



Mungai (Practicing as Clarion Architects) v Multimedia University of Kenya (Civil Suit E001 of 2022) [2024] KEHC 88 (KLR) (Commercial and Tax) (17 January 2024) (Ruling)

Neutral citation: [2024] KEHC 88 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E001 OF 2022
A MABEYA, J
JANUARY 17, 2024**

BETWEEN

**ARCH. CHARLES MIGICHI MUNGAI PRACTICING AS CLARION
ARCHITECTS PLAINTIFF**

AND

MULTIMEDIA UNIVERSITY OF KENYA DEFENDANT

RULING

1. The plaintiff instituted this suit against the defendant vide a plaint dated 16/12/2022. He sought judgment for special damages in the sum of Kshs 29,244,634.70 and interests thereon in the sum of Kshs. 150,222,948.08. In the alternative, the plaintiff sought special damages of Kshs 27,801,702.76 and interest of Kshs142,598,167.66. All the claims were as at 31/10/2022.
2. The defendant filed a notice of preliminary objection dated 20/4/2023 on the ground that the suit was statute barred under section 4(a) of the *Limitation of Actions Act* (CAP 22) Laws of Kenya (“the Act”). The preliminary objection was canvassed by way of written submissions.
3. The defendant submitted that the dispute between the parties arose from a consultancy agreement between the parties which was terminated on 26/3/2010. That the cause of action arose at the time of termination of the contract. Counsel submitted that the suit was statute barred was brought 12 years after the cause of action arose. That the plaintiff seeks to rely on documents that are written without prejudice and the same are inadmissible.
4. The plaintiff submitted that the defendants letter dated 12/3/2019 was not marked as being on a without prejudice basis and therefore the communication was not privileged. That section 23(3) of the *Act* was an exception to section 4(1)(a) thereof as the defendant acknowledged the debt. Counsel submitted that the plaintiff’s suit was not time barred and the same was properly before Court.



5. I have considered the preliminary objection and the submissions. The core issue before the Court is whether the preliminary objection can be sustained.
6. In *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, a preliminary objection was defined to mean 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.
It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. In this regard, it cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.
7. Section 4(1)(a) of the Act provides that: -

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

 - a. actions founded on contract;

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”
8. The defendant’s contention was that the plaintiff’s suit was statute barred since the cause of action arose from the consultancy services agreement which had been terminated on 26/3/2010. That since the suit founded on contract, it ought to have been filed by 26/3/2016 and not after 12 years.
9. On the other hand, the plaintiff contended that section 23(3) of the Act was an exception to section 4(1)(a). That the defendant had acknowledged being indebted to the plaintiff and had requested time to settle the debt.
10. Section 23 of the Act provides: -

“(3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim ... and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgment or the last payment ...”
11. Further, section 24 of the Act provides that: -
 - (1) Every acknowledgement of the kind mentioned in section 23 of this Act must be in writing and signed by the person making it.
 - (2) The acknowledgement or payment mentioned in section 23 of this Act is one made to the person, or to an agent of the person, whose title or claim is being acknowledged, or in respect of whose claim the payment is being made, as the case may be, and it may be made by the agent of the person by whom it is required by that section to be made.”
12. From the forgoing, where a person acknowledges a debt or liability, the cause of action in respect thereof is deemed to arise on the date of acknowledgement and not before that date. However, such acknowledgement should be in writing.
13. In the present case, the cause of action is based on a contract and time began to run when the cause of action accrued, 26/3/2010 when the consultancy was terminated. In *Afro Freight Foundation Ltd v.*



African Liner Agencies [2009] eKLR, the court allowed an appeal on the basis that section 23 (3) of the *Act* applied to revive a cause of action where there was proof that there had been an acknowledgement. That time began to run from the date of acknowledgement.

14. In this case, the plaintiff relied on the correspondences between the parties appearing at pages 84 to 90 of its bundle of documents wherein the defendant acknowledged the debt and was requesting for forbearance. The last of such correspondence was dated 19/6/2019. That in my view revived the cause of action from that date.
15. Accordingly, I find no merit in preliminary objection and the same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY, 2024.

A. MABEYA, FCI Arb

JUDGE

