



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, KOOME & WARSAME, JJ.A

CIVIL APPEAL NO. 199 OF 2007

BETWEEN

MUA PARK INVESTMENTS LIMITED.....APPELLANT

AND

KENYA NATIONAL ASSUARANCE COMPANYLIMITED

(in Liquidation).....RESPONDENT

(An appeal from the Ruling and Decree of the High Court of Kenya at Nairobi (Mary Kasango, J) dated 16th November, 2005

in

HCCC NO. 355 OF 2005)

JUDGMENT OF THE COURT

By a charge made on 24th day of October, 1989 between **Mua Park Investments Limited** (appellant), and **Middle Africa Finance Company Limited**, as chargee, the appellant charged its property known as Title No. I.R 48130, (suit property), to secure payment of a sum not exceeding Ksh ten million (10,000,000.00) or lower at the interest rate of 18%.

Although, the charge document does not seem to form part of the record of appeal, according to the appellant, the legal date of redemption of the said charge indicated in the charge, was 1st November 1989, which would in effect mean less than two weeks after the date of the charge.

According to the appellant's plaint in Nairobi HCCC No. 5357 of 1993, it repaid the loan in agreed installments but the Middle Africa Finance Company declined to discharge the title to the suit property to the appellant.

In its plaint in HCCC No. 355 of 2005, the appellant averred that it signed the charge; that the same was redeemable by 19th November 1989; and further and more importantly, that no monies were advanced to it pursuant to the said charge.

It is not clear which version of the transaction is correct, but that does not concern us much for now. According to the appellant, it did not receive any demand for payment of the monies, or notice of default from Middle Africa Finance, at any one time.

In the meantime, Middle Africa Finance was placed under receivership.

On 7th October 1992, Middle Africa Finance assigned the said charge to Kenya National Assurance Company Limited (respondent). According to the appellant, without any notice whatsoever, or demand for payment the respondent proceeded to appoint auctioneers to sell the suit property. The auctioneers advertised the charged property for sale which was supposed to take place on 6th November 1993.

That is what prompted the appellant to rush to court by way of plaint dated 3rd November 1993, seeking several reliefs, *inter alia* orders of injunction to restrain the respondent from selling the suit property; and declarations that the charge was null and void; and that there was no privity of contract between the appellant and the respondent.

That suit was dismissed for want of prosecution on 11th November, 2003. The appellant then filed a fresh suit being Milimani Commercial Court Civil Suit No. 141 of 2004. This suit was also dismissed on 25th May 2004 on the respondent's application, as leave to sue the respondent which was in liquidation had not been sought.

Undeterred, the appellant moved back to court after obtaining the requisite leave of the court and filed Civil Suit No. Nai 355 of 2005, seeking similar reliefs. Once again, the respondent lodged a challenge to the suit on the basis that it was statutorily time barred in contravention to **Section 4(1)(a) of the Limitation of Actions Act (Cap 22 Laws of Kenya)**. The application was heard by Kasango, J who rendered the ruling, now impugned, dated 16th November 2005.

The learned Judge found that the claim was statutorily barred on two aspects. Firstly, according to the learned Judge, the charge fell under the law of contract whose limitation of action is six (6) years from the date of the charge. On the other hand, an action based on discharge of a charge is governed by **Section 7 of Cap 22** which limits the life of a cause of action to twelve (12) years.

The learned Judge found that the appellant was time barred under both **Section 4** and **Section 7 of Cap 22**. The appellant had also advanced an argument to the effect that the public notice placed in the newspaper gave fresh life to its cause of action under **Section 24 of Cap 22**. This argument did not find favour with the learned Judge and it too, was dismissed.

Aggrieved by the said dismissal, the appellant filed this appeal in which it has proffered six (6) grounds of appeal as hereunder:-

- 1. The learned Judge erred in law and in fact in holding that the plaintiff's claim offends the limitation period requirement under Sections 4 and 7 of Cap 22.*
- 2. The learned Judge alternatively erred in law and in fact in failing to find that there was a fresh accrual of right of action by the defendant's notice in a newspaper.*
- 3. The learned Judge erred in law in misdirecting herself as to the requirements of Section 24 of Cap 22.*
- 4. The learned Judge erred in law and in fact in failing to hold that if the plaintiff's action was caught by limitation then so were the defendant's rights under charge.*
- 5. The learned Judge erred in law in holding that Cap 22 only deals with actions in court and only lays down the period within which action ought to be commenced in court.*

6. *The learned judge erred in law and in fact in coming to the conclusions and the ruling she came to contrary to the evidence, the law and the submissions urged before her.*

The appellant entreats this Court to allow the appeal with costs, and set aside the impugned ruling and substitute therefor an order dismissing the respondent's chamber summons application dated 21st September, 2005 with costs.

