



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 324 of 2004

NATIONAL HOUSING CORPORATIONPLAINTIFF

VERSUS

OSII OWADE AYOMA DEFENDANT

RULING ON QUESTION OF LAW

The parties in this suit agreed to argue a preliminary point before the suit is heard under Order XIV rule 2 of the Civil Procedure Rules. The rule stipulates:

“If it appears to the court that there is in any suit a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a referee or an arbitrator, the court may make an order accordingly, and may direct such question of law to be raised for the opinion of the court in such manner as the court thinks expedient; and all such further proceedings as the decision on such question of law may render unnecessary may thereupon be stayed.”

Pursuant to a consent filed and signed by Advocates to both parties dated 7th May, 2008 the parties raised the following issues of law for determination as set out herein below:

- 1. Is the Plaintiff exempt from the provisions of the Limitation of Actions Act when it comes to recovery of loans granted out of the Housing fund?**
- 2. If the plaintiff is exempt from the provisions of the Limitation of Actions Act the suit be remitted to the lower court for determination of whether or not the Defendant is liable to pay the sum claimed in the plaint.**
- 3. If the Plaintiff is bound by the Limitation of Actions Act when it comes to recovery of loans granted out of the Housing fund then the suit against the Defendant be dismissed with costs.**
- 4. Both parties shall have the right to appeal if they so desire.**

As can be noted from these issues the fourth issue is not for determination but merely gives the party aggrieved by this ruling to go on appeal.

Each Advocate has filed submissions in support of the client’s position on the question of law raised. I will soon get to the submission. The brief facts of the case is as can be inferred from the plaint. The Plaintiff is National Housing Corporation, a government corporation while the Defendant was one of the beneficiaries of its Rural Housing Loan Programmes. The Plaintiff filed the suit against the Defendant

intending to recover Kshs.83,106/-, owed to it by the Plaintiff as of 28th February, 2003 as arrears of the loan advanced to the Defendant by the Plaintiff in respect of the Rural Housing Loan Account No. 7333.

The Plaintiff's Advocate filed submissions. In brief, the Plaintiff contends that it is a public corporation established under section 3 of the Housing Act hereinafter referred to as the Act. That under Section 8(1) (b) of the Act, it provided the Defendant with a Rural Housing Loan on 23rd March 1979. The Plaintiff contends that the Defendant defaulted in his repayments in 1986. The Plaintiff on 3rd June, 2003 instituted a suit for recovery of the sum owed by the Defendant in the **Chief Magistrate's Court Nairobi No. 3263 of 2003**. The parties agreed to have the matter determined by this court.

On the law, the Plaintiff's advocate submitted that the Plaintiff relies on sections 8 and 21 of the Act to maintain its claim being one of recovery of a debt *on a statute*, in this case, the Act. The Plaintiff draws a distinction between a claim *on a statute* and a claim under statute and relies on the English Court of Appeal decision of **Gutsell vs. Reeve [1936] 1 KB 272**. In the cited case the Plaintiff filed a suit against his employer 10 years after the cause of action arose, to recover the difference of wages paid to him 10 years earlier at a rate lower than the minimum wage allowed by statute. The Court of Appeal held:

“That the action was not an action for debt upon a statute, but was one based on the contract as amended by substituting for the amount provided by the contract the amount of the minimum rate of wages provided by the statute.

Therefore, that the action was not a specialty, but for a simple contract debt, and was barred by the Limitation Act, 1623.”

The court found that the action was subject to the Limitations Act and was therefore barred by statute. The Plaintiff's Advocate submitted that the action was time barred since it was a debt claim given by Statute as opposed to an action on the statute which, counsel submitted, would not exist but for the Act of Parliament.

Plaintiff's Advocate relies on the **Halsbury's Laws of England 4th edition reissue Vol. 28** at paragraph 801 foot note 1 where it is held:

“The Limitation of Actions has been described as entirely statutory and an action will be barred only if there is some period of limitation applicable to it under statute.”

That is the common law and position in England that where there is no Act of Parliament limiting an action, then the action may be brought at any time.

The Plaintiff's Advocate submitted that the Limitation of Actions Act did not apply to the claim by the Housing Corporation since the action was not one brought by virtue of a written law but are actions brought under a written law. The Plaintiff's Advocate also argued that the intention of Parliament was to empower the National Housing Corporation with summary powers to recover funds owed to the housing fund under Section 21 of the Act.

That section provides as follows:

“21. (1) if an individual person to whom, or a company or society to which, a loan has been made –

(a) fails to pay any amount due in respect of the principal or interest of the loan; or

(b)...

(c) ...

(d)...

(e) ...

The Corporation or the local authority, as the case may be, may either proceed to recover the amount outstanding on account of the loan together with all interest due thereon, by action in a competent court, or may, by an officer authorized in writing by it and without obtaining any judgment or order of any court, enter upon and take possession of the land and premises on which the loan is secured, using force, if necessary, for that purpose; and may thereupon sell, the public auction or after public tender, the land and premises and transfer it to the purchaser and give a good and valid title thereto notwithstanding that such land and premises may have been mortgaged or charged in favour of some other person:

Provided that –

(i) if the land and premises are so mortgaged or charged, the Corporation or the local authority, as the case may be, shall transmit to the second or subsequent mortgagee or chargee at his last known abode or date fixed for the sale, notice by prepaid registered post of such its intention in order that such mortgagee or chargee may redeem the loan, if he so desires”

Counsel argued that going by the wording of this section, it was clear that Parliament was doing away with any procedural obstacles that may hinder the Corporation in the recovery of funds, by making the Act a complete code for enforcements of the rights and liabilities that accrue under it.

Counsel for the Plaintiff relied on Section 30 of the Act for the proposition that where the Act was in conflict with any other Act, the Court should resolve the conflict in favour of the Act.

Section 30 of the Act provides:

“The provisions of this Act shall be deemed to be in addition to and not in substitution for any provisions of any other law which are not in conflict or inconsistent with this Act; and if the provisions of any law are in conflict with or inconsistent with this Act the provisions of this Act shall prevail.”

Counsel for the Plaintiff cited **Republic vs. Communication Commission of Kenya exparte East Africa Television Network Limited [2001] KLR 82** for the proposition that as provided under Section 30 of the Act, the provisions of the Act shall prevail over the provisions of any other Act that contradicts its intention. Counsel urged that since the Limitation of Actions Act was enacted after Housing Act, and since Section 30 of the Act was left intact, Parliament intended that the provisions of the Limitations of Actions Act should not apply to the Act.

The brief summary of the Defendant’s submission are as follows. The Defendant’s Advocate sets out a brief background of the instant case including facts not pleaded in the plaint. Counsel contends that as per agreement of the parties dated 20th March, 1979, the Plaintiff lent to the Defendant K?660, equivalent of Ksh.13,200/-, which sum was repayable in 7 years with effect from 1st May, 1999. That the loan was paid through check off system. That although the Plaintiff alleges that the Defendant defaulted in 1986, no action was brought until 2003, well beyond the limitation period allowed in law for such actions.

Counsel for the Defendant relies on Section 4(1) of the Limitation of Actions Act for the proposition that actions founded on contract should not be brought after six years from the date the cause of action arose. Section 4(1) stipulates:

“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 –

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) *actions to enforce an award;*

(d) *actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;*

(e) *actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”*

Counsel also relied on section 19 of the Limitations of Actions Act for the proposition that actions for recovery of money secured by a mortgage or charge or for recovery of proceeds of sale of land should be brought within 12 years. Section 19 provides:

“19. (1) An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued.”

Counsel also relies on Section 4(5) of the same Act for the proposition that an action for recovery of any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law may not be brought after the end of two years from the date on which the cause of action arose. Counsel submitted that from Section 4(5), it was clear that even statutory causes of action were subjected to the provisions of the Limitations of Actions Act unless specifically exempted.

Section 4(5) stipulates:

“An action to recovery any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law may not be brought after the end of two years from the date on which the cause of action accrued.”

Counsel for the Defendant submitted that exemptions to the provisions of the Limitations of Actions Act are provided under Section 3 and Part III of the Act and that the same do not apply to the instant case.

Counsel also submitted that Section 39 of the Actions Act was not pleaded by the Plaintiff as providing an exemption to the application of the Actions Act to the Plaintiff’s claim and that it was in any event irrelevant to the instant case. Counsel submitted that Sections 41, 42 and 43 of the Limitations of Actions Act do not apply to the instant case.

Counsel for the Defendant rightly submitted, as did counsel for the Plaintiff, that the Plaintiff herein was created under Section 3 of the Act. The section provides:

“3. (1) There is hereby established a National Housing Corporation which shall be a body corporate by that name with perpetual succession and a common seal, and which shall perform the duties and have the powers conferred on it by this Act.

(2) The Corporation shall consist of the Permanent Secretary of the Ministry, a person appointed by the Minister for the time being responsible for finance and not less than six nor more than eight other members appointed by the Minister, being persons who in his opinion possess special knowledge of housing development or housing finance and of whom at least three shall be public officers, and the Minister shall designate one of the members to be chairman.

(3) ...

(4) The Corporation shall have power to enter into contracts, to hold and dispose of property both movable and immovable, and may sue and be sued in its corporate name.”

Counsel submitted that the corporation derived its right power and authority from the Government as provided under Section 7(2) of the Act thus:

“There shall, by virtue of this Act and without further assurance, become vested in the Corporation the right of the Government to demand, sue for and recover, and give receipts for, and the benefit of all securities for every loan made to a local authority by the Government out of the Housing Fund established under the Housing Ordinance (now repealed) to the extent to which such loans, at the commencement of this Act, remain outstanding, and all moneys received by the Corporation on account of every such loan shall be carried to the Housing Fund.”

Counsel submitted that the corporation could not acquire more rights than the Government itself did, to sue and recover and that therefore the Limitation of Actions Act applied to the Corporation in equal measure as it did to Government.

Regarding Section 27 of the Limitation of Actions Act, counsel submitted that there was no conflict between that Act and the Housing Act. Counsel urged that position on grounds that since the Housing Act was silent on limitation, then the Limitation of Actions Act filled that Lacuna and applied to the Act. Counsel traced the historical background of the Acts which preceded the Housing Act, i.e. Local Government Loans Act which, counsel submitted, was also silent on the issue of limitation. The learned Counsel submitted that under Section 8 of the earlier Act sufficient security was provided for loans advanced to local authorities under that earlier Act and that therefore there was no need to sue. Counsel urges further that limitation was not provided under the Housing Act as recovery proceedings were never intended to be the principle mode of recovery.

Counsel for the Defendant argues that there were many Acts of Parliament which created bodies corporate with power to sue and be sued but with no provisions for limitations. Counsel argued that it was because of these statutes that parliament decided to pass one Act of Parliament to deal with issue of limitation. These included Industrial and the Commercial Development Corporation (ICDC) Act (Cap 445), the National Construction Corporation (NCC) Act (Cap 493), Building Societies Act (Cap 489) and Banking Act (Cap 483). Counsel submitted that it was his view that the Limitation of Actions Act was an Act of General Application which applies to all Acts on matters of Limitation except where its provisions are expressly exempted. Counsel for Defendant urged the court to find that since the Limitations of Actions Act itself exempted other specified statutes from its application, the intentions was that it be a statute of General Application.

Counsel also urged the court to note that under the law of interpretation, a subsequent act of Parliament would take precedence over an earlier one. That the Housing Act came into force on 9th June, 1953 while the Limitations of Actions Act was enacted on 1st December, 1967.

In regard to whether contracts created under the Housing Act are exempt from the application of the Limitation of Actions Act, Counsel submitted that the provisions of Limitations of Actions Act were applicable to such contracts and that the Limitations of Actions Act applied to the instant case since the course of action was based on contract, (i.e. The agreement of 20th March, 1979). Learned Counsel submitted that the reason of the existing agreement between the parties, the cause of action was founded on contract and was not a statutory debt as alleged by the plaintiff. Counsel submitted that an example of a statutory debt was tax.

In regard to **Gutsell case**, supra, counsel submitted that it did not apply as the case was cited in support of a hypothesis of a statutory debt.

Counsel also submitted that **Republic vs. CCK**, Supra, did not apply.

Counsel for the Defendant argued that since Kenya was governed by Statute Law, save for limited applications of English Common Law and Local custom, it should be presumed that unless exempted by the Limitation of Actions Act, the latter Act was applicable.

Counsel for the Defendant argued that this case is being brought 20 years after the Defendant retired from employment, through whom the Plaintiff was recovering the debt in question and that the claim should be caught up by the equitable principle that equity, aids the vigilant. Counsel urged the court to find that this

cause of action was barred by statute.

In response to the Defendants' Advocates submission, the Plaintiff's advocate submitted thus. Counsel submitted that section 2 of the Limitations of Actions Act listed the corporations included in the definition of Government as the Kenya Railways Corporation, The Kenya Ports Authority and the Kenya Posts and Telecommunications Corporation. Counsel submitted that the National Housing Corporation was omitted and is therefore not government and therefore Section 43 which applies the Limitation of Actions Act to actions by or against Government does not apply. Counsel invoked Section 6 of Housing Act as providing for the creation of a bank account for the corporation while Section 7(2) provided for the established of the Housing Fund. Counsel submitted therefore that the corporation did not derive its right, power and authority from Government.

Counsel for Plaintiff, in regard to recovery through the court not being the only manner for recovery urged that since the Defendants admitted this as a fact, and since Section 17(1) of the Housing Act created a first charge against any property that is ameliorated by the proceeds of a loan from the Housing Funds and, since, under Section 21 of the Act the Corporation could sell the property as ameliorated without recourse to the law, the Corporations right under these sections had no time limit. Counsel for Plaintiff submitted that going by the side note to Section 30 of the Housing Act, the provisions of the Act were unambiguous and superseded the provisions of any other Act and that therefore Section 4(d) and (e) of the Limitations of actions Act did not apply.

In regard to application of English Law, Counsel for Plaintiff submitted that since the genesis of our laws was English Law, our statute law must be interpreted in a manner compliant to this tradition. Counsel submitted that in that regard the terms "by virtue of a written law" and "under a written" were technical legal terms with specific meanings as demonstrated at page 281 in the case of **Gutsell**, supra.

Counsel for Plaintiff in conclusion urged the court to find that Parliament provided that the Housing Act shall prevail over sections of the Limitation of Actions act, and that by virtue of Section 30 of the Act, actions under the Housing Act were unlimited.

I have carefully considered the able submissions of counsels for the parties in this case.

In answer to the first question of law raised, whether the Plaintiff is exempt from the provisions of the Limitations of Actions Act for purposes of recovery of loans granted out of the Housing fund.

The Housing Act (the Act) does not make any provisions giving any period of limitations for the rights and liabilities arising there from.

Mr. Mwenda has used that failure to argue that Parliament intended that no period of limitation should apply under the act. The distinction sought to be made between an action on a statute and one under statute to show when limitation may operate has been misapplied. The Limitations of Actions Act is quite clear of instances when the said Act will not apply. These are specified under Section 3 and also Part III of the Act. They also extend to sections 42 to 43 of the same Act. This was observed by Mr. Olouch in his submissions. There is one other section providing an exemption to the application of the Limitations of Actions Act. Section 44 stipulates *inter alia* that a cause of action may be revived by an admission or part payment

Regarding whether the Limitations of Actions Act applies to the Act, both parties agree that in accordance to the rules of interpretation, a subsequent Act of Parliament takes precedence over an earlier one. It is also agreed between the parties that the Limitations of Actions Act, having been enacted in 1967, is a latter Act than the Act, which came into force in 1953.

Whether the Limitations of Actions Act applies to the Act depends on the provisions of the Act itself. As already noted, the Act does not have any provisions relating to limitation. Should it be assumed, as Mr. Mwenda submitted, that the intentions of Parliament was that no limitation would apply to the Act? Mr. Mwenda argued that Section 30 of the Act provided an exclusion provision to other Acts of Parliament

being applied to the Act.

I have set out herein the actual sections so I need not repeat it here. The section provides that prevalence should be given to the Act in case of conflict with another Act. The Plaintiff has to show that there is a conflict between the provisions of the Act and those of the Limitations of Actions Act. I do not see any conflict between the two Acts. The Act is silent on the issue of limitation period. Silence cannot be interpreted to mean the same thing as limiting the application of a provision to the Act. So the total silence of the Act on the issue of limitation cannot be interpreted to mean that Parliament intended that no limitation should apply to the Act. Just like the position in England as set out hereinabove, where there is no Act of Parliament limiting an action, then the action may be brought at any time. In the instant case where the Act did not provide for a limitation period, the next issue to determine is whether there is any exemption to the application of the Limitations of Actions Act. I find none in the Act. Section 30 which Mr. Mwenda argues is an exemption does not advance the Plaintiff's position. If there was specific provision providing a limitation period within the Act, which conflicts with the Limitations of Actions Act, then it can be argued that the Act would take precedence as provided under Section 30 of the Act. Likewise, if the Act specifically provided that limitation period does not apply to the Act, then under Section 30 the Act would take prevalence. None of these scenarios apply to the Act and so Section 300 of the Act does not come into play.

The Act did not exempt the application of the Limitation of Actions Act. The Act is also not in conflict with the Limitation of Actions Act regarding any limitation period to actions under the Act. It follows then that the Limitations of Actions Act does apply to the Act and provides a limitation period within which actions brought under the Act can be sustained.

For an action under contract Section 4(1) of the Limitations of Actions Act applies. Such actions should not be brought six years after the date the cause of action arose. The only exemption being the one provided under Section 44 of the Limitations of Actions Act. So that even if the cause of action arose more than six years prior to the filing of the suit, if the Plaintiff can show that there was an admission or a part payment subsequent to the six years limitation period provided under Section 4(1), then the cause of action will stand revived as provided under Section 44 of the Limitations of Actions Act.

In answer to question one, the Plaintiff is not exempt to the provisions of the Limitations of Actions Act for purposes of the recovery of loans granted out of the Housing Fund.

In regard to question No. 2 and 3, these should be taken together. In light of my ruling on this preliminary objection, the whole of the Limitations of actions Act applies to the Housing Act. That includes Section 4 and Section 44 of the Limitations of Actions Act. At this stage, it is premature to dismiss the Plaintiff's suit without the benefit of evidence. It may be that as provided under Section 44 of the Limitations of Actions Act, the Plaintiffs' suit, even though filed in court long after the limitation period had passed may have been revived. That should be determined by the trial court whether in an appropriate application by the Defendant, or alternatively in the main trial of the suit.

Dated at Nairobi this 3rd day of October, 2008.

LESIIT, J.

JUDGE

Read and signed in presence of:

Mr. Mwenda for the Plaintiff

Mr. Oluoch for the Defendant

LESIIT, J.

JUDGE