



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 24 OF 2019

BETWEEN

ARGOS FURNISHERS LIMITED.....PLAINTIFF

AND

COMAT TRADING COMPANY LIMITED.....DEFENDANT

RULING

1. The court has been asked to adjudicate on the Defendant's Notice of Preliminary Objection dated 26th August 2020 which is based on the ground that the Plaintiff's cause of action is time barred under **section 4** of the **Limitation of Actions Act (Chapter 22 of the Laws of Kenya)**. Before I deal with the objection, it is appropriate to appreciate the case before the court as set out in the parties' pleadings.
2. In the original plaint filed dated 16th January 2019, the Plaintiff sued the Registered Trustees of Shree Wanza Union, Comat Trading Company Limited ("the Defendant") and the Chairman, Business Premises Rent Tribunal as Defendants. The Plaintiff was subsequently amended removing the other defendant and leaving the Defendant. The Plaintiff's case is now set out in the Further Amended Plaintiff dated 20th January 2020.
3. The Plaintiff pleads that it was a tenant in a shop located on the property, LR No. 209/1438/39 situated along Gaborone Road within Nairobi ("the suit premises") and which was owned by Shree Wanza Union. Around 1st July 2010, the Defendant purchased the suit property from Shree Wanza Union. In 2011, the tenancy was terminated and the premises demolished with the attendant consequence that the Plaintiff's shop was vandalized and its goods stolen.
4. According to the Plaintiff, the Defendant denied that it was responsible for the demolition and alleged that it had authority of the Business Premises Rent Tribunal ("BPRT") to demolish the suit premises. It later learnt that the Nairobi City Council had issued a letter dated 18th February 2012 declining approval of the demolition. The Plaintiff alleges that this letter was not delivered to it. The Plaintiff alleges that the Defendant has denied it access to the suit premises and has constructed a new building on the suit premises.
5. The Plaintiff alleges that it learnt that the Defendant and Shree Wanza Union colluded to legitimize an unlawful process by purporting that the Plaintiff had not opposed the Defendant's notice to terminate the tenancy agreement between the Plaintiff and the Defendant when no such notice was served on the Plaintiff. As a result of the collusion and fraud, the Plaintiff avers that it sustained that suffered loss amounting to Kshs. 21,660,115.50 on account of loss of stock items, non-stock items and renovation costs., loss of income and goodwill.
6. In its Statement of Defence dated 5th March 2020 to the Plaintiff's Further Amended Plaintiff, the Defendant contended that it purchased the suit premises for valuable consideration from Shree Wanza Union Registered Trustees on 1st July 2020 whereupon it proceeded to develop a 16 storey commercial building and hotel.
7. The Defendant further pleads that upon purchasing of the suit property, it was never and has never been served with any order of whatever nature from the BPRT. It denies colluding with any person to perform the acts of fraud alleged by the Plaintiff. It also states that it has never had any dealings with the Plaintiff.
8. Although the Defendant raised the issue of limitation as a preliminary issue, the issue was not pleaded in its Statement of Defence. In fact, the Defendant admitted this court's jurisdiction to adjudicate the claim. It is settled law that a plea of limitation must be pleaded before it is raised as preliminary objection.

9. In *Stephen Onyango Achola and Another v Edward Hongo Sule and Another* NRB CA Civil Appeal No. 209 of 2004 [2004] eKLR, the Court of Appeal held that the plea of limitation must be pleaded before it can form the basis of a preliminary objection. The Court pointed to **Order VI rule 4** of the *Civil Procedure Rules* which is now **Order 2 rule 4** of the *Civil Procedure Rules, 2010* which states as follows:

[Order 2, rule 4.] Matters which must be specifically pleaded.

4. (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality —

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

10. Since neither respondent in that case pleaded the issue of limitation, the Court concluded as follows:

The second respondent having failed to specifically plead the issue of limitation in its defence it was not entitled to rely on that issue and base its preliminary objection on it; nor will the second respondent be entitled to rely on that defence during the trial of the suit unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition. It is equally not to be forgotten that a party who is entitled to rely on the defence of limitation is perfectly entitled to waive such defence and thus let the suit proceed to trial on its merit.

11. At the end of the day, a party cannot benefit from a defence that it has not pleaded. Consequently, I find and hold the Defendant's preliminary objection lacks merit as it is not founded on its Statement of Defence. It is dismissed with costs to the Plaintiff.

DATED and DELIVERED at NAIROBI this 22nd day of FEBRUARY 2021.

D. S. MAJANJA

JUDGE

Ms Madowo instructed by KWEW LLP Advocates for the Plaintiff.

Mr Kariuki instructed by Wambugu Kariuki and Associates Advocates for the Defendant.