



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 534 OF 2003**

HARITH ALI EL-BUSAIDYPLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED ...DEFENDANT

RULING

The Plaintiff's application is a chamber summons dated 17th October 2003.

The date of hearing of that application was fixed by consent before me for the 13th October 2004. When this matter was called out on that date the defendants counsel was absent and the same proceeded *ex parte*.

The application is brought under Order 9 Rule 2 (3), Order 8 Rule 1 (2) and Rule 7 and 13 (1) (b) and (d) of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act.

The Plaintiff seeks the following orders: -

- (1) That the defendant's statement of defence filed herein be struck out and interlocutory judgment be entered for the Plaintiff in terms of the Plaintiff.
- (2) That a date be assigned for assessment of general damages.

The Plaintiff began by informing the court that he was not now proceeding under Order 9 because since the filing of this application the defence and memorandum of appearance had been regularised.

Counsel submitted that the history of this matter was that on 20th December 1985 the Plaintiff offered the suit property as guarantee to secure facility, which was advanced to Cleopatra Theatre Ltd; the limit of the charge created was kshs 900, 000/-. By a letter dated 24th November 1993 the defendant offered Cleopatra Theatre Ltd a new facility and that letter, he said was the basis of this case. That letter counsel said required a debenture to be registered, fresh director's guarantees to be executed and fresh resolution of the company. Those were necessary before any draw down could be effected. That letter counsel argued was never signed and was never returned to the bank and accordingly there was no contract by which the plaintiff could be held liable. Counsel said that there was no evidence that a charge ensued after the said letter of offer upon which the defendant could sell the plaintiff's property as they had attempted to do, hence this suit. By paragraph 4 of the defence counsel said that the defendant was relying on a 1985 charge yet by the letter of 1993 that charge had been satisfied.

Plaintiff's counsel argued that, that charge was caught by the Limitation Act and in this regard he relied on the case of *RICHES – V – DIRECTOR OF PUBLIC PROSECUTIONS: (1973) ALL E R page 935* , which held that where there was clear that a plaintiff relied on statute then there was no defence.

Plaintiff's counsel then drew the court's attention to the defence hereof, and stated that it does not distinguish between the guarantor and principal debtor.

Unfortunately the court did not have the benefit of hearing the arguments in opposition of this application on behalf of the defendant and the plaintiff's contentions were therefore controverted.

That being the case the court grants the following orders: -

- (1) That the Plaintiff's application dated 17th October 2003 is granted in terms of prayer NO. 1 and 3 thereof.**
- (2) That the Plaintiff will proceed to fix a date at the registry for assessment of damages.**

Dated and delivered this 10th day of November 2004.

MARY KASANGO

JUDGE