



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 255 OF 1999

KENYA TEA PACKERS LIMITEDPLAINTIFF

VERSUS

SAMUEL MOTANYA JOCONIAH.....DEFENDANT

R U L I N G

The hearing of the suit herein came up on 14.6.2004. But before the hearing could get underway, Mr. Nyaencha, learned counsel for the Defendant, raised a Preliminary Objection, notice of which had been given and filed on 31.5.2004 and served on the same day, 31.5.2004.

The Objection was that the Plaintiff's claim is time barred under the Limitation of Actions Act, Cap 22, Laws of Kenya. Mr. Nyaencha submitted that the suit was filed on 8.3.1999 and the cause of action arose in June 1994 and February, 1995; which is 4 years and one month. He went on to submit that the Plaintiff's claim is in conversion and breach of duty of care, and these two claims come under the Law of Torts where the limitation period is 3 years. Hence, the suit should be dismissed. Mr. Ngaru, learned counsel for the Plaintiff submitted that the Preliminary Objection was misplaced since the matter is founded on both tort and contract. To resolve the issue, the relevant provisions of Cap. 22 must be looked at vis-avis the facts of the case, especially what is claimed. Section 4 (1) of the Limitation of Actions Act, Cap. 22, Laws of Kenya, provides as follows:

“The following actions may not be brought after the end of 6 years from the date on which the cause of action accrued: (a) actions founded on contract.”

(2) An action founded on tort may not be brought after the end of three [3] years from the date on which the cause of action accrued.” Then follows a proviso which is not relevant in this case.

The foregoing are the statutory provisions touching on limitation of actions. In the suit we are dealing with, the relevant parts of the Plaintiff claim as follows:

3. At the material times, the Defendant was employed by the Plaintiff as its warehouse supervisor at the Plaintiff's Nairobi Depot and his duties included, **inter alia**, receipts of tea stocks, supervision of sales preparation of weekly receipts and sales summaries.

4. On diverse dates between June 1994 and February 1995, both months inclusive, and in breach of the said duties, the Defendant sold and/or disposed tea stocks belonging to the Plaintiff value at and failed to remit the said sums to the Plaintiff and thereby converted the same to his own use and wrongfully deprived the Plaintiff thereof, by reason whereof, the Plaintiff has suffered loss and damage in the said value.

5. In pursuance of the said breach of duty and conversion the Defendant was charged and convicted in Criminal Case No. 746 of 1995the said conviction being relevant to the issue of conversion

8. Reasons whereof, the Plaintiff prays for judgment against the Defendant for

: (a)

(b) General Damages for conversion

(c) Costs.

On the basis of the above brief facts and claim, the Plaintiffs submission is that the claim is in both contract and torts and not only in torts, and hence the claim is not time barred. There is no doubt that the claim arises out conversion, which is a tort not contract. But that conversion in my understanding of the Plaintiff's claim, arose out of breach of the Defendant's duty. The Plaintiff's submission is that, that duty arose out of contractual relationship between the parties-employee/employer – and that is why the Defendant was charged with the offence of **stealing by servant** contrary to Section 281 of the Penal Code.

However, it is instructive to note that the Plaintiff does not, anywhere in its claim, claim for damages for the breach of contract; probably out of the knowledge that such claim would be time barred and also because it is easier to rely on the criminal conviction in claiming the sum which the criminal court found was converted, than establishing the claim under breach of contract. The law is clearer than it may appear from the submissions by counsel for the Defendant, and this was so stated in **KENYA CARGO HANDLING SERVICES LTD –VS- UGWANG** [1985] KLR, 593, Civil Appeal No. 64 of 1984, where the same issue, as herein, was raised.

In the cause of their judgment, the Court of Appeal held that where the claim lies in both contract and tort, a party can choose to pursue its claim in either contract or in tort. At pages 597 through 598, the court held that **where the suit is based on both contract and tort the Plaintiff can pursue his remedies on contract of employment.”**

That, in my view, is the case in the present suit. The limitation period on contract is six years, and that period had not ran out when the suit was filed. The Preliminary Objection based on limitation fails and the suit should be set down for hearing.

DATED and delivered in Nairobi this 13th Day of May, 2005.

O. K. MUTUNGI

JUDGE