



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO.87 OF 2007

ELLY OYIER OLUOCHAPPELLANT

VERSUS

NATIONAL HOUSING CORPORATION.....RESPONDENT

(APPEAL FROM ORIGINAL JUDGEMENT

IN CMCC No.548 OF 2007: A.C. ONGINJO – PM]

J U D G E M E N T

This is an appeal from the decision of the Principal Magistrate in CMCC No.548 of 2007. Being dissatisfied with the judgment of the court the appellant moved this court by way of an appeal on the following grounds:

- 1. The learned trial magistrate erred in not considering the defence of limitation which was raised in both the defence and submissions;**
- 2. The learned trial magistrate erred in not finding that the respondent had by its failure to reply to the defence more particularly the defence of limitation was deemed to have admitted that the claim was statutorily time barred;**
- 3. The learned magistrate failed to analyse properly or at all the evidence on the record and thus arrived at a wrong decision; (sic)**
- 4. The learned trial magistrate's findings which were not supported by evidence. (sic)**

The appellant sought for the judgment of the lower court to be set aside and for the suit to be dismissed with costs.

The respondent opposed the appeal on the grounds that the loan the subject matter of the suit was illegal, the appellant acknowledged the loan in April 1993 and sought for time to make good the same, the suit is not time barred as time started to run a fresh after the appellant acknowledged the loan was due, and that the plea of time limitation is not categorical.

I have considered the record and submissions by learned counsel on record.

This is the court of 1st appeal. It has a duty to re-consider the evidence a fresh, examine and analyse the same so as to arrive at its own independent decision. See **Sella & Another versus Associated Motor Boat Company Limited & Another (1968) E.A. at 127**, and **Peters versus Sunday Post (1958) E.A. at 424**

The brief facts of the case which facts are not in dispute are that by an agreement dated 25th December, 1988 the respondent loaned the sum of Kshs.100,000/= to the appellant, which loan was to be repaid in 10 years. The repayments were to be done through salary deductions. The terms of the agreement in part indicated that in the event of any one installment being unpaid the whole amount would become due.

The respondent in its pleadings and in evidence through its officer **Paul Bosire Makori** working in its Rural Housing Section, testified that the appellant paid only a sum of Kshs.36,000/= of the Kshs.100,000/= plus interest but only up to June, 1993 when his former employer **Twiga Chemicals Limited** stopped remitting monthly installments. That the corporation wrote to the appellant who acknowledged non payment of the debt and he promised to pay.

On his part both in the defence and in his evidence the appellant acknowledges receipt of the loan but maintains that he cleared the same. However no proof is given of the alleged clearance. The appellant also testifies that he stopped working for **Twiga Chemicals** in 1990. In his defence he raised the defence of Limitation which the respondents did not respond to. He however acknowledged the letter dated 1st April, 1994, where he promised to make good the balance

From the pleadings the issues for the court's determination are:

1. **Whether or not the respondent advanced the appellant with Kshs.100,000/=?**
2. **Whether or not the said loan was paid in full?**
3. **Was the loan illegal?**
4. **Is the respondent's claim statutory time barred?**
5. **Who pays the costs?**

From the evidence and admission of the parties the respondent did advance to the appellant the sum of Kshs.100,000/= as loan to be repaid by monthly installments over a period of 10 months.

Exhibit P1 is an application form filled by the appellant seeking for a loan of Kshs.100,000/=. Exhibit P2 is an acknowledgment and approval of a loan of K\$5,000. It also details the terms and conditions of the loan. The said letter dated 23rd November, 1988 did not limit the loan to Kshs.80,000/=. The limitation is in the application by the appellant. The appellant admitted receiving Kshs.100,000/= which translates to K\$5,000. In my view it will be a travesty of justice for the appellant to turn around now having himself filled a form with a limit of Kshs.80,000/= yet he applied for Kshs.100,000/= which he got to claim the loan was illegal. I do find that the loan was legal for all intents and purposes and the same by admission of both parties was advanced to the appellant.

The respondent's witness stated that only Kshs.36,000/= had been paid as at April, 1993. This loan was for 10 years from 1988 to 1998. There is evidence that the appellant defaulted in his monthly repayments. One of the exhibits on page 79-80 of the record is proof remittances. It shows that the last remittance was on 25th June, 1993 for Kshs.5,000/=. This I take was the last repayment by the appellant.

Exhibit P3 is the agreement signed between the parties it stipulated in condition No.4 thereof that in default of payment of any one installment the whole amount and interest would fall due.

By its letter dated 1st September, 1993 the respondent wrote seeking for repayment of arrears of Kshs.33,801/=. Several months had lapsed and by the December 1988 agreement the full loan was up for

repayment. It is on record that the deductions from the company had stopped since 30th November, 1990. Repayments were sporadic up to and including June 1993 when they stopped completely. One would have expected the respondent to institute legal proceedings as threatened in the letter of 1st September 1993 then . The suit was instituted on the 26th of May, 2007 14 years later. The Law of Contract as correctly cited by the appellant puts limitation at 6 years. Obviously the six years limitation lapsed in the year 1999 if one considers the loan having become due even then liberally by June 1993 the date of last payment.

From the judgment of the lower court it is obvious that the learned trial magistrate failed to consider the defence of limitation which had been raised as an issue by the defence (the appellant).

From the above analysis and the fact that no reply to the defence was filed by the respondent I find that the defence by the appellant that the claim was term barred is merited. Indeed the claim after 14 years against a limitation period of 6 years was late by all standards

I therefore allow the appeal and I set aside the judgment of the lower court.

Each party in the circumstances of the case will bear their own costs.

Dated and delivered this 19th day of October 2011

ALI-ARONI
J U D G E

In the presence of:

..... **Counsel for appellant**
.....**Counsel for respodnent**