



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CIVIL SUIT NO. 482 OF 2011

JOSEPH KAHUTHIA KIBUI

t/a KAHUTHIA KIBUI & CO. VALUERS.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANTS

JUDGEMENT

In his Plaintiff dated 1st November, 2011 and filed in court on 4th November, 2011 the plaintiff herein has sued the defendant claiming special damages amounting to Ksh.6,132,202/-, general damages plus costs and interests on the special damages.

The Plaintiff claims that on or about the year 1987, he was instructed by the registered owners Sheikh A. Mursal and Anuh S. Adam of plot numbers 13139/72 and 13139/285 respectively to inspect the same with a view to advising them on the open market values of the two said properties at that time.

That the Plaintiff, had the two plots inspected by his associate G.K Mutugi following which valuation reports were produced referenced numbers SPS/NAI/296 and SPC/VAL/297 both dated the 18th day of February, 1987.

On the 16th January, 1992 the defendant's Branch manager in charge of Tom Mboya street wrote a letter to the plaintiff which, as the plaintiff came to learn later, was written because the valuation reports referred herein above had been used to secure financial accommodation in favour of a third party, one Salah Ibrahim Mohammed and that there was a problem with the figures that the Plaintiff's associate had included in the reports. The defendant wanted the plaintiff to explain how the defendant's position would be secured in the event of the parties failing to obtain prices good enough to secure the bank's position.

In spite of having no initial request by the defendant for the plaintiff to carry out valuation on its behalf and considering the cordial relationship that existed between himself and the defendant, and the fact that the valuations were done in good faith, the Plaintiff assured the defendant of his full co-operation to see that the defendant's interests were fully safeguarded.

The parties held a meeting and it was agreed that the Plaintiff do proceed to carry out fresh survey and he reported his findings and suggestions to the defendants which included among others that the defendant sells the plots soonest. The Plaintiff also suggested that the defendant do find a way of incorporating Salah Ibrahim Mohammed's own property being plot No. 13139/286 as additional security so that the

debtors and guarantors would be responsible for their own debts.

Following further discussions between the Plaintiff and the defendant, it was agreed that the two properties be sold in public auction, that the defendant would lodge a caveat on Plot NO. 13139/286, that the defendant would follow the debtor and the guarantors for the shortfall and the plaintiff would keep in a fixed deposit a sum of Kshs.600,000 as lien to safeguard the bank as it proceeded to carry out recovery measures from the debtor and guarantors.

That the plaintiff co-operated by allowing the fixed account which he had with the defendant to be placed under lien and vide a letter dated 25th September, 1993 the defendant confirmed it would continue to hold the fixed deposit until the debt is paid in full.

It is averred that thereafter, and contrary to the agreement between the plaintiff and the defendant herein, the defendant unilaterally lifted and converted the fixed deposit then amounting to Kshs.893,125.80cts to repayment of the loan yet the plaintiff has no legal obligation to pay the loan.

In February, 2011, the plaintiff raised the issue with the defendant after it emerged that the defendant was in the process of discharging the caveat on plot No. 13139/286 which to the plaintiff was an indication that the loan had been paid in full.

The Plaintiff contends that the unilateral action by the defendant of illegally converting the plaintiff's fixed deposit into repaying the loan was un-procedural, unwarranted and illegal. He has claimed a total sum of 6,132,202 being the principal sum, plus accrued interest during the last 17 years at an interest rate of 12% p.a.

The defendant filed a statement of defence on the 5th day of December, 2011 wherein it has denied that the plaintiff had with it, a fixed deposit account which was earning attractive interest. It also denies the allegation by the Plaintiff that he did not know until the 16th January, 1992 that the valuation reports that he had prepared were to be used for purposes of securing financial facilities from it.

The defendant averred that the instructions to the plaintiff to value the two properties being plot Nos. 13139/72 and 13139/285 were conveyed and received by the Plaintiff by virtue of his being on the defendant's panel of valuers and not otherwise.

The defendant further avers that in the alternative, in preparing the valuation reports for both plots, the Plaintiff is taken to have applied his special skills as a Valuer and knew or ought to have known that other parties particularly the defendant could reasonably rely on his judgment and skill by placing reliance on the representations made therein. It avers that the plaintiff owed it a duty of care to, in the course of undertaking valuation on the two properties, take sufficient care that the contents of his reports are not misleading.

It is further pleaded that the Plaintiff expressly and by his conduct admitted that he breached his duty of care to the defendant by preparing and signing the valuation reports in respect of the two plots. The defendant states that the valuation reports were misleading and negligent representations, the particulars of which have been set out in paragraph 10 of the defence.

That, by offering to co-operate in safeguarding the defendant's interest, the plaintiff assumed full responsibility for remedying the loss that the defendant was likely to suffer as a consequence of having place reliance on the plaintiff's negligent and misleading representations in the valuation reports in respect of the properties. That the proceeds of the fixed deposit were liquidated on the basis of the plaintiff's express admission of liability for the loss suffered by the defendant.

