REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 914 of 2003

JARIBU CREDIT TRADERS …….. PLAINTIFF

VERSUS

AMEDO CENTRES K. LTD
THE HON. ATTORNEY GENERAL…… DEFENDANTS

RULING

Coram: Mwera J.

Gitonga for Plaintiff

Ms Malik for 1st Defendant

Nguyo for 2nd Defendant

The court was poised to hear the suit herein filed on 01.09.03 when the 2nd defendant proposed to argue a preliminary point of law contained in his defence filled on 26.1.04.

The suit was based on the tort of detinue (basically seizing and unlawfully retaining one's goods).

It was claimed in the plaint that:

> "4. On or about the 28th March 2002 the 1st defendant acting by itself through its authorized agents, servants or employees laid a complaint against the plaintiff with the Department of Weights and Measures alleging that the plaintiff and its Managing Director then Mr. Vinod Patel, were offering for sale goods with false trade description contrary to the Trade Descriptions Act (Cap 505 Laws of Kenya)."

It was pleaded that that complaint was made maliciously, unlawfully and without justifiable reasons, and all led to the prosecution of the plaintiff with its managing director. That followed when:

> **"6. Acting on the complaint, officers of the Department of Weights and Measures, Ministry of Trade and Industry moved quickly and on or about the 28th March 2002 unlawfully seized 1076 sewing**

machines the property of the plaintiff and proceeded wrongfully (to) detain the machines."

That the plaintiff and its director were prosecuted in RM CR. C.879/02 but were acquitted on 7.1.03 under S. 210 CPC. On the same day the release of the goods was ordered. Accordingly, the plaintiff suffered loss of profits on the sale of the 1067 machines between March 2002 and February 2003. So the plaintiff prayed for loss of profits, special and general damages.

The 2nd defendant's defence began by denying that on 28/3/02 himself with the 1st defendant laid a complainant that the plaintiff was selling fake goods which complaint led to the seizure of the said goods on that date (para. 6). But added that the visit to the plaintiff's premises and the seizure that followed was on reasonable cause and belief that an offence had been committed and so the seizure was lawful and an action on detinue did not lie. Then the plaintiff with its director were charged as per the law. The part in the defence that gave rise to the preliminary objection about to be determined stated:

"10. In response to paragraph 13, the second defendant shall at the hearing of this suit raise and argue a preliminarily objection that the suit against it is statute – barred and militates against the provisions of the Public Authorities Limitations Act (Cap. 39), in so far as the plaintiff is claiming an action in detinue."

Paragraph 13 of the plaint stated that the plaintiff was seeking general damages for detinue.

All the foregoing as per the principal pleadings in reproduced with the court well aware that when arguing a preliminary point the fundamental and basic principle is set out thus in Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] EA 696,701:

> **" 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 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."**

The above needs no explanation, elucidation or other. A pure point of law is raised with the assumption that facts as pleaded by the other side are correct. No fact needs be ascertained at this stage and even the courts' discretion is not being sought to be exercised.

The point of law raised by the 2nd defendant and the 1st defendant supported him, urging this court to strike out the plaint reads as per section 3 of Cap 39:

"3. (1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action occurred.

(2) ……. (3) …….."

Mr Nguyo for the 2nd defendant told the court that the tort of detinue, the cause of action herein took place on

28.3.2002 while this suit was filed on 1.9.03. To him the time to sue expired on or about 29.3.09 and so doing so on 1.9.03, was clearly 6 months out of time. The suit was time – barred and should be struck out. No need to go on with it. The case of Iga Vs Makerere University [1971] EA 65 was cited and also the case of Thuranira Karauri Vs Agnes Ncheche Civ. APPEAL No. 192/96.

As said earlier Ms Malik for the 1st defendant concurred with the position taken by the 2nd defendant to the effect that the suit against the latter was time – barred and it cannot therefore be sustained against 1st defendant either and it should therefore be thrown out in the interest of ending litigation, cutting costs, saving judicial time etc, as the guiding object of the Civil Procedure Act (S.1B).

