



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 72 OF 2016

MOGAS KENYA LIMITED.....PLAINTIFF

-VERSUS-

SPIN MASTERS LIMITED.....1ST DEFENDANT

CHRIS KINYUA.....2ND DEFENDANT

RULING

1. The Supreme Court of Kenya when considering a Preliminary Objection (PO) stated in the case of **Independent Electoral Boundary Commission vs Jane cheperenger & 2 others [2015] eKLR** as thus:

“As to whether a preliminary objection is one of merit, this court has already pronounced itself on the threshold to be met. The court endorsed the principle in Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors [1969]EA 696, in the case of Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013 [2014]eKLR [paragraph 31]:

“To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors [1969]EA 696:

‘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 a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a 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 or if what is sought is the exercise of judicial discretion.’

2. The defendants have raised a PO dated **7th April 2017**, the subject of this ruling. It is in the following terms:

a. *“The cause of action having arisen in the year 2009 and suit filed on 11th March, 2016 this claim is time barred, under the provisions of section 4 of the Limitation of Actions Act.*

b. *The Plaintiff’s rights to sue for alleged breach of contract having lapsed at the latest on 1st January, 2015; he lacks capacity to agitate any cause against the Defendants. This suit is therefore an abuse of the court process.*

c. *The court therefore has no jurisdiction to entertain this suit and the same ought to be struck out with costs to the Defendant.”*

3. A careful consideration of what was stated in the case of **Mukisa Biscuits** (*supra*) to be a proper PO, that it should arise from the pleadings and should arise on a pure point of law which is argued on the assumptions that all the facts pleaded by the other side, in this case by the plaintiff, are correct, the court shall interrogate the pleadings. I will therefore examine the plaint herein filed by the plaintiff. The relevant paragraphs of the plaint states as follows:

“(6) The plaintiff supplied the Defendants with petroleum product worth USD 229,449.22 on diverse dates in the year 2009 at the request of the Defendants.

(7) The Defendants had issued the Plaintiff a Performance Guarantee from Dubai Bank Limited.

(8) The Plaintiff wrote to the bank severally to invoke the guarantee, but Dubai Bank did not honour the demand to facilitate payment under the guarantee.

(9) That the Defendants made a payment of USD 27,705 but have refused to settle the balance of USD 201,744.22 owing to the Plaintiff.”

4. The plaintiff then proceed to pray for judgment against the defendants for **USD 201,744.22** plus costs and interest.

5. The defendants’ PO is and must be constrained within the pleadings of the plaintiff. The defendants, however, by the PO have superimposed a date when the plaintiff’s claim accrued as the year 2009. That is contrary to the plaintiff’s plaint. The plaint shows that there was part payment of **USD 27,705**. The plaint does not reveal the date the part payment was made.

6. The relevant law that would determine whether the plaintiff’s claim is time barred, is the Limitation of Actions Act Cap 22. If indeed the plaintiff’s claim lies in contract, then Section 4 of Cap 22 provides that an action in contract may not be brought after the end of 6 years from the date the action accrued. The Blacks Law Dictionary 8th Edition defines accrue as:

“To come into existence as an enforceable claim or right...The term ‘accrue’ in the context of a cause of action means to arrive, to commence, to come into existence, or to become a present enforceable demand or right. The time of accrual of a cause of action is a question of fact.”

7. Section 23 of Cap 22 provides that where there is acknowledgment of the claim or part payment of it, the right to sue accrue on the date of such acknowledgment of payment.

8. With the above provision in mind, the court cannot determine when the plaintiff’s right to sue accrued and therefore cannot determine, as the defendants seek, whether the plaintiff claim is time barred.

9. It is for the above reasons that the defendants PO dated **7th April 2017** is rejected. It is dismissed with costs to the plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of October, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

MARY KASANGO

JUDGE