



REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.861 OF 2001

CEMENTERS LTD ::: PLAINTIFF

VERSUS

TELKOM KENYA LTD ::: 1st DEFENDANT

L.W. KUNGU ::: 2nd DEFENDANT T/A EMKAY DESIGNERS

J.K. MURAGURI ::: 3RD DEFENDANT T/A KIMCONSULT

RULING

By an amended plaint filed on 6th August 2001 the Plaintiff claims Kshs 252,634,026.20 against the Defendant for breach of contract. The Plaintiff further claims interest and costs. The genesis of the Plaintiff's claim is a building contract dated 23rd September 1987 made between the Plaintiff and the defunct Kenya Posts and Telecommunications Corporation whose liabilities are alleged in the Plaint to have been assumed by the 1st Defendant. The Plaintiff alleges fraudulent misrepresentation by the Defendants to the Plaintiff and particulars of alleged fraudulent misrepresentation are given. The Plaintiff has given in the plaint incidents of alleged fraudulent misrepresentation spanning a period of about 8 years. 1992 – 2000.

On 22nd August 2001 the 1st Defendant filed an amended statement of defence in which it raised inter alia illegality of the contract alleged in the Plaint and want of jurisdiction of the Court as the claim is Statute barred under the provisions of section 109 of The Kenya Posts and Telecommunications Corporation Act (Cap. 411) of the Laws of Kenya.

The suit came up before me for hearing on 29th September, 2004. Counsel for the 1st Defendant applied to argue a Preliminary Objection based on paragraph 4, 5 and 6 of the amended statement of defence. I allowed the Preliminary Objection to be disposed of first as jurisdiction was being challenged.

Mr. Ochieng for the 1st Defendant submitted that as the alleged contract on which the Plaintiff based its cause of action was made on 23rd September, 1987 and the date of completion was given as 9th December, 1992, the Plaintiff had up to 9th December 1993 to institute proceedings. In Counsel's view by the time the Kenya Communications Act No 2 of 1998 vested existing contractual liabilities of the defunct Kenya Posts and Telecommunications Corporation in Telkom Kenya Limited the Plaintiff's claim was statute barred and could not be revived. Counsel further argued that under Section 109 (b) of the said Kenya Posts and Telecommunications Corporation Act, the Plaintiff should have filed its suit by October

1993. Accordingly by the time the liabilities of the defunct body were being vested in the 1st Defendant the liability to the Plaintiff herein had ceased to exist and could not even have been enforced against the defunct body. This liability was therefore not an existing liability, as at 30th June 1999. It could therefore not be vested in the 1st Defendant. Counsel therefore submitted that the Plaintiff's claim cannot be enforced against the 1st Defendant and should be dismissed with costs.

Responding to the Preliminary Objection raised by the 1st Defendant Mr. Kabaka Counsel for the Plaintiff submitted that the issue of Limitation in this case cannot be resolved without looking at evidence. The Plaintiff had alleged fraudulent misrepresentation by the Defendants. It had also pleaded that by correspondence exchanged between the Plaintiff and the Defendants, the cause of action accrued on discovery of the fraudulent misrepresentation. In Counsel's view the Plaintiff's claim is not statute barred. For this proposition he relied upon the following authorities:

1. The Postal Corporation Kenya -v- Paul g. Ndama and 4 others: Nairobi
HCCC No.1055 of 2002 (unreported)
2. Telkom Kenya Ltd & Another – v – Kamconsult Limited Nairobi HCCC
NO.262 & 267 of 2000 (unreported)

Counsel further submitted that the averments in the Plaintiff disclosed that by the time of filing this suit a final account and certificate had not been completed. In the circumstances the Plaintiff's claim is not statute barred. For this proposition Counsel relied on the case of: Kenya Ports Authority –v – James Nderitu Gachagua t/a Jagar Consultants: Nairobi C.A. No. 106 of 1999 (unreported).

In this case it was observed that where negotiations are ongoing, Limitation of Actions could not be relied upon.

Counsel finally submitted that the Plaintiff's claim had specifically been vested in the 1st Defendant by the Kenya Communications Act No.2 of 1998 and indeed there had been part payment which could only be proved by evidence. Counsel urged that the Preliminary Objection be rejected. In a brief reply Counsel for the 1st Defendant submitted that the authorities relied upon by the Plaintiff related to the Limitation of Actions Act and not Section 109 of the Kenya Posts and Telecommunications Act Chapter 411 of the Laws of Kenya which provided its own Limitation period. In Counsel's view even if the Limitation of Actions Act (Cap.22 of the Laws of Kenya) applied the Plaintiff's claim would still be time barred because it is a liquidated claim and non-issuance of completion certificate is not relevant.

I have now considered the rival arguments, I have also perused the pleadings and the authorities cited. Having done so I take the following view of the matter. The relationship between the Plaintiff and the defunct Kenya Posts and Telecommunications Corporation commenced with the Building Contract of 23rd September, 1987. It is pleaded that payment under the said contract would be made by the Defendant within 14 days of raising the final account/certificate by the Architect. It is also pleaded that the Defendants have by acts of omission failed to pay the Plaintiff or prepare its final account. These averments suggest that to date the final account/certificate has not been issued. In terms of the alleged term of the Contract, the Plaintiff's action is still alive and kicking.

The amended Plaintiff also suggests breach of the said contract. Fraudulent misrepresentation is further pleaded as evidence of the alleged breach of contract. The particulars given of the fraudulent misrepresentation comprise correspondence ending on 11th April 2000. This again suggests a dispute that is current and alive to both the Plaintiff and the 1st Defendant. Then there is the 1st Defendant's endorsement of this dispute and also the Legislative, endorsement of the Plaintiff's claim. By Legal Notice No.158, under the Kenya Communications Act No. 2 of 1998 the liability to the Plaintiff appears to be one of the contractual liabilities vested in the 1st Defendant. This was with effect from 1st July 1999. If this liability was considered by the defunct Corporation as being non-existent, it could not have been one of the ones transferred to the 1st Defendant by the said Legal Notice. On a prima facie basis it

would appear as if a defence under Section 109 of the Kenya Posts and Telecommunications Corporation is not available to the 1st Defendant.

It is also to my mind clear that in the light of the averments in the Plaint already referred to above a final determination on the question of Limitation in respect of the Plaintiff's claim cannot be made without a consideration of the evidence. This is not possible at this preliminary stage.

In the result the Preliminary Objection raised by the 1st Defendant is dismissed with costs. For the avoidance of doubt I must state that the finding at this stage does not prevent the parties canvassing the issue of Limitation at the trial during submissions.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER 2004.

F. AZANGALALA

AG. JUDGE