



**Erdermann Company (K) Ltd v AON Minet Insurance Brokers Ltd & another (Civil Appeal E712 of 2023) [2024] KEHC 684 (KLR) (Civ) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 684 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL APPEAL E712 OF 2023**

**JN MULWA, J  
FEBRUARY 1, 2024**

**BETWEEN**

**ERDERMANN COMPANY (K) LTD ..... APPELLANT**

**AND**

**AON MINET INSURANCE BROKERS LTD ..... 1<sup>ST</sup> RESPONDENT**

**APA INSURANCE LTD ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This Appeal arises from the ruling of Hon. Ms. A. N. Makau PM, delivered on 23/06/2022 in Milimani CMCC No. 5401 of 2005 in which the 2<sup>nd</sup> Appellant APA Insurance Company Limited then 2<sup>nd</sup> Defendant challenged the jurisdiction of the Magistrate's Court to entertain the suit.
2. Upon hearing the Preliminary Objection dated 14/03/2022 the trial Court upheld it, by a finding that the Plaintiff's suit against the 2<sup>nd</sup> Respondent was statute barred and struck out the 2<sup>nd</sup> Respondent from the suit with costs payable by the Plaintiff<sup>to</sup> the 1<sup>st</sup> Respondent, AO Minet Insurance Brokers Ltd.
3. Being dissatisfied with the ruling, the Appellant Endermann Company (K) Ltd preferred this Appeal by a Memorandum of Appeal dated 16/09/2022 upon grounds that: -
  1. The Learned Magistrate erred in law and in fact by failing to evaluate correctly the facts adduced by the Appellant and consequently arriving at a conclusion that has no legal factual basis.
  2. The Learned Magistrate failed to consider and take into account the facts, touching on pertinent and substantial points of fact and law, so as to arrive at a just and fair decision.
  3. The Learned Magistrate erred in law and in fact in failing to consider the written submissions of the Appellant in arriving at her ruling.



4. The learned Magistrate erred in law and in fact in finding that the 2nd Respondents should be struck out of the matter and by ordering the Appellant to cater for the 2nd Defendants cost.
5. The learned Magistrate erred in law and in fact by considering and upholding the Preliminary Objection.

The Appellant urged this court to allow the Appeal, set aside the awards to the Respondents and re-assess the Preliminary Objection and make its own conclusion.

4. A brief background to the Appeal is that the 1<sup>st</sup> Respondent hereinafter called (AON MINET) filed the suit on 19/05/2005 against the Appellant (Erdermann Company (K) Ltd) claiming some money allegedly owed to it on account of Insurance Policies that it had procured. In denial, it filed a defence and counterclaim dated 3/10/2014. On 7/11/2019, the main suit was withdrawn leaving the counterclaim active.
5. By an application dated 4/10/2021, the appellant Erdermann Company (K) Ltd sought to include the 2<sup>nd</sup> Respondent as a party to the suit.

In response, the 2<sup>nd</sup> Respondent filed a Preliminary Objection (P.O) to the application as well as a statement of defence dated 15/03/2022. Upon hearing the preliminary objection, the trial court allowed the P.O and struck out the 2<sup>nd</sup> Respondent (APA) from the proceedings. The ruling is dated 23/06/2022. It is the subