



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 158 OF 2003**

**BHUPINDER SINGH DOGRA ..... PLAINTIFF**

**VERSUS**

**COAST DEVELOPMENT AUTHORITY ..... DEFENDANT**

**RULING**

1. On 13<sup>th</sup> August, 2020 the defendant/applicant filed a Notice of Motion application under the provisions of Order 2 rule 15 and sub-rules 1(a) and 2 of the Civil Procedure Rules. The applicant seeks the following orders-

(i) That the plaintiff/respondent's suit be dismissed as it does not disclose any reasonable cause of action against the defendant/applicant; and

(ii) That the cost of this application together with the suit and interest thereon be awarded to the defendant/applicant.

2. The application is supported by the grounds on the face of it, with no supporting affidavit. On 9th October, 2020 the law firm of Munyithya Mutugi, Umara & Muzna Co. Advocates, filed grounds of opposition on behalf of the plaintiff. The plaintiff also filed a replying affidavit sworn on the same day, to oppose the application.

3. In highlighting the submissions filed by Mr. Mwanyale, Counsel for the defendant submitted that the suit herein does not disclose a reasonable cause of action as it is barred under the provisions of Section 4A of the Limitation of Actions Act. He stated that in its statement of defence, the defendant pleaded that the original plaint was filed on 9th July, 2003, which was outside the limitation period.

4. He cited the case of **Desai v M. Patel**, Civil Appeal No. 178 of 2000 which shows that no affidavit is needed to support an application brought under Order 2 rule 15 of the Civil Procedure Rules.

5. It was submitted that time accrues from the date when a cause of action arises and not from the time a demand is made, as contained in the plaintiff's submissions.

6. The defendant's Counsel submitted that Section 23(3) of the Limitation of Actions Act does not apply as there has been no part payment of the debt. It was stated that the defendant is a legal entity with the right to sue and be sued as it has its own statute governing it.

7. The defendant's contention is that the cause of action arose on 9th July, 1997 and the plaint ought to have been filed on 8<sup>th</sup> July, 2003, thus the suit discloses no reasonable cause of action.

8. It was submitted that the foundation of the suit herein is the plaint filed on 9th July, 2003 which was subsequently amended. That through paragraphs 6, 6A, 6B, 7A, 7B and 7C of the said amended plaint, the plaintiff pleads that a demand was made and that was when the cause of action arose, and not when the amount became due as stated in the plaintiff's grounds of opposition to the present application.

9. In making reference to the plaintiff's submissions, the defendant's Counsel stated that Section 23(3) of the Limitations of Actions Act presupposes an acknowledgement by the debtor but in this case, there had been no admission nor part payment made by the defendant. It was argued that this court could not invoke the said provisions

10. The case of **Telkom Kenya Limited v Kenya Railways Corporation** [2018] eKLR, was cited to support the foregoing submissions. The case of **Maersk Kenya Ltd v Mwabu Chaka Tsuma**, Civil Appeal No. 209 of 2019 was relied on to demonstrate that in computing whether a case is time barred, the applicable law is Section 4(1)(a) of the Limitation of Actions Act, which provides that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued.

11. It was submitted that the case herein was time barred and disclosed no cause of action. The defendant's Counsel prayed for the suit to be dismissed with costs.

12. Mr. Joseph Munyiya for the plaintiff filed written submissions on 9th October, 2020. In expounding on the same, he stated that the case before this court is based on the amended plaint dated 26th March, 2014, which this court needs to look at, in determining if the suit is time barred. He stated that paragraph 6 of the said plaint is the reference point to the present application.

He submitted that paragraph 6(A) states that the defendant requested the plaintiff to hold on to their demand until money was released by a 3<sup>rd</sup> party who was the financier of the project. He further submitted that as at 9<sup>th</sup> July, 2017 some money was payable but the defendant could not make payment because of the reason given.

13. It was indicated that the claim was taken up by the Ministry of Finance and Planning which had to verify if there was any money payable to the consultant, and that a report of the verification was attached to the plaintiff's affidavit. He stated that the defendant did not file an affidavit to controvert the depositions made in the plaintiff's affidavit.

14. It was submitted that the main consultant was Coast Care Consultants, which made its final demand on 6th September, 2020. Mr. Munyiya further submitted that this court has to consider if the Ministry of Finance and Planning confirmed the amount which was payable on 31<sup>st</sup> August, 1998, and if the plaintiff made a formal demand for payment on 6th September, 2002

15. Mr. Munyiya stated that the submissions by Mr. Mwanyale to the effect that time started running on 7th September, 1998 was misleading. He pointed out that once the leading financier disowned the project, the Government stepped in and paid the other consultants but not the plaintiff. The provisions of Section 23(3) of the Limitation of Actions Act were relied on in submitting that the matter before this court is on an issue of a debt which is due and payable. He relied on the case of **Telkom Kenya Limited v Kenya Railways Corporation** [2018] eKLR, which interpreted the provisions of Section 23(3) of the Limitation of Actions Act and adopted the decision in **Shire v Thabiti Finance Co. Ltd** [2002] 1 EA 279.

16. He also cited the case of **Mariano Dinacci v Angelo Latinelli** [2015] eKLR, where the court held that time started running from the time a demand was made.

17. It was submitted by the defendant's Counsel that the claim in the suit herein is not a fictitious one as it is clear from the demand notice made by the lead consultant that services were rendered.

18. Mr. Munyiya further submitted that the auditing firm confirmed that the amounts due were payable and that the Ministry of Finance verified the said information on 31<sup>st</sup> August, 1998. It was stated that the plaintiff's demand was made on time. He urged this court to dismiss the application and direct the case to proceed to hearing.

19. In response to the plaintiff's submissions, Mr. Mwanyale stated that an amended plaint flows from the original plaint and that the amended plaint did not cure the late filing of the suit. It was submitted that the Judgment on admission was set aside by Judge P. J. Otieno and an application to set aside the said ruling was dismissed. The defendant's counsel prayed for the suit to be struck out for being filed out of time thus disclosing no cause of action.

## **ANALYSIS AND DETERMINATION**

**The issue for determination is if the suit herein should be struck out for having been filed out of time thus disclosing no cause of action.**

20. The plaint in this case was filed on 9<sup>th</sup> July, 2003. In paragraph 4 thereof, the plaintiff averred that the defendant's Managing Director, Professor Lugogo wrote to the plaintiff on 16th July, 1994 and that the latter was commissioned to provide professional services regarding the area architectural matters which would enable the defendant to realize its project.

21. The plaintiff further averred in the said plaint that the fees payable to him as at 9th July, 1997 was Kshs. 44,640,000/= and inclusive of tax at 12% for 6 years, the amount due was Kshs. 117,017,070.

22. In paragraph 7 of the plaint, the plaintiff claimed that he ought to have received the money by 9<sup>th</sup> July, 1997 but the defendant only made empty promises to pay without doing so.

23. The defendant filed a statement of defence on 1<sup>st</sup> December, 2003. It denied being indebted to the plaintiff in the sum of Kshs. 117,017,070/= claimed in the plaint and put the plaintiff to strict proof thereof.

24. In paragraph 8 of the said statement of defence, the defendant averred that the plaintiff's claim was time barred by reasons of the provisions of the Limitation of Actions Act Cap 22 Laws of Kenya.

25. The plaintiff filed an amended plaint on 1<sup>st</sup> April, 2014 and averred that he was appointed a consultant vide a letter ref. No. CDA 1/13/3 of 30<sup>th</sup> October, 1994 during a Board of Directors' meeting for the defendant held on 14<sup>th</sup> October, 1994. That he signed the letter of acceptance on 31<sup>st</sup> October, 1994.

26. The plaintiff further averred that funding for the project was to be sourced from external financiers but the Treasury declined to give

authorization and endorsement for the development.

27. It was stated in the amended plaint that on 5<sup>th</sup> January, 1995 the defendant's Managing Director wrote to the other consultants informing them that the defendant was not in a position to pay them until such time that the outcome proposals had been received, discussed and approved, the scheme designs submitted and funds released.

28. It was also averred in the amended plaint that the plaintiff was not consulted during a 1998 Ministry of Finance and Planning verification and analysis exercise of the suit project which indicated that the plaintiff and the other consultants could only claim payment under quantum meruit. The plaintiff claimed that the outcome of the exercise as set out in paragraph 6A of its amended plaint was not released to him until later after the filing of this suit.

29. Further, that no report had been received from the defendant confirming if project funds had been received until in 2013, when the plaintiff came across copies of the recommendation set out in paragraph 6A of the amended plaint. The plaintiff claimed in the amended plaint that other consultants had been paid either fully or partially.

