



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. E549 OF 2020**

**ARM CEMENT PLC (under administration) .....PLAINTIFF**

**VERSUS**

**G. M. KARIUKI HARDWARE LIMITED.....1<sup>ST</sup> DEFENDANT**

**PETER MUTHEE.....2<sup>ND</sup> DEFENDANT**

**RULING**

**(On Notice of Preliminary Objection by the Defendant Dated 1<sup>st</sup> February 2021)**

1. By notice of Preliminary Objection (hereafter PO) dated 1<sup>st</sup> February, 2021 the Defendants asks this court to strike out the suit on the ground that it lacks jurisdiction to hear and determine the suit on the following grounds:

a) This Honourable Court has no territorial jurisdiction to hear and determine this matter which is within the territorial jurisdiction of Nyeri and Karatina Law Courts.

b) This suit constitutes a total breach of the law and violates the mandatory provisions of Section 15 (c) of the Civil Procedure Act, 2010, to wit:

***“Subject to the limitations aforesaid in Section 12 and 13 of the Act every suit shall be instituted in a Court within the local limits of whose jurisdiction:***

***(a). The defendant or each of the defendants, where there are more than one, at the time of commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, or***

***(b). Any of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides or carries on business or personally looks for gain, provided either the leave of the Court is given or the defendants who do not reside or carry on business or personally work or carry on business or personally work for gain in aforesaid acquiesce, in such institution or***

***(c). The cause of action wholly or in part arises.”***

c) This suit constitutes a total breach of the law and violates the mandatory provisions of Section 4 of the Limitation of Actions Act, as the cause of action arose more than 6 years prior to the date when the Defendants were served with court papers in this suit.

d) This suit is illegal and a nullity ab initio as it was filed without any authority or capacity, the term of the Administrators Anthony Muniu Thoiti and George Muriithi Weru having automatically ended on 17<sup>th</sup> August 2019 in terms of Section 593 of the Insolvency Act.

e) This suit is a nullity as it is founded on an Authority to Institute Suit signed by one **Anthony Muniu Thoiti** on an unknown date and another **George Muriithi Weru** on 18<sup>th</sup> December 2020 whose signatures are not under seal of ARM Cement PLC and further who are prosecuting the suit on a without prejudice basis (without personal liability) which is not permitted in Court proceedings especially where, as in this case, they seek to enforce illegalities for which the said purported Administrators must take personal

responsibility and liability.

f) The above suit is a nullity as it is founded on an Authority to Institute Suit that is not dated by **Anthony Muniu Thoiti** whose signature is also not witnessed by an Advocate of the High Court.

g) The above suit is fatally defective and a nullity as it fails to comply with the mandatory provisions of Sections 23 (2A) and 34A of the Advocates Act as to mandatory endorsements required of Advocates drawing and filing pleadings.

h) This suit is thus an abuse of the Court Process and should be struck out with costs.

2. In response, the Plaintiff filed a Replying Affidavit dated 9<sup>th</sup> February 2021 in opposition to the PO.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Submissions**

3. Parties agreed to canvass the PO by way of written submissions. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' submissions were filed by their advocates **Githii & Co. Advocates** on 23<sup>rd</sup> April 2021. Relying on **Section 15 (c) of the Civil Procedure Act 2010**, the Defendants submitted that this Court lacks territorial jurisdiction to hear the matter since the matter arose in Karatina. This is because an undertaking dated 5<sup>th</sup> March 2016 was issued and executed by the 1<sup>st</sup> Defendant whose address is P. O. Box 1223 Karatina at Clause 13.4.1 of the Guarantee and Indemnity.

4. The Defendants also submitted that the Plaintiff's claim is time barred according to **Section 4 (1) (a) of the Limitation of Actions Act** in that the cause of action arose sometime before 2<sup>nd</sup> April 2014 when the 1<sup>st</sup> Defendant habitually issued cheques which would be returned unpaid upon presentation to the Bank not on 5<sup>th</sup> March 2016 as the Plaintiff claims. Relying on the case of **Rawal v. S. Rawal (1990) KLR 275**, it was also submitted subjecting the Defendants to litigation of a matter out of time would amount to a great injustice.

5. On the contention that this suit is a nullity as it is founded on an invalid authority to institute suit, the Defendants cited **Order 1 Rule 13 of the Civil Procedure Rules** and the case of **John Kariuki and 347 others v John Mungai Njoroge & 8 Others, Nakuru HCCC No. 152 of 2003 (unreported)**. Additionally, the Defendants cited the cases of **Johann Distelberger v Joshua Kivinda Muindi & Another, H. C. Misc. Civil Appl. No. 1587 of 2003** and **Peter Kimonye & Others v Barclays Bank of Kenya Limited & 2 Others, HCCC No. 403 of 2004** for the proposition that this suit is a nullity in that it does not comply with the mandatory provisions of **Sections 23 (2A) and 34 of the Advocates**. For these reasons, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants urged the Court to allow their objections and strike out this suit with costs.

