



**Gilbi Construction Company Ltd & another v Wrigley Company (East Africa) Ltd; Civicon Limited (Third party) (Environment & Land Case 36 of 2020) [2023] KEELC 438 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 438 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 36 OF 2020  
A NYUKURI, J  
FEBRUARY 1, 2023**

**BETWEEN**

**GILBI CONSTRUCTION COMPANY LTD ..... 1<sup>ST</sup> PLAINTIFF**

**GILBI BUSINESS PARK MANAGEMENT LTD ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**WRIGLEY COMPANY (EAST AFRICA) LTD ..... DEFENDANT**

**AND**

**CIVICON LIMITED ..... THIRD PARTY**

**RULING**

**Introduction**

1. Before court is a preliminary objection dated May 16, 2022 filed by the defendant seeking to strike out the plaintiffs' suit on the following grounds;
  - a. That the plaintiffs' claim against the defendant is premised on tort of negligence and the cause of action arose in the year 2015.
  - b. That section 4 (2) of the *Limitation of Actions Act* cap 22 Laws of Kenya provides that 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 arose.
  - c. That the suit herein is statute barred as it has been brought after more than three (3) years from the date on which the cause of action arose.
  - d. That accordingly the honourable court lacks jurisdiction to hear and determine the proceedings herein.



- e. That the plaint dated April 27, 2022 should be struck out and costs be awarded to the defendant.
2. The preliminary objection was canvassed by way of written submissions. On record are the defendant's submissions dated May 16, 2022 together with their supplementary submissions dated October 5, 2022. On their part, the plaintiffs filed their submissions dated September 21, 2022.

### **The Defendant's Submissions**

3. Counsel for the defendant submitted that the plaintiff stated in paragraph 6 of the plaint that the defendant's activities adversely affected the common wall between their property and the defendant's property and that paragraph 8 of the plaint clearly demonstrated that the plaintiffs' cause of action was based on the tort of negligence. According to the defendant, the plaintiffs have stated in paragraph 5 of the plaint that sometime in May 2015, the plaintiffs realized that due to the actions of the defendant, their wall was adversely affected and the claim for loss of rent from June 2015 meant that the cause of action arose in May 2015.
4. Counsel stated that as the suit herein was filed by the plaintiff in April 2020, that showed that the same was filed five years after the cause of action had arisen. Reliance was placed on section 4 (2) of the Limitation of Actions Act to argue that an action based on tort ought to be filed within three years.
5. The court was referred to the cases of *Pirelli General Cable Works Ltd v Oscar Faber and Partners* [1983] 2 AC 1 Stanton [1983] 99 LQR 175, *Stanley Ombeva & another v Nathan Murugu & 5 others* [2015] eKLR, *Rawal v Rawal* [1990] KLR 275, *Iga v Makerere University* [1972] EA 65, and *Owners of Motor Vessels Lillian S v Caltex Oil (Kenya) Limited* [1989] KLR 1, all of which the court has considered.
6. It was argued for the defendant that the preliminary objection raised points of law. Reliance was placed on the case of *Mukisa Biscuits Co Ltd v West End Distributors* [1969] EA 696, to argue that the preliminary objection raised by the defendant raised pure points of law. Counsel pointed out that paragraph 8 of the plaint specifically stated that the plaintiffs relied on tort as stated in *Rylands v Fletcher*. They faulted the plaintiffs' reliance on the decision of *Samuel Waweru v Geoffrey Muhoro Mwangi* [2014] eKLR and argued that the plaintiffs misconstrued the courts decision in that case.
7. It was contended for the defendant that the plaintiffs argument that the damage complained of was a recurring event did not change the fact that the cause of action arose in 2015. Counsel referred to the cases of *Independent Electoral & Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR, *Simon Ndwiga Murage v Embu Water & Sanitation Co Ltd* [2020] eKLR, *Vuyile Jackson Gcaba v Minister for Safety and Security First & others* Case CCT 64/08 [2009] ZACC 26, *Republic v Chairman Public Procurement Administrative Review Board & another exparte Zapkass Consulting and Training Limited & another* [2014] eKLR and *Oladeji (Nig) Ltd v Nigeria Breweries PLC* SC 91/2002, for the proposition that parties are bound by their pleadings and jurisdiction is determined on the basis of pleadings.

### **Plaintiffs' Submissions**

8. Counsel for the plaintiff submitted that the preliminary objection raised by the defendant did not constitute pure points of law as set out in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696.
9. It was submitted for the plaintiffs that for the court to inquire into when the cause of action arose and whether it was a recurring event, the court must examine the facts of the case. According to the



plaintiffs, the cause of action was a recurring event and that time started running in 2020. Counsel argued that the preliminary objection was based on points of fact which denied the plaintiffs a right of reply. Counsel relied on the case of *Samuel Waweru v Geoffrey Muboro Mwangi* [2014] eKLR. It was their argument that a preliminary objection ought to be concise and specific and confined to a point of law and that therefore, the preliminary objection raised by the defendant did not meet that threshold. Counsel held the view that whether the cause of action was a single event or a recurring event was a factual issue before court, which could only be determined upon examination of the facts. Counsel submitted that it would be prejudicial for the court to make a decision based on the preliminary objection without examining documents in this matter.

