REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

Civil Suit 163 of 2006

ALLAN P. KARANJA WATHIGO :::::::::::::::::: PLAINTIFF

VERSUS

C.M.C. HOLDINGS COMPANY LTD. :::::::::::: DEFENDANT

R U L I N G

Before me for determination, is a Notice of Preliminary objection, as well as a supplementary Notice of Preliminary Objection. The four grounds set out in the two notices are as follows:-

(i) The action, which is founded on contract, is time-barred, by virtue of section 4 (1) of the Limitation of Actions Act.

(ii) Further, or in the alternative, the equitable reliefs sought are time-barred, by virtue of Section 4 (1)(e) of the Limitation of Actions Act.

(iii) C.M.C. Holdings Company Limited is non-existent.

(iv) The Amended plaint is fatally defective, for non-compliance with Order 7 Rule 1 (1) of the civil Procedure Rules.

When canvassing the preliminary objections, the defendant explained that the filing of the supplementary notice of preliminary objection was necessitated by the amendment of the plaint.

The defendant's submission is that the claims set out in the amended plaint, were based on two contracts, which were signed by the parties herein, on 23rd April, 1999.

That being date when the contracts were executed, the defendant holds the view that any litigation arising therefrom should have been instituted within a period of six years, from then. Yet, by the defendant's calculations, the plaint herein was filed some 6 years and 5 months after the contracts were signed.

As no leave was obtained by the plaintiff to bring the suit outside the period stipulated under section 4 of the Limitation of Actions Act, the defendant submits that the suit is time-barred, and ought therefore to be struck out.

Furthermore, the defendant submitted that insofar as the prayer for a declaratory order was an equitable remedy, it too, had to have been brought within six years, pursuant to the provisions of section 4 (1) (e) of the Limitation of Actions Act. It was the defendant's contention that a declaratory suit could only be filed after the lapse of six years if there was a written law which so provided. And in this case, the defendant says that it knows of no such an exception.

Thirdly, the defendant says that CMC Holdings Company Limited is non-existent. The proper defendant ought to be CMC Holdings Limited.

It is said that in the Memorandum of Appearance, the defendant did put the plaintiff on notice, regarding the identity of the proper party. In the circumstances, as the plaintiff appears to be intent on prosecuting the suit against a non-existent defendant, the court was asked to strike out the suit.

Finally, the defendant pointed out the plaintiff's failure to comply with the mandatory provisions of Order 7 rule 1 (1) of the Civil Procedure Rules.

Essentially, the Amended Plaint is said to be fatally defective because it does not contain an averment that there were no other proceedings between the parties herein.

In answer to the preliminary objections, the plaintiff submitted that the suit was not time-barred. His argument is that there exists a contract dated 12th August¸2006, which constitutes a continuous series of the other contracts dated 23rd April, 1999.

Having perused the Amended Plaint as well as the Amended Defence, it is clear that both parties make reference to an agreement dated 12th August, 2006. The said agreement was in relation to accounts in respect of four tractors. The four tractors were the subject matter of the initial two contracts dated 23rd April, 1999.

That therefore begs the question whether or not the agreement dated 12th August, 2006 could be deemed to constitute a continuation of the contracts dated 23rd April, 1999.

In order to resolve that issue, the parties will have to lead evidence. Therefore, it is not an issue which can be resolved through a preliminary objection. In arriving at that conclusion, I have derived guidance from the unanimous decision by the Court of Appeal in **MUIRURI VS. KIMEMIA (2002) 2 KLR 677** at 682, whereat the court cited with approval the following words of Sir Charles Newbold in **MUKISA BISCUIT MANUFACTURING CO. LTD. VS. WEST END DISTRIBUTORS LTD (1969) E.A. 696**, at page 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 the 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."***

Having come to the conclusion that it will be necessary for the parties to lead evidence on the issue as to whether or not the agreement dated 12th August, 2006 was a continuation of the contracts dated 23rd April, 1999, I reiterate that the issue cannot be resolved through a preliminary objection.

The plaintiff also submitted that there is no time limit stipulated for bringing an action for declaratory orders. Indeed, as far as the plaintiff was concerned, the court is empowered to make a declaration of rights even in the absence of pleadings. Therefore, he believes that there is no limitation of time for bringing actions for declarations.

Order 2 rule 7 of the Civil Procedure Rules, which the plaintiff said gives the court authority to make declaratory orders, even in the absence of pleadings, reads as follows;-

> "***No suit shall be open to objection***
>
> ***on the ground that a merely declaratory judgment or order is sought thereby, and the court may make a binding declaration of the right whether any consequential relief is or could be claimed or not."***

In my understanding, that rule relates to declaratory suits. It says that such suits cannot be objected to simply because they seek only declaratory judgments or orders.

However, the rule does not purport to disregard the time limits, if any, for the institution of declaratory suits, as submitted by the plaintiff.

In my considered opinion, declaratory suits do fall within the ambit of Section 4 (1) (e) of the Limitation of Actions Act, which stipulates as follows:

"***The following actions may not be brought***

after the end of six years from the date on which the cause of action accrued –

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) ***actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law."***

Does that therefore mean that the claims for declaratory relief's herein are time barred?

I think not, because as I have already stated earlier herein, the parties will need to lead evidence to show whether or not the contracts dated 23rd April, 1999, and the agreement dated 12th August, 2006 are a part of a series of a continuing single contract.

If the court were persuaded that the agreement dated 12th August, 2006 is distinct and separate from the earlier contracts, it may then follow that the declaratory reliefs in relation to the agreements dated 23rd April, 1999 were time barred.

In effect, the issue cannot be resolved through a preliminary objection.

At this juncture, I feel that it is important to emphasize the fact that the time stipulated in the Limitation of Actions Act, only begins to run from the date when the cause of action accrues. That may or may not be the date when parties execute a contract or agreement.

Therefore, if as the defendant suggests, the cause of action accrued on the 23rd of April, 1999, the defendant would first have to satisfy the court about that fact. It is only then that the court will determine the date from when time began to run.

In so saying, I wish to point out that ordinarily, the execution of an agreement, does not, by itself, give rise to a cause of action. It is usually when one or the other party to such an agreement breaches the said agreement, that a cause of action accrues.

Meanwhile, as regards the defendant's submission that the plaintiff had failed to obtain leave of the court before filing suit out of time, it is the law that;

"***The limitation period of six years in***

respect of contracts, had already lapsed and since this period cannot be extended, the suit with respect

to a breach of contract if that was so, was also properly time barred."

That was made clear by Kwach, Akiwumi and Pall JJA, in **DIVECON LTD (otherwise known as DIVING CONTRACTORS LTD VS. SHIRINKHANU SADRUDIN SAMANI, CIVIL APPEAL NO. 142 OF 1997**, at page 12 of their judgment. In other words, when the cause of action is founded on a contract, there can be no extension of time for bringing a suit.

In relation to the question about the non-existence of the company known as **CMC HOLDINGS COMPANY LIMITED**, all that I wish to say is that pursuant to the provisions of Order 1 rule 10 (2) of the Civil Procedure Rules, the court may order that the name of any party improperly joined, whether as a plaintiff or a defendant, be struck out, and the name of any person who ought to have been joined, be added.

That being the position, I hold that the error in suing the defendant as CMC Holdings Company Ltd, instead of CMC Holdings Ltd is not reason enough to strike out the suit. It is an error, but one which is not fatal.

Furthermore, the defendant could not be prejudiced by the insertion of its proper name, in place of the company which it says is not in existence.

On the other hand, if the plaintiff was to persist in prosecuting the suit against the current defendant, as named, it is the plaintiff who risks having a decree, if it were successful, which it could not execute against CMC Holdings Limited.

Finally on the issue of Order 7 rule 1 of the Civil Procedure Rules, paragraph (e) thereof stipulates that a plaint shall contain;

> "***(e) an averment that there is no***
>
> ***other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter."***

The plaintiff explains that that paragraph was intended to address the mischief of a multiplicity of suits.

But, as in this case there was no such mischief on the plaintiff's part, the defendant is said not to have been prejudiced by the plaintiff's omission.

Clearly, the plaintiff did concede his failure to comply with the provisions of Order 7 rule 1 (e) of the Civil Procedure Rules. The question that needs to be answered by the court is whether or not the said omission is fatal to the suit.

On the one hand, the defendant has not accused the plaintiff of having filed any other suits against the defendant. Therefore, the plaintiff would be right to say, as he did, that the defendant has not been prejudiced by the omission.

On the other hand, the rules committee did not state that it was only in instances in which the mischief was being perpetrated that plaintiffs would be required to comply with 0.7 rule 1 (e) of the Civil Procedure Rules.

On this issue, I would subscribe to the same school of thought as the Hon. Ringera J. (as he then was) in **PASTIFICIO LUCIO GAROFALO S.P.A. VS. SECURITY FIRE EQUIPMENT CO. ZAZECO (K) LIMITED, MILIMANI HCCC NO. 966 OF 2000**, wherein the learned judge said;

> "***In exercising such discretion***
>
> ***the court should be alive to the principle of justice that procedural lapses, omissions and irregularities,***

unless they go to the jurisdiction of the court or prejudice the adversary in a fundamental respect which cannot be atoned for by an award of costs are not to be taken as nullifying the proceedings affected."

In this instance, I have already held that the omission herein does not prejudice the defendant. Also I do find that the issue does not go to jurisdiction of the court. Accordingly, I find that the omission is not fatal.

However, as there is a requirement that the plaintiff should comply with the provisions of Order 7 rule 1 (e) of the Civil Procedure Rules, I hereby issue a consequential order, directing him to file an Amended plaint within the next TEN (10) DAYS, to ensure that he is compliant.

As regards costs, although the preliminary objections have been largely overruled, I nonetheless order that the costs thereof should be in the cause. I so hold because the preliminary objection has culminated in the plaintiff having to take some corrective measures. To that degree, the preliminary objection has been successful and I consider that success as sufficient to cancel out the failure of the other grounds of objection, hence the decision to let the issue of the costs thereof be determined by the substantive suit.

It is so ordered.

Dated and Delivered at Kitale this 21st day of March, 2007.

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FRED A. OCHIENG.

JUDGE.