



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.47 OF 2016

BETWEEN

JOAS COMPONENTS COMPANY LIMITED APPELLANT

AND

THE COUNTY GOVERNMENT OF HOMA BAY RESPONDENT

(An appeal from the judgment of the chief

magistrate P. Gichohi dated 27th October 2016)

JUDGMENT

1. **JAOS COMPONENTS COMPANY LIMITED** (appellant) claimed that on diverse dates in the year 2000 it supplied to **THE COUNTY GOVERNMENT OF HOMA BAY** (respondent) assorted construction equipment and tools valued at kshs.750,000/= which the respondent was to pay upon delivery but never did. It further stated that since it owned several pieces of land within Homa Bay County whose land rates payable to the respondent had accumulated to Kshs.343,000/- as at the date of the suit, the sum owing should be set off from the monies owed by the respondent. The prayer was for orders to issue against the respondent for:

Payment of Kshs 750,000/- owing by virtue of the said contract

Set off Kshs 343,000/- from the amount due, as this sum had accrued as a result of delayed payment by the respondent

Order of specific performance to compel the respondent to credit and adjust the appellant's land rates on UNS Plot Nos. 1432/592, UNS.BCR. Plot No 1414,142, UNS. BCR Plot No.1

2. The respondent denied the jurisdiction of this court contending that this cause of action was statute barred and that no notice of intention to sue was issued, hence this suit was incompetent by reason of prematurity. In conclusion, the respondent stated that the appellant is non-suited as it has never had any form of nexus with the claim.

3. After hearing the matter the appellant's claim was dismissed on grounds that the suit was time barred since the appellant had failed to show cause why it had not instituted the suit within 6 years as provided by law.

4. **PW1 (JOSHUA OUKO AGANDO)** the appellant's managing director testified that it was awarded a tender dated 30/6/2000 by the respondent to supply assorted construction equipment to it. On 3/7/2000 a

contract was signed between the parties and the equipment was delivered as agreed. However the defendant did not satisfy its end of the deal despite his demand for payments both orally and through letters (dated 27/5/2010 and 16/8/2010).

5. In PW1 testimony that the only land parcel in the appellant's name was land parcel no. 23- all the other parcels were either in his name or the name of the co-director **PW2 (LENCER ANYANGO)**. He further stated that sometime in the year 2009 a gazette notice was published showing that his plots were among those repossessed due to non-payment of land rates. He approached the town clerk on 23rd November 2009 over the re-possession and he was asked to pay land rates to plot no.23 at Kshs.20,000/- which he did. However the town clerk changed his mind and said that the plots remained repossessed. That is when an application was filed in court for an injunction order to issue against the county government for repossession of the land. He stated that all they want is for the county government to set off the money it owes them with the money they owe him.

6. PW2 the director of the defendant company also testified to the effect that the defendant gave their company a contract to supply equipment and tools; since they delivered the equipment and tools they have never been paid. She further stated that they have a case with the defendant over 5 plots. She concluded that since they have not paid them and they are demanding rates they should offset the claim and pay them the balance so that they can continue developing there plots.

The respondent did not call any witness and closed its case on 18/8/16 after several adjournments.

7. The magistrate held that there was a valid contract between the parties and the same has not been disputed, in paragraph 3 of the contract (exh3) the time period was indicated "**immediately**" but there was room for variation; "**otherwise the contractor would pay the employer, as penalty, an amount of Kshs. 139,000/= only per calendar day for or part thereof that the work remains incomplete after time period is lapsed** "

8. She further pointed out that one of the directors of the plaintiff company wrote a letter (exh8) to the defendant stating "**we have continued to wait for the council to settle our payments 8 years down the line. We would appreciate if you processed our payments without further delay**"

9. She referred to section 4 of the Limitations of Action Act Cap 22 of Laws of Kenya which provides;

1. The following actions may not be brought after the end of six years from the date which the cause of action accrued –

a. Action founded on contract

b.

10. She held that the cause of action here arose after the last delivery of the equipment on 28/9/2000. He further held that there is nothing to show in the documents produced in court that the contract was intended to be continuous, and nothing showed that, so long as the respondent continue to retain the equipment that time will not start running. Moreover, that there was no evidence to show that leave for extension of time to file suit was sought and granted by court.

11. With regard to the 5 plots, he held that apart from plot no.23, the rest were in the name of PW1 and PW2 in their personal capacity and as such the demand for rates was in their personal capacity. As for plot no.23 set-off on the same had been caught up with Limitation of Action Act, Cap 22 of Laws of Kenya. She cited **Section 35** of the said **Act** to support his judgment, it states:

"For purposes of this act and any other written law relating to limitation of actions, any claim by way of setoff or counterclaim is taken as separate action and to have been commenced on the same date as action in which the setoff or counterclaim is pleaded"

12. The trial magistrate acknowledged that the defendant did not avail the witnesses to defend the claim but the court had a duty to find out if the claim had been established on a balance of probabilities, which according to her had not been met.

13. The appellant contested this decision on grounds that the trial magistrate erred in not making specific orders regarding plot No 23 which she held belonged to the appellant. The judgment contradicted an earlier ruling made in favour of the appellant. The trial court was also faulted for failing to appreciate that the contract between the parties had no specific delivery date, and since payment had not been effected and the respondent remained in possession of the equipment; there was an implied continuing contract and the issue of time limitation did not apply.. The trial court was also blamed for failing to consider that repossession of the plots was a fundamental aspect of the claim.

