REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 38 OF 2007

STONECREST LIMITED.....PLAINTIFF

VERSUS

STANDARD CHARTERED BANK (K) LIMITED.....DEFENDANT

R U L I N G

1. This ruling concerns the defendant preliminary objection dated 9/6/2017 and filed on 12/6/2017 in which it is contended that:-

   i. **"THAT the Charge, Further Charge and Second Further Charge were executed and/or dated the 17th March, 1992, 5th June, 1992 and 3rd March, 1994;**

   ii. **THAT the suit property was sold on or about the 4th September, 1996".**

2. The preliminary objection was argued by way of the written submissions filed pursuant to courts direction given on 13/6/2017 and highlighted orally in court.

3. In the submissions, the defendant underscores the point that there having been a contractual relationship between the parties in the suit, the plaintiff executed a legal charge over his land LR No. 1884/III/MN in favour of the defendant to secure some financial accommodation. On the terms of that charge there was a default by the plaintiff and the defendant is said to have exercised the statutory right of sale on 4/9/1996 and soon thereafter the property was burnt down by fire but a transfer was later completed on 13/07/2001. It is therefore the defendant's position that under Section 4, Cap 22, the cause being grounded upon a contract could not be brought after the expiry of a period of six years from the date of sale. To anchor his point reliance was placed upon the limitation of actions Act and the precedent in ***Bomet Beer Distributors Ltd vs KCB [2005]eKLR*** for the proposition that once a charged property is sold the chargor's remedy remains in a suit for general damages.

5. The decision of the ***Court of Appeal in Divecon vs Seremi [1995 – 1998] 1 EA 48*** was also cited for the proposition that not even the court has no power to entertain a suit grounded on a contract brought after the expiry of six year.

6. On the defect in the summons, the defendant pointed out that even though the plaint was filed on 30/10/2007, summons to enter appearance were never applied for or issued till 14/8/2008. On that fact, reliance was placed on the then provisions of Order IV Rule 3(5) and the interpretation of that provision in ***PRAFULLA ENTERPRISES LTD VS NORLAKE INVESTMENTS LTD*** for the proposition that a plaint filed without compliance with the Rules is abusive of the court process and subject to being struck out. The court was urged to uphold the two points and dismiss the suit with costs.

7. For the plaintiff, the preliminary objection was resisted and faulted not to lie being grounded on misapprehension of the plaintiff's cause of action. To the plaintiff, the provision of Limitation of Actions Act governing the suit was not Section 4, but Section 19(1) of the same Act as read with Section 20(1) thereof. The precedent in ***Housing Finance Company of Kenya Ltd vs J.N. Wafubwa*** was cited to court to demonstrate that a dispute as to sale and recovery of surplus of a charged property is governed by Section 20 and not 4.

8. On prejudice, the plaintiff pointed out that the preliminary objection was brought after directions having been given and some nine years after defence was filed hence it must be seen as a design to delay the just determination of the suit and further that no prejudice can be demonstrated to await the defendant having filed a defence to the suit. ***Unga Ltd vs Magina Ltd [2014] eKLR*** was cited for the proposition of law that article 159 now dictates that courts of law are enjoined to do substantial justice to the parties and in doing so must disregard technical procedures with the focus being put on settling the root of the dispute. The words of ***Charles Newbold in Makesha Biscuits Ltd vs Westland Distributors Ltd*** as echoed in ***Kenya Union of Commercial, Food and Allied Workers Union vs Water Resource Management Authority [2015] eKLR*** were quoted to court for the disdain the court should direct at the improper raising of preliminary objectives.

10. In response to the submissions by the defendant, the plaintiffs' counsel underscored the fact that land being what it is to Kenya people, the time within which to bring an action on title to land is twelve years and not the six years as contended by the defendant. The poetic words of Ogola J, in captain ***J.N. Wafubwa vs HFCK [2012] eKLR*** were cited to court. Bomet Beer Distributors (supra) was said to be distinguishable from the facts now before me because the decision there was based a Section 26 Auctioneers Act because an irregular sale was alleged.

11. On the summons to enter appearance the plaintiff took the position that the purpose of summons to enter appearance is to notify defendant about the suit and that purpose is conclusively served once an appearance or defence is filed. The plaintiff cited to court the decision in ***Terry Wanjiru Karuiki vs Equity Bank Ltd [2012] eKLR*** for the proposition of law that all the pre-overriding objective decisions must be looked at and applied with the overriding objectives of the court in mind.

