



**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.....DEFENDANT**

**RULING**

**Outline of facts**

1. The plaintiff seeks from the court an order that the court reviews the orders issued herein on 16/2/2018 and reinstates the plaintiff suit which was struck out for being statute barred.
2. The grounds upon which the application is founded are that there is evidence that the suit was not statute barred because the county council of Kwale having become defunct, its assets and liabilities were taken over by the Transitional Authority which on the 9/3/2015 acknowledged the debt on behalf of the defendant and granted approval from its payment. Upon the said acknowledgment, the Authority successor, Inter-governmental Relations Technical Committee (IGRTC), the plaintiff and the defendant engaged to have the debt settled and exchanged correspondence to that effect.
2. The application was supported by the Affidavit of the plaintiff/applicant which basically reiterated the grounds and exhibited documents to show acknowledgement dated 9/3/2015, 8/8/2017, gazette notice published 24/3/2017 establishing structure for transfer of assets and liabilities of the defunct councils, a letter by the defendants', County Secretary, dated 6/9/2017 stating that the subject debt was inadvertently omitted from the schedule given to the IGRTC and a response thereto seeking that the County Asset and Liabilities Committee do submit a final report including the subject debt in this litigation.
3. The Application was opposed by the defendant by the grounds of opposition filed on 13/4/2018 which assert that the application could not be granted because; there were no disclosed grounds to merit discretion in favour of the applicant; the application is fatally defective, bad in law and an abuse of the court process; that the affidavit in support was incurably defective and offends provisions of the law cited and the grounds raised were premature and predicated upon wrong premise as the court had rendered a final decision.
4. By its decision dated 9/2/2018, the court said:-

**“The law under section 23 as interpreted by the courts is that time starts to ran from the date of the acknowledgment [1]. In this matter, therefore, I do find that the defendant did unequivocally admit the debt to the plaintiff 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”.**
5. That ruling is now being sought to be reviewed on the basis that there were acknowledgements the court did not take into account.
6. In their written submissions, as highlighted in court, the Defendants/respondents counsels did not challenge the authenticity of the letters annexed and exhibited to the application for review. All Mr. Kibaara said was that the ground on apparent error on the fact of the record was a ground of appeal and not review and that there was no indication when the plaintiff came by the documents now sought to be relied upon.
7. I have taken into account the grounds of the application and documents exhibited, the submissions offered and have come to the view that the issues from determination are:-

**i. Is there an error apparent on the face of the record?**

ii. Are there new and important matter of evidence that was not available to the Applicant at the time of the decision, due diligence notwithstanding?

**Error apparent on the face of the record?**

8. When the suit was filed on the 24/7/2015, there was indeed that letter dated 9/3/2015 filed with the plaint which at paragraph 4 the Transaction Authority said:-

**“Taking into account the aforementioned, accruing interests from 2004 and verification report by an inter-agency team, the TA therefore grants approval for Kwale County Government to settle the referred debt pursuant to Section 35(2) (b) of the Transition to Devolved Government (TDGA) Act, 2012”.**

9. Those words to me were a clear and unequivocal that the Transitional Authority had acknowledged the debt and gave approval for the defendant to settle the same. That information was availed to court by the time the decision sought to be reviewed was made.

10. It is unfortunate that the debt was acknowledged and thereby Section 23(3) Limitation of Actions Act was invited to the dispute, but the court was not led to look at the letter and in its own duty to look at the entire record, the court did not notice its presence. That to this court is an apparent error and omission on the face of the record. The error is one of fact, the fact of the acknowledgement and not an error in appreciation of the law. An error of fact which is apparent on the face of the record, invites review while an error of appreciation of the law only invite an appeal.

11. In *National Bank of Kenya Ltd vs Ndugu Njau [1997] eKLR*, the Court of Appeal said:-

**“A review may be granted wherever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law”.**

12. In this matter, I consider it an error and omission on the part of the court not to have taken regard of the letter of 9/3/2015 which then led to the suit being adjudged time barred based on that error of fact.

13. That to this court is a valid and sufficient reason for review for which reason which even in the absence of additional ground is good enough to allow the application for review. I do allow the notice of motion dated 19/3/2018, set aside the decision striking out the suit and I now reinstate the suit for being on the merits.

14. I order that the costs be in the cause because it was incumbent upon the counsel to highlight the existent of that letter to court and having failed in that regard none of their clients need to benefit or be penalized for an error the court ought to have avoided.

Dated and delivered at **Mombasa** this 22nd day of **October 2018**.

**P.J.O. OTIENO**

**JUDGE**