



**Bukhala & another (Both t/a Crown Jewel Enterprises) v Daima Bank Limited (In Liquidation)
(Civil Appeal 633 of 2015) [2024] KEHC 13023 (KLR) (Civ) (28 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13023 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL 633 OF 2015
TW OUYA, J
OCTOBER 28, 2024**

BETWEEN

**SILVERIUS ISANYA BUKHALA 1ST APPELLANT
MARY WAMBUI BUKHALA 2ND APPELLANT
BOTH T/A CROWN JEWEL ENTERPRISES**

AND

DAIMA BANK LIMITED (IN LIQUIDATION) RESPONDENT

*(Being an interlocutory appeal from the Ruling and Orders of the
Honourable Senior Principal Magistrate L. Kasan on 3rd December 2015
in CMCC NO.347 OF 2014, Milimani Commercial Courts, Nairobi)*

RULING

Background

1. The Respondent through a plaint dated 13th January 2014 instituted a suit to recover Ksh.810,009.90/= from the Appellant. The Plaintiff alleges the Appellants on 9th March 2001 jointly requested an overdraft facility of ksh.810,009.90 from the Respondent. The Respondent case is that the Bank was placed under statutory management on 14th March 2003 and all the outstanding balances became due and were demanded.
2. The Appellants *vide* a statement of defence dated 12th August 2011 denied the Respondent's allegations and even went further to make a preliminary objection on the point that the Plaintiff's suit was time barred by dint of section 4(1) (a) and (d) of *Limitations Act* Cap 22 Laws of Kenya.



3. The trial court pronounced itself vide a ruling dated 3rd December 2015 and dismissed the Appellant's preliminary objection. The Appellants being dissatisfied by the decision filed the above appeal based on the following grounds:
 - a. The Learned Trial Magistrate erred in law in failing to uphold the Appellant's preliminary objection and to find that the Respondent's claim against the Appellant was time barred despite undisputed material on the record showing that the cause of action which sounds in contract arose in the year 2003 and the suit was not instituted in court until the year 2014 which was clearly outside the six years limitation period prescribed by section 4(2)(a) of the *Limitation of Actions Act* Cap 22 of the Laws of Kenya.
 - b. The learned trial magistrate erred in law failing to hold and find that the cause of action arises on breach and not dismissing the Appellant's preliminary objection be set aside.
 - c. The learned trial Magistrate erred in law and fact in finding that the preliminary objection was not merited.
 - d. The learned trial Magistrate misapprehended the law and the admitted/undisputed facts when he dismissed the preliminary objection with costs to the Respondent.
4. The Appellant prays that:
 - a. This Appeal be allowed.
 - b. The Appellants preliminary objection be allowed and the Plaintiff suit be struck out/dismissed with costs to the Appellants.
 - c. Such other relief as the court may deem fit and proper to grant.

Submissions

5. The matter was canvassed by way of submissions by the rival parties through their counsel. The Appellant's arguments were premised on 4 issues:
 - a. Whether a cause of action in this case arose out of breach of contract or when the defendant was required to clear the overdraft.
 - b. Whether the Respondent's suit was time barred at the time of filing it.
 - c. Whether the Trial Magistrate erred in law and facts in finding that the preliminary objection was not merited.
 - d. Whether the Appellants came to Court with clean hands.

a. Whether a cause of action in this case arose out of breach of contract or when the defendant was required to clear the overdraft.
6. The appellants argue that a cause of action in a case of contract arises out of breach of contract and not when a party is required to perform the contract to completion. He cited case of *Melitus Oluoch Odero and another v Peter Matheka Ndivo* and *South Nyanza Sugar Company Limited v Dickson Aoro Owuor* where the courts reaffirmed the position that a cause of action arises only when one of the parties happens to be in breach of the contract and that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period. Guided by the above precedents the Appellants submit that the honorable magistrate erred in law in finding that the cause of action arises from the breach of contract.



b). Whether the Respondent’s suit was time barred at the time of filing it.

7. The Appellants submit that the Respondent’s suit was time- barred at the time of filing it. That the agreement between the Appellants and the Respondent was entered into on the 9th March 2001 when the Appellants requested and overdraft facility and that the cause of action arose on the 14th March 2003 and not when all the outstanding balances became due as a result of placing their Respondent bank under statutory management. He refers to paragraph 5 of the witness statement of Adam Boru and urges the court to note that the cause of action in this case arose when the outstanding balances became due which is on 14th March 2003 in accordance with the paragraph 5 of the witness statement of Adam Boru. However, the case was filed on the 13th January 2014 which is outside the required 6 years statutory time limit.
8. The Appellant submits that the Respondent’s case was filed outside the 6 years provided under the Limitations of Actions Act. He relies on Section 4(1)(a) and (d) of the Limitation of Actions Act provides that:

“..actions founded on contract and actions to recover a sum recoverable by virtue of a written law, other than penalty or forfeiture or sum by way of penalty or forfeiture may not be brought after the end of six years from the date on which the cause of action accrued.”

c. Whether the Trial Magistrate erred in law and facts in finding that the preliminary objection was not merited.

9. The Appellants submit that their preliminary objection was merited and that the trial court erred in law and in facts in finding that the preliminary objection lacked merit. He relies on the case of Peter Mungai v Joseph Ngaba Kuria and 2 others which set out three c conditions to be considered when allowing a preliminary objection: first is whether the preliminary objection raises a pure point of law. Secondly, whether the facts pleaded by the other side are correct and finally, it cannot be raised if any fact has to be ascertained or if what is sought is exercise on judicial discretion. The Appellants’ argument is that they meet the requirements for grant of orders sought in a preliminary objection as provided for in the above precedent. Further, they contend that the trial Court did not disclose in the ruling why it reached the determination that the preliminary objection does not have merits.
10. The Appellants submitted further that the court in the case of Peter Mungai v Joseph Ngaba Kuria and 2 others cited with approval the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors Ltd (1969) EA where it was held that:

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of court or a plea of limitation, or a submission that the parties are bound by the contract giving rise the suit to refer to the dispute to the arbitration.’

d. Whether the Appellants came to court with clean hands.

The Appellants make reference to part of the ruling which read:

“The defendant seeks to have the suit struck out yet it appears that he has not met his obligations. He has not come to court with clean hands...”



11. The Appellants reiterate that they have come with clean hands. That they stated in their defence that the Respondent held and owed the them a sum in excess of Ksh. 840,000/= in fixed deposit at the time the Respondent went under statutory management. That, after the statutory management, the Appellants filed claim forms and lodged the same with the liquidator in respect of the funds held in the fixed account deposit account but the liquidator did not make any single payment. The Appellants made reference to correspondence dated 10th November 2000 and 12th August 2014 in the record of appeal by the Appellants to the Respondent, where the appellant made application for enhancement of overdraft facility and their continued engagement.
12. The Respondent on the other hand argues that limitation period had not been reached by virtue of interest, bank charges and penalties accruing on the outstanding debt. That the Appellants confirmed that they did have an overdraft relationship with the Respondent. The terms and conditions of overdraft facility are contained in a contract dated 13. 01. 2000. That overdraft facilities could be recalled by the Respondent through a written notice. That the Respondent instructed advocates to make demand or payment of outstanding arrears. The contract between the parties was still in force. The respondent agrees with the trial court for finding that the appellants had come to court with unclean hands by virtue of having outstanding loan with the Respondent.
13. The Respondents contend that the claim by the Appellant that the Respondent owed them money at the time it went into liquidation is farfetched and is not supported in the pleadings or by counterclaim which could have been addressed by the trial court.
14. The Respondent also submits that the cause of action arises from the Appellants failure to service loan which is a continuing breach as interest and other bank charges continue to accrue. That the cause of action was not time barred. That the fact that the Respondent went into liquidation does not extinguish obligations owed by clients. The Respondent went into liquidation for reasons including defaulting of loan facilities by its customers. That this suit is instituted by the liquidation agent as an attempt to recover sums for payment to depositors.

