



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 254 OF 2018

CHACKROS INVESTMENTS LIMITED.....APPELLANT

VERSUS

HACO INDUSTRIES [K] LIMITED.....RESPONDENT

JUDGMENT

1. By a plaint dated 13th June 2016, the appellant sued the respondent seeking general damages for breach of contract; special damages in the sum of KShs.11,281,094.79; costs of the suit and interest.
2. A perusal of the plaint reveals that the appellant's claim was based on an alleged breach of a distribution agreement executed by the parties on or about 5th November 2009. The terms of the agreement were specified in paragraph 5 of the plaint. It was the appellant's case that on or about 14th June 2010, the respondent breached the terms of the said agreement by terminating it arbitrarily without any justifiable cause occasioning it loss and damage.
3. Upon being served with the plaint, the respondent filed a statement of defence and counterclaim dated 15th August 2016. The respondent denied having entered into any agreement with the appellant as alleged and claimed that the contract referred to by the appellant was entered into with *Charles Njoroge Waruru* and *Roselyn Njeri Njoroge* trading as Chackros Investments and not with the appellant; that the appellant was incorporated on 20th August 2010 after the aforesaid contract had been executed and terminated on 14th June 2010; that the appellant cannot therefore claim any rights under the distribution agreement.
4. The respondent's averments were denied in *toto* in the appellant's reply to the defence and defence to the counterclaim filed on 7th September 2016.
5. On 9th March 2018, the respondent filed a notice of preliminary objection raising three grounds which I reproduce verbatim as follows:
 - i. *That the plaintiff's suit is statute barred under Section 4 of the Limitation of Actions Act Cap 22 Laws of Kenya in that the plaintiff seeks to enforce a contract dated 5th November 2009;*
 - ii. *The plaintiff company has no locus standi to enforce a contract signed on 5th September 2009 before it was incorporated on 20th August 2010; and*
 - iii. *The plaintiff cannot enforce the contract dated 5th September 2009 that was terminated on 14th June 2010 before it was incorporated on 20th August 2010.*
6. The record shows that the preliminary objection was prosecuted by way of written submissions. The learned trial magistrate after considering the parties' written submissions delivered his ruling on 29th August 2018 and upheld the preliminary objection. He consequently dismissed the appellant's suit with costs. The appellant was aggrieved by the trial court's decision hence this appeal.
7. In its memorandum of appeal dated 6th June 2018, the appellant advanced five grounds of appeal which can be condensed into two main grounds as follows:
 - i. That the learned trial magistrate erred in law and fact in finding that the appellant's suit was statute barred;
 - ii. That the learned trial magistrate erred in law in finding that the issue of the appellant's legal character and capacity as well as the

other points taken in the respondent's objection met the legal threshold of a preliminary objection.

8. When the appeal came up for hearing, both parties agreed to have it disposed of by way of written submissions. The appellant filed its submissions on 22nd February 2019 while those of the respondent were filed on 11th March 2019.

9. I have carefully considered the rival submissions filed by both parties and all the authorities cited. I have also considered the grounds of appeal and the record of appeal including the ruling of the learned trial magistrate.

10. Having done so, I find that only two issues arise for my determination in this appeal, namely:

i. Whether the grounds raised in the notice of preliminary objection dated 9th March 2018 qualify to be preliminary points of law; and

ii. Whether the learned trial magistrate erred in dismissing the appellant's suit on grounds that it was statute barred.

11. Starting with the first issue, a preliminary objection was defined in the celebrated case of *Mukhisa Biscuit Manufacturing Company Limited V West End Distributors Company Limited, (1969) E.A. 696* by Law JA in the following terms:

“So far as I am aware, 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.”

In the same case, *Sir Charles Newbold P* described a preliminary objection as follows:

“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. ...”

12. The requirement that a preliminary objection must be based on uncontested facts which can only be ascertained from the pleadings was further expounded by *Ojwang J* (as he then was) in *George Oraro V Barak Eston Mbaja, Civil Suit No. 85 Of 1992 [2005] eKLR* when he opined that:

“A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr Ougo, that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.”

