



REPUBLIC OF KENYA



KENYA LAW
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**Shah v Bid (Commercial Case E118 of 2021) [2023] KEHC 24557 (KLR)
(Commercial and Tax) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 24557 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E118 OF 2021**

MN MWANGI, J

JULY 31, 2023

BETWEEN

ASHWIN SHAH PLAINTIFF

AND

MUKESH HARAKHCHAND BID DEFENDANT

RULING

1. The plaintiff filed the suit herein on March 1, 2021, seeking judgment against the defendant for the sum of Kes 147,000,000/= being sums allegedly advanced to the defendant by the plaintiff as a friendly loan between the years 2016 and 2018, costs of the suit and interest. Contemporaneously with the said plaint, the plaintiff filed a notice of motion application seeking an order for conditional attachment of the defendant's property as sufficient to satisfy the decree that may ultimately result after the hearing and determination of the case, in the sum of Kes 147,000,000/=. The said application was allowed on March 9, 2021.
2. In opposition to the said suit, the defendant filed a notice of preliminary objection dated March 27, 2023 raising the following grounds of objection-
 - i. That the court lacks jurisdiction to hear this matter noting that the suit is time barred having been brought outside the statutory limitation of six (6) years in view of section 4(1) of the *Limitation of Actions Act*, cap 22 Laws of Kenya;
 - ii. That the plaintiff's suit is incompetent, bad in law, barred in law and an abuse of the Court process; and
 - iii. That the suit is fatally and incurably defective and the same should be dismissed with costs to the defendant.



3. The defendant also filed a notice of motion application dated March 27, 2023 pursuant to the provisions of order 2 rule 15(1) and order 51 rule 1 of the [Civil Procedure Rules](#), sections 1A, 1B & 3A of the [Civil Procedure Act](#) any other enabling provisions of the law seeking the following orders –
 - i. Spent;
 - ii. That this Honourable Court be pleased to strike out the plaint and application both dated March 1, 2023 and lodged on even dates in Milimani Commercial Suit No. E118 of 2021; Ashwin Shah vs. Mukesh Harakhchand Bid; and
 - iii. That the costs of and incidental to this application be awarded to the applicant.
4. The application is premised on the grounds on the face of it and is supported by affidavits sworn by Mukesh Harakhchand Bid, the defendant herein, on March 27, 2023 and May 23, 2023. In opposition thereto, the plaintiff filed a replying affidavit sworn on May 22, 2023 by Ashwin Shah, the plaintiff herein.
5. The notice of preliminary objection and the application dated March 27, 2023 were canvassed by way of written submissions. The defendant’s submissions were filed on both April 12, 2023 and May 23, 2023 by the law firm of Saroni & Stevens Advocates, whereas the plaintiff’s submissions were filed by the law firm of Mbalu & Associates Advocates on May 23, 2023.
6. Mr. Steve Ogolla, learned Counsel for the defendant cited section 4(1) of the [Limitations of Actions Act](#) and submitted that in support of the claim, the plaintiff relies on an alleged loan agreement dated January 1, 2015 but pursuant to the provisions of the said section, actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. He relied on the case of [Gatboni v Kenya Co-operative Creamaries Ltd](#) Civil Application No. 122 of 1981 and submitted that the plaintiff had not explained the delay in filing the suit herein. Counsel referred to the case of [Alba Petroleum Limited v Total Marketing Kenya Limited](#) [2019] eKLR, where the Court cited with approval the case of [Iga v Makerere University](#) [1972] EA and explained that the suit herein is barred by limitation and as such, this court lacks jurisdiction to grant the reliefs sought by the plaintiff in the plaint dated March 1, 2021.
7. Mr. Steve Ogolla submitted that jurisdiction is everything and without it, a Court lacks jurisdiction and the suit before it becomes a nullity *ab initio*. He urged this Court to down its tools and strike out the suit filed by the plaintiff, He relied on the decisions in [Joseph Muthee Kamau & another v David Mwangi Gichure & another](#) [2013] eKLR and the [Owners of the Motor Vessel “Lillian S” v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR.
8. Mr. Mutava, learned Counsel for the plaintiff submitted that the plaintiff started demanding for payment of the loan way back in the year 2018 and since the last demand made was in the year 2018, it is the year that should form the start date for purposes of computation of limitation of action and which if applied the suit herein, is squarely within the statutory limit as per the provisions of section 4 of the [Limitation of Actions Act](#). He also submitted that the defendant obtained a bankruptcy order in Insolvency Cause No. 10 of 2018 with the intention of frustrating and forestalling the recovery action by the plaintiff. He argued that for the said reason, litigation of the dispute between the parties herein commenced in the year 2018 and was instigated by the defendant himself, hence the claim for limitation of actions cannot stand, even if the date of January 1, 2015 was to be applied.
9. Counsel relied on the case of [Mukisa Biscuits Manufacturing Limited v West End Distributors](#) [1969] EA 696 and contended that the issue of what constitutes the start date for purposes of computing the limitation period is highly contested thus the court will require more evidence in order to ascertain



the exact date when the parties herein entered into a loan agreement and what the entry resembling a date made on the Gujarati version of the agreement relates to. He stated that for the said reason, the preliminary objection herein must fail. Mr. Mutava asserted that for purposes of computation of time, the effective word under section 4(1) of the *Limitation of Actions Act* is the date in which the cause of action accrued, which in this case is the date when the loan repayment became due.

10. He submitted that the date may either be stipulated in the agreement and if not, it is the date when the lender made the first demand for repayment. Mr. Mutava relied on the case of *South Nyanza Sugar Company Limited v Dickson Aoro Owuor* [2017] eKLR, where the Court held that it is only when one of the parties to a contract is in breach of the same that a possible cause of action arises as at the date of the alleged breach and not at the end of the contract period, which means that the cause of action in this case arose in the year 2018 when the plaintiff demanded repayment of the debt since in this case, there was no contract period stipulated and no date for repayment was specified. He stated that in view of the foregoing, the suit herein is well within the limitation period.
11. He submitted that the issue of limitation was not pleaded by the defendant in his statement of defence dated April 6, 2021 thus it is not open for the defendant to raise the said defence at this point in time. Mr. Mutava relied on the Court of Appeal decision in *Stephen Onyango Achola & another v Edward Hongo Sule & another* [2004] eKLR. He also submitted that a party who has not specifically pleaded the defence of limitation in his defence cannot rely on it to support a preliminary objection
12. In a rejoinder, Mr. Steve Ogolla submitted that at paragraph 5 of the plaintiff's replying affidavit, he acknowledged the date in the alleged loan agreement, therefore he cannot approbate and reprobate the existence of the date in order to suit his convenience. Counsel further submitted that the plaintiff's submissions that the cause of action in this case arose in the year 2018 when he demanded repayment of the debt is an impermissible manoeuvre intended to enlarge time, since the plaintiff neither pleaded in his plaint the alleged demand nor tendered any evidence of such demand.
13. He relied on the case of *Women Enterprise Fund v Pamoja Women Development Program* [2021] eKLR and contended that jurisprudence on limitation of time arising from claims based on contract for which section 4(1) of the *Limitation of Actions Act* applies are organized around three core issues; firstly, the claim ought to have been filed within six (6) years from the date of default, secondly, where the defendant acknowledges the indebtedness, the claim may be revived and time would start running from the date of such acknowledgment and thirdly, where the agreement does not stipulate the date of repayment, the claim must be brought within six (6) years from the date on which the cause of action accrued.
14. He asserted that the first and second limb are not applicable to this case, but the third limb is applicable since the loan agreement relied on by the plaintiff did not stipulate the date of repayment. He cited the case of *Bosire Ogero v Royal Media Services* [2015] eKLR, where the Court held that even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the Court cannot entertain a suit which it has no jurisdiction over. He submitted that this Court lacks jurisdiction to hear and determine the main suit since it is time barred.

Analysis and determination

15. I have considered the preliminary objection raised by the defendant, the application also filed by the defendant, the grounds on the face of Motion and the affidavits filed in support thereof. I have also



considered the replying affidavit by the plaintiff and the written submissions by Counsel for the parties. The issues that arise for determination are –

- i. Whether the preliminary objection dated March 27, 2023 should be sustained;
and
 - ii. Whether the suit herein is statutorily time barred.
16. The defendant in his affidavit in support of the instant application deposed that the plaintiff avers that on diverse dates between the years 2016 and 2018 he allegedly advanced a loan to him while relying on an alleged loan agreement dated 1st January, 2015 in support of his claim. The defendant deposed that the plaintiff has not annexed any document in his bundle of documents proving that there was an agreement between the parties herein in years 2016 and 2018. He averred that since the plaintiff's suit is founded on an alleged loan agreement dated 1st January, 2015, it is time barred and could only be filed before 1st January, 2021.
 17. The plaintiff in his replying affidavit deposed that the loan agreement he relies on was done in Gujarati language hence there cannot be any certainty from it that the entry thereon resembling a date connotes the date of the loan agreement. He also deposed that the ambiguity can only be resolved by resorting to the English translated version which was done by a certified firm of translators and which contains no such date.
 18. He averred that the translators of the agreement having carefully considered the contents of the Gujarati version of the agreement must have found the entry date therein as being totally irrelevant and that is why they omitted inclusion of a date in the English translation of the agreement. He stated that since the translated version was made for the benefit of this Court and the parties herein, it is now not open to the defendant to seek to rely on the Gujarati version as it would amount to dragging the Court and the parties back to the question of interpretation of a language that is not the Court's official language.
 19. It was stated by the plaintiff that the parties herein have been actively involved in repayment discussions from the year 2016 mediated by the leader of the Shah Community in Nairobi but such negotiations are usually not in writing until an agreement is reached. He further stated that based on the said discussions, the defendant rushed to Court and filed Insolvency Cause No. 10 of 2018, where he managed to obtain a Bankruptcy Order on 2nd December, 2019, having misled the Court as to his inability to pay the loan in issue.
 20. The plaintiff averred that *vide* a notice of motion application dated November 17, 2020, he sought an order setting aside the Bankruptcy Order on the basis that it had been procured through false and misleading evidence and the said application was allowed in a ruling dated December 3, 2020. The plaintiff stated that he thereafter applied for warrants of attachment of the defendant's goods *vide* an application dated December 10, 2020 but in a ruling dated January 14, 2021, the Court dismissed the said application and advised the plaintiff to file a fresh suit for recovery of the loan owed. He asserted that the Court sanctioned the filing of the present suit.
 21. The plaintiff averred that the delay in filing the present suit was entirely caused by the defendant by virtue of him filing for bankruptcy thus costing the plaintiff time to overcome the same and pave way for filing of the suit herein. The plaintiff contended that this Court is *functus officio* in regard to the application dated 1st March, 2021 since the said application was heard on its merits and a ruling delivered on 22nd March, 2023, and as such, this Court lacks jurisdiction to dismiss the application dated 1st March, 2021.



22. In his further affidavit the defendant deposed that the date on the alleged loan agreement being 1st January, 2015 is self-evident and is judicially noticeable, hence it does not call for any translation whatsoever. He averred that at paragraph 15 of the plaintiff's replying affidavit he admits that there was a delay in filing the present suit, but attempts to provide an account for the delay. The defendant contended that the plaintiff ought to have moved the Court appropriately by way of an application for leave to file the present suit out of time.
23. It was stated by the defendant that this Court has the authority and discretion to rely on all documents presented before it to determine the matter in an expeditious and just manner. He further stated that in paragraph 8 of the plaint dated 1st March, 2021, the plaintiff averred that there was no other suit pending, and no previous proceedings in any Court between the plaintiff and the defendant over this matter, whereas in opposition to the instant application the plaintiff invites this Court to make reference to Court proceedings that have no relevance to the instant suit.

Whether the Preliminary Objection dated 27th March, 2023 should be sustained.

24. In the case of *Oraro v Mbaja* [2005] 1KLR 141, Ojwang, J (as he then was), expressed himself as follows on Preliminary Objections -

“The principle is abundantly clear. A ‘preliminary objection’ correctly understood, is now well defined as and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling proof or seeks to adduce evidence for its authentication, is not, as matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts a matter cannot be raised as a preliminary point. ... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

25. Based on the above decision, it is evident that a preliminary objection ought to raise a pure point of law, it should be argued on the assumption that all the facts pleaded by the other side are correct and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The defendant's application and the Notice of Preliminary Objection herein are founded on the claim that the plaintiff relies on a loan agreement dated 1st January, 2015 in support of his claim in the suit filed on 1st March, 2021, thus the said suit is time barred pursuant to the provisions of Section 4(1) of the *Limitation of Actions Act* cap 22, Laws of Kenya which states as hereunder-

“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. actions to enforce a recognizance;
- 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.”

26. On the other hand, the plaintiff’s contention is that he started demanding for the loan repayment way back in the year 2018 and since the last demand made was in the said year, it is that year that should form the start date for purposes of computation of limitation of time in the case between the parties herein. He stated that the defendant also obtained a Bankruptcy Order in Insolvency Cause No. 10 of 2018 which frustrated and forestalled his recovery action. He argued that litigation of the dispute between the parties herein commenced in the year 2018, thus the claim for limitation of actions cannot stand even if the date of 1st January, 2015 was to be applied. It was contended by the plaintiff that the Preliminary Objection raises factual issues such as the start date of the loan agreement for purposes of computing the limitation period, which is highly contested, that it ought to be ascertained through evidence and for the said reason, the Preliminary Objection ought to be dismissed.

27. The defendant submitted that in view of the fact that the present suit is time barred, this Court has no jurisdiction to hear and determine the dispute between the parties herein. In the case of the *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1, Nyarangi, JA., held as follows on the issue of jurisdiction-

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

28. In order to determine whether this Court has jurisdiction or not to hear and determine the dispute between the parties herein, the Court has to determine whether the present suit was filed within the timelines provided for, under section 4(1) of the *Limitation of Actions Act*. However, before venturing into that issue, I will first determine whether the Preliminary Objection raised by the defendant meets the threshold of a Preliminary Objection, as was held in the case of *Oraro v Mbaja (supra)*.

29. In this instance, the defendant avers that the plaintiff’s suit is anchored on the loan agreement dated 1st January, 2015 but the plaintiff asserts that in as much as his suit is anchored on the said loan agreement, the same is not dated 1st January, 2015 and that is the reason why the people who translated the said agreement from Gujarati to English language left out the said date. The defendant also states that the question of limitation of time was not pleaded by the defendant in his statement of defence dated 6th April, 2021, thus it is not open to the defendant to raise the said defence at this point in time.

30. I agree with Counsel for the plaintiff that the start date of the loan agreement and/or the date when the cause of action accrued for purposes of computation of time for limitation of time in the suit between the parties herein, is contested and has to be proved by way of evidence, thus the Preliminary Objection fails on this ground. It is also not disputed that the defendant did not plead the issue of limitation of time in his statement of defence dated 6th April, 2021. In the case of *Stephen Onyango Achola & another v Edward Hongo Sule & another* [2004] eKLR the Court of Appeal stated as follows-

“The second respondent having failed to specifically plead the issue of limitation in its defence it was not entitled to rely on that issue and base its preliminary objection on it; nor will the second respondent be entitled to rely on that defence during the trial of the suit unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition. It is equally not to be forgotten that a party



who is entitled to rely on the defence of limitation is perfectly entitled to waive such defence and thus let the suit proceed to trial on its merit.”

31. I am bound by the aforementioned holding by the Court of Appeal. Therefore, since the defendant did not raise the defence of limitation of time in his statement of defence, he is not entitled to rely on it and/or base his Preliminary Objection on that fact alone. In the said circumstances, the Preliminary Objection also fails on this point. Consequently, I find that the Preliminary Objection cannot be sustained for being devoid of merit. I hereby dismiss it with costs to the plaintiff.

Whether the suit herein is statutorily time barred.

32. The defendant did not want to leave anything to chance as concurrently with the notice of preliminary objection, he filed the application that I am now going to consider on whether or not the plaintiff's suit filed on March 1, 2021 was statutorily time barred as at the time of filing. The plaintiff has brought a claim for recovery of loans allegedly advanced to the defendant in the sum of Kes 147,000,000/=, pursuant to a loan agreement. The plaintiff relies on a loan agreement written in Gujarati language which was later translated into English language. Translating the loan agreement into English does not mean that the contents of the agreement in Gujarati language will be disregarded at the hearing and determination of the dispute between the parties herein.
33. It is not disputed that on the face of the alleged loan agreement written in Gujarati language, there is an entry of the date 1st January, 2015 which is not captured in the translated version. In order to determine whether this suit is time barred this Court has to determine when the cause of action between the parties herein accrued so as to ascertain the start date in computation of time for purposes of limitation of actions. The alleged loan agreement relied on by the plaintiff does not specify when the said loans ought to have been repaid, as a result, it is not clear when exactly the defendant defaulted in his loan repayment. The plaintiff contends that it advanced the loans in issue to the defendant between the years 2016 and 2018. That is aptly captured in paragraph 3 of the plaint, where the plaintiff avers that on diverse dates between the year 2016 and 2018, the plaintiff at the request of the defendant advanced friendly loans to the defendant both in Kenya Shillings and in Indian Rupees.
34. In paragraph 5 of the said plaint, the plaintiff contends that the defendant used the loans to expand his business empire and promised to repay the loans once his businesses picked up, which promise the defendant has failed, ignored and/or refused to honour, in spite of repeated extensions of time by the plaintiff.
35. On perusal of the defendant's statement of defence dated April 6, 2021, it is evident that the defendant disputes and/or denies ever being indebted to the plaintiff. That is well captured in paragraphs 3, 4, 5, 6 and 7 of the said defence.
36. This Court cannot overlook the averment in the plaintiff's plaint as to when the monies in issue were advanced to the defendant. It is claimed that it was done between the years 2016 and 2018. Considering that the money was advanced over a period of time, unless the loan agreement had set the deadline for the payment of the said loans, then the cause of action accrued on the date that the demand notice was issued.
37. The plaintiff in his affidavit made reference to attempts that had been made by the Shah Community in Nairobi from the year 2016 or thereabouts, in negotiations so as to have the loans repaid. If that is the correct position, and even assuming that the last loan was advanced in the year 2018, the defendant's claim that the cause of action accrued in the year 2015 is a fallacy as the cause of action could not have accrued on 1st January, 2015 which the defendant states was the date when the contract was entered into.



38. The plaintiff's averment as to the delay in filing the present suit is that it was occasioned by the defendant's institution of Insolvency Cause No. 10 of 2018 where the defendant was granted a Bankruptcy Order, which the plaintiff successfully applied to set aside vide a ruling delivered on 3rd December, 2020.
39. Given the foregoing factors, I hold that it would be premature at this juncture to strike out the plaintiff's suit for being statutorily time barred. The defendant who has made the said allegation did not place cogent evidence before this Court to persuade me that such a drastic action should be taken against the plaintiff.
40. In the present application, the defendant also prays for the application dated 1st March, 2021 to be struck out. This Court agrees with the observation made by the plaintiff to the effect that the said application was heard and determined by Lady Justice W. Okwany and a ruling was delivered on 22nd March, 2023 by Judge Mabeya on Judge Okwany's behalf. This Court cannot therefore strike out the application dated 1st March, 2021 which has already been determined by a Court of competent and concurrent jurisdiction. If anything, this Court is functus officio in regard to the said application and the request made by the defendant for this Court to strike out an application that has already been determined is an abuse of the Court process.
41. In the result, the application dated March 27, 2023 is devoid of merit. It is hereby dismissed with costs being awarded to the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JULY, 2023.

NJOKI MWANGI

JUDGE

