



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 31 OF 2020**

**FRANCIS LIKHABILA..... APPELLANT**

**VERSUS**

**BARCLAYS BANK OF KENYA.....RESPONDENT**

***(Being an appeal from the whole ruling and order delivered on 19 December 2019 at the Chief Magistrate's Court at Nairobi by the Honourable Ms. E. Wanjala in CMCC no. 1423 of 2019)***

**JUDGEMENT**

1. Francis Likhabila, the appellant herein, filed an action before the Chief Magistrate's Court, Nairobi against Barclays Bank of Kenya, the respondent herein in which he sought for judgment vide the plaint dated 28<sup>th</sup> January 2019, in the following terms:

- i. A refund of ksh.111,646/80 plus interest at commercial rates with effect from 14<sup>th</sup> January 2000 until payment in full.***
- ii. Damages for breach of contract.***
- iii. Costs of the suit.***

2. The respondent filed a defence in which it inter alia raised a preliminary point of law which is to the effect that the alleged breach of contract in the plaint is time-barred under Section 4(1) of the Limitation of Actions Act.

3. The respondent later filed a formal notice of preliminary objection dated 23<sup>rd</sup> April 2019. The preliminary objection was disposed of by written submissions. Hon. E. Wanjala, learned Senior Resident Magistrate heard and upheld the respondent's preliminary objection by dismissing the appellant's suit on the basis that the same was statutorily barred by statute vide her ruling delivered on 11<sup>th</sup> July 2019.

4. The appellant being aggrieved by the order, filed the motion dated 22<sup>nd</sup> August 2019 whereof he sought for the dismissal order to be reviewed and set aside. The respondent resisted the motion. The learned Senior Resident Magistrate heard and proceeded to dismiss the motion vide the ruling she delivered on 19<sup>th</sup> December 2019.

5. Being aggrieved by the aforesaid decision, the appellant preferred this appeal whereof he put forward the following grounds of appeal.

- i. The learned magistrate erred in law and fact and contradicted herself in holding that there was no error apparent on the record in dismissing the suit at a preliminary stage despite making a finding that at the time of making the order, the court could not make a determination on one limb of breach of contract as it required taking of evidence.***
- ii. The learned magistrate erred in law and fact in arriving at the conclusion that the appellant's cause of action is as set out in paragraph 4 and 5 of the plaint and not paragraph 13.***
- iii. The learned magistrate erred in law and fact in dismissing the appellant's application without fully appreciating the contents and nature of the application before her.***
- iv. The learned magistrate erred in holding that no sufficient grounds had been set out to warrant orders for review and that the application before court was an attempt by the applicant to have the court to sit on appeal of its decision.***
- v. The learned magistrate erred in law and fact in failing to consider the evidence, relevant authorities and submissions by the appellant thus arriving at a wrong conclusion.***

6. When the appeal came up for hearing, this court gave directions to have the same disposed of by written submissions.
7. I have re-evaluated the arguments that were made before the learned Senior Resident Magistrate. I have further considered the rival written submissions plus the authority cited.
8. Though the appellant put forward a total of 5 grounds, I think there is one main ground in which the appellant argued that the learned trial magistrate contradicted herself by holding that there was no error apparent on the face of the record yet she made a finding that at the time of making the order that the court could not make a determination on one limb of breach of contract as it required the taking of evidence. It is the submission of the appellant that the trial magistrate should have reviewed and set aside the order upholding the preliminary objection.
9. In response to the first ground, the respondent urged this court to find that the learned Senior Resident Magistrate arrived at the correct decision by finding that there was no error apparent on record. The respondent further argued that misconstruing a statute or other provisions of law cannot be a ground for review.
10. The respondent also argued that even if the appellant's argument could be considered that the court made an apparent error on the face of the record by considering the limb on withholding of funds, that the purported error is not capable of review without re-evaluating the pleadings, submissions and evidence available on this matter.
11. Having considered the rival submissions, it is not in dispute that the learned Senior Resident Magistrate stated in her ruling inter alia as follows:

**“The main ground that the plaintiff seeks for review is that the court failed to consider particulars of breach of contract by the defendant as set out in paragraph 13 of his plaint, however my finding is that the court could not have at the preliminary stage and on a preliminary objection determine the issue of breach which would have called for the taking of evidence.”**

12. The learned Senior Resident Magistrate also stated in her ruling in part as follows:

**“.....from the plaint dated 28.1.2019 the cause of action is clearly spelt out in paragraph 4 and 5 hence the ruling on the preliminary objection based on the cause of action as pleaded. I find that there is no error apparent on the record and what the applicant is calling this court to do is to sit on appeal of its own decision.”**

13. The respondent put forward a powerful argument that the trial court could not have considered the appellant's argument that there was a continuing breach without inviting an overdrawn divergent legal arguments from the parties.
14. I have looked at the reply to defence filed by the appellant and it is apparent that in paragraph 2 the appellant averred that the suit is not time-barred but properly before the court. The record also shows that the respondent stated in its written submissions that the suit was brought after the lapse of six (6) years contrary to Section 4(1) of the Limitation of Actions Act.
15. In his written submissions which the appellant filed to resist  
  
The preliminary objection, the appellant stated that the inordinate delay by the defendant (respondent) in giving the plaintiff (appellant) proper information regarding the account kept the statute of limitation in abeyance until the year 2014 when he discovered the breach of contract.
16. The appellant further argued that it is at this point that time started running in respect of this suit. The appellant expressly informed the trial court that the cause of action effectively arose on 19<sup>th</sup> June, 2014. The record shows that the learned Senior Resident Magistrate considered the rival arguments on when the cause of action arose.
17. The learned magistrate appreciated the fact that the respondent responded to the appellant's inquiries in 2014 and that is when the appellant discovered the instructions he gave the respondent in the year 2010 were not acted upon, but nevertheless the trial magistrate proceeded to uphold the preliminary objection.
18. The question on appeal is whether there was an error apparent on record to warrant issuance of an application for review? It is the submission of the appellant that the trial court only dealt with statute of limitation with regard to the failure by the respondent to effect the instructions to transfer the appellant's money from Nairobi to the Kakamega branch. It is pointed out that the ruling did not mention the second limb of the breach of contract nor did the court address the question as to whether the claim was statute barred or not.
19. In my humble view, I think the trial magistrate fell into error when she concluded that there was no error apparent on record. I am satisfied that the appellant demonstrated that there was an error apparent on the face of record which was obvious and a patent mistake.
20. It is apparent that the trial magistrate failed to determine whether the respondent's act of withholding the appellant's money constituted a continuing breach hence not statute barred.
21. The appellant expressly stated in paragraph 13 of the plaint that his claim is founded on a breach of contract in that, first, the respondent failed to effect his instructions and secondly that the respondent withheld his money for no reason at all. It is arguable that the second limb of the claim could be a continuing breach which could not be dismissed on the basis of a preliminary objection.
22. It is clear from the decision of the trial magistrate that she appreciated the fact that an application for review did not need contested and

lengthy arguments. However, it is clear that the error and or mistake pointed out by the appellant in the application for review was apparent and obvious on the face of the record. Simply put, the learned magistrate did not determine whether or not the complaint of withholding the appellant's cash by the respondent was a continuing breach.

23. In the end, I find the appeal to be meritorious. Consequently the appeal is allowed. Therefore, the order dismissing the appellant's motion dated 22<sup>nd</sup> August 2019 is set aside and is substituted with an order allowing the motion.

24. Costs of the appeal is awarded to the appellant. The suit to be set down for hearing before another magistrate of competent jurisdiction other than Hon. E. Wanjala on priority basis.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE, 2021.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent