



**Ndeta & another v Mwaura (Commercial Cause 38 of 2017)
[2023] KEHC 27423 (KLR) (Commercial & Admiralty) (15 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27423 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
COMMERCIAL CAUSE 38 OF 2017
DO CHEPKWONY, J
DECEMBER 15, 2023**

BETWEEN

BENSON SANDE NDETA 1ST PLAINTIFF

YVONNE KATUSIME NDETA 2ND PLAINTIFF

AND

DONALD KIBORO MWAURA DEFENDANT

RULING

1. This ruling is in respect of the Defendant's Notice of Preliminary Objection dated 15th June, 2022. The gist of the objection is as follows;
 - a. That the Plaintiffs' suit against the Defendant is statute barred by virtue of being filed more than 6 years after the cause of action arose contrary to Section 4(1)(a) of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya.
 - b. That the suit against the Defendant is therefore fatally incompetent, bad in law and the same should be struck out or dismissed with costs to the Defendant.
2. On 20th October, 2022, both parties agreed to canvass the Notice of Preliminary Objection by way of written submissions. Both parties complied with the directions and filed their respective submissions in support and opposition to the Preliminary Objection.

Analysis and Determination

3. I have read through the Notice of Preliminary Objection and the written submissions filed by both parties together with the authorities cited and find the following issues arising for determination:-
 - a. Whether the Defendant's Notice of Preliminary Objection is merited; and



- b. Whether this court can extend time?
4. On the first issue, the parameters to be considered in determining whether a Notice of Preliminary Objection has merit were elucidated in the celebrated decision of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 where the court held 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 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.”

Further in the same case, Sir Charles Newbold, JA stated that: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

5. In light of the foregoing, this Court has the task of establishing whether the grounds set out in the Notice of Preliminary Objection dated 15th June, 2022, have met the threshold that was laid down in the aforesaid authority.
6. From the said authority, it is clear that the elements required to be satisfied for a Preliminary Objection to succeed are that it must be based on pure points of law, must arise from the pleadings and if argued should be capable of disposing the matter.
7. In the instant suit, the Preliminary Objection relates to time limitation within which an action may be instituted in court, which if argued would determine this matter. Therefore, the question that becomes, does the objection meet the threshold as set out in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (*supra*).
8. The primary ground that has been raised in the objection is that the suit herein is statute barred by virtue of Section 4(1)(a) of the *Limitation of Actions Act*. The said Section provides as follows:-

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- (1) 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;(emphasis added)
 - 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.
9. For purposes of determining when the cause of action accrued, it is important to determine when the agreement was completed. Clause 5 of the Agreement provided that for completion of the Agreement. At 5.1, it states:-
- “Provided that it has not been rescinded in accordance with Clause 4.3, completion shall take place on the completion date at
- the offices of the purchaser’s Advocates or within 180 days after this agreement ceases to be conditional under Clause 4.1 when all the transaction mention in the following subclauses shall take place”.
- (Also see Clause 5.4 of the Agreement).
10. It must be noted that Clause 7.5 of the Agreement provided for time being of essence of the agreement with regard to the dates and periods specifically mentioned and as to any dates which may be substantiated by the agreement in writing between or on behalf of the Vendors and Purchasers.
11. In this case, the Plaintiffs submitted that vide a letter dated 8th December, 2014, they directed the Defendants to remit the balance of Kshs.USD.700,000.00 subject to Clause 3.1.2 of the Agreement. That the Plaintiff failed to honour the terms of the demand hence this suit which was filed on 26th January, 2017.
12. On the other hand, the Defendant submitted that by virtue of Clause 7.5 of the Agreement the time of completion was to be within 180 days which lapsed on 15th February, 2009 so that, if the Plaintiff’s claim that the Defendant had not settled all the sums as at December, 2010, then there was already a breach. That being the case, then the cause of action accrued on 15th February, 2009 which is more than six (6) years to the time the suit was filed.
13. In determining when the cause of action accrued, it is important to appreciate the definition of the term “accrue”. In the *Black’s Law Dictionary (10th Edition)*, the word “accrue” is defined to mean “to come into existence as an enforceable claim or right”. Thus, under the Share Sale Agreement of 15th August, 2008, given the undefined date of completion, the right to sue for breach of contract would only have arisen when the Defendant failed to pay the balance on the purchase price on the Plaintiffs’ direction as per the term of contract as per Clause 3.1.2 of the Agreement. Such directions were made vide a letter dated 8th December, 2016 from the Plaintiff with a rider that the same be complied with within fourteen (14) days of the demand. This then means that the time began to run after the expiry of the fourteen (14) days, within the meaning of the provisions of Section 4(1)(a) of the *Limitation of Actions Act*.
14. The instant suit was filed on 26th January, 2017, which was before the expiry of six (6) years. This court is therefore persuaded that the suit was filed within the statutory limit as provided by law. Consequently, the Notice of Preliminary Objection dated 15th June, 2022 hereby fails and is dismissed with orders as to costs for the Plaintiff.

It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 13TH DAY OF DECEMBER 2023.

D. O. CHEPKWONY



JUDGE

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF
DECEMBER, 2023.**

ALFRED MABEYA

JUDGE

In the presence of:

Mr. Githui for Plaintiffs

No appearance for Defendant

Court Assistant - Kinyua

