KENYA NATIONAL CAPITAL CORPORATION……..PLAINTIFF

VERSUS

EASTLAND THREATRES LIMITED……1ST DEFENDANT

JAMES SAMUEL KINYANJUI……..……2ND DEFENDANT

ANNE NJERI KINYANJUI…….....……..3RD DEFENDANT

JUDGMENT

The plaintiffs claim as it can be discerned from the amended plaint dated 17th May 2002 is for a sum of Ksh.23,978,096.30/- with interest at the rate of 18% per annum from 30th October 1988 until payment in full. The plaintiff also claims a sum of Ksh.7 million with interest at the rate of 18% per annum from 11th February 1988 until full payment from the 2nd and 3rd defendants being the sum guaranteed to the plaintiff for the loan advanced to the 1st defendant. The said sum is claimed jointly and severally from the 2nd and 3rd defendants.

The defendants filed a defence which is captured in their amended defence. The defence challenges the validity of the of the guarantees, the interest charge, and generally denies liability. The plaintiff is also faulted for giving too much time to the 1st defendant who compromised the interests of the 2nd and 3rd defendants under the guarantee. Lastly, the defendants contend that the property was sold at an under value and for that reason the defendants were released from the obligations under the guarantee if any.

These are the brief facts of the matter, by a letter of offer signed by the 1st defendant and dated 2nd March 1981, the plaintiff agreed to advance to the 1st defendant a sum of Ksh. 7 million subject to conditions as set out in the said letter of offer. The amount was to be paid in 6 semi annual installments within a period of 3 years. The 1st defendant agreed to charge his property known as LR NO. 209/8155 situated in the city of Nairobi to secure the loan advanced. To this end, a charge in favour of the plaintiff dated 8th April 1981 was executed by all the defendants. In addition to the charge, the 2nd and 3rd defendants executed personal guarantees dated 2nd March 1981. The 2nd and 3rd defendants jointly and severally agreed to guarantee the payment of all the sums advanced to the 1st defendant to a maximum of 7 million with interest thereon and other charges and expenses that may occasion by instrument of the security.

The 1st defendant defaulted in the loan repayment; the plaintiff issued a demand letter requiring the entire balance of the loan. After the defendants persistly failed to pay the loan then the plaintiff filed this suit on 1st November 1988.

The plaintiff also sought to recover the debt through the realization of the security held. There were numerous attempts to realize the security between 1983 to 1990 without success. The charged property was eventually sold in 1990 to a company known as West Kenya Wholesalers Limited for a sum of 4.5 million.

Cetherine Njeri Muthiora gave evidence on behalf of the plaintiff. She produced several documents to show how the loan was disbursed after the letter of offer was made to the 1st defendant, a legal charge was created and personal guarantees of the 2nd and 3rd defendants were executed. She also produced demand letters issued to the 1st defendant. The plaintiff also instructed Tysons Limited to carry out a valuation of the market value of the charged property on 30th August 1988. The property was valued for 7 million being the open market and forced sale Ksh.5.6 million. There were several attempts to sell the property by CB Mistry Auctioneers but they were not able to sell the property in the auction due to lack of interested buyers. The plaintiff decided to file this suit to recover the money under the charge and the guarantees that were singed by the 2nd and 3rd defendants. The property was eventually sold by way of private treaty for Ksh.4.5 million. However the defendants loan account still stood at Ksh.23,978,096.30/- as at 30th October 1988.

Further evidence in support of the plaintiffs case was given by Samuel Otieno Odhiambo a valuer by profession working with Tysons Limited. He produced the valuation report dated 8th September 1988 over the suit property which was known as East Lands Cinema located along Jogoo road at the time the valuation was prepared. The property was valued for both open market and forced value sale at 7 million and 5.6 million respectively.

On the part of the defendants James Kamau Kinyanjui the 2nd defendant gave evidence. He testified that he and his wife the 3rd defendant were the principle share holders of the 1st defendant. Between 1978 and 1979 he constructed a complex called East lands Cinema on L.R. N0 209/8155 using a short term loan. He decided to apply for a long term loan facility from the plaintiff. In support of his application he annexed a valuation report prepared by Wairagu & Mbuu Associates dated 1st July 1980. He was given a letter of offer for 7 million; this was followed by a charge over his property and a guarantee which he and the 3rd defendants executed. The interest rate under the charge was 13%. The 2nd defendant denied that the plaintiff ever sought his consent to vary the interest rate.

