REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 260 of 2001

TIMOTHY U. K. M'MELLA ……..…… APPELLANT

AND

SAVINGS & LOAN (K) LIMITED …….…….….. RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya at Milimani Commercial Courts (Mbaluto, J) dated 4th May, 2001 in H.C.C.C No. 394 of 1998)

****

JUDGMENT OF THE COURT

This is a first and last appeal from the decision of the superior court (Mbaluto J.) delivered on 4th May 2001 in the High Court at Milimani Commercial Courts, Civil Case Number 394 of 1998 in which the superior court entered judgment in favour of the respondent, **Savings and Loan (Kenya) Ltd**. (then plaintiff), against the appellant herein, **Timothy U.K. M'Mella** (then defendant), for Ksh.4,062,316/= together with interest thereon at the rates prevailing from time to time on mortgage accounts and costs of the suit together with interest thereon at court rates.

In his memorandum of appeal dated 24th September 2001, the appellant raises grounds which are in brief, that the learned Judge erred in failing to determine whether there was any valid charge created between the appellant and the respondent before 8th October 1991; that the learned Judge failed to resolve what he called "*that difficult question*" in his judgment while that question was central to the whole case of the respondent against the appellant; that the learned Judge erred in determining the case on the basis of a simple contract while the whole case was based on the assumption that the charge between the parties was valid; that the Judge failed to appreciate that the respondent's right to sell the purported property of the appellant, its right to charge interest in accordance with the terms of the charge and its rights to exercise any other rights under the charge depended on the validity of the charge; that the learned Judge erred in failing to appreciate that the charge was only valid from 8th October, 1991, and that the interest and other charges could only accrue to the principal sum lent from that date and not earlier; that the learned Judge erred in finding that as at 23rd July 1998 the appellant owed the respondent the sum of Ksh.4,062 316/= which could only be the case if the charge was valid *ab-initio*; that the learned Judge erred in finding that the appellant was advanced the sum of Ksh.286,200/= while the evidence was that the appellant did not participate in the actual discussion with the respondent; that the learned Judge erred in laying undue emphasis on the question whether the appellant did actually occupy the charged property or not while that issue was peripheral to the central question before him; that the learned Judge erred in relying on the provisions of **Order VI rule 4(1) (a)** of the Civil Procedure Rules while it was irrelevant to the central issue before him and lastly that the learned Judge erred in finding that the respondent had

proved its case on the balance of probabilities while the evidence clearly showed that all charges that the respondent made before the charge was registered could not be claimed as if the charge had been registered.

The facts of the case as can be deciphered from the record before us, are, in our view, brief and straight forward. We may revert to the same. First, the pleadings. In a plaint dated 17th August 1998, the respondent, Savings and Loan Kenya Limited (hereinafter the respondent) stated that by an instrument in writing dated 28th October 1982, made between the respondent and the appellant, the respondent offered and the appellant accepted a loan of Ksh.286,000/=, upon the terms and conditions contained in that instrument. The appellant executed a legal charge over property L.R. No. NAIROBI/BLOCK 72/1288 as a security for the same loan in favour of the respondent. Interest for the same loan was to be charged at bank rates with the respondent reserving powers to vary the same without notice to the appellant. The appellant's liability was to be discharged by the respondent once the principal debt plus all accrued interest was paid by the appellant. The appellant defaulted in the repayment of the loan installments as agreed. The respondent, upon default of payment by the appellant, exercised its statutory power of sale and sold the charged property, thereby realising Ksh.1,900,000/=. That amount was not enough to liquidate the total amount outstanding and hence the claim for the balance which was Ksh.4,062,316/= as at 23rd July 1998. That amount continues to attract interest at the rate of 25% per annum calculated on daily balances. The respondent then claimed in that plaint Ksh.4,062,316/= plus interest at 25% p.a. from 24th July 1998 until payment in full; costs of the suit and interest on such costs at court rates.

In his defence to the same suit, the appellant admitted having signed some documents but denied discussing the advancement of the loan with the respondent and stated that the terms and conditions of the said loan were not brought to his attention. He further stated that if he executed the alleged charge over property LR No. Nairobi/Block 72/1288, then the same charge was defective as it was contrary to the provisions of the Registered Land Act **Cap 300** Laws of Kenya. He continued in the statement of defence and stated that the alleged sale of the property by public auction was fraudulently done as he was not notified of the intended sale; the property was sold at abnormally low price; and in collusion with the purchaser to deprive him of the proper sale price. The appellant lastly pleaded that the amount claimed after Ksh.1,900,000/= had been paid for a loan of Ksh.286,000/= only was unconscionable; that he was not served with any demand notice and that the interest charged was not only usurious but patently illegal and lastly, he questioned the reason why the respondent took a long time to claim the amount in the plaint after sale of the mortgaged property.

During the hearing of the suit in the superior court, the record shows that the respondent produced several documents and called three witnesses in support of its case whereas the appellant gave evidence in his defence and called no witness. As this is a first appeal, the law requires that we revisit the facts afresh, evaluate the same and arrive at our own independent conclusion but always bearing in mind that the trial court had the advantage of hearing the witnesses, seeing their demeanour and giving allowance for that. The brief facts of the case as came out during the trial and as can be deduced from the exhibits that were produced by consent of both parties form the second part of our summary of the facts. These were that during the relevant period, the appellant was a civil servant having joined the civil service in 1975. By the year 1980, he was a junior Physical Planning Officer in the government. He was also a member of the Civil Servants Union. His union was anxious to develop a housing estate for its members, so it formed a company known as Civil Servant's Housing Co. Ltd. Apparently, it sought to develop the same at Lang'ata area of Nairobi and the starting point was Lang'ata Civil Servant's Housing Project. The project was financed by the Kenya Commercial Finance Limited which provided initial or bridging finances and later the respondent provided loans to the individual beneficiaries of the project. Both Kenya Commercial Finance Ltd. and the respondent were subsidiaries of the Kenya Commercial Bank. Although the arrangements for the loans were facilitated by the Civil Servants Union and particularly by the Civil Servants Housing Co. Ltd., the agreements and documentations pertaining to the same remained between the respondent and the appellant. The first document as per the record was application form for an advance to the respondent. Whoever filled that form, it shows that it was signed by the appellant on 15th August 1980. The part of that form bearing the signature of the appellant states:

"**TO BE SIGNED PERSONALLY BY ALL APPLICANTS.**

I/We hereby declare that I am/we are full of age, that all the above answers are correct and true and I/we agree that the above statements shall form the basis of any arrangement as to an advance (if any) made between myself/ourselves and the company.

The inspection fee of Shs. …….. enclosed (see scale of fee below).

Date 15.8.1980 Signature of Applicant(s). …….."

The appellant also gave the name of his bankers in that form. The amount required was stated in that form to be Ksh.225,000/=. There was also with that form, another form which was headed "Further Particulars Form in respect of application for Mortgage Advance to Savings And Loan Kenya Limited". That form mainly dealt with the particulars of the applicant. It was also filled and signed by the appellant. It contained a declaration which was signed by the appellant. That declaration read:

"**I DECLARE that the above information is correct and that together with the completed application form, it shall form a material part of any arrangement for any advance between the company and myself.**

Date 15.8.1980 Signature ……..."

After those documents, a letter of offer dated 7th June 1982 was addressed to the appellant by the respondent. That letter stated in the main as follows:

"**RE: MR. TIMOTHY HEZIAH KYAYADI M'MELLA**

HOUSE NO. 22 – LANGATA NAIROBI.

Dear Sir,

The Company is prepared to advance on security of a mortgage of the above, the sum of Sh.286,200 to be repaid with interest at 14% per annum in approximately 15 years, by monthly instalment of Sh.3,959/= inclusive of a mortgage security premium of Sh.66/=.

This offer is made on the basis of the statements contained in your application dated 15th August, 1980 and is subject to the terms of the memorandum as to advances attached and any special conditions detailed below. These should be read carefully before acceptance. It is assumed that you have satisfied yourself as to the condition of the property in every respect.

The premises are to be insured for their full value through the company in accordance with section 5 of the Memorandum as to advances, in the sum of not less than Sh.320,000. This offer is also made subject to signature and return by you of the enclosed Acceptance Note.

Yours faithfully,

A.A General Manager."

