IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MUSINGA, JJ.A.)

CIVIL APPEAL NO. 248 OF 2016

BETWEEN

EASTLANDS THEATRES LIMITED.....1ST APPELLANT

JAMES SAMUEL KINYANJUI.....2ND APPELLANT

ANN NJERI KINYANJUI.....3RD APPELLANT

VERSUS

KENYA NATIONAL CAPITAL

CORPORATION LIMITED.....RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya

at Nairobi (M.K. Koome, J.) delivered on 30th October, 2009

in

H.C.C.C. No. 4640 of 1998)

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JUDGMENT OF THE COURT

1. The respondent's claim against the appellants in its amended plaint was for Kshs. 23,978,096.30 with interest at the rate of 18% per annum on account of moneys advanced to the 1st appellant sometimes in 1981. The said sum was secured by a charge over a parcel of land known as **L.R. No. 209/8155** that was owned by the 1st appellant.

2. By two continuing guarantees and indemnity dated 2nd March, 1981 executed by the 2nd and 3rd appellants, the two guarantors guaranteed and bound themselves jointly and severally to repay to the respondent on demand upto a maximum of Kshs.7 million together with interest of any sum of money which the 1st appellant would be liable to pay to the respondent.

3. The 1st appellant defaulted in the loan repayment. Consequently, on 11th February 1983 the respondent sent out a demand letter to the 2nd and 3rd respondents asking the guarantors to pay the guaranteed sums together with interest thereon at the rate of 16% per annum.

4. The respondent made several unsuccessful attempts to realize the aforesaid security through its sale by public auction. Eventually the respondent sold the property by private treaty at a price of Kshs.4,500,000/=. The sale was done sometimes in 1990. However, the 1st appellant's loan account still had outstanding arrears amounting to Kshs.23,978,096.30. That is the amount that the respondent sought to recover from the appellants together with accrued interest.

5. In their amended statement of defence, the 2nd and 3rd appellants admitted having separately signed a document referred to as "Form of Guarantee" and contended that for that reason the guarantees were void; that the claim was usurious and in contravention of the Central Bank

Regulations; that the respondent acted *ultra vires* its powers by advancing the loan and that this made the loan and guarantees void; that the suit was time barred, having been filed 8 years after advancement of the loan; and that the respondent compromised the interests of the guarantors by giving the principal debtor too much time.

6. In the hearing before the High Court, the respondent called two witnesses. The first one, **Catherine Njeri Muthiora**, testified as to how the loan was disbursed. She produced several documents including the letter of offer; the charge document; the guarantees and demand letters. The second witness, **Samuel Otieno Odhiambo**, a valuer by profession, produced a valuation report dated 8th September, 1988. He stated that the open market value of the charged property was Kshs.7million and the forced sale value was Kshs.5.6 million.

7. For the appellants, **James Samuel Kinyanjui** (the 2nd appellant), told the court that together with his wife, the 3rd appellant, were principal shareholders and directors of the 1st appellant; that the respondent advanced the loan facility to the 1st appellant at an agreed interest rate of 13% per annum; that together with his wife they executed a form of guarantee; that the 1st appellant defaulted in repayment of the loan; that the appellants made attempts to sell the charged property but were unsuccessful. That before the respondent sold the charged property the same had been valued by **Begeine Karanja Limited** at a sum of Kshs.11,500,000/= and in his view the respondent sold the charged property at a gross under value.

8. **Wilfred Onono**, the Managing Director of a consulting firm known as Interest Rate Advisory Centre (IRAC), testified that he was instructed by the appellants to recalculate the interest on the loan that had been advanced to the 1st appellant by the respondent; that in his view the respondent had overcharged the 1st appellant to the tune of Kshs.127,757,318.55.

9. The High Court, (Koome, J. as she then was), in its judgment addressed four main issues. The first one was whether the suit was barred by the Law of Limitation. Although the learned judge erroneously held that the issue of limitation had not been pleaded by the appellants, as indeed they had so pleaded, she nevertheless held that the demand for repayment of the loan was made on 11th February, 1983 and therefore that is the date when the cause of action arose; that the 2nd and 3rd appellants had executed guarantees that were continuing as security for the borrowing until the loan was fully repaid, and consequently the suit was not time barred.

10. As to whether the claim was usurous and in contravention of the Central Bank Regulations, the trial court made reference to the IRAC report and held that even if the respondent had overcharged the interest payable, that *per se* could not affect the loan agreement or the guarantees executed by the 2nd and 3rd appellants. She cited this Court's decision in **GITHUNGURI v JIMBA CREDIT CORPORATION [1988] KLR 825.** The court however held that the appropriate rate of interest as contained in the charge document was 13% per annum.

