



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 45 OF 2017

MS. INTAMBA FREIGHTS S.A.....PLAINTIFF

VERSUS

1. KENYA REVENUE AUTHORITY

2. KENYA PORTS AUTHORITY

3. OKIEK ENTERPRISES LIMITED

4. SKYMORE FREIGHTERS.....DEFENDANTS

R U L I N G

1. The court is called upon to determine two preliminary objections. The first was filed by the 2nd defendant on 5th July 2017 and the second by 1st defendant on 1/9/2017 but curiously dated 20/9/2018. Those Notice of Preliminary objections contend and seek orders that:-

By 1st defendant

i) The plaintiff's suit is time barred under the provisions of Section 3(2) (a) of the Kenya Revenue Authority Act (CAP 469) read together with Section 3(1) of the Public Authorities Limitation Act (CAP 39).

ii) The plaintiff's suit is time barred under the provisions of Section 4(2) of the Limitations of Actions Act (CAP 22).

iii) The Plaintiff herein has no right to bring or maintain this suit as the Plaintiff is an agent of a disclosed principle and has no legal or possessory title to the subject matter of the suit.

By 2nd defendant

1. The suit is time barred under the provisions of section 66 of the Kenya ports authority act, cap 391

2. The plaintiff herein has no right to bring or maintain this suit as the plaintiff is an agent of a disclosed principal and has no legal or possessory title to the subject matter of the suit

2. Against the said objections, the plaintiff filed grounds of opposition (*I do doubt if a preliminary objection is an application inviting grounds of opposition*) which essentially contend that:-

(i) The preliminary objection is unmeritorious as the tort is continuing and relies on the decision in *Samson Luyera & 800 Others vs A.G. [2006] eKLR*

(ii) Section 4(2) Cap 22 is expressly ousted for application to proceedings governed by Cap 39 and puts reliance on *Anaclet Kalia Musau vs A.G. [2015] eKLR*.

(iii) The objection that the plaintiff lack capacity is a matter of fact to be proved by evidence and cannot be canvassed by a preliminary objection an contention premised on the decision in *Mukisa Biscuits Company Ltd vs Westend Distributors Ltd [1969] EA 696*.

3. Both sides filed lists of authorities in support and opposition to the preliminary objections, respectively, and at the hearing offered brief submissions.

Submissions by the 1st Defendant

4. To the 1st defendant, the cause of action is pleaded at paragraph 10 to have accrued on 1/9/2012 hence by the time the suit was filed on 5/7/2017 it was statute barred. Noting that the cargo was cleared and released way back on 31/12/2012, but was yet to be received by the plaintiffs by the time the suit was filed, the suit ought to have been filed not later than 22/12/2013.

5. The 1st defendant contended that even under Cap 22 and Cap 39 the suit is statutorily time barred because the limitation period is limited to three years for the accrual of the cause of action. The counsel placed reliance on the decision in *Thuranira Karauri vs Agnes Nchedhe [1997] eKLR* as well as that in *Harrison Ndungu Mwai & Others vs A G [2014] eKLR* for the proposition that a suit filed out of time ought to be struck out because statutory limitation goes to jurisdiction. It was added that the contention of continued violation does not itself validate a suit that is obviously statute barred.

6. For the 2nd defendant, Ms. Onyango also urged her preliminary objection dated the 21/9/2017 hinged on the provisions of Section 66 of Kenya Ports Authority Act and the principle of law that an agent for a disclosed principle has no cause of action against the person contracting with the principal. According to counsel, the plaintiff made a demand on the 11/2/2013 against the defendant to underscore the fact that the cause of action arose in February 2013 hence in terms of Section 66 of the Act, the cause of action became of statute barred at the expiry of 12 months from that date. Reliance was then placed upon the decision in *Kilion G V Ondu vs KPA [2008] eKLR* where the court held that it has no jurisdiction to extend time to commence an action under KPA act as Section 27, was not available to the plaintiff. To the counsel whether under the Kenya Port Authority Act or Limitation of Actions Act, the suit was statutorily time barred and was a subject for being struck out.

7. Counsel also put reliance on the decision by the court of Appeal in *Victor Mabachi vs Nurtun Bates Ltd [2013] eKR*, for the proposition of law that an agent acting for a disclosed principle cannot sue or be used on behalf of the principal. On those grounds it was urged that the suit be struck out.

