



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL APPEAL 77 OF 2006**

BENSON KIBUGI RIGII.....APPELLANT

VERSUS

ANSELIMY AERODI ABENJIRA.....RESPONDENT

JUDGMENT

The appellant filed in the Chief Magistrate's Court on 3rd May 2005 a suit against Anselimy Aerodi Abenjira (hereinafter the respondent) seeking a declaration that the appellant is entitled to vacant possession of Plot Number 9/22/XV Majengo, Mombasa for purposes of selling the same as per a Chattel's Transfer Investment. In the alternative the appellant sought refund of Kshs. 33,000/= together with interest at 25% p.a. from 20th November 1996 until payment in full. The appellant also sought costs and interest. The foundation of the appellant's claim is pleaded in paragraphs 3, 4, 5 and 6 of the plaint. In paragraph 3, the appellant avers that by a Chattel's Transfer Investment dated 20th November 1996 the respondent agreed to transfer the property stated above to the plaintiff as security for the payment of Kshs. 33,000/= which was due and owing to the appellant from the respondent. In paragraph 4 it is pleaded that it was a term of the Chattels Transfer that in the event of default of payment of the said sum of Kshs. 33,000.00/= the appellant would take possession of the property and sell the same to recover his money. In paragraph 5 the appellant avers that the respondent has failed and/or refused to pay the said sum and the appellant has become entitled to possession of the said property for purposes of selling the same to recover the said money. In the premises the appellant sought the said declaration and in the alternative recovery of the said sum.

The respondent delivered his defence on 15th June 2005. In paragraph 3, he averred that there was an agreement between himself and the appellant whereby the Loan was being repaid to the appellant's advocates by installments and the respondent is still continuing with the installments. In view of that defence, the appellant lodged a Notice of Motion for judgment on admission. When the Motion on Notice came up for hearing, counsel for the respondent raised a Preliminary Objection notice whereof he had given. The objection was premised on the ground that the appellant's suit was statute barred and should be dismissed with costs. The Learned Resident Magistrate upheld the objection and struck out the plaint as in his view, it offended the provisions of the Limitation of Actions Act. That ruling provoked this appeal. There are two primary grounds of appeal expressed as follows:-

- 1) That the Learned Trial Magistrate erred in law and in fact in failing to appreciate that the respondent had not complied with the requirements of Order VI Rule 4 of the Civil Procedure Rules.**
- 2) That the Learned Trial Magistrate erred in Law and in fact in finding that a notice of Preliminary Objection was a pleading.**

Counsel for the appellant argued the grounds together. The substance of his argument is that the plea of

limitation must be specifically pleaded and as the respondent failed to do so, his preliminary objection should have been overruled. In that regard, the Learned Resident Magistrate erred in holding that a Notice of Preliminary objection was a pleading. Reliance was placed upon the Court of Appeal decision in **Achola & Another – v – Hongo & Another** in which it was held *inter alia* as follows:-

“1. The provisions of the Civil Procedure Rules Order VI Rule 4

(1) and (2) required the second respondent to specifically

plead the statute on whose provisions he relied in seeking to defeat the appellant’s claim. The respondents were obliged to specifically plead limitation based on statute before being allowed to use it as the basis of the Preliminary Objection.

2. The second respondent having failed to plead limitation in its defence, it was not entitled to rely on that issue and base a preliminary objection on it and it was not entitled to rely on that defence during the trial of the suit unless it amended its defence.

3. The High Court was not right in allowing the issue of limitation to be raised when it had not been pleaded and in upholding the preliminary objection of the second respondent based on the issue of limitation.”

Counsel for the respondent in response argued that the appellant’s claim as pleaded was hopeless and could not be cured by amendment. He therefore saw no reason why the decision of the Learned Resident Magistrate should be disturbed.

Having considered the pleadings, the Grounds of Appeal, the submissions of counsel and the authorities cited, I have come to the conclusion that this appeal must be allowed. The Learned Resident Magistrate dealt with an issue that was similar to the one considered by the Court of Appeal in the **Achola & Another – v – Hongo & Another (supra)** case. In my view, if that decision had been brought to the attention of the Learned Resident Magistrate, he would not have upheld the respondent’s preliminary objection. I have perused the respondent’s defence. The respondent does not plead limitation. Indeed, in my view, the defence in its present form excludes the plea of limitation. The respondent’s averment in paragraph 3 already referred to above appears to admit the alternative claim of the appellant and the respondent’s averment that he is continuing with installments revives the appellant’s claim even if it may have been statute barred. So, the respondent not only failed to plead limitation as required by Order VI Rule 4 (1) and (2) of the Civil Procedure Rules, but specifically excluded such a plea. The finding of the Learned Resident Magistrate that a Notice of Preliminary Objection is a pleading although erroneous was consequential as the respondent’s own pleading in the statement of defence did not avail the plea of limitation to the respondent.

The respondent’s argument that the entire plaint was hopeless does not hold water. With respect, the Learned Resident Magistrate considered a specific plea raised by the respondent which has given rise to this appeal. The respondent cannot now seek to support the decision of the Learned Resident Magistrate on other grounds.

It is clear therefore that the Learned Resident Magistrate was not right in allowing the issue of limitation to be raised when it had not only not been pleaded but was not available to the respondent in view of his averments in his written statement of defence.

I accordingly set aside the ruling and order of the Learned Resident Magistrate dated 9th May 2006 striking out the appellant’s plaint and substitute that order with one dismissing the respondent’s preliminary objection. The appellant’s plaint is restored and the suit should proceed in the usual way.

The appellant will have the costs of the appeal.

Judgment accordingly.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF MAY 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Kariuki for the Appellant.

F. AZANGALALA

JUDGE

8TH MAY 2008