



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 833 OF 1992

DELPHIS BANK LTD..... PLAINTIFF

VERSUS

PRATAPM MADHVANI DEFENDANT

RULING

This is the defendant's application under order VI rule 13(1) (b) and (d) praying for the plaint to be dismissed on the ground that it is frivolous, vexatious and abuse of the process of the Court.

It is common ground that the plaintiff's claim against the defendant is founded on contract and that the letter of demand was given by the plaintiff to the defendant on the 26th of August 1986. Ordinarily, therefore, the action to recover the sum owed to the plaintiff by the defendant should have been begun within 6 years from that date. The trite rule is that the cause of action in any such matter arises on the date when the debt becomes payable. But in this case there was a letter of acknowledgement of the debt by the defendant. It is the letter dated 16th September 1986. In the letter the defendant unequivocally promised the plaintiff that he would liquidate the debt by the 30th September 1986. In the case of *Dungate v Dungate* [1965] 3 All ER 818 it was held as follows:

“Where any right of action has accrued to recover any debt or any other liquidated pecuniary claim or any claim to the personal estate of the estate or to any share or to interest therein and the person liable or accountable acknowledges the claim or makes any payment in respect thereof the right shall be deemed to have accrued on and not before the date of the acknowledgement or last payment.”

This is in fact the statutory provision in s 23(1) of the Limitation of Actions Act. It follows that owing to the letter of acknowledgement of the debt and the promise to pay the important date when the limitation period started running against the plaintiff was 30th September 1986. This suit should thus have been filed by 30th September 1992. That would have been with the 6 years limitation period assigned to actions founded on contract by virtue of s 4(1) of the Limitation of Actions.

It is, however, plain and unarguable that the suit here was filed on 8th December 1992. It has been vigorously contended by Mr Inamdar on behalf of the defendant that the plaintiff's action is, therefore, frivolous, vexatious and an abuse of the process of the Court. Mr Inamdar then went on to cite the authorities that support his contentions. Firstly, I was referred to the case of *Riches v DPP* [1973] 2 All ER 935 in which Stephenson LJ at p 941, said:

“There is no material put before the Court which could possibly suggest that (limitation) statute will not be a complete answer to the plaintiff's claim. I think that it would be absurd for the Court faced with an application such as this one to strike out under its interest jurisdiction or under the

Rules, a claim as an abuse of the process of the Court to shut its eyes to the fact that there is going to be raised an apparently unanswerable plea of the Limitation Act 1939.

... why should such an action not be an abuse of the process of the Court? Why should not the Court exercise its inherent jurisdiction to stay or to dismiss an action which must fail.

In my judgment, justice requires that no further time or money should be wasted by either party on obligation which can end with the failure of the plaintiff's claim."

At p 939 Davies LJ had expressed similar view when he said:

"I do not want to state definitely that, in a case where it is merely alleged that the statement of claim disclosed no cause of action, the limitation objection should or could prevail. In principle I cannot see why. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that it is difficult to see why a defendant should be called to pay large sums of money and the plaintiff permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitation and must fail."

In the same case at p 942 Lawton LJ dealt with the issue as follows:

"The object of RSC order 18 rule 19 is to ensure that the defendants shall not be troubled by claims against them which are bound to fail having regard to the uncontested facts. One of the uncontested sets of facts which arises from time to time is when on the statement of claim it is clear that the cause of action is statute barred... and on the uncontested facts there is no reason to think that the plaintiff can bring himself within the exceptions set out in the Limitation Act 1939. In those circumstances it is pointless for the case to go on so that the defendant can deliver a defence. The delivery of a defence occupies time and wastes money; and even more useless and time-consuming from the point of view of the proper administration of justice is that there should then have to be a summons for directions, and an order for an issue to be tried, and for that issue to be tried before the inevitable result is attained."

It is of utmost importance to notice that RSC order 18 rule 9 is the verbatim equivalent of order VI rule 13 of our Civil Procedure Rules. Has the plaintiff in the instant case therefore demonstrated that it has an escape from the statute of limitation?

First, Mr Kasmani also conceded the contention that the debt became payable to the plaintiff on 30th September 1986 when the defendant failed to abide the promise he had made in his letter dated 16th September 1986. However, the defendant's main arguments are the ones averred in paragraph 4 (b) and 5 of the affidavit of the defendant's Mombasa branch manager and they are as follows:

"4(b) That in consequence (to, the defendant's letter dated 16th September 1986) the demand by BCCI dated 20th August 1986) was waived and the operation of the account continued.

"5. That I am advised by Mr K A Kasmani advocate for the plaintiff, and I very believe this to be true, that in any event the plaintiff's claim for interest immediately prior to the six years from the date of filing of the suit is not time barred. The amount due in respect of such interest is Shs 2,130,367/20."

The first question is whether there was any waiver? What is waiver and what constitutes waiver? It is relevant to note that when the defendant failed to honour the promise in the letter of 16th September 1986 he did not at all operate the account in the strict banking sense. He neither made any deposits nor any withdrawals. But the statements continued to reflect the interest and other bank charges levied on the sum which was outstanding as at the 20th August 1986 when the demand notice had been issued by the plaintiff. Is there then the evidence of any waiver? It is pertinent to note that the *Oxford Advanced Learner's Dictionary* meaning of word waiver is "document that records the waiving of a legal right." It

is not in dispute that there is no such a document nor is there any evidence as to an oral waiver in the present case. *Strouds Judicial Dictionary* 3rd Edition at page 3246 says that the waiver can be express or implied:

“*express*, when the person entitled to anything expressly and in terms gives it up in which case it resembles a release.

implied, when the person entitled to anything does or acquiesces in something else which is inconsistent with that to which he is entitled. De1ay of itself does not constitute waiver but it may be such as to amount to evidence of waiver. “

Mr Kasmani in his submission did not show any circumstances which suggest that there was express or implied waiver in this case. On this point Mr Inamdar cited the case *Selwyi v Garfit* (1988) 38 Ch D 238 whose headnote reads:

“A mortgage deed contained a covenant to pay at the expiration of six months, and power of sale in the usual form with a proviso that the power should not be executed until the mortgagee had given notice to the mortgagor to pay off the debt and default should have been made for three months. The deed contained also the usual clause for the protection of purchasers in any sale purporting to be made under the power. The mortgagor subsequently incumbered his equity of redemption. Two months after the date of the mortgage the mortgagee gave notice to the mortgagor to pay off the debt and seven months after the date of the mortgage sold the property to the defendant.

Held in an action by mortgagor to set aside the sale, that three months not having elapsed since default in payment of the mortgagor debt, the proviso had not been complied with, and the sale was invalid; and that the purchaser must be taken to have known that the proviso had not been complied with, she was not protected by the protection clause. Held also that the mortgagor had incumbered his equity of redemption, and therefore not being in a position to waive the necessity of notice, the purchaser had no right to assume that there had been any such waiver.”

It is certainly the latter holding which is of relevance to the instant case. In dealing with the issue of waiver Cotton LJ at p 283 said:

“In this case I can see no evidence of any waiver. It is contended that the mortgagor had waived the notice by lying by; but even if it were proved that he knew what was being done, in my opinion lying by would not be sufficient ...”

In the present case the sole evidence on this point is that showing mere inaction on the part of the plaintiff for the subsequent 6 years from the date when the debt had become due and payable. It is the sort of lethargy or inaction of which a litigant faced with the defence such as the one here would easily have been guilty. On careful reflection I am satisfied this inaction (or lying by) does not at all constitute the waiver raised by the plaintiff in this case.

The next question concerns the interest which accrued on the principle sum within the 6 years. Is the action to recover this interest also barred by the Limitation Act? The following statement from *Halsbury's Laws of England* p 405 at para 902 provides a clear answer to the question posed on the point:

“If a debt properly carries interest then as a rule principal and interest constitute one demand so that if the principal is barred the interest is barred also.”

That rule which was enunciated in the case of *Hollis v Palmer* (1836) 2 Bing N C 713 and was followed by the Privy Council in the case of *Cheang Thue Phin v Lam Kim Sang & Others* [1929] AC 670 was rationalised on the grounds that there was one debtor and one creditor; that there was no independent contract to pay interest; that the interest was a mere accessory of the principal and so if the principal was irrecoverable so is the interest on it.

For all these reasons I am of the clear opinion that the plaintiff has no escape from the statute of limitation. There is thus no justification for leaving this case to go for trial. It is a case which is frivolous, vexatious and an abuse of the process of Court.

Accordingly I strike out the plaint and I dismiss the suit with costs.

I also award the defendant the costs of this application.

Dated and delivered at Mombasa this 6th day of August, 1993

I.C.C. WAMBILYANGAH

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JUDGE