



REPUBLIC OF KENYA



**Guumba Contractors Limited v Okeno & Sons Building Contractors & 3 others
(Civil Suit E001 of 2025) [2025] KEHC 1561 (KLR) (17 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1561 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL SUIT E001 OF 2025
OA SEWE, J
FEBRUARY 17, 2025**

BETWEEN

GUUMBA CONTRACTORS LIMITED PLAINTIFF

AND

OKENO & SONS BUILDING CONTRACTORS 1ST DEFENDANT

**MINISTRY OF MINING, BLUE ECONOMY AND MARITIME
AFFAIRS; STATE DEPARTMENT FOR THE BLUE ECONOMY AND
FISHERIES 2ND DEFENDANT**

**MINISTRY OF LANDS, PUBLIC WORKS, HOUSING AND
URBAN DEVELOPMENT; STATE DEPARTMENT FOR PUBLIC
WORKS 3RD DEFENDANT**

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. Before the Court for determination is the Preliminary Objection raised by the 1st defendant vide the Notice of Preliminary Objection dated 24th January 2025. The 1st defendant thereby objected, not only to the hearing of the plaintiff's application dated 13th January 2025, but also the entire suit on the following grounds:
 - (a) This Court is divested of the requisite jurisdiction to hear and determine this matter.
 - (b) The Plaint, as filed herein, is time-barred by dint of the mandatory provisions of Section 35(3) of the *Arbitration Act*, Chapter 49 of the Laws of Kenya as read with Section 4(1)(a) of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya.
 - (c) The plaintiff lacks the requisite locus standi to bring and/or prosecute this suit as it never participated in the subject Mbita Fish Project and it is a stranger to the defendants.



- (d) This suit is bad in law and is nothing but a cheap ploy by the plaintiff to vex the 1st defendant.
- (e) The Plaint and the application filed herein are scandalous, frivolous, and constitute an egregious abuse of the process of the Court.
2. The Preliminary Objection was canvassed by way of written submissions, pursuant to the directions given herein on 27th January 2025. The 1st defendant's written submissions are dated 30th January 2025. In addition to summarizing the factual background of the suit, the 1st defendant made submissions on the leading authorities on the subject, such as *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, *Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others* [2014] eKLR and *Independent Electoral & Boundaries Commission v Jane Cherenger & others* [2015] eKLR.
3. On the issue of limitation, the 1st defendant hinged its arguments on Section 4(1) of the *Limitation of Actions Act* and submitted that the Court lacks jurisdiction to entertain a suit that is stale. It relied on *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd and Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others* [2012] eKLR in this regard and submitted that since the cause of action, which is based on contract, arose 18 years ago, it is hopelessly time-barred.
4. On the purpose of the law of limitation, the 1st defendant relied on *Alba Petroleum Limited v Total Marketing Kenya Limited* [2019] eKLR and *Iga v Makerere University* [1972] EA for the proposition that the law of limitation is intended to protect defendants against unreasonable delay in the bringing of suits; and that the statute expects the intending plaintiff to exercise reasonable diligence in protecting its interests.
5. Another angle pursued by the 1st defendant was the attempt by the plaintiff to upset the arbitral award issued in 2014 as between the defendants. The 1st defendant made reference to Section 35(3) of the *Arbitration Act*, CAP 49, Laws of Kenya and the cases of *Ann Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR and *Nyutu Agrovet Ltd v Airtel Networks Kenya Limited and another*, SC Petition No. 12 of 2015, and submitted that an arbitral award cannot be challenged after 3 months from the date of delivery of the award.
6. Lastly, it was the submission of the 1st defendant that the plaintiffs suit, as filed, is scandalous, frivolous and vexatious and therefore warrants being dismissed with costs. This submission was premised on the assertion that the plaintiff's cause of action arose in 2007 and that the subject works were concluded in 2001; yet the documents presented herein show that the plaintiff was only registered in the year 2012. The 1st defendant therefore submitted that the plaintiff cannot sustain a claim over matters which were concluded long before its existence.
7. Further to the foregoing, the 1st defendant attempted to demonstrate that the plaintiff unsuccessfully sought to be enjoined in Homa Bay High Court Judicial Review No. E010 of 2024, which concerns the enforcement of the subject award, but its application was dismissed with costs for the reason that it was never a party to the arbitration proceedings. Thus, according to the 1st defendant, the plaintiff's actions are only intended to vex and scandalize the 1st defendant.
8. In response to the 1st defendant's submissions, the plaintiff filed written submissions herein dated 2nd February 2025. It contended that its cause of action in this matter arose on 23rd November 2023 when the 1st defendant was paid the first tranche of Kshs. 10,000,000/=. The plaintiff added that the arbitral process was undertaken secretly and without any notice to him while he was waiting for the final account. The plaintiff therefore insisted that its suit was filed within time and that the Court has the jurisdiction to hear and determine it.



9. Regarding Section 53(3) of the *Arbitration Act*, the plaintiff submitted that the date of receipt by it of the arbitral award is a question of fact that can only be ascertained through production of evidence at the trial; and therefore cannot be disposed of by way of a preliminary objection. Similarly, the plaintiff submitted that the assertion that it came into existence after the subject works were undertaken is a question of fact and is therefore not a proper subject of a preliminary objection. On the issue of locus standi, the plaintiff urged the Court to deem it as abandoned since the 1st defendant never submitted on the said ground.
10. In sum, the plaintiff submitted that the 1st defendant's Preliminary Objection is devoid of merit and prayed that it be dismissed with costs.
11. What amounts to a preliminary objection was aptly captured in *Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors* [1969] EA 696 thus:

“...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 plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...A preliminary objection is in the nature of what used to be a 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...”
12. Similarly, in *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others* [2015] eKLR the Supreme Court emphasized the point that: -

“...a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record...”
13. The written submissions filed hereub show that the parties present divergent views on many issues. For instance, while the 1st respondent contended that the plaintiff's cause of action accrued in 2007, the plaintiff insisted that its cause of action arose on 23rd November 2023 when the 1st defendant was paid the first instalment of Kshs. 10,000,000/=. The 1st defendant also made submissions touching on Homa Bay Judicial Review No. E010 of 2022; which submissions involve the examination of documents that are yet to be introduced as exhibits in this case.
14. Additionally, at paragraph 43, the 1st defendant made direct reference to documents annexed to its Replying Affidavit to back up its submission that the plaintiff was only registered as a corporation in 2012, long after the subject works had been executed to conclusion.
15. In similar fashion, the plaintiff also made numerous references to the parties' affidavits and the documents filed herein in its submissions. This is manifest at paragraphs 6, 7, 10, 11, 14, 18, 23, 24, 25, 33, 35 of the plaintiff's written submissions. This is impermissible in respect of a preliminary objection. In *Oraro v Mbaja* [2005] 1 KLR 141, Hon. Ojwang, J. (as he then was) held that:

“...A “preliminary objection” correctly understood, is now well defined 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 processes of evidence. Any assertion, which claims to be a preliminary objection, 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...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

16. In the light of the foregoing, I have no hesitation in holding that the 1st defendant's Preliminary Objection was improperly taken. The same is hereby dismissed with an order that the costs thereof be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 17TH DAY OF
FEBRUARY 2025**

OLGA SEWE

JUDGE