The defendant denies that the banking facilities granted on the strength of the plaintiff's misleading valuation reports have been fully recovered. That the plaintiff's claim is statute time barred having been advised of the liquidation of the fixed deposit of Kshs.893,125.8cts. on 22/12/1995.

The plaintiff testified on 1st December, 2016. He told the court he is a valuer by profession trading as Kahuthia Kibui & Co. valuers. He admitted having been instructed to carry out valuations for plot Nos. 13179/72 and 13139/285 but the valuation was undertaken by his associate a Mr. G.K. Mutugi also a registered valuer. He produced the valuation reports as exhibits.

That in January, 1992 he received a letter from the defendant informing him that the reports had been used for financial accommodation to a 3rd party and that the defendant was having problems realizing the security. He was asked to check the matter and advise the defendant on the way forward. Latter it was agreed that he would help the defendant follow up the matter and also he would keep a fixed deposit of Kshs.600,000/- which they could use as security just in case the debtors defaulted in repayment of the loan.

That, on going back to the land, he discovered there was fraud in that his associate valued different plots altogether from what was on the ground. He also discovered that the person who had taken the loan was closely related with those who had given him instructions to value the plots. He stated that they also agreed with the defendant that the defendant would put a caveat on plot No. 286 belonging to the debtor.

That on 22/12/1995, the defendant wrote to him informing him that they had converted his deposit amounting to Kshs.893,125.80cts to pay the loan which he alleges was contrary to their agreement.

On cross examination, he admitted that when a valuer is instructed to carry out valuation of a plot, he is supposed to visit the site, inspect and verify the truthfulness of that information as far as possible using third parties like the government officers and offices like the survey of Kenya. He stated that there were no plans that time either at the survey of Kenya or department of planning. The defendant did not call any witnesses to support their case but submissions were filed on its behalf.

The court has duly considered the submissions by both parties. The plaintiff has largely reiterated the evidence on record but on issues of law, he submitted that collateral and guarantors are necessary under the law for one to obtain credit in any lending institution and it is not in dispute that the debtor in this case had collateral and guarantors. That the defendant had the option of selling the charged property to clear the loan, but it opted to use a short cut hence invade the plaintiff's fixed deposit. The plaintiff suggested that the defendant is hiding something and that is why it did not call witnesses. That the defendant took advantage of the good will extended to it by the plaintiff who wanted to co-operate with the defenant to retain his professional job but the defendant abused the generosity.

On the part of the defendant, it was submitted that the defendant relied on the valuation reports to grant a loan to the borrower. That the plaintiff confirmed that no due diligence was exercised in preparation of the reports. That the plaintiff confirmed that the minutes for the meeting held on 2nd April, 1993 were a true reflection of what transpired during that meeting and though he stated he complied with what had been agreed upon between him and the defendant he failed to produce any documentary evidence confirming the same. The Plaintiff assured the defendant of his co-operation to safeguard its interests.

It was also submitted that the fact that the Plaintiff did not raise any concerns and/or questions why the defendant utilized the valuation report without his knowledge, why he did not appear to be surprised that the defendant had utilized the valuation reports on which strength they lent Kshs.700,000/- to a third party, why he did not write a protest letter distancing himself from the defendant's usage of the valuation reports and refuting any negligence claim, why he did not request for loan defaulters loan contract and statement of accounts to verify whether indeed the defendant was owed Kshs.931,373.40cts depicts that he may have been aware of the same.

The court was asked to take cognizance of the fact that the Plaintiff voluntarily offered to make amends in favour of the defendant in view of inaccurate and misleading valuation reports.

The court was also asked to consider that the Plaintiff had even offered to replace the money held in the fixed deposit account with a title deed so as to take care of the defendant's interest. The plaintiff having accepted responsibility for the inaccuracy of the valuation done, he could not run away from the

consequences of his own negligence. The court was referred to the case of **Segwick Kenya Insurance Brokers Vs Price Water House Coopers Kenya (2007)**eKLR HCCC No. 720/2006 in which the Judge quoted the case of **K.C.B. Vs. Kabita t/a Ondongo Kabita Valuers (2002) KLR 419** where Ringera J held:-

1. The defendant as a professional body duly instructed by the plaintiff owed a duty of care to the plaintiff since he knew that a professional opinion which the plaintiff would rely on was required.

2. The defendant was also in breach of that duty in that he did not proceed to value the property in accordance with the ordinary standard of care, skill and diligence expected of a professional valuer.

3. Although to err may be human, for a professional to err as a result of not applying professional skills and tools is negligence. The defendant had been negligent and he had caused loss to the plaintiff.

That it is instructive to note that there is no protest letter by the plaintiff against the defendant upon utilization of his fund in alleged breach of the arrangement that his funds would be released to him. That a refund cannot issue to the plaintiff considering that the loan account as at 16th January, 1992 stood at Kshs.931,373.80cts and upon utilization of the money that was in his fixed deposit account of Kshs.893,125.80cts it left a deficit of Kshs.38,247.60cts.