Mr. Gitonga for the plaintiff held a different view. The goods were seized and detained w.e.f 28/3/02. Then there was this criminal prosecution against his client and another which ended on 7.1.03 with an acquittal. Goods were ordered released and the actual release was on 28/2/03. To him the act of detinue was running all the time because of the intervening case at the end of which the plaintiff could now and consequently did file its suit on 01.09.03. The twelve months began to run and would end on 27.2.04. The suit was within time.

As for the 1st defendant, counsel argued that its support of the preliminary objection was presumptive. It did not depend on the joinder of suit with the 2nd defendant. It could have been sued on its own. And what the 2nd defendant took up as a preliminary objection was in essence a fact to be proved with evidence at the trial especially as to the events herein. Their suit was therefore not time – barred.

Before proceeding to determine this objection, it is clarified that the court heard submissions and the dates of what happened when, not as evidence, but points in the cause as to when what happened in order to fix the transaction of the 12 months envisaged by section 3 of Cap 39.

In the Iga case the Court if Appeal was determining a cause of tort – road accident claim where the cause was brought 4 1/2 years after the act. Reference was to the Limitation of Actions Act which also provides for a party who sued, as the appellant here did, to as well seek and get exemption for not suing in time under that Act. That court stressed that a plaint barred by limitation is barred by law and must be rejected, with the claimant perhaps taking course to file a fresh claim which must still be within time to make sense or meaning. The High Court in that case had dismissed the suit but the Court of Appeal was of the view that the plaint should have only been rejected. Still the appellant/claimant failed in the appeal. The trial judge had jurisdiction to hear the cause but only that he had no power to grant the relief sought because it was time – barred.

The Thuranira case was also rooted in the Limitation of Actions Act. The road accident in issue occurred on 5.11.88. A suit was brought on 24.11.94. This was pleaded in the defence and even as the defendant did not

appear at the trial, still it was a point in law the trial judge was bound to require and be given proof if leave was granted by court to lay the claim even after due time to sue. None was produced before the trial court which had granted reliefs to the claimant/respondent. With that the Court of Appeal ruled that the plaint was incompetent and ought to have been struck out. The appeal was allowed.

The present case is based on a tort of detinue. It was pleaded that the seizure of the goods was done on 28/3/02. They continued to be held until 7.1.03 when the plaintiff was acquitted in the criminal case the selfsame the 2nd defendant had preferred and the goods were ordered released. So at what point did the cause of action arise? Mr Nguyo argued that the plaintiff did not seek to enlarge time a year from 28.3.02 and so due time expired before this suit was brought. Fair enough. But it only came to be established that the detention of the goods was unlawful when and after the court trying the criminal case so determined on 7.1.03. This is not evidence. It was pleaded thus in the plaint:

> "10. The court on the same day (ie 7.1.03) ordered officers of the weights & measures Department to release the 1067 sewing machines to the plaintiff forthwith."

The 2nd defendant, and if one may add the 1st defendant, accepted this fact as correct when the preliminary objection was presented.

In this court's opinion when the magistrate's court acquitted the plaintiff on 7.1.03 and ordered the release of its goods, the plaintiff cannot be faulted for not having sued during the pendency of the criminal case which was in any case being conducted by the 2nd defendant. True the Act relied on here has no provision to extend/enlarge time after the 12 months. Had the trial court not acquitted the plaintiff, in essence saying that the goods had all along been lawfully detained, this suit could not have been instituted. Otherwise in this case the plaintiff can be said to have laid this claim properly as soon as it was practicable, after it transpired on 7.1.03 that its goods had in fact been unlawfully detained all along. The preliminary point is thus dismissed and the suit should be set down for hearing as it is, lest it appear that the 2nd defendant can institute criminal proceedings in such cases, whereby time to sue lapses during those proceedings, only to turn round and plead protection under section 3 (above).

Costs in the cause.

Orders accordingly.

Delivered on 9.3.10

J. W. MWERA

JUDGE