



Products East Africa Ltd as Sales Representative for Kenya and used his retirement gratuity to put up a permanent building on plot No.8, Nyilima Market, East Asembo Location, Bondo District. He ran a bar and restaurant business in the building. The bar and restaurant business fetched between Kshs.900/= and 1,500/= per day depending on volume of business. He recorded the sales himself and kept no books of account. I pause here to observe that the plaintiff appeared to have some difficulty in expressing himself in English.

It was plaintiff's evidence that in 1981, three men from the then Kenya Posts & Telecommunications Corporation (KP & TC) approached and asked him to allow KP & TC to use 2 rooms in his aforesaid building, for which they offered Kshs.1,500/= per room per month; total Kshs.3000/= per month. He named the three persons as Morris Owuor Wera, Telephone Surveyor, Nyanza & Western Provinces; J.T. Ayiro, Telephone-in-charge, Nyanza & Western Provinces; and a driver called Magak. Plaintiff produced as Exhibit 2 a photocopy of internal memo dated 03.12.89 from J.T. Ayiro as ATC/Sales to someone in KP & TC Kisumu office whose designation is faint on Exhibit 2 but it is to the effect that two rooms of the plaintiff's building had been reserved for KP & TC's used for telephone exchange and that the plaintiff would be willing to operate the service on agency basis when the switchboard is installed and would be paid remuneration fee accordingly. Exhibit 2 was not copied to the plaintiff but he said someone in KP & TC gave him a photocopy thereof. It is plaintiff's case that he allowed KP & TC to occupy the building from 01.12.81 and that KP & TC removed its equipment on 20.03.89. Plaintiff produced as Exhibit 3 a note of delivery of the equipment back to KP & TC dated 20.03.89. One of those who signed the delivery note is Morris Owuor (referred to earlier).

Plaintiff told the court that he was not paid the monthly rent as agreed verbally or at all. He added that when he demanded payment, he was told he would be given storage charges to buy torches for guarding the building and that the KP & TC representatives who took the KP & TC equipment to the building told him to engage three watchmen. He, however, engaged only two as the money was not enough for three watchmen. Plaintiff said he paid each watchman Kshs.1,500/= per month, total Kshs.3,000/= per month. He also bought two torches for the watchmen at Kshs.150/= per torch, total Kshs.300/=, and that he spent Kshs.600/= per month on batteries for the torches but he had no receipts.

Among documents produced by plaintiff is a letter dated 28.03.89 from Divisional Manager, Nyanza (Exhibit 5) confirming that although no specific amount was offered to plaintiff, KP & TC would have paid him Kshs.1,500/= per month agency fee. The letter also said the plaintiff would have been required to engage at least two operators at his cost to man the telephone exchange had it been opened. The letter (Exhibit 5) added that since the exchange was not opened, no basis arose for KP & TC to pay the plaintiff anything else other than storage charges. KP & TC maintained that plaintiff rendered no other service to the corporation other than availing the two rooms. Plaintiff said he complained about the low level of compensation offered to him and KP & TC kept reassuring him that his matter was being handled at higher levels of the Corporation. He produced as Exhibit 6 an internal memo dated 21.02.89 from the Corporation's Deputy Managing Director to the DM/Nyanza to the effect that the DM/Nyanza should discuss with the plaintiff the issue of adequate compensation to him, agree on suitable sum and make proposals for the Corporations' approval.

Plaintiff told the court that he paid the two watchmen by petty cash vouchers and the watchmen thumbprinted to acknowledge payment. He produced as Exhibit 7 a bundle of vouchers. He also produced a bundle of some receipts in respect of travels he made in pursuing the question of his dues from the Corporation. He said some of the travels were from the suit premises to Nairobi and back but that he did not keep receipts for bus fares and living expenses in Nairobi. He also complained that there was damage to the room where the telephone equipment was kept when the Corporation removed its equipment and that the Corporation never repaired the damage. He added that the two rooms have remained vacant and unrepaired to date.

Arising from the foregoing, plaintiff reiterated the prayers in his amended plaint.

The plaintiff was cross-examined at length but he basically maintained his ground. One important highlight of the cross-examination was an allegation that the plaintiff had made alterations to some of the

petty cash vouchers for paying the watchmen he had said he engaged. His answer was that what the defence described as alterations was actually double writing, e.g. repeating the writing of an item if the pen did not write well. He said the watchmen/guards were there for 41 months. Asked whether he objected in writing to the compensation offered, plaintiff said he did so orally. He added that no formal agreement was entered into as defendant's representatives kept saying the matter was being considered.

On the other hand, the defendant called one witness, Margaret Anindo Lutta (D.W.1). She said she worked for Telkom Kenya Ltd, the successor to KP & TC, in Sales and Customer Service section in Kisumu and that she was involved briefly in the initial contacts made by KP & TC representatives with the plaintiff regarding the Corporation's desire to use the plaintiff's subject premises for a telephone exchange. Briefly, D.W.1's evidence was that KP & TC wished to put up its Divisional Headquarters for Rarieda at Nyilima. KP & TC approached the plaintiff regarding the use of the building on his plot for telephone exchange project. This witness said KP & TC agreed to pay plaintiff kshs.150/= per room per month. It was D.W.1's evidence that the plaintiff was told that once the infrastructure was ready, KP & TC would go into agency agreement. No telephone exchange was, however, installed there although KP & TC telephone equipment was kept there.

It was D.W.1's evidence that thereafter plans changed and no telephone exchange was installed; that eventually KP & TC considered transferring its equipment from the plaintiff's building in 1989 but that the first two attempts were unsuccessful as plaintiff was unwilling to give KP & TC's representatives access to the equipment. According to D.W. 1, it was not until defendant was offered assistance by officials in Provincial Administration that KP & TC was able to remove the telephone exchange equipment from plaintiff's building in 1989. After removal of the equipment, KP & TC paid storage charges totaling Kshs.11,630/=, at Kshs.150/= per month per room. It was D.W.1's evidence that KP & TC never forced plaintiff to close down his bar and restaurant business at the suit land; that he took the money offered and raised other issues later D.W.1 denied the plaintiff was authorized to engage watchmen and that no guarding was required. She conceded that removal of KP & TC equipment caused damage to the walls of the building of the plaintiff but it was small. D.W.1 denied that the plaintiff refused KP & TC access to repair the damage. D.W. 1 conceded she was referring to some notes as she testified. She said it was not necessary to enter into a formal contract even after KP & TC put its telephone exchange in the plaintiff's building. According to D.W.1, the equipment was installed in 1985 but she could not tell the date. She denied that the equipment was installed in 1983. She too said removal of the equipment was in 1989 but the exact date could be ascertained from payment vouchers. She said the equipment was in KP & TC's opinion minor and no security was required. D.W.1 said she did not know if Angara Orimba instructed plaintiff to engage watchmen and added that it was not within his portfolio. She confirmed there was no written contract. D.W.1 insisted that it was agreed the plaintiff would be paid Kshs.150/= per month per room and that the agreement was verbal.

I have duly considered the rival arguments of the parties, advanced by learned counsel, Mr. O.M. T. Adala for the plaintiff and by learned counsel, Mr. A. Wandabwa for the defendant.

The issue of limitation was raised by the defence in their submissions before me and I shall address that issue first. Section 109 of the then Kenya Posts & Telecommunications Corporation Act relied on as a basis for the defence of limitation provides as follows:

**'109. Where any action or other legal proceeding is commenced against the corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect –**

**(a) the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the plaintiff or his agent;**

**(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve**

**months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.'**

The Kenya Posts & Telecommunications Corporation Act (Cap.411) was repealed vide section 103 (1) of the Kenya Communications Act, 1998 (No.2 of 1998) whose purpose is stated to be to provide for the establishment of the Communications Commission of Kenya, to provide for the transfer of the functions, powers, assets and liabilities of the Kenya Posts and Telecommunications Corporation to the Commission, the Telkom Kenya, and for connected purposes. Subsection (2) of section 103 of the Act provides:

'103. (2) The provisions of the Third Schedule shall, upon the repeal of the Kenya Posts and Telecommunications Corporation Act, have effect with respect to the transfer of the functions, assets liabilities of the former corporation to the Company, the Corporation and the Commission, as the case may be and to all matters incidental to such transfer.'

Save for a general traverse at paragraph 1, the amended defence of Telkom Kenya Ltd filed on 06.09.2000 has not expressly denied being the successor of the Kenya Posts & Telecommunications Corporation and I take Telkom Kenya Ltd to be the successor of the now defunct Kenya Posts Telecommunications Corporation. Section 98 of the Kenya Communications Act is in essence a replica of section 109 of the repealed Kenya Posts & Telecommunications Corporation Act.

On 03.06.02 the defendant herein, being the successor of Kenya Posts & Telecommunications Corporation, filed notice of preliminary objection based on the ground that the plaintiff's suit is incompetent and cannot lie in so far as it offends the mandatory provisions of section 109 of the Kenya Posts & Telecommunications Corporation Act (now repealed). The preliminary objection was argued inter-partes before His Lordship Justice G.B.M. Kariuki on 05.11.03. The learned Judge noted that on 11.06.03, Hayanga, J (as he then was) had made an order enlarging time for filing the suit herein and deeming the same as having been duly filed. Kariuki, J also found that there was no formal application for review or setting aside of Hayanga, J's orders of 11.06.03 and that it was not competent for him to purport to set aside Justice Hayanga's order enlarging time for filing the suit herein on a preliminary objection. Kariuki, J observed, apparently *orbiter*, that the suit was clearly time-barred under section 109 of the Kenya Posts & Telecommunications Corporation Act when it was filed. However, he held that he could not set aside the orders issued by Hayanga, J on 11.06.03 enlarging time to file the suit herein on a preliminary objection without 'more'. Kariuki, J dismissed the preliminary objection with costs on 26.03.04.

What 'more' has been placed before me subsequent to Kariuki J's order of 26.03.04 dismissing the defendant's preliminary objection on grounds that the suit was time-barred at the time of filing? I was referred by the defendant to various provisions of the law:-

- a) Section 109 of the repealed Kenya Posts & Telecommunications Corporation Act (reproduced above).
- b) Section 4 of the Limitation of Actions Act (Cap. 22) to the effect that an action founded on contract should not be brought after 6 years.
- c) Section 8 of Cap. 22 to the effect that an action for distress, recovery of rent arrears or damages in respect thereof cannot be brought after 6 years from the date they became due.
- d) Law of Contract Act (Cap.23) to the effect that there could not have been an agreement to dispose of land by way of lease where such agreement was not in writing.

The defendant further submitted that even if the plaintiff properly demonstrated that he was entitled to an extension of time, the same is not available in causes of action based on contract. Defendant's counsel added:

**‘Sections 26, 27 and 28 of the Limitation of Actions Cap. 22 give the Courts power to extend time to bring an action outside the stipulated times. It is however noteworthy that this power is only limited to instances of fraud, mistake and ignorance of material facts. This power is not available at the instance of the plaintiff whose cause of action is based on contract.’**

Contrary to defendant’s counsel’s above contention, I am of the respectful view that the defendant’s conduct in giving the plaintiff reassurances that his complaint was being addressed and giving him hope of solution which never materialized ended up in defrauding the plaintiff of opportunity for early pursuit of litigation. It would be unconscionable for KP & TC and subsequently Telkom Kenya Ltd as defendant to benefit from the act of misleading the plaintiff as above.

My brief reaction to the points raised at (a) – (d) in the preceding paragraphs is as under:-

i Sub-paragraph (d)

With regard to (d), I am of the view that the deal between the plaintiff and defendant did not relate to disposal of land. In the premise, the Law of Contract Act is not applicable.

ii Sub-paragraph (c)

As regards (c), I am of the view that the plaintiff’s suit is not for distress, recovery of rent arrears or in respect thereof. Section 8 of the Limitation of Actions Act is not applicable.

iii. Sub-paragraph (b)

As for (b) to the effect that the plaintiff’s action, being based on contract, could not be brought after 6 years, attention is drawn to the fact that section 4 of the Limitation of Actions Act under which limitation is pleaded is subject to Part III of the Act where power to extend time is provided if the conditions stipulated there exist. I am of the view that such conditions do exist. I shall come back to this point short shortly.

Iv Sub-paragraph (a)

Concerning (a) relating to section 109 of the Kenya Posts & Telecommunications Corporation Act, I note that there was a series of correspondence between the plaintiff and defendant, as exemplified by the bundle constituting Exhibit 5 plus Exhibit 6, which shows there had been various negotiations between the parties aimed at resolving the dispute as to what was adequate compensation for the plaintiff arising out of the use of his building by the now defunct Kenya Posts & Telecommunications Corporation (KP & TC). It is common ground between the parties that KP & TC removed its equipment in 1989. Exhibit 3, which I accept, shows that KP & TC took delivery of its equipment on 20.03.89. The initial suit, which was validated by Hayanga J’s order, was filed on 15.05.90, i.e. after about 14 months. The plaintiff’s evidence is to the effect that KP & TC kept reassuring him whenever he raised the issue of his adequate compensation that the matter was being addressed by higher echelons of KP & TC. Plaintiff told this court that he took KP & TC’s reassurances in good faith, which was a mistake. Eventually KP & TC never came up with a satisfactory answer. I regard the injury or damage to plaintiff’s cause as having been of a continuing nature within the meaning of section 109 (b) of the Kenya Posts & Telecommunications Corporation Act, which in my view gives the plaintiff a further 6 months over and above the 12 months given under section 109 (a) of the Act. The plaintiff, therefore, had 12 months under section 109 (a) and a further 6 months under section 109 (b), which totals 18 months from the date KP & TC took away its equipment. As the plaintiff’s suit was filed within 14 months, my conclusion is that it was in fact not out of time! In case I am wrong on this, I note that Hayanga, J granted the plaintiff extension of time to file the suit herein. In my view that enlargement of time was within the learned Judge’s discretion and power, for the ends of justice as section 3 A of the Civil Procedure Act (Cap.21) stipulates. My overall finding is that either way, the plaintiff’s suit is not time-barred.

Learned defendant’s counsel drew attention to Kabugu -vs- Kenya Bus Service Ltd [1995] LLR 406

(CAK) in which the Kenya Court of Appeal considered the issue of a court enlarging time for filing of suit out of time. The central issue I would pick from that case is that the defendant ought to challenge a court order extending time to file action at the trial, either on facts brought out at the trial, or by way of arguments. I have considered the evidence on record regarding the issue of limitation and the submissions thereon. My conclusion is that the plea of limitation fails and the same is hereby dismissed.

Reverting now to the substantive issues in the suit, I note that each party called only one witness. In the case of the plaintiff, he is the only one who testified in support of his case while the defendant company called only Margaret Anindo Lutta to testify on its behalf.

The plaintiff took the court through the motions of how the deal between him and KP & TC started, how it progressed to the point when KP & TC stored its equipment in his premises with a view of installing a telephone exchange there but eventually no installation of the proposed telephone exchange materialized. He narrated how representatives of the defendant made him offers for availing two rooms in his building and how, through no fault of his own, KP & TC never installed the telephone exchange and also refused to pay all that became due to him out of the deal. Plaintiff blames KP & TC for the failure of the telephone exchange installation programme to take off and maintains that he should not be penalized as it was not his mistake.

On the other hand, Telkom Kenya Ltd as successor to the Kenya Posts & Telecommunications Corporation has not denied that negotiations took place between its predecessor and the plaintiff whereunder KP & TC secured two rooms at the plaintiff's building for a telephone exchange. Telkom Kenya Ltd now as the succeeding defendant has acknowledged that the telephone exchange installation project in the plaintiff's premises did not materialise, through no fault of the plaintiff. The only issue in controversy is what should be the correct quantum of the plaintiff's dues. According to the only defendant's witness, Margaret Anindo Lutta (D.W.1), KP & TC paid the plaintiff Kshs.11,630/= after removal of KP & TC's equipment from the plaintiff's building, being storage charges at Kshs.150/= per room per month and that nothing else is due to the plaintiff.

The plaintiff is aged around 72 years. Although getting on in years and having apparent difficulty in expressing himself in English, he gave reasonably clear and straight – forward testimony. He seemed frustrated by the treatment he received at the hands KP & TC. He said neither KP & TC nor its successor Telkom Kenya Ltd repaired the premises after removing the telephone equipment nor paid for such repairs. He complained of not having been given adequate compensation either. Plaintiff did not deny receiving the Kshs.11,630/= from the defendant. I take it that the amount was duly paid to him.

The plaintiff struck me as a simple and straightforward old man. I believe him.

I think the defendant Kenya Posts & Telecommunications Corporation/Telkom Kenya Ltd treated the plaintiff very unfairly and should pay for so doing. The issue of general damages does not, however, arise as the deal between plaintiff and defendant relates to contract. Defendant's counsel challenged even other items in the plaint, arguing that they were not described as claims for special damages. I agree that the phrase 'special damages' was not used and should have been used. Instead, the plaintiff summarises his claim under the sub-heading 'Particulars of Loss and Damages'. I hold that there is no substantive difference between 'particulars of special damages' and 'particulars of loss and damage'.

I am satisfied that the plaintiff has proved his suit on a balance of probability and the same is allowed. The amount of Kshs.11,630/= shall, however, be deducted from any award to plaintiff. I make the following final orders:-

1. Prayer (a) for general damages is refused.
2. Prayer (b) for Kshs.437,000/= is allowed in part by deducting therefrom Kshs.11,630/=, leaving a balance of Kshs.425,370/=, with interest at court rate from the date of this judgment until payment in full.
3. Prayer (c) for costs of this suit is allowed.

Orders accordingly.

Delivered at Nairobi this 31<sup>st</sup> day of March, 2006

**B.P. KUBO**

**JUDGE**