduct is loathed by law. The *in duplum* rule was designed by common law and now statutory law in Kenya to obviate such circumstances as these ones. Judicial prophesy may not be avoided when cases of this nature show up. It is about time Parliament clears the clutter in the statutory expression of the *in duplum* rule in our Banking Act; there is need for courageous enactment here so that courts will apply the rule for its full effects and extent. But that is for another day. For now I grant relief to the Plaintiff as follows:-

> **a) I issue a declaration that continued holding of the legal Charge dated 8th October 1982 over L.R No. 7785/201 (Original number 7785/10/197) by the Defendant is unlawful, inequitable and unconscionable.**

b) I direct the Defendant to forthwith and not later than seven (7) days execute and handover to the Plaintiff an appropriate instrument of discharge of Charge on LR. No. 7785/201 (Original Number 7785/10/197); and

c) In default of execution of the instrument in (b) above, the Deputy Registrar shall execute one in favour of the Plaintiff.

Those are the orders of the court.

Dated and Signed in Meru this 10th day of February 2016.

F. GIKONYO

JUDGE

Dated, signed and Delivered in court Nairobi on this 26th day of February, 2016.

C. KARIUKI

JUDGE