



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

Civil Case 407 of 2004

SHIVJI RUDA t/a AJIT CONSTRUCTION COMPANY LIMITED.....PLAINTIFF

VERSUS

NATIONAL HOUSING CORPORATION RESPONDENT

RULING

This Chamber Summons, dated and filed, on 29/10/04, is under order 6 Rule 13(1) (b) (c) and (d) of the Civil Procedure Rules, and seeks the following orders:

1. That the plaint herein, dated and filed on 21/7/04, by the Plaintiff, be struck out and the suit dismissed with costs to the Defendant.
2. Costs of this application to be paid by the Plaintiff.

Supported by an Affidavit by W.K.B. Keitany, the application is on the grounds, inter alia, that: the cause of action arose from a Building Construction Agreement entered between the parties on 18/5/1990; final accounts were signed and the project handed over (uncompleted) on 23/3/93 and the plaintiff's claim arises from the non-settlement of those accounts, which forms the date the cause of action accrued; any action could only be brought within 6 years on or before 22/3/1999, as per Section 4(1) of the Limitation of Actions Act, Cap. 22, Laws of Kenya

if a new cause of action arose from the meeting of the parties on 30/5/96, final certificate No. 13 dated 4/9/97, or payment of K.Shs.1,000,000/- on 13/11/97, any suit arising therefrom could only be brought on or before 12/11/03. This suit was brought on 21/7/04, totally out of time, and without leave or extension of time, and it is frivolous, vexatious, scandalous and only meant to prejudice and embarrass the Defendant; it is an abuse of the due process of the court.

In opposition, the Respondent/Plaintiff filed grounds of objection on 26/11/04, which I have carefully considered.

Taking the pleadings herein and the submissions by learned counsel for both sides, I have reached the following findings and conclusions.

This is a case based on contract between the parties as per the agreement dated 18/5/90. Under Section 4(1) of the Limitation of Actions Act, any breach from such a contract must be prosecuted within 6 years of the cause of action, on pain of the suit being time barred.

The evidence before me shows that the Agreement was terminated on 23/3/93. The suit should have been instituted on 23/3/1999. Here the suit was filed on 21/7/04 – way beyond the statutory limitation period of 6 years.

Even the alleged new cause of action on 30/5/96, that would also be time barred after 30/5/02. All in all, I hold that both the original cause of action, and the alleged new cause of action, are time barred, and are not tenable in law.

I need also add that the invocation of arbitration is of no assistance to the Plaintiff. Arbitration is generally a clause in a contract, and if not invoked within the statutory period of 6 years, the matter cannot be referred to arbitration when the suit is time barred.

The Plaintiff/Respondent sought to rely on the case of D'SILVA V. RAHIMTULLA, [1968] E.A. 287. My reading of that case is that it deals with restitution – a claim for money from a void land transaction, which meant that from the word go, there was no legal basis of the money that had changed hands. The transaction was **void ab-initio** and the money could not be held without consideration or valid transaction. In contracts, the time begins to run from breach.

All in all therefore, I rule as under:

1. Grant the prayers in the Chamber Summons herein, dated 29/10/2004, and strike out the suit and dismiss the same, for being time barred.
2. Order that the costs of both this application and the suit herein be paid by the Plaintiff/Respondent.

DATED and delivered in Nairobi, this 28th day of March, 2007.

O.K. MUTUNGI

JUDGE

Mr. Mwangi: We apply for leave to appeal against the ruling just delivered.

Ruling:

Leave to appeal NOT granted, as such an action would further delay a matter already delayed. Litigation must come to an end.

O.K. MUTUNGI

JUDGE