Analysis And Disposition

15. This court has considered all the pleadings, record of appeal and the submissions by the rival parties plus the authorities cited. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Limited* (1958) EA 424; *Selle and Another v Associated Motor Boat Co. Limited and Others* (1968) EA 123 and *Williams Diamonds Limited v Brown* (1970) EA
16. The Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278 stated that:

“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”
17. After considering the submissions by the parties, and upon reevaluation of the evidence before court by the parties, it is the court’s view the appeal on three key issues, namely:
 - a. Whether the Appellants were indebted to the Respondent at the time of filing the suit,
 - b. whether the Respondents suit against the Appellants was time-barred at the time it was filed and lastly,



- c. whether the Appellant's application for interlocutory judgement was merited.
18. The Appellants' bone of contention is that the suit by the Respondent in the trial court was premised on debt arising out of an overdraft facility which was prematurely recalled by the Respondent following the Respondent institution being placed under statutory management. There was indeed a contractual arrangement between the parties for an overdraft facility dated 13th January 2001. However, the Respondent was placed under statutory management on 14th March 2003. It was on this basis that the Respondent recalled all loans from its borrowers to secure the interest of the depositors, the appellants being among them. Despite demand, the Appellants did not pay the outstanding amount which stood at kshs.801,0009.90 forcing the Respondent to file a suit on the 13th January 2014 for recovery of the same.
 19. The Appellants' preliminary objection is based on two arguments. One is that the suit was time-barred because the cause of action arose on 14th March 2003 while the suit was filed on 13th January 2014 which was way after 6 years limitation period. The second is that the cause of action should be determined to have arisen from the date of statutory management as opposed to when all the outstanding amounts became due. The Appellants also allege that the Respondent owes them Ksh. 840,000 which was on fixed deposit. Upon perusal of the record, the court observes that the Respondent relied on the following among other documents in support of its case: contract letter dated 13th January 2000 and 10th November 2000, demand letters dated 20th April 2010, contract documents for loan facility dated 13 January and 17th November 2000, copies of bank statements, copies of account opening forms with supporting documents and correspondence between the parties.
 20. It would have been logical that the debtors would have been contacted soon after the Respondent was placed under statutory management. However, the Respondent pleaded in the plaint that they obtained leave to file suit out of time in High Court Misc.591of 2010.
 21. This Court discerns that there was a long-term financial relationship between the Appellants and the Respondent which was renewed from time to time and that on 14th March 2003 when the Respondent was placed under statutory management, some amounts were still outstanding which has been the basis of the Respondent's claim. The Respondent's claim together with the supporting documents raises triable issues which cannot be addressed summarily at an interlocutory hearing. Similarly, the issues raised by the Appellants both in their statement of defence and in this appeal and are weighty and require interrogation.
 22. It is also discernible from the Respondent's supporting documents and particularly from the bank statement that Appellant's loan remained outstanding and continued to earn interest and bank charges long after the Respondent was placed under statutory management. This court will therefore not determine that the Appellant's obligation to the Respondent ceased upon the Respondent's new status nor that the cause of action arose on the very date that the management ensued. This is because there are many factors that play when financial institutions are placed under management. The statutory manager has got an obligation to recover all monies due to the client from the debtors in order to secure the interest of the depositors. It is therefore logical that both parties are given a chance for the entire evidence to be interrogated.



23. In the case of *V.K. Construction Co. Ltd v Mpata Investments Milimani* HCCC No. 257 of 2003, the court held *inter alia* that no suit should be dismissed unless it discloses no reasonable cause of action even if it is time-barred. The learned Judge (as he then was) Ringera held:

“... In the premises I have come to the conclusion that the Defendant’s Application must be refused. All I would want to add is that in my discernment an application to strike out the plaint on the ground that the claim is time barred by statute of *Limitation Of Actions Act* is best predicated on rule 13(1)(b) or (d) on the ground that it is vexatious or it is otherwise an abuse of the process of the court. And then of course in that event, the action would ordinarily have to be supported by evidence. The upshot of my consideration of the matter is that the Defendant’s application is dismissed with costs.”

DETERMINATION

24. Based on the above premises, this court finds that the Appellant’s preliminary objection is not merited and should fail allowing the matter to proceed to full trial.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28th DAY OF OCTOBER, 2024

ROA 14 days.

HON. T. W. Ouya

JUDGE

For Appellant... Kiganka Mutwiri

For Respondent N/A

Court Assistant ...Martin Korir

