



Bowip Agencies Limited v Family Kitchen Restaurant Company Limited (Civil Case E004 of 2020) [2023] KEHC 19354 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE E004 OF 2020
MS SHARIFF, J
JUNE 30, 2023**

BETWEEN

BOWIP AGENCIES LIMITED PLAINTIFF

AND

THE FAMILY KITCHEN RESTAURANT COMPANY LIMITED RESPONDENT

JUDGMENT

1. The plaintiff filed this suit by way of plaint dated May 15, 2020 seeking the following orders;
 - a. Payment by the defendant of the sum of Kshs.14, 468,008. To the plaintiff.
 - b. The payment of Kshs 7,000,000/- to the Plaintiff.
 - c. Costs of the suit.
 - d. Interest.
2. The suit is founded on a lease agreement entered into by the parties on October 20, 2013 in respect of LR Kisumu Municipality/ Block 10/112. Despite service, the defendant did enter appearance but did not any defence. Nonetheless, the defendant participated in the hearing by way of cross examining the plaintiff's only witness. After the hearing, parties filed their respective submissions.
3. While perusing the said submissions, I noted that the defendant raised a preliminary point of law on 2 grounds; first is that the suit is time barred and secondly, the suit has been filed without authority.
4. As such, I find it prudent to first dispense with the issue of limitation before delving in the merits of the case, in the event that I find the suit to have been timeously filed.



5. On the first ground, the defendant contends that it was a condition of the agreement under clause 9 (b) and (c), that the plaintiff was obligated to serve a 14-day notice in case of default by the defendant in paying rent and to thereafter proceed to take possession of the premises upon terminating the lease.
6. A perusal of the said agreement reveals that the same was to commence on October 20, 2013 and lapse on October 19, 2019. As matters stand, the lease has determined by lapse of time.
7. According to the defendant, the agreement having been entered into on October 20, 2013, the cause of action arose on the 15th day after service of notice of default. That accordingly, the 15th day accrued on December 20, 2013. wherefore the suit, having been filed in the year 2020, the same was filed out of time and was statutorily barred by the provisions of Section 4(1) of the [Limitation of Actions Act](#).
8. In support of this contention, counsel cites authorities in *Director Ltd v Samani* (1995-1998) 1 EA 48 and [South Nyanza Sugar Company Limited v Dickson Aoro Owuor](#) (2017) eKLR.
9. The plaintiff did not make any submission on the issue.

Analysis and determination.

10. A preliminary objection is what was held in *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 as:

---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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.

In the same case 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”.

11. The defendant’s objection is based on Section 4(1) of the [Limitation of Actions Act](#) which provides;
 - (1) 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;
 - (b)
 - (c)
 - (d)
 - (e)
12. According to the plaintiff, the defendant defaulted in paying rent and subsequently sold the premises to a third party without their notice.



13. Premised upon the facts aforesaid, it evident that the lease agreement was entered into in the year 2013, the default happened immediately thereafter as no rent was paid and the cause of action arose then. The six years limitation period started running from that time.
14. In the circumstances I find the suit herein was time barred and I therefore proceed to strike it out with no orders as to costs.

DELIVERED, DATED AND SIGNED AT KISUMU THIS 30TH DAY OF JUNE 2023.

MWANISHA S SHARIFF

JUDGE

In the presence of:

