



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**  
**Civil Case 24 of 2009**

**MICHAEL ANDREW SUITER (Suing as the Administrator Of estate of the late**

**BERNARD THOMAS FRANCIS SUITER (DECEASED) ..... PLAINTIFF**

**VERSUS**

**ABDULHAKIM ABDALLA.....DEFENDANT**

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**RULING**

Before court is a preliminary objection raised by Mr. Abeid for the Defendant/Respondent. He argues that by virtue of S.2(3)(b) of the Law Reform Act Cap 26 Laws of Kenya this suit is incompetent and a non-starter as it was lodged out of time. S.2(3)(b) Cap 26 provides that:-

*“(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either .....*

*(a) .....*

*(b) Proceedings are taken in respect thereof not later than six months after his executor or administrator took out representation”.*

Counsel for the Defendant/Respondent argues that in this case the grant was issued to the Plaintiff in October 2007. The present suit was filed much later on 6<sup>th</sup> February 2009.

However Mr. Oddiaga for the Plaintiff/Applicant opposes the preliminary objection and contends that the suit is properly before the court. I am inclined to agree with Mr. Oddiaga that S2(3) pre-supposes issuance and confirmation of a full grant. The Plaintiff was only issued with an interim grant for the purposes of filing this suit. As such S.2(3) cannot be said to strictly apply. In the case of Mukhisa Biscuit Manufacturing Company Ltd –vs- West End Distributors Ltd Civil Appeal No. 9 of 1969 a preliminary objection was defined thus:-

*“So far as I am aware, 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”.*

The preliminary objection being raised here by Mr. Abeid does not consist strictly on points of law. Several issues raised will require evidence to determine such as when did this cause of action arise and was the Defendant aware of the same. On the whole I find that this preliminary objection has no merit and it is hereby dismissed in its entirety. Costs in the cause.

Dated and delivered at Mombasa this 7<sup>th</sup> day of August 2009.

**M. ODERO**

**JUDGE**

No appearance by either party

**M. ODERO**

**JUDGE**

**7/8/2009**