

Banking, Finance & Projects

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KENYA

Supreme Court settles the uncertainty around further advances on the strength of a continuing security



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Supreme Court settles the uncertainty around further advances on the strength of a continuing security

There have been divergent opinions in the Kenyan courts about whether, in the case of fresh advances to a borrower, the existing securities should be discharged and fresh securities prepared or whether the fresh advance can be accommodated within the limits of the existing securities held by a bank.

This was an issue that was framed by the Court of Appeal for determination by the Supreme Court in the case of *Standard Chartered Financial Services Limited v Manchester Outfitters (suing division) Limited and Two Others* [2025] eKLR.

After a 35-year legal battle, the Supreme Court settled the issue by holding that where a lender provides further advances to a borrower on the strength of existing and valid securities which contain continuing security provisions, the existing securities remain valid, binding and enforceable to secure subsequent obligations.

This decision also serves as a "*borrower beware notice*" by reiterating that there is no automatic discharge of a security since a security can only be validly discharged where the loan facility has been repaid in full and the requisite discharge document has been registered at the relevant registry.

Background

In 1982, Manchester Outfitters (now King Woolen Mills Limited) (the borrower) applied for and obtained a Eurocurrency loan facility from Standard Chartered Merchant Bank, London (SCMB) (the initial lender).

The predecessor of Standard Chartered Bank Kenya Limited (the bank) issued an unlimited guarantee to SCMB as security for the Eurocurrency loan. Thereafter, the borrower created in favour of the bank an all-asset debenture and a charge over two of its properties to secure the facilities.

In 1986, the bank took over the Eurocurrency loan and converted it into a KES currency loan of KES 9 million. A fresh facility letter was executed in 1986 for the KES loan. Since the existing securities contained continuing security provisions, the borrower did not create fresh securities in favour of the bank, nor were the existing securities discharged.

The borrower defaulted on the KES loan and the bank appointed joint receivers and managers under the existing debenture, which prompted the borrower to seek the removal by the court of the joint receivers and managers on the basis that the bank did not have the right to enforce the debenture since it did not extend to the KES loan. Additionally, the borrower argued that the 1986 facility letter required the borrower to provide fresh securities for the localised loan, which was not done.

On its part, the bank argued that the existing debenture extended to the KES facility and the borrower had approved the terms of the debenture which contained continuing security provisions and that it applied to future advances and, following the borrower's default, the bank had the right to appoint a receiver/manager under the debenture.



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Findings

The High Court held that the bank merely took over the existing Eurocurrency loan which was localised and did not make fresh advances to the borrower. In the circumstances, the existing debenture continued to operate as a valid and enforceable security for the KES loan and it was not necessary for the existing securities to be discharged to accommodate further advances. Additionally, the debenture, having not been discharged in the manner required by law, remained available to secure the KES facilities since securities endure until formally discharged.

The court held that to require the parties to execute fresh securities would have defeated the intention of the parties and a re-execution of the securities would only arise where the borrower had repaid the Eurocurrency loan in full and had obtained fresh facilities from the bank, which was not the case. The High Court found that the bank had the right to enforce the debenture following the borrower's default and entered judgment in favour of the bank.

Disgruntled, the borrower appealed against the High Court decision. The Court of Appeal (CoA) held a contrary view and treated the conversion of the Eurocurrency loan to a KES loan as a separate and distinct transaction which necessitated the preparation and execution of fresh securities. The CoA's view was informed by the execution of a fresh facility letter in 1986 by the parties. However, the CoA did not address the issue of the existing securities not having been discharged. Instead, the CoA faulted the bank for not following the laid down legal procedures in preparing fresh securities. Having held that there were no valid securities in existence in 1986, the CoA held that the appointment of the receiver and manager under the existing debenture was illegal, null and void.

Dissatisfied with CoA's judgment, the bank appealed to the Supreme Court seeking an interpretation as to whether the bank was required to call for fresh securities for further advances, notwithstanding the fact that the securities held by the bank were drafted to cover future advances to the borrower and had not been discharged.

The Supreme Court adopted the view that had been taken by the High Court and held that the conversion of the Eurocurrency loan to a KES loan was a takeover of existing facilities that had been advanced to the borrower. The Supreme Court held that debenture and the charge remained as valid securities for the KES loan as the securities contained continuing security provisions which were to cover any future advances to the borrower. It reiterated that a discharge of existing securities would only be complete by effecting a two-step process, namely (i) the execution and submission of the discharge instrument at the relevant registry, upon the facilities having been repaid in full; and (ii) registration of the instrument by the relevant registry.



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The Supreme Court clarified that there is no automatic discharge of securities and unless securities are discharged in the manner prescribed by law, such securities remain valid, binding and enforceable to secure subsequent obligations.

The court was of the considered view that the borrower could not escape its repayment obligations on account of a defective or incomplete security since the only way for a borrower to redeem its indebtedness is by repaying the loan and all costs associated with the loan in full and, even upon full settlement, the discharge needed to be registered.

Conclusion

The judgment of the Supreme Court provides a reprieve to lenders as it confirmed that a lender is not required, as a matter of law, to register fresh securities every time a new advance is made where existing securities remain valid and undischarged, unless the terms provide otherwise. Additionally, the Supreme Court reaffirmed the fact that where a security held by a lender is found to be invalid, the debt still survives as an unsecured obligation and a borrower will not be discharged from its obligation to repay the loan, since such obligation exists independent of any security.

The decision serves as a cautionary tale to borrowers by re-emphasising the obligation to repay a facility notwithstanding any defect in the security provided since a security is an accessory to the debt. The absence of a security would not excuse the borrower's repayment obligation since this would amount to unjust enrichment.

Borrowers should also ensure that upon repayment of their facilities in full, the securities are formally discharged as there is no automatic discharge of securities.

Lenders are also urged to reconsider continuing security provisions in their facility agreements and the subsequent security documents prior to effecting any further advances to customers since the continuing security provisions cannot be inferred into security documents.

Stella Situma



Chambers Global 2025 Results

Banking, Finance & Projects

Chambers Global 2021–2024 ranked our Banking, Finance & Projects practice in:
Band 2: Banking & Finance, Capital Markets: Debt and Capital Markets: Equity.

Chambers Global 2025 ranked our Banking, Finance & Projects practice (Kenya) in
Band 4: Banking & Finance.

Ludwig Smith recognised as a "Senior Statesperson" in Banking & Finance.

Njeri Wagacha ranked in Chambers Global 2025 in
Band 2: FinTech.

Sammy Ndolo ranked by Chambers Global 2025 in
Band 3: Banking & Finance and in
Band 3: FinTech.

Peter Hesseling ranked by Chambers Global 2023–2025 in
Band 3: Capital Markets: Equity.

Deon Wilken ranked by Chambers Global 2025 in
Band 4: Banking & Finance.



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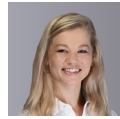
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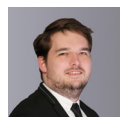
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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