



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL SUIT NO.10 OF 2019**

**BETWEEN**

**WOMEN ENTERPRISE FUND.....PLAINTIFF**

**VERSUS**

**PAMOJA WOMEN DEVELOPMENT PROGRAMM.....DEFENDANT**

**RULING**

1. For consideration in this Ruling are the Notice of Motion application dated 18<sup>th</sup> October, 2019 and a Preliminary Objection (PO) dated 4<sup>th</sup> March, 2020.
2. The plaintiff, **WOMEN ENTERPRISE FUND** (hereinafter the Fund) is a semi-autonomous government agency established through Legal Notice NO. 147 to provide accessible and affordable credit to support women enterprise to start and expand their businesses.
3. The defendant, **PAMOJA WOMEN DEVELOPMENT PROGRAMM** is registered as a Non-Governmental Organization (NGO).
4. The Fund has filed this case seeking judgment against the defendant for Kshs.40,000,000/=. Through its plaint, the Fund pleaded that by a letter of offer dated 8<sup>th</sup> October, 2007 it offered to advance to the defendant Kshs.50,000,000/= in three separate tranches. The defendant was to use those funds for on-lending purposes that is to lend to Kenyan women above 18 years to enable them finance viable business enterprises. The letter of offer provided the defendant would make, "one bullet payment of the principal," three years after disbursements. The interests applicable to the outstanding amount was 1% per annum payable quarterly. The Fund pleaded in this suit that it disbursed to the defendant Kshs.20 million on 11<sup>th</sup> December, 2007 and Kshs.20 million on 25<sup>th</sup> April, 2008 making the total amount advanced to the defendant Kshs.40 million.
5. The defendant by its defence admitted that the Fund did remit to it total of Kshs.40 million but further pleaded that the said amount was less than the amount agreed to be advanced to it by the Fund. The defendant pleaded that the fund breached the agreement by failing to remit an extra Kshs.10 million.
6. It is in that background the notice of motion application was filed by the Fund and the Preliminary Objection was filed by the defendant.

**THE NOTICE OF MOTION**

7. The fund seeks the following prayers by its Notice of Motion application dated 18<sup>th</sup> October, 2019.

1. ***THAT the honourable Court be pleased to enter summary judgment in favour of the plaintiff/applicant herein in the sum of Kshs.40,000,000/.***
2. ***THAT the honourable court be pleased to enter judgment on admission against the defendant for the admitted sum of Kshs.40,000,000/=.***
3. ***THAT the alternative, the honourable court be pleased to enter judgment on admission against the defendant for the admitted sum of Kshs.40,000,000/= without waiting for determination of any other questions between the parties.***
4. ***THAT the defendant be condemned to shoulder the costs of this suit to the extent of the admitted part of the claim and cost of the instant application."***

8. The application is based on the grounds that the defendant's defence is a sham and discloses no reasonable defence; that the defendant admitted in its defence and its witness statement, indebtedness to the Fund and that the denials in the defence are meant to delay the disposal of this case.

9. The defendant filed grounds of opposition to the application wherein it termed the application as misconceived, incompetent and abuse of the court process. The defendant further stated in those grounds of opposition that it has a good defence which raises triable issues.

## **PRELIMINARY OBJECTION**

10. The defendant also filed a Preliminary Objection seeking the striking out of the Fund's claim on the ground that the claim is time barred by virtue of and The Limitation of Actions Act Cap. 22.

## **ANALYSIS**

11. The court directed that the Notice of Motion application and P.O. be considered together. Parties filed their written submissions and relied on decided cases. I have had an opportunity to consider these.

12. I will begin by considering the defendant's P.O. for if indeed it does succeed there will be no basis of determining the application for the suit will have been struck out.

13. The defendant by its P.O. stated that the Fund, having released to it the two loans of Kshs.20 million each on 11<sup>th</sup> December, 2007 and 25<sup>th</sup> April, 2008 its claim is time barred. The defendant submitted that time for filing the Fund's claim began to run from 21<sup>st</sup> July, 2011 when the Fund made a written demand for repayment of the loan by the defendant.

14. The written submissions filed on behalf of the Fund acknowledged that the claim hereof is based on contract. That accordingly the provisions of **Section 4(1) of Cap. 22** applied, that is the claim ought to have been filed within 6 years from the date of default. It has however been submitted on behalf of the Fund that the defendant acknowledged indebtedness to the Fund and accordingly that acknowledgement revived the claim.