13. My reading of the rival submissions filed by the parties reveal that the parties' are in agreement that the first ground raised in the objection attacking the validity of the appellant's suit on grounds that it was statute barred met the legal threshold of a preliminary point of law. I agree with the position taken by the parties because whether or not a suit is statute barred is a pure point of law which can be determined on the basis of the pleadings without any reference to evidence and it can on its own lead to the disposal of an entire suit.

14. From the grounds of appeal, it is apparent that the appellant is of the view that the other grounds raised in the preliminary objection did not constitute pure points of law that could properly form the basis of a preliminary objection as in its view, they were based on disputed facts which required proof by way of evidence.

15. The respondent on its part maintained that the appellant's lack of capacity to institute the suit was clear from the pleadings given its averment in its defence and counterclaim that the appellant was not privy to the contract having been incorporated after the contract was executed and terminated which averment was not contested by the appellant.

16. After closely examining the pleadings, I take a different view of the matter. I find that the averments in paragraphs 3 and 4 of the defence in which the respondents denied that there was privity of contract between the parties claiming that the appellant was incorporated on 20th August 2010 long after the distribution agreement was executed and terminated were contested in paragraph 4 of the appellant's reply to the defence and counterclaim.

17. The above in effect means that the appellant's *locus standi* in the suit was contested. Given the manner in which the issue was raised, there is no doubt that this was a factual issue which required to be proved by way of evidence in the course of the trial. The learned trial magistrate erred in failing to appreciate that the respondent's claim that the appellant was incorporated on 20th August 2010 after the contract was terminated was disputed by the appellant. The learned trial magistrate thus misdirected himself by treating the last two grounds of the notice of preliminary objection as proper preliminary points of law and in determining them *in limine*.

18. Turning to the second issue, I find that it is not disputed that the appellant's claim was based on contract; that the contract was executed on 5th November 2009 and terminated on 14th June 2010. In his ruling, the learned trial magistrate held as follows:

“The plaintiff herein relies on a contract that was entered on 5th November 2009. In the agreement the distributor is described as Chakros Investments. The suit herein was failed (sic) on 15th June 2016 which is clearly over the six year limitation period set out in section 4 of the Limitation of Action Act.”

19. Section 4 of the *Limitation of Actions Act* provides for limitation of time for actions based on tort and contract among others. Section 4 (1) (a) makes it clear that:

“Actions founded on contract cannot be instituted after the end of six years from the date on which the cause of action accrued.”
(Emphasis mine)

20. Section 4 (1) (a) of the *Limitation of Actions Act* is very clear. It prohibits the filing of suits based on contract after the expiry of six years from the date the cause of action arose or accrued. This means that the limitation period starts running not from the date of execution of the contract but from the date the cause of action arose.

21. In this case, the appellant’s cause of action was breach of contract arising from the manner in which the respondent allegedly terminated the contract subject matter of the suit. From the pleadings, the cause of action arose on 14th June 2010 when the respondent terminated the contract and this is the date on which the six year limitation period started running. That being the case, it is obvious to me that the appellant’s suit was filed within the time prescribed by the law.

22. The learned trial magistrate erred in law in calculating the six year limitation period from the date of execution of the contract instead of the date on which the alleged breach of contract occurred thereby arriving at the erroneous conclusion that the appellant’s suit was statute barred.

23. For all the foregoing reasons, I am satisfied that the appeal is merited and it is hereby allowed. The ruling of the trial court dated 29th May 2018 is accordingly set aside and is substituted with a ruling of this court dismissing the respondent’s preliminary objection dated 9th March 2018 with costs to the appellant. The appellant’s suit shall now proceed for hearing in the Chief Magistrate’s Court Milimani before any magistrate of competent jurisdiction other than *Hon. P. N. Gesora (CM)*.

24. On costs, the order that best commends itself to me is that each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 31st day of July, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Karwithia holding brief for Mr. Thuku for the respondent

No appearance for the appellant though duly served with the judgment notice

Mr. Salach: Court Assistant