



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 4041 OF 1990**

**COMB BOOKS LIMITED .....1ST PLAINTIFF**

**V E R S U S**

**INDUSTRIAL & COMMERCIAL DEVELOPMENT .....DEFENDANT**

**R U L I N G**

This matter merely escaped attention because of its dispositive simplicity. At the hearing of the application, Mrs Magunga for the Defendant said that the matters raised are time barred and referred to the defence stating that the matters complained of occurred in 1979 secondly she said that the Receiver/Manager who was agent of the Plaintiff company should have been brought in as a party to the suit and without that the company which is still under receivership cannot bring a suit; thirdly, that the matters raised in the suit have been canvassed in a previous suit. Mr. Mutunga however, opposed this saying first that the suit is not res judicata as the Plaintiff was the debtor, secondly, there was no Receiver/Manager as purported appointment was oral, lastly that limitation does not arise as Plaintiff is not the one being sued.

The original plaint asked for the termination of receivership and for an order requiring Defendant to pay to the Plaintiff full value of the Plaintiff's assets in the amount of Kshs.2,896,121/- with interest or alternatively to surrender the said assets.

The nature of the cause of action is not stated in the plaint, but the date of attachment was in 1978 as a result of another suit; HCCC No. 117 of 1997 wherein it would appear a third party attached the assets of the Defendant.

In these complicated factual situation, it is not possible to determine which of the facts are agreed between the parties, whether there was or there was no manager, so grounds number 1 and 2 cannot support preliminary point. As for ground 3, it is not that the matters in the suit were also the matters in an earlier case, but that if there were any such similar issues, res judicata operates only because those matters were raised and were heard by a competent Court and finally decided by such Court. Res judicata cannot operate in a situation where decisions were not rendered on the alleged similar issues. Counsel did not state the full content and texture of the law upon which she relied. That is a requirement of preliminary objection that the law relied on must be clear point of law and the facts relied on must be undisputed facts but agreed and common to both parties.

For these reasons, preliminary point cannot arise and with regards to limitation the law relates to institution of suits with concern to causes of action. It is essential to ascertain the cause of action one relies on before operation of Limitation Act can be invoked. Objector did not say which cause of action is meant whether it is tort of conversion or detinue, breach of contract, wrongful attachment or excessive attachment. These are matters prerequisite, and when one desires to seek rejection of plaint on account of limitation, it is advised to heed the cautionary words of BULLEN & LEAKE & JACOBS on Precedent of Pleadings 12th Edition pp 1192, where they said that ; -

“A statement of claim will not be struck out simply because on the facts as pleaded it appears that the cause of action arose before a relevant statutory period of limitation since it is for the Defendant to raise the defence and the plaintiff may be able to counter such defence. See DAWKINS vs. LORD PENRYN (1879) 4 APP C 51.. but where there is nothing before the Court to suggest that Defence may fail, the Court can strike off the plaint as raising no cause of action.”

In this instant case, Mrs Magunga has not shown as an undisputed fact that the time of alleged limitation began to run from the date the cause of action accrued and she cannot do that without the cause of action.

For these reasons, the preliminary objection fails and is dismissed with costs.

DELIVERED this 11th day of July 2003

**A.I. HAYANGA**

**JUDGE**

**Read to Mr. Mutunga for Plaintiff**

**Kania for Defendant**