8. For the plaintiff Mr. Wangila Advocate opposed the two sets of preliminary objections on three distinct grounds. The first is that Section 4(2) Cap 22 does not apply to the 1st & 2nd defendants because the same act ousts its application and operation on suits subject to Public Authorities Limitations Act save for Part III thereof .

9. On possessory title, the counsel submitted that evidence of such Needs to be called and tested but cannot be dealt with by a preliminary objection. The counsel placed reliance on his list of authorities in the following order:-

i) **Samson Lereya & 800 Others vs AG** for the proposition of law that where the tort subsists, the time starts to be reckoned with after the cessation of the tort.

ii) **Anaclet Kalia Musau vs AG** for the proposition that Section 42 (1) Cap 22 ousts the Application of Section 4(2) of the Act from application of suits governed by Cap 39.

iii) **Mukisa Biscuits Company vs Westend Distributors Ltd [1969] E.A. 696** for the proposition of law that questions of right to some or possessory rights are matters lost for the detailed evidence at trial and need not be canvassed by a preliminary objection.

Analysis and determination

10. Being a preliminary objection, the principles are clear that it must be grounded upon a pure and clear point of law and argued on the assumptions that the facts pleaded by one side are not opposed but rather admitted by the opponent.

11. Where a matter is to be ascertained by detailed scrutiny of facts, the matter ceases to be a preliminary objection and must await trial and production of evidence^[1].

12. In this matter, I consider the point on limitation of time to be ideal candidate as a preliminary objection. However, for the record it is imperative to point out where a statute creates a statutory body with its own identity and prescribes thresholds like limitation of time, then the statutes of general application like the Limitation of Action Act and Public Authority Limitation of Actions Act do not apply.

13. This I say for two reasons:- The first reason is that Public Authorities Limitation of Actions Act, is limited to proceedings against what used to be called local authorities and no other public and statutory bodies like the 1st & 2nd defendants. I get this from the preamble to the Act which gives the purpose of the Act as:

*“An act of parliament to provide for the limitation
of proceedings against the government and a local
authority, and for purposes incidental and connected
with the foregoing”.*

14. I am not in doubt that neither the 1st nor the 2nd defendant is the government of Kenya nor a local authority. This position has been reiterated severally on the stature and personality of statutory corporations even if they be state compositions. The following are just but examples:-

In Gurdoba Enterprises Ltd vs Kenya Revenue Authority, HCCC No. 676 of Page 9 Mbogholi Msagha J said:-

“Kenya Revenue Authority ...must submit

itself to the rights of litigation and stop operating under the shadow of the Government when it comes to legal proceedings”.

In Menginya Salim Murgani vs Kenya Revenue Authority, HCC No. 1139 of 2002. Prof. J.B. Ojwang, as he then, was even more candid and succinct when he said:

“The body parliament intended was a responsible and accountable one empowered to discharge its legal obligations without resorting to reserved privilege when obligations fall upon it”.

15. Those two decisions were endorsed and upheld as good and proper application of the body parliament created in the decision in **Kenya Revenue Authority vs Habinana** sued **Hemed & Another [2015] eKLR**. The Court of Appeal I think finally laid the position of the distinction of Kenya Revenue Authority from the government of the Republic of Kenya when the Court said:-

We hold the view that the Kenya Revenue Authority is not an organ of the Government as contemplated under the Government Proceedings Act.

There are three arms of Government, and they are clearly defined and recognized universally over the ages. We do not need to redefine them here. Kenya Revenue Authority collects taxes for the Government, and they do a good job of it. It is nonetheless an autonomous, corporate, statutory body specifically with power to sue and be sued. The appellant cannot hide behind the cloak of the Attorney General when it is accused of breaching the law or otherwise violating people’s rights purely in order to take advantage of the 30 days statutory notice!

It would be ridiculous, nay, fallacious even, for one to imagine that KRA would be immunized, or shielded by the law against issuance of injunctive orders against it, even where such orders are merited and may be necessary for preservation of property, and protection of peoples’ fundamental rights as happens many times...

These two decisions, (by mbogholi and ojwang, jj) together with Osiemo J’s impugned decision, though coming from the High Court are good law, which we hereby endorse.

16. My reading of the Architecture of Kenya Revenue Authority Act and Kenya Ports Authority Act, at the preambles, and the legal entity created thereby is that they are in *pari materia* and what is said for one authority will as well pass for the other.

