



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 10 of 2005

NATIONAL BANK OF KENYA LIMITED..... PLAINTIFF

VERSUS

FELIX OLE NKARU..... DEFENDANT

JUDGMENT

The plaintiff filed suit against the defendant seeking judgment to be entered against the said defendant for the sum of KShs.2,262,838/60 together with interest at the rate of 20% per annum until payment in full. The plaintiff further prayed for costs on the suit. In its plaint, the plaintiff averred that the said amount had accrued from a loan of KShs.100,000/= which was advanced to the defendant in 1991 at the defendant's own request. The plaintiff averred that the defendant charged his property i.e. LR No.Ruiru/Ruiru East Block 4/40. The plaintiff had attempted on several occasions to realize the security charged but all in vain. It was due to its frustration to sell the suit property that the plaintiff filed the present suit.

The defendant filed defence to the plaintiff's claim. He denied owing the plaintiff the sum pleaded in the plaint. He further denied borrowing any amount from the plaintiff and put the plaintiff to strict proof thereof. The defendant averred that the interest charged by the plaintiff on the principal sum was excessive and unconscionable and therefore not recoverable. The defendant stated that the plaintiff's suit was time barred in view of the provisions of the Limitation of Actions Act and therefore the plaintiff's suit did not disclose any reasonable call of action. The defendant averred that similarly the interest on the principal sum was not recoverable on account of the same being time barred. The defendant stated that the entire debt had been written off by the plaintiff before the suit was instituted and consequently the entire suit was misconceived. The defendant averred that the plaintiff's suit was therefore a nullity in law. He prayed for the plaintiff's suit to be dismissed with costs.

The plaintiff filed a reply to the defence filed by the defendant. The plaintiff denied that its suit was time barred and further denied that the defendant was entitled to have his defence upheld in view of the issues pleaded in the said defence. The plaintiff prayed for its claim to be allowed with costs. The parties to this suit concluded discovery and agreed on the issues to be placed before the court for determination.

At the hearing of the suit, the plaintiff called one witness, Joseph Cheptumo to testify on its behalf. Joseph Cheptumo is an accounts manager with the plaintiff. The defendant did not offer any evidence in support of his defence. The evidence adduced by the plaintiff was therefore uncontroverted. It was the plaintiff's case that the defendant did on 16th December 1991 apply to be advanced a loan for the sum of KShs.180,000/=. The defendant's application was produced in evidence by the plaintiff. The plaintiff

did, by its letters of offer dated 18th December 1991 and 23rd January 1992, advance to the defendant a loan of KShs.140,000/=. The defendant was required to pay the said loan within a period of thirty six (36) months. The defendant charged his property being LR No.Ruiru/Ruiru East Block 4/40 Kiambu as security for the advance of the said amount. It was apparent from the correspondences produced in evidence by the plaintiff that the defendant failed to repay the said loan that he was advanced. The plaintiff on two occasions attempted to realize security by instructing the auctioneers to sell the same. The plaintiff was however unsuccessful in realizing the said security. The two attempts to realize the security were made in 1997 and in 1998 respectively.

It was after the plaintiff failed to realize the security that it filed the present suit. The plaintiff adduced evidence in support of its claim for the sum of KShs.2,262,838/60 plus interest at the rate of 20% per annum until payment in full. The plaintiff produced the documents that it relied on in support of its case as plaintiff's exhibit No.1. After the close of the plaintiff's and the defendant's case, counsel for the plaintiff and counsel for the defendant filed written closing submissions. The issue for determination by this court is whether the plaintiff is entitled to the prayers sought in its plaint.

As stated earlier in this judgment, the evidence adduced by the plaintiff in support of its case was uncontroverted. The defendant did not adduce any evidence to controvert evidence adduced by the plaintiff. It is not therefore in dispute that the plaintiff advanced to the defendant the sum of KShs.140,000/= in the years 1991 and 1992, which sum the defendant failed to repay. It is further not disputed that the plaintiff's attempt to realize the security that was charged to it failed hence its decision to file the present suit against the defendant. The defendant, both in his defence and in the closing submission stated that the suit against him was barred by the Limitation of Actions Act since the plaintiff had filed the suit against him beyond the twelve (12) years contemplated under the said Act.

