



**Consolidated Bank of Kenya Limited v Family Bank Limited & 2 others (Miscellaneous Civil Case E077 of 2023) [2023] KEHC 20112 (KLR) (Commercial and Tax) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 20112 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL CASE E077 OF 2023  
JWW MONG'ARE, J  
JUNE 30, 2023**

**BETWEEN**

**CONSOLIDATED BANK OF KENYA LIMITED ..... APPLICANT**

**AND**

**FAMILY BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**TABITHA WOTHAYA NDIGIRI ..... 2<sup>ND</sup> RESPONDENT**

**CLEMENT MUCHIRI NJAI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Applicant has moved the court by way of Originating Summons dated 26/1/2023 seeking the following orders
  - i. Spent
  - ii. That this Honourable Court be pleased to issue an order directing the 1<sup>st</sup> Defendant/Respondent to honour the undertaking issued by itself to the Plaintiff/Applicant dated October 16, 2014;
  - iii. That this Honourable Court be pleased to issue an Order directing the 1<sup>st</sup> Respondent to pay the entire interest that has accrued on the current outstanding amounts;
  - iv. That the costs of this suit be provided for.
2. On 8/3/2023 the Defendants having been served with Originating Summons Applications filed a Notice of Preliminary objection raising the following grounds:-



- i. That the court lacks jurisdiction to hear and determine the suit since the cause of action, in so far as it seeks to enforce a contract in the nature of an undertaking, is statute barred pursuant to section 4 of the *Limitation of Actions Act*;
- ii. That the suit is res judicata and offends the mandatory provision of section 7 of the *Civil Procedure Act* following the hearing and determination of Milimani HCCC 314 of 2016, *Family Bank Limited v Tabitha Wothaya & 2 others* which was determined on December 19, 2021.

### **Analysis and Determination:**

3. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

“...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 the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....”

4. I have considered the pleadings placed before me, the written submissions by the parties and the oral arguments thereto. I note that the Defendant has raised the Preliminary objection on two grounds; Firstly, that the suit is time barred by operation of the law and secondly, the issues being canvassed herein are res judicata, having been determined in a suit between the parties. Section 4 (1) of the *Limitation of Actions Act* provides as follows;

“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”

5. From the pleadings I note that the contract in issue arises from a professional undertaking issued by the Defendant on December 16, 2014. It is failure to honour this undertaking by the 1<sup>st</sup> Defendant to the Plaintiff that triggered this suit before the court. On its part, the Applicant states that time should run when the court dismissed the suit filed by the first Defendant in HCCC No. 314 of 2016- *Family Bank Limited v Tabitha Wothaya & 2 others* in 2019 and hence the suit is not statute barred. Courts have held that time begins to run when a contract is breached and not when it ends. This is as was held by the Court in the case of *Sony Sugar Company limited v Dickson Aoro Owuor* [2019]eKLR;-

“...it is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period”.



The undertaking issued was for the payment of the redemption amounts to the Applicant within 14 days of the registration of the discharge of charge and a charge in favour of the Defendant or 60 days after the receipt of the security documents by the 1<sup>st</sup> Defendant. From the pleadings, the discharge of the Plaintiff's charge and the charge in favour of the Defendant were registered on October 21, 2015 as evidenced by a copy of the title deed produced in evidence by the Defendant/Respondent. To my mind, six years were to be computed to run 14 days after October 21, 2015 and therefore a suit for enforcement of the said contract should have been commenced on or before the 4/11/2021. The Originating Summons herein have been filed in 2023 are therefore filed out of time and hence I agree with the Defendants/Respondents that the suit is filed outside the period by law to bring claims based on contract.

6. In the locus classic case of the *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, Justice Nyarangi, (as he then was) stated as follows:-

“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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

It is imperative that a court seized with a matter must first confirm that it is clothed with the requisite jurisdiction to hear and determine the same and once it determines that it is lacking in jurisdiction, then it must stop and make no further steps. Having ascertained that the suit before me is statute barred, this court therefore has no jurisdiction to entertain the matter and will down its tools and take no further steps. In view of the same the court will not consider the second ground raised in the Preliminary Objection.

7. In light of the above, this court finds and holds that the Preliminary Objection has merit and will allow it with costs to the Defendants/Respondents. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE, 2023.**

.....

**J. W. W. MONG'ARE**

**JUDGE**

**In the Presence of:-**

- 1. Ms. Allie for the Applicant**
- 2. Mr. Munai for the Respondent**
- 3. Sylvia- Court Assistant**

