



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION –MILIMANI

CIVIL CASE NO. 364 OF 2000

INDUSTRIAL & COMMERCIAL

DEVELOPMENT CORPORATION:..... PLAINTIFF

VERSUS

NEHEMIAH KIPTOON NYOMBOI:..... 1st DEFENDANT

ABRAHAM KIPTANUI :.....2ND DEFENDANT

RULING

By an Application in the form of a Summons in Chambers filed in Court on 9th February 2005, the 2nd Defendant seeks the striking out of the plaint dated 1st March 2000 and the suit filed against him. The Application is expressed to be brought under Order VI Rule 13 1(b) (c) and (d) of the Civil Procedure Rules, Sections 37 and 39 of the Advocates Act, Section 4 of the Limitation of Actions Act and all other enabling provisions of the Law.

The genesis of this Application is a plaint filed in Court on 1st March 2000 in which the Plaintiff claims against he Applicant and one Nehemiah Kiptanui Nyomboi a sum of Kshs 1,919,580/90 together with interest at prevailing commercial rates until payment in full. The Applicant is sued on the basis of a guarantee executed in favour of the Plaintiff.

The 2nd Defendant's/Applicant's defence raises the plea of limitation and that the Plaintiff has no cause of action against him. The Application is supported by the 2nd Defendant's affidavit. There is a Replying Affidavit by one Isaac B. Mogaka the Plaintiff's Corporation Secretary.

The Application was canvassed before me on 6th April 2005 by Mr. Katwa Learned Counsel for the 2nd Defendant/Applicant and Mr. Kinyanjui Learned Counsel for the Plaintiff/Respondent. The thrust of the 2nd Defendant's case is simple. It is that the guarantee upon which the Plaintiff's claim is based was executed in 1987. The suit was filed in the year 2000, 13 years after the alleged breach by the 2nd Defendant. The action is therefore statute barred under Section 4(1) (a) of the Limitation of Actions Act. The second argument of the 2nd Defendant is that the plaint was drawn by an unqualified person in contravention of the express provisions of the Advocates Act.

The gist of the Plaintiff's case is that the claim is alive as the guarantee was a continuing guarantee and

the guarantee itself had waived reliance on the Limitation of Actions Act. Regarding the challenge raised against the drawer of the Plaint the plaintiff maintained that the drawer was duly qualified to draw the plaint, as she was a qualified advocate in the employ of the Plaintiff.

Looking at the plaint that is sought to be struck out I detect no clear averments that conclusively show that the Plaintiff's action is statute barred. At paragraph 6 of the plaint the plaintiff has averred that a notice to repay the loan together with interest was given on 8th May 1998 and there was default. The guarantee exhibited by the Plaintiff as "amm 4" provides at clause 4 that acknowledgment or admission by the Principal Debtor shall be conclusive and binding on the guarantor and clause 3 (1) of the said guarantee is to the effect that when the Principal Debtor is in default, a demand would be made against the guarantor. From material availed to me it appears as if a conclusive finding on whether or not the Plaintiff's action is time barred will depend on the construction of other documents not before me. This being my view of the matter I cannot hold that the plaint as drawn attracts the penalty of being struck out for being statute barred. As regards the challenge made against the drawer of the plaint, I have not been persuaded that she was indeed an unqualified person to draw the plaint for the Plaintiff. The upshot of what I have said above is that the 2nd Defendant's application dated 9th February, 2005 and filed on the same date is without merit and is dismissed with costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MAY 2005

F. AZANGALALA

JUDGE

read in the presence of:-



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