



**Mwangi v Nation Staff Sacco Society Limited (Civil Appeal E596 of 2021)
[2023] KEHC 27116 (KLR) (Civ) (22 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27116 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E596 OF 2021**

**DAS MAJANJA, J
DECEMBER 22, 2023**

BETWEEN

ISAAC MWANGI APPELLANT

AND

NATION STAFF SACCO SOCIETY LIMITED RESPONDENT

*(Being an appeal from the Ruling and Order of the Cooperative Tribunal
at Nairobi dated 2nd September 2021 in Tribunal Cause No. 166 of 2020)*

JUDGMENT

1. This is an appeal from a ruling and order of the Cooperative Tribunal (“the Tribunal”) dismissing the Appellant’s Notice of Preliminary Objection dated 27.07.2020 claiming that the Respondent’s claim was statute barred under the provisions of section 4(1)(a) of the *Limitation of Actions Act* (Chapter 22 of the Laws of Kenya) (“the LAA”). On this issue the Tribunal held that the issue when the cause of action accrued is a matter of evidence and since the preliminary objection called upon the Tribunal to delve into factual issues for determination it was not a preliminary objection.
2. The substance of the Appellant’s appeal as contained in the Memorandum of Appeal dated 20.09.2021 is that the Tribunal erred in applying the principles in *Mukisa Biscuits v West End Distributors Ltd* [1969] EA 696 when it found that the date when the cause of action accrued was an issue that needed to be proved by evidence yet it could be ascertained from the pleadings and documents.
3. The appeal was urged by way of written submissions which I have considered. The central issue is whether the Appellant’s objection was a preliminary objection within the meaning of *Mukisa Biscuits*



Manufacturing Co., Ltd [1969] EA 696. In that case, the court held that a preliminary objection is based on a pure point of law or uncontested facts. Law JA., observed that:

So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as Preliminary Objection may dispose of the suit.

Likewise, in *Hassan Ali Joho & Another v Suleiman Said Shabal & 2 Others* [2014] eKLR, the Supreme Court stated 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.

Finally, the Court of Appeal in *Nitin Properties Ltd v Jagjit S. Kalsi & Another* [1995] eKLR pointed out that:

A Preliminary Objection 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...

4. The corpus of the Respondent's statement of claim was that,

“The Claimant's case against the Respondent is for Kshs. 1,618,565.81 being the loan outstanding and payable by the claimant.”

It was therefore improper for the parties to file affidavits in support of and in opposition to the notice of preliminary objection as a preliminary objection, by its nature, is determined on the assumption that the averments in the pleading are true and correct. In *Nitin Properties Ltd v Singh Kalsi & Another* (*supra*), the court observed that,

“It must be borne in mind that for a preliminary point to succeed the facts as alleged in the plaint are deemed to be correct.”

The Tribunal was thus limited to looking at the Statement of Claim to determine whether the preliminary objection succeeds or fails.

5. From the clear averments of the Statement of Claim, the Tribunal could not determine whether or not the claim was time barred. The Statement of Claim only set out the amount due to the Appellant. The Tribunal therefore came to the correct conclusion that the issue whether the claim was statute barred was not a preliminary point within the meaning of the *Mukisa Biscuits Case* (*supra*).

6. The Tribunal also considered whether the Annexure PM5 to the affidavit of Paul Mwita ought to be expunged from the record for failure to comply with Rule 9 of the *Oaths and Statutory Declarations Act*. This is the affidavit that was sworn on behalf of the Respondent in opposition to the Notice of Preliminary Objection. Having reached the conclusion that the parties could not file affidavits in support of or in opposition to a preliminary objection, it follows that the issue raised in the appeal in relation to that affidavit is now moot.

7. I hold that the Tribunal came to the correct conclusion in dismissing the Appellant's Preliminary Objection. The appeal is therefore dismissed with costs. The Appellant shall pay costs of the appeal assessed at Kshs. 35,000.00.



DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER 2023.

D.S. MAJANJA

JUDGE

Mr Isaac Mwangi, the Appellant in person

Mr Getange instructed by Bw'ogara Getange and Company Advocates for the Respondent.