Special conditions were attached at the bottom of the same letter of offer. One of the special conditions was on the rate of interest. The appellant signed the "Acceptance Note" dated 21st June 1982 and in doing so, he also confirmed that he had read the Company's Memorandum as to Advances and that he accepted the same offer subject to the conditions contained in the same Company's Memorandum as to Advances. There is a document headed Completion Particular Form dated 11th May 1983 which shows that the respondent completed the advance on 18th April 1983. The statements of account held by the respondent show that on 29th April 1983, Account No. 201890591 in the name of the appellant was

opened and it had the amount of Ksh.286,200/= posted as advance, and other payments such as insurance premium, and annual interest were posted thereafter. Thus, there could not be any doubt that the appellant received an advance of Ksh.286,200/= from the respondent on the security of the subject property namely NAIROBI/BLOCK 72/1288 after he had signed an application form together with a form in which he gave further particulars of himself. Further, the advance was made after a letter of offer had been given to him over one and a half years after he applied and after he had signed the Acceptance Note for the same offer indicating that he accepted the offer for the advance together with all the terms and conditions pertaining to the same offer. On 28th October, 1982, the appellant signed a charge in respect of the loan being secured by the subject property. That charge was not registered till 8th October 1991. The respondent blamed the appellant for the delay as it contended that the appellant refused to sign the lease documents. Evidence shows that at that time, that property was non-existent as the property came into existence later after the subdivisions were made to the original property. Further evidence availed to the superior court, which was not disputed, shows that the appellant never made any repayment to the respondent and so the respondent moved to sell the property but that sale was delayed as the appellant, together with others, in a different case, moved to court and obtained injunction against that and other sales. The injunction was obtained in H.C.C.C NO. 3381 of 1985. Later that injunction was removed and the respondent sold the property by public auction on 16th February, 1996. Ksh.1,900,000/= was realised. That amount was short of the total amount that was due to the respondent. There was a balance of Ksh.2,144,670/= due to the respondent. We need to add here that the record shows that several notices of enhancement of interest rates had been sent to the appellant during the period when the loan remained unpaid between April 29th 1983 when the loan was advanced and 16th February, 1996 when the property was sold by public auction. The respondent apparently did not move quickly to realise the balance of Ksh.2,144,670/= and the appellant also did not challenge the auction immediately after it took place. There was a lull for about two and a half years later. It was on 17th August 1998 when the respondent moved by way of a plaint in the court to realise the balance. By that time, unfortunately, the balance had increased as a result of the interest to the amount of Ksh.4,062,316/= which is the subject of the plaint, the genesis of the suit before the superior court.

As we have stated, the respondent claimed that amount together with interest whereas the appellant denied indebtedness to the respondent. Before the trial court, the appellant's position was that he applied for a loan of Ksh.225,000/= and not Ksh.286,200/= as was being demanded and there was no time he applied for more money from the respondent than the amount of Ksh.225,000/=; that the letter of offer was not taken to him and he never dealt with the respondent. He admitted he signed the acceptance note on 21.6.1982 and that he signed the acceptance note at the offices of the respondent. In 1983, when he inspected the house, he found it to be below his expectation and he told the Civil Servants' Union officials that he was not interested in the house and he never moved into the subject house. Later, he left the country in 1983 and was out of the country for about 10 years on a study leave, so that all letters written to him by the respondent demanding payment of arrears were written when he was outside Kenya in the United States of America. He therefore was being asked to pay for a property he never owned. He however admitted having written a letter dated 10th October, 1993 seeking time to pay the arrears but he said he wrote that letter because he was then under a lot of stress as his name was being splashed in the news papers over the indebtedness to the respondent and that embarrassed him in his then position as the deputy to the United Nations. He said he never lived in the house, never accepted it and did not get notification of sale from the auctioneers. The first time he came to learn that the house had been sold was in 1996. He confirmed that he had never paid a single cent in settlement of the loan because he rejected the house. He ended up his evidence in chief thus:

"**I did not own L.R. NO. NAIROBI/BLOCK 72/1288. I have never owned it. I signed the charge in the Union Office. I do not know where I signed…… I say that I have never borrowed the money. I have never owned the property and I want the suit to be dismissed with costs."**

In cross-examination, the appellant said, *inter alia*, as follows:

"**I recall instructing a lawyer to file a suit to stop the auction of my land. I stooped (sic) the plaintiff through court action because I wanted to see whether a way would be found to sell the property,**

pay back the money and stop the repeated publication of my name in the media because it was attracting very negative publicity for me."

We may also add here that during the trial, several correspondence exchanged between the parties and their advocates were exhibited and referred to. These were put to the respondent's witnesses and to the appellant and are on record together with the answers explaining the same. We shall revert to the same hereafter.

The above were, in brief, the facts of the entire case. The learned counsel for the appellant, Mr. Ombete, having abandoned the seventh ground addressed us at length on the remaining grounds. He contended that the basis of the entire respondent's case before the superior court was the instrument created on 28th October, 1982. That charge was not valid as at the time it was created, no property existed and that being the case, the entire respondent's case before the superior court should have been dismissed as it lacked the substratum. In his view, there was no instrument of charge in place till 8th October, 1991, although it was signed on 28.10.1982. On the other hand, Mr. Ombete submitted, if it was accepted that the lease was not in place as aforesaid, then the money lent, was lent on the basis of a simple contract, which in law, was defeated by the principles of limitation as it was extinguished within six years of the date it was advanced. He therefore submitted that even on that score, the suit in the superior court should have been dismissed. In his submission, the learned Judge should have resolved the question as to whether the charge that secured the loan and upon which the suit was based was valid or not as, in his view, the charges of interest on the amount were made before the charge was perfected. The property was registered in the appellant's name on 8th October, 1993 and that was the time when any charges including interest should have been made against the appellant and not before. He referred us to several provisions of the Registered Land Act **Chapter 300** Laws of Kenya to buttress that argument and also to the case of **Russel Company Ltd. vs. Commercial Bank of Africa Ltd. and another – CA No. 31 of 1985 (unreported)** where this Court stated that a person not registered as a proprietor cannot be in charge of the land in question, and supported that by a reference to **Torrens Title in Australia Volume I by Francis**. Thus, Mr. Ombete's main attack on the superior court's judgment, if we understood him, was that as the charge was defective for having been registered after the events, the respondent could not rely on it as a basis of the claim against the appellant and all that the respondent could rely on for his claim was a simple contract based on the letters of offer and acceptance and other such documents but the same contract also could not stand in the face of the provisions of the Limitation Act and so the superior court should have resolved the matter in favour of the appellant. Mr. Lakisha, the learned counsel for the respondent, on the other hand while admitting that the charge in question was dated or executed on 28th October 1982 but was not registered till 8th October 1991, submitted that the late registration was because the appellant refused to sign the lease and the respondent had to move to court to force the signing of the lease by the appellant and to that effect, he referred us to a letter dated 28th October 1988 addressed to the appellant by the respondent's advocates in which the respondent threatened to move to court if the appellant still persisted in his refusal to sign the lease. He contended that the superior court rightly found that the claims prior to 1991 were rightly made as they were based on a proper contract between the parties. He also referred us to **section 38(2)** of the Registered Land Act and submitted on that authority that unregistered instruments can operate as a contract. He submitted further that on the question of limitation, the law provides under **section 19** of the Limitations Act that recovery of land would not be done until after expiry of 12 years and so he contended that limitation could not arise in this matter as it was on the recovery of land. Further, he maintained that limitation was never pleaded as required by law. Mr. Lakisha also relied on several authorities for his submission that the matter of limitation, as well as rates prior to 1991 could not be considered by the superior court as the same were not pleaded.

We have anxiously considered the pleadings, the evidence that was adduced before the superior court, the submissions before the superior court, the judgment of the superior court, the memorandum of appeal and the submissions made by the learned counsel before us and the law.

The learned Judge (Mbaluto J.) in his judgment appreciated the legal difficulties that were apparent in the entire case when he stated:

"**The plaintiff's case as stated in the plaint is that by an instrument in writing dated 28.10.1982 made between it and the defendant it offered the defendant a loan of Shs.286,200/= upon terms and conditions contained in the said instrument. The instrument in question is a charge bearing the date aforesaid over L.R. No. Nairobi/Block 72/1288 described therein as the defendant's property but which said piece of land, it is common ground, did not exist as at the time and was obviously not owned by the defendant. Given those facts, could a valid charge be created?"**

Having so appreciated the problem or the gravemen of the appellant's case before him then, and having posed the question of whether or not the charge upon which the respondent's case was based was valid or not, he however appeared not to have resolved that question at that stage. We say "at that stage" because reading his entire judgment reveals that he did address himself to it and by inference answered it later in his judgment. However, at the stage of his judgment when he posed that question he did not immediately answer it and found a way out thus:

"**Fortunately, I do not have to answer that difficult question because as I shall endeavour to show below, the central issue arising from the plaintiff's claim against the defendant in this matter is not dependent on the resolution of that question."**

And the learned Judge set out the respondent's claim against the appellant as he understood it. He stated it as follows:

"**The plaintiff's claim against the defendant is that he defaulted in the repayment of the loan as agreed and as a result thereof the plaintiff was forced to exercise its statutory power of sale by sale of the charged property by public auction. According to the evidence tendered on behalf of the plaintiff, the sale, which took place on 16.2.1996, realised Sh.1.9 million which said amount was not enough to liquidate the total debt then outstanding. The balance to be paid as at 23.7.1998 was Sh.4.062,316/= and is the subject of this suit."**

He then proceeded to analyse the evidence before him and to evaluate it. Having done so, he made the following finding on matters of fact:

"**By reason of the admissions contained in the above quoted letter, I find that the defendant accepted the loan, took over the house and resided therein with his large family."**

Having reached the above conclusion, the learned Judge then considered whether the charge between the respondent and the appellant was legal; whether the sale of the appellant's property was conducted in a fraudulent manner and whether the interest charged on the loan was usurious and illegal. But before he dealt with those, he disposed of the question of limitation raised by the appellant before him and dismissed it on the basis that it was not pleaded as required by the provisions of **Order 6 Rule 4(1) (a)** of the Civil Procedure Rules. The learned Judge thereafter reverted to the question of the validity of the charge and held that even if the charge was not valid as the appellant argued, that did not, in his view, assist the appellant because even if the charge was not valid, there was ample evidence to show that there was a contract between the parties whereby the appellant undertook to repay the loan plus interest and he then proceeded to consider the same other evidence.

Before we proceed to consider the other aspects of the case, we are certain in our mind that the learned Judge was of the view that the charge was not valid at its inception and only became valid later after the respondent had applied for court order to perfect it and that was done for purposes of effecting the sale of the charged property. He made this clear towards the end of his judgment where he stated:

"**Before I conclude this matter, I wish to make one observation. As observed above, the plaintiff does not appear to have acted prudently in connection with this matter. Firstly, it got involved in an ill-thought out project and then proceeded to create a charge of questionable validity over land which did not then exist and had to go to court in order to obtain a court order in order to be able to perfect the charge."**

That is the reason why we stated earlier on in this judgment that on proper reading of the judgment of the superior court, it revealed that by inference, the learned Judge was of the view that the charge was not valid at its inception. It must however be accepted that after it was perfected, it became valid. That was on 8th October, 1991. We shall also consider later in this judgment the reason for the delay in registering that charge and which delay made it not valid for quite sometime during the period of the entire transaction. The learned Judge however proceeded on the basis that even with that invalid charge, the appellant was still liable to the respondent on the grounds of a contract as he had accepted an offer of a loan from the respondent, taken the property and lived in it with his family as was revealed by the evidence before the court notwithstanding the appellant's denial of the same.

On our own consideration, we do, with respect, agree with the learned counsel for the appellant, Mr. Ombete, that the charge was, as at the time before it was legally registered, not valid. It could not, as during that period, form a basis for the transaction between the appellant and the respondent. In saying so, we cannot fail to observe that that situation was partly the creation of the respondent and partly the creation of the appellant. It was partly the creation of the respondent in that as at the time the charge was executed, the property in question did not exist in the name of the appellant and was therefore not capable of being dealt with by the appellant as a security for any loan. It was partly a creation of the appellant in that even later when the instruments were proper, the appellant failed and/or refused to avail himself to sign the lease despite several reminders to do so, forcing the respondent to seek the court's intervention.

However, that being so, could one say that because the charge was not valid, the appellant was released from his duties under the charge? The answer is, in our view, yes, during the period when the charge remained invalid. But we make haste to add that the appellant was only released from his duties under the charge and not under the contract. This is what we must now consider.