It was evident that the defendant did not dispute owing the amount that was advanced to him together with the accrued interest thereto. His defence seems to be that the plaintiff's suit against him was time barred. The defendant relied on Section 19 of the Limitation of Actions Act which provides as follows:

“(1) An action may not be brought to recover a principal sum of money secured by a mortgage on land or moveable property, or to recover the proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued.

(2)...

(3)...

(4) An action to recover arrears of interest payable in respect of any sum secured by a mortgage or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears, may not be brought after the end of six years from the date on which the interest became due ...”

In response to the submissions made by the defendant in regard to whether the suit was time barred, the plaintiff while acknowledging that it had filed suit more than thirteen years after it had advanced the loan to the defendant, submitted that the defendant had in 1999 and also in 2005 acknowledged being indebted to the plaintiff. The plaintiff submitted that the said acknowledgement of indebtedness by the defendant constituted a waiver on the effective date that ought to be considered as when the suit is to be considered as being barred by the provisions of the Limitation of Actions Act.

I think the defendant is incorrect in stating that the plaintiff's suit was time barred. My interpretation of Section 19(1) of the Limitation of Actions Act is that the limitation period, in a suit to recover the principal sum of money secured by a mortgage of land, starts running from the date when there is default on the repayment of the money and the bank has made a demand for the repayment of the same. From the exhibits produced by the plaintiff as plaintiff's exhibit No. 1, the plaintiff gave notice of default to the defendant on 23rd October 1997. The redemption notice was issued on behalf of the plaintiff by El Dima Limited, a firm of auctioneers, notifying the defendant of its intention to sale of the charged property. The limitation period of twelve years therefore started running from 1997 when the right to recover the money

accrued. That period expires in 2009. The plaintiff filed its suit in 2005. The defendant cannot therefore claim that the plaintiff's suit was time barred.

Further, according to Section 23 and 24 of the Limitation of Actions Act, where a mortgagor acknowledges being indebted to the mortgagee or where part payment in settlement of the principal sum or the interest thereof is made, the limitation period shall run from the date of such acknowledgment or part payment. In the present suit, the defendant wrote three letters to the plaintiff acknowledging indebtedness to the defendant. In the first letter dated 4th May 1999, the defendant acknowledged being indebted to the plaintiff to the then sum of KShs.1,553,644/10. The plaintiff undertook to liquidate the outstanding amount by selling some of his cattle and goats. On 23rd May 2005, the defendant again acknowledged being indebted to the plaintiff. The defendant however pleaded with the plaintiff to waive the interest that had accrued. The defendant did not stop there. On 8th April 2005, the defendant instructed his advocate to make a proposal to the plaintiff regarding the mode of repayment of the amount that he admitted owing to the plaintiff. It was instructive that the said letter was not written on without prejudice basis.

In Fidelity Commercial Bank Ltd vs. Holiday Investments (K) Ltd & 2 others Nairobi HCCC No. 971 of 2002 (unreported), and VK Construction Co. Ltd vs. Mpatia Investments Ltd Nairobi HCCC No. 257 of 2003 (unreported) it was held that where the debtor acknowledges indebtedness after the limitation period has expired, such an acknowledgment constitutes a fresh cause of action. It is therefore clear from the foregoing that since the defendant acknowledged being indebted to the plaintiff, firstly in 1999 and subsequently thereafter in 2004 and 2005, the defendant cannot rely on Section 19 of the Limitation of Actions Act to defeat the plaintiff's claim.

Since the defendant offered no evidence to controvert the plaintiff's claim, it is apparent that the plaintiff's claim, being unopposed is for granting. I hereby enter judgment in favour of the plaintiff and as against the defendant for the sum of KShs.2,262,838/60. Interest shall be applied on the said amount from the date of filing suit at court rates until payment in full. The plaintiff shall have the costs of the suit.

DATED at NAIROBI this 4th day of NOVEMBER 2008.

L. KIMARU

JUDGE