



Mohamed v Walker Kontos Advocates & another (Miscellaneous Application E008 of 2020) [2022] KEHC 16797 (KLR) (Civ) (22 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16797 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS APPLICATION E008 OF 2020
CW MEOLI, J
DECEMBER 22, 2022**

BETWEEN

NAAME ALI MOHAMED APPLICANT

AND

WALKER KONTOS ADVOCATES 1ST RESPONDENT

MOHAMED ALI GHALIB 2ND RESPONDENT

RULING

1. Naame Ali Mohamed (hereafter the Applicant) filed an application (originating summons) dated 07.07.2020 seeking leave to file her suit out of time against Walker Kontos Advocates and Mohamed Ali Ghalib (hereafter 1st & 2nd Respondent/Respondents); and that upon leave being granted the annexed draft plaint be deemed to be duly and regularly filed on the day and date of the order, upon payment of the appropriate prescribed court filing fees. The application is expressed to be brought inter alia under Section 1A, 1B, 3A & 95 of the *Civil Procedure Act* (CPA), Section 26 & 27 of the *Limitation of Actions Act* and Order 37 Rule 6(1) of the Civil Procedure Rules.
2. The motion is premised on the grounds on the face of the application as amplified in the supporting affidavit sworn by the Applicant. To the effect that she left Kenya to settle in New Zealand sometime in 1995 and in February 2020 she had instructed the present counsel on the instant matter. She swears that she had earlier instructed the 1st Respondent to act for her in a matter relating to property jointly owned with another which property was subject to disposal owing to a dispute arising; that it was her instruction to the 1st Respondent to receive and or collect her share of the proceeds of the sale of the disputed property and thereafter remit the net amount of Kshs. 1,170,648.55/- due to her after deducting their professional fees and disbursements; and that the 1st Respondent did not comply with



- her instructions and to date have not remitted the monies into her account held at Housing Finance Company (HFCK).
3. She further asserts that the intended suit is genuine as she is entitled to recover her hard-earned money together with interest standing at a total of Kshs. 12,527,393/- as of 31.03.2020. That demand and notice have served upon the Respondents and that delay in instituting the suit in time was not deliberate but due to circumstances completely beyond her control. In conclusion she deposes that it is fair and just that leave be granted as prejudice will be visited on the Respondents.
 4. The 1st Respondent filed a replying affidavit dated 15.09.2020 and a preliminary objection dated 26.08.2020 in opposition to the originating summons. On grounds that as admitted by the Applicant the proposed suit is time barred for all purposes under the provision Section 4 of the Limitation of Actions Act given that the alleged cause of action arose over twenty-three years ago as admitted in the grounds contained in the said summons.
 5. The Respondent further invoked the Guideline 5.17 (Record keeping) of the Central Bank of Kenya Prudential Guidelines (Guideline on Anti-Money Laundering and Combating the Financing of Terrorism – CBK/PG/08) published pursuant to the provisions of Section 33(4) of the Banking Act, Rules 90 & 91 of the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct (2017) issued in exercise of the powers conferred by Section 4 & 5 of the Law Society of Kenya Act.
 6. The 1st Respondent contended that there is no cause of action disclosed against the 1st Respondent in the draft plaint; that the proposed suit is frivolous, vexatious, mala fides, malicious, defamatory of the 1st Respondent and greatly injurious to its reputation and is an abuse of the court process; that the court has absolutely no jurisdiction to entertain a suit founded on the proposed draft plaint; that the originating summons and draft plaint constitute a mischievous attempt to drag the 1st Respondent into a matrimonial dispute which dispute is the sole preserve of the Kadhi's court and not this court; and that the originating summons and draft plaint are a blatant attempt by the Applicant to extort the 1st Respondent which action is a criminal offence as set out in Section 299 of the Penal Code. Hence, the originating summons should be struck out with costs to the 1st Respondent.
 7. The 2nd Respondent filed a replying affidavit dated 03.10.2020 and a preliminary objection dated 20.09.2021 in opposition to the originating summons. He took objection to the motion on grounds that the court lacks pecuniary jurisdiction to entertain the matter. He reiterated the contents of the 1st Respondent's notice of preliminary objection and went on to depose that he and the Applicant were wed in accordance with the Islamic law on 17.03.1986 and are blessed with two issues.
 8. He goes on to assert that on or about 1994 the Applicant instructed the 1st Respondent to act on her behalf in two court matters which led to the sale of LR. No. Nairobi/Block93/243 (hereafter issue property) which was jointly owned with another party but was their matrimonial home. That at all material times during the conduct of the matter he had the Applicant's authority to actively engage on any issues that were arising.
 9. He further states that at the determination of the relevant suit and sale of the issue property the Applicant was awarded Kshs. 1,170,648.55/- and because at the time of the award the Applicant was not in the country, he collected the said money on her behalf with her authority and duly informed the Applicant who did not object. The 2nd Respondent contends that the issues raised by the Applicant are purely matrimonial questions that emanates from marital discord and her motion should be dismissed.
 10. The Applicant equally filed a preliminary objection dated 22.12.2020 to the participation of the Respondents in the matter. On grounds that the 1st Respondent's opposition to the summons is



premature, malicious, misdirected, misconceived, mischievous, frivolous, vexatious, suspect, dilatory, prejudicial and an abuse of the court process. She contends that the originating summons is brought under the provisions of Section 26, 27 as read with Section 28 of the *Limitation of Actions Act*; that the originating summons is an ex parte application; that the participation of the 1st Respondent in the instant proceedings is in contravention of Section 27 & 28 of the *Limitation of Actions Act*; and that the 1st Respondent is barred by law from opposing or raising any preliminary objection at this stage where the Applicant is merely seeking leave to file suit out of time.

11. Further that, no prejudice will be suffered by the Respondents who will at the appropriate stage have opportunity to challenge the facts and law at the trial of the main suit if any shall be filed; that the orders sought are at the discretion of the court and merely provisional and the same can only be challenged by defence during hearing; and that the 1st Respondent's objection ought to be struck out with costs.
12. Directions were taken on the preliminary objections to be disposed of by way of written submissions.
13. Counsel for the Applicant anchored his submissions on the provisions of Section 4(2), 26 & 27 as read with 28 of *Limitation of Actions Act* to argue that the intended action against the 1st Respondent is founded on professional negligence, breach of professional duty. Calling to aid several decisions including *James Mbugua v Paul Kibet Biwott & Another* [2005] eKLR, *Mary Wambui Kabugu v Kenya Bus Service Limited EA*. [1997] eKLR, and *Yunes K. Oruta & Anor v Samwel Mose Nyamato CA No. 96 of 1984 (U.R)* counsel submitted that the Respondents are barred by cardinal principle and law from raising any objection at this stage where the Applicant is merely seeking leave of the court to file suit out of time.
14. That at this stage there is no suit against the Respondents as the motion is ex parte and any order made in exercise of the discretion of the court thereon can only be challenged at the hearing of the suit. Addressing the court on jurisdiction counsel cited Article 165 (3) (a) to submit that this court has unlimited original jurisdiction to hear matters and where the court establishes that the pecuniary claim is suitable to determined elsewhere it has powers to transfer the suit to the appropriate court for adjudication under the provisions of Section 18(1) of the *Civil Procedure Act* and Article 159(2) (a), (b), (d) & (e) of *the Constitution* of Kenya 2010.
15. On whether the preliminary objections raised by the Respondents are merited, counsel relied on *Mukisa Biscuits Manufacturing Company Limited v West End Distributors* (1969) EA 696 and *John Musikali v Speaker County of Bungoma & 4 Others* [2015] eKLR inter alia to argue that a preliminary objection should not be blurred by factual details liable to be contested or proved through evidence. Finally, he cited *Republic v Communication Authority of Kenya & Another Ex-Parte Legal Advice Center aka Kituo Cha Sheria* [2015] eKLR in submitting that the Respondents have prematurely participated in the matter and they ought to be condemned to meet costs upon the dismissal of their preliminary objections.
16. Counsel for the 1st Respondent in pressing his preliminary objection anchored his submissions on several decisions including the of-cited decision in *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, *Kenya Bus Service Ltd & Another v Minister for Transport & 2 Others* [2012] eKLR, *Christine Amoiti Barasa (Suing as the personal Representative and next of kin of the Estate of the Late Michael Ambuchi) v Abikar Mohammed* [2015] eKLR, *V.V Karanja Shah v Kaplan & Stratton Advocates* [2005] eKLR. And citing Section 4 of the *Limitation of Actions Act* he argued that the Applicant's application is a belated attempt to institute a suit regarding a cause of action which arose more than twenty-three years ago and has failed to tender any reasonable explanation for the inordinate delay in instituting her suit.