The starting point is the application form to which we have referred in this judgment. As we have stated above, the appellant signed that application form and the signature appears under the words we have reproduced hereinabove part of which states that the statements in the form were to form the basis of any arrangements as to advance that was to be made to him. The appellant did not deny that that signature was his. One of the answers he gave in that form when a part of the form asked if the whole property was for the applicant's occupation, was "yes", meaning that when he filled the application form for the loan, he wanted a loan for a property which could be occupied by him and presumably his family. In the form for further particulars, again to which we have referred hereinabove, he in fact repeated the same i.e. that no other person would be occupying the house. Then comes the letter of offer dated 7th June 1982. We had reproduced it earlier in this judgment. The amount of money to be advanced in that letter of offer was clearly spelt out as Ksh.286,200/= The advanced sum was to be repaid with interest at 14% per annum in approximately 15 years by monthly instalments. The offer was made on the basis of the statements contained in the application form and subject to the terms of the Memorandum as to Advances, a copy of which was attached, and other special conditions that were specified below in the same letter. The appellant was advised in that letter of offer to read carefully the Memorandum as to Advances. In the acceptance note, the appellant accepted the offer, doing so after having read the company's Memorandum as to Advances. In our view, we do find that there was a proper contract created by these documents between the appellant and the respondent. The appellant states in his statement of defence in the superior court at paragraph 2 that although he was requested to sign and did sign some documents, the actual loan discussion and the advancement thereof was made between the plaintiff and the now defunct Civil Servants' Union and all the terms and conditions of the said loan were not brought to the attention of the defendant. We find this impossible to believe. The appellant has not denied signing the application form, the further particulars form, and the Acceptance of Offer. All these contain specific undertakings which the appellant made by virtue of appending his signatures immediately under each of the same undertakings. His standard of education would betray his allegation that he made these undertakings without reading the documents he was signing. Further, and to buttress our finding which was also the finding of the learned Judge of the superior court, the appellant, during the hearing of the suit maintained that he had declined the property and thus knew almost nothing about it; he never lived in the property and had never owned the property, yet the letters written to the respondent's lawyers both by the appellant and his lawyer gave a contrary situation. A letter from Asike-Makhandia Advocates, who were then acting for the appellant, dated 9th December 1992 to the respondent says in part as follows:

"**However, before we do so, we have been instructed to state that our client is in the process of organizing for the full repayment of the amount due under the charge. He will be in a position to do so latest by the end of March, 1992 (sic). He therefore requests you to cancel the intended auction on the basis of the foregoing."**

In response to that letter, the respondent through its advocates, Kaplan & Stratton, in a letter dated 21st December, 1992 addressed to Asike-Makhandia advocates gave detailed chronological events leading to the advertisement of the property for sale as at that time – December 1992. Having done so, the respondent, in the same letter gave the appellant the time required i.e. upto 31st March, 1993 for the appellant to clear the arrears. That never materialized and the house was later again advertised to be sold on 22nd October 1993. Again in a letter dated 8th October, 1993, the same advocates, Asike-Makhandia, still acting for the appellant, wrote a letter to Kaplan & Stratton Advocates and stated, *inter alia*, as follows:

"**Our client is now back in the country and his attention has been drawn to an advertisement appearing in the standard newspaper of 1st October, 1993 wherein it is stated that his property Nairobi/Block 72/1288 will be sold on the 22nd October, 1993 by the chargee in exercise of its statutory powers of sale under the charge. Our client pleads once more for time to settle down and enter into some agreement with an organization to take over the servicing of the mortgage on his behalf. If granted a breathing space of say 3 months our client and the organization will be in a position to work out the modalities of resolving this matter once and for all.**

We would therefore appreciate if you would kindly call off the intended sale as our client resides in the house together with his large family. He has nowhere else to go. If our client's proposal is acceptable to you, kindly let us have your confirmation thereof by return."

In our mind, those two letters written by the appellant's advocates on the appellant's instructions clearly show, first, that the appellant owned the property; that he lived in it together with his family and that he knew he was owning it and living in it on account of a loan he was offered by the respondent under terms and conditions which he duly accepted apart from acknowledging that the property was under mortgage. Those letters also clearly evidenced the appellant's appreciation or admission that he had not made any effort to honour the terms of the contract under which he was enjoying the facilities including the property. If one were to say that those were letters from the appellant's advocates and not from the appellant himself, the answer to that is that that trend of admission was not confined to letters from his advocates only. In a letter dated 10th October, 1993 – only two days later after a letter from his advocates, the appellant, in his own hand, wrote to the respondent directly and stated as follows:

"**As a follow up to two previous visits made to your office in connection with the above matter and further to a letter written to Kaplan & Stratton dated 8th October, 1993 by the lawyers acting on my behalf by name of M/S Asike-Makhandia on same subject, I hereby personally make a desperate request to you to intervene and stop the intended auction of the above mentioned property on the 22/10/1993.**

As intimated to you earlier on, I have been out of this country since 1983. During this period to date, I left the administration of this property under the care of my lawyers with the instructions that they remit every monies they received in the way of rent to Savings and Loan Kenya Ltd. Needless to emphasize that on my return, I was given to understand that this house has never enjoyed permanent tenancy even for a period of six months. This meant that it was impossible even for the said lawyers to pay themselves their administration fees. This state of affairs has put me in a very awkward and embarrassing position.