### **The Plaintiff's submissions**

6. The Plaintiff, in opposing the PO relied on written submissions dated 19<sup>th</sup> April, 2021 filed by **MJD Associates Advocates**. The Plaintiff urged that the PO is unmerited and should be dismissed with costs.

7. As to whether this Honourable Court has territorial jurisdiction to hear and determine this suit, the Plaintiff submitted that there is currently no High Court station at Karatina that has the jurisdiction to hear and determine this suit as the pecuniary value of this suit is KShs. 90,002,527.31/- which is beyond the pecuniary jurisdiction of the Magistrate's Courts at Karatina. It was also submitted that Article 165 (3) (a) of the Constitution of Kenya establishes the High Court of Kenya which has unlimited original jurisdiction in civil matters. It was further submitted that a single High Court is established not distinct ones as alleged in the PO. For this proposition, the case of **Githunguri Dairy Farmers Co-operative Society Ltd v Attorney General & 4 others [2019] eKLR** and **Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 others [2017] eKLR** were cited.

8. Additionally, the Plaintiff contends that the cause of action arose in Nairobi since the suit is premised on the 1<sup>st</sup> Defendants Undertaking dated 5<sup>th</sup> March 2016 and the Guarantee and Indemnity dated 9<sup>th</sup> March 2016 executed between the Plaintiff and 2<sup>nd</sup> Defendant that were both executed and delivered in Nairobi. The Plaintiff therefore submits that the suit has been filed in compliance with Section 15 (c) of the Civil Procedure Act. The Plaintiff relied on the case of **Hangzhou Agrochemical Industries Ltd v Panda Flowers Limited [2012] eKLR** where the Court held that "efficient disposal of the business of the court and efficient use of available judicial administrative resources demand that as much as possible cases be filed within the jurisdiction of the subject matter so as not to clog other registries while others remain unutilized."

9. Regarding whether the suit is time barred, the Plaintiff submitted that while Section 4 of the Limitation of Actions Act provides for different periods of limitation, the PO does not state on which specific provision and/ or limitation the instant proceedings should be dismissed. Therefore, it is the Plaintiff's contention that the PO fails the strict test because examination of evidence is required to determine whether the instant proceedings should be dismissed. For this proposition, the Plaintiff relied on the cases of **Mukhisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696** and **Aviation & Allied Workers Union Kenya v. Kenya Airways Limited & 3 others [2015] eKLR**.

10. In addition, the Plaintiff submitted that Section 23 (3) read together with Section 4 (1) (a) of the Limitation of Actions Act allows the Plaintiff to institute the suit as part payment of the debt by the Defendants on 30<sup>th</sup> September 2017 revived the cause of action regardless of whether or not the same was statute barred. In this respect, the case of **Telkom Kenya Limited v Kenya Railways Corporation [2018] eKLR** and **Nicholas Mahihu Muriithi v Barclays Bank Kenya Limited [2018] eKLR** were relied on. Furthermore, the Plaintiff contended that through issuance of cheques which bounced, the Defendants acknowledged being indebted to the Plaintiff. The case of **Kirpal Singh v Qurbanlite Limited [1978] eKLR** was cited in this regard.

### **Analysis and determination**

11. I have considered the PO together with the respective rival submissions. In the instant matter, the PO is premised on the grounds that this Court has no territorial jurisdiction to hear and determine this matter; that the suit was filed without any authority or capacity and that the instant suit is time barred. To my mind, the issues for determination in the matter are whether this Court has the jurisdiction to hear this suit; whether the suit herein is time-barred; and whether the suit was filed with authority or capacity.

12. In the *locus classicus* case of *Mukisa Biscuits Ltd vs West End Distributors Ltd* [1969] EA 696 the Court of Appeal for East Africa stated as follows:-

**“A preliminary objection is in the nature of what used to be called a demurer. 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”.**

13. The Supreme Court in the case of *Independent Electoral and Boundaries Commission v. Jane Cheperenger & 2 Others* [2015] eKLR expounded on the above principle and the rationale for raising a preliminary objection as follows:-

**“1. Preliminary objection consisted of a point of law which had been pleaded or which arose by clear implication out of pleadings and which if argued as a preliminary point could dispose of the suit. A preliminary objection was in the nature of what used to be a demurrer. It raised a pure point of law which was argued on the assumption that all the facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion. The Court had to be satisfied that there was no proper contest as to the facts. The facts were deemed agreed, as they were prima facie presented in the pleadings on record.**

**2. Preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts were incompatible with that point of law. In the instant case the prayer for consideration of extension of time to file a notice of appeal out of time tied with a claim that the issue had been overtaken by events was a factual issue, to be established by evidence from both parties. Therefore the Court was unable to dispose of the question, without first evaluating evidence from the parties. It raised no pure point of law on its own.**

3. ....

