



REPUBLIC OF KENYA



**KENYA LAW**  
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**Proland Realtors Limited v Letshego Kenya Limited (Civil Appeal E096 of 2021)  
[2023] KEHC 27114 (KLR) (Civ) (22 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27114 (KLR)

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

**CIVIL  
CIVIL APPEAL E096 OF 2021**

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

**BETWEEN**

**PROLAND REALTORS LIMITED ..... APPELLANT**

**AND**

**LETSHEGO KENYA LIMITED ..... RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon.G. Mmasi, SPM dated 4th February 2021 at the Nairobi Chief Magistrates Court, Milimani in CMCC No. 127 of 2020)*

**JUDGMENT**

1. This is an appeal from a ruling of the Subordinate Court dismissing the Appellant’s preliminary objection raised by way of a notice dated 03.05.2020 stating the court lacks jurisdiction on the ground that the suit was time barred under section 4(2) of the *Limitation of Actions Act* (Chapter 22 of the Laws of Kenya) (“the LAA”).
2. Before I deal with the substance of the appeal and to give the matter context, a brief background of the dispute is necessary. By a plaint dated 22.11.2020 and filed on 15.01.2021, the Respondent’s case was that it instructed the Appellant to carry out a valuation of a property; Kajiado/Kaputiei North/42687 for purpose of advancing its customer a loan of Kshs 2,000,000.00. The Appellant prepared a valuation report dated 04.05.2025 which indicated that the forced sale value was Kshs 1,875,000.00 while its market value was Kshs 2,500,000.00. When the customer defaulted, the Respondent instructed another valuer, Gimco Limited, to value the property which it did and assessed the forced sale value at Kshs 900,000.00. After the property was auctioned on 21.12.2016, the Respondent realized Kshs 900,000.00 only. It therefore claimed Kshs 1,378,677.57 inclusive of recovery costs as a result of the Appellant’s negligence. It also averred that the Appellant admitted its negligence by a letter dated 04.04.2017.



3. In its Statement of Defence dated 03.03.2020, the Appellant admitted that it was instructed by the Respondent as claimed. It however denied that allegations of negligence made against it. It averred that the letter dated 04.04.2017 was written under duress and pleaded that it would raise a preliminary objection at the appropriate time.
4. When the Appellant filed the notice of preliminary objection, the Respondent filed a Replying Affidavit sworn by its legal officer, Winnierohi Wafula, sworn on 14.12.2022 setting out its grounds and reasons for opposing the objection.
5. The trial magistrate considered the preliminary objection and held that based on the Respondent's admission contained in the letter dated 04.04.2017, this had the effect of extending the three-year limitation period for the tortious claim under section 4(2) of the LAA as provided in section 23(3) thereof. The court therefore dismissed the preliminary objection thus precipitating this appeal.
6. In its Memorandum of Appeal dated 03.03.2021, the Appellant complains that the trial magistrate erred in finding that the suit was for recovery of a debt and therefore subject to section 23 of the LAA and disregarding the provisions of section 4(2) thereof which applied to the Respondent's suit which is founded on tort. Both parties have filed written submissions and the issue in contention is whether the suit is time barred.
7. Since the subject of the ruling before the Subordinate Court was a preliminary objection, I think it is important to recall the meaning of a preliminary objection. In the seminal case of *Mukisa Biscuits Manufacturing Co., Ltd* [1969] EA 696 the court held that the 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 Jobo & 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 ...

8. From the record and the ruling, it was improper for the Respondent to file a replying affidavit and for the court to entertain issues of fact deponed in the affidavit in the reply to the notice of preliminary objection as a preliminary objection, by its nature, is determined on the assumption that the averments 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."
9. The Appellant contends that the Respondent's claim against it as set out in the Plaint was based on the tort of negligence. That the particulars of negligence are clearly pleaded in paragraph 10 where the



Respondent accuses the Appellant of failing to exercise due care and skill in carrying out its instructions thus causing it to suffer loss and damage to the extent of Kshs 1,378,677.57. The Appellant therefore submits that the suit was time statute barred under section 4(3) of the LAA which states:

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- (2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.

10. The Appellant urged that the Respondent's suit was time barred as the cause of action accrued when it prepared the valuation report dated 04.05.2015 which report contained the negligent statements complained of. That the report by Gimco Limited received on 28.06.2016, was received while the cause of action was still alive and that nothing prevented the Respondent from filing suit by 04.05.2018. That even if the Respondent became aware of the negligence as a result of the report prepared by Gimco Limited, it ought to have filed suit by 28.06.2019. In the circumstances, the Appellant contends that the Respondent's claim was clearly time barred. The Appellant further submits that the trial court erred by relying on section 23(1) of the LAA on the ground that the Respondent's claim was not for the recovery of a debt as claimed by the Respondent.
11. The Respondent contends that its claim was not merely one of negligence but for a liquidated debt as it was based on a letter dated 04.04.2017. It argues that the claim is not statute barred by reason of section 23(3) of the LAA which states as follows:

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- (3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to moveable property of a deceased person, and the person liable or accountable therefor acknowledges this claim or makes payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment.

12. The Respondent further submits that from the plaint it seeks to recover Kshs 1,378,677.57 which it contends is a liquidated sum. Further, the letter dated 04.04.2017 amounts to an acknowledgement of debt within the meaning of section 24 of the LAA which states as follows:

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- (1) Every acknowledgement of the kind mentioned in section 23 of this Act must be in writing and signed by the person making it;
- (2) The acknowledgement or payment mentioned in section 23 of this Act is one made to the person, or to an agent of the person, whose title or claim is being acknowledged, or in respect of whose claim the payment is being made, as the case may be, and it may be made by the agent of the person by whom it is required by that section to be made.

13. The Respondent therefore urges that the acknowledgement of the debt after the expiry of the limitation period gives rise to a fresh period of limitation thus the period started to run on 04.04.2017 and thus the suit was not time barred.



14. As I have stated, the preliminary objection is determined on the basis that the averments in the plaint are true and correct. The Respondent’s claim as pleaded is based on negligence and I agree with the Respondent that the cause of action accrues where the claimant suffers damage as damage is an integral element in a claim based on negligence (see *Eric Omuodho Ounga v Kenya Commercial Bank Limited* [2017] eKLR). In *Ami Development Services Limited and 6 others v David Kabubua Gitau and 8 others* [2005] eKLR, the court cited with approval *Sbarham –Souter and another v Town and Country Development (Essex) Ltd and another* [1976]QB 858 where it was held that,

“The cause of action for negligence accrues, not at the date of the negligent act or omission but at the date when the damage is first sustained by the plaintiff .....

In this case, therefore the time for cause of action accrued when the Respondent sold the suit property on 21.12.2016 at a loss which represented the damage it sustained. Thus, under section 4(2) of the *LAA*, the suit ought to have been filed latest by 21.12.2019. Since the suit was filed on 15.01.2020, it was clearly time barred.

15. Based on the letter dated 04.04.2017, the trial court applied section 23(3) of the *LAA* to hold that since the Appellant admitted indebtedness then the claim was not time barred. Section 23(3) only applies where the claimant seeks to, “recover a debt or other liquidated pecuniary claim.” The Appellant is correct to state the claim is not for recovery of a debt. A reading of the plaint shows that the claim is based on negligence and it seeks damages as a result.
16. A liquidated claim is a specific sum of money due and payable under or by virtue of contract which must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum, even though it is specific or named as a definite figure requires investigation beyond mere calculation, it constitutes damages (see *Robert Ngari Gateri v Maringo Transporters & others* [2005] eKLR and *Postal Corporation of Kenya and another v Aineah Likumba Asienya & 11 others* [2018] eKLR).
17. The Respondent seeks damages for wrongful valuation which in this case constitutes special damages which must be proved. The value of a property is a professional opinion which must also be proved. It therefore clear that the Respondent’s claim could not be for a debt of a liquidated pecuniary amount. The trial court therefore erred in holding that the Respondent’s claim was not time barred under section 23(3) of the *LAA* as the claim was not a debt based on what was pleaded in the Plaint but a claim based on negligence.
18. In *Nitin Properties Ltd v Jagjit S. Kalsi & another* (supra) the Court of Appeal observed that striking out of a suit is a drastic remedy and that striking out procedure can only be invoked in plain and obvious cases and that such jurisdiction must be exercised with extreme caution. In this case, the Respondent appears to argue that its case was based on a debt as admitted in the letter dated 04.04.2017. Since the contents of the letter are not pleaded, the court cannot look beyond the plaint and determine its contents. In as much as I find the claim based on negligence time barred, I think the Respondent should be permitted to amend its claim to properly ground it on the letter dated 04.04.2017 and for the court to determine whether the letter constituted an admission which can constitute a cause of action.
19. I allow the appeal on the following terms:
- a. The ruling to the Subordinate Court dated 04.02.2021 be and is hereby set aside and substituted with an order allowing the Appellant’s Preliminary Objection to the suit to the extent that the Respondent’s claim based on negligence is statute barred under section 4(2) of the *Limitation of Actions Act*.



- b. The Respondent is granted leave to amend its Complaint within 21 days from the date of service of the Judgment and Decree herein to plead its cause of action based on the letter dated 04.04.2017 written by the Appellant to the Respondent.
- c. The Respondent shall pay costs of the appeal assessed at Kshs 35,000.00.

**DATED and DELIVERED at NAIROBI this 22<sup>nd</sup> day of DECEMBER 2023.**

**D.S. MAJANJA**

**JUDGE**

Mr Kirimi instructed by Kirimi Mbobua and Company Advocates for the Appellant.

Mr Mukeli instructed by Tobiko Njoroge and Company Advocates for the Respondent.