30. Section 4(1)(a) of the Limitation of Actions Act provides that an action founded on contract may not be brought after 6 years from the date from which the cause of action accrued.

31. I do not to agree with Mr. Munyithya's submission that this court should not consider the date when the initial plaint was filed in an application where the court has been moved to strike out the suit for being filed out of time. This court's view is that in order to fairly determine the matter in issue, it must consider the date when the initial plaint was filed. In addition, this court must also consider if the amended plaint introduced new factors which would render a suit which would be regarded as having been time barred, as having been duly filed within the statutory period of 6 years.

32. The plaintiff's bundle of documents filed on 7th August, 2017, contain a letter from the defendant's Managing Director, Prof. J.A. Lugogo addressed to the plaintiff herein dated 16<sup>th</sup> July, 1994. In the said letter, the plaintiff was informed that he had been selected and therefore commissioned to provide professional services for the proposed redevelopment of Tudor Municipal Housing Project, Mombasa. The letter also stated that the plaintiff was required to determine the best options available for the exercise. It also informed the plaintiff that the commissioning of architectural services were to be governed by Part 3 C of the Architects and Quantity Surveyors Act Cap 525. The defendant informed the plaintiff that time was of the essence and they would be pleased if he could provide them with his schedule and undertaking of the work.

33. The above was followed by another letter dated 30th October, 1994 informing the plaintiff that following his application and subsequent registration in their list of consultants and under Minute BM 18/94 of the Board meeting of 14<sup>th</sup> October, 1994 the defendant's Board of Directors recommended that his firm be appointed as a consulting architect for their Tudor Housing re-development project in Mombasa in accordance with the Architects and Quantity Surveyors Act Cap 525. The plaintiff was requested to signify his acceptance of the offer by signing and returning a copy of the said letter of offer within 7 days from the date thereof.

34. Another letter dated 18th November, 1994 was written by the defendant to the plaintiff in which the former noted that the latter had started preparing the working drawings. The defendant requested the plaintiff to submit to them the preliminary drawings for discussion and approval before proceeding to a detailed stage. The said letter went on to explain to the plaintiff the number of units that would comprise phase 1C and gave a description of the type of units they would require. The defendant also said that the final figures would be determined after evaluation of phase 1A and 1B. The defendant expressed hope that the working drawings, the revised layout and costings would be ready soon for presentation to the financier before the end of the month (November).

35. On 5<sup>th</sup> January, 1995 the defendant wrote to the plaintiff asking him to note that following his appointment as the consulting Architect for the Tudor Re-development project and his subsequent acceptance, the Authority (defendant) was not in a position to honour any fee notes until such a time that his outline proposals had been received, discussed and approved and the scheme designs submitted and funds released. The plaintiff was in the said letter informed of the consultants he would work with.

36. On 2<sup>nd</sup> May, 1995 the plaintiff sent a fee note to the defendant for the sum of Kshs. 57,006,696.80 being 1% of the estimated cost of the project for preparation of a layout plan/preliminary scheme for Tudor Municipal Housing project – Mombasa.

37. On 9th June, 1997 the plaintiff sent to the defendant, his fee Note No. 1 for the sum of Kshs. 16,467,751.40.

38. It later turned out that Treasury approval for the project was not given, thus no donor funding was obtained.

39. In his replying affidavit sworn on 8th October, 2020 the plaintiff (deponent) stated that the after amending his plaint on 1<sup>st</sup> April, 2014 paragraph 6 of his initial plaint acquired a new meaning and that the defendant has never filed a defence to controvert the amended plaint.

40. In paragraph 5 of the replying affidavit by the plaintiff, he deposed that further activities took place after the year 1997 as shown in paragraphs 6A, 6B, 7A, 7B and 7C of the amended plaint.

41. The plaintiff deposed that his case was based on the findings of 1998 where the Ministry of Finance under Treasury completed the evaluation of his bills. He as such asserted that the time for filing suit started running in the year 1998 as per the verification and analysis (report) of pending bills as at 31<sup>st</sup> August, 1998 (Volume 4).

42. The plaintiff attached to his affidavit a letter by Costcare Consultants, the lead consultants for the project to the defendant wherein a final

demand was made for the professional work done by the consultants. The plaintiff's claim in the said letter was stated as Kshs. 21,974.035.00.

43. The case relied on by Mr. Munyiya of **Regina Kavenya Mutuku & 3 Others v United Insurance Co. Ltd** (supra) is not applicable to the circumstances of this case as no pleading has been struck out by the court in this case. Striking out of pleadings cannot be equated to amendment of a pleading, specifically the plaint in this case. It is obvious that when a pleading is struck out it leaves the affected party with no valid pleading on record. In the case referred to above, the defendant's amended statement of defence had been struck out and she was left with no valid defence to fall back to.

44. I however do concur with Mr. Munyiya's submission that the defendant did not file an amended defence to controvert the amended plaint, thus the pleadings by the plaintiff in the amended plaint remain uncontested.

45. In **Gathoni v Kenya Cooperative Creameries Limited**, Civil application No. 122 of 1981 Porter JA stated as follows –

***“The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”***

46. In this case, the defendant through its letter dated 5<sup>th</sup> January, 1995 gave the plaintiff hope that it would make good the payment for work rendered when it received funds. That was however not done despite the letters which were sent by the plaintiff to the defendant requesting for the payment.

47. It turned out later as per the annexure marked Bs – 2 attached to the plaintiff's affidavit that the Ministry of Finance and Planning undertook a verification and analysis and a report, named “Volume 4 on legal aspects” dated 31<sup>st</sup> August, 1998 was issued, which indicated that the work certified for the plaintiff was Kshs. 25,9225, 229.00

48. In this court's view, due to the intervening factors whereby the Ministry of Finance and Planning took over to verify the pending bills due from the defendant's State Corporation, this court agrees with the plaintiff's position that the cause of action arose on 31<sup>st</sup> August, 1998 being the date of the report of the verification and analysis.

49. Section 23(3) of the Limitation of Actions Act provides as follows-

***“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 to 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 payment of interest is treated as a payment in respect of the principal debt.”***

50. This court holds that due to the special relationship that existed between the Ministry of planning and Finance and the defendant in regard to approval of its budget and financing, and also due to the communication which had been made by the defendant to the plaintiff that it was not in a position to honour any fee notes until such a time that funds were released, time started running from 31<sup>st</sup> August, 2008 when the Ministry of Finance and Planning released its report on the defendant's pending bills. That was an acknowledgment that there was an amount of money due and owing to the plaintiff from the defendant.

51. Although the said acknowledgement did not come from the defendant but from the Ministry of Planning and Finance, the said acknowledgment was applicable to the parties in this case. This court takes cognizance of the fact that the defendant, Coast Development Authority, is a State Corporation. As such, it is an entity under the Central Government of Kenya and Treasury approval had to be sought for the project which was to be undertaken by the defendant. Indeed, Sections 11, 12 and 13 of the Coast Development Authority Act sheds light on the role that the Central Government plays with regard to the defendant. The provisions of Section 23(3) of the Limitations of Actions Act apply. This court notes that the initial plaint was filed on 9th July, 2003. It is this court's finding that the suit herein was filed almost 5 years after the cause of action arose. It was therefore filed within the 6 years statutory period provided under the provisions of Section 4(1) of the Limitation of Actions Act. The authorities relied on by the defendant's counsel are not applicable in this instance.

52. In the case of **Telkom Kenya Limited v Kenya Railways Corporation** (supra), the court therein adopted the decision in **Shire v Thabiti Finance Co. Ltd** [2002] 1 EA 279 and further stated thus –

***“The decision in Shire (supra) is binding upon this court. I am also convinced with the reasoning and would agree with it wholly. An acknowledgement in the absence of a contrary provision in the statute gives an already barred action a new birthday. The action is revived de novo. The acknowledgement need not be made when the time is running. It may be made after expiry of time and will still suit the purposes of Section 23 of Limitations of Actions Act.”***

53. In the circumstances of this case, I find the application by the defendant dated 13<sup>th</sup> August, 2020 is lacking in merit. It is hereby dismissed with costs to the plaintiff.

54. The case herein has not proceeded for full hearing due to the numerous applications which have been filed over the years. In order to progress the hearing of the main suit, this case is scheduled for pre-trial conference on 27<sup>th</sup> April, 2021.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 26<sup>th</sup> day of February, 2021. Ruling delivered through Microsoft Teams online platform due to the outbreak of the covid-19 pandemic.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of -**

Mr. Sidinyu holding brief Mr. Mwanyale for the defendant/applicant

Mr. Joseph Munyithya for the plaintiff/respondent

Mr. Oliver Musundi - Court Assistant.