African Banking Corporation Limited v Dokoria (Civil Appeal E069 of 2023) [2024] KEHC 4550 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEHC 4550 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E069 OF 2023

DKN MAGARE, J

MARCH 7, 2024

BETWEEN

AFRICAN BANKING CORPORATION LIMITED ..... APPELLANT

AND

MOSES OMOIT DOKORIA ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the Ruling and order of the honourable D O Mbeja delivered on 23/2/2023. Appellant filed 4 grounds of Appeal, namely:
    a. The learned magistrate erred in law and in fact in finding that the suit was time barred
    b. The learned magistrate erred in law and in fact by misapplying provisions of the law
    c. The learned magistrate erred in law and in fact in failing to appreciate the nature of dispute before it, thereby arriving at a finding that the suit was time barred.
    d. The learned magistrate erred in law and in fact in failing to appreciate the evidence and authority adduced by the Appellant
2. The matter was dismissed for being time-barred. The loan was taken as an overdraft with a tenure of 3 months, ending 22/8/2010. According to the Respondent, the claim became time barred within 6 years of default. The Appellant maintained that this was a continuing security and as such continued in perpetuity.

The Appellant's submissions

3. The Appellant stated that they relied on the case of Habib Bank A.G. Zurich v Rajnikant Khetshi Shah [2018] eKLR: -

> " The Judge held and rightfully so that as long as the legal charge was not discharged, it was a continuing security and as long as the debt it secured remained unpaid a suit can be filled either to recover the debt or to discharge the charge. The learned Judge was spot on this issue and we find ourselves agreeing that as long as the contract is tied to a legal charge that is a continuing security; until the debt is paid and the security is discharged none of the parties' claim can be time barred. A cause of action under a continuing security never dies or lapses."

4. The appellant relied on the case of Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation [2019] eKLR where the court of Appeal (Koome, Warsame & Kiage, JJ.A) stated as doth: -

> " It must be stated that the extent of the liability of a Guarantor is always dependent on the contract between the parties. The deed of Guarantee and Indemnity dated 15th May, 1992 and signed by the appellants and its co-guarantors (Majani Mingi Sisal Estate Limited, Lomolo (1962) Limited and Harris Horn Junior) state that the guarantees should not exceed 30,000,000 with interest.
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> Clause 1 states:
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> "Payment under this guaranteed shall be free of any set-off or counterclaim PROVIDED ALWAYS that subject to Clause 4 hereof the total liability ultimately enforceable against the Guarantor under this guarantee should not exceed the sum of Shillings 30 MILLION together with interest at the maximum rate allowed by law to be charged or if there is no such maximum rate then at the rate payable by the Borrower from the date of demand for payment ..."
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> Upon default by the 2nd appellant, the guarantees were called in against all the personal and corporate guarantees in separate letters dated 13th September, 1994. Unfortunately, the suit in the High court was filed in the year 2013, which was 20 years after notices of default were issued. This was contrary to Section 4 of the *Limitation of Actions Act* which bars any cause founded on contract from being brought after the lapse of 6 years from the date when the cause of action accrued. The law is clear that this Court has no discretion to extend the period of limitation (see Court of Appeal in Divecon vs. Samani [1995-1998] 1 EA 48) neither does it have the powers to grant any relief where a remedy is time-barred. (Habib Bank A.G. Zurich vs. Rajnikant Khetshib Shah, Civil Appeal No. 233 of 2016). We ardently agree with the observations by Potter, JA in Gathoni vs. Kenya Cooperative Creameries Limited, Civil Application No. 122 of 1981 where he stated:
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> "The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."
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> We find that the Judge in upholding this position rightfully upheld the 2nd, 3rd, and 4th defendants' defence on statutory limitation against the counterclaim. The 1st appellant faced no such luck. It is trite law that as long as a contract is tied to a legal charge there is a continuing security; until the debt is paid and until the security is discharged, none of the

parties can claim a cause of action based on a charge to be time-barred. A cause of action under a continuing security never dies or lapses."

5. They submitted that financial institutions advance facilities on the strength of securities issued to borrowers based on their creditworthiness. It was their view that the Respondent concealed the whereabouts of the security.

6. They stated that the courts must balance between institutions and borrowers, especially those who have refused or ignored to repay or have untraceable assets leading to untraceable leading to lapse of time.

7. They stated that they filed the case on 14/11/2022 over a loan secured on the security of Motor Vehicle Registration Number KAS 898 Q. They stated that the accrued interest does not lapse.

8. It is their case that the security was tied to the contract and as such was on a continuing security. It is their case that the vehicle was yet to be discharged and its location is concealed. They stated that the section of the law relied on was not the correct one.

9. They pray that the sum of Ksh. 800,000/= was an investment that continues to accrue interest till paid in full.

10. The Respondent filed submissions dated 23/10/2023, where they stated that there are 4 main issues for determination:

    a. Whether the prayer for Reinstating the main suit for hearing and determination is valid.

    b. Whether the appellant's claim/suit is time-barred.

    c. Whether the security herein is a continuing security

    d. Who should bear the costs of the suit?

11. The Respondents submitted that the court cannot reinstate a fatally defective suit. The appeal was thus incurably defective and the court was incurably defective. They stated that the case should be summarily rejected under Sections 79C and 79 B of the *Civil Procedure Act*.

12. There was a letter of offer was made on 27/5/2010. It related to a three-month temporary overdraft facility to be repaid in three months. The demand indicated that the parties agreed that in the absence of demand or cancellation, the loan was to be repaid by 22/8/2010. The parties agreed that there was no demand for cancellation. It was also noted that the default occurred immediately. In any case,the case had a specific sale-by date.

13. The issue of Limitation and the computation of time is derived from the contract and the Respondent submits that it is not in dispute that the term of the contract called "Expiry"- is in effect describing the end of the contract and means it to be on 22nd August 2010- This means by contractual obligation the loan facility period of bringing an action starts from 22nd August 2010 and expires in 6 years been 22nd August 2016.

14. The Respondent submitted that the suit in the lower court was filed on 3/11/2022, that is, 12 years from the date of the cause of action being 22/8/ 2010. The suit was time-barred. It was inordinate, malicious and mischievous. They relied on the case of Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR where the court of appeal stated as follows: -

    " It is common ground that the cause of action in this matter was based on contract and that section 4 of the *Limitation of Actions Act* prohibits suits filed after the end of six years from

the date on which the cause of action accrued. As Potter, JA observed in the case of Gathoni vs Kenya Cooperative Creameries Limited (Civil Application No. 122 of 1981):

"The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest." The Respondent submits that time to recover any sums and also an action on contract is by law prescribed to be six (6) years and this period in law cannot be extended.

15. They relied on the case of Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR, where the court of appeal sitting in Nairobi held in 2017 as follows: " –

> " It is also trite law that the period of limitation cannot be extended. If any authority is necessary, this Court in Divecon vs Samani (1995-1998) EA 48 stated as follows: -
>
> "....to us, the meaning of the wording of section 4 (1) is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that „„the wording of section 4 (1) of the *Limitation of Actions Act* (Chapter 22) suggests a discretion that can be invoked?"

16. They stated that the conduct of the Appellant bank as summed up above mirrors the conduct of another bank in the case of Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited [2014] eKLR. On the issue of charging interest, (increased from 14% to 45% in that case) this Court examined comparative jurisprudence and concluded that, even where a lending institution has a written clause permitting it 'In its sole discretion from time to time to charge different rates for different accounts and such interest to be calculated on daily balances and debited monthly by way of compound interest and together with commission, commitment charges, and other usual bank charges and other costs and expenses incurred or to be incurred by the Bank about the customer,' the discretion was not absolute.

17. They stated that it cannot be exercised willy-nilly to charge exorbitant interest. They relied on the case of Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR, where the court of appeal sitting in Nairobi held "The conduct of the bank as summed up above mirrors the conduct of another bank in the case of Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited [2014] eKLR. On the issue of charging interest, (increased from 14% to 45% in that case) this Court examined comparative jurisprudence and came to the conclusion that, even where a lending institution has a written clause permitting it 'In its sole discretion from time to time to charge different rates for different accounts and such interest to be calculated on daily balances and debited monthly by way of compound interest and together with commission, commitment charges, and other usual bank charges and other costs and expenses incurred or to be incurred by the Bank in relation to the customer,' the discretion was not absolute. It cannot be exercised willingly to charge exorbitant interest."