The court was also told that the plaintiff did not produce any evidence to proof his claim on the applicable interest rate. Though he stated that his fixed deposit was earning interest at the rate of 14% p.a the same was neither pleaded nor proved. Even the interest rate of 12% which he claims, from the date of conversion to the date of filing of the suit, he has no evidence to support the same.

In the alternative, it was submitted that if the plaintiff is entitled to any refund if at all, the claim as at the date of filing the suit was Kshs.893,125.80cts which amount should earn interest from the date of filing. On the other hand, if the applicable interest had been proved, then the same amount as at the time it was applied to satisfy the loan, if at all, would be Kshs.2,175,1022.43cts and not Kshs.6,132,202.00 claimed in the Plaintiff.

Lastly, the defendant raised a fundamental point of law, the issue of limitation of time. That under Section 4(1) of the Limitation of Actions Act, an action founded on contract may not be brought after the end of six (6) years from the date on which the cause of action arose. It has relied on the case of **Phillip Kioko Kathenge Vs Housing Finance Company (K) Limited (2014) eKLR** where the court observed thus:-

“The general rule in contract is that the cause of action accrues, not when the damage is suffered but when the breach takes place. In an action of assumpsit, the statute of limitation begins to run not from the time when the damage results from the breach of the promise but the time when the breach of promise takes place. (Howell Vs Young (1826) 5B&C 259. The gist of the action for breach of contract is the breach, and not any resulting damage which may be occasioned thereby. Consequently, the Act runs from the time when the contract is broken, and not from the time at which any damage resulting therefrom is sustained by the Plaintiff. Therefore, although such damage may occur within six years before the action is brought, the action will be barred if the contract was broken before that period.”

That the alleged breach took place on 22nd December, 1995 and it's when the Plaintiff's cause of action arose. That the suit was filed 16 years after the date of accrual of the cause of action and thus was filed out of the statutory limitation period of six (6) years. To support this legal point, the defendant cited the case of **Kitale ELC NO. 17/2014 (Richard Toroitich Vs Mike K. lelemet & 3 others (2014) eKLR** quoted with authority in the case of **Director Limited Vs Samani (1995 -1998) 1 EA 48** where it was held:-

“No one shall have the right or power to bring an action after the end of six years from the date on which 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.”

The court has carefully considered the evidence on record and the submissions by the parties. As noted earlier, though the defendant filed a defence in this matter it did not call any witnesses in support of its case. Courts have stated on several occasions that a party cannot prove his/its case by way of submissions without calling evidence. However, the law allows a party to raise points of law at any time.

From the evidence on record, it has emerged that the Plaintiff was instructed by owners of plot Nos. 13139/72 and 13139/285 to carry out inspection of the said plots with a view to advising on the open market value of the plots. The same was inspected by his associate and two valuation reports were prepared.

That the defendant was not involved when the instructions were given but later became involved as they were working together with the plaintiff. It is also on record that the reports were used by the defendant for financial accommodation to a 3rd party namely Salah Ibrahim Mohammed.

It also emerged that the defendant encountered problems with selling the plots because they had been over valued and it is at this point that the plaintiff got involved. That upon undertaking another valuation for the same plots the value drastically went down from the initial Kshs.600,000/- and 570,00/- for plot Nos. 13139/72 and 13139/285 respectively to Kshs.50,000 – Kshs.70,000.

It was at that point that the plaintiff discovered that there was some fraud in that they were shown other different plots at the time of valuation to create the impression that they were developed and therefore they valued the wrong plots.

It is also clear that the person to whom the loan was advanced was a close relative to the owners of the two plots which were valued by the Plaintiff and because the plaintiff wanted to retain a good relationship with the defendant, it was agreed that the plaintiff would keep a deposit of Kshs.600,000/- which the defendant could use as security just in case. It is noted that the plaintiff did not state anywhere in his evidence that he was coerced to enter into that agreement and there was no undue influence or duress. He voluntarily agreed to enter into the same. In fact it is on record that at some stage he had requested the bank to allow him to substitute the FDR held under lien with his property but the defendant declined to grant his request. See Exhibit 6. This is clear evidence that at all material times, the Plaintiff knew what he was doing and the legal implications of his own action. At no time did he protest even after he defendant wrote the letter dated 22nd December, 1995 informing him that the defendant had utilized the FDR to offset the loan.

The plaintiff did not produce any evidence to proof that the loan was paid in full as alleged to entitle him to the refund of his money, if at all. He has also not produced evidence in support of his claim of interest at 14% per annum and the same is not even pleaded.

On the issue of the limitation of time, the cause of action herein arose on the 22nd of December, 1995 when he was informed that his fixed deposit was applied to offset the loan amount. The cause of action herein is based on contract. Section 4(1) of the Limitation of Actions Act provides that an action founded on contract may not be brought after the end of six (6) years from the date the cause of action accrued. It is obvious that the suit was filed out of time. Either way, the plaintiff would not have succeeded and consequently, the suit is dismissed with costs to the defendant.

Dated, signed and delivered at Nairobi this 16th day of March, 2017

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L. NJUGUNA

JUDGE

In the presence of

.....**For the Plaintiff**

.....**For the Defendant**