REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 56 OF 2013

EBRAHIM AND COMPANY LIMITED.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

RULING

1. The application before me has been brought by the Defendant, **BARCLAYS BANK OF KENYA LIMITED.**

2. The applicant requests the court to strike out the suit. The basis upon which that request is founded is that the cause of action had accrued more than 13 years before the suit was filed.

3. As the claim was based on an alleged breach of contract, the defendant contends that it ought to have been brought within six (6) years from the date when the cause of action accrued.

4. In the plaint, the plaintiff identified two letters as forming the basis for the financial facilities which the Bank advanced to it. The two letters are dated 12th March 1998 and 7th July 2000, respectively.

5. Pursuant to the Facility letter dated 12th March 1998, the plaintiff, **EBRAHIM AND COMPANY LIMITED**, sought and was granted an aggregate of short term financial facility amounting to Kshs. 12,300,000/-.

6. The plaint also discloses that by a facility letter dated 7th July 2000, the Bank granted to the plaintiff financial facilities amounting to Kshs. 11,200,000/-.

7. According to the plaint, the parties had agreed that the Bank would charge **EBRAHIM AND COMPANY LIMITED** (hereinafter cited as "EBRAHIM") interest on the facilities, at the rates stipulated by law.

8. But the plaint asserts that the Bank did not honour the agreement on the interest rates. Instead, the Bank is said to have charged interest at rates which were illegal, unconscionable and un-contractual. As those rates were higher than what EBRAHIM believes ought to have been charged, a sum in excess of Kshs. 7.2 million was paid to the Bank, over and above the sums which ought to have been paid.

9. It was for that reason that the plaintiff seeks a refund of Kshs. 7,227,797/93 from the Bank.

10. EBRAHIM also wishes to have the Bank ordered to meet all penalties and costs incidental to the account.

11. In its Defence, the Bank denies the allegations made by the plaintiff.

12. According to the Bank, it always charged interest at the contractual rates.

13. As the facility letters specified the rates of interest, penalty charges and the manner in which the variation would be effected, the Bank believes that the plaintiff was estopped from questioning what it had agreed to.

14. The said Estoppel is said to arise because the plaintiff benefitted from the contract whose terms it was now challenging.

15. The Bank also contends that estoppel did arise due to the fact that for more than 13 years the parties agreed to and were bound by the terms of their contract.

16. Furthermore, the Bank was of the view that the terms of the contract did not violate the law, as Ebrahim had asserted, or at all.

17. Another issue which was raised in the Defence was that the claim was not sustainable because it was time-barred by virtue of the provisions of the Limitation of Actions Act. It was this last assertion which the Bank invoked in the present application.

18. Pursuant to the provisions of Section 4 (1) (a) of the Limitation of Actions Act, actions funded on contract may not be brought after the end of six (6) years from the date when the cause of action accrued.

19. In **GATHONI VS. KENYA CO-OPEATIVE CREAMERIES LIMITED [1982] KLR 104,** at page 107 Porter JA explained the reasons why there was need to impose a time limitation within which legal suits may be instituted. This is what the learned Judge said;

> "*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*".

20. In this case the Bank has suggested that the cause of action accrued on the date when the parties executed the second Facility letter, on 7th July 2000.

21. A cause of action is said to accrue upon the happening of something which gives a person a basis to lodge a complaint against another person. Madan JA (as he then was) cited with approval the following words of Lord Pearson in **DRUMMOND – JACKSON VS BRITISH MEDICAL ASSOCIATION [1970] 2 WLR 688,** at page 696;

> "*A cause of action is an act on the part of the defendant which gives the plaintiff the cause of complaint*".

22. Madan JA quoted those words in the famous case of **D.T DOBIE & COMPANY (KENYA) LIMITED VS MUCHINA [1982] KLR 1,** at page 6.

23. Therefore, the date when the parties executed the contract pursuant to which the plaintiff was to derive a benefit from the defendant, cannot be said to be the date when the defendant's action gave to the plaintiff a cause for complaint.

24. On 7th July 2000 the plaintiff executed a Facility letter which was going to enable it access funding

for its business ventures. Therefore, as at that date the plaintiff was not given any cause to complain against the Bank.

25. On the other hand, Ebrahim contends that the cause of action accrued to it in 2011, when the Bank denied the Demand Notice which the plaintiff had given to the Bank.

26. According to the plaintiff, the cause of action accrued when a demand was made by the plaintiff and the defendant denied the said demand. That preposition is said to be derived from **INDUSTRIAL DEVELOPMENT BANK LIMITED VS ANOTHER, CIVIL APPEAL NO. 128 OF 2001.**

27. In that case, the High Court had held that the cause of action accrued when the Bank first wrote to its customer, giving it Notice that unless the overdue payments were made good immediately, the Bank would proceed to enforce the securities.

28. As that Notice was issued on 26th April 1990, Hewett J. had held that the period of six (6) years commenced running from that date.

29. However, the Court of Appeal faulted that reasoning on the following grounds;

> "*True, the failure to pay the instalments on their due dates constituted a breach of the contract which entitled the appellant to treat the contract as repudiated, but other clauses in the contract allowed the appellant the right to show indulgence to the respondents and the subsequent letters of demand written by the appellant to the respondents clearly showed that the appellant was treating Loan Agreement as still valid and subsisting even as late as 1st November, 1996"*.

30. First, it was not the Demand letter which, when denied, gave rise to the cause of action.

31. It was the failure by the respondents to make payments of instalments when each fell due, that gave to the Bank the right to complain. The Demand Letter constituted the complaint.

32. After the Bank had given the first Notice, the respondents approached it, and the Bank granted to the respondent several indulgences. However, the respondents did not keep their side of the bargain, prompting the Industrial Development Bank Limited to issue several other letters of demand.

33. This is what the Court of Appeal said in regard to the question regarding the cause of action;

> "*Other causes of action could have arisen on each of the subsequent dates when each instalment fell due and was not paid"*.

34. It was the default by the respondents in that case which gave rise to the cause of action.

35. In the case of **MOHAMED AHMED GAID VS. AWO SHARIFF MOHAMED, MILIMANI HCCC NO. 84 OF 2003,** Emukule J. expressed himself thus;

> *"Clearly taking analogy from mortgage advances, in the absence of a repayment date, the debt becomes payable upon the giving of the necessary statutory notice of demand for repayment and upon the default of which the loan becomes payable.*
>
> *In this case, as the Agreement between the parties provided for repayment upon demand, the cause of action arose from the date of such demand"*.

36. If the borrower responded to the demand notice by making payment, the lender would have no basis for taking legal action against the borrower.

37. But if the borrower failed to comply with the lawful demand, then the lender would be entitled to take legal action.

38. Therefore, the trigger for legal action is the default.

39. In **JANENDRA RAICHAND SHAH & 2 OTHERS VS MISTRY VALJI NARAN MULJI, CIVIL APPEAL NO. 237 OF 2006** (At Mombasa), the Court of Appeal dealt with an appeal arising out of the decision by the High Court, striking out a plaint on the strength of a Preliminary Point of Law.

40. It was the considered view of the learned Judges of Appeal that the real issue before the High Court should have been whether or not the issue that was canvassed before it was preliminary objection on a point of law. This is what the Court of Appeal said;

> "*We have considered the pleadings, the rival submissions by counsel and we are of the view that the issue for determination is whether what was urged before the learned Judge was a preliminary objection on a point of law. Looking at the pleadings as captured in the paragraphs that we have reproduced in this judgment, it would appear that the question of limitation was raised and disputed.*
>
> *That being the case, it may have been necessary for evidence to be adduced by either side to the dispute. It cannot be said that all the facts pleaded by one side are correct. From the pleadings, facts were in serious dispute. With due respect to the learned Judge, this was not a proper case for determination by way of preliminary objection on a point of law".*

41. For that reason, the Court of Appeal reinstated the suit and directed that the said suit be heard on merit, by the High Court.

42. In the case before me, there are serious issues which are in dispute. Those issues relate to whether or not the interest and penalties which the Bank was charging to the account of Ebrahim were lawful.

43. However, none of those issues in dispute have any bearing on the application before me. I say so because the only matter now before me relates to the Limitation of Actions Act.

44. There is no dispute about the fact that the claim before the court emanates from contract.

45. There is also no dispute that the two Facility letters which formed the said contract are dated 12th March 1998 and 7th July 2000.

46. The plaintiff engaged Financial Consultants known as **INTEREST RATES ADVISORY LIMITED (IRAC)** who carried out the re-calculation of the interest and penalties which had been debited to the account of Ebrahim.

47. According to the plaintiff, the recalculation revealed that the sum of Kshs. 7,227,797.93 was due from the Bank to Ebrahim.

48. The Bank's position was that the plaintiff had no authority to compel the Bank to accept the unilateral intrusion by IRAC, which had the effect of altering or amending the terms and conditions of the Agreement between the plaintiff and the defendant.

49. But whether or not the recalculations by IRAC were accurate, which is not admitted by the Bank, I understand the Bank to be saying that the plaintiff is barred, by law, from bringing the action against the Bank.

50. That submission is founded upon the plaintiff's own assertion that IRAC advised the plaintiff that as at 1st January 2004, the plaintiff's account at the Bank was overpaid by Kshs. 4,190,082.78, as opposed to being in debit of Kshs. 2,777,155.35.

51. When IRAC provided the plaintiff with a Report which indicated that the Bank had over-charged Ebrahim, it became possible for the plaintiff to complain about the bank's actions. In effect, the cause of

action accrued upon the Bank's acts of alleged over-charging the plaintiff.

52. By a letter dated 7th February 2005, the plaintiff complained to the Bank, after the plaintiff had carried out its own interest recalculation.

53. That means that the actions giving rise to the complaint against the Bank had already taken place.

54. In effect, the cause of action had already accrued.

55. But the plaintiff waited until 1st February 2011, to write a formal Demand Notice through its lawyers, Messrs **HASSAN, BULLE & COMPANY ADVOCATES.**

56. By that Demand Notice, the lawyers said;

> "*We act for Ebrahim & Company Limited and our instructions are to write to you as hereunder.*
>
> *On or about January 2005, our client instructed Interest Rates Advisory (sic!) Centre Limited (IRAC) to scrutinize and re-calculate the interest on the above account. The account was scrutinized on the over draft account covering the period from June 1996 to December 2003 and interest was re-calculated on the documents signed between yourself and our client i.e Bank correspondence, statement of accounts and banking facility letters".*

57. It is not clear why the plaintiff first complained to the Bank in February 2005, about the alleged over-charging, but did not proceed to file suit until 15th February 2013.

58. By the time the plaintiff first complained in February 2005, its cause of action had already accrued against the Bank.

59. That is clear from the Report from **IRAC** which is dated 26th January 2005.

60. I find that the claim by the plaintiff has been brought to court after the lapse of more than six years from the date when the cause of action accrued.

61. Accordingly, the claim is barred by the Limitations of Actions Act. It cannot be sustained. Therefore, I allow the defendant's application, and strike out the plaint.

62. The costs of the application and of the suit are awarded to the Defendant.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **8th day** of **October** 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Otieno for the Plaintiff.

Ogunde for the Defendant.

Mr. C. Odhiambo, Court clerk.