11. As to whether the charged property was sold at a throw away price, the learned judge rejected the appellants' contention, holding that the property was sold by private treaty at a reasonable price, considering that the respondent had previously made many fruitless attempts to sell it by way of public auction. With that, the High Court entered judgment for the respondent as prayed in the amended plaint, save on the issue of interest which was allowed at the rate of 13% per annum from the date of the filing of the suit.

12. Being dissatisfied with that judgment, the appellants preferred an appeal to this Court. Although the memorandum of appeal contains 12 lengthy grounds of appeal, in their submissions the appellants clustered them into six (6) grounds as follows:

> ***"(a) Whether or not the trial judge was casual in the way she handled the matter and consequently erred in law and in fact by failing to appreciate the totality of the Appellants' defence, evidence and submissions before arriving at her decision (grounds 1 & 2).***
>
> ***(b) Whether or not the trial judge erred in law and in fact by failing to appreciate and find that the Respondent's claim was barred by the statute of limitation (grounds 3 &4).***
>
> ***(c) Whether or not, the learned trial judge erred in law and in fact in failing to appreciate that the principal sum of Kshs.23,978,096.50 comprised of illegal rates of interest as well as illegal charges which had been debited by the Respondent (grounds 5 & 6).***
>
> ***(d) Whether or not the learned trial judge erred in law and in fact in failing to find that the guarantees were void and unenforceable (grounds 7, 8 &9).***
>
> ***(e) Whether or not the learned trial judge erred in law and in fact in ignoring the Appellants' evidence and thereby failing to find that the Respondent sold the suit property at an undervalue (ground 10).***
>
> ***(f) Whether or not the learned trial judge erred in law and in fact in failing to find that the Appellant had failed to prove its Claim and that the same was unsustainable***
>
> ***(ground 12)."***

13. The appeal was canvassed by way of written submissions that were briefly highlighted by counsel. The issue of limitation goes to jurisdiction and whenever such an issue is raised the court must deal with it first. See this Court's decision in **THURANIRA KARAURI v AGNES NCHECHE [1997] eKLR.**

14. Regarding the issue of limitation, **Mr. Tiego**, the appellant's learned counsel, submitted that under **section 4(1)** of the **Limitation of**

Actions Act an action founded on contract cannot be brought after 6 years from the date on which the cause of action accrued; that the letter of offer was dated 2nd March, 1981; the demand for full payment was made on 16th March, 1982 and therefore the suit was time barred as at 16th March, 1988. Before the High Court, counsel relied on the English case of **PARR'S BANKING COMPANY LIMITED v YATES (1898) 2 QBD 460** where it was held that a cause of action arises on a guarantee from the moment that the guaranteed sum becomes due and is not paid.

15. On the other hand, **Ms. Kirimi**, the respondent's learned counsel, submitted that the trial judge was right in her finding that the guarantee was continuing as security for the borrowing until the loan was fully repaid; that the demand for payment was made to the guarantors on 11th February, 1983 and that is when the cause of action accrued.

16. To determine whether the suit was time barred, it is imperative that we consider the date when a formal demand for payment was made to the guarantors. The appellants contended that the demand was made on 16th March, 1982 whereas the respondent argued that the demand was made on 11th February, 1983. At page 203 of the record of appeal there is a letter dated 16th March, 1982 signed by Ian W. Sinclair, Consultant, on behalf of the 1st respondent. The letter was addressed to the 2nd appellant only and stated as follows:

> ***"Dear Sir,***
>
> ***RE: CAPITAL INSTALMENT DUE***
>
> ***31/12/81 SHS.700,000=***
>
> ***The position was again reported to our Finance Committee today. A serious view is taken of this large outstanding instalment. Full payment is demanded by 31st March 1982, and we look to you to meet this engagement.***
>
> ***Yours faithfully,***
>
> ***for KENYA NATIONAL CAPITAL CORPORATION LIMITED***
>
> ***(Signed)***
>
> ***Ian W. Sinclair***
>
> ***CONSULTANT"***

17. On 11th February, 1983 Hamilton Harrison & Mathews, the respondent's advocates, sent demand letters to each of the appellants. The demand letters to the guarantors read as follows:

