



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kaigi General Contractors Ltd v National Irrigation Authority (Civil Suit E009 of 2021) [2023] KEHC 3396 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3396 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL SUIT E009 OF 2021  
FN MUCHEMI, J  
APRIL 27, 2023**

**BETWEEN**

**KAIGI GENERAL CONTRACTORS LTD ..... PLAINTIFF**

**AND**

**NATIONAL IRRIGATION AUTHORITY ..... DEFENDANT**

**RULING**

1. This ruling is in respect of the defendant's preliminary objection dated June 6, 2022 which is based on the following grounds:-
  - a) That the suit is time barred under Section 4(1) of the *Limitation of Actions Act* as the cause of action is premised on alleged accrued debts which fall within the realm of contract law whose limitation period is six (6) years.
  - b) That this Honourable Court lacks the geographical jurisdiction to hear and determine this suit in view of Section 15 of the *Civil Procedure Act*.
2. Parties disposed of the preliminary objection by way of written submissions.

**The Defendant's Submissions**

3. The defendant relies on Section 4 of the Limitations of Actions Act and the case of *Nairobi Civil Appeal No 43 of 2015 Alba Petroleum Limited v Total Marketing Kenya Limited* and submits that the works allegedly performed by the plaintiff in the year 2014 and 2015 are time barred and ought to have been brought within a period of six years from the date of the contract. The defendant argues that the plaintiff has conveniently omitted to disclose in the plaint the actual dates the causes of action arose save for the references as to when the works were undertaken. Further, the defendant states that the plaintiff issued a formal demand for the said sum of Kshs 187,679,102.08 on May 19, 2018. As such,



the defendant contends that any cause of action borne out of debts accrued before October 4, 2015 are statute time barred and ought to be struck off.

4. The defendant further argues that the court lacks territorial jurisdiction as the cause of action arose in Mwea and Bura as per the plaint and thus the defendant contends that the claim ought to have been filed in the relevant court within those jurisdictions.

### **The Plaintiff's Submissions**

5. The plaintiff submits that its case is based on various invoices, certificates of completion and unpaid payment vouchers. For instance, the payment vouchers dated October 9, 2015 and July 15, 2015 indicate that they were paid on July 8, 2016 and September 15, 2015. The plaintiff states that these vouchers have been paid unlike the three payment vouchers dated April 12, 2015, numbers PV\_28985, 29008 and 29013 on pages 16, 17 and 18 of its list of documents and the one dated March 12, 2015, number PV\_28948 on page 19 of the bundle of documents. The certificates of completion in respect to the said unpaid vouchers were signed on November 4, 2015 to November 4, 2021. Thus, the plaintiff argues that the period between November 4, 2015 to October 4, 2021, when the suit was filed, is not six (6) years and therefore the claims are not statute barred.
6. The plaintiff further argues that there is a payment voucher dated July 22, 2016 document number PV\_37038 which is in the amount of Kshs 14,386,900/- paid on February 23, 2017 for parking lots, walkways, aid workshop bays at Mwea Irrigation Scheme. The payment narration shows retention of Kshs 3,150,560/- which amount the plaintiff has claimed in paragraph 3 of the plaint. Therefore since the claim arose on February 23, 2017, it is not statutory barred.
7. The plaintiff argues that the documents attached in the second, third and fourth bundle dated February 22, 2022 contains local purchase orders, delivery notes, invoices, delivery confirmation, certificates of completion and unpaid payment vouchers in respect of Mwea Irrigation Scheme cannot be said to be statute barred for they are dated 2016 and November 2015. Further, the local purchase orders dated October 28, 2015 and unpaid payment vouchers dated November 6, 2015 in respect of Bura Irrigation Scheme for the total sum of Kshs 15,914,387/- is not time barred.
8. The plaintiff further refers to the payment voucher dated February 23, 2017 for payment of Kshs 10,364,555/- and leaves the retention fund of Kshs 3,150,560/- is an admission of debt and therefore Section 23(3) of the *Limitation of Actions Act* applies which provides that the right of action accrues on or before the date of acknowledgement or the last payment in cases of recovery of debt. The plaintiff thus argues that the defendant having made part payment and/or acknowledged the debt through the unpaid voucher, then the entire claim of Kshs 185,913,953/- is not statutory barred.
9. The plaintiff cites the case of *Gitau v Thuo & 2 Others [209] KLR 86* and submits that the preliminary objection ought not to be sustained as it does not raise pure points of law. The plaintiff argues some facts ought to be ascertained being the dates the part payments were made and dates of payment vouchers preparation as the works it carried out stretched over a long period of time.
10. The plaintiff further argues that pursuant to Article 165(3)(a) of the *Constitution*, the High Court has unlimited jurisdiction in civil matters. The plaintiff states that the suit concerns the National Irrigation Authority, which is a national body with offices all over the counties including Nyeri. The plaintiff submits that the debt in question arose in various places including Kirinyaga, Meru and Bura. Furthermore, the plaintiff relies on Order 3 Rule 5 of the *Civil Procedure Rules* and argues that this is a liquidated claim against the defendant arising out of the same debts and thus to avoid multiplicity of suits, it has united the various claims and filed one claim in a central place. As such, the plaintiff contends that the court has territorial jurisdiction to hear and determine matter. That



notwithstanding, the plaintiff refers to Article 159(2)(d) of the Constitution and argues that the court ought to promote justice and overlook technicalities.