10. On whether the suit offends section 4 (2) of the *Limitation of Actions Act*, counsel argued that the documents filed in court show that the plaintiffs, the defendant and the third party had discussions aimed at resolving the dispute in this matter as demonstrated in emails between 2015 and 2019. Counsel pointed out that in the email of one Lorenzo dated December 11, 2015, he stated that when the earthworks on the area are done, they will repair the wall. Therefore, that the third party admitted liability for the damages on the wall and agreed to repair it upon completion of the construction, which promise was relied on by the plaintiffs. It was the plaintiffs' position that water was seeping through their wall from the defendant's side as of June 2019 which led to the wall collapsing in April 2020, hence the tortious actions of the defendant and third party were continuous in nature hence section 4 (2) of the *Limitation of Actions Act* does not apply.
11. Counsel relied on the case of *Amaka Development Ltd v County Government of Taita* [2021] eKLR, for the proposition that where there is a continuing breach as opposed to a one off action, the cause of action continues so long as the breach persists. It was the plaintiffs' position that time started running upon the collapse of the wall in 2020 hence the plaintiffs' suit is not time barred.
12. Counsel submitted that the plaintiffs were not indolent as they presumed their rights which culminated in the third party's undertaking on December 11, 2015, that they will repair the wall on completion of construction, and therefore, the plaintiffs would not have filed suit when there was admission and promise to repair the wall as that would have been contrary to the agreement. Accordingly, the plaintiffs argued that as the third party had agreed to repair the wall on completion of their construction, there was no longer a dispute. Counsel cited article 159 of the *Constitution* and argued that courts and tribunals are to encourage alternative dispute resolution mechanisms hence the parties' decision to settle the matter out of court is constitutional and ought to be encouraged by the court. Counsel relied on the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR.
13. On who should bear the costs of preliminary objection, counsel argued that costs are within the courts discretion which discretion ought to be exercised judiciously. Reliance was placed on the cases of *Party of Independent Candidate of Kenya v Mutula Kilonzo & 2 others* HC EP No 6 of 2013 and *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* [2016] eKLR.

### **Analysis and Determination**

14. Having considered the preliminary objection as well as the submissions filed by the parties, two issues arise for determination, namely;
  - a. Whether the preliminary objection raised is a proper preliminary objection; and
  - b. Whether the preliminary objection is merited.



15. A preliminary objection is an objection raised against a suit or pleading based on a point of law which arises from the pleadings, where there is no dispute on facts. In the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* [1969] EA 696, the court described a preliminary objection as follows;

“a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration. ....a preliminary objection is in the name of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issues, and this improper practice should stop.”

16. Similarly, in the case of *Oraro v Mbaja* [2005] 1 KLR, the court stated as follows;

“I think the principle is abundantly clear. A “preliminary objection” correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

17. Therefore, a preliminary objection ought to be anchored on uncontested facts. Where facts are disputed or where the points of law can only be determined after considering contested facts, then that cannot be a proper preliminary objection.

18. The defendant’s preliminary objection is based on section 4(2) of the *Limitation of Actions Act*. The same provides as follows;

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued; provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

19. It therefore follows that an action based on tort, such as the one filed by the plaintiffs ought to be filed within three years from the date the cause of action arose.

20. While the defendant argues that the plaintiffs cause of action arose in May 2015, as the plaintiffs alleged that that was the time the plaintiffs realised cracks in its wall, due to the activities of the defendant; the plaintiffs submitted that the cause of action started running in 2020 when the wall the subject of this suit collapsed, as the cause of action was recurring. The plaintiffs also argued that one Lorenzo, an employee of the 3<sup>rd</sup> party, by an email dated December 11, 2015, conceded to the liability and stated that the damage on the wall was caused by the defendant’s roller vibrations and undertook to repair the wall once the construction work was complete. What therefore is in contention is the date the cause of action arose.

21. This suit is a tripartite dispute between owners of two adjacent properties and a contractor contracted to construct on one of the properties. A preliminary objection must be anchored on undisputed facts. It is clear that the date the cause of action arose has not been agreed upon by the parties as the plaintiffs



alleged that the defendant's wrongful activities began in 2015 but continued up to 2020 when the wall collapsed. And that in the intervening period, there was an acknowledgment or concession of liability on the part of the defendant who promised to repair the plaintiffs' wall once they were through with the construction on the defendant's property.

22. Having considered the plaint, I note in paragraph 7 of the plaint that the plaintiffs alleges that subsequent to them realizing cracks on their wall, there was a series of exchange of emails between them and the defendant who promised to repair the wall. The dates for the emails are not disclosed in the plaint, neither was the time of the repair disclosed. That allegation in paragraph 7 of the plaint points to an averment that there was an acknowledgment on the part of the defendant conceding liability to the extent of restituting the plaintiffs' loss of the damaged wall.
23. The emails alluded to in paragraph 7 of the plaint are part of the evidence the plaintiffs may produce in court which means that that is a factual matter that has not been settled. In other words, both the defendant and the third party have not stated that the allegation in paragraph 7 is not in dispute. That being the case, and considering that the issue as to whether there was a settlement reached between the 3<sup>rd</sup> party and the plaintiff is a matter that can only be resolved at the hearing of the suit, it is my view that the issues raised in the preliminary objection touch on contested facts and therefore as the same are not based on a pure point of law, the defendant cannot select some paragraphs in the plaint and ignore others in arguing their preliminary objection. Although the plaintiffs did not plead in the plaint that the wall collapsed in 2020, it appears that that fact is not disputed by any of the parties as both have alluded to the same in their arguments and documents.
24. In the premises, the preliminary objection dated May 16, 2022 being premised on contested matters cannot be termed as a proper preliminary objection and the same is hereby dismissed with costs to the plaintiffs.
25. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 1<sup>st</sup> DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Ms Muyoka holding brief for Dr. Mutubwa for the Plaintiffs

Ms Kwamboka holding brief for Ms Kitoo for the Third Party

Mr. Mbeche for the Respondent holding brief for Mr. Obura for the Defendant

Josephine – Court Assistant

