REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 90 OF 2009

BENJOH AMALGAMATED LIMITED ……..…. PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD. …… DEFENDANT

R U L I N G

Application dated 27/4/09 by plaintiff invoking **Order 8 (1) (2), Order VI Rule 13 (1), Section 3A, Civil Procedure Act** seeking orders that the defence filed in this suit on 6/3/2009 be struck out and the court do enter judgment as prayed in the plaint on ground stated and affidavit of Samuel Kungu. On 13/2/2009 the plaint is said to have been served on the bank as shown in the copy of affidavit exhibited.

Defence was filed on 6/3/2009 and that the defence was not served within 7 days. That the defendants have not complied with court order made in court on 28/11/2008 marked "CL1" (order in court case **HCC 494/08**). It is sworn the bank failed to serve the defence in time in order to delay the determination of this suit.

The respondent bank caused an affidavit to be sworn in reply by one Chris Theuri. He said the bank failed to serve the statement of defence after it had in time because the plaintiff does not exist at address given. Process server who has not been able to trace the plaintiff's physical address. Therefore, the issue of service is explained by defendant.

The affidavit referred to back in time to 12/4/1989 when defendant began a relationship with the plaintiff of customer and banker/borrower and lender. There was default by borrower and it is sworn how lender was frustrated in its quest for realizing its security. In the year 2008 suit **No. HCC 494/2008** was filed and in an interlocutory application the court made a finding that all those suits were res judicata. However the suit is still pending because that was an interlocutory application.

The deponent has filed a further affidavit denying that the defendant has ever been served with summons to enter appearance and the affidavit of Njonjo, process service is false in all respects and the stamp impression affixed on his exhibit has been found to be a forgery by the document examiner as per report exhibited "CT 1" to his further affidavit.

Summons to enter appearance have not been properly served. This witness was cross-examined by Mr. Wachakana, counsel for applicant. Mr. Wachakana referred to the authorities in his list namely **Housing & Industrial Developments Contractors vs. A.G & another** and **Wilfred Odhiambo**

Musungo where the court struck out the defences not filed within prescribed time.

The respondent submitted in writing on both Preliminary Objection dated 4/5/09 and the plaintiff's application dated 27/4/2009. On the issue of limitation, the plaint alleges that the cause of action of breach of contract arose in 1990. It is now 18 years since then and the **Limitations of Actions Act** prescribes 6 years within which to file matters are on contracts, therefore the period within which the suit shall have been filed has since expired. The **Act** provides that:-

"4 (1) the following actions may not be brought after the end of six years from the date on which the cause of action accrued which actions are founded on contract."

Regarding the issue of jurisdiction counsel relies on **Section 6** of **Cap. 21.** On this issue the respondent (KCB Ltd.), counsel relied on the case of **Mumina Fazzini, Madina Fazzini & Mariam Fazzini vs. Amina Aden Abdi – Admiralty Case No.7 of 2001 (OS).** In that case the court (Waki, J., as he then was) addressed **Section 6** of **Civil Procedure Act.** There were suits between the same parties and he stated that the scope of **Section 6** aforesaid is four-fold:-

1. *"Matter in issue in both suits must be substantially the same;*

2. *The previously instituted suit must be pending in the same court in which the subsequent suit is brought or in any other court having jurisdiction in Kenya to grant the relief sought;*

3. *Both the suits must be between the same parties or their representatives;*

4. *Such parties must be litigating in both suits under the same title."*

The court said also that **Section 6** does not require that the subject matter and the causes of action of the two suits should be the same. It requires that they should be substantially the same. In the present case all suits referred in the replying affidavit are substantially the same. They relate to the subject of a loan granted to the plaintiffs by the defendant.

There is no dispute that there has been several suits between the parties regarding the issues arising in respect of that loan and I do not need to recite them all (about 15 in number). In **HCC No. 494 of 2008** the issues outstanding are the fraud and illegality of sale and damages. By **Section 6** this suit must be stayed pending the hearing and finalization of the previous suit, not struck out. In addition to the case of **Mumina Fazzini** mentioned above the counsel for the defendant relies on other authorities; **George Marcelo vs. HFCK – No.12 of 2006 – Benjoh Properties Ltd., Patrick Kiromo Mwaura vs. Commercial Bank Ltd. – HCC No. 533 of 2005 2006 e KLR, Nairobi City Council vs. Commissioner of Lands & 2 others – HCC No.1231 of 2002 [2005] e KLR.**

On the issue of res judicata this court has made a finding in an interlocutory application that this suit is res judicata in **HCC No. 494 of 2008,** this suit is still pending finalization. In the suit **No. HCC 1219 of 1992** the parties entered into a consent which was recorded finalizing all the issues relating to the loan facility granted to the plaintiff by defendant. Since then several other suits have been raised by plaintiff on the same issues.

There is no dispute as to this issue. There was an effort to challenge the said consent judgment but the challenge went up to Court of Appeal and came back to the High Court where the court stated:-

"For avoidance of doubt the consent order of 4.5.1992 in HCC No. 1219/92 remains the decision of court in the dispute between the parties."

Defendants also refers to the cases of **Pop-In (K) Ltd. vs. Habib Bank, Rajwani vs. Roden 1990 KLR 4, Madede & another vs, Fita [1988] KLR 211**. On the issue of defective supporting affidavit there is authority by the plaintiff company that the one named Samuel Kungu Mungai has authority to represent the plaintiff.

Regarding the provisions of **Order VIII Rule 1 (2)** the evidence of service of summons of appearance upon the defendant is disputed. The plaintiff states it was served and acknowledged while defendant states that it was not served and the stamp of acknowledgement having been examined by an expert is a forgery. It is clear the defendant has an upper hand here, it obtained expert report while the plaintiff relies only on unsupported allegation.

The explanation as to failure to serve as given by defendant is reasonable and is acceptable. If the plaintiff had served the summons, there is no reason why it could have failed to enter appearance and serve the statement of defence within time.

In the circumstances, the court cannot estimate when the 7 days' period started to run for the purpose of striking out the pleading. The rule applies only when the summons to enter appearance has been properly served. The plaintiff has not demonstrated any prejudice suffered for failure to serve defence on time. This application was filed as an afterthought to avoid the consequence of the defendant's application to strike out the suit.

The defendant has relied on 10 authorities listed to support its submissions

Upon considering the facts and the authorities relied upon both parties. It is clear to me that the applicant relied on alleged failure to comply with **Order VIII 1 (2),** however, he has not proved when the summons was served. He relies on the date statement of defendant was filed.

However, the defendant explained that the statement of defence was filed as a precaution, no doubt, due to the long battle fought between the parties over the years. The evidence of the plaintiff on the issue of service is not reliable and therefore the alleged service was not properly effected or effected at all. The reason given that a copy of defence was not served is also not controverted. The plaintiff could not trace the whereabouts of the address where defendants could be found.

It is my view that unless proper service is done, it is not possible to penalize a party for non service of defence within time prescribed. I therefore do not see merit in this application and the same is hereby dismissed with costs to the respondent.

Orders accordingly.

DATED, SIGNED and **DELIVERED** at Nairobi this 6th day of July 2009.

JOYCE N. KHAMINWA

JUDGE