



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 6 OF 2021

JOHN OMOLLO NYAKONGO T/A H.R GANJEE & SONS.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO.LTD.....DEFENDANT/APPLICANT

Coram:

Hon. Justice S.M Githinji

Mutisya Mwanzia & Odeng Advocates for the Applicant

Mckay & Co Advocates for the Respondent

RULING

Background

The plaintiff herein brought a suit vide a Complaint dated 25th May 2021 seeking the following orders;

- 1. The immediate payment of Kshs. 143,522,762.68.**
- 2. Interest on the above at commercial rate from the date of filing of the complaint till payment in full.**
- 3. Costs of the suit.**

The brief facts of the case are that the plaintiff and defendant entered into a contract for the provision of construction of the defendant's works vide a letter dated 9th April 2006 which letter spelt out their terms and conditions and it was agreed on by both parties.

The plaintiff's case is that he proceeded to carry out the contracted works as per the contract but the defendant refused to honor its part of the bargain by failing to pay monies due even after issuance of invoices in 2006 and several reminders through demand letters.

The defendant filed a preliminary objection on a point of law that the plaintiff's cause of action being founded on contract is barred by effluxion of time by dint of **Section 4 (1) (a) of the Limitations of Actions Act, Cap 22 Laws of Kenya**, thus the court does not have jurisdiction as the suit is bad in law, incurably defective and should be dismissed with costs to the defendant.

Parties elected to dispose of the preliminary objection by way of written submissions.

Submissions of the Parties

The Defendant raises two issues for determination

- 1. Whether the Preliminary Objection raised is sustainable?** To this, it is the respondent's submission that the preliminary objection is based on a pure point of law as set out in the ***Mukisa Biscuit case***.
- 2. Whether the said Preliminary objection has merit and should be upheld?** It was submitted that any claim by the plaintiff

against the defendant was to be done before the end of 2012 as the breach was in the year 2006. That the plaintiff bringing a claim 15 years later was indolent and guilty of laches. They relied on *Gathoni Vs Kenya Co-operative Creameries Limited [1982] KLR*.

It was further submitted that the plaintiff's cause of action is stale and in the absence of the plaintiff seeking leave or making an application for extension of the limitation period, the suit is incompetent and the court has no jurisdiction. They relied on *IGA V Makerere University [1972] E.A 65*, *Bosire Ongero V Royal Media Services [2015] eKLR*, *John Mwaniki Mwaura V John Ndonyo Njuguna [2018] eKLR*, *Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd [1989] KLR1*, *Divecon Limited V Samani [1995-1998]1 EA & Delphis Bank Ltd V Pratapm Madhvani [1993] eKLR*.

The Plaintiff raises two issues for determination;

1. Whether the suit is barred by effluxion of time as per Section 4 (1) of the Limitations of Actions Act? To this it was submitted that the cause of action arose on 22nd May 2018 when the defendant in its email refused to pay the plaintiff its contractual dues. That further, the defendant in their email dated 25th July 2014 asked the plaintiff to hold the matter in abeyance thus the cause of action is within the six years period prescribed by the limitations of action's Act. They placed their reliance on *Santowels limited V Stanbic Bank Kenya Limited [2018] eKLR*.

It was further submitted that the P. O filed does not meet the set threshold for preliminary objections as it does not disclose pure points of law and involves contested facts thus ought to be dismissed.

2. Whether Section 3(2) of the Public Authorities Limitation Act is applicable to the defendant? To this it was submitted that the act does not apply to the defendant as the same is a preserve of Government, Attorney General or any Government department which the defendant does not fall under. They relied on the case of *Bob Thompson Dickens Ngobi V Kenya Ports Authority & others [2017] eKLR*.

3. Whether the plaintiff's cause of action against the defendant is a legal issue or a factual issue? It was submitted that the suit by the plaintiff is against the defendant for breach of payment of the contractual sum which issues can be verified and subjected to evidential test during hearing.

Analysis and Determination

I have carefully considered the Preliminary Objection and read submissions by both parties and the one issue that emerges for determination is whether the Preliminary Objection is meritorious.

The Notice of Preliminary objection is anchored on Limitation of Actions Act Section 4 (1) and Section 3 (2) of the Public Authorities Limitation Act CAP 39 and that the plaintiff has no cause of action against the defendant.

A Preliminary Objection was well settled in the *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696* to mean: -

"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 Sir *Charles Nebbold, 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."

It is evident that a *Preliminary Objection*, raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.

In the case of *Oraro...Vs...Mbaja (2005) 1KLR 141*, the Court held that:-

"Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence."

It has also been submitted that the suit is *statute barred*. It is not in doubt that the issue of limitation goes to the jurisdiction of the Court and the same does not require ascertainment of facts. The Court is only required to determine what the law says and whether indeed the suit is barred by Limitation of Action will not require the probing of evidence. All that the Court is expected to do is determine what the law says and this means that the same raises a pure point of law.

As per the description of Preliminary Objection in the *Mukisa Biscuits case (supra)*, the Court finds that the said ground raised by

the Defendant meets the test of what amounts to a **Preliminary Objection**. It raises pure points of law and it can be determined without ascertainment of facts from elsewhere.

The Court is now left to determine whether the same is merited as provided for by the Limitation of Actions Act.

Section 4 (1) of the **Limitation of Actions Act** provides:

“4 (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;

(b).....

(c).....

(d).....

(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.”

It is my finding that the cause of action accrued in 2006 and that is the time that time started running. As per **section 4 of the Limitation of Actions Act** the causes of action founded on Contract have time limit of **6 years**, time having begun to run in **2006**, naturally it would mean it lapsed in **2012**.

It would therefore mean that the suit is affected by Limitation of Actions Act. Section 39 of the said Limitation of Actions Act provides as to when a period of Limitation does not run.

39. (1) A period of limitation does not run if—

(a) there is a contract not to plead limitation; or

(b) that the person attempting to plead limitation is estopped from so doing.

(2) For the purposes of subsection (1) of this section, “estopped” includes estopped by equitable or promissory estoppel.”

It is the plaintiff’s contention that vide the email by the defendant dated 25th July 2014, the defendant instructed the plaintiff to hold the matter in abeyance. I have not seen on record this particular email referenced by the plaintiff. Even in the existence of the said email, the same would be two years after the statutory period for a claim against the defendant had lapsed.

There has been no sufficient explanation as to the cause of delay, nor evidence that the defendant is estopped from raising a preliminary objection of the claim being statute barred.

The upshot of the foregoing is that the Notice of Preliminary objection dated 5th July 2021 succeeds to the extent that the claim is statute barred as per Section 4 (1) of the Limitation of Actions Act.

There are no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY/PHYSICALLY AT MALINDI THIS 22ND DAY OF FEBRUARY, 2022

.....

S.M GITHINJI

JUDGE

In the presence of: -

1. Miss Muriranja holding brief for Mr Nyausi for the Defendant/Applicant

2. Mckay & Co Advocates for the Respondent (absent)