11. In closing submissions, the defendants advocate took the view that Sections 19 and 20 of Cap. 22 only apply to a suit for recovery of surplus unlike here where only accounts and not refund of surplus is sought. To counsel there is no need for them to prove prejudice as the provisions of the law on preparation and signing of summons is very clear.

Analysis and determination

12. Even though expressed in several words the preliminary objection faults the suit for:-

- **Having been brought after end of four years, and before expiry, as mandated by Section 4 Cap 22.**

- **The summons to enter appearance were not lodged with the plaint hence the suit is defective".**

13. On those grounds the defendant sought that the suit should be dismissed, rather than get struck out. To determine the objection, one must as of necessity look at the pleadings, filed and determine what is the cause of action disclosed.

14. By the plaint at paragraphs 6, 7, 8, 9 & 10 it is pleaded that the charged property was placed under receivership in 1999 and that the defendant communicated in the year 2005 that the same had been sold and that prior to the auction, the plaintiff was unaware of several facts including the date and terms of sale as well as a fact that a subsequent further charge had been registered over the same property without his consent in the year 2005.

15. This suit was filed in the year 2007. The suit seeks among other remedies; accounts for the facilities afforded to the plaintiff and settlement of account arising out of the alleged sale.

16. To that plaint a defence was filed which besides putting up the defence of limitation generally denied the allegations of the plaintiff without giving specific dates when the alleged burning and sale took place.

17. Whether or not a cause of action is barred by limitation is a question of calculating time from the date the cause of action arose to the date of suit was filed and subjecting the same to the statutory timelines set by the statute of limitation.

18. In this case, it is difficult to establish when the cause of action arose away from the plaintiff's assertion that he learnt of the same and subsequent charge in 2005.

19. With such scarcity of facts, even if the suit was to be grounded on breach of contract, the six (6) years had not elapsed by the time the suit was filed. However, the pleadings and prayer in the plaint are to the court seeking accounts for the proceeds of sale and the guiding provision in Section 19 as read with Section 20 and not Section 4 of the Cap 22. The suit could thus be brought anytime within 12 year from the date of sale. I chose to be guided by the decision by the Court of Appeal in ***HFCK VS J.N. Wafubwa [2014] eKLR*** to the effect that by operation and dint of Section 20(1) Limitation of Actions Act, a suit filed to recover surplus from the sale of a charged property was not statute barred.

20. However a preliminary objection properly so called must raise pure point of law based on facts which are not the subject of contest as to demand ascertainment by evidence. The facts must be clear and self-evident deserving no minute explanation or scrutiny. That is what the court said in ***Joho vs Suleiman Said Shabal [2014] eKLR*** when the court remarked:-

> **"….a preliminary objection may only be raised on a pure question of law. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record".**

21. That decision was following the well followed path set by the Court of Appeal for East Africa in Mukisa Biscuits Ltd vs West End Distributions Ltd [1969] E A 696 at 701 where the Sir Charles Newbold P, said these ever enduring words:-

> ***"A preliminary objection is in the nature of what used to be a demurrer. It raises pure point of law which is argued on the assumption that all the facts pleaded are by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The proper raising of points by way of preliminary objection does nothing but unnecessary increase costs and, on occasion, confuse issues, this improper practice should stop".***

22. Put in the contexts of this file, it is not plain when the sale and the alleged fraudulent further charge was executed so as to set the time clock to start ticking. The fashion in which the defence was crafted was to steer clear of dates a scenario which left the only known date to

be that by the plaintiff that be learnt of the wrongs in 2005 and filed a suit in 2007. To that extent the point that the suit was statute barred when filed has not been properly raised as a meriting preliminary objection. It was improperly raised and the words of Sir Charles Newbold, P, must be repeated to the defendant in this case. This improper practice should stop.

23. The situation does not improve or get altered by assertion in the preliminary objection that the sale was on or about the 4/9/1994. That was a material fact that ought to have been pleaded and cannot be sneaked by the preliminary objection because a preliminary objection must be grounded upon the pleadings on record to which the parties are bound.

24. The upshot is that the objection lacks merits and is dismissed with costs for the plaintiff.

Dated and **delivered** at **Mombasa** this **22nd** day of **February 2019.**

P J O OTIENO

JUDGE