



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO.691 OF 2001

INDUSTRIAL AND COMMERCIAL

DEVELOPMENT CORPORATION.....PLAINTIFF

VERSUS

SAMUEL WESLEY NYANCHOGA.....DEFENDANT

R U L I N G

When this suit came up for hearing on 22nd September, 2004 learned counsel for the Defendant raised a preliminary objection to the suit on a point of law. That objection, as set out in the notice dated 13th September, 2004, is that –

(a) The suit is incompetent and/or time-barred; and

(b) in the alternative and without prejudice to (a) the suit contravenes the provisions of Section 74 of the Registered Land Act, Cap.300.

The submissions of the learned counsel for the Defendant were that the loan agreement from which the suit arose was executed on 5th December, 1991; that repayment was due to commence on 15th March 1992 and spread over 60 monthly instalments (paragraph 3 of the plaint); that in the event of default of payment of any instalment the full amount of the loan then outstanding would become due and payable immediately; that it is pleaded in paragraph 5 of the plaint that by notice dated 17th May, 2000 the Plaintiff called upon the Defendant who was in breach of the contract to repay the loan granted and interest but that the Defendant refused and/or failed to pay. Learned counsel further submitted that the first instalment fell due on 15th March, 1992 and that therefore that is when the cause of action accrued. The suit having been filed on 14th May, 2001, some ten (10) years after the cause of action accrued, the suit is statute-barred under Section 4(1) (a) of the Limitation of Actions Act, Cap.22 as far as the principal sum of Kshs.100,000.00 is concerned. Counsel also submitted that the interest claimed is also statute-barred under Section 19(4) of the same Act as interest became due and payable from 15th March, 1992.

Learned counsel also argued, in the alternative and without prejudice, that the suit contravenes Section 74 of the Registered Land Act, Cap. 300, in that no charge is pleaded. That Section provides various remedies to the chargee where default is made in payment of the principal sum advanced or of any interest payable. I cannot quite see the point the learned counsel sought to make in this regard. To begin with no charge under the Registered Land Act, Cap.300 is pleaded in the plaint. Only a loan agreement is pleaded. Even in the Defendant's defence there is no reference to such charge. And even if a charge under

Cap.300 had been pleaded, the Plaintiff would have been entitled under Section 74 (3) (a) of the said Act to bring the suit as it is pleaded in the plaint that the Defendant was bound to pay the amount advanced and interest. There is no merit in this point taken in the alternative.

The reply of learned counsel for the Plaintiff was that the cause of action accrued after expiry of the 60 month period for repayment of the loan advanced and interest, which according to him was some time in 1997. The suit was therefore filed well-within time.

The submissions of the learned counsels appearing, I must point out, were based upon evidence that was not before the court and which they sought to give from the bar. That evidence included the all-important loan agreement dated 5th December, 1991 pleaded in paragraph 3 of the plaint. Learned counsel for the Defendant should have brought a formal application under Order VI, rule 13 of the Civil Procedure Rules in order to exhibit the loan agreement in the supporting affidavit. As it is, the court is being asked to decide an important issue of law upon facts that are not agreed and that are not before the court. The court cannot depend upon the conflicting interpretations by counsel of a contract between the parties that has not been produced before it. This preliminary objection has been a useless and futile exercise. It has been a complete waste of time. I hereby dismiss it with costs to the Plaintiff.

Order accordingly.

DATED AND SIGNED AT NAIROBI

THIS 14TH DAY OF OCTOBER, 2004

H. P. G. WAWERU

JUDGE

DELIVERED THISDAY OF OCTOBER 2004