**4. The true preliminary objection served two purposes of merit:**

**1. it served as a shield for the originator of the objection against profligate deployment of time and other resources. and**

**2. it served the public cause, of sparing scarce judicial time, so it could be committed only to deserving cases of dispute settlement. It was distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”**

#### **Whether this Court has jurisdiction**

14. The Defendants contend that this Court lacks the jurisdiction to hear this suit. They rely on **Section 15 of the Civil Procedure Act Cap 21** which provides that when filing a suit, a plaintiff must take into account where the defendant resides or carries business or where the cause of action arose. It reads thus:-

**“Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—**

**(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or**

**(b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or**

**(c) the cause of action, wholly or in part, arises.”**

15. The Court of Appeal in *Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 others* [2017] eKLR stated as follows:-

**“On the last issue, section 15 of the Civil Procedure Act makes provision on where suits should be filed and requires that suits should be filed where the defendant lives or where the cause of action arises. We really do not understand why the appellant, who describes himself as a reputable scholar, bothered to raise this objection in respect of a suit filed in the High Court. Way back in 1958, the former Court of Appeal for Eastern Africa held, in *Riddesbarger v. Robson* [1958] EA 375, that section 15 of the Civil Procedure Ordinance (Now section 15 of the Civil Procedure Act) applies only to subordinate courts and not to the High Court. The reasoning of *Forbes, JA.* was that because the jurisdiction of the High Court (then known as Supreme Court) was provided for by the Kenya Colony Order-in-Council and was national, original and unlimited, it could not be limited by section 15 of the Ordinance. This was simply because the Order-in-Council was juridically a higher norm than the Ordinance. This Court upheld**

that position in *Francis Ndichu Gathogo v Evans Kitazi Ondansa & Another*, CA. No. 287 of 2002, where it reiterated that the jurisdiction of the High Court under the Constitution, being national, original and unlimited, could not be limited by section 15. In addition, the Court was of the view that section 15 was subject to the preceeding provisions of the Act, which deal with the subordinate courts, rather than the High Court. The High Court has followed that view in a number of decisions, among them *Gitau John Kimemia v. Unilever Tea Company Ltd* HCCC No. 63 of 2007; *Jane Wambui Weru v. Overseas Private Inv. Corp & 3 Others*; HCCC No. 83 of 2012; and *Aly Jamal v. Erastus George Momanyi & 2 Others*, HCCC No. 34 of 2014.”

We must reiterate that the High Court of Kenya remains one and the same court, only that it sits at different locations in the country, such as Malindi and Nairobi. The location where it sits cannot therefore affect its jurisdiction. The practice and requirements that suits be filed in particular stations of the High Court are purely for administration and convenience in the hearing and determination of suits. That is not in any way to suggest that such requirements or practice is unreasonable or unnecessary; it is intended to reduce costs of transporting witnesses from one corner of the country to another for hearing of cases and to expedite hearing and determination of suits, thus giving meaning to the overriding objective and the constitutional value in Article 159 which emphasize the need to reduce costs and delay in the hearing and determination of suits. (See *Gititha v. Family Finance Building Society & Others* [2013] 1 EA 75).”

16. In the case of *Atta (Kenya) Limited V Nesfood Industries Limited*[2012] eKLR, cited with approval in *Samuel M. W’njuguna v Benjamin Achode & 8 others* [2013] eKLR, the court stated as follows;

“Be that as it may, given that the Constitution of Kenya Act, 2010 gives this court unlimited original jurisdiction in civil and criminal matters, and given the supremacy of the Constitution over the Civil Procedure Act, and given further that article 159 (2) (d) of the Constitution vouches for substantive justice even in the face of procedural technicalities, a party seeking to oust the jurisdiction of one station of the High Court in favour of another, must, in my view go beyond the face value of the tenets of convenience stipulated in Section 15 of the Civil Procedure Act. At the minimum, the applying party must demonstrate that the right of access to justice under Article 48 of the Constitution is at threat. This should be advanced by placing before the court material showing that beyond the pillars of convenience stipulated in Section 15 of the Civil Procedure Act, there is a verifiable motive on the part of the Plaintiff to use geographical inconvenience to defeat the substantive ends of justice. A mere apprehension of such a possibility may not suffice. Further, the Applicant should demonstrate that it has come to court at the earliest opportunity with its request.”