17. He posited that the intended proceedings are an afterthought, unmeritorious and blatant breach of the overriding objectives as codified in Section 1A of the *Civil Procedure Act*. In addressing the 2nd Respondent's preliminary objection counsel agreed that the Applicant's suit is a non-starter and an abuse of the court process as the intended suit falls within the pecuniary jurisdiction of the magistrate's court by dint of Section 7(1)(b) of the Magistrates Court's Act 2015.
18. Finally, with respect to the Applicant's objection to the Respondents' participation in the instant matter, counsel contended that the Applicant voluntarily served the Respondents and having done so is estopped from belatedly objecting to their participation. That besides, the 1st Respondent's participation shall assist the court in discerning the real issues in controversy and Article 48, 50 & 159(2) (d) of *the Constitution* enjoins the court to eschew technicalities and that it is in the interest of justice that the 1st Respondent be granted an opportunity to ventilate its objection and that the Respondents' objection be allowed with costs.
19. Counsel for the 2nd Respondent in addressing the Applicant's objection to the Respondents participation in the instant matter cited the decision in *Pontrilas Investments Limited v Central Bank of Kenya & Another – EACJ Reference No.8 of 2017* and Article 48, 50 & 159(2) (d) of *the Constitution* of Kenya 2010 to argue that in its wisdom this court earlier issued directions for the service of the originating summons, to enable the participation of the Respondents in the proceedings which is crucial for the dispensation of justice. It was further submitted that the Applicant's preliminary objection is not only premature but fatally defective as it not based on pure points or issues of law.
20. Submitting on the 1st Respondent's preliminary objection, counsel reiterated the 1st Respondent's submissions thereon. He cited some of the said Respondent's authorities and in addition *John Mutai Mwangi & 26 Others v Mwenja Ngure & 4 Others – Civil Appl. No. 126 2014* to argue that the proposed suit is time barred and that the court lacks jurisdiction to entertain it. He contended that the Applicant's failure to tender a reasonable explanation for the inordinate delay in instituting her suit renders the motion fatally defective and incurable in law. He urged the court to allow with costs the Respondents' preliminary objections.
21. The court has reviewed the material canvassed in respect of the preliminary objections filed by the respective parties. In *Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors (1969)* EA 696, Law J. A. stated 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, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”



22. In the case of *Oraro v Mbaja* [2005] KLR 141, Ojwang J (as he then was) reiterated the foregoing by stating that;

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

23. Applying the above test to the objections and counter-objections by the respective parties hereto, it is evident that on the whole, the objections raise substantive and pure points of law. The preliminary objection by the Applicant ought to be determined first, followed by the 1st Respondent's. The Applicant's preliminary objection is to the effect that the originating summons before this court is an ex parte application and therefore the participation of the Respondents herein is contravenes sections 27 & 28 of the *Limitation of Actions Act*.

24. The Applicant's motion is premised on the provisions of Section 26 & 27 of the *Limitation of Actions Act* and Order 37 Rule 6(1) of the Civil Procedure Rules. Section 28 (1) of the *Limitation of Actions Act* provides states that;-

“An application for the leave of the court for the purposes of Section 27 of this Act shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.”

25. Order 37 Rule 6(1) & (2) of the Civil Procedure Rules essentially replicates the provisions of Section 28(1) of the *Civil Procedure Act* as follows:-

“(1) An application under Section 27 of the *Limitation of Actions Act* made before filing a suit shall be made ex parte by originating summons supported by affidavit.

