



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 963 OF 1996**

**MUSTAFA LORD .....PLAINTIFF**

**VERSUS**

**CALTEX OIL KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**SALEH MOHAMED.....2<sup>ND</sup> DEFENDANT**

**RULING**

This case was filed on 18<sup>th</sup> April, 1996. The defendants entered appearance and filed their respective defences. Under the old civil procedure rules, summons for directions were filed and issues for determination settled on 21<sup>st</sup> June, 1997 and filed on 26<sup>th</sup> June, 1997.

Subsequently, it transpired that the 1<sup>st</sup> defendant herein had been wound up and its operations taken over by Total Kenya. That being the case, the plaintiff filed an application by way of Chamber Summons dated 1<sup>st</sup> August, 2017 for leave to file suit out of time. In that application, he seeks to replace the 1<sup>st</sup> defendant with Chevron Kenya Limited. In that application he confirms that the 1<sup>st</sup> defendant did not exist when he filed his suit.

The application is opposed and a replying affidavit was filed on behalf of Total Kenya Limited. Both parties have filed submissions which I have considered. In the application neither Chevron Kenya Limited nor Total Kenya Limited are parties. Any party sought to be joined or sued out of the statutory period provided in law ought to have notice of the intended proceedings. The plaintiffs claim was founded on contract. This is clear from the draft plaint annexed to the application.

That contract was said to have been entered into on 16<sup>th</sup> November, 1992 between the plaintiff and the proposed 1<sup>st</sup> defendant Chevron Kenya Limited. The draft plaint is lacking in detail as to how the proposed 1<sup>st</sup> defendant was succeeded by Total Marketing Limited. That notwithstanding, an action founded on contract is supposed to be instituted within six years otherwise it will be out of time by virtue of Limitation of Actions Act, Cap 22 Laws of Kenya.

It is now over twenty years since the alleged cause of action. There has not been a convincing reason advanced as to why the plaintiff slept on his rights even

when he had legal advice from counsel. Equity aids the vigilant not the indolent. – see **Ibrahim Mungara Kamau vs. Francis Ndegwa Mwangi (2014) e KLR.**

The existing suit HCCC No. 963 of 1996 is still in existence. The suit sought to be filed is founded on the same facts yet there is no proposal to withdraw or discontinue the existing suit. It is not even an application to amend that suit. In my view I agree with the position taken by the defendant that it is an abuse of the court process.

The plaintiff must leave with the position he has found himself in, which his claim is totally out of time and therefore unsustainable by way of an application before the court. The application is therefore dismissed. I have considered the age of this matter and the positions of the respective parties. In the circumstances each party shall bear their own costs.

**Dated, signed and delivered at Nairobi this 28<sup>th</sup> Day of June, 2018.**

**A. MBOGHOLI MSAGHA**

**JUDGE**