17. Guided by the foregoing, I find that the Defendants have not demonstrated that there is a motive on the part of the Plaintiff to defeat the substantive ends of justice. Both parties have appointed advocates in Nairobi without any difficulty. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have filed an Amended Defence amended on 22<sup>nd</sup> February 2021 in effect submitting themselves to this Court’s jurisdiction. Therefore, I find that there is no basis to transfer the matter to the High Court at Nyeri for disposal as it is my considered view that it is in neither party’s interests to do so in the circumstances. This ground therefore fails.

#### Whether this suit is time-barred

18. It is common ground that the cause of action in this matter is based on contract. Section 4(1)(a) of the Limitations of Actions Act provides that:-

“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;

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

19. Notably, Section 23 (3) of the Limitation of Actions Act which provides that

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

20. When faced with similar circumstances, the Court of Appeal in the case of *Afro Freight Foundation Ltd v. African Liner Agencies* [2009] eKLR allowed an appeal in favour of the Plaintiff/ Appellant on the basis that Section 23 (3) of the Limitation of Actions Act is applicable to revive a cause of action where there is a proven acknowledgement and time would start running afresh therefrom.

21. In the present matter, although the Defendants contend that the suit is time barred, the Plaintiff’s position is that its case is not time barred on grounds that the Defendants made part payment on 30<sup>th</sup> September, 2017 and that as a result the cause of action was revived. Having looked at the evidence, I concur with the Plaintiff that the time for filing the suit would start running from 30<sup>th</sup> September, 2017, when the Defendants made part payment and that the suit ought to have been filed on or before 1<sup>st</sup> October, 2023. (Refer to annexure GMW-4 to the Response) Therefore, I find that the suit was filed within time.

#### Whether the suit was filed with authority or capacity

22. As to whether the suit was filed with authority or capacity, the Defendants have argued that the suit is founded on an invalid authority to institute suit and that it does not comply with the mandatory provisions of **Sections 23 (2A) and 34 of the Advocates Act.**

23. In response, the Plaintiff has submitted that **Section 23(2A) of the Advocates Act** is applicable to documents which are lodged for registration and not pleadings which are presented to the Court registry for filing. The Plaintiff has also submitted that the pleadings were prepared by associates employed by the law firm representing the Plaintiff and that **Section 34 (1) (ii)** provides an exemption to the rule prescribed in **Section 34 of the Advocates Act.** Having looked at the evidence on record, I find that the Defendants have not established that the Plaintiff has not complied with **Sections 23 (2A) and 34 of the Advocates Act.**

24. With respect to the Defendants' contentions concerning the authority to institute suit, I find that that on 10<sup>th</sup> March, 2020, the term of the Joint Administrators was renewed under **Section 594 of the Insolvency Act** by this Court in **High Court Insolvency Cause No. 14 of 2014 in the Matter of ARM Cement PLC (Under Administration).** This was at the instance of an application filed by the Administrator's Advocates which was allowed by consent on 10<sup>th</sup> March, 2020. **(Refer to annexure GWM-1b to the Response)** Therefore, I find that under **Sections 576 and 583 read together with paragraph 5 of the Fourth Schedule of the Insolvency Act** the Joint Administrators had authority to bring the suit, filed on 18<sup>th</sup> December, 2020, on behalf of the Plaintiff. Moreover, I find that the Defendants have not presented any evidence to the contrary.

25. Regarding the claim that one of the Joint Administrators, **Anthony Muniu Thoiti** signed the Authority to Institute Suit on an unknown date and that his signature was not witnessed by an advocate, the Plaintiff submits that the Authority was in fact dated 18<sup>th</sup> December, 2020 and was witnessed by a Commissioner for Oaths. I find that there is no evidence tendered by the Defendants to the contrary. This contention therefore fails.

26. Regarding the personal liability of the joint administrators and the lack of seal of the Plaintiff, it is my considered view that the Defendants have erred in interpreting Sections 576 and 583 as read with paragraph 5 of the Insolvency Act. Further, I am inclined to agree that the Defendants have failed to demonstrate that the Joint Administrators are agents of the Plaintiff's Board of Directors so as to require the company seal.

#### **Disposition**

27. The upshot is I find that the Preliminary Objection dated 1<sup>st</sup> February, 2021 is unmerited and I therefore dismiss it with costs. It is so ordered.

**DATE AND DELIVERED AT THIS 27<sup>TH</sup> DAY OF MAY, 2021**

**G.W.NGENYE-MACHARIA**

**JUDGE**

#### **In the presence of:**

1. Onyancha for the Plaintiff/Respondent.
2. Miss Mutinda for the Defendant/Objector.