



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 96 OF 2015

JOHN OMOLLO NYAKONGO.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KWALE.....RESPONDENT

R U L I N G

1. When served with the plaint and after entering an appearance, the defendant filed a statement of defence in which at paragraph 10 it pleaded:-

“The defendant further states that the plaintiffs’ suit is statute barred and/or time barred and does not lie by virtue of the Public Authorities Limitation of Actions Act Cap 39, Laws of Kenya and the Limitation of Actions Act. The defendant shall at the earliest opportunity crave the leave for the striking out and/or dismissal of the plaintiffs suit as drawn and filed”.

2. That is the pleading the defendant now seeks to pursue and has taken up with a prayer that the suit be struck out for having been filed out of the statutory set timelines and is thus statute barred.

3. When served with the said statement of defence, the plaintiff did file a Reply to defence which only addressed the plea of limitation in the following words:-

“In reply to paragraphs 7, 8, 9 and 10 of the statement of defence, the plaintiff reiterates the contents of paragraph 5, 7, 9 & 8 of the plaint in their entirety”.

4. I have read the three paragraphs in the plaint and I have not seen an explanation why the suit was never filed prior to 2014. Parties did file written submissions to canvass the preliminary objection. The submissions by the defendant are dated and filed on 29/2/2016 while those by the plaintiff were dated 9/5/2016 and filed in court on 17/5/2016.

5. From the pleadings filed the only issue for determination is whether or not the plaintiff suit when filed was statute barred. That issue can only be determined by looking at the pleadings filed to establish if the facts as pleaded by the defendant are conceded or incapable of contestation by the plaintiff. It is only if the pleaded facts are accepted by the one side that a matter become a preliminary objection on a pure point of law. If there be contestation as to when the cause of action arose which may require an explanation beyond the pleading by way of evidence then the same gets disqualified as a preliminary objection.

6. I get this from the decision, of the East African Court of Appeal in MUKISHA BISCUITS MANUFACTURING CO. LTD VS WESTEND DISTRIBUTORS LTD [1969] EA 696 where the court said:-

“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 preliminary point may dispose of the suit. Examples are ... plea of limitation....”

“A preliminary objection is in the nature of what used to be a demurrer. It raises the 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...”.

7. Now in this matter, the plaintiff has pleaded at paragraph 3, 4 and 6 that the contract was entered into on 15/3/2004, that the payment would be based on estimates of work done and paid within 30 days of the date of the Certificate. The last certificate issued was dated 6/2/2007.

Indeed those facts are shown to be true by the bundle of documents filed in support of the plaintiffs claim.

8. The question that must be posed to assist the court determine the issues at hand is when did the defendant's predecessor, COUNTY COUNCIL OF KWALE, breach its obligation so as to let the plaintiffs cause of action accrue. There is in the plaintiff's bundle of documents a letter dated 11/3/2004 informing the plaintiff that it had emerged the successful bidder and asking him to sign copies therefore by way of acceptance of the award. There is also the standard tender document signed by both parties and dated 15/3/2004. That documents is explicit that the period of honouring the certificates would be 30 days and that the certificates would be issued monthly.

9. Those are facts that are not contestable nor deniable as they emerge prominently from the parties agreement. Based on those facts, the cause of action accrued on the 30th day after the certificate dated 6/2/2007 was issued, thus on or about the 3 of March 2007. However, these are subsequent correspondence by and on behalf of the defendant notably:-

(i) Letter dated 21/01/2009 from the town council of Kwale to the permanent secretary, ministry of local Government, by which that Local Authority acknowledged a debt of Kshs.3,778,417 as owing to the defendant.

(ii) Letter dated 2/7/1/2011 from the county works officer, Kwale County, and directed to clerk to the council, Kwale Town Council stating that the authors analysis of Kshs.1,930,021.54 was payable to the plaintiff.

(iii) Letter dated 26/01/2012 by the County Works Officer, Kwale by which the author said:-

“We hereby strongly advice that you make arrangements to pay the amount to avoid further escalation of interests”.

10. In its submissions, the plaintiff has stressed and pleaded that the defendant did acknowledge the debt and therefore revived the cause of action pursuant to sections 23 & 24 of the limitation of Actions Act. It is true that section 23 & 24 of the limitation of Actions Act, apply to this matter by virtue of the provisions of section 6 of the public Authority Limitation Act.

11. The law under section 23 as interpreted by the courts is that time starts to run from the date of the acknowledgment^[1]. In this matter, therefore, I do find that the defendant did unequivocally admit the debt to the defendant by its letter of 26/01/2012 hence the time started to run on that day. If that be true and in terms of section 3 of the public Authority Limitation Act, the plaint ought to have been filed not later than the 25/01/2015. However, the same was never filed till the 24/7/2015. When so filed it was filed outside the time prescribed by the statute and was therefore filed out of time and thus statute barred.

12. I have noted that the plaintiff keeps oscillating between the provisions of the Limitation of Actions Act and Public Authority Limitation Act as it the same are one and the same and apply to the defendant in equal measure. That is misapprehension of the law, the way I understand it. My reading of section 6 of Public Authority Limitation Act is that only part III of Cap 22 is applicable to Cap 106. Now part III of Cap 22 is the provision that provide for acknowledgment and revival of causes of action by acknowledgement or part payment of the claim. For that appreciation the plaintiffs' submissions at paragraph 22 purporting that the debt having been acknowledged on 8/2/2011, the cause remained alive till 8/2/2017 is erroneously grounded on the provisions of section 4 of Cap 22. That provision does not apply to the defendant in this case.

13. The upshot is that I uphold the defendant's preliminary objection and hold that this court has no jurisdiction to entertain a suit filed out of time. If it was filed out of time, the court has no jurisdiction to entertain it. There being no jurisdiction in the court, the court must down its tools but before doing so must declare that the matter was filed out of time and was statute barred and is hereby struck out.

14. I award the costs of the suit to the defendant.

15. It is so ordered.

Dated and delivered at Mombasa this 16th day of February 2018.

P.J.O. OTIENO

JUDGE

[1] Kisii County Government vs Masosa Construction Co. Ltd [2015] eKLR; Pius Kimaiyo Langat vs The Co-operative Bank of Kenya Ltd [2017] eKLR.