The defendants received a demand letter from the plaintiff recalling the balance of the loan. The 2nd defendant started looking for a buyer so that he could sell the property by way of private treaty. He started negotiating with the Ministry of Social Services who wanted to buy the complex and make it a cultural social centre for 12 million. He therefore approached Bagaini Karanja valuers who valued the property for 11 million. That is why defendants contended that the property was sold by the plaintiff at a gross under value.

During the cross examination the 2nd defendants admitted that he was supposed to pay the loan according to the letter of offer which he signed but he only managed to pay 2 or 3 installments amounting to about Ksh.500,000/- in 1992. The 2nd defendants admitted that when the property was sold, there was an outstanding amount, and he was also trying to sell the property by private treaty.

He also admitted there were many attempts to sell the property but there were no interested buyers.

Wilfred Onono the Managing Director of a consulting firm known as Interest Rate Advisory Centre (IRAC) also gave evidence of how he re calculated the interest of the defendants' loan. He produced a report showing that after the re calculation of the interest, they found that the amount due to the plaintiff is Ksh.57,330,934.85/-. This witness contended that the plaintiff has been over charged a sum of Ksh.127,757,318.55/-.

The above is the summary of the evidence, the parties did not file an agreed statement of issues but each party filed their own issues, the plaintiff framed the following issues for determination.

a. The guarantees were void having been signed separately and not jointly.

b. The claim was usurious and in contravention of Central Bank Regulations, thereby making the entire loan void.

c. The advances made to the defendants were ultra vires the plaintiff's powers.

d. The claim was time barred and the guarantees had lapsed by reason of laches.

e. The guarantees were void by reason of the plaintiff having given the first defendant too much time to repay the debt.

On the part of the defendants the following issues have been framed;

i. Whether the suit is barred by the law of limitation.

ii. Whether there is a legal basis for the plaintiff to claim the sum of Ksh.23,919,862 from the 1st Defendant.

iii. Whether the guarantees executed by the 2nd and 3rd Defendants are void.

iv. Whether the plaintiff had a cause of action as against the defendants.

v. Whether the rights of the 2nd and 3rd defendants under the guarantee if any were compromised by the plaintiff.

vi. Whether the property was sold at an undervalue.

Arising from the above issues the first matter to consider is whether the suit is time barred as contended by the defendants. It is the defendants counsel's submission that under section 4(1) (a) of the Limitations of the Actions Act, an action founded on contract cannot be brought after the expiry of six years. Counsel referred to a letter of offer dated 2nd March 1981 which he argued formed the basis of the agreement between the plaintiff and the defendants, thus going by the time the suit was filed it was time barred. According to the defendants the suit should have been filed on 15th March 1988 and not 11th November 1988. This is because the defendants did not pay the money when it was due on 31st March 1982 when the cause of action started running.

On the part of the plaintiff demand for the outstanding balances was made on 5th February 1983 and that is when the cause of action accrued. The guarantees were continuing and they were payable on demand. Moreover the defendants produced a letter made in September 1985 in which he admitted the outstanding balance, the 2nd defendant requested for three months in which to make payment proposal. This was an admission of debt, thus according to the plaintiff, the issue of limitation is without basis. In any event this is a new issue which is being introduced by submissions.

According to the charge document the defendants were supposed to pay the loan on the 15th April 1981 that was the legal date of redemption or the third day after the loan was advanced to the defendants. According to the statement of account the loan was drawn on 5th May 1981. However, the defendants defaulted in payment and the 1st demand by the plaintiff was made on 11th February 1988. According to the defendants that is when the cause of action accrued. The defendants wrote several letters dated 30th March 1988 and 23rd September 1985 in which they were proposing to be given time to source for buyers so as to sell the property charged and pay the loan. This is an admission of liability on the part of the defendants and the cause of action accrued also from that date.

More importantly the issue of limitation is not pleaded by the defendants if it was the plaintiff could have adduced evidence on the issue. For those reasons, I am not satisfied that this suit is time barred. Moreover the guarantees signed by the defendant were continuing as security for the borrowing until the loan was paid. The loan was demanded on 11th February 1983 that is when the cause of action arose. (See Halsbury's volume 20(1) at page 175 paragraph 269) which states as follows:

"***The creditor's cause of action accrues and time begins to run against him in favour of the guarantor when the guarantor becomes liable to make payment under the guarantee. When that liability accrues depends on the terms of the guarantee. . . . for example, where on the true construction of the guarantee, a valid demand upon t e guarantor is a necessary ingredient of the creditor's cause of action against the guarantor, time will not begin to run until such demand has been made."***

It is not denied that the plaintiff borrowed a sum of 7 million. The 2nd defendant admitted that in their evidence and admitted that they paid two or three installments and had fell in arrears. It is also not denied that the 2nd and 3rd defendants executed the guarantee to secure the borrowing. The only issue raised by the defence is that the interest charged is usurious.

The report by ILAC identified the items that were overcharged amounting to over 127 million. Does this therefore affects the contract or the loan agreement contained in the charge or the guarantee executed by the 2nd and 3rd defendants? In the case of **Githunguri vs. Jimba Credit Corporation 1988 KLR page 825** it was held that:-

"***5. Where a contract on its performance is implicated with breach of statute, this does not entail that the contract be avoided. If a statute is silent on the civil rights of the parties but penalizes the making or performance of the contract, the courts consider whether the Act, on its true construction, was intended to avoid contracts of the class to which the contract belongs or whether it merely prohibited the doing of some act. The contract in this case fell under the category of contracts expressly or impliedly prohibited by statute.***

6. the object of the Banking Act was the protection of the public or depositors. It would be inconsistent with the object and intention of the Act to construe it as allowing the plaintiff to retain the money, which amounted to Shs 90,000,000 of depositor's funds, merely because an officer of the defendant inadvertently contrived the Act"

Apart from the fact that the issues in the above case are distinctly different from the present case, I see no bleach of a statutory provision. The defendants are challenging the interest rates charged and the charge was also faulted by the defendants for failure to indicate the name of the advocate who prepared it. The case of **Obura vs Koome (2001) KLR 175** where the Court of Appeal held that a Memorandum of Appeal which was prepared by unqualified person was incompetent was cited. Drawing an analogy to this case counsel argued that the charge should be declared a nullity for failure to comply with the provisions of section 34 and 35 of the Advocates Act. Can a charge herein be voided for failure to give the address of the firm of the advocates who drew it? Under section 35 of the Advocates Act, as I understand it, the person who fails to indicate the address and endorse the instrument he has prepared can be found guilty of an offence and there is a penal consequences for failure to endorse the address of the drawer. Accordingly, this ground cannot also hold and certainly cannot be used to declare a contract void.

What about the issue of whether the suit property was sold at a throw away price? There is a valuation report carried out by Wairagu & Co. in 1991 showing the property was worth about 11 million. It is however evident from that report of Wairagu & Co. that it incorrectly gave the built up area of the property as 5,660 sq ft. which grossly under estimated the area and therefore must have affected the accuracy of the report. PW2 gave evidence why the property attracted low bids and this is consistent with the evidence that many attempts were made to sell the property by way of public auction and even private treaty including the evidence by the 2nd defendant but they were not interested purchasers. The plaintiff sold the property in a private treaty contract for 4.5 million which is not far from the valuation that was given by Tysons Limited in respect of a forced sale.

Moreover the defendants have not counter claimed for the difference between what he contends to be the market value and what was sold and realized from the property. What is clear is the defendants were in arrears and the plaintiff was entitled to sell the suit premises to recover the loan. That argument also has no basis as the terms of lending and consequences of default in loan repayment were well spelt out in the contract.

The last issue is whether the interest charged by the plaintiff is usurious. The interest according to the charge document was the maximum of 15%. Under the letter of offer and the charge the interest could only be varied, after consultation with the defendants. The calculation of interest was also faulted according to the evidence of PW2 who claims to have re calculated the interest chargeable according to the Central Bank Regulations . The defendants also denied having received any notices purporting to vary the interest rate.

I also take note that under section 26 (1) of the Civil Procedure Act, the court has discretion to award in reasonable interest as it deems fit. I find the interest agreed in the letter of offer and in the charge documents is 13% and I therefore fix the interest chargeable at the rate of 13%. For the foregoing reasons I find the plaintiff has proved the case against the defendants, the plaintiff advanced money to the defendants. The loan was not paid, the plaintiff realized the security but the account was not fully settled.

Judgment is hereby entered against the defendants as prayed in the amended plaint with interest at the rate of 13% from the date of filing of this suit. The plaintiff will also have the costs of this suit.

JUDGMENT READ AND SIGNED ON 30TH OCTOBER 2009 AT NAIROBI.

M.K. KOOME

JUDGE