Kawaken Holdings Limited v Tulsi Construction Limited (Civil Appeal E039 of 2021) [2022] KEHC 11333 (KLR) (Civ) (21 April 2022) (Judgment)

Neutral citation: [2022] KEHC 11333 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL

CIVIL APPEAL E039 OF 2021

JN MULWA, J

APRIL 21, 2022

BETWEEN

KAWAKEN HOLDINGS LIMITED ..... APPLICANT

AND

TULSI CONSTRUCTION LIMITED ..... RESPONDENT

(Being an Appeal from the Ruling and Order delivered by Hon. A.N Ogonda (SRM) on 29th March 2021 in CMCC No. E769 of 2020)

JUDGMENT

1. The appellant was sued by the respondent in the lower court for payment of the sum of Kshs. 2,781,937/- plus interest and unremitted withholding tax in the sum of Kshs. 964,530.28/- arising from breach of an Agreement and Conditions of Contract for Building Works. It was the Respondent's case that it performed its part of the contract and raised an invoice for the sum of Kshs. 2,781,937/= but the Appellant defaulted in payment.

2. The appellant, then the defendant, having filed a statement of defence dated December 16, 2020 proceeded to file a Notice of preliminary objection dated February 1, 2021 in which it challenged the competency of the suit on two grounds thus, the suit was barred by the *Limitation of Actions Act*; and that the subject contract expressly reserved the resolution of any disputes arising therefrom exclusively to arbitration mechanism.

3. By a ruling delivered on March 29, 2021, the lower court dismissed the preliminary objection thus precipitating the instant appeal.

4. The appeal is based on four grounds contained in the appellant's memorandum of appeal dated October 3, 2021 That:

1. The honourable magistrate erred in law and in fact in holding that the appellant had failed to controvert the respondent's claim made at paragraph 11 of the respondent's submissions dated 8/03/2021 that there had been an acknowledgement of the alleged debt in question.

2. The learned magistrate erred by failing to consider any of the authorities cited in support of the appellant's position.

3. The learned magistrate erred in law and in fact in holding that the mere fact that the appellant had filed a defence meant that the appellant had submitted to the jurisdiction of the court to hear and determine the matter.

4. The learned magistrate accordingly erred in law and in fact in making an order dismissing the appellant's preliminary objection and awarding costs thereof to the respondent.

5. The court has perused the record of the lower court, considered the grounds of appeal and the parties' submissions in respect of the appeal. It is clear that the appellant is dissatisfied with the entire ruling of the lower court.

6. In my considered opinion, the issues that arise for determination are as hereunder;

   a. Whether the learned magistrate erred in declining to strike out the respondent's suit for being time barred by the *Limitation of Actions Act*; and

   b. Whether the learned magistrate erred in finding that the Appellant submitted itself to the jurisdiction of the court by filing a statement of defence in response to a claim that ought to have been referred to arbitration.

7. In determining whether the claim filed by the respondent was time barred, it is common ground that the parties entered into an agreement and conditions of contract for building works on July 30, 2010. It is also not in dispute that on completion, the respondent issued the appellant with an invoice for the sum of Kshs. 2,781,937/- on March 6, 2014 but filed the suit claiming the same on September 29, 2020.

8. Under section 4 (1) (a) of the *Limitation of Actions Act*, actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. In this case therefore, the cause of action arose and/or accrued on March 6, 2014 when the respondent issued the appellant with the invoice. Time started running from then which means that ordinarily, the suit ought to have been filed by March 6, 2020 latest. It was however filed on September 29, 2020, over six months after the limitation period had lapsed.

9. In its submissions in response to the appellant's preliminary objection, the respondent defended its move to file the suit outside the limitation period by making reference to the appellants email of August 8, 2020 acknowledging the debt.

10. Noting that the appellant did not controvert the respondent's submissions regarding the said acknowledgment communication, the learned trial magistrate found that indeed the appellant's acknowledgment of the debt revived the respondent's time barred claim. This was proper as it was in accordance with section 23(3) of the *Limitation of Actions Act* which stipulates that:

> Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:

Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt.

11. According to the Appellant however, the position taken by the learned trial magistrate failed to controvert the Respondent's submissions was inconsistent with the well-established precedence that evidence can only be admitted through pleadings and not submissions. The Appellant contended that this was the reason why it did not find it necessary to file rejoinder submissions and opined that the trial court should also have ignored the Respondent's submissions regarding the acknowledgement of the debt as well as the related annexture. In this regard, the trial court relied on the decisions in *Republic v Chairman Public Procurement Administrative Review Board & Another ex parte Zapkass Consulting and Training Ltd* [2014] eKLR and *Clips Limited v Brand Imports (Africa) Ltd formerly Brand Imports Limited* [2015] eKLR.

12. On the other hand, the respondent defended the decision of the trial court by submitting that it was unnecessary for it file any pleading in opposition to the appellant's notice of preliminary objection since a preliminary objection raises points of law which can only be opposed through written submissions.

13. In determining whether or not the leaned trial magistrate erred as alleged by the appellant, it is important to begin by defining what a preliminary objection is. In *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, a Preliminary Objection was defined 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".

14. 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..."

15. In the case of *Quick Enterprises Ltd v Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, the Court held that:-

> "When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings."

16. From the above authorities, it is clear that a preliminary objection raises a pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. The facts must stem from the pleadings or the court record and must not require ascertainment from elsewhere or the exercise of judicial discretion.

17. In *George W M Omondi & another v National Bank of Kenya Ltd & 2 others* [2001] eKLR, Ringera J (as he then was) when determining preliminary objections on locus standi and res judicata stated that:

> "...both the objection as to the legal competence of the plaintiffs to sue and the plea of res judicata are pure points of law which if determined in their favour would conclude the litigation and they are accordingly well taken as preliminary objections. In fact, I must confess I was taken aback by the plaintiffs' counsel's insistence that the issues of locus standi and res judicata were not proper points for a preliminary objection for in my experience at the bar and on the bench I had not before heard it doubted that they were. And I hasten to add that in determining both points, the court is perfectly at liberty to look at the pleadings and other relevant matters in its records. It is not necessary to file affidavit evidence on those matters as contended by counsel for the plaintiffs. What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of a judicial discretion."

18. In the present case, there is no doubt that an objection on limitation of action is a pure point of law which does not necessarily require affidavit evidence to ascertain the fact. Further and in any case, I note that the respondent did not introduce any new issues or evidence in its submissions filed in the lower court in opposition to the preliminary objection. The respondent merely alluded to emails in its list of documents filed in court at the institution of the suit and thus was already part of the court record. In determining the objection therefore, the court was at liberty to look at the pleadings and any other relevant matters in its record. Without a rejoinder to the respondent's submissions from the appellant, the trial court cannot be faulted for finding that the appellant failed to controvert the respondent's position.

19. In the premises, the court finds that the learned magistrate did not err in declining to strike out the Respondent's suit for being time barred by the *Limitation of Actions Act*. That ground of appeal is thus dismissed for lack of merit.

20. On the issue as to whether the appellant submitted itself to the jurisdiction of the court, there is no contestation that Clause 45.1 of the parties' agreement and conditions of contract for building works provided that any dispute or difference arising either during the progress or after completion or abandonment of the works would be submitted to arbitration.

21. Section 6(1) of the *Arbitration Act* provides that:-

> "A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds —
>
> (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
>
> (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration".

22. From the above provision, it is clear that if a matter is subject of an arbitration agreement, a party may apply to have the dispute referred to arbitration. However, the same is not automatic as it will only be allowed if such an application is made either before or at the time of entering appearance and if the claim has not been acknowledged.

23. In *Mt. Kenya University v Step Up Holding (K) Ltd* [2018] eKLR, the Court of Appeal held as follows: -

> "We have construed section 6 of the *Arbitration Act* on our own and considered it in light of the case law highlighted above. We adopt the position taken by the court in the above pronouncements as in our view; they represent a correct interpretation of the provision. Considering the above in light of the findings of the trial Judge, it is our finding that the trial Judge correctly exercised his discretion and properly appreciated both the facts and the law and arrived at the correct conclusion on the matter. We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter. The appellant herein entered appearance, and then responded to the respondent's application for injunction before filing the application seeking an order for reference to arbitration. Critically the appellant's response to the respondent's application for injunction amounted to the taking of a procedural step in the matter before the initiation of the reference process. We therefore find no error in the Judge's findings. They are accordingly affirmed.

24. In the instant case, I note that the appellant filed raised its preliminary objection dated 1st February 2021 long after its statement of defence dated December 16, 2021 had been filed. The appellant did not comply with the provisions of section 6(1) of the *Arbitration Act* and therefore the learned trial magistrate was correct in finding that the appellant submitted itself to the jurisdiction of the court.

Disposition

25. For the foregoing, the court finds that the appeal lacks merit and is hereby dismissed in entirety with costs to the respondent. The trial court file is remitted back to the trial court for hearing and determination of the suit.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL 2022.

J.N.MULWA

JUDGE.