(2) Any such application made after the filing of a suit shall be made ex parte in that suit”.

26. In that regard *Akiwumi J.A in Mary Wambui Kabugu v Kenya Bus Service* (supra) cited with approval the words of Lord Denning, M.R. in the English Court of Appeal case of *Cozens v North Devon Hospital Management Committee and Another* [1966] 2 All E. A. 799 to the effect that:-

“Now I quite agree that in general a party affected by an ex parte order can apply to discharge it. We applied this rule as of course in *R v. Morley (Valuation Officer) E.P. Peachy Property Corporation Ltd* recently; but the procedure under the Limitation Act 1963 is altogether exceptional. It says in terms that an application shall be made ex parte. This is a strong indication that the judge is to decide the application on hearing one side only. No provision is made for the defendant being heard; and I do not think that we should allow it to be done at this stage. It must be remembered that, even when the Judge grants leave, there is



nothing final about it. It is merely provisional. The defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by the provisional view expressed by the judge in chambers who gave leave.”

27. Earlier, in *Oruta & Another v Nyamato*[1988] eKLR, Platt JA observed that:-

“I agree that this Court should respectfully adopt the reasoning in *Cozen v North Devon Hospital Management Committee*, [1966] 2 All ER 799. It follows that the defendant can only challenge the extension of time in the trial itself and not by a preliminary application. This is an exception to the general rule that the parties affected by an ex-parte order can seek to set it aside under the principles of natural justice.

I agree with the result reached by Gachuhi JA and the orders he proposes.”

28. Notwithstanding the foregoing, the matter does not end there, because of the peculiar facts revealed by a cursory perusal of the record of proceedings herein from 10th July 2020 until 4th May 2022 when the court reserved the ruling date. On the former date, Githua J having considered the Applicant’s summons had certified it urgent and directed that a hearing date be taken on priority basis and that the application be served upon the Respondents herein.

29. These orders were reiterated by Mbogholi J (as he then was) on 29.7.2020 when the same application was placed before him, the learned Judge stating inter alia that:-

“Githua J has already made orders herein which are yet to be complied with.

Let the applicant comply with the (court) orders made on 10.7.2020.”

30. It appears that the 1st Respondent was subsequently served with the application and filed their preliminary objection dated 26.08.2020. The said Respondent attended the mention before Githua J on 21st September 2020 which date they had taken on 8.09.2020 for the purpose of their preliminary objection (P.O). On that date, while counsel for the 1st Respondent sought directions on the P.O., for his part, counsel for the Applicant who was in attendance addressed the court as follows: -

“We have not served the 2nd Respondent since I do not know how to trace him. Seek time to seek instructions from my client on where the 2nd defendant can be reached for service”.

31. The court directed that the 2nd Respondent be served before directions could be taken in the matter. Although the matter was fixed for mention on 21.9.2020, a new date was fixed by both parties for 19.04.2021 and meanwhile the Applicant filed her own P.O. dated 22.12.2020. It appears that the matter was not listed on 19.04.2021 and on 2.06.2021 the 1st Respondent fixed a date for the hearing of their P.O. The 2nd Respondent equally filed his P.O. dated 20.09.2021 and eventually directions were given on 19.10.2021 to have the three P.O.s canvassed together by way of written submissions.

32. In the above period, the Applicant could have, but did not at any time apply to set aside the orders by Githua and Mbogholi JJ directing that service be effected on the Respondents implying that the said Respondents were to participate in the matter. A preliminary objection against their participation cannot overturn the orders of the learned Judges, and so long as the orders subsist, the court cannot deny the Respondents audience in the matter.



33. In addition, the court agrees with the 2nd Respondent's submission that given the Applicant's compliance with the orders for service upon the Respondents, the Applicant waived his right to ex parte proceedings and is estopped from belatedly challenging the participation of the said Respondents.
34. In that regard, an illuminating passage in the judgment of the Court of Appeal in *748 Air Services Limited v Theuri Munyi* [2017] eKLR deserves quoting in extenso :-

“Estoppel is not easy to define in legal terminology. In his customary innovativeness, Lord Denning in the case of *McIlkenny vs Chief Constable of West Midlands*, [1980] All ER 227 gave the history of its evolution from French origins and compared it to a house with many rooms. Let us hear him:

“..we have so many rooms that we are apt to get confused between them. Estoppel per rem judicatum, issue estoppel, estoppel by deed, estoppel by representation, estoppel by conduct, estoppel by acquiescence, estoppel by election or waiver, estoppel by negligence, promissory estoppel, proprietary estoppel, and goodness knows what else. These several rooms have this much in common: they are all under the same roof. Someone is stopped from saying something or other, or doing something or other, or contesting something or other. But each room is used differently from the others. If you go into one room, you will find a notice saying 'estoppel is only a rule of evidence. If you go into another room you will find a different notice: 'estoppel can give rise to a cause of action'. Each room has its own separate notices. It is a mistake to suppose that what you find in one room, you will find in the others.”

The rooms we shall enter in the matter before us is estoppel by conduct and estoppel by election or waiver. Waiver is an intentional relinquishment or abandonment of a known right or privilege. In the case of *Banning v Wright* [1972] 2 All ER 987, at page 998 the House of Lords stated thus:-

“The primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. A person who is entitled to a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waivers are not always in writing. Sometimes a person's actions can be interpreted as a waiver - waiver by conduct”.

Closer home in the case of *Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Ltd* [2007] eKLR the Court stated thus:

“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right.”

This Court also did explore at some length the issues of waiver, estoppel and acquiescence in the *Serah Njeri Mwobi* case (supra) and we adopt its analysis in respect of waiver and estoppel by conduct, thus: -

“The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See *Seascapes Limited*



vs Development Finance Company of Kenya Limited, [2009] eKLR. The words waiver, estoppel and acquiescence have also been defined by the Halsbury's Laws of England, 4th Edition, Volume 16. At page 992 waiver has been defined as follows: -

Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right... The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him.” (Emphasis added)

35. Applying the foregoing wisdom to the facts of this case, it seems to the court that the Applicant is caught up by the doctrine of estoppel by conduct and waiver. It would amount to a denial of the right to a hearing and a travesty of justice to evict the Respondents from the seat of justice in the circumstances of this case. The Applicant's P.O. appears to be an afterthought and is misconceived. The P.O. is accordingly dismissed with costs to the Respondents.

36. Turning now to the P.O. by the 1st Respondent, the key plank therein is that the proposed suit captured in the originating summons is time barred for all purposes and the court would have absolutely no jurisdiction to entertain such suit. Although the originating summons invoked section 26 of the *Limitation of Actions Act*, the proposed plaint neither expressly pleads fraud against any of the Respondents nor gives particulars thereof. However, in her written submissions, the Applicant asserted under the heading 'brief facts- Recap.' that the "Applicant was convinced...that there was a fraudulent transaction and or collusion between the 1st and 2nd Respondent to steal" from her. Submissions are not a substitute for pleadings. The Applicant submitted as follows concerning the nature of her intended claim against the 1st Respondent: -

“The Applicant's intended action against the 1st Respondent is for professional negligence and breach of professional duty, coupled with lack of knowledge by the Applicant that her money was or did not reach HFCK (account) as she had directed.”

37. In the court's view therefore, the Applicant's proposed claim as pleaded may be founded on the torts of negligence and breach of duty and/or contract, but it is not founded on fraud. Hence the applicable provisions are section 4, 27 and 28 of the *Limitation of Actions Act*. Happily, these provisions have been the subject of numerous pronouncements by superior Courts including those cited herein. While section 4(2) prescribes the limitation period in respect of actions founded on tort, section 4(1) of the Act provides:-

“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. 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.”

38. In Owners of the Motor Vessel Lillian “S”, (supra) Nyarangi JA (as he then was) expressed himself as follows: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

See Words and Phrases Legally defined – Volume 3: I – N Page 113”.

39. The learned Judge concluded by stating that:

“It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.

I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.

In *Il Congresso del Partido*, [1978] 1 QB 500, *the River Rima*, *Gatoi International Inc v Arkwright – Boston M. M. Insurance Co. & Others* and *The Evpo Agnic*, the respective



courts analysed the evidence before the court and upon that evidence the question of jurisdiction was immediately decided.”

40. Undeniably, the cause of action in the proposed suit accrued some 23 years ago and as pleaded in the draft plaint, is founded in part on negligence, contract or written law as envisaged in section 4(1) (a) and (d) and 4(2) of the Limitation of Actions Act. Evidently, the time for filing suit lapsed some 17 years ago at the latest. Could section 27(1) of the Limitation of Actions Act provide succour to the Applicant? I fear not. Section 27(1) is in the following terms: -

- “(1) Section 4(2) does not afford a defence to an action founded on tort where—
- (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
 - (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
 - (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
 - (d) the requirements of subsection (2) are fulfilled in relation to the cause of action.” (Emphasis added).

41. The section envisages extension of time in respect of torts only and all the ingredients in the section must be present for a suit founded on tort to survive a defence of limitation under section 4(2) of the Limitation of Actions Act. In this instance the proposed suit while based on tort in part is not for damages in respect of personal injuries as anticipated in subsection (b) above, and the court has no power to extend time for the filing of claims founded on contract. In *Mary Osundwa v Nzoia Sugar Company Limited* Civil Appeal No. 244 of 2000 [2002] eKLR the Appellant had successfully sought leave under the section, (which was granted by consent in the High Court) to file a cause for alleged breach of contract, some 7 years after her cause of action accrued.

42. The Court of Appeal having set out the provisions of Section 27 (1) of the Limitation of Actions Act stated that:

“The section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort. Accordingly, Osiemo J. had no jurisdiction to extend time as he purported to do on 28th May, 1991. That the order was by consent was neither here nor there; the parties could not confer jurisdiction on the Judge by their consent”. (Emphasis added).

43. Similarly, in *Bosire Ogero v Royal Media Services* [2015] eKLR and *Dr. Lucas Ndung’u Munyua v Royal Media Services Ltd & Another* [2014] eKLR, the courts held that Section 27(1) does not provide for the extension of time to file a suit for defamation. No doubt echoing the earlier pronouncements in *Wycliffe a. Swanya v Toyota East Africa Limited and Another* [2009] eKLR; *Rawal v Rawal* [1990]



KLR 275 and Dhanesvar v Mehta vs Manilal M. Shah [1965] EA 321, Aburili J. restated the rationale behind the Limitation of Actions Act, in Bosire Ogero's case as follows: -

“The Law of Limitation of actions is intended to bar plaintiffs from instituting claims that are stale and (is) aimed at protecting defendants against unreasonable delay in bringing of suits against them. The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same”.

44. Therefore, whether based on tort or contract the Applicant's proposed suit cannot benefit from the provisions of section 27(1) of the Limitation of Actions Act.

45. The question of limitation is a jurisdictional issue and not a technicality. The Court of Appeal in Thurania Karauri v Agnes Ncheche [1997] eKLR held that:

“We do not understand how the Judge could proceed with the trial without finally determining such an important point of jurisdiction and it is pointed out that as a general rule, a point or issue of limitation of time goes to the root of jurisdiction which this Court should determine at the first instance. Subsequently, that where a suit is time barred, the same is incompetent and consequently a court has no jurisdiction to entertain such suit”.

46. This court therefore finds that, on a plain reading of the provisions of section 27(1) of the Limitation of Actions Act and relevant precedent, there is no jurisdiction to extend time for the filing of a suit founded on contract and or tort as herein proposed in the draft plaint, and the originating summons is a non-starter. The P.O by the 1st Respondent is hereby upheld. The originating summons dated 7.07.2020 is accordingly struck out with costs to the Respondents. In the result, no useful purpose will be served by delving into the merits of the P.O. raised by the 2nd Respondent who primarily supported the P.O. by the 1st Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 22ND DAY OF DECEMBER 2022.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Simiyu h/b for Mr. Munikah

For the 1st Respondent: Otieno h/b for Mr. Karungo

For the 2nd Respondent: Ms. Amutavi h/b for Mr. Okatch

C/A: Adika

