



REPUBLIC OF KENYA

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

Civil Suit 539 of 2000

JAMES JOSEPH RUGENDO PLAINTIFF

VERSUS

KENYA POWER AND LIGHTING CO. LTD DEFENDANT

RULING

In its Amended Defence dated 16th November, 2006 the Defendant states as follows in paragraph 1:

“The defendant files this statement of defence, in the alternative and without prejudice to its intention to apply at the earliest opportunity to strike out the suit on the ground that the Plaintiff’s alleged cause of action did not arise within three (3) years before this action and is barred by virtue of the Limitation of Action Act, Cap.22 of the Laws of Kenya.”

When the parties came before me for hearing of the main suit on 4th March, 2008 Mr. Nyoro representing the Plaintiff while Mr. Ngasha represented the Defendant, Mr. Ngasha raised a preliminary point of law based on the above quoted paragraph of the Amended Defence. Mr. Nyoro opposed it.

The gist of the matter, from what has been brought to my attention, is that the Plaintiff filed this suit on the basis of a contract and therefore after a period of more than three years from the date of the cause of action while the Defendant is of the view that the suit should have been filed on the basis of a tort and therefore within three years from the date of the cause of action. The Defendant goes on to argue that since the suit was filed after three years from the date of the cause of action had expired, the suit is time barred even if the Plaintiff based it on contract, which he should not have done.

From what is before me and to be brief, I find there are circumstances in which a litigant has the option of filing a suit in tort or filing the suit in contract. If he opts to file the suit in tort, he must file it within the limitation period of three years. If on the other hand he opts to file the suit in contract, he must file it within the limitation period of six years.

The point in time within those two limitation periods at which the litigant elects to file that suit is upon him. He may elect to file the suit after three years from the date of the cause of action. If that suit happens to be in contract, is it lawful or fair for the court to strike out or dismiss that suit on the ground that since he did not file the suit before the expiry of three years or did not file the suit in tort, then the suit is not competent and maintainable because it is time barred by

section 4(2) of the Law of Limitations Act?

The following authorities were cited before me

Court of Appeal Civil Appeal No.40 of 2002

between Electoral Commission of

Kenya and Nunow Abdi Abdullah;

The Common Law Library, Number 5,

BULLEN and LEAKE and J.M.

PRECEDENTS

of

PLEADINGS

Twelfth Edition by I.H. JACOB LLB

at page, 1192 to 1193;

HALSBURY'S LAWS OF ENGLAND

Fourth Edition

Volume 16

at page 358 paragraph 560;

and

Civil Case No.2678 of 1991

High Court Nairobi, JONNAH GATHU KIMANI

Vs

INTER FREIGHT KENYA LTD

My simple answer to the question posed above is that it is not lawful and fair. Let the litigant advance his case whether in tort or in contract so that he is confronted with the defence the Defendant thinks is appropriate for the necessary material and evidence to be produced or adduced, tested, canvassed and evaluated for the court to make its decision on all aspects of the main suit during the hearing of the main suit.

It follows that I should reject and I do hereby, reject the preliminary point of law raised by the learned Defendant's counsel.

Cost of the preliminary objection will however be in the cause and the parties are at liberty to fix the main suit for hearing before any Judge.

Dated and delivered at Nairobi this 12th day of March, 2008

J.M. KHAMONI

JUDGE

Present:

Mr. Marete holding brief for Mr. Nyoro for the Plaintiff

Mr. Moya holding brief for Mr. Ngasha for the Defendant

Mr. Muturi Court Clerk