

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.1042 OF 1996

CANNON ASSURANCE (KENYA) LTD PLAINTIFF

VERSUS

SILVESTER KURIA KINYANJUI & ANOTHER..... DEFENDANTS

R U L I N G

The 2nd Defendant has raised a preliminary objection on the ground that this suit is barred by the Limitation of Actions Act (Cap 22). The matters leading to the objection are briefly as follows:- The Plaintiff's case is that it lent a substantial amount of money to the 1st Defendant which was secured by way of mortgage over property defined as L.R. 330/537 (hereinafter referred to as "the suit land"). In 1984, the 2nd Defendant commenced proceedings in this court against the 1st Defendant in miscellaneous High Court Civil Case No.15 of 1984 (O.S) by which the suit land was vested in the 2nd Defendant against the 1st Defendant in an order made on 2/3/1984. The Plaintiff filed this suit on 15 of 1984 (O.S.) was made without its notice and without a determination of its interests as mortgages of the suit land. The Plaintiff seeks among others a declaration that the order complained of was in contravention of its statutory rights as secured by the mortgage.

Mr. Wandaba for the 2nd Defendant argued that since the Plaintiff's cause of action against the 2nd Defendant was premised on the Judgment given in March, 1984, it was barred by section 4(4) of the Limitation of Action for having been filed after the expiry of 12 years. Mr. Chacha for the Plaintiff argues that the objection ought to be rejected as the 2nd Defendant ought to have made a formal application since if the preliminary objection were to be upheld it would have the effect of striking out the plaint. In that regard he cited the case of **Narshida & Co., Ltd V. Nyali air conditioning and Refrigeration Services ltd.** NAI Civil Appeal No.205 of 1995. He also referred to the case of **Shirinkham V. Divecon** and argued that points of limitation are to be taken during examination. He argued that vide section 23 of the Limitation of Actions Act, the exceptions given there as concerns acknowledgements or part payment were worthy of consideration. Mr. Chacha submitted that his client's case was not based only on the Judgment but also as mortgage and that the Plaintiff wanted a declaration that he was entitled to all rights to the suit land as mortgagee.

Mr. Wandaba in reply argued that the Plaintiff's argument regarding acknowledge, had not been pleaded. It is obvious that the Plaintiff has based its claim on the Judgment mentioned earlier. It is that Judgment that it alleges to have interfered with its rights as mortgagee. If it was not for that Judgment, the Plaintiff would have agitated its claim as mortgagee with reference to that Judgment. It is also clear that this suit was brought without the 12 years period allowed for action on Judgment and for that reason the same cannot be maintained. I do not agree with Mr. Chacha that the 2nd Defendant was obliged to bring a formal application to have her preliminary objection argued. The Notice that was filed and served was satisfactory. It is unnecessary for an objector who relied on a pure point of law to file a formal application. He is not interested in the facts; he does not dispute that claim against him. All he does is to say that the claim as stated does not afford the Plaintiff any remedy in law (see generally **Mukisa Biscuit Manufacturing Co., Ltd V. West End Distributors Ltd.** {1969} E.A. 696 at 701, the observations of SIR CHARLES NEWBOLD P. on preliminary objections.)

The **Narshida & co., Ltd.** case cited by Mr. Chacha does not apply to this case since the 2nd Defendant does not ask that the plaint be struck out. His argument simply is that the suit has been filed out of time, and is barred by the Limitation of Actions Act. Finally, the Plaintiff cannot allege acknowledgement at this time, as the same has not been pleaded in the plaint. In **Ghelani V. Radia** {1968} a preliminary point of law similar to the present one was argued and FUAD J. upheld the objection and dismissed the suit without any formal application being made. In that case, the defendant received money for use by the

Plaintiff. The Plaintiff filed suit after limitation period without leave. The Plaintiff made attempt, without pleading, to argue that the case out of the limitation bar. FUAD J held that his pleading the Plaintiff has not shown any ground upon which he could escape the application of the Limitation Act and went a head to dismiss the suit for being statute-barred. The preliminary objection is allowed with costs to the 2nd defendant.

Dated and delivered at Nairobi this 30th day of October, 2000

ALNASHIR VISRAM

COMMISSIONER OF ASSIZE