



REPUBLIC OF KENYA



**Mehta Electricals Limited v Civicon Limited (Commercial Case E416 of 2019)  
[2025] KEHC 3068 (KLR) (Commercial and Tax) (7 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3068 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E416 OF 2019**

**MN MWANGI, J**

**MARCH 7, 2025**

**BETWEEN**

**MEHTA ELECTRICALS LIMITED ..... PLAINTIFF**

**AND**

**CIVICON LIMITED ..... DEFENDANT**

**RULING**

1. The plaintiff filed a suit against the defendant vide a plaint dated 6<sup>th</sup> November 2019 seeking judgment against it for a declaration that that the defendant is liable to pay the admitted sum of USD 519,412.16 comprising USD 467,470.95 as the net amount due under interim application No. 1, USD 51,941.21 as the retention sum, payment of USD 467,470.95 with 12% p.a. interest from 17<sup>th</sup> March 2013 until full payment, payment of USD 51,941.21 with 12% p.a. interest from 17<sup>th</sup> March 2014 until full payment, costs of the suit plus interest at Court rates from the date of filing the suit until payment in full, and any other relief deemed just by the Court.
2. In opposition to the application, the defendant filed a statement of defence dated 29<sup>th</sup> July 2021 and a Notice of Preliminary Objection dated 26<sup>th</sup> April 2024 raising the following grounds -
  - i. That the cause of action arose on 11<sup>th</sup> March 2013 as averred at paragraph 10 of the plaint dated 6<sup>th</sup> November 2019. This suit was filed on 22<sup>nd</sup> November 2019. Section 4(1)(a) of the *Limitation of Actions Act* requires that a suit founded on contract should be brought within six (6) years from when the cause of action arose. The six years lapsed on 11<sup>th</sup> March 2019. The suit was therefore filed out of time; and
  - ii. This Court lacks jurisdiction to entertain the suit by virtue of Section 4(1)(a) of the *Limitation of Actions Act*.



3. The instant Preliminary Objection was canvassed by way of written submissions. The defendant's submissions were filed on 8<sup>th</sup> May 2024 by the law firm of Kitoo & Associates Advocates, and the plaintiff's submissions were filed by the law firm of Kisilu Wandati & Company Advocates on 29<sup>th</sup> August 2024.
4. Ms. Kitoo, learned Counsel for the defendant relied on the decisions in the Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 and Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, and submitted that the defendant's Preliminary Objection challenges this Court's jurisdiction and raises a pure point of law, which if determined, could dispose of the suit, making it a valid objection. She referred to the provisions of Section 4(1)(a) of the Limitation of Actions Act and argued that the cause of action in this suit arose between 28<sup>th</sup> February 2013 and 17<sup>th</sup> March 2013. She contended that the suit ought to have been filed by 17<sup>th</sup> March 2019. She further contended that since this suit was filed on 22<sup>nd</sup> November 2019, it is time-barred, and this Court lacks jurisdiction to hear the case. Counsel urged this Court to down its tools and strike out the suit with costs to the defendant.
5. Mr. Wandati, learned Counsel for the plaintiff relied on the Court of Appeal case of Stephen Onyango Achola & another v Edward Hongo Sule & another [2004] eKLR, and submitted that the defendant cannot raise the defence of limitation at this stage since it did not plead the said defence in its statement of defence. He asserted that the defendant acknowledged the Court's jurisdiction in its defence. He argued that Order 2 Rule 4(1) of the Civil Procedure Rules, 2010 requires such defence as the one raised herein to be specifically pleaded to avoid surprising the opposing party. He asserted that by allowing the plaintiff to present and conclude its case, including cross-examining its witness, the defendant effectively waived its right to rely on the defence of limitation.

#### **Analysis And Determination.**

6. Upon consideration of the Preliminary Objection raised by the defendant, as well as the written submissions filed by Counsel for the parties, the issue that arises for determination is whether the instant Preliminary Objection should be sustained.
7. The Court in the case of Oraro v Mbaja [2005] 1KLR 141 considered what constitutes a valid Preliminary Objection as hereunder -

The principle is abundantly clear. 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 process of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling proof or seeks to adduce evidence for its authentication, is not, as 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.

8. A Preliminary Objection ought to raise a pure point of law, it should be 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.
9. The defendant challenges the plaintiff's suit on the ground that it is time barred contrary to the provisions of Section 4(1)(a) of the Limitation of Actions Act. It is argued that this Court has no jurisdiction to entertain this suit. This in my view, is a pure point of law that can be raised as a



Preliminary Objection. The plaintiff on the other hand contends that the defendant cannot raise the defence of limitation at this stage since it did not plead the said defence in its statement of defence.

10. On perusal of the defendant's defence dated 29<sup>th</sup> July 2021, I note that it did not plead the defence of limitation. On the issue of jurisdiction, the defendant expressly admitted the jurisdiction of this Court to hear and determine the suit. It is trite law that a plea of limitation must be pleaded before it is raised as a Preliminary Objection. The Court of Appeal in the case of Stephen Onyango Achola & another v Edward Hongo Sule & another (supra) in allowing an appeal where the High Court had upheld a Preliminary Objection on limitation of time held as follows-

A plaintiff is not bound to plead in his pleadings issues which would negate possible defences such as limitation, fraud, mistakes and so on long before such issues are raised. He can only deal with such defences if and when they are actually raised in the defence. That must be why order VI rule 4 (1) states:

“A party shall in any pleading subsequent to a plaint....”

The second respondent having failed to specifically plead the issue of limitation in its defence was not entitled to rely on that issue and base its preliminary objection on it; nor will the second respondent be entitled to rely on that defence during the trial of the suit unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition. It is equally not to be forgotten that a party who is entitled to rely on the defence of limitation is perfectly entitled to waive such defence and thus let the suit proceed to trial on its merit.

11. Bound by the above decision, it is my finding that the defendant's Notice of Preliminary Objection dated 26<sup>th</sup> April 2024 is not merited as the issue of the suit between the parties herein being time barred under Section 4(1)(a) of the Limitations of Actions Act was not pleaded in the defendant's defence.
12. In the result, the defendant's Preliminary Objection dated 26<sup>th</sup> April 2024 is hereby dismissed with costs to the plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF MARCH 2025.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Ms Kitoo for the defendant/applicant

No appearance for the plaintiff/respondent

Ms B. Wokabi - Court Assistant