### **Issue for determination**

11. The main issue for determination is whether the preliminary objection is sustainable.

### **The Law**

#### **Whether the preliminary objection is sustainable.**

12. The case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors [1969] EA 696* is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

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 a preliminary point may dispose of the suit.

13. Sir Charles Newbold P stated:-

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

14. Similarly the Supreme Court in the case of *Hassan Ali Jobo & Another v Suleiman Said Shabal & 2 Others SCK Petition No 10 of 2013 [2014] eKLR* 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 a preliminary point may dispose of the suit.

15. Further in the case of *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others, [2014] eKLR* the court held that:-

Thus a preliminary objection may only be raised on a 'pure question of law.' To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

16. Guided by the cited authorities, it is evident that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.

17. The defendant argues that the suit is time barred by dint of Section 4(1) of the Limitation of Actions Act as the alleged debts owed to the plaintiff date back to the year 2014 and 2015. Thus, any cause of action borne out of debts accrued before October 4, 2015 ought to have been filed within a period of 6 years from the date the cause of action arose and hence are statute barred. The plaintiff's pleadings show that the dates of the contract giving rise to this claim were not included in the plaint. It would have been prudent for the plaintiff to indicate the date of the contracts upon which the claims are based. However, upon perusal of the documents relied on by the plaintiff, it is noted that due to the nature of the contract, certificates of completion were issued at different times as the work proceeded. This was the same case that applied to the payment vouchers and other related documents. Some of the said documents were signed about one to two years after the works were completed which explains the diverse dates in the documents. Some vouchers were paid long after the works were completed while others still remain unpaid. These are matters of facts that may need to be determined after hearing both



parties in the suit. It is therefore, not possible for this court to ascertain at this stage that the plaintiff's claim is time barred.

18. On the issue of jurisdiction, the law was enunciated in the case of *Owners of the Motor Vessel 'Lilian S' v Caltex Kenya Limited [1989] KLR 1* where the court held:-

Jurisdiction is everything. Without it a court has no power to make one more step. 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.

19. On the source of jurisdiction, it was held in the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & Others [2012] eKLR* that:-

A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

20. The defendant has argued that the court has no jurisdiction to entertain the suit as the cause of action arose in Mwea and Bura which is not within this court's territorial jurisdiction. The defendant argues that the suit offends Section 15 of the *Civil Procedure Act*. Section 15 of the *Civil Procedure Act* envisages a situation where the cause of action arises in the geographical jurisdiction of one court and the defendant resides, carries on business or personally works for gain in the geographical jurisdiction of another court. In such a situation, the plaintiff has an option of instituting the suit in the court in whose jurisdiction either the cause of action arose or where the defendant resides, carries on business or works for gain.

21. The jurisdiction of the High Court in civil matters is unlimited by virtue of Article 165 (3) of the *Constitution* as follows:-

(3) Subject to clause (5), the High Court shall have-

- a. Unlimited original jurisdiction in criminal and civil matters.

22. The plaintiff explains that the defendant herein is the National Irrigation Board which has offices in several counties of the country. He further said that the claim before this court is a combination of works that were carried out in different counties at different times. These include counties of Kirinyaga, Meru and in Tana River. The said works may be based on one contract or more contracts which facts may be known only at the time of the hearing. The plaintiff said he was avoiding multiplicity of suits. Whether this explanation is correct or justifiable will be confirmed during the hearing of this suit.

23. Bearing in mind that the High court has unlimited jurisdiction under Article 165 of the *Constitution*. I am of the considered view that such jurisdiction cannot be limited by Section 15 of the *Civil Procedure Act* especially given the peculiar circumstances of this case. It was held in the case of *Selina Vukinu Ambe Vs Ketan Shashikant Khatri [2020]eKLR*

' With reference to the matters at hand, this means that the High Court is constitutionally mandated to hear and determine all civil disputes irrespective of their nature or the value of the subject matter. The High Court jurisdiction being a creature of the *Constitution* which is the supreme law of the land cannot be limited or fettered by any other written law including the *Civil Procedure Act*. In my view, any statute that would purport to limit the High Court's jurisdiction as conferred by Article 165(3) would to that extent be unconstitutional by virtue of Article 2(4) of the *Constitution*.'



I therefore find that this court is possessed of the requisite jurisdiction to determine this case.

24. The preliminary objection lacks merit and is hereby dismissed.
25. Due to the peculiar circumstances of this case, I hereby order that each party meets its own costs of the preliminary objection.
26. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 27<sup>TH</sup> DAY OF APRIL, 2023.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through videolink this 27<sup>th</sup> day of April, 2023**

