



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**Civil Appeal 78 of 2001**

**SAMUEL NJIRAINI MURAGE.....APPELLANT**

**VERSUS**

**MURIITHI MURAGE.....RESPONDENT**

**JUDGMENT**

This appeal arises out of a rehearing of the suit as ordered by High Court in Civil Appeal No. 323 of 1997. The order of court was “it is ordered that this litigation be reheard by another court”. That appeal had been filed against the Judgment of F.F. Wanjiku Senior Resident Magistrate at Kerugoya in SRMCC No. 42 of 1991.

This current appeal which therefore arises from the rehearing under the court of Appeal order. The rehearing was undertaken by Resident Magistrate Miss P.K. Sultan at Kirinyaga. The record shows that the hearing before P.K. Sultan R.M commenced on 13/3/2001 in presence of all parties.

Mr. Muchira Advocate for Defendant raised a preliminary objection on a point of law, “That this case is barred under the limitation of Actions Act” and submitted that the original plaint was dated 21/3/1991 and when amended the claim was commencing in 1974 and it was barred after expiration of 6 years from that date. But the case was brought 17 years after action arose. Also the valuation showed the value of the subject matter was one (1M) million shillings beyond the jurisdiction of the Resident Magistrate’s Court.

The plaintiff’s counsel pointed out that in the appeal there was no issue of Limitation was raised and the issue of jurisdiction had been overruled as the claim was for rent payments not value of the property. Thereafter the Resident Magistrate gave a considered Ruling on 27/3/2001 and held that the suit was brought long after the stipulated time and there was no attempt to seek leave. She therefore dismissed the suit, hence this appeal. The grounds are set out in the memorandum.

On ground numbered one the complainant was that the cause of action arose in 1974 and the suit was filed on 8/4/1991. This was 17 years since the commencement of cause of action. This ground has no merit.

On ground numbered 2 that the claim was continuous the plaint prays for accounts to 1974. That is the date the plaint states that the premises were let to them first time. Therefore the claim commenced in 1974 but it continued to the date the suit was filed. It follows that the plaintiff was at liberty to file suit after expiration of 6 years. But by 1991 more than 6 years had expired. I find this ground to be of no merit.

Regarding ground 3 it is to be noted that the suit was to be retried before another court. The raising of Preliminary Objection is in the process of hearing. The success of Preliminary Objection would bring further hearing to an end. This ground has no merit.

Upon considering the record and the submissions of both Counsels, I find that the order on Appeal No. HCC.323 of 1997 for a retrial was complied with in Kerugoya Senior Resident Magistrate's Court before Resident Magistrate P.K. Sultani. I therefore find no merit in this appeal the same is dismissed with no order as to costs.

Dated this 28<sup>th</sup> of January, 2008.

**J. N. KHAMINWA**

**JUDGE**

**28/1/2008**

**Khaminwa – Judge**

**Njue – Clerk**

**Mr. Kathungu HB for Mucira**

**Ms Njeru**

Read in open court.

**J. N. KHAMINWA**

**JUDGE**