



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 350 OF 2011**

**NAJIR JINNAH ..... PLAINTIFF**

**VERSUS**

**ZAHEER MERLAHI JHANDA ..... 1<sup>ST</sup> DEFENDANT**

**CO-OPERATIVE BANK OF KENYA LTD ..... 2<sup>ND</sup> DEFENDANT**

**MO SOUND ENTERTAINMENT LTD.....INTERESTED PARTY**

**RULING**

By a preliminary objection dated 19<sup>th</sup> and filed on 21<sup>st</sup> February, 2019 the 2<sup>nd</sup> defendant moved the court to declare that it has no jurisdiction in this matter as it is barred by statute pursuant to Section 4(2) of the Limitation of Actions Act Cap 22 Laws of Kenya. It is the position taken by the 2<sup>nd</sup> defendant that in the further amended plaint and claims against 2<sup>nd</sup> defendant the plaintiffs move is affront to the said section as the same has been brought after the expiry of the statutory provided time of 3 years. In that case therefore no valid action or claim could be brought against the 2<sup>nd</sup> defendant relating to the matters in issue unless allowed by the court under Section 27 of the Act.

The 1<sup>st</sup> defendant supports the 2<sup>nd</sup> defendant in the preliminary objection. The plaintiff however opposed the same and counsel for the parties have address the court on the subject. The allegations of the plaintiff as against the 2<sup>nd</sup> defendant were contained in the further amended plaint filed on 24<sup>th</sup> January, 2019 while the suit was first filed on 22<sup>nd</sup> August, 2011.

The genesis of the plaintiff's suit against the defendants is an agreement entered into between the plaintiff and the 1<sup>st</sup> defendant dated 11<sup>th</sup> February, 2010 involving the purchase of a motor vehicle the details of which appear in paragraph 3 of the plaint.

In the further amended plaint that introduced the 2<sup>nd</sup> defendant and the allegations against it the main thrust is that the 2<sup>nd</sup> defendant was negligent in its involvement in the said transaction. This is because the said motor vehicle was sold to the interested party at the instance of the 2<sup>nd</sup> defendant who is owned money by a firm known as Dakika Limited.

There are several particulars of negligence set out in the further amended plaint and in particular paragraph 11 thereof. An action based on negligence is supposed to be brought within 3 years from the date the cause of action arose. At face value therefore the preliminary objection would appear to have some merit. However, paragraph 13 of the further amended plaint which should read paragraph 12 alleges that the 2<sup>nd</sup> defendant is in possession of proceeds obtained from the illegal sale of the plaintiff's motor vehicle.

When the allegation of negligence is intertwined with a plea of illegality then I believe the period of limitation cannot be limited to 3 years. In that case therefore, the plea of Limitation is ousted. This is because such an issue becomes triable and the 2<sup>nd</sup> defendant may not raise the application of Section 4 (2) of the Act. Where is any suggestion in the pleading or averments by way of an affidavit that the inclusion or presence of a party is necessary to assist the court in arriving at a just and proportionate decision then no impoundment either by way of statute or any other means should be allowed to stand on the way of such averment. Above all such a party should demonstrate succinctly and persuasively that prejudice shall be visited upon it that is likely to lead to some loss. Even then, such a loss should be cited and demonstrated.

The present suit may not be termed stale as submitted by the 2<sup>nd</sup> defendant in terms of the plaintiff's quest to have it included. Stale means expired, lifeless and beyond any degree of resuscitation that may breathe life into such a claim. The question is whether this claim falls within that category. I do not think so. In fact in recognition of the rights of parties section 27 of the Act was introduced to address such issues. In this case however it was not even necessary for the plaintiff to seek leave under the said Section.

The preliminary objection raised by the 2<sup>nd</sup> defendant is not likely to determine the issues in question and more particularly the allegation of illegality and this therefore falls outside the principles enunciated in the case of **Mukisa Biscuit Manufacturing Co. Limited vs. West end Distributors Limied (1969) EA 696.**

Having observed as much I also appreciate the provisions of Articles 50 and 159 of the Constitution and also Sections 1A, 1B and 3A of the Civil Procedure Act that have introduced a new approach towards resolution of dispute brought before the courts. I can even go further and strongly propose that it is high time the statutes of Limitation and they are a number, should be relooked afresh to ease the challenges parties encounter in enforcing their rights.

In the end I find the preliminary objection misconceived and therefore dismissed with costs to the plaintiff. I observe that this is an old case and parties should make efforts to comply with the relevant provisions of the civil procedure rules to ensure that it is determined

expeditiously.

**Dated, signed and delivered at Nairobi this 19<sup>th</sup> day of December, 2019.**

**A. MBOGHOLI MSAGHA**

**JUDGE**