



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO.147 OF 2000**

**BHUPENDRARAY PATEL**

**alias BHARAT PATEL t/a .**

**MAINTENANCE & GENERAL CONTRACTORS.....**  
**PLAINTIFF**

**VERSUS**

**D.M. KONTOS**

**MRS. A. KONTOS.....**  
**DEFENDANTS**

**RULING**

This application, by way of Chamber Summons dated 28.5.2003, seeks dismissal of the suit herein, and awarding of costs of the suit to the Defendants, on the grounds that: part of the Plaintiff's claim is barred by the Limitation of Actions Act, while the remaining portion is against a Third Party- Penta- and therefore no claim lies against the Defendants and no cause of action can be established against the Defendants.

The application, canvassed under Order 6 rule 13(1) (a) (d) of the Civil Procedure Rules is supported by an Affidavit sworn by Dimitrios Michael Kontos dated 28.5.03. In opposition, the Respondent aver that: the application is incompetent and fatally defective for offending the mandatory requirements of Order 6 rule 13(2), and Order 10 rule 11A of the Civil Procedure Rules; that the application mischievously seeks a summary determination for the suit and thereby avoid hearing on merit of the suit. Finally, the Respondents aver that the application is made belatedly. I have carefully studied the pleadings and the submissions by Counsel for both sides, and considered the authorities cited by Mr. Namachanja – for the Defendant/applicant, especially DIVECON LTD. VS. SAMANI [1997] (CAK) p.585 and based on this, I have reached the following findings and conclusions:

The Plaintiff/Respondent, for whatever reasons, did not consider it prudent to file a Replying Affidavit to the applicant's Supporting Affidavit dated 28.5.2003. This, in my view is fatal because the factual matters deponed in that Supporting Affidavit of Dimitrios Michael Kontos stand absolutely unchallenged. The Plaintiffs/Respondent's Grounds of opposition to this application, date 23/10/03, deal with matters of law, not facts, as raised in the Supporting Affidavit herein above referred to. But even if they addressed issues of facts, they were filed in violation of Order 50 Rule 16(1) which requires three clear days before the

hearing date. The said grounds were filed on 24/10/03, the very day of the hearing of this application. Consequently, they are invalid and are hereby expunged from the court record.

The other finding and conclusion I have reached is that the cause of action arose sometime prior to 2/8/1988. This is confirmed by the Plaintiff's letter to the Defendant/Applicants, dated 2/8/1988, which letter gives a statement of account for work done at the Defendant's Residence. This statement is clearly the one from which the particulars in paragraph 3 of the plaint are extracted. There is no evidence whatsoever that the Plaintiff did any other work for the Defendants either prior to or subsequent to 2/8/1988. Hence the averment by the Plaintiff that the cause of action arose in February 1994, in the Plaint, is totally without any basis. The above being the case, it follows that the Plaint herein, dated 31/1/2000 and filed in court the same date, is time barred by virtue of Section 4(1) (a) of Cap. 22, Laws of Kenya, which has a limitation period of six years for actions founded on contract, which is the case in the present suit.

From the authority of DIVECON LTD. VS. SAMANI (Supra) at page 6 – 7 of their Lordships judgment, the meaning attached to Section 4(1) (a) of the Limitation of Actions Act, [Cap. 22, Laws of Kenya] was put at rest when they said: "The following actions may not be brought after the end of six years from the date on which the cause of action occurred – actions founded on contract. It means that no one shall have the right or power to bring after the end of six years the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done, namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for bringing of the action."

The Plaintiff clearly knew that his action was time barred. His suit is thus an abuse of the court process, and a waste of valuable judicial time on stale matters. The abuse of the court process is further evidenced by the Plaintiff's claim against the Defendants for work and expenses incurred in respect of Third Party – PENTA GODOWN – which work and expenses are clearly documented in both the plaint and the statement of account by the Plaintiff. The upshot of all the going is that this application succeeds and accordingly:-

1. The suit herein is dismissed with costs in favour of the Defendants/Applicants and against the Plaintiff/Respondent.
2. The Respondent is also ordered to pay the costs of this application.

DATED and delivered in Nairobi, this 2nd day of December, 2004.

**O.K. MUTUNGI**

**JUDGE**