

**THE REPUBLIC OF UGANDA****IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA****COMMERCIAL COURT DIVISION**

HCT-00-CC-0S-0004-2007

Vincent Kawunde T/A Oscar Associates

Plaintiff

Versus

Damiano Kato  
Defendant**BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE****JUDGMENT**

1. The plaintiff brought this action by way of originating summons seeking to recover from the defendant the sum of Shs.133,746,141.00, as at 31<sup>st</sup> December 2006, by way of foreclosure of the defendant's right to redeem the mortgaged property. The plaintiff intends to sell the mortgaged property to recover the outstanding amount. The defendant did not respond to service, and the case proceeded *ex parte*.
2. The defendant obtained a loan of Shs.20,000,000.00 from Sembule Investment Bank Ltd on the 24<sup>th</sup> January 1994. The loan was for a period of 6 months and the interest rate was 30% per annum. The Security initially assigned were two properties. The defendant registered a caveat over one of them. The defendant did not pay as agreed or at all. In his letter of 8<sup>th</sup> May 1995 to the Manager of the bank, he requested to be allowed up to the end of August 1995 to pay the loan.
3. Sembule Investment Bank Ltd was succeeded in title eventually by the Commercial Bank of Africa which assigned the debt to the plaintiff now before the court.

4. At the hearing of this case, it was drawn to the attention of learned counsel for the applicant, Mr. Isaac Walukaga, that this action, both to the principal and interest, including foreclosure, was barred by Section 18 of the Limitation Act, Chapter 80, Laws of Uganda 2000 Edition. Mr. Walukaga conceded that interest was time barred, and stated that there are dropping the claim for interest. The plaintiff was only interested in pursuing the principal sum of Shs.33,258,723.00.
5. Mr. Walukaga further submitted that the limitation time should start to run, not from July 1994 but August 1995 in light of the letter of acknowledgement written by the defendant dated 8<sup>th</sup> May 1995. He further submitted that Section 22 of the Limitation Act saves this action in light of that letter.
6. I shall set out the letter in full.

‘Damain Kato  
P O Box 14210 Kampala.  
8<sup>th</sup> May 1995  
Your Ref: SIB/BR/10.  
The Manager,  
Sembule Investment Bank Ltd.  
Plot. 24 Jinja Road, KAMPALA.  
Dear Sir,  
RE: LOAN REPAYMENT A/C 1404205

Further to my earlier communication of 27<sup>th</sup> June, 1994 and the discussion, I had with you in March 1995 over the above loan, I wish to inform you that now there some progress being made. I have been in constant touch with Mr. Mugabe who has promised to assist me personally as he follows up the money I paid to Mr. Vincent Salam. Mr. Vincent Salam has accepted to refund the money to me by the help of Mr. Mugabe. He has promised to refund all the money through Mr. Mugabe in a period of 2 months. The purpose of this letter is to let you know of this progress and to request you to allow me to end of August, 1995 to clear my loan.

Yours Faithfully,  
(signed)  
DAMIAN KATO’

7. It will also be useful to set in view Section 18 of the Limitation Act. It states in part,

‘(1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover proceeds of the sale of land, after the expiration of twelve years from the date when the right to receive the money accrued.

(2)

(3)

(4)

(5) No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of proceeds of sale of land, or to recover damages in respect of such arrears, shall be brought after the expiration of six years from the date on which the interest became due; except that:’

8. There is no evidence on whether the addressee to the above letter responded in anyway, including whether he accepted or not the defendant’s request. Had there been evidence of acceptance of that request, the due date would have shifted to the end of August 1995. As there is no evidence to that effect, I am not prepared to hold just on the basis of that letter that the due date was end of August 1995.
9. However, the letter dated 8<sup>th</sup> May 1995 from the defendant did acknowledge that there was a debt due from him to the bank. Under Section 22(4) of the Limitation Act, the cause of action for recovery of debts or liquidated sums can start to run , in this case, from the 8<sup>th</sup> May 1995, the date on which the loan was last acknowledged. But this is not an action brought to recover a debt as such. This is an action for foreclosure. In that sense it is an action for recovery of land. And I must proceed to answer the three questions that the originating summons set out for the court.
10. Whether the principal debtor having failed in spite of repeated demand to pay to the plaintiff/Assignee the sums advanced by M/s Sembule Investment Ltd now Bank of Africa-Uganda which sums as at the 31<sup>st</sup> December 2006 stood at Ug. Shs.133,746,141.00 should be foreclosed of his right to redeem the mortgaged property.
11. The action for foreclosure is in time once it is determined that the time for the cause of action for recovery of the recoverable portion of the debt starts to run

- from the 8<sup>th</sup> May 1995. However, the basis of the claim for doing so, that is the none payment of Shs.133,746,141.00 is untenable. Most of this money is interest which accrued more than six years ago. Recovery of such interest is barred by Section 18(5) of the Limitation Act. The plaintiff cannot succeed in an action to foreclose in order to recover that sum.
12. The plaintiff's counsel in his address from the bar stated that he had abandoned the claim for interest, and wanted Shs.33,000,000.00 only being the principal amount. Counsel did not amend the plaintiff's pleadings in this case. The originating summons still claims the original sum claimed. It is not possible on the pleadings to distinguish the claim for interest from the claim for the principal sum. It is an omnibus claim.
13. In the affidavit sworn by Mr. William Odelle on 4<sup>th</sup> June 2007 and filed in court on 8<sup>th</sup> June 2007 it is averred in paragraph 2 that the defendant obtained credit facilities to the tune of Shs.33,000,000.00. In his testimony to the court Mr. Odelle contradicted that statement and stated that the defendant had received a loan of Shs.20,000,000.00. He actually produced evidence that showed that the defendant was offered a loan of Shs.20,000,000.00.
14. It is important to understand why the procedure of originating summons is present on our statute books. As was noted in *Re Giles(2) (1890), 43 Ch. D. 391 and quoted in Kulsbai v Abdulhessein [1957] E A 699 at 701*,  
     'such procedure "was intended, so far as we can judge, to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question."
15. The matters in issue here are not simple. The matter is complicated by the question of limitation. A substantial part of the subject matter is barred by law, not to be recovered by way of an action in the courts. It is just not enough that the plaintiffs' counsel concedes so from the bar. The initial pleadings, conveniently,

failed to disclose the true facts related to this proceeding which show that a substantial part of the claim is not tenable at law.

16. In the circumstances of this case, I refuse to grant an order for foreclosure given that the bulk of the claim on which it is premised is not recoverable at law. And it is not possible to distinguish on the pleadings what is recoverable and what is not recoverable. The sum claimed, by counsel for the plaintiff from the bar, of shs.33,000,000.00 is clearly not the principal amount on the evidence produced by the plaintiff himself.

17. With regard to the second question which is whether the plaintiff/assignee should be permitted to sell the mortgaged land upon foreclosure in accordance with the law, it is answered in the negative. As the prayer for foreclosure has failed for the reasons given, permission can not be granted for the proposed sale to proceed as it was intended to recover monies barred from recovery by law.

18. I am satisfied that this is not the kind of matter that ought to have been brought by way of originating summons as it was neither straightforward nor simple. The plaintiff ought to have proceeded in the ordinary way, and may yet do so, if he is within time.

19. As this matter proceeded in the absence of the defendant, the plaintiff shall bear his own costs for these proceedings.

Signed, dated and delivered at Kampala this 5<sup>th</sup> day of March 2008

FMS Egonda-Ntende  
Judge