My humble prayer to you is to suspend the auction of the said property since this is where I am currently staying together with my large family and give me sometime at least to settle down so that I can be able to enter some agreement with an organization to take over the servicing of the mortgage on my behalf. If granted some breathing space, say 3 months, I and the organization

should be able to work out modalities on how we are going to resolve this issue once and for all.

In the same breathe (sic) it is my humble prayer to you to consider how best you can help me resolve the issue of very high rates of interest that have accumulated on this property over the years. A quick glance at the total figure owing reveals that about 84 percent is nothing but interest. I once more make a kind request to you to address this issue on purely humanitarian grounds given the deteriorating economic environment in the country. ……..”

That letter, together with the letter written to the respondent's advocates, do confirm that the appellant knew very well that together with the charge he had signed earlier which was on account of law ineffective for part of the transaction, there was a valid, binding contract which was enforceable.

Mr. Ombete's submission was that in Kenya, our law is based on the Torrens System and he cited passages in **Torrens Title in Australia Volume I by Francis**. These passages were taken from **pages 228 and 229**. They deal with effect of registration and particularly **section 41(1)** in NSW which provides:

“**No dealing until registered in manner hereinbefore prescribed shall be effected to pass any estate or interest in any land under the provisions of this act, or to render such land liable as security for the payment of money, but upon the registration of any dealing in manner hereinbefore presented, the estate or interest specified in such dealing shall pass, or as the case may be the land shall become liable as security in manner and subject to the covenants, conditions and contingencies set forth and specified in such dealing or by this act declared to be implied in instruments of a like nature.”**

In discussing that provision, the author states, *inter alia*, that there are other enactments of a similar nature but:

“**The common factor in all of these provisions is that it is the official act of registration in the manner prescribed which passes an estate or interest or which renders the land liable as security.”**

This Court in the case of **Russed Company Ltd. vs. Commercial Bank of Africa Ltd. and another** endorsed the above legal position when it stated:

“**It is trite law that the law in Kenya is based on the Torrens System. If authority is wanted it will be found in Souza Figuiredo vs. Mooring Hotel (1960) EA 926; Cross vs. Great Insurance Company Ltd of India (1966) EA 94.”**

We too agree that the law is as specifically stated above that unregistered instrument would not be a valid security. However, further reading of the same passage to which we were referred shows the following:

“**It is, of course, abundantly clear (and it has been so held by the courts on numerous occasions), that notwithstanding the generality of the words of these provisions, they are restricted in their application to the passing or creation of an estate or interest at law, and that in equity, an instrument which is unregistered is by no means devoid of all effect.”**

Our view of the matter is that the learned Judge was plainly right when he held that even without considering the effect of non registration of the charge for part of the transaction, there was enough evidence to hold the appellant responsible on the basis of a clear contract that was created between the parties. Mr. Ombete however, stated that that contract was unenforceable by virtue of the Limitation of Actions Act. The learned Judge considered the same submission and stated as follows:

“**Mr. Ombete spent considerable time talking about the issue of limitation. However, as provided in O. VI rule 4(1) (a) of the Civil Procedure Rules:**

“***A party shall in any pleading subsequent to a plaint plead specifically any matter, for example***

performance, release, payment, fraud, inevitable accident, act of God, any relevant statute or limitation or any fact showing illegality:-

(a) which he alleges makes any claim or defence of the opposite party not maintainable".

Since the plea of limitation is not raised in the defence, the defendant is not entitled to raise it through submissions."

That is the law and we see no reason to fault the learned Judge's exposition of the same. We may add that the necessity of pleading a matter such as limitation need not be emphasised. Mr. Ombete stated that as it is a matter of law, it can be taken at any stage of the proceedings, even on appeal. That may be so, but it must be appreciated that if it is not pleaded in the first instance, it may not be alluded to in evidence and that would make it difficult, as in this case, for the court to decide on it upon an informed basis based on evidence. In this case, in which the loan was offered to cover a period of 15 years and where the appellant, in the letters parts of which we have reproduced hereinabove, did accept the loan and asked for extension of time at least on two occasions, it becomes difficult unless proper evidence is adduced to ascertain the time when the cause of action began to run. We will conclude this aspect of the appellant's plea by referring to this Court's decision in the case of **Nairobi City Council vs. Thabiti Enterprises Ltd**. **(1995-98) 2 EA 231**. It stated, *inter alia*:

