



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 331 of 2004

CO-OPERATIVE BANK OF KENYAPLAINTIFF

VERSUS

PETER KIMANIDEFENDANT

R U L I N G

1. The Chamber Summons dated 12th April, 2010 is brought by the Defendant under the provisions of **Order 6 rule 13(1)** of the **Civil Procedure Rules** among other provisions of the law. The applicant is seeking for an order that the Plaintiff's suit be struck out with costs to the Defendant. This is on the grounds that the suit seeks for judgment for a sum Kshs. 7,341,884.55 being the sum owing in respect of a loan agreement entered into between the Plaintiff and the Respondent in 1996. It is contended that the cause of action accrued 12 months after 1996 when the Defendant was supposed to repay the loan. Thus the Plaintiff's claim which is founded on contract ought to have been filed within six years from the date of the cause of action, as provided for under **Section 4(1)** of the **Limitation of the Actions Act**.

2. This application is supported by the Defendant's affidavit sworn on 4th April, 2010. He annexed copies of letter of offer dated 2nd May 1996 and a charge to secure the borrowing over the property known as Title No. Dagorretti Ruthimiti/733 which is dated 20th May 1996. Mr. Nyachoti learned counsel for the Applicant submitted that even if the

Applicant had written a letter dated 22nd August 2003 in which he admitted the loan, and made proposals of settlement, that letter was written before six years. He urged the court to find that the suit was filed two years after the cause of action and the Plaintiff is time barred and ought to be struck off.

3. This application was opposed; Mr. Onsando learned counsel for the Respondent, he submitted that the loan was an overdraft facility which was continuous. There is also a charge to secure the borrowing which is a continuing security for loan and interest that shall accrue on the account. Thus the applicant cannot plead limitation of Actions under the Act. Once a charge is in place, as security, limitation of action is hinged upon the charge which is a continuous security until the loan is paid. Moreover, the borrower acknowledged the debt, and under the provisions of Section 23, of the Limitation of Actions Act, the date of acknowledgment is when the limitation period starts to run. For this proposition Mr. Onsando relied on the text by **Halsbury's Laws of England 4th Ed Vol 28 page 1083** where the learned authors have posited as follows:

“Actions to recover debts and legacies. Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest in any such estate, and the person liable or accountable for claim acknowledges the claim or makes any payment in respect of it, the right is deemed to have accrued on and not before the date of the acknowledgment or payment. A payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but any payment of interest is treated as a payment in respect of the principal debt.”

4. The above opinion seems to have been cited with approval by the Court of Appeal in the case of **Afrofreight Forwarders Ltd vs African Liner Agencies [2009] eKLR** in which their Lordships held that:

“With due respect to the learned Judge, we think the learned Resident Magistrate was right in reaching

the conclusion that time started to run from the date of the letter in which the debt was acknowledged. We have looked at the contents of the letter of 4th July 2000 and in our view the said letter acknowledged the debt. What the respondent was uncertain about was the exact amount which was owed. Section 23(3) of the Limitation of Actions Act provides:-

“(3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim or a claim to movable property, of a deceased person and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgment as the last payment.”

5. It is trite law that striking out pleadings is a drastic measure which is done when the pleadings complained about are an abuse of the court process and discloses no triable issues. (See the case **D.T. Dobbie v Muchina [1982] KLR**) as per **Madan JA:**

“The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”

6. It is common ground that the Applicant admitted liability by a letter dated 22nd August 2003. In that letter, he also made proposals of settlement. By dint of **Section 23(3) of Limitation of the Actions Act**, the Applicant acknowledged the debt, thus the cause of action arose on that date of acknowledgement. This suit is therefore not time barred it cannot be struck out, it should proceed for trial. The application dated 12th April, 2010 is dismissed with costs to the Plaintiff.

RULING READ AND SIGNED ON THE 24TH SEPTEMBER 2010.

**M. K. KOOME
JUDGE**