Although, the firm of D. Njogu & Co., Advocates on record for the respondent were duly served with the hearing notice for the hearing of this appeal on 17th December 2015, they did not show up in Court on 17th December 2015 for the hearing thereby necessitating the appeal to proceed in their absence.

In his oral submission in Court, Mr. Thiga, learned counsel for the appellant abandoned grounds 3 and 5 and urged grounds 1, 2, 4, and 6. Learned counsel submitted that the learned Judge was wrong in her finding that the claim was time barred. He urged that under **Section 60 of the ITPA**, the rights of a chargee cannot be extinguished as long as the property has not been disposed off. This right, submitted counsel, remains alive and cannot be caught up by limitation pursuant to the proviso to **Section 60 of the ITPA**.

He also urged that the learned Judge erred in failing to find that the notice in the newspapers gave the cause of action fresh accrual, as it acknowledged that the appellant was the owner of the suit property. He maintained that the suit ought to have proceeded to full hearing to enable the court give a determination on all the issues raised, instead of dismissing it summarily.

Counsel called in aid this Court's decisions in **D. T. Dobie & Co. (K) Ltd vs Joseph Mbaria Muchina & Another, Civil Appeal No. 37 of 1978** and **Kutima Investment Limited vs Muthoni Kihara & Another, Civil Appeal No. 117 of 2005**.

We have given adequate consideration to the grounds of appeal, and the nature of the dispute before us. We have also taken into consideration the defence, chamber summons and all documents and arguments presented before the trial court. Having done so, we think the salient and pertinent issues are as follows:

If we can start from this last submission however, we observe that the case of D.T. Dobie (supra) was totally different from the case before the Judge in this matter. The same dealt with summary dismissal of a suit under **Order VI Rule 13 of the Civil Procedure Rules** for reasons other than limitation of time.

In the Kutima Investment case (supra), the appeal was allowed basically because there were some "*bona fide and serious issues*" pertaining to the issuance of mining licences which should have been canvassed in full before the High Court. We are quick to note that in arriving at its decision, the Court left undisturbed other decisions of this Court that have allowed striking out or summary dismissal of suits under the same provisions of the law. We can therefore state that each case of striking out/summary dismissal must be considered within its own peculiar facts and circumstances.

Coming back to the appeal before us, we hold the view that the circumstances of the suit were peculiar in the sense that limitation of time was not patent on the face of the pleadings. There were the very germane issues as to whether the charge was still live, or whether indeed the chargee had served the chargor, with the requisite notice under **Section 69A of the Transfer of Property Act**, or not.

The appellant's contention is that no notice or demand of payment had ever been made to it by the respondent. On the other hand, in one of the complaints referred to earlier on, the appellant was claiming that the entire amount had been paid. If that was the case, then the issue of limitation would not have arisen at all. That was an important issue which needed to have been canvassed in full. We hold the view therefore, that the issue of limitation was not an open and shut one as the learned Judge seems to have determined. It was clearly an arguable issue. On that ground therefore, this appeal would succeed.

The second ground for our determination is on the issue of assignment of the charge which is a very important one. Given however, our finding on the issue of statutory limitation, it will not be prudent for

us to make a determination on the same as the matter will have to be remitted to the High Court for rehearing. It would be improper for us to determine that issue with finality here and in the process shackle the hands of the court that will be charged with determining the suit on its merits. We think that we should not make a determination on that ground of appeal.

For that reason, we shall not make any determination in respect of that point. The same goes to the question as to whether the notice in the newspaper amounted to a fresh accrual. We shall leave those issues to the court that will eventually hear and determine the suit before the High Court.

In conclusion, we find that this appeal is meritorious. We allow the same with costs to the appellant. We order that Nai. High Court Civil Case No. 355 of 2005 be listed for hearing afresh before a Judge other than Kasango J.

Dated and delivered at Nairobi this 22nd day of April, 2016.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR