



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 13 OF 2015**

**JOSEPH MUNGAI WANENE.....PLAINTIFF**

**-VERSUS-**

**HOUSING FINANCE COMPANY OF KENYA LIMITED.....DEFENDANT**

**RULING**

[1] The Notice of Motion dated **3 May 2016** was filed herein by the Defendant/Applicant pursuant to **Section 4(1) of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya**, for orders that the suit herein be struck out with costs for being statute-barred; and for the costs of the application to be provided for. The application was premised on the ground that whereas the cause of action accrued on **22 September 2008**, when the Defendant sold and transferred the suit property, being **Title Number 12945/16-Bogani Road, Karen in Nairobi City County**, to a third party, the Plaintiff only filed this suit on **14 January 2015**, which is a period of over six years from the date of accrual of the cause of action.

[2] The application is premised on the affidavit of **Martin Machira**, sworn on **3 May 2016** annexed thereto, in which it was averred that the Plaintiff charged the suit property to secure a loan of **Kshs. 5,000,000** in **1996**, and that following his default in repaying the loan, the Defendant, in exercise of its Statutory Power of Sale, sold and transferred the suit property to a third party. It was further the contention of the Defendant that since this suit, which was only filed on **14 January 2015**, is based on the allegation that the sale was in breach of the Defendant's statutory duty to the Plaintiff, it is a cause of action founded on contract, and should therefore have been brought within six years from the date the property was transferred to the third party. The foregoing averments were reiterated in the Defendant's Further Affidavit filed herein on **19 September 2016**. It was therefore urged, on behalf of the Defendant that the suit be struck out with costs.

[3] The Plaintiff responded to the application vide his Grounds of Objection dated and filed on **22 June 2016**, in which the following grounds were set out:

- [a] That the application does not lie, is vexatious and amounts to an abuse of the Court process;
- [b] The Defendant is intent on using the statute as an instrument to commit fraud upon the Plaintiff;
- [c] The Plaintiff's claim is for the Defendant to render a true and just account for the proceeds of the sale of his property by the Defendant and that this cannot be said to be time barred under any stretch of imagination;

[d] That the plea of limitation has not been pleaded with clarity in the Defence and therefore cannot be raised in the absence of supporting documents;

[4] The Plaintiff also relied on his Replying Affidavit sworn and filed herein on **22 June 2016**. He conceded therein that he was indeed indebted to the Defendant as alleged and that the Defendant was entitled, in law, to realize its security upon default. He however posited that the Defendant was obligated to act professionally and in accordance with the law. It was the Plaintiff's contention that at no time did the Defendant ever notify him of the date of the purported sale, the amount realized, the application of those proceeds or even the final account. He added that, through his Advocates, he wrote to the Defendant the letter dated **21 October 2014** (marked Annexure **JMW2**), requesting for the information aforementioned; and that the Defendant was yet to respond thereto.

[5] The Plaintiff disputed the Defendant's contention that the property fetched only **Kshs. 17 million**, adding that even the Collector of Stamp Duty rejected the declaration in connection therewith and assessed the value of the property at **Kshs. 33 million**. On that account, the Plaintiff urged the Court to find that the Defendant acted callously, recklessly, unprofessionally and should therefore be held to account; which, he posited, could only be done by dismissing the instant application with costs to pave way for hearing of the suit and a determination thereof on its merits.

[6] The facts forming the foundation of the instant application are not in dispute. The parties are in agreement that by a Charge dated **16 July 1996**, the Plaintiff charged the suit property to the Defendant as security for a loan of **Kshs. 5,000,000** that was advanced to him by the Defendant. The facility was to be repaid with interest, in monthly instalments of **Kshs. 117,288**, or by such increased or varied monthly instalments as the Defendant would require until the whole amount aforesaid was fully settled. It was not in contention that the Plaintiff defaulted in repayment and that as a result, the Defendant proceeded to exercise its Statutory Power of Sale, by selling the charged property by private treaty to **Jan and Josh Company Limited** for **Kshs. 17 million**. The transfer was effected on **22 September 2008**.

[7] It is therefore unquestionable that this is a cause of action premised on the contract between the Plaintiff as the a Chargor and the Defendant in its capacity as a Chargee; and there is no gainsaying that any such cause of action ought to be pursued within a period of 6 years. It is of no help either that the other limb of the Plaintiff's claim is for accounts for **Section 4 of the Limitation of Actions Act** provides that:

**"(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;**

...

**(3) An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action."**

[8] The Defendant exhibited documentation to confirm its averments that the property was transferred to the third party, **Jan and Josh Company Ltd** on **22 September 2008**; and the final payment credited to the Plaintiff's account on **5 August 2008**. In either case therefore, the Plaintiff, ought to have moved to by **6 August 2014**. He opted to sleep on his rights until **14 January 2015**, and therefore, it is clear that his suit was filed outside the limitation period.

[9] In his written submissions filed herein on **29 September 2016**, Counsel for the Defendant cited several persuasive authorities in support of the Defendant's posturing, namely:

**(a) Gathoni vs Kenya Co-operative Creameries Limited [1982] KLR 104;**

**(b) Mathew Njoroge Kabetu vs. Kiambu Dandora Farmers Co. Limited & 5 Others [2014]**

eKLR;

(c) **Richard Toroitich vs. Mike K. Lelmet & 3 Others [2014] eKLR**; and

(d) **Katumbi Kiio vs. Reuben Musyoki Muli [2015] eKLR**.

[10] It is not lost on the Court that the Plaintiff made an attempt to explain his tardiness by contending that he was all along in the dark as to the date of sale and the amount realized thereby, and that he sought for information from the Defendant, but the same was not forthcoming. It is noteworthy however that even the letter that the Plaintiff relied on in this connection, namely **Annexure JMW1**, was written after the period of limitation had lapsed; so was the demand notice marked Annexure **JMW2**.

[11] The rationale for the limitation period cannot be overemphasized. In the case of **Gathoni vs Kenya Co-operative Creameries Limited [1982] KLR 104**, the Court (Porter J) had the following to say:

**"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**

But more importantly, it is trite law that the issue of limitation is not just one of a mere technicality, but is an issue that goes to the jurisdiction of the Court, without which the Court cannot make one more step in a matter. In the treatise, **Words and Phrases Legally Defined Vol 3**, jurisdiction is defined as follows:

**"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like meant. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics ... Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."**

[12] Indeed in the case of **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya Limited [1989] KLR 1**, the Court of Appeal made this point thus:

**"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

[13] The Court of Appeal restated the above position in the case of **E. Torgbor v Ladislaus Odongo Ojuok [2015] eKLR**, thus:

**"...we reaffirm the dicta that jurisdiction is everything and whenever a jurisdictional issue is raised, it is important for the court to pause and determine the issue before proceeding with the case."**

[14] In view of the foregoing, it is apparent that the Plaintiff's suit is untenable from the standpoint of **Section 4(1) and (3) of the Limitation of Actions Act**. Accordingly I would endorse, as being applicable herein, the position taken in **Director Limited vs. Samani [1995-1998] EA 48**, that:

**"No one shall have the right or power to bring an action after the end of six years from the date a cause of action accrued, in 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 based on contract six years after the cause of action arose or any application to extend such time for bringing of the action based on contract."**

**[15]** In the premises, I would agree with the Defendant that the Plaintiff's suit is untenable. The Defendant's application dated **3 May 2016** succeeds and is accordingly allowed with the result that the Plaintiff's suit is hereby struck out with costs for being statute-barred.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2017**

**OLGA SEWE**

**JUDGE**