



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.355 OF 2005

MUA PARK INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

KENYA NATIONAL ASSUARANCE

COMPANY LIMITED IN LIQUIDATION.....DEFENDANT

JUDGMENT

1. The plaintiff herein **MUA PARK INVESTMENT LIMITED** through a plaint dated 22nd June 2005 sued the defendant herein seeking the following orders;-

- i) An injunction restraining the Defendant whether by itself, or its servants or agents, or auctioneer or advocates or otherwise, from selling Title No. I.R. 48130 (L.R No.209/11241) Nairobi, which is the subject matter of the charge, dated 24th October 1989.
- ii) A declaration that the charge dated 24th October 1989 is null and void, illegal and unenforceable for want of consideration as no monies were disbursed under it.
- iii) A declaration that the Defendant is not in law entitled to exercise any rights over property Title No. I.R. 48130 (L.R. No.209/11241) by virtue of any transfer or assignment or other right howsoever.
- iv) A declaration that there is no privity of contract between the Plaintiff and the Defendant.
- v) An order that the Defendant do execute a discharge of the charge in the pleadings mentioned, and all encumbrances created by the Defendant, or any person claiming under it.
- vi) An order that the Defendant do pay to the Plaintiff the costs of drawing up, engrossing, stamping and registering the said discharge and the amount thereof to be certified by the Registrar.

2. The defendant filed statement of defence dated 27th July 2005 denying liability and seeking that the plaintiff's suit be dismissed with costs.

3. The plaintiff subsequently filed a Reply to the defence dated 17th August 2005, praying that the defendant's defence be dismissed with costs and judgment be entered as prayed in the plaint.

Brief facts

4. The plaintiff case is that by a charge made on 24th October 1989 between the plaintiff as chargor and the Middle Africa Finance Company Limited (*in liquidation*) as chargee, the plaintiff charged it's property known as **I.R. 48130 (L.R. No.209/1/241)** to secure payment of sum not exceeding Kshs.10,000,000/- or a lower limit or advance or banking facilities agreed or fixed from time to time by the said middle Africa Finance Company Limited as lender, that might be advanced to the plaintiff interest thereon at a rate of eighteen (18%) per cent per annum. That the legal date of redemption specified in the charge was stated to be on the 15th November 1989, barely 20 days after the charge was executed.

5. The plaintiff avers, that notwithstanding the execution of the charge herein, that no monies were advanced to it, in pursuance thereof by the Middle Africa Finance Company Limited. That shortly thereafter, the said Middle Africa Finance Company Limited, went into

liquidation before any disbursements were made to the plaintiff's company. The plaintiff contends that it has not and has not at any time received any written demand for payment from the said Middle Africa Finance Company Limited, in terms of section 69 A of the Transfer of Property Act. That the Middle Africa Finance Company Limited, has purported to transfer or assign to the defendant herein the aforesaid charge made between the plaintiff and the said Middle Africa Finance Company Limited, which said assignment the plaintiff urges was in law null and void for all intents and purposes. The plaintiff contends that it is entitled to delivery of its title and to a discharge at the defendant's expense.

6. The defendant's case is, that money was advanced to the plaintiff before Middle Africa Finance Company Limited went into liquidation. That charge was registered over the suit property in its favour pursuant to Transfer on charge registered on 7th October 1992 in accordance with the provision of the Registration of Titles Act and, that the charge between the plaintiff and Middle Africa Finance Company Limited was valid and in accordance with the relevant provision of the law, urging further the plaintiff received statement of account and as such the defendant is legally entitled to sell the charged property.

7. The defendant further as per witness statement of Patrick Thoithi Kanyuira, states that an official receiver was appointed as the liquidator of the Kenya National Assurance Company, and amongst the assets owned by the company was a charge over **L.R. 209/1/124**, Mombasa Road, and to which a charge had been transferred to the defendant herein by Middle Africa Finance Company Limited for valuable consideration on 30th September 1992 and registered against the title of **L.R. No.209/1/124** on 2/10/1992.

