



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL CASE NO 11 OF 2015

ANDREW GITHINJI MWIHURI (T/A GITHAMBO GENERAL CONTRACTORS).....
PLAINTIFF

VERSUS

KAY CONSTRUCTION COMPANY LTD.....
DEFENDANT

RULING

1. The Plaintiff's claim herein against the Defendant is for special damages for breach of contract in the total sum of KShs 21,924,000/00 plus costs and interest.

2. The Defendant filed defence and denied the claim. He also filed a **notice of preliminary objection on points of law dated 25/09/2015**. The points of law raised are –

(a) That the suit is *res judicata* on account of a previous similar suit between the same parties, being **Nyeri HCCC No 135 of 2009** (as pleaded at paragraph 8 of the statement of defence dated 25th and filed on 28th September 2015).

(b) That the suit is also statute-barred by time limitation (as pleaded at paragraph 9 of the statement of defence).

3. The preliminary objection was canvassed by way of written submissions. The Defendant filed its submissions on 22/07/2016 while the Plaintiff filed his on 05/12/2016. On 07/02/2017 the Defendant filed further submissions. I have considered those submissions, including the cases cited. I have also perused the pleadings.

Res Judicata

4. The principle of *res judicata* is set out in **section 7 of the Civil Procedure Act, Cap 21** in the following terms –

“7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

There follow some six (6) explanations of the principle.

5. The Defendant's plea is that the previous suit between the same parties was **struck out**. A suit that is **struck out** cannot have been **heard and finally decided**. The principle of **res judicata** as set out above therefore cannot apply. Nothing precludes a party whose suit has been struck out unheard, apart from limitation or other statutory or equitable impediments, from bringing a fresh suit on the same or similar facts so that the same can be **heard and finally decided**.

6. The Defendant's preliminary objection based on the principle of *res judicata* is not well-taken and is hereby overruled.

Limitation

7. The Plaintiff's suit is based on a road-works contract entered into on 14/08/2007. The breach of that contract that gave rise to the Plaintiff's suit, as pleaded by him at paragraph 7 of the plaint dated 12/08/2015, occurred at the latest in May 2009.

8. **Section 4(1) (a)** of the *Limitation of Action Act, Cap 22*, provides –

“4 (1) The following actions may not be brought after the end of six years from the date on which the cause of action occurred -

(a) actions founded on contract.”

9. The Plaintiff's action is founded on contract. The contract in question was entered into on 14/08/2007. The Plaintiff's cause of action accrued when that contract was breached by the Defendant. As pleaded by the Plaintiff, that breach occurred at the latest in May 2009. No particular day in May is pleaded. We may therefore take 31st May 2009 as the day the Plaintiff's cause of action accrued. Six (6) years from that date expired on or about 1st June 2015.

10. The present suit having been filed on 21st August 2015, it was filed out of the period of six (6) years stipulated under section 4(1) (a) aforesaid of the Limitation of Actions Act. I so hold.

11. In the result, I will uphold the Defendant's preliminary objection on the legal point of limitation of time. The Plaintiff's suit is thus incompetent in law. It is hereby struck out with costs to the Defendant. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 29TH DAY OF JUNE 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 30TH DAY OF JUNE 2017