



**Odero & another v Ndivo & another (Civil Case E105 of 2021)  
[2021] KEHC 289 (KLR) (Commercial and Tax) (25 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 289 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E105 OF 2021  
WA OKWANY, J  
NOVEMBER 25, 2021**

**BETWEEN**

**MELITUS OLUOCH ODERO ..... 1<sup>ST</sup> PLAINTIFF**

**MILD STEEL ENGINEERING WORKS LTD ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**PETER MATHEKA NDIVO ..... 1<sup>ST</sup> DEFENDANT**

**MUKUYUNI FILLING STATION LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect to the application dated 6<sup>th</sup> May 2021 wherein the 2<sup>nd</sup> defendant/applicant seeks orders to strike out the plaintiffs' suit with costs. The application is brought, *inter alia*, under Section 4(1) of the *Limitation of Actions Act Cap 22* and Order 2 Rule 15(1) (d) of the [Civil Procedure Rules](#). It is supported by the affidavit of the 2<sup>nd</sup> defendant's Director Mr. Moses Munywoki Mwendwa and is premised on the grounds that: -
  - i. The Plaintiffs/Respondents filed this suit seeking an order of specific performance against the 2<sup>nd</sup> Defendant to pay Ksh. 10,313,268/- for work done by the 2<sup>nd</sup> Respondent for the Applicant which the Applicant purportedly failed to pay for.
  - ii. The Plaint as filed does not disclose when the cause of action arose, but from the documents filed by the Plaintiffs in support of their claim, more so the auditor's report, the services were rendered between 2<sup>nd</sup> September 2000 and 7<sup>th</sup> October 2012.



- iii. The cause of action arose on 7<sup>th</sup> October 2012 when the last invoice was raised and purportedly not paid which period of time for filing this suit is time barred as per the provisions of the Limitations of Time Act,
  - iv. The Plaintiffs have not sought the leave of this Honourable Court to file the suit against the 2<sup>nd</sup> Defendant out of time and as such the suit as filed against the 2<sup>nd</sup> Defendant is time barred and this Honourable Court consequently lacks jurisdiction to hear and determine the claim as against the 2<sup>nd</sup> Defendant.
2. The Plaintiffs opposed the application through the 1<sup>st</sup> plaintiff's replying affidavit sworn on 26<sup>th</sup> May 2021 wherein he states that the application lacks merit and is a tactic employed by the 2<sup>nd</sup> Defendant/Applicant to waste the courts time. He explains that the Plaintiff filed the plaint on the 22<sup>nd</sup> day of February, 2021 upon receiving an audit report which revealed glaring lapses on the part of the 1<sup>st</sup> defendant who was found to have grossly defrauded the company in collaboration with the 2<sup>nd</sup> Defendant thereby driving the 2<sup>nd</sup> Plaintiff to heavy financial losses. He adds that the audit report was presented to the 2<sup>nd</sup> Plaintiff/Respondent on the 12<sup>th</sup> of December 2020 in which case, limitation period started to run on the date that the fraud was discovered.
  3. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the defendants have made out a case for the striking out of the suit for having been filed out of time without the leave of the court.
  4. The 1<sup>st</sup> defendant submitted that even though the plaintiff's case is founded on an alleged contract for supply of goods or services, no contract document was produced to indicate when payment was due under the contract. The 1<sup>st</sup> defendant noted that since the documents submitted by the plaintiffs show that the last invoice was issued in the year 2012, it means that time started to run in the said year which is therefore the time that the cause of action arose. Reference was made to the decision in [\*Joseph Odira Ombok vs. South Nyanza Sugar Company Ltd \[2018\] eKLR High Court Civil Appeal No. 83 of 2018\*](#) where the court discussed Limitation period in actions founded on contract thus: -

“Turning to the substantive issue, section 4(1)(a) of the LAA provides as follows:

The following action may not be brought after the end of six years from the date when the cause of action accrued

(a) actions found on contract

The question before the trial magistrate was when did the respondent's cause of action accrue for purposes of section 4(1)(a) of the LAA Two arguments, which had the support of decided cases, were made by the parties. The appellant took the position in *South Nyanza Sugar Company Limited v Diskson Aoro Owuor MGR HCCA No. 85 of 2015 [2017] eKLR* where the court held that;

There is no doubt in this matter that the parties entered into a contract and which contract was allegedly breached. What is for determination is when exactly the cause of action accrued since from that time the limitation period of 6 years starts running. I do not find that issue difficult to decide on. I say so because when a party enters into a contract for a specific period of time, it does so in the understanding and belief that each of the parties to the contract will observe its part thereof until full execution of the contract. It is only when one of the



parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period.”