8. During the hearing of this suit, the plaintiff called one witness, Salim Manji, **PW1**, who testified that he had prepared and signed witness statement dated 18th October 2016 (**Exhibit P-1**) and bundle of documents (**Exhibit P-2**) which court adopted as **PW1's** evidence in chief. The defendant on the other hand called one witness, **DW1**, Patrick Kinyua Kanyuira, Deputy chief state counsel, in the office of Attorney General, the Republic of Kenya, who is in charge of Kenya National Assurance Company Limited (*in liquidation*) since 2004 to date. He produced his witness statement (**Exhibit D-1**) which he adopted as his evidence in chief and bundle of the defendant's documents (**Exhibit D-2**) which the court adopted as **DW1's** evidence in chief.

9. This suit was subject of appeal in HCCA No.199 of 2007 (*Nairobi*) in which it was ordered that Nairobi High Court Civil Case No.355 of 2005 be listed for hearing afresh before a different Judge.

10. I have very carefully considered the pleadings in this matter, the witnesses written statements, as well as oral evidence, the Advocates rival submissions and list of issues, however in view of the pleadings, evidence and submissions tendered before me, the issues for determination can be reduced to two (2) being as follows:-

a) **Whether any money were advanced to the plaintiff under the charge dated 24th October 1989?**

b) **Whether the plaintiff's suit is statute barred?**

A) Whether any money were advanced to the plaintiff under the charge dated 24th October 1989?

11. The charge executed on 24th October 1989 between the plaintiff and the Middle Africa Finance Company Limited is found on page 12 of (**P-Exhibit 1**) and is duly executed at pages 33 and 34 and duly witnessed. The Transfer of the charge from Middle Africa Finance Company Limited to Kenya National Assurance Company Limited is found on page 35 of (**P-Exhibit 1**) and is dated 30th September 1992.

12. The plaintiff's position as regards advancement of the monies under the charge dated 24th October 1989 is, that no monies were advanced to it under the said charge. The plaintiff in its plaint in Hccc No. 355 of 2005 under several paragraphs has denied any money having been advanced, notwithstanding execution of the charge and states shortly after execution of the charge, Middle Africa Finance Company Limited, went into liquidation before disbursement were made to the plaintiff company.

13. **PW1**, in his statement denies advancement of the monies. In cross-examination of **PW1** by Mr. Njogu, learned Advocate, for the defendant, Mr. Salim Manj, for the plaintiff, admitted that he was aware that the charge was transferred to the defendant and that he came to know of that when the plaintiff received notification of the auctioneers intention to sale the property forcing them to put a caveat emptor and informed their lawyer. **PW1** stated the initial case was Hccc 537 of 1993, which he claimed was decided in the plaintiff's favour, following which the plaintiff filed Hccc 141 of 2004, which was struck out on 25/5/2004, hence the plaintiff filed the present case; which was dismissed, provoking filing of court of Appeal No. 99 of 2007 in which a retrial was ordered. On being questioned on a letter dated 19th May 2003 (**Exhibit D-1**) talking of sum of Kshs.12, 000,000/- **PW1** stated that they did not pay the amount. On being referred to paragraph 6 of **PW1's** statement (**Exhibit P-1**) he was categorical no monies were advanced to the plaintiff by Middle Africa Finance Company Limited, in pursuance of the charge; he however admitted they were creating several charges and that the plaintiff had four accounts with the Middle Africa Finance Company Limited. In re-examination **PW1** stated no money was lent and disbursed.

14. The defendant through **DW1**, Patrick T. Kinyuira, testified that the plaintiff had an outstanding loan balance of Kshs.99, 926,430/- as at 31st October 2003. He stated that a demand letter was served upon the plaintiff by the defendant's Advocate claiming Kshs.99,926,430/- to which plaintiff's Advocate replied through a letter dated 19th May 2003 as follows (*see Exhibit D-1 pages 5*);

"Kindly confirm upon payment of the said sum of Kshs. 12 million, the charge held by Kenya National Assurance Company Limited (in liquidation) shall be fully discharged and freed from any encumbrances."

DW1 testified numerous cases were subsequently filed by the plaintiff against the defendant all of which were struck out.

15. During cross-examination of **DW1**, he stated a demand letter claiming an amount of Kshs.99, 926,420/- was issued to the plaintiff. He

admitted he has no statement to back his claim nor does the defendant have statement to show how the amount is arrived at. He stated the charge was for 15 million and that the letter was on an offer for Kshs.12 million. **DW1** on being referred to his statement, on paragraph 4 of his statement, he stated he does not have a copy of the statutory notice. He claimed the Advocate were instructed to issue demand notice to the plaintiff on 4/11/2003. **DW1** further stated the amount owing and due to the defendant at the time of transfer is not known to him and further he does not have document in support of the amount claimed in the demand notice before court. He urged that plaintiff's account was closed after the property was sold between 2003 – 2005 at Kshs. 38,000,000/-. **DW1** further informed the court that he does not have evidence that money was advanced to the plaintiff by the Middle Africa Finance Company Limited save the evidence of a charge. He further confirmed that the draw down is done after registration of the charge. He confirmed he does not know the arrangement the plaintiff had with the Middle Africa Finance Company Limited. He stated inspite of the contents of the charge, he does not have evidence of money exchanging hands but urged the factor of admission of some money being due is evidence of receipt of money, admitting he is not aware, if the plaintiff had any other dealings with the Middle Africa Finance Company Limited.

16. The plaintiff contends, that the defendant conceded that it had no evidence that the sum of Kshs. 10 million was ever advanced to the plaintiff by the Middle Africa Finance Company Limited, that it has no evidence that it had placed Middle Africa Finance Company Limited money amounting to Kshs. 15 million as to constitute consideration mentioned in Transfer of charge; that the plaintiff, advocates letter dated 19/5/2003, proposing to pay a sum of Kshs. 12 million could not have been a response to demand letter demanding Kshs. 99,926,420/- due as at 31/10/2003; which demand was not supported by a statement or account; that the plaintiff's advocate letter dated 19th May 2003 merely made a proposal to pay the sum of Kshs. 12 million and that it was normal practice for a lender to require that a charge over property be registered before draw down of the loan.

17. From the assertion advanced by the plaintiff in it's plaint and witness statement as well as the oral evidence adduced before court, which evidence was direct and specific plea by the plaintiff that it was never advanced with any money, it became apparent that it was incumbent upon the plaintiff to avail evidence to demonstrate that no money was advanced to it before burden is suffered to the defendant to demonstrate otherwise.

18. The defendant contend that the claims by the plaintiff that no money was advanced is perjury and an attempt to defraud the defendant. The defendant avers the plaintiff on its previous filed suit namely Milimani Hccc 5357 of 1993 Mua Park Investment Ltd vs Kenya National Assurance Limited, under paragraph 5 it sated:-

"There was, however, an arrangement to pay the loan money by instalments which the plaintiff latterly adhered to and brought its obligations to the said Middle Africa Finance Company Limited to date by repaying all monies reflected in the statement supplied by this Middle Africa Finance that the plaintiff proposed to a settlement of Kshs. 12 million in exchange for a discharge of the charge held by the defendant. Further in Hccc 141 of 2004 Mua Park Investment Ltd vs Kenya National Assurance Limited and another the plaintiff under paragraph 6 stated as follows;

"There was however an arrangement to pay the loan money by instalments, which the plaintiff advanced to and brought its indebtedness to the said Middle Africa Finance Company Limited to date by repaying all monies reflected in the statements supplied by the said Middle Africa Finance Company Limited."

Under paragraph 7 (ii) of the plaintiff's plaint it is stated;

"In spite of having fully repaid the loan amount, the said Middle Africa Finance Company Limited declined to discharge the title of the suit premises to the plaintiff."

19. From the pleadings in Hccc 5357 of 1993 and Hccc 141 of 2004 the plaintiff herein, in my view seems to have acknowledged receipt of a loan from Middle Africa Finance Company Limited, made arrangement to repay the loan and even states it fully repaid the loan. The pleadings in the said two suits filed by the plaintiff contradict his averments in the instant suit, that no monies were lent to him inspite of having executed the charge. If the court was to take no monies had been advanced to the plaintiff as it avers, then how would the court reconcile the plaintiff's pleadings in the previous suits, where plaintiff claim to have made arrangements to pay the sum lent and the contents of his letter of 19th May 2003 where it offered to pay Kshs. 12 million to have the charge held by the defendant fully discharged?

