



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 700 OF 2005**

**PHILIP KIOKO KATHENGE ..... 1<sup>ST</sup> PLAINTIFF**

**DOROTHY MUENI KIOKO ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY (K) LIMITED ..... DEFENDANT**

**RULING**

1. The Plaintiffs have brought a Notice of Motion dated 24th September 2012 before this Court. It is grounded on the provisions of **sections 1A, 1B and 3A** of the *Civil Procedure Act* as well as **Order 51 rule 2** of the *Civil Procedure Rules, 2010*. As a result, the Application is based upon the inherent jurisdiction of this Court. The Application requests of the Court, to adopt a settlement agreement reached by the parties on 12th July 2004 so as to confirm the full and final settlement of this suit. The Application was based on the following grounds:

**“1) A without prejudice settlement agreement was entered into between the Plaintiffs and the Defendant on 12/7/2004 which provided for payment of Kshs. 350,000/= in full and final settlement hereof over a period of 6 months.**

**2) The period lapsed and was subsequently extended indefinitely by mutual agreement on 1/3/2005.**

**3) The Plaintiffs have subsequently paid the agreed sum of Kshs. 350,000/= in full and final settlement of this matter.**

**4) Thereafter, the Defendant has reneged on the said agreement and now insists on payment of well over Kshs.700,000/= from the Plaintiff.**

**5) The Defendant is debarred, precluded and estopped from denying the terms of the consent agreement entered into and duly consummated by the parties.**

**6) It is in the interests of justice that this Honourable Court do adopt the agreement reached between the parties as the full and final settlement hereof”.**

2. The Application was supported by the Affidavit of the first Plaintiff herein sworn on 24th September 2012. The deponent averred that prior to he and his wife, his co-Plaintiff, proceeding to court, the parties hereto had entered into a “without prejudice” settlement agreement dated 12th July 2004. That agreement saw the parties agreeing to the Plaintiffs paying the sum of Shs. 350,000/- in full and final settlement of the Defendants loan to them. The deponent attached a copy of the letter from the Defendant company dated 12th July 2004 which detailed that the Plaintiffs’ mortgage account would be zero rated for 6 months while the Defendant Company waited for the final payment of Shs. 350,000/- as per its letter and the terms set out therein dated 24th June 2004. Interestingly, the first Plaintiff did not attach a copy of that letter to his Affidavit in support of the Application. However, a copy of the same was contained in the first Plaintiff’s Supporting Affidavit sworn on 20th December 2005. That Affidavit supported the Plaintiffs’ Application before Court bearing even date therewith seeking an injunction to restrain the Defendant from selling the suit property LR No. NAIROBI/BLOCK 60/64. The pertinent section of that letter dated 24<sup>th</sup> June 2004 reads as follows:

**“Subsequently we write to advise you that we have evaluated your counter proposal and are acceptable to your full and final figure of Kshs 350,000. subject to the following terms and conditions:-**

- 1. That Kshs. 60,000.00 is paid within the first 5 months as per your offer and the balance of Kshs 50,000 to be paid within the sixth month.**
- 2. Offer lapsing on 30th November 2004 thereafter we shall charge interest at the prevailing market rate.”**

The first Plaintiff then maintained in paragraph 5 of his said Supporting Affidavit that the period of six months elapsed prior to the finalisation of the payments of the agreed sum of Shs. 350,000/- **due to the hard economic situation in the country at the material time.** (Emphasis mine).

3. The first Plaintiff maintained that he then wrote to the Defendant a letter dated 17th February 2005 requesting that he be allowed to continue with his payments under the agreement to which the Defendant accepted his request as per its reply dated 1st March 2005. The first Plaintiff’s said

letter of 17th February 2005 reads as follows in the salient paragraph:

**“In our agreement signed on 28th June 2004 we agreed on a final settlement figure of Ksh 350,000/= of which I managed to pay only Ksh 60,000/= due to the prevailing economic condition in our country. This left me with a balance of Ksh 290,000/=. I requested to be given another chance to pay up at a manageable rate of Ksh 15,000/= a month. This I undertake to pay up without default till I finish, starting immediately.”**

The letter from the Defendant in response was dated 1st March 2005 and advised the first Defendant of an increase in interest rates as regards his mortgage account No. 600-0002701, owing to the Government increasing threefold the interest payable on 91 day Treasury Bills. However, the Defendant added a penultimate paragraph upon which the Plaintiffs rely in their Application in submitting that the aforesaid agreement and settlement figure of Shs. 350,000/- was open-ended. That paragraph reads:

**“However, in view of the existing settlement Agreement between yourself and us, interest shall not be charged on this Account until the expiry or termination of this Agreement by either party. In the event of non performance of this Agreement interest rate shall be charged on this account as per paragraph 3 above.”**

4. Thereafter, the first Plaintiff deponed to the fact that he and his wife had paid to the Defendant a total amount of Shs. 367,000/- as between the 1st July 2005 and the 4th May 2010. What the first Plaintiff failed to detail in his said Affidavit in support of the Application before Court, was to reveal that the Defendant had, in fact, sent a further letter to the Plaintiffs dated 9th March 2005. Again that letter was contained in the exhibit to the Plaintiffs' Application for injunction dated 20th December 2005. It was also annexed as exhibit “MM-2” to the Replying Affidavit of the Defendant sworn on 23rd July 2013. The salient paragraphs of that letter read as follows:

**“Kindly be advised that your total outstanding balance now stands at Kshs. 468,093.85 and interest continues to accrue at the rate of 17% p.a. until payment in full.**

**As you may realize, you never honored the terms and conditions of our mutual agreement for settlement of your indebtedness to us and in the circumstances the offer lapsed on 30th November 2004.”**

5. Apart from filing the said Replying Affidavit dated 23rd July 2013 (to the Plaintiffs' Application) sworn by one **Migui Mungai**, the Defendant filed a Notice of Preliminary Objection dated 6th June 2013. That Objection detailed that the Application was incompetent, misconceived, did not lie and should be dismissed with costs for the reason that:-

**“1) The purported cause of action upon which the said Application is founded is time barred under the provisions of the Limitation of Actions Act (Cap. 22) Laws of Kenya.”**

In my view, if this Court should uphold the Defendant's Preliminary Objection, then the Plaintiffs' said Application dated 24<sup>th</sup> September 2012 will automatically fall away. It would make sense for this Court to determine the Preliminary Objection prior to considering the substantial Application as a whole.

6. As regards to whether the Plaintiffs' Application was time barred, the Plaintiffs submitted that the cause of action was premised on breach of contractual obligations. They submitted that while the settlement agreement was reached on the 12th July 2004, it was the Defendant who reneged on the same on or about 21st June 2010. It went without saying that the cause of action arose at the point and on the date that the Defendant breached the settlement. As the date was in June 2010, the

Application could not be time barred having been filed only two and a quarter years later. The Defendant submitted and agreed that the Plaintiffs' Notice of Motion was predicated on a cause of action in contract which was subject to a six-year limitation period under section 4 of the Limitation of Actions Act. It was the Defendant's contention that although a settlement agreement had been reached, the Plaintiffs failed to adhere to the terms of the same following which the Defendant had written to the Plaintiffs on 9th March 2005 notifying them of their default to abide by the terms and consequently the settlement offer had lapsed. It was the Defendant's submission that if there was any cause of action upon which the Plaintiffs could hang their hats, then such would have accrued on 9th March 2005. The Application before Court had been filed seven years and six months after that date.

7. The Defendant went on to refer the Court to **Chitty on Contracts 27th Edition Vol. 1** wherein it detailed:

**“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 Statue of Limitations begins to run not for the time when the damage results from the breach of the promise, but the time when the breach of promise takes place. (*Howell v Young (1826) 5 B & C 259*). The gist of an 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”.**

8. In light of the above, the Defendant submitted that the Plaintiffs' Application before Court was time barred under the Limitation of Actions Act. It noted that an action begun after the period of limitation has expired is not maintainable. The Defendant went on to quote from **Halsbury's Laws of England 4th Edition Vol. 28** at paragraph 601:

**“The courts have expressed at least three differing reasons supporting the existence of statutes of limitation, namely (1) that the long dormant claims have more of cruelty than justice in them, (2) that the defendant might have lost the evidence to disprove a stale claim, and (3) that the persons with good causes of actions should pursue them with reasonable diligence.”**

The Defendant concluded its submissions in relation to its Preliminary Objection by submitting that the Plaintiffs' Notice of Motion could not be maintained for the reason that it was predicated on a cause of action in contract which accrued (if at all) on 9th March 2005, well beyond the 6 year limitation period.

9. I have considered the submissions of both parties in relation to the Defendant's said Preliminary Objection. I do not consider that the letter from the Defendant to the first Plaintiff dated 1st March 2005 in any way extended the settlement agreement which had been reached on 28th June 2004. I hold much more store by the Defendant's said letter dated 9th March 2005 and I find that the offer made by the Defendant in the said settlement agreement lapsed on 30th November 2004. As a result, I find merit in the Defendant's Preliminary Objection based on limitation of actions. The said settlement agreement was by way of contract and **section 4** of the *Limitation of Actions Act* limits actions in relation to contract to 6 years. I believe that the Plaintiffs' Notice of Motion dated 24th September 2012 must be considered as being such an action. There is no definition of the term “cause of action” in the *Limitation of Actions Act*. In 1888 as per **Chitty on Contracts 27th Edition** (supra) the term was defined by **Lord Esher** as:

**“every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court.”**

Again as per **Chitty**, in 1891 **Lindley L.J.** defined the same as:

**“it has always been held that the statute runs from the earliest time at which an action could be brought.”**

In 1927 **Lord Dunedin** defined cause of action to mean:

**“that which makes action possible”.**

I would adopt these quotations as set out above as part of this Ruling.

10. In conclusion therefore, I uphold the Defendant’s Preliminary Objection dated 6th June 2013 and strike out the Plaintiffs’ Notice of Motion dated 24th of September 2012 with costs to the Defendant.

**DATED and delivered at Nairobi this 13<sup>th</sup> day of February, 2014.**

**J. B. HAVELOCK**

**JUDGE**