5. The 2<sup>nd</sup> defendant reiterated the 1<sup>st</sup> defendant’s submissions and argued that since the audit report indicates that the last invoice was raised on 7<sup>th</sup> October 2012 that was the date that the cause of action arose. It was submitted that the plaintiff therefore ought to have filed the suit to recover the claimed amounts from the 2<sup>nd</sup> Defendant by 7<sup>th</sup> October 2018 in line with the provisions of the Limitation of Actions Act. The 2<sup>nd</sup> defendant maintained that this suit is time barred having been filed without the leave of the court 2 years and four months after the limitation period had lapsed.
6. Regarding the plaintiffs claim that their suit is founded on fraud and that time begins to run from the date that the fraud is discovered, the defendants submitted that the particulars of fraud were not pleaded.
7. The plaintiffs, on the other hand, submitted that they had pleaded fraud on the part of the 1<sup>st</sup> defendant which fraud was revealed in the audit report dated 12<sup>th</sup> December 2020. They urged the court to note that the pleadings establish that there was collusion between the 1<sup>st</sup> and 2<sup>nd</sup> defendants who are connected to each other by dint of directorship. They also submitted that there was the claim over the of destruction of company records by the 1<sup>st</sup> defendant in order to defeat the Plaintiffs claim.
8. According to the plaintiffs, this court has the jurisdiction to hear and determine the suit as the cause of action arose on the date that they received the audit report being 12<sup>th</sup> December 2020. They argued that time starts to run from the date that the demand for payment is made.
9. Section 26 of The Limitation of Action Act provides for extension of limitation period in case of fraud or mistake as follows: -

Where, in the case of an action for which a period of limitation is prescribed, either -

- a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or (
  - b) the right of action is concealed by the fraud of any such person as aforesaid; or
  - c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:
10. I have perused the plaint and I note that the plaintiffs state as follows at paragraph 14 thereof: -

“The 1<sup>st</sup> defendant also fraudulently obtained money, company assets and services from the 2<sup>nd</sup> defendant and refused to pay back or account for the same and destroyed records in an effort to conceal the scam as indicated below.

Particulars of negligence, breach of duty, trust and theft of company resources by the 1<sup>st</sup> defendant.

    - a. Fraudulently obtaining and diverting money, company assets and services from the plaintiffs for his own benefit.
    - b. Destruction of Company assets/records of accounts in an effort to conceal the theft and misappropriation of funds.



- c. Failure to remit to the plaintiffs Kshs 22,040,000 paid to him by purchasers from sale of assorted items including storage tanks, pipes, sheds and valves in South Sudan.
  - d. Failure or refusal to remit Kshs 466,157 it paid on his behalf by the plaintiffs through Hire Purchase to Cooperative Bank of Kenya to purchase a truck registration number KCD487Q.
  - e. Refusal to pay the plaintiffs for fabrication and installation of a tanker of 10,000 litres capacity on the same truck totaling to Kshs 420,000.
  - f. Failure to remit to Afritech General Suppliers Ltd, a supplier a total of Kshs 900,000 despite collecting the amount from the 2<sup>nd</sup> plaintiff.
  - g. Failure to remit to Insteel Limited, a supplier a total of Kshs 22,300 despite collecting the amount from the 2<sup>nd</sup> plaintiff.
  - h. Fraudulently taking possession and retaining for his own benefit Kshs 300,000 paid to him meant for the 2<sup>nd</sup> plaintiff in cash by Rupingazi Service Station.
  - i. Failure or refusal to service or cover an outstanding bank loan of Kshs 499,219 on motor vehicle registration No. KBM 776P after he acquired the car from the 2<sup>nd</sup> plaintiff.
  - j. Failure of the 1<sup>st</sup> defendant to exercise reasonable care, skill and diligence in conjunction with the 2<sup>nd</sup> defendant by frustrating any attempts by the 2<sup>nd</sup> plaintiff to recover Kshs 10,313,263 for services rendered by the 2<sup>nd</sup> plaintiff to the 2<sup>nd</sup> defendant.
  - k. Exposing the plaintiff to unnecessary law suits by suppliers.
11. Considering the full import of the particulars listed hereinabove, it is clear that the plaintiffs' suit is founded on fraud, negligence, theft and breach of duty. I note that even though the defendants argued that the particulars of fraud were not pleaded, I find that the particulars listed at paragraph 14 of the plaint include fraud among other claims made against the defendants. However, even assuming that particulars of fraud were not pleaded, I note that pleadings had not closed as at the time that the instant application was filed and one can therefore say that the plaintiffs still have the opportunity to amend their pleadings so as to include the particulars of fraud.
12. In sum, looking at the plaint that is sought to be struck out, I cannot see any clear averment that conclusively shows that the Plaintiff's action is statute barred. At paragraph 6 of the plaint the plaintiffs state that the 1<sup>st</sup> defendant appeared at a board meeting held on 31/03/2020 and casually expressed his wish to retire as the Managing Director. At paragraph 12 of the plaint, it is averred that the audit report that exposed the fraudulent activities was obtained on 21<sup>st</sup> December, 2020. The instant suit was filed one year later.
13. I find that a conclusive decision on whether or not the Plaintiff's action is time barred will depend on the construction the documents availed before the court and further evidence to be adduced at the hearing. I therefore cannot, at this stage, hold that the plaint, as drawn, attracts the penalty of being struck out for being statute barred.
14. Consequently, I decline to grant the orders sought in the instant application which I hereby dismiss with orders that costs shall abide the outcome of the main suit.



DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL 2020.

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Angaya for Plaintiff.

Mr. Nduhiu for 1<sup>st</sup> Defendant

Ms Mwangi for Chege for 2<sup>nd</sup> Defendant

Court Assistant: Margaret

