National Cereal and Produce Board v Kenya Phonic Travel and Tours Limited & 4 others (Civil Suit 176 of 1995) [2024] KEHC 9759 (KLR) (Civ) (31 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9759 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 176 OF 1995

CW MEOLI, J

JULY 31, 2024

BETWEEN

NATIONAL CEREAL AND PRODUCE BOARD ..... PLAINTIFF

AND

KENYA PHONIC TRAVEL AND TOURS LIMITED ..... 1ST DEFENDANT

YAMAO LIMITED ..... 2ND DEFENDANT

NCHOKE LIMITED ..... 3RD DEFENDANT

NALIN SHRETA T/A LOTUS COMMERCIAL COMPLEX ..... 4TH DEFENDANT

MOMBASA DEVELOPMENT LIMITED ..... 5TH DEFENDANT

JUDGMENT

1. This suit was brought by National Cereal & Produce Board, (hereafter the Plaintiff) via a plaint filed on 16.01.1995 and amended on 10.04.2000, against Kenya Phonic Travel & Tours Limited, Yamao Limited, Nchoke Limited, Nalin Shretta t/a Lotus Commercial Complex and Mombasa Development Limited (hereafter the 1st, 2nd, 3rd, 4th & 5th Defendant/Defendants). Seeking judgment in the sum of Kshs. 32,000,000/- from all Defendants; and in addition damages for breach of contract as against the 1st to 4th Defendants; costs of the suit and interest. However, before addressing the respective parties' pleadings it is important to note that what is before the court by way of record is the court file re-constructed pursuant to the Court order issued on 31.08.2016.

2. In the amended plaint the Plaintiff averred that sometime in 1986 the Plaintiff entered into a contract with the 1st, 2nd, 3rd & 4th Defendants for the supply of 2.9 million gunny bags by the Defendants in the following terms; - 1st Defendant – 0.5 million bags; 2nd Defendant – 1.0 million bags; 3rd Defendant –

0.5 million bags; and 4th Defendant – 0.9 million bags. That the 1st, 2nd, 3rd & 4th Defendants through an agent, entered into an arrangement with the 5th Defendant to supply 2.9 million bags to the Plaintiff.

3. It was averred that the 5th Defendant represented to the Plaintiff that it held a total of 4 million bags in its various godowns in Mombasa; that on the strength of the representation the Plaintiff paid the sum of Kshs. 32,000,000/- to the 2nd, 3rd and 4th Defendants through the 1st Defendant, which sums would be paid to the said Defendants on the following terms;- 2nd Defendant – 18,000,000/-; 3rd Defendant – 9,000,000/-; and 4th Defendant – 5,000,000/- . However, despite the said payments, the gunny bags were not delivered even though a further Kshs.18,830,000/- was paid to the 5th Defendant.

4. The Plaintiff allegedly subsequently discovered that the 5th Defendant had raised dummy documents purporting that the said gunny bags had been delivered to the Plaintiff, whose servants and agents acting in good faith were induced by false pretenses to the release of payments to the Defendants. It was averred that the directors of the 5th Defendant were arraigned in court on 18 counts relating to charges of conspiracy to defraud and stealing by agent and were found guilty, sentenced to seven years imprisonment in 1990. However, the sentence was reduced to two (2) years on appeal. That the Defendants in a well-organized conspiracy acted in concert in inducing the Plaintiff to pay Kshs. 32,000,000/- for non-existent goods. The sum which the Plaintiff claimed against the Defendants and damages for breach of contract against the 1st, 2nd, 3rd & 4th Defendants

5. The 1st Defendant filed a statement of defence in May 1995 denying the key averments in the plaint.

6. The 2nd & 3rd Defendants equally filed a statement of defence in May 1995 denying the key averments in the plaint.

7. The 4th Defendant on his part filed a statement of defence dated 12.05.2000 denying the key averments in the plaint. And also averred that the Plaintiff is estopped from denying that the 4th Defendant performed its contract and that the Plaintiff's servants or agents voluntarily executed delivery notes and purchase advices that were issued by the Plaintiff, and also confirmed and acknowledged receipt of the goods delivered.

8. On the part of the 5th Defendant, the reconstructed record shows that it entered appearance on 15.12.2003, however, despite a request by the Plaintiff on 23.02.2004 judgment in default of defence, it is not clear that such judgment was entered. There is however on record what appears to be a defence and counterclaim by the said Defendant. The foregoing was the state of pleadings prior to hearing of the suit.

9. The hearing proceeded ex parte on 08.11.2023 as the Defendants despite being duly served via substituted service failed to attend the court.

10. During the trial, John Kiplagat Ngetich testified as PW1. Identifying himself as the Corporation Secretary of the Plaintiff he proceeded to adopt his witness statement dated 30.01.2019 as his evidence-in- chief and produced the documents in the list of documents dated 29.01.2019 as PExh. 1 - 7. It was his evidence that the Defendants had represented to the Plaintiff that they had 2.9 million bags for packaging of cereals. That, on the basis of the said representation the Plaintiff entered into a contract with the Defendants following which cheque payments were released to each Defendant as averred in the plaint. He stated that the 5th Defendant was presented as an agent of the 1st, 2nd, 3rd & 4th Defendants who would thus deliver the bags in question, however the bags were never supplied despite the Defendants receiving a total sum of Kshs 32,000,000/- which is taxpayers' money.

11. He described the transaction as a heist and the staff who inspected goods and the director of the 5th Defendant were charged with 18 counts of conspiracy to defraud and convicted in 1990. He further

testified that the Plaintiff did not recover the sums paid out and no value for money was received as no goods were supplied to the Plaintiff. That the Plaintiff's claim is for the sum of Kshs. 32,000,000/- paid between 1987 and 1988 which remains an audit query. The witness produced the bundle of documents in the Plaintiff's supplementary list of documents dated 05.12.2023 as PExh.8-19.

12. Upon the close of the trial, the Plaintiff filed submissions. Counsel for the Plaintiff began his submission by restating the pleadings and evidence. Addressing the question whether the Defendants were in breach of contract, it was submitted that it is not in dispute that the Plaintiff paid the Defendants the sum of Kshs. 32,000,000/- in order for the Defendants to deliver 2.9 million gunny bags to the Plaintiff's Mombasa Depot. Unfortunately, the Defendants failed to discharge their contractual obligation of the contract , which was tantamount to breach of contract.

13. Further concerning proof , counsel relied on Section 3(2), 107 & 108 of the *Evidence Act*, the decisions in Gichinga Kibutha v Caroline Nduku [2018] eKLR, Bwire v Wayo & Sailoki (Civil Appeal 32 of 2021) 2022 KEHC 7 (KLR), Kirugi & Another v Kabiya & 3 Others (1987) KLR 347, Kanyungu Njogu v Daniel Kimani Maingi [2000] eKLR and the English decision in Miller v Minister of Pensions (1947) 2 ALL ER 372. To submit that when a Court is faced with two probabilities it can only decide the case on a balance of probabilities if there is evidence to show that one probability was more probable than the other.

14. Counsel contended that the Plaintiff has demonstrated a prima facie case therefore the irresistible and only conclusion emerging from an analysis of the evidence is that the Plaintiff's case has been proved to the required standard. It was further submitted that apart from filing defences, the Defendants did not tender evidence to controvert the Plaintiff's evidence. Therefore, in the absence of such evidence, the Plaintiff has proved its case to the required standards. In conclusion the Court was urged to allow the Plaintiff's suit as pleaded.

15. The Court has considered the scant reconstructed record, the pleadings therein evidence as well as the submissions by the Plaintiff. The sole question falling for determination in light of the exparte proceedings is whether that Plaintiff has established its claim on a balance of probabilities and if so, what relief(s) ought to be granted. The Court of Appeal in *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, stated that: -

> " We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the *Civil Procedure Rules*. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

16. Further, as rightly submitted by counsel for the Plaintiff, the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. In Karugi & Another v Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal

proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

17. The parties' respective pleadings have been elaborately captured earlier in this judgment. As held in the case of Wareham t/a A.F Wareham, "cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules". From the Plaintiff's amended plaint, especially at paragraphs *4*, *5* & 7 and counsel's submissions, the Plaintiff's claim arose from a contract entered between the Plaintiff and 1st, 2nd, 3rd and 4th Defendants for supply of 2.9 million gunny bags. These parties through an agent entered into an arrangement with the 5th Defendant to supply the said gunny bags to the Plaintiff.

18. The amended plaint at paragraph *13* sets out the particulars of breach of the contract, primarily pleading the 1st to 4th Defendants' failure to supply the 2.9 million gunny bags as contracted. Undoubtedly therefore the Plaintiff's claim is primarily based on breach of contract, even though allegations touching on misrepresentation and/or fraud are also discernible from the said plaint, albeit without the particulars required under Order 2 Rule 10(1) (a) of the Civil Procedure Rules.

19. The role of the Court in adjudicating a dispute arising between contracting parties is well settled. In the oft-cited decision of National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, the Court held that; -

> " A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties."

19. However, considering the pleadings and evidence herein, it is the court's view that this cause resolves upon a question not hitherto addressed, and which is self-evident. The suit herein was filed in 1995 in respect of a contract entered into in 1986 between the Plaintiff and 1st, 2nd, 3rd and 4th Defendants. (See Para. 4 of the Amended Plaint). Section 4(1) of the *Limitation of Actions Act* provides that: -

> " The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
>
> (a) actions founded on contract;
>
> (c) actions to enforce an award;
>
> (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
>
> (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law."

19. It is trite that limitation of the time within which a claim may be brought is not a technicality but a matter that goes to the root of the Court's jurisdiction; no court has jurisdiction to hear a matter that is time barred. The Court of Appeal in Thuranira Karauri vs Agnes Ncheche [1997] eKLR addressing a similar scenario as we have here stated that:-

> " We do not understand how the Judge could proceed with the trial without finally determining such an important point of jurisdiction and it is pointed out that as a general

rule, a point or issue of limitation of time goes to the root of jurisdiction which this Court should determine at the first instance. Subsequently, that where a suit is time barred, the same is incompetent and consequently a court has no jurisdiction to entertain such suit".

19. The same Court in Phoenix of EA Assurance Company Limited v S.M. Thiga t/a Newspaper Service [2019] eKLR observed that;-

> " In common English parlance, "Jurisdiction" denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and to make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae."

19. In determining whether the the Plaintiff's suit is time barred, the Court must contemporaneously determine when the cause of action arose. As earlier noted, the Plaintiff specifically avers that contract between the Plaintiff and 1st, 2nd, 3rd and 4th Defendants was entered into in 1986. The Plaintiff's claim by the amended plaint is for judgment against all the Defendants in the sum of Kshs. 32,000,000/-, paid out pursuant to contract executed in 1986 as well as damages for breach of contract as against the 1st, 2nd, 3rd and 4th Defendants. From the material presented at the trial, as early as June 1987, the Plaintiff's leadership had become aware of the breach/ fraud perpetrated by the Defendants in collusion with the Plaintiff's own officers. Which discovery was followed by a criminal investigation that resulted in the prosecution of the culprits in Nairobi Criminal Case No. 536 of 1989 which terminated in 1990 in their conviction and imprisonment.

20. Thus, the Plaintiff's cause of action regarding the alleged breach of contract or fraud and misrepresentation accrued in 1987. Pursuant to section 4(1) of the *Limitation of Actions Act*, the Plaintiff's claim based on breach of contract ought to have been filed within a period of six (6) years upon accrual of a cause of action in 1987. That is by 1992. Equally any claim based on misrepresentation and or fraud ought, under section 4(2) of the same Act, to have been brought within 3 years since accrual of the cause of action. That is, by 1990. The entire suit is caught up by limitation, having been filed in 1995, possibly to address audit queries arising given that the Plaintiff is a government parastatal.

21. In the circumstances, this court can do no more than state the position of the Court of Appeal in Phoenix of EA Assurance Company Limited (supra):

> " A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied.... Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given".

19. The Plaintiff's suit being time barred, this court has no jurisdiction to determine the merits. This finding applies mutatis mutandis to the 5th Defendant's counterclaim. Consequently, the suit is hereby struck out with no orders as to costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JULY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: N/A

For Defendants: N/A

C/A: Erick