> ***"Mr. James Samuel Kinyanjui,***
>
> ***P.O. Box 48349,***
>
> ***NAIROBI.***
>
> ***Dear Sir,***
>
> ***RE: Kenya national capital corporation limited***
>
> ***TAKE NOTICE that M/S Eastlands Theatres Limited for whom you became Guarantor to our client, has defaulted in payment of Kshs.8,098,700.00 being the amount due to our Client.***
>
> ***Under the guarantee your liability is limited to Kshs.7,000,000.00 together with interest thereon at the rate of 16% p.a. from the date of this letter, until payment in full.***
>
> ***Unless we receive your remittance together with interest within 14 days, our instructions are to sell the property charged to our Client as security without further notice.***
>
> ***Yours faithfully,***
>
> ***for HAMILTON HARRISON & MATHEWS***
>
> ***(Signed)***
>
> ***RICHARD OMWELA***

c.c. Client"

18. In our view, it is the letter dated 11th February, 1983 that constituted a formal demand in terms of the guarantees. Contextual reading of the letter dated 16th March, 1982 addressed to the 2nd appellant reveals that the respondent was requesting Mr. Kinyanjui to remit the full instalment of Kshs.700,000/= by 31st March, 1982. Time therefore began to run on 11th February, 1983 and not earlier.

HALSBURY'S LAW OF ENGLAND Volume 20(1) at Page 175 paragraph 269 states:

> ***"The creditor's cause of action accrues and time begins to run against him in favour of the guarantor when the guarantor becomes liable to make payment under the guarantee. When that liability accrues depends on the terms of the guarantee…for example, where on the construction of the guarantee, a valid demand upon the guarantor is a necessary ingredient of the creditor's cause of action against the guarantor, time will not begin to run until such demand has been made."***

19. Clause 1 of the guarantees executed by the 2nd and 3rd appellants provided that:

> ***"….we the undersigned hereby (jointly and severally if more than one) guarantee to you the due payments of and undertake on your demand in writing to pay to you, all sums including interest which now are or may hereafter from time to time become owing to you by the Principal…"***

20. In view of the foregoing, we must reject the appellants' contention that the suit was time barred. The guarantees, being contractual documents, were subject to a six year limitation period. The suit was filed in November, 1988. The statutory period was upto 10th February, 1989.

21. We now turn to consider whether the guarantees were void and unenforceable. The appellants' counsel argued that the letter of offer stated that a joint and several guarantee was to be executed by the appellants. Counsel added that the learned trial judge was in error in ignoring and failing to make a determination on the legal implication of two different guarantees having been executed for an aggregate sum of Kshs.14,000,000/= instead of one for Kshs.7,000,000/=.

22. In reply, the respondent's learned counsel submitted that the claim against the guarantors was on a joint and several basis for a sum of Kshs.7,000,000/= plus interest; the fact that they may have signed separate guarantees did not result in the creation of liability twice the amount of the loan; and that the liability was joint and severally and was to take effect as if each had signed separate documents.

23. Although the learned judge did not exhaustively address the issue of validity of the guarantees, she nevertheless held that they were valid. The learned judge observed that there was no denial that the second and third appellants executed the guarantees.

24. There is no denial that the letter of offer required the directors of the first appellant to execute a joint and several irrevocable continuing personal guarantee. The fact that the guarantees were signed separately, in our view, cannot absolve the second and third appellants from liability to pay the guaranteed sums in the event of default by the first appellant.

25. We agree with the respondent's counsel's submissions that there is no statutory requirement that the guarantees could only be valid if they were contained in one document. The fact that they signed separate guarantee documents did not result in creation of any additional liability beyond the guaranteed amount.

26. Moreover, clause 11 of the guarantee stated as follows:

> ***"If this guarantee is signed by two or more parties they shall be severally liable hereunder and the word "we" wherever used herein shall be construed to refer to each of such parties separately all in the same manner and with the same effect as if each of them has signed separate instruments; and in such case this guarantee shall not be revoked or impaired as to any one or more of such parties by the death of any of the others or by the revocation or release of any liabilities hereunder of any one or more of such other parties. If the guarantee is signed on behalf of a corporation or corporations, the word "we" shall refer to such, corporation or each of such corporations as the case may be."***

27. In view of the foregoing, we must therefore dismiss this ground of appeal challenging the validity of the guarantee.

28. Did the learned judge err in law in failing to appreciate that the principal sum of Kshs.23,978,096.80 comprised of illegal rates of interest as well as illegal charges which had been debited by the respondent? Regarding the interest chargeable on the advanced sum, the letter of offer stated that:

> ***"Interest on this facility will be debited monthly and paid at the rate of 13% per annum quarterly in arrears on the last days of March, June, September and December during the period of the loan. Kenya National Capital Corporation Limited however, reserves the right to increase the rate at any time without notice upto and including 15% per annum."***

29. The learned judge refused to allow the rate of interest of 18% per annum that was prayed for by the respondent. She reduced it to 13% per annum as per the letter of offer and entered judgment in favour of the respondent against the first appellant for the sum of Kshs.23,978,096.30 plus interest at the aforesaid rate of interest from 30th October 1988 until payment in full. She also entered judgment against each of the second and third respondents in the sum of Kshs.7,000,000/= plus interest at 13% per annum from 11th February, 1983

until payment in full.

30. The appellants' complaint was that in arriving at the judgment sum of Kshs.23,978,096.30, against the first appellant, the respondent had computed the rate of interest at 18% per annum instead of 13% per annum; that the appellants had testified that the respondent had on various dates debited the first appellant's account with illegal charges amounting to Kshs.820,642.50 which included service charge; Auctioneer's charges; lay out fees; inventory fees; valuation fees and Advocates fees in the sum of Kshs.519,081.30.

31. The respondent's contention regarding the sum of Kshs.820,642.50 above was that the said sum was not proved by the appellants. As regards the total amount repayable, the respondent argued that the appellants had not sought a re-calculation of the loan amount in their pleadings and therefore the learned judge could not be faulted for failing to make a finding on an issue that she was not called upon to determine.

32. In the amended defence filed on 27th May, 2002, the appellants stated that the computation of the sum claimed against the first appellant of Kshs.23,978,096.80 made the whole claim usurous and in contravention of the Central Bank Regulations. However, the appellants did not pray for re-calculation of the interest rate. Instead they sought dismissal of the suit in its entirety.

33. The evidence tendered by Wilfred Onoano (DW 2) showed that the respondent levied interest at the rate of 13% per annum for the first two months only. From 1st July 1981 the interest was increased to 14% per annum upto 1st December when it was increased to 15%, from 1st November 1983 it was charged at 20%. From 1st June, 1984 the interest rate was reduced to 19% per annum. In June 1988 the interest was further reduced to 18% per annum.

34. Granted that the trial court held that the lawful rate of interest was 13% per annum and there is no cross appeal by the respondent, by the trial court, it cannot be disputed that by computing interest at an higher rate than the lawful one, the sum of Kshs.23,978,096.80 that was said to be outstanding as at 30th October, 1988 was erroneous. The correct amount was the advanced sum plus all the lawful charges and interest thereon at 13% per annum or such rate as did not exceed 15% and no more. Looking at the statement of account produced by the respondent to demonstrate how the amount stated in the plaint was arrived at, there can be no denial that the rate of interest was in excess of 13% per annum. To that extent, this ground of appeal is meritorious and is for allowing.

35. As regards the sum of Kshs.820,642.50 that was alleged to have been illegally debited to the first appellant's account, DW 2 conceded that as per the terms of the letter of offer, the borrower was liable to pay all the legal expenses incurred by the lender in suing for recovery of any sum due. The aforesaid sum was therefore properly debited to the first appellant's account.

36. We now turn to consider whether the learned trial judge erred in law in ignoring the appellants' evidence that the respondent sold the suit property at an under value. The second appellant testified that between 1981 and 1989 both himself and the respondent were unable to sell the suit property. Eventually the respondent sold it at Kshs.4,500,000/=.

37. The appellants' basis for their contention that the suit property was grossly undervalued was that on the day the transfer was registered, a charge was created over the suit property in favour of National Bank of Kenya for Kshs.6,000,000/= and shortly thereafter a further charge of Kshs.4,000,000/= was registered. On 15th February, 1994 a second further charge for Kshs.17,200,000/= was registered.

38. Neither of the appellants' witnesses nor those of the respondent shed any light regarding the circumstances that led to creation of the aforesaid charges. We are therefore unable to find that the suit property was undervalued in 1990 when it was sold.

39. The learned trial judge rightly observed that even if the suit property was undervalued, the appellants had not counterclaimed for the difference between what was contended to have been the market value and the realized sum. In the absence of appropriate pleadings and supporting evidence on the said issue, the trial court could not reach a finding that the suit property was sold at an undervalue. We dismiss that ground of appeal.

40. Save the allowed ground of appeal that the principal sum of Kshs.23,978,096.80 was wrongly arrived at, having been computed through application of interest rates that were higher than the agreed one of 13% to 15% per annum, we dismiss all the other grounds of appeal.

As regards the actual amount payable by the appellants in light of our finding hereabove, we hereby remit this matter to the High Court for the sole purpose of computing the sum due at the appropriate interest rates.

41. As the appellants have partially succeeded in this appeal, we award them one quarter of the costs of the appeal.

Dated and delivered at Nairobi this 20th day of April, 2018.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

.....

JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR