



Maritime Freight Company Limited v Aya Investment Uganda Limited & 2 others (Civil Suit 56 of 2013) [2023] KEHC 27551 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 27551 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 56 OF 2013
F WANGARI, J
JULY 28, 2023**

BETWEEN

MARITIME FREIGHT COMPANY LIMITED PLAINTIFF

AND

AYA INVESTMENT UGANDA LIMITED 1ST DEFENDANT

KENYA PORTS AUTHORITY 2ND DEFENDANT

KENYA REVENUE AUTHORITY 3RD DEFENDANT

RULING

1. The Plaintiff sued the 1st Defendant via a plaint dated 14/5/2013. The plaintiff later amended their plaint which is dated 30/5/2018 and filed on 5/6/2018. The amended plaint included the 2nd and 3rd defendants in the suit.
2. The 3rd Defendant filed a Notice of Preliminary Objection dated 20/7/2018. The 3rd Defendant stated that the suit against it was time barred as per section 4 of the *Limitations of Actions Act* and section 3 of the *Public Authorities Limitation Act*. Further, the 3rd Defendant stated that the suit did not raise a cause of action against it, thus praying that the entire suit be dismissed with costs.
3. Directions were taken that the Notice of Preliminary Objection be disposed of by way of written submissions. Both parties failed to comply and further directions were given to have the PO be argued orally.
4. The counsel for the 3rd Defendant submitted as per the Notice of the Preliminary Objection. He further submitted that there was no contract between the Plaintiff and the 3rd Defendant. He relied on the case of *Savings & Loan (K) Limited v Kenyenje Karangaita Gakombe & ano* (2015) eKLR on privity of contracts.



5. On the other hand, the counsel for the Plaintiff made reference to paragraphs 3A, 9 & 10 of the amended plaint indicating that the cause of action arose before the amendment of the plaint in year 2016, but not in year 2013 hence the suit was not time barred.
6. It was further submitted that the dispute as to whether there was a cause of action, and or when it arose was a matter of fact, which can only be determined through trial. The plaintiff's claim against the 3rd Defendant is as a result of the act of releasing the cargo to the 1st Defendant without the approval of the Plaintiff. The plaintiff prayed that the Preliminary Objection be dismissed.

Analysis and Determination

7. Having considered the submissions by both parties. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd* [1969] EA 696. At page 700, Law, JA stated: -

“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.”

8. At page 701, Sir Charles Newbold, P added: -

“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...”

9. For a preliminary objection to succeed the following tests ought to be satisfied;
 - a. It should raise a pure point of law
 - b. It is argued on the assumption that all the facts pleaded by the other side are correct
 - c. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
 - d. A valid preliminary objection should, if successful, dispose of the suit or application.
10. The basis of the 3rd Defendant's objection that the suit was time barred and there was no cause of action that arose. To fall on the four corners of a Preliminary Objection, it would be imperative to decide whether limitation of time is a point of law.
11. In order to determine if the suit was time barred under the *Limitation of Actions Act*, the time when the cause of action arose must be determined. The Plaintiff submit that the cause of action against the 3rd Defendant arose when they released the cargo to the 1st Defendant, which necessitated the amendment of the plaint. On the other hand, the 3rd Defendant denied that there was any cause of action that had arisen.
12. I find that the issues raised in the Notice of Preliminary Objection requires an analysis of evidence, and as such, it fails the test set in the case of *Mukhisa Biscuits (supra)* on what a PO ought to be.



13. As to the issue of costs, the same follows the event. That is what section 27 of the *Civil Procedure Act* decrees. However, this court has the discretion to direction otherwise.
14. Flowing from the foregoing, I proceed to make the following orders: -
 - a. That the Notice of Preliminary Objection dated 20/7/2018 lacks merit and is hereby dismissed.
 - b. Costs to abide the outcome of the main suit.

Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 28TH DAY OF JULY, 2023.

F. WANGARI

JUDGE

In the presence of:-

Ondego Advocate for Plaintiff

Baraza Advocate for 2nd Defendant

Abdullahi, Court Assistant