15. As stated before the claim hereof is based on the Loan agreement between the parties dated 9<sup>th</sup> November, 2007. It follows that the Fund's claim is founded in contract. Section 4(1) of Cap. 22 provides:-

***“4 (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.”***

16. In the Court of Appeal decision in the case **ALBA PETROLEUM LIMITED VS. TOTAL MARKETING KENYA LIMITED (2019) eKLR**, the purpose and the effects of **Section 4(1) Cap 22** were discussed as follows:-

***“30. In GATHONI VS. KENYA CO-OPERATIVE CREAMERIES LTD. [1982] KLR 104, Potter, JA at page 107 expressed himself thus:***

***‘The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.’***

**31. In IGA VS. MAKERERE UNIVERSITY [1972] EA it was held:**

***‘A claim which is barred by limitation is a claim barred by law. A reading of the provisions of Section 3 and 4 of the Limitations Act Cap 70 together with Order 7 Rule 6 of the Civil Procedure Rule of Uganda which has same provisions with Limitations Act of Kenya seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.’***

17. The contract between the parties provided that the loan would mature within three years of disbursements. What that seems to suggest is repayment by the defendant of the loan granted was due to start three years of disbursements. It is common ground that the Fund granted the defendant two loans of Kshs.20 million each disbursed on 11<sup>th</sup> December, 2007 and 25<sup>th</sup> April, 2008. This present claim was filed in court on 18<sup>th</sup> April, 2019. It would therefore seem that by considering the time period set out in **Section 4(1) of Cap 22** six years period, the claim for both loans above were time barred by the time the Fund filed this claim.

18. The Fund has opposed the defendant's Preliminary Objection on the ground that the claim was revived by the dependent's acknowledgment of the debt and also by payment. The Fund relied on the provisions of section 23(3) of Cap. 22. That Section provides:-

***“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 to or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement 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.***” (emphasis mine)

19. The defendant made a payment of the principle debt on 19<sup>th</sup> June, 2013, an amount of Kshs.200,000/=. It further repaid the loan on 19<sup>th</sup> June, 2013 of Kshs.100,000/=.

20. **Section 23(3) of Cap 22** has been the subject of many court’s decisions. In those decisions the courts have held that the effect of acknowledgment of a debt (in writing see **Section 24 Cap. 22**) or payment of the debt revives a claim even if the claim had been time barred. Indeed, courts have held that such action gives the claim a “new birth.”

21. I will proceed to cite those decisions for appreciation of how the courts have interpreted section 23(3) of Cap. 22.

22. In the case **PARETO SACCO LTD VS. PYRETHRUM AND OTHER INDUSTRIAL CROP DIRECTORATE & ANOTHER (2019) eKLR** it was held:-

***“6. Citing the case PATRICK S.K. KIMITI -VS- JOHN NGUGI GACHAU & ANOTHER (2-15) eKLR AND DICKTON ORUKO NYAKACH & ANOTHER VS CHEMILIL SUGAR CO. LTD (2015) eKLR held, on Section 23 of the Act, that:-***

***‘Actions based on contract accrue afresh, and are not caught up with limitation where there is acknowledgment or part payment.’”***

23. **CO-OPERATIVE BANK OF KENYA VS. PETER KIMANI (2010) eKLR** it was decided:-

***“The above opinion seems to have been cited with approval by the Court of Appeal in the case of AFROFREIGHT FORWARDERS LTD VS AFRICAN LINER AGENCIES [2009] eKLR in which their Lordships held that:-***

***‘With due respect to the learned Judge, we think the learned Resident Magistrate was right in reaching the conclusion that time started to run from the date of the letter in which the debt was acknowledged. We have looked at the contents of the letter of 4th July 2000 and in our view the said letter acknowledged the debt. What the respondent was uncertain about was the exact amount which was owed.***

Section 23(3) of the Limitation of Actions Act provides:-

***‘(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 therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgment as the last payment.’”***

24. The defendant made payment on 19<sup>th</sup> June, 2013. That payment revived otherwise time barred claim of the Fund and the six years period, provided under section 4(1) of Cap 22, began to run a fresh from 19<sup>th</sup> June, 2013. The six year period, the window within which the fund could sue was up to June, 2020. The Fund filed this claim on 18<sup>th</sup> April, 2019. That was within the six years period and it follows that the Fund’s claim is not time barred. It complies with the provisions of section 4(1) of Cap 22. For that reason, the defendant’s Preliminary Objection fails and is dismissed with costs.

25. I shall now proceed to consider the Notice of Motion filed by the fund. It will be recalled that the Fund seeks entry of judgment on the ground that the defendant admitted indebtedness.

26. Notably, the defendant admitted in paragraph 3 of its defence the receipt of the Loan of Kshs.40 million. This is what the defendant pleaded in that paragraph of its defence:-

***“The defendants admits the content of paragraph four (4) of the plaint save that what had been agreed for advancement of Kenya shillings fifty million (Ksh.50,000,000) was not what was disbursed to the defendant as the Defendant only received Kenya shillings forty million (Ksh.40,000,00/=) only instead of Kenya shillings fifty million (Kshs.50,000,000/=) pursuant to the Loan Agreement dated 9<sup>th</sup> November, 2007.”***

27. The defendant further pleaded in paragraph 5 of its defence that:-

***“The defendant admits that on 9<sup>th</sup> November, 2007 the plaintiff and the Defendant entered into a formal Loan agreement save that what was agreed is not what was disbursed and this caused logistic problems to the defendant and which the defendant had not accounted for.”***

28. Additionally, the defendant wrote two letters, one dated 12<sup>th</sup> September, 2008 and the other 1<sup>st</sup> august, 2011, by which the defendant admitted receiving total of Kshs.40 million Loan from the Fund.

29. Although the defendant pleaded that it was the Fund that breached the agreement by only disbursing part of the agreed loan, it is instructive to note that the defendant did not, in this suit, make a counterclaim and accordingly that allegation of breach of contract by the

Fund is not an issue for consideration in this case.

30. In this Court's view, the admissions made by the defendant in its defence and by correspondence justified entering of judgment on admission as sought through the application before court.

31. Judgment on admission is considered under the provisions of **Order 13(2)** of the Civil Procedure Rules. The order provides:-

***“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or Order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such Order, or give such judgment, as the court may think just.”***

32. The Fund has shown from the defendant's pleading and correspondence that the defendant's admission is plain and obvious. The defendant admitted receiving a Loan from the Fund of KShs.40 million. A case in point on how the court should consider an application for judgment on admission is ***CANNON ASSURANCE (KENYA) LIMITED VS. MAINA MUKOMA (2018) eKLR*** thus:-

***“All that the Plaintiff is required to show is that there is a plain and obvious admission by the Defendant as was held in CHOITRAM VS NAZARI [1984] eKLR 327, wherein Madan, J. A. stated thus:-***

***‘For the purpose Order XIII Rule 6 (now Order 13 Rule 2), admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence...***

***It matters not if the situation is arguable, even if there is a substantial argument; it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or entitled to without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of the words even when faced with a Plaintiff such as the one in this case. To analyze pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provision of the established law by which a legal right is enforced.”***

33. Although the Fund prayed for judgment to be entered on admission as prayed in the plaint, having perused the Loan statement of the defendant's loan account, I find that the entire judgment as sought in the plaint would fail to take into account payments made by the defendant. Further, I find no justification to enter judgment on interest at 10% per annum as sought in the plaint when the parties' agreement provided for payment of interest at 1%. Although that agreement provided for payment of a penalty of 10% per month (of the amount in default) the Fund did not provide an account tabulating the amount in default. What is before court is two statements in respect to the two Loans. Those statements will guide this Court in entering judgment against the defendant.

34. Before concluding this judgment it is important to consider the defendant's opposition to the Fund's claim, which opposition was captured as follows in the written submissions:-

***“We hereby submit that the plaintiff was a Kenya Government Department under the Ministry of Gender, Children & Social Services and as had been pleaded by the Defendant herein in its defence foresaid, the plaintiff is not a legal entity capable of suing on its own without the Attorney General of the Republic of Kenya”.***

35. The above submission was based on the provisions of section 12(1) of the Government Proceedings Act Cap 40. The defendant further submitted that the Fund, not having been established by an Act of Parliament, was not capable of suing as it had done in this case. The defendant therefor surmised that the suit filed herein was bad in law and incompetent.

36. The response by the Fund on this issue was not helpful to the court. The Fund submitted that the Solicitor General authorized the utilization of external advocates in giving it legal services.

37. **Section 12(1)** of **Cap 40** provides:-

***“12(1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.”***

38. It does seem clear that the afore stated provision means that unless any other written law provides the contrary, any grievance by or against the government which is civil in nature must be instituted against the Attorney General (AG).

39. The issue to determine here is whether the Fund is government. The definition of Government under the Interpretation and General Provisions Act Cap 2 is defined:

***“‘The Government’ means the Government of Kenya.”***

40. Whereas the above definition does not assist in the determination of the objection before court, I believe the definition in **Section 2(3)** of **Cap 40** gives a clue. That Section provides:-

**“Any reference in Part IV or Part V of this Act to civil proceedings by or against the Government, or to civil proceedings to which the Government is a party, shall be construed to include a reference to civil proceedings to which the Attorney-General, or any Government department, or any officer of the Government as such, is a party:**

**Provided that the Government shall not, for the purposes of Part IV or Part V of this Act, be deemed to be a party to any proceedings by reason only that they are brought by the Attorney-General upon the relation of some other person.”** (underlining mine)

41. The above definition still begs the question whether the Fund is government as referred to in **Section 12(1) of Cap 40**.

42. The Fund known as Women Enterprise Fund was promulgated by the Minister of Finance through Legal Notice No. 147 dated 3<sup>rd</sup> August, 2007. The Regulations thereof established the Fund and stated the Fund would consist of monies appropriated by Parliament; grants and donations and income generated from the proceeds of the Fund. The objects of the Fund are stated in those Regulations as:-

**“4. OBJECT AND PURPOSE OF THE FUND.**

***The object and purpose of the Fund is to:-***

***(a) Provide loans to credible micro-finance institutions (MFIs), registered non-governmental organizations (NGOs) involved in micro financing, and savings and credit co-operative organizations (SACCOs) for on-lending to women enterprises;***

***(b) Attract and facilitate investment in micro, small and medium enterprises oriented infrastructure such as business, markets or business incubators that will be beneficial to women enterprises;***

***(c) Support women oriented micro, small and medium enterprises to develop linkages with large enterprises;***

***(d) Facilitate marketing of products and services of women enterprises in both domestic and international markets; and***

***(e) Support capacity building of the beneficiaries of the Fund and their institutions through Divisional Women Enterprise Fund Committees.”***

43. The Regulation also set up a Board to run the Fund. The initial fund provided to the Fund was Kshs.1billion appropriated by Parliament in financial year 2007/2008 and additional contribution to the Fund, if necessary would be on the basis of appropriation.

44. My consideration of the Legal Notice No. 147 shows that the Fund was neither the Attorney General, nor Government department and nor an officer of the Government as provided under **Section 2(3)** of the Government Proceedings. There is no evidence that I could trace which showed the Fund was caught by the provisions of **section 12(1) of Cap 40**, and none was provided by the defendant.

45. Accordingly, the prayer to strike out the claim for allegedly contravening the Government Proceedings Act, Cap. 40 is not merited and is dismissed.

**DISPOSITION**

46. In view of the admissions made by the defendant, the prayer in Notice of Motion dated 18<sup>th</sup> October, 2019 has satisfied the threshold of judgment on admission. The defence filed and the correspondence by the defendant is unequivocal recognition of the defendant's acceptance of the claim by the Fund.

47. In the end I grant the following orders:-

(a) The preliminary objection dated 4<sup>th</sup> March, 2020 is dismissed with costs.

(b) Judgment is entered for the plaintiff on the basis of defendant's admission as follows:-

(i) Judgment for Kshs.20,006,167 (Twenty million, six thousand, one hundred and sixty seven shillings) with interest at 1% per annum from 18<sup>th</sup> March, 2019 until payment in full.

(ii) Judgment for Khss.20,000,000 (twenty million shillings) with interest at 1% per annum from 18<sup>th</sup> March, 2019 until payment in full.

(c) The plaintiff is awarded costs of the suit and costs of the Notice of Motion dated 18<sup>th</sup> October, 2019.

***RULING DATED and DELIVERED at KIAMBU this 23<sup>rd</sup> day of SEPTEMBER, 2021.***

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant : Ndege

For the Plaintiff: Mr. Mwangi

For the Defendant : Mr. Kihara

**COURT**

Ruling delivered virtually.

**MARY KASANGO**

**JUDGE**