18. The Respondent submitted that It is not in dispute that the document that formed the contract is the letter of offer dated 27th May 2010. That letter of offer did not have in it a clause referring to a continuing security. It did not have a term that the security offered being the motor vehicle is to be a continuing security. Therefore, this court has no basis to determine where the continuing security

was created between the parties, and in law, any claim of a term that was not agreed by consent in the contract between the parties cannot be imposed on any one party. It was their case that the Respondent could not be forced to accept that there was a term establishing the car as a continuing security. They placed reliance on the case of John Karanja Kichaga & another v Jamii Bora Bank & 2 others [2020] eKLR, which held as doth: -

> " In this regard, the Bank submitted that the definition may be borrowed from the case of Equip Agencies Limited v I & M Bank Limited [2017] eKLR where Nzioka J. observed:
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> "40. The doctrine of "continuing securities" in banking transactions arises from the practice whereby the banks do offer facilities that may be rolled over or renewed if the terms and conditions of the facility remain materially unchanged, and the doctrine takes effect. However, the said facilities must be within the headroom created by the securities."

19. The Respondent stated that the arguments that the cause of action begins anew every year that interest is added with interest has been made unlawful in jurisprudence because while this position was captured in the high court case of deposit Protection Fund vs Rosaline Njeri Macharia & Another HCCC No. 399 of 2005, the position was departed from in appeal in the case of Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) vs Rosaline Njeri Macharia & Another [2016] eKLR where the same court of appeal as sitting in the annexed court of appeal case of Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR where the court of appeal sitting in Nairobi held in 2017 as follows: -

> " As to whether the suit was statute barred under the *Limitation of Actions Act*, the suit was filed on 19th July 2007. By dint of paragraphs 24, 25, 26, 28, 29 and 30 of the plaint, the cause of action was pleaded to have accrued on 27th July 1999 when the alleged breach of contract occurred. As the breach was of a contract relating to lending of money whose security instrument is contested, section 4(1)(a) of the Limitations of Actions Act, Cap 22 requires that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. In this appeal, the "suit" having been instituted in 2007 when the accrual of the cause of action was in July 1999, it was filed outside the six years and consequently was time-barred, if indeed, it was a suit."

20. They submitted that the issue of continuing security also implies that interest is accountable every year and the position of law on this is that that does not suffice on an action founded on contract and it does not operate to defeat the purpose of legislation as drafted and in particular the operation of section 4 of the limitation of actions acts.

Analysis

21. This is a fairly straightforward appeal. The Appeal relates to a suit filed on 22/11/2022. It arose from a contract for a temporary overdraft facility given on 27/5/2010. The contract provided that the said amount of 800,000/= was payable within 3 months unless cancelled or demanded it was to be paid by 22/8/20210.

22. The amount was not paid and as such full default occurred on 22/8/2010. Since default occurred on the said date, the claim became time-barred by 22/8/2016. The suit was filed 6 years and 3 months after the claim became time-barred. The contract claim can only be saved, if there was an acknowledgment of the debt within the meaning of section 23 of the *Limitation of Actions Act*.

23. Section 3 of the *Limitation of Actions Act*, provides as follows: -

> " Part subject to Part III This Part is subject to Part III of this Act, which provides for the extension of the periods of limitation in the case of disability, acknowledgment, part payment, fraud, mistake, and ignorance of material facts."

24. The same appears to have been secured on the security of a chattel mortgage over Motor Vehicle Registration Number KAS 898 Q. The dispute is whether this was a continuing security.

25. Sections 23 and 24 of the Limitation of actions provide as follows: -

> " 23. Fresh accrual of the right of action on acknowledgment or part payment
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> (1) Where— (a) a right of action (including a foreclosure action) to recover land; or (b) a right of a mortgagee of movable property to bring a foreclosure action in respect of the property, has accrued, and—
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> (i) the person in possession of the land or movable property acknowledges the title of the person to whom the right of action has accrued; or
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> (ii) in the case of a foreclosure or other action by a mortgagee, the person in possession of the land or movable property or the person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest, the right accrues on and not before the date of the acknowledgment or payment.
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> (2) Where a mortgagee is, by virtue of the mortgage, in possession of any mortgaged land and either receives any sum in respect of the principal or interest of the mortgage debt or acknowledges the titles of the mortgagor, or his equity of redemption, an action to redeem the land in his possession may be brought at any time before the end of twelve years from the date of the payment or acknowledgment.
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> (3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgment or the last payment: Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but payment of interest is treated as a payment in respect of the principal debt.
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> 24. Formalities as to acknowledgments and part payments
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> (1) Every acknowledgment of the kind mentioned in section 23 of this Act must be in writing and signed by the person making it. (2) The acknowledgment or payment mentioned in section 23 of this Act is one made to the person, or to an agent of the person, whose title or claim is being acknowledged, or in respect of whose claim the payment is being made, as the case may be, and it

may be made by the agent of the person by whom it is required by that section to be made.

26. The alleged acknowledgment did not meet the criteria for extending time. In the circumstances, there was no acknowledgment. Further, there was the aspect of pleading. The alleged acknowledgment was not pleaded. Parties are bound by their pleadings. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, A C Mrima stated as follows: -

> "
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> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
>
> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

27. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity to place the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

28. Under order 2 rule 4 of the Civil Procedure Rules, provides as follows; -

> "
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> " 4. Matters which must be specifically pleaded [Order 2, rule 4.]

(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not

maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence, on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

29. The aspect of acknowledgment is not useful. We then move to the second aspect. The time bar. Section 4 of the *Limitation of Actions Act* provides as follows:

"4. Actions of contract and tort and certain other actions

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture; (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

30. In this case, the date of accrual is crucial. The accrual occurs on the first date the cause of action arose. This is the first date of default and not the date the contract was entered into. In the case of Joseph Odira Ombok v South Nyanza Sugar Company Ltd [2018] eKLR, Justice D S Majanja stated as follows: -

"14. The trial magistrate held that in either case, the appellant's claim was statute-barred. That the agreement between the parties was signed on 4th January 1995 was not in dispute. In the former case, the first breach would have occurred at least 2 years into the agreement when the plant crop was expected to have been harvested hence the suit would have to be filed 4th January 2003 latest. In the latter case, the agreement would expire on 4th January 2000, and by that argument, the claim ought to have been filed on 4th January 2006 latest. As the suit was filed in 2010, the claim would be time-barred in either case and the trial magistrate was correct to so hold.

15. I adopt the position taken in South Nyanza Sugar Company Limited v Diskson Aoro Owuor (Supra) in determining when the cause of action

> accrues. According to Black's Law Dictionary (10th Edition) the word "accrue" means "to come into existence as an enforceable claim or right." Thus under the outgrowers cane agreement, such as the one subject to the suit, the right to sue could only arise when the Respondent failed to harvest the plant crop. This is when the cause of action accrued and when, in terms of section 4(1)(a) of the LAA, the time begins to run."

31. The time started running, from 22/8/2010. The time run out on 22/8/2016. The suit in the lower court was clearly time barred. The security was not a continuing security. This was a specific time bound contract. The enforcement of the security is not on the table. I need not decide on the same. In this case, the Appellant filed a case for recovery of money.

32. Whereas I agree that the money is not the bank's money, the Appellant must steward the same. Nothing was stopping the bank from filing for a claim within the limitation period. It is not that other people whose claims are marked as time-barred don't have good cases.

33. It is simply that the court does not entertain stale claims. No wonder, the Appellant waited for a sum of Ksh. 800,000/= to increase to Ksh. 3,836,011.82. If the court is to countenance this kind of claim, the banks will simply sit and let the interest accumulate for years before resurrecting the same.

34. In this case, the suit was filed outside the limitation period. The claim was dead on arrival. In any case, even if the court used different sections of the law, the empirical decision was correct. I find no merit in the Appeal and as such, I dismiss the same, with costs of 176,000/=. The file is closed.

Determination

35. The upshot of the foregoing, I make the following orders; -

    a. Appeal is dismissed for lack of merit. The Suit was properly dismissed as the suit was time-barred.

    b. Costs of Ksh. 176,000/= to the Respondent.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF MARCH, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

M/s G.M. Gamma Advocates LLP

Ochieng Eddie Vincent & Company Advocates

Court Assistant - Brian