



**First Community Bank Limited v Cecil G. Miller t/a Miller
& Company Advocates (Commercial Civil Case E055 of 2019)
[2021] KEHC 284 (KLR) (Commercial and Tax) (19 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 284 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E055 OF 2019
DAS MAJANJA, J
NOVEMBER 19, 2021**

BETWEEN

FIRST COMMUNITY BANK LIMITED PLAINTIFF

AND

CECIL G. MILLER T/A MILLER & COMPANY ADVOCATES DEFENDANT

RULING

1. The Defendant (“the Advocates”) have filed a Notice of Preliminary Objection (“the Objection”) dated 15th December 2020. They assail the Plaintiff’s (“the Bank”) suit on the ground that it is incompetent and fatally defective on two grounds; that it is filed outside the period contemplated under section 4 of the *Limitation of Actions Act* (Chapter 22 of the Laws of Kenya) and that there is no Board Resolution by the Bank sanctioning and/or authorizing the institution of the suit as against them or the appointment of Kenyariri & Associates, Advocates to institute the suit.
2. The Objection was canvassed by way of written submissions with the parties advancing their respective positions.
3. A brief summary of case as set out in the Plaint and Statement of Defence is as follows. The Bank retained the Advocates to render legal services to it and more specifically, it instructed them to prepare and register securities extended to a borrower, Allied (E.A) Limited. By a letter dated 23rd April 2015, the Advocates informed the Bank that they had successfully perfected the securities and advised the Bank to release the loan amount to the borrower. The Bank accuses the Advocates of being in breach of the express and implied terms of the retainer agreement and negligently carrying out the instructions as the Bank would later discover that its security, an All Assets Debenture, ranked 3rd in priority to other debenture holders thereby greatly affecting the Bank’s security for the monies lent to the borrower.



The Advocates denied the allegations of negligence and stated that they relied on information provided by third parties.

The Advocates' Submissions

4. The Advocates ground their case on the oft cited case of *Mukisa Biscuits Manufacturing Ltd v Westend Distributors [1969] EA 696* and state that accrual of the cause of action can be determined from the Plaintiff dated 1st April 2019, drawn and filed by the firm of Kenyariri & Company Advocates and where from the Court stamp on its face shows that it was filed on 1st April 2019 and that from the Bank's bundle of documents, the debenture was registered on 16th April 2015, thus, the Bank's cause of action accrued and/or arose on this date. The Advocates thus contend that the Plaintiff having been filed on 1st April 2019, it was initiated over 3 years, 12 months and 15 days from the date of accrual of the cause of action arising from the registration of the impugned debenture.
5. The Advocates submit that from the undisputed facts set out above, the suit was filed outside the time provided in section 4(2) of the *Limitation of Actions Act* which provides that, "An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued." To buttress their submission, they cite *Jones M. Musau & another v Kenya Hospital Association & another NRB CA Civil Appeal No. 42 of 2016 [2017] eKLR* and *Leisure Lodges Limited v Amirali Shariff NRB CA Civil Appeal No. 192 of 2015 [2019] eKLR* and urge that the suit ought to be struck out. The Advocates further rely on the Supreme Court's decision in *Mary Wambui Munene v Peter Gichuki King'ara & 2 others SCOK Petition No. 7 of 2014 [2014] eKLR* to submit that the issue of time limitation is a jurisdictional issue and a successful plea denies the court the jurisdiction to entertain the suit as it renders the proceedings void ab initio.
6. The second ground of attack by the Advocates is that the Verifying Affidavit accompanying the Plaintiff does not state whether the deponent was authorized by the Bank to swear it on its behalf. It states that the Bank has not included a resolution confirming that it has authorized the institution of the suit or appointment of Kenyariri and Associates Advocates to file suit on its behalf either in the deposition or in its List of Documents. The Advocates rely on the decisions of the court in *Kenya Commercial Bank Limited v Stage Coach Management Ltd ML HCCC No. 45 of 2012 [2014] eKLR* and *East African Portland Cement Ltd v Capital Markets Authority & 4 others NRB HC Petition No. 600 of 2013 [2014] eKLR* to urge the court to dismiss the suit for being filed without due authority and that the firm of Kenyariri & Associates Advocates do bear the costs of the suit.

The Bank's submissions

7. The Bank challenges both the competence and substance of the Objection. On the issue of limitation, the Bank submits that the Statement of Defence does not specifically plead the defence of limitation as required under Order 2 Rule 4 of the *Civil Procedure Rules* hence they cannot raise the plea of limitation as a preliminary objection in the manner that they have. It cites *Abdikadir Mohammed v Sammy Kagiri & another MRU HCCA No. 102 of 2011 [2016] eKLR* to support this position.
8. The Bank submits that a Preliminary Objection is based on pure points of law that does not warrant an interrogation of facts yet the Advocates' have raised a factual issue on whether there exists a board resolution authorizing the institution of the suit by the Bank's board. As this is not a pure point of law and is one that requires a factual inquiry, the Bank submits that is not a Preliminary Objection and cites *Moses Parantai & another v Keekonyoike Community Trust & another NRB CA Civil Appeal No. 297 of 2016 [2020] eKLR* to support this submission.
9. The Bank submits that in any case, the issue of lack of a board resolution can be cured/ratified as was held in *Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar*



Company Limited ML HCCC No. 192 of 2015 [2016] eKLR. On the challenge based on section 4 of the Limitations of Actions Act, the Bank submits that the suit is not only founded on a tort of negligence but also on breach of contract, that is, the retainer agreement and that a reading of the Plaintiff confirms that its claim is for breach of professional duty based on the retainer agreement. The Bank also submits that since the Advocates did not plead the limitation under section 4(2) of the *Limitation of Actions Act*, it was denied the opportunity to rely on section 27(1) thereof.

Analysis and Determination

10. In determining whether a preliminary objection is merited, the Supreme Court, in *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others SCOK Petition No. 10 of 2013 [2014]eKLR*, endorsed the principle in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors (Supra)*, where the apex court stated as follows:

[31] To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors (1969) EA 696*:

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. 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’. [Emphasis mine]

11. For one to succeed in putting up a Preliminary Objection, the facts pleaded by the other party are assumed to be correct, it must be a matter of law which is capable of disposing off the suit, it must not be blurred by factual details calling for evidence and it must not call upon the Court to exercise discretion.
12. The Advocates admit that they did not plead the issue of limitation. In *Stephen Onyango Achola & another v Edward Hongo Sule & another NRB Civil Appeal No. 209 of 2004 [2004] eKLR*, the Court of Appeal in line with Order 2 rule 4 of the Civil Procedure Rules held that a party must plead the issue of limitation in its defence and that failure to do so disentitles a party from subsequently raising it as a preliminary objection or during the trial of the suit unless the party amends its defence. In response to this decision, the Advocates submit that the decision pre-dated the *Constitution* whose Article 159(2) (d) obligates the Court to administer justice without due regard to procedural technicalities and that holding otherwise and dismissing their Objection would be elevating procedural law above substantive law.
13. The Court of Appeal, in a subsequent decision dated 18th October 2013, which was after promulgation of the 2010 Constitution, *Abdullahi Ibrahim Ahmed (Suing As The Personal Representative Of The Estate Of Anisa Sheikh Hassan (Deceased)) v Lem Lem Teklue Muzolo NRB CA Civil Appeal No. 278 of 2005 [2013] eKLR* cited its earlier decision *Stephen Onyango Achola & another v Edward Hongo Sule & another (Supra)* and reiterated that:

‘In terms of Order 2 Rule 4 (1) the issue of limitation must be specifically pleaded before a court can act on it.

In the case of *Achola & Another V. Hongo & Another LLR No. 4007 [CAK]* this Court quoting *Halburys Laws of England*, fourth edition, volume 36 at paragraph 48 page 38 headed; “Matters which must be specifically pleaded” stated;



“The defendant must in his defence plead specifically any matter which he alleges makes the action not maintainable or which, if not specifically pleaded might take, the plaintiff by surprise or which raises issue of fact not arising out of the statement of claim. Examples of such matters are performance, release, any relevant statute of limitation, fraud or any act showing illegality.”

14. The view that the defence of limitation must be pleaded is not inconsistent with the holding that limitation is a jurisdictional issue as has been held in several decisions including *Anacet Kalia Musau v Attorney General & 2 Others NRB CA Civil Appeal No. 111 of 2017 [2020] eKLR* where the Court of Appeal held that time limitation is a jurisdictional question and that if a matter is statute-barred, a court has no jurisdiction to entertain it and cited *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others SCOK Petition No. 19 of 2018 [2018] eKLR* where the apex court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue on its own motion. Thus, if the issue of limitation has not been pleaded, it may be raised by the Defendant as a preliminary objection or by the court on its own motion.
15. The rule that a party must plead limitation and indeed any defence that would defeat a claim is salutary and good practice and underpins a fair trial that a party must have notice of the case against it to avoid being taken by surprise. The reason why the law requires the defence of limitation to be pleaded is that the opposing party may have a response that would defeat the claim of limitation. It must not also be lost to the Defendant, that the Defence of limitation can be waived (see *Stephen Onyango Achola & another v Edward Hongo Sule & another (Supra)*). The party facing a defence of limitation must therefore be given an opportunity to set out the facts upon which the court may conclude that the defence is not well founded. It upon a proper plea that court may determine that the issues is one that warrants an investigation of the facts. In sum, there are some instances where a plea of limitation may not be suitable for determination as a preliminary objection.
16. Turning to the matter at hand, the Bank’s cause of action arose or accrued on 16th April 2015 and that the claim being an action founded on tort, ought to have been brought within three years from this date as provided for by section 4(2) of the *Limitation of Actions Act*. The Bank on the other hand does not dispute that its cause of action arose on this date but then argues that it is founded on both tort and contract. The Bank also finds shelter in section 27 of the *Limitation of Actions Act* which provides that:
 27. Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.
 - (1) Section 4(2) does not afford a defence to an action founded on tort where—
 - (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
 - (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
 - (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
 - (d) the requirements of subsection (2) are fulfilled in relation to the cause of action.