"**It is now settled law that the only way to raise issues for determination by the court is through pleadings and it is only then that a claimant will be allowed to proceed to prove them. See the case of Sande v. Kenya Co-operative Creameries Ltd. (1992) LLR 314 (CAK)."**

We would add here that where a matter is not specifically pleaded, the court may consider it if it has been canvassed during the trial and is made an issue by both parties at the end of the trial (see the case of **Kenya Commercial Finance Company Ltd. vs. Ngeny and another (2002) I KLR 106**). However, in this case, the law specifically requires limitation to be pleaded and that was not done. Further, during the trial, no evidence was led to establish the facts that would be relied upon to base the defence of limitation against the respondent's case. As we have stated, without those aspects being ventilated at the trial and without the pleading as required by law, the defence of limitation could not stand on the way of the respondent's case. In any event, we have also indicated hereinabove that the delay on the side of the respondent to proceed to recover the arrears partly arose from the refusal and/or failure of the appellant to sign the lease and that resulted in the failure to perfect the charge. Therefore, the appellant was partly to blame for the delay, if any, in the transaction and it would not be fair for him to seek to be beneficiary of the same delay.

The last matter that we need to consider is the question of interest charged. The amount that was advanced was Ksh.286,200/= only. The property was sold and an amount of Ksh.1.9 million recovered. That still left an amount of Ksh.2,144,670/= outstanding. As the respondent did not move quickly to recover the same and as the appellant also did not clear the same, it continued attracting interest such that as at the time the plaint before the superior court was filed, the amount allegedly due and which was claimed in the plaint was Ksh.4,062,316/=. All this was due to the interest charged. We do agree that this increase resulting from the interest charged was inordinately high and generally would appear unfair. However, we note that this same interest charged was as a result of the contract between the parties. The appellant in his handwritten letter we have reproduced hereinabove dated 10th October 1993, does not challenge the interest rates that were being charged but merely pleaded with the respondent to address that issue of interest on humanitarian grounds. We deprecate the system prevailing upto about the end of the year 2006 when the banks and financial institutions were allowed to charge unrestricted rates of interest and for as long as the loan or part of it remained unpaid. It is common knowledge that the same has been a bone of contention in the country's financial sector and serious debates both public and private have taken place. Fortunately, these have culminated in the Act that has just been given assent by the President of this Country. We hope the Act will instill some sense into the financial institutions on this matter which, left to itself, would have been and might have been part of the causes of economic woes in the country. The learned Judge of the superior court did, in our view, rightly criticize the respondent for the delay in realizing the balance immediately after sale. This was perhaps to enable the interest to

accumulate and that attitude is the same as that exhibited by the financial institutions, banks included, towards ensuring that interests charged not only were high but left to accumulate so as to make profit out of a silent trade. However, much as we may indicate our displeasure with the system that allowed that unfair system to thrive, there is not much the courts can do about it, as to do anything to stop it would amount to writing a new contract for the parties. That would not be in law tenable. Parties are bound by their own lawful contracts, freely entered into as this one was such a contract.

On the delay to recover the balance after the sale of the property, again we can do nothing on the same as the law does not specify the time within which such balances, if any, are to be recovered and as this was a claim on contract and recovery proceedings were brought within two years after the sale of the subject land, we cannot interfere with the same. Thus, in our view, both the interests charged before the registration of the charge and after the registration of the charge were within the contractual agreements in that the interests charged before registration were as spelt out in the letter of offer together with the terms of the memorandum as to advances, both of which were forwarded to the appellant. Further, the appellant's attention was drawn to the contents of both. The appellant then signed the acceptance note indicating that he had read the Memorandum as to Advances and he accepted the letter of offer. After the charge was registered, the interest charged was governed by the contents of the Memorandum as to Advances plus the contents of the charge.

In conclusion, having considered the entire case and having revisited the facts afresh and evaluated the same, we are of the same view as the superior court was, that even though the charge was not valid before it was registered, and only became valid after registration and thus assisted in disposing off of the charged property, the appellant was nonetheless still liable to the respondent on account of a contract duly and freely entered into between the parties, evidenced by the various documents, correspondence as well as the conduct of both parties. That being the case, the appellant was bound to meet the conditions of the same contract.

The totality of all the above is that this appeal cannot succeed. It is dismissed with costs to the respondent. Judgment accordingly.

Dated and delivered at Nairobi this 2nd day of February, 2007.

P.K. TUNOI

……..

JUDGE OF APPEAL

E.M. GITHINJI

……

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR