



**Jumbo Commodities Limited v B. N Kotecha & Sons Limited (Commercial Cause E209 of 2021)  
[2022] KEHC 15675 (KLR) (Commercial and Tax) (25 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15675 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CAUSE E209 OF 2021  
DO CHEPKWONY, J  
NOVEMBER 25, 2022**

**BETWEEN**

**JUMBO COMMODITIES LIMITED ..... PLAINTIFF**

**AND**

**B. N KOTECHA & SONS LIMITED ..... DEFENDANT**

**RULING**

1. The applicant has vide a Plaint dated 21<sup>st</sup> April, 2021 and filed in court on 22<sup>nd</sup> April, 2021 sued for Judgment to be entered against the Defendant for:-
  - a. A sum of Kshs.81,284,696.00.
  - b. Interests on (a) above at 24% per annum from 25<sup>th</sup> April, 2021 until payment in full.
2. In response, the Defendant filed a Notice of Preliminary Objection dated 29<sup>th</sup> March, 2022, which is for determination before court. It is premised on the grounds that;
  - a. This suit is time barred and contrary to Section 4(1) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya;
  - b. This court lacks jurisdiction to hear and determine this matter as it has been filed outside the six (6) years window.
3. It is argued that on 24<sup>th</sup> April, 2015, the Plaintiff alleges to have entered into a commercial contract with the Defendant for the supply of sugar from various sugar companies and as a result, advanced the Defendant Kshs.60,375,000/= on 24<sup>th</sup> April, 2015 and a further Kshs.18,900,000/= on 25<sup>th</sup> April, 2015, which the Defendant has failed to pay. It is averred that the Plaint dated 21<sup>st</sup> April, 2021 and filed in court on 22<sup>nd</sup> April, 2021, has been brought outside the 6 years period limited to bringing causes



of action of this nature. It is hence averred that this court lacks the requisite jurisdiction by virtue of the Limitation period provided for under Section 4(1) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.

4. On the other hand, the Plaintiff argues that the instant Preliminary Objection lacks merit and is an abuse of the process of court, only fit for dismissal. The Plaintiff maintains that the suit was filed within the stipulated time, and submits that the Plaintiff entered into a commercial relationship for the supply, delivery and purchase of local sugar. And on or about April, 2015, the Defendant agreed to supply to the Plaintiff 24,773 bags of sugar of 50kg each at the rate of Kshs.3,200/= per bag, immediately upon payment for the consignment by the Plaintiff. He goes on to state that in acceptance of this contract, on 24<sup>th</sup> and 25<sup>th</sup> April, 2015, the Plaintiff paid the consideration of Kshs.79,275,000/= in total, being full and final payment of for 24,773 bags of sugar as agreed. The Defendant then delivered a total of 8,738 bags of sugar equivalent to Kshs.27,961,600/= on diverse dates between July, 2015 and December, 2015. The Defendant failed to deliver the remaining bags of sugar and after several reminders by the Plaintiff, the Defendant admitted that it was unable to deliver the remaining 16,035 bags equivalent to Kshs.51,313,400/= and undertook to refund the balance together with interest at the rate of 24% per annum. And as at 30<sup>th</sup> November, 2016, an amount of Kshs.12,000,000/= had been refunded by the Defendant and later on 3<sup>rd</sup> October, 2017, another Kshs.6,000,000/= was refunded bringing the outstanding balance amount of Kshs.33,313,400/= which balance remains unpaid to date. The Plaintiff has then sued the Defendant for breach of contract.
5. The parties were directed to canvass the Notice of Preliminary Objection by way of written submissions. The Defendant filed written submissions dated 24<sup>th</sup> June, 2022.
6. I have considered the Notice of Preliminary Objection in line with the Plaintiff's submissions filed by the parties alongside cited authorities and the law. I find the issues for determination being:
  - a. Whether the suit filed vide a Plaintiff dated 21<sup>st</sup> April, 2021 is time barred;
  - b. Whether this court lacks jurisdiction to hear and determine the suit.
7. With regard to whether the suit filed vide a Plaintiff dated 21<sup>st</sup> April, 2021 is time barred, I am guided by the celebrated case of *Mukisa Biscuit Company –vs- West End Distributors Limited (1969) EA 696*, where the court analyzed the definition of a preliminary objection in the following manner:

“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 in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”
8. The issue of Limitation period within which a suit or action should be brought to court is a question that touches on the jurisdiction of a court by virtue of Section 4(1) of the *Limitation of Actions Act*. It is therefore a question of law and hence qualifies for determination at the first instance in the preliminary.
9. To determine whether this matter was time barred at the time of filing suit, one has to first establish when the cause of action arose. It is not in dispute that both parties are in agreement that in acceptance of the offer, the Plaintiff made payments on 24<sup>th</sup> and 25<sup>th</sup> April, 2015 respectively. This then is the coming into force of the implied contract. According to the Plaintiff, this date cannot be used in calculating time within which to bring a claim for breach under this contract as this is the date the breach arose. Cause of action in contracts arise upon breach and not at execution as was observed by the Court of Appeal in the case of *Diana Katumbi Kiiro –vs- Reuben Musyoki Muli [2018] eKLR*,



while citing from the Journal of International Banking and Financial Law: " What's the Limit" (2007) 11 JIBFL 642 where it was observed that;

" A cause of action in contract arises from breach of the contract and not at the time it is executed. According to the author in the Journal of International Banking and Financial Law: " What's the Limit" (2007) 11 JIBFL 642:-

"In contract the cause of action accrues when the breach occurs, but in tort the cause of action accrues when damage is first sustained. The cause of action, whether in tort or contract, arises regardless of whether or not the claimant could have known about the damage."

10. The Plaintiff submits that the cause of action arose on 3<sup>rd</sup> December, 2015 when the Defendant stopped delivering the bags of sugar to the Plaintiff. Nothing can be far from the truth that this is when the 1<sup>st</sup> breach arose. It should be noted that the undertaking by the Defendant to refund the balance after failing to deliver the sugar created yet another contract. Thus, in this case, the breach arose after the last payment of Kshs.6,000,000/= on 3<sup>rd</sup> October, 2017. In my view, the Plaintiff in which the Plaintiff has made its claim against the Defendant on 21<sup>st</sup> April, 2021 and filed on 22<sup>nd</sup> April, 2021, was well within the stipulated period for filing of this suit, hence met the threshold of Section 4(1) of the Limitation of Actions Act.
11. And even if 24<sup>th</sup> April, 2015 when the first payment was made to the Plaintiff was to be the date of breach, the six-year period would have lapsed on 23<sup>rd</sup> April, 2021. This suit was filed on 22<sup>nd</sup> April, 2021, a day shy of the six-year limitation period provided for by law hence it was still within time. I find that the Defendant has misconstrued the provisions of Section 4(1) of the Limitation of Actions Act on when the period for breach in this case started running.
12. The upshot therefore is that the Preliminary Objection dated 29th March, 2022 is lacking in merit and is hereby dismissed with costs to the Plaintiff.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2022.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

M/S Nyakundi counsel for Plaintiff/Respondent

No appearance for and by Defendant/applicant

Court Assistant - Sakina

