



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 176 OF 2013

KENYA FORESTRY RESEARCH INSTITUTE.....PLAINTIFF

VERSUS

BONIFACE PETER NDEGWA.....1ST DEFENDANT

JACKSON MUGWE NDEGWA.....2ND DEFENDANT

RULING

INTRODUCTION

1. On 22nd April 2013, the Plaintiff filed suit seeking the following reliefs against Bon Motors Limited for:-

- a. Recovery of Kshs 2,853,615, (sic) being the amount the defendant unlawfully and wrongfully claimed from the Kenya Revenue Authority;**
- b. Damages for non-delivery of the remaining ten vehicles;**
- c. Damages for breach of contract;**
- d. Interest on (a) , (b) and (c) at prevailing court rates for such period as this Honourable Court may deem fit; and**
- e. Costs of this suit.**

2. It amended its Complaint on 6th September 2013 where the name of Bon Motors Limited was deleted and substituted with the 1st and 2nd Defendants' names herein. The reliefs which were now being sought from the Defendants herein were not altered and/or amended.

3. The suit was listed for dismissal of suit on 13th April 2018 before Njuguna J. In a Ruling delivered on 3rd May 2019, the learned judge directed the Plaintiff to prosecute its suit within one hundred and twenty (120) days. On 23rd May 2018, the Plaintiff filed a Notice of Motion application dated 4th May 2018 seeking the re-issue of Summons to Enter Appearance. It contended that the suit could not be prosecuted within the stipulated period because Summons to Enter Appearance had not yet been served upon the Defendants herein.

4. Mbogholi Msagha J allowed the said application and the re-issued Summons to Enter Appearance. The said Summons to Enter Appearance were subsequently served upon the Defendants herein who entered appearance on 31st July 2018. On 28th August 2018, the Defendants filed their Statement of Defence and Notice of Preliminary Objection both dated 7th August 2018. It was this Preliminary Objection that is the subject of the Ruling herein.

5. The Defendants' Written Submissions and List of Authorities were both dated 12th April 2019 and filed on 15th April 2019 while those of the Plaintiff were dated 3rd May 2019 and filed on 8th May 2019.

6. Parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. The Defendants submitted that there was no privity of contract between themselves and the Plaintiff herein because all the documents the

latter was relying upon were by Bon Motors Limited and that Kenya Revenue Authority (KRA) had asked it to recover the monies from the said company. It submitted that the company is a different person from the subscribers of the memorandum. It referred the court to several cases amongst them the case of **Salmon vs A Salmon & Company Limited [1897] AC 22** where the common thread was that a body corporate was a separate independent identity in law.

8. They further submitted that the suit was barred by Limitation of time on the ground that having been a contract, the Plaintiff could not bring its claim after the end of six (6) years as had been stipulated in Section 4(1)(a) of the Limitations of Actions Act Cap 22 (Laws of Kenya). In this regard, they relied on the case of **Joseph Mungai Wanene vs Housing Finance Company of Kenya Limited [2019] eKLR** in which it was held that limitation was to protect defendants against unreasonable delay in bringing suits against them.

9. They further submitted that since the Plaintiff's claim against them was for the recovery of VAT Refund from KRA, their claim could not be brought after three (3) years for the reason that their allegation constituted the commission of the tort of retinue. It was their argument that the Plaintiff ought to have filed its claim for retinue against Bon Motors Limited by latest 26th August 2010.

10. On its part, the Plaintiff submitted that the question of whether or not it was entitled to recover the VAT refunds from KRA was a matter of fact that could not be determined in a preliminary objection. It added that the circumstances regarding the lifting of the veil was a matter of fact for each case.

11. It added that the Defendants had misunderstood its case in arguing that its suit was time barred. It relied on the provisions of Section 26 of the Limitations of Actions Act which provides that if the right of action is concealed by fraud, time does not begin running until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.

12. In the case of **Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd [1969] EA 696**, the then Court of Appeal of East Africa defined a preliminary objection as one which:-

"...consists of a point of law which has been pleaded, or which arises by clear implication, and which if argued as a preliminary point, may dispose of the suit..."

13. The questions of limitation of the Plaintiff's claim or that of privity of contract between it and the Defendants was not as straight forward as the Defendants had contended. The answers to these questions were matters of evidence which could only be ascertained during trial. To strike out the Plaintiff's suit *in limine* would be to drive it out and/or from the seat of justice and deny it an opportunity to present its case. This would be contrary to Article 50(1) of the Constitution of Kenya, 2010 that gives every party a right to have its dispute determined fairly and in a court of law.

14. Accordingly, having considered the parties' respective Written Submissions and the case law, this court came to the conclusion that the Defendants had not demonstrated that the issues they had raised in the Preliminary Objection were capable of disposing of the suit herein. Indeed, a preliminary objection cannot be sustained if the issues raised therein were factual and had to be ascertained as was held in the case of **Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd** (Supra) where it was also held that:-

"...a preliminary objection cannot be raised if any fact has to be ascertained..."

DISPOSITION

15. For the foregoing reasons, the upshot of this court's decision was that the Defendants' Preliminary Objection dated 7th August 2018 and filed on 28th August 2018 was not merited and the same is hereby dismissed with costs to the Plaintiff.

16. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2019

J. KAMAU

JUDGE