- (2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—
 - (a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and
 - (b) in either case, was a date not earlier than one year before the date on which the action was brought.
- (3) This section does not exclude or otherwise affect—
 - (a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or
 - (b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

17. The subsequent section 28 provides that for a party to obtain the benefit of section 27 above, they ought to seek leave of court. The Bank submits that it did not plead section 27 above as the Advocates did not plead the limitation under section 4(2), which was prejudicial to it. The Advocates on the other hand dispute the existence of a retainer agreement and thus deny the claim of breach of contract. They further urge the court to take note of the adjective “and” which is used conjunctively in section 27 above and hold that the said provision is inapplicable to the Bank’s case.

18. As stated in the introductory part, the Advocates admitted in their statement of defence that they were retained and instructed by the Bank to perfect securities in favour of the Bank. The Bank, in its Plaint, accuses the Advocates of breach of contract in respect of “the retainer agreement”. The Advocates deny the existence of such a retainer agreement. In my view, whether such a retainer agreement exists and the terms thereof is a question of fact to be determined at the trial and likewise the issue whether the Banks claim, which is founded on tort and contract, is time barred.

19. The relationship between an advocate and client is a contractual one. Where the advocate acts negligently in performing his duties under the contract, he could be held liable for professional negligence for breach of duty, which is a tort. This what the Court of Appeal stated in *Kinluc Holdings Ltd v Mint Holdings Ltd & Another NRB CA Civil Appeal No. 264 of 1997 [1998] eKLR*:

What the learned Judge did not consider was “what is the duty of an advocate owes to his client when he is asked to see to it that he has the money in his client’s account before effecting registration of transfer? Had the learned judge considered this he would well have said that the client (vendor) has a cause of action against the advocate. What we have so far said shows, at least prima facie, that the vendor has a cause of action against the advocate for breach of contract as well as a possible negligence and we are not prepared to say at this stage that the advocate was not negligent or that he was in no breach of duty. That must be a matter for the trial court after a full hearing.

20. Returning to the issue of negligence, I am of the firm view that in the circumstances of this case, the defence of limitation ought to have been pleaded. I say so because, the parties have submitted whether



indeed section 27 of the *Limitation of Actions Act* is available to the Bank. Resolution of this issue is a matter of evidence as the Bank has to show that it has obtained leave and it can only show that if the matter had been pleaded. Resolution of the matter through a preliminary objection would deny the Bank the right to respond appropriately since the court is limited to looking at the pleadings.

21. While the authorities cited by the Advocates are clear that the issue of limitation is a jurisdictional issue, they do not foreclose such a matter being one of pure law or mixed fact and law nor do they dictate that the issue of limitation must be raised as a preliminary objection. It is for these reasons that I hold that the preliminary objection on the issue of limitation is not well founded as a preliminary objection.
22. The Defendant did not plead the issue of a Board Resolution authorizing the suit in its Statement of Defence. It is a factual issue that must be settled by providing evidence of such resolution. A preliminary objection in the absence of a plea in the Defence to that effect requires the Bank to respond by providing evidence, which may or may not be disputed. I therefore find and hold that this limb does not constitute a preliminary objection.
23. I would also point out that the verifying affidavit in support of the Plaintiff is sworn by Yahya Dahit, the Bank's corporate manager. Although he does not state expressly that he is duly authorized by the Bank, the Defendant does not dispute that he holds that position in the Bank and that as an officer of the Bank, he is its agent and authorized to act on its behalf. The point here is that this is a question of fact that can only be resolved by a proper plea before the court and evidence.
24. The Advocates do not deny that such a defect can be cured by providing the relevant resolution and the duly authorized officer swearing a verifying affidavit stating that he was duly authorized. There is no requirement in the Civil Procedure Rules that authority to file suit must be filed or that it cannot be produced on a subsequent date (see *Leo Investments Ltd v Trident Insurance Company Ltd [2014] eKLR* and *Republic v Registrar General & 13 Ors [2005] eKLR*). Indeed, in *Kenya Commercial Bank Limited v Stage Coach Management Ltd (Supra)* although the learned judge struck out the suit, he found the plaintiff could produce the authorization to file suit.
25. To assuage and dispel any doubts the Advocates may have about the suit, I direct the Bank to provide a resolution of its board authorizing and or ratifying the filing of this suit by the firm of Kenyariri & Associates Advocates within the next 30 days.

Conclusion and Disposition

26. In summary, I have found the grounds raised in the Preliminary Objection are not preliminary objections within the meaning of *Mukisa Biscuits Manufacturing Ltd v Westend Distributors (Supra)* and it is for those reasons I dismiss the Defendant's Notice of Preliminary Objection dated 15th December 2020 with costs to the Plaintiff. I direct the Plaintiff to provide its resolution authorizing and or ratifying the filing of this suit by the firm of Kenyariri & Associates Advocates within the next 30 days.

DATED and DELIVERED at NAIROBI this 19th day of NOVEMBER 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Ms Lipwop instructed by Issa and Company Advocates for the Plaintiff.

Mr Mugambi instructed by Muthoga Gaturu and Company Advocates for the Defendant.