17. For that reason, I hold and find that the Public Authorities Limitations Act just as the Government proceedings Act do not apply to the two defendant and the more counsel, some of whom are in-house-counsel, who have had the chance and opportunity to relate with the previous decisions of the court, continue to raise the same point, over and over again, is nothing but a design to delay and defeat expeditions disposal of court disputes. This practice should be brought to an end unless and until the law be charged or the decisions of the Court of Appeal be reversed.

18. For the foregoing reasons, the preliminary objection by the 1st defendant grounded on section 3(1) of Public Authorities Limitation Act and that by the second defendant based on Section 4(2) of the Limitation of Actions Act have no merit and the same are dismissed.

19. On the question of the plaintiffs capacity to bring the suit, being an agent for a disclosed principles, I do find that the details and extent of such urgency are matters best left for evidence at trial. It is a matter that falls beyond the boundaries and permitted realm of preliminary objection and cannot be the basis to terminate a suit before evidence is led.

20. I now come to the question whether the suit is statorily time barred under the Kenya Revenue Authority Act and Kenya Ports Authority Act as against the 1st and 2nd defendants respectively.

1st Defendant

21. In its creating statute, there is no limitation provided for beginning or instituting litigation against the Kenya Revenue Authority. However, having found that the provisions of Public Authority Limitation Act does not apply to it, it must be clarified here that it is subject to the general legislation found under the Limitation of Actions Act. As pleaded in the Amended Plaint the complaint of the plaintiff is that having been contracted to clear and transport some cargo in some 5 x 20 containers to Uganda, with the assistance of the 3rd defendant, as a subcontractor, the goods in 3 x 20 containers were cleared in December 2012 but the goods had never been released by the time the matter came to court despite the fact that a report was made to the police way back in February 2013 the same time a demand was made for the release of the 2 x 20 containers

22. Even though not perfectly pleaded, I understand the plaintiffs claim to be premised on failure to release the goods when demanded. That to this court would, subject to evidence on how the 1st defendant came to be in possession of the goods, be a tort of detinue or conversion.

Such a cause must be brought before the expiry of the three (3) years. In this case the plaintiff pleads unequivocally, and without any evidence that after the month of February 2013 any acknowledgement were ever made by the 1st defendant as to restart the computation of time afresh, that the goods were demanded in February 2013 and the suit not brought till April 2017.

23. My computation is that three years ended sometimes in February 2016 and therefore when the suit was not filed by end of February 2016, it became statute barred under Section 4(2) Cap 22.

24. It does not matter that the detainer continues. The continuation does not revive the cause every extra day it continues. The continued detainer might only be a consideration for measure of damages if the length of detainer was to become a consideration. The fact of the matter is that the cause of action accrued upon the plaintiff, subject to it being suited, to be proved by evidence, when the goods became due for release but were never released. For that clear reason the suit against the 1st defendant is undeniably time barred and this court has no jurisdiction to entertain it and must have it struck out which I hereby do.

2nd defendant

25. Unlike for the 1st defendant, Kenya Ports Authority Act has in it a specific provision on limitation to govern suits and litigation against the 2nd defendant. Section 66 of the Act provides:-

“Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect –

a) ...

b) The action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of continuing injury of damage, within six months next after the cessation thereof”.

26. That law, as said before is specific to the 2nd defendant, and ousts the Application of Cap 22, for application to the 2nd defendant. It limits the time within which to sue the 2nd defendant to twelve (12) months from the date of the accrual of the cause of action. As said of the 1st defendant, the plaintiff demanded the release of the goods in February 2013. That is a clear indication that it learnt that its rights were being infringed then. That is when the cause of action, if any, and it had up to twelve months, from that time, to bring the action. It did not do so and waited for up to some four (4) years later to act. It was late to act in filing suit and was caught up with the law on limitation of time. I therefore find that the suit against the 2nd defendant is equally statute barred and is incapable of sustenance but must be struck out. I do strike it out.

27. The totality of the foregoing is that the cudgels aimed at the head of the plaintiff's suit as against the 1st and 2nd defendants is inescapable. When filed, the suit, was out of time limited by law and is therefore statute barred for which reasons the same is struck out with costs to the two defendants.

Dated and delivered at Mombasa this 18th day of June 2018.

P.J.O. OTIENO

JUDGE

[1] Mukisa Biscuit Company (supra); per Sir Charles Newbold, P, page 701 para B.