14. The appeal was canvassed by way of written submissions and the appellant's counsel (**MISS MIMBA**) submitted that the trial magistrate should not have dismissed a suit where the defence offered no evidence. He reiterated the position that this was an implied continuing contract which could not be governed by the statute of limitation of actions Counsel argued that the trial court ought to have considered the fact that the appellant's director was losing five plots repossessed by the respondent and allocated to other persons when the respondent could easily have adjusted what it owed the appellant by crediting the sums to what he claimed. The result is that the appellant lost the money the respondent owed him for the equipment he supplied, the respondents still keeps the equipment to-date, and he also lost the plots which he could easily have saved if the sum owing had been paid to him by way of set off.

15. The respondent's counsel (**MR NYAUKE**) submitted that the appellant's case was time barred and urged the court to be guided by the law

ISSUES TO BE DETERMINED

1. Whether specific orders in respect to plot no.23 could have been granted
2. Whether the learned magistrate contradicted the earlier ruling of the Preliminary Objection in her judgment
3. Whether the fact that the suit remained undefended technically the judgment could have automatically been delivered in favor of the plaintiff
4. Whether the contract between the appellant and the respondent had specific date of delivery or not
5. Whether repossession of the 5 pieces of land was never taken in to account by the magistrate.

1. Whether specific orders in respect to plot no.23 could have been granted

16. It is evident from the witnesses and the documents that was put before the trial court that plot no.23 was in the name of the appellant. When one takes a look at appellant plaint it is evident that specific order in relation to this plot is intertwined by the contract the appellant had with the respondent of supplying equipment and tools. Hence, if an action can be brought to that effect then the specific order in regards to the above mention plot could follow, the trial court did find that such set off could only apply if the cause of action was not statute barred for want of time.

2. Whether the learned magistrate contradicted the earlier ruling of the PO in her judgment

17. In the magistrate ruling on Preliminary Objection he quoted the case of *Mukhisa Biscuit Manufacturing Co. ltd Vs West End Distributors ltd (1969) EA 696* where it was held that the Preliminary Objection should be purely on the point of law and should not be raised where facts are to be ascertained. In this case the fact that was to be ascertained was whether the contract was a continuous one or not, the appellant had a duty to avail evidence demonstrating that it was a continuous contract and

that the monies continue to accrue.

18. The demand letter from the plaintiff's director stated that they were demanding payment for monies that had accrued for the last 8 years, but the pleadings demonstrated and evidence demonstrated such as the contract the parties signed and the fact that it was to be discharged immediately negated the assertion that this was a continuous contract.

3. Whether the fact that the suit remained undefended technically the judgement could have automatically been delivered in favor of the plaintiff

19. The respondent did not call any witness to defend its case however it is noted that it did cross examine the appellant witnesses to further its case. It is crystal clear that in civil matters the onus of proof is on the one who alleges and it is in balance of probability. I wish to rely on *civil case 88 of 2009; D. T. Dobie & Company (K) Ltd v Wanyonyi Wafula Chebukati [2014] eKLR* where it was held that the onus to discharge burden is on the plaintiff.

20. As such the appellant had to prove that the contract between itself and the respondent was a continuous contract and the monies were accruing. This is not evident from the appellant case.

4. Whether the contract between the appellant and the respondent had specific date of delivery or not

21. The contract between the parties stated that the delivery should be "immediately", it provided a penalty in the event of non-compliance by the appellant).

22. My perception of the term "immediately" is after the contract is duly signed. Therefore as evidenced the parties duly signed the contract sometime in 2000, as such it cannot be said the delivery did not have a specific date.

Whether repossession of the 5 plots was never taken in to account by the magistrate

23. Certainly from the evidence it is clear that the contract between the parties and repossession of the 5 plots alleged to be owned by the appellant was the reason of filing this suit. The appellant argued that the respondent should not repossess the plots on the grounds that they had not paid rates while the respondents had not paid them their contractual dues, as such they should offset the amount owed and pay them the balance.

24. As pointed out in the earlier part of this judgment, it is evident that the only plot that belonged to the appellant was plot no.23 and the learned magistrate took this in to consideration. The trial magistrate also clearly stated that offset, which will result to non-repossession, of the rates owed by the plot no.23 could not be realized since claim of the contract was statute barred.

25. **Section 4(1)(a) of Limitation of Action Act, Cap 22** of the laws of Kenya clearly provides that actions founded on contract may not be brought after the end of six years from the date which the cause of action accrued. It is also clear that the date that the action accrued was when the appellant delivered the equipment to the respondent and it was not paid immediately.

26. In **Richard Toroitich v Mike K. Lelmet & 3 others [2014] eKLR, the case of Director Ltd -Vs-Samani [1995 – 1998] 1EA 48** was quoted where it was held as follows;-

“No one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued, in an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is based on contract six years after the cause of action arose or any application to extend such time for bringing of the action based on contract”

27. In civil case **Rosemary Wanjiru Kungu v Elijah Macharia Githinji & another** [2014] eKLR the case of **Rawal vs. Rawal** (supra) was quoted as follows:

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims”. See also Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321.

28. I hold and find that the trial magistrate did consider all the facts and the evidence that was and duly analyzed the same; she also made reference to the appropriate laws applicable in making her decision. It is unfortunate that the appellant ended up burning both ends of the stick and lost his claim by virtue of the statute of limitation but that is why the law is indeed an ass!! The appellant did not prove its case on balance of probability and as such this appeal fails and is dismissed with costs.

Delivered and dated this 17th day of August, 2017 at Homa Bay

H.A.OMONDI

JUDGE