REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO.57 OF 2010

WILLIAM EDWARD ADEGU……..…… APPELLANT

VERSUS

NATIONAL BANK OF KENYA…… RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate Honourable C. Mbogo in Eldoret Chief Magistrate's Court Case No. 820 of 2004, dated 12th March, 2010)

JUDGMENT

The respondent filed a suit against the appellant at the trial court claiming the payment of the sum of Kshs. 1,657,000/- and other charges from May 2003 till payment in full together with costs. The cause of action arose from a temporary overdraft and loan facility and financial accommodation. The appeal seeks to set aside the judgment in Eldoret CMCC No. 820 of 2004.

APPELLANT'S CASE

The appellant submitted that the trial court erred in failing to find that it could allow the appellant to pay the prescribed fee for the amended defence pursuant to *Section 96* of the *Civil Procedure Act* before arriving at the judgment. The trial magistrate held there was no amended defence because in his considered opinion the amended defence could not be deemed to be duly filed as there was nothing to show that the requisite court fees of seventy shillings was paid. The court dismissed the appellants' case including the written submissions for this reason alone. The magistrate ought to have made use of provisions which provide for remedial measures such as *Section 96* of the *Civil Procedure Act.* The fee had already been paid and the appellant should have been deemed to have fully complied. The appellant relied on the case of ***Kenya Commercial Bank Ltd. V Osebe (1982) KLR*** where the court held that the fee payable in lodging a document is due for payment when the document is lodged but where the fees is not paid the subsequent acceptance of that fee cures the original failure to pay.

The appeal is predicated on the finding that the amended defence was not signed in the mode required for pleadings by dint of the then applicable civil procedure rules at *Order VI rule 14*. The document was indeed signed. The appellant relied on the case of ***Trust Bank Ltd v Amalo Company Ltd*** to buttress his point on the administration of justice. Even if the application was to proceed exparte the learned judge was under a duty to consider application on merit based on the usual principles governing the grant of injunctions.

It is clear that the respondents could not bring the claim after discharge of the charge having been accepted and registered pursuant to section 82 of the Registered Land Act.

The trial court erred in failing to find that the claims for the loan and interest were time barred pursuant to *Section 4(1)* and *19(4)* of the *Limitation of Actions Act*. The respondent filed its suit on 5th July 2004 after a period of 11 years from the expiry date of the facility, which is 31st October 1993. An action to recover arrears of interest payable in respect of any sum of money secured by mortgage may not be brought after the end of six years form the date on which interest became due. The Act defines a mortgage to include a charge hence the claim for the principal debt and interest were time barred. The Appellant relied on the case of ***Nairobi Civil Appeal no. 76 of 2000 – Abdi S. Raham Shire v Thabiti finance Company Limited*** where the court dismissed a claim for interest on a mortgage for being time barred.

The respondent having accepted payment from the guarantor ceased to have a cause of action against the appellant. It was only the guarantor who had a cause of action to claim indemnity for the money paid to the respondent. the learned magistrate erred by failing to find that the respondent could not obtain money from the guarantor and sue the principal debtor.

The magistrate erred by considering issues not raised by parties in the suit by focusing on a technical omission regarding the amended defence which has now been corrected by paying the requisite fee and obtaining a receipt.

The appellant cited *Section 3* of the *Judicature Act* and stated that the courts were to exercise jurisdiction in conformity with the doctrines of equity. He further submitted that *Sections 1A* and *1B* of the *Civil Procedure Act* obliges courts not to dwell on technicalities and to do

substantive justice. He relied on the case of ***John Peter Kiria & Another v Pauline Kagwira (2013) eKLR*** and ***Phillip Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende (1982-1988) 1KAR 1036.*** He submitted that the judgment violated the proportionality principle as it is clear that the Shs. 75/-receipt that would show the amended defence was paid for does not weigh against the overwhelming merits of the defence.

The appellant submitted that the enactment of *Sections 3A* and *3B* of the Appellate Jurisdiction Act provided for the oxygen principle which is to the effect that the overriding objective of the Act and the Rules is to provide just, expeditious, proportionate and affordable resolution of appeals with the courts striving to achieve furtherance of the overriding objective. He cited the case of ***Daniel Kipkemboi Bett & 7 others v Margaret Wanjiku Chege (2010) eKLR.***

The appellant submitted that the learned magistrate erred in law and fact in entering judgment without proof of the claim, the result of which the appellant has been aggrieved by the judgment.

The appellant prayed that the appeal be allowed.

RESPONDENT'S CASE

The respondent set down the facts of the case in their submissions. The crux of which is that the matter was set for hearing on 2/05/2007 when the appellant did not attend court and judgment was entered against him. After the process of execution was commenced the appellant filed an application to set aside default judgment which was allowed by consent on 28/01/2009. However, the parties' consent was that the draft amended defence be deemed to have been duly filed upon payment of the requisite court fees as per page 164 of the record of appeal. This meant that in the absence of the payment of the court fee there would be no amended defence.

After the hearing commenced the respondents called one Thomas Tenai, an officer at the bank in charge of recoveries who testified how the appellant by his letter applied for an overdraft facility of kshs. 400,000/- on 28/10/1992 but the bank only approved Kshs. 300,000/-. There was a guarantee for a similar amount by one Z.W Ombudu supplied by a charge under the registered Land Act over the guarantor's land parcel NAKURU MUNICIPALITY BLOCK 3/813 at an agreed interest rate of 24% p.a.

It was the respondents'' further evidence that the appellant did not service the loan as agreed and when the guarantor was notified he sought to be allowed to pay Kshs. 600,000/- which he did and the charge was discharged. The respondents then gave the appellant more time to pay the balance but he failed. The bank demanded payment vide a letter dated 22/11/1999 and the appellant did not pay hence the bank filing a suit in 2004.

The appellant did not adduce any evidence to controvert the respondents' evidence that he had not paid a single cent of the loan advanced and the court entered judgment in their favour as the plaintiff had proven its case.

It is worth noting that it was the parties' consent that the amended defence would be deemed as duly filed upon payment of the requisite fees. The appellant is blaming the court and seeking protection of the law while it is him who never complied with a consent order to validate the defence. He also claims to have been prejudiced when he had already paid Kshs. 75 but has not annexed any receipt in proof.

Section 96 of the *Civil Procedure Act* cannot help the appellant as at no time was the court called upon to exercise that discretion and the appellant has not shown that he paid such fees. The cited case of ***Kenya Commercial Bank Ltd. V Osebe (1992) KLR*** can be distinguished from this one as the court in that case said that the subsequent acceptance of the court fees would cure such a situation.

The trial court at page 16 of the judgment acknowledged that the defence had not been signed but stated that had the requisite fees been paid it would have been deemed to have been duly filed.

The respondents submitted that the section cited by the appellants, Section 82 of the Registered Land Act related to the charge which guaranteed the loan, in the instant case the chargor was different from the principal borrower thus the contract of guarantee was limited to the terms and conditions of that contract which was different from the principal borrower's loan agreement with the lender. The law did not prohibit the respondents from bringing the claim in the manner they brought it.

Under *Section 19(1)* of the *Limitation of Actions Act* the period started running from the date a formal demand was made on the outstanding sum thus the claim for the loan and subsequent interest were not time barred pursuant to the section as claimed by the appellant. In their evidence the respondents proved that the demand for payment was first made on 22/11/1999. The respondent cited the case of ***National Bank of Kenya v George Onyango Okara (KISUMU HCCC NO. 269 of 1996)*** in support of this submission.

There is no proof that the trial court disregarded substance and relied on form to prejudice the appellant. Secondly, the appellant should be alive to the maxim that equity helps the vigilant not the indolent based on which he should have given evidence in court that he had paid the loan and that the respondent had no case against him. If the appellant wants to rely on equity, he must demonstrate that he has come to equity with clean hands.

The respondents submitted that the appellant cannot rely on the oxygen principle as for it to apply he ought to have presented a case before the court which he never did at trial.

ISSUES FOR DETERMINATION

a) Whether the trial court erred in disregarding the amended defence

b) Whether the claim was time barred

WHETHER THE TRIAL COURT ERRED IN DISREGARDING THE AMENDED DEFENCE

The appellant had submitted that the trial court erred by failing to regard the amended defence as per the oxygen principle. However, this does not apply in this particular instance as the defence was to be admitted pursuant to a consent between the parties. It is trite law that a consent is contractual in nature and therefore the court cannot interfere with the terms of the consent.

In ***Francis Oriosa Orango v Joseph Mato Ngoko & Ambrose Bwoma Boruma [2008] eKLR*** the court held;

> **"It is trite law that a court cannot interfere with a consent order except in such circumstances as would justify varying or rescinding a contract."**

As per page 164 of the record of appeal, it is clear that the amended defence was to be deemed duly filed upon the payment of requisite fees. The appellant in his submissions has not proven that the fees were paid or that there was any evidence adduced in the lower court to prove that the requisite fees were paid. In light of this, the failure to pay the fees and consequently the disregarding of the amended defence as duly filed ceases to be a mere technicality as it was a term of a consent between both parties. The respondent had already rightfully obtained judgment in default and had accorded the defendant an opportunity to defend the suit vide a consent which he failed to adhere to the terms thereof.

In the absence of proof that the defence was duly filed, the trial court rightfully disregarded the amended defence.

WHETHER THE CLAIM WAS TIME BARRED

The appellant submitted that the time within which the cause of action was to be instituted ran from the date of expiry of the facility being 31st October 1993. Notably he referred to the *Limitation of Actions Act* as Cap 22 wherein it is Cap 21. That notwithstanding, he relied on *Section 4(1)* and *Section 19(4)* of the *Limitation of Actions Act.*

Section 4(1) of the *Act* provides;

> **(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.**

Section 19(4) of the *Act* provides;

> **(4) An action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears, may not be brought after the end of six years from the date on which the interest became due:**

Provided that—

> **(i) where a prior mortgagee or other encumbrancer has been in possession of the property mortgaged, and an action is brought within one year of the discontinuance of such possession by the subsequent encumbrancer, the subsequent encumbrancer may recover by that action all the arrears of interest which fell due during the period of possession by the prior encumbrancer, or damages in respect thereof, notwithstanding that the period exceeded six years;**
>
> **(ii) where the property subject to the mortgage comprises any future interest or life insurance policy and it is a term of the mortgage that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage, interest does not become due before the right to receive the principal sum of money has accrued.**

However, the claim that arose is not with respect to the charge as the same was discharged when the guarantor paid Kshs. 600,000/-. The appellant was still the principal debtor for the purposes of settling the loan facility. The demand for payment of the balance after the guarantor offset the balance was made vide a letter dated 22/11/1999. The same was annexed as p-exh 13. The limitation period was to run from then and the appellant did not provide any proof that the demand was made before that date.

Section 19(1) of the *Limitation of Actions Act* states;

> **(1) An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued.**

The right to receive the money accrued when the defendant made the demand on 22/11/1999 and the suit was filed in 2004 and therefore, it was within the time limits.

In the premises the appeal fails with cost to the Respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **22nd** day of **October, 2019**

In the presence of:

Mr. Kigamwa for the appellant

Ms. Matoke for the respondent

Ms Abigael – Court assistant