



REPUBLIC OF KENYA



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**Mwangi v Mburu (Civil Appeal 43 of 2020)
[2022] KEHC 17114 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 17114 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 43 OF 2020
AC MRIMA, J
NOVEMBER 17, 2022**

BETWEEN

DUNCAN MWANGI APPELLANT

AND

OBADIAH MBURU RESPONDENT

(Being an Appeal arising out of the ruling and order of Hon V Karanja (Principal Magistrate) in Kitale Chief Magistrate's Court Civil Case no 222 of 2020 delivered on August 25, 2021)

JUDGMENT

1. The appeal subject of this judgment arose from a ruling on a Notice of Preliminary Objection. The objection, which was allowed and the suit struck out, was premised on limitation of actions.
2. The appellant herein, Duncan Mwangi, had on September 16, 2020 filed Kitale Chief Magistrate's Court Civil Case no 222 of 2020 Duncan Mwangi vs Obadiah Mburu (hereinafter referred to as 'the suit'). The Complaint was dated September 14, 2020.
3. In the suit, the appellant averred that he entered into a car sale agreement with the respondent over a motor vehicle registration number KBA 725C (hereinafter referred to as 'the motor vehicle') where the appellant was the purchaser. That was in 2009. The consideration was kshs 300,000/=.
4. Following the purchase, the appellant repaired the car and changed the engine of the motor vehicle from an automated to a manual transmission. Thereafter, the appellant sold the said vehicle to one Peter Kibiru at a consideration sum of kshs 365,000/=.
5. It appeared that the motor vehicle was reported missing by one Adan Mohamed. Eventually, the motor vehicle was recovered and the appellant arrested and charged with theft thereof. That was in Makadara Chief Magistrates Criminal Case no 2091 of 2011 (hereinafter referred to as 'the criminal case').



6. At the determination of the criminal case, the appellant was acquitted of the charges on account of having been an innocent purchaser for value without notice. However, the court ordered *inter alia* that the motor vehicle be returned to the owner Adan Mohamed and that the documents which had been used in the sale of the motor vehicle to the appellant be destroyed. The orders of the court were duly complied with.
7. The appellant then informed the respondent about the outcome of the criminal proceedings. He demanded a refund of the purchase price.
8. The appellant averred that the respondent promised to refund the purchase price. As the respondent was not making good his promise, the appellant lodged a complaint with the police.
9. With a view to stop any police intervention in the matter, the respondent filed High Court Constitutional Petition no 3 of 2019 at Kitale Law Courts. The Petition was, however, dismissed with the respondent being ordered to refund the appellant the purchase price.
10. As the respondent was still not intent on making good the demand, the appellant instituted the suit.
11. In response to the suit, the respondent entered appearance on October 30, 2020 and subsequently filed his Defence on November 10, 2020. The respondent thereafter filed a Notice of Preliminary Objection dated April 5, 2021. He sought to have the suit struck out in limine on the following grounds: -
 - The plaintiff's claim is premised on a sale agreement made in 1999 which claim is statutory barred by virtue of the [Limitation of Actions Act](#), section 4 thereof.
 - There is no cause of action subsisting against the defendant herein.
 - The defendant shall also seek for costs of the suit.
12. The objection was heard by way of written submissions.
13. In a ruling dated August 25, 2021 and delivered on an even date, the Notice of Preliminary Objection was upheld and the suit struck out for being time barred.
14. It is that ruling that prompted the appeal subject of this judgment.
15. Upon directions being given, the appeal was heard by way of written submissions. The appellant duly complied by timeously filing the submissions.
16. On his part, the appellant submitted that time only started running when the cause of action became known to him. He computed that time started running when the judgment in the criminal proceedings was rendered, that was on January 17, 2019. As a result, he was within the statutory required limitation period to file the suit.
17. He pitted out that he could only file the present suit once the criminal proceedings had been concluded. He urged this court to allow the Appeal.
18. The respondents on their part elected not to file submissions.
19. The central issue for determination in this appeal is when time started running for purposes of limitation. Putting it differently, when the cause of action accrued.
20. The [Limitation of Actions Act](#) is an Act of Parliament enacted to *inter alia* prescribe periods for the limitation for actions and arbitrations. The idea behind this statute is to prevent parties from being condemned with having to live with a dispute hanging over their heads many years after the cause of action arose. This law, hence, has a bearing on the old adage that litigation must come to an end.



21. Section 4 (1) of the *Limitation of Actions Act*, under which the preliminary objection was founded upon, provides that actions founded on contract may not be brought after the end of six (6) years from the date on which the cause of action accrued.
22. There is no dispute that the subject matter is a contract. That contract is bound by the said provision. As said, the point of departure is when the cause of action arose.
23. According to the respondent, and who the trial court concurred with, time started running when the appellant was aware of the criminal proceedings instituted against him, that is to say, in 2011.
24. On his part, the appellant conversely stated that time started running when the criminal proceedings were determined in 2019.
25. The *Black's Law Dictionary 11th Edition* defines "accrue" to mean "to come into existence as an enforceable claim or right."
26. The Court of Appeal in *Diana Katumbi Kiio vs. Reuben Musyoki Muli* [2018] eKLR held that a cause of action in contract arises from breach of the contract and not at the time it is executed. The court relied on the exposition of the author in the Journal of International Banking and Financial Law: "What's the Limit" (2007) 11 JIBFL 642 where it was stated thus: -

.... 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.
27. Flowing from the definitions, it is settled that in contracts the cause of action arises when a breach of the contract occurs.
28. Turning to the present matter, it cannot be gainsaid that the appellant was arrested and charged in relation to theft of the motor vehicle in 2011. That followed a complaint lodged by Adan Mohamed on the theft of the motor vehicle which he alleged to belong to him. As stated before, the appellant was acquitted of all the charges in 2019.
29. The matter did not, however, end with the acquittal of the appellant. The trial court also found that the vehicle belonged to Adan Mohammed and another. The court thus ordered that the motor vehicle as well as the original and genuine logbook be restored to the rightful owners. Additionally, the court ordered that the transaction between the appellant and one Peter Kibiru be litigiously determined before a civil court since they were both victims of circumstances.
30. Had the trial court found that the motor vehicle was rightfully passed and transferred to other parties, the suit, the subject of the instant appeal proceedings would have been superfluous. In other words, had the trial court in the criminal case found that the motor vehicle belonged to Peter Kibiru rightfully, the appellant would not have instituted the suit.
31. In light of the foregoing, it can be only reasonably and logically held that the cause of action accrued when judgment was delivered in 2019. I say so because it was the trial court which instigated any recovery proceedings by the appellant.
32. This court, hence, finds and hold that the cause of action arose upon the delivery of the judgment in the criminal case in 2011 and not before. As such, the suit was still not barred by limitation when it was instituted in 2020.



33. Having so held, it, therefore, follows that the objection was allowed in error. The court ought to have instead allowed the suit to be heard and determined on its merit.
34. Consequently, the appeal is hereby determined in the following manner: -
 - a. The appeal is hereby allowed.
 - b. The ruling dated August 25, 2021 rendered in Kitale Chief Magistrate's Civil Case no 222 of 2020 and the resultant order striking out the suit be and are hereby set aside.
 - c. The suit, Kitale Chief Magistrate's Civil Case no 222 of 2020, is hereby reinstated and shall be accordingly heard.
 - d. The Notice of Preliminary Objection dated April 5, 2021 is hereby dismissed with costs.
 - e. The respondent shall bear the costs of the appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 17TH DAY OF NOVEMBER, 2022.

A C MRIMA

JUDGE