20. Section 120 of the Evidence Act provides;

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

The plaintiff in it's prior pleadings in Hccc 5357 of 1993 and Hccc 141 of 2004 Mua Park Investment Limited vs Kenya National Assurance Limited and another categorically admitted its indebtedness to the defendant and averred it's willingness to settle the debt through a letter of 19th May 2003 and went on to claim it has fully paid the loaned amount. The plaintiff did not however bother to produce any evidence to confirm repayment of the loaned amount in full, notwithstanding under paragraph 5 of it's amended plaint in Hccc 5357 of 2003 it admitted having been supplied with statements by Middle Africa Finance Company Limited. I find the plaintiff by its own pleadings, and admission of indebtedness and admitting having received statements from Middle Africa Finance Company Limited, is estopped from denying having received the money from the Middle Africa Finance Company. The plaintiff is further bound by its own pleadings. He cannot claim otherwise, I so hold.

21. **DW1** in being cross-examined, he testified that the defendant instructed it's advocate to issue a statutory notice to the plaintiff and the same was issued on 14/11/2003 (*page 8 of the defendant's list of documents*) filed on 1/3/2017. The same was sent to the plaintiff by registered post and ordinary mail. The plaintiff did not deny receipt of the same, consequently, I find the defendant did serve the plaintiff with the statutory notice as required by law.

22. The plaintiff raised the issue of defendant's failure to serve it with statement of accounts to support the claim of money owed. The charge was created between the plaintiff and Middle Africa Finance Company Limited and not the defendant herein. The defendant never lent any money to the plaintiff nor has the plaintiff paid any money to the defendant and as such, statement of account would flow from the defendant but not from the chargee. In this matter the plaintiff admitted having been supplied with statement of accounts by the Middle Africa Finance Company Limited, in its plaint in Hccc 5357 of 1993 under paragraph 5. The defendant herein avers it is only calculating interest on money owed by the plaintiff to Middle Africa Finance Company Limited, at the time of assignment of the charge. In view of the aforesaid, I am satisfied from the plaintiff's admission, that the statement of accounts were duly supplied to it by the Middle Africa Finance Company Limited which had advanced money to the plaintiff and which was legally bound to furnish the plaintiff with statement of accounts and not the defendant herein.

23. In view of the above, I find the plaintiff has failed to demonstrate that monies were not disbursed to it so as to shift the burden of proof to the defendant herein. I find the plaintiff by its own admission of indebtedness and receipt of statement of accounts from Middle Africa Finance Company Limited, its purported repayment of the loan, confirmed that monies were released to it after execution of the charge between it and Middle Africa Finance Company Limited.

B) Whether the plaintiff's suit is statute barred?

24. The plaintiff's plaint dated 22nd June 2005 was filed on 29th June 2005. The suit is based on cause of action, according to the defendant that took place in 1992. The cause of action is based on a contract, challenging a charge which was assigned to the defendant by Middle Africa Finance Company Limited in 1992, and which was registered against the title on the 7th of October 1992. The defendant contends, that by virtue of **section 4(1) of the Limitation of Actions Act**, the plaintiff's claim is time barred. **Section 4(1) of the Limitation of Actions Act** provides:

"(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) Actions founded on contract;

25. The plaintiff's counsel did not submit on the issue, nevertheless the defendant having done so, the court shall proceed to deal with same and pronounce itself on the issue.

26. I have perused the plaint and indeed what provoked the plaintiff to file this suit is well set out under paragraph 12 of the plaint in which it is stated;

"The defendant has now by inter alia, letter dated 5th November 2002, threatened to sell the charged property in pursuance of the alleged assignment or transfer."

27. The plaintiff has not disputed the assignment giving the defendant powers to issue such notice, was made in 1992, thus 13 years to the date of filing of the present suit by the plaintiff.

28. In the case of **Divecon vs Samani [1995 – 1998] 1 EA at P.54** the court stated that:-

"No one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract."

29. Having considered the facts of this suit, and that the suit was filed 13 years after the assignment, and the claim being based on contract, I find that this suit having been filed after expiry of 6 years from the date the cause of action occurred, this court's hands are tied and has no power to entertain a time barred claim. I find this claim is time barred for offending the provision of **section 4(1) of the Limitation of Actions Act**.

30. The property herein is said to have been auctioned and sold to Muimora Properties Limited on the 14th January 2005 and title issued. I find the auction having taken place the property has exchanged hands. The plaintiff's claim has been overtaken by such events.

31. The upshot is that the plaintiff's suit is not meritorious. The same is dismissed with costs to the defendant.

Dated, signed and delivered at Nairobi this 25th day of April, 2019.

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J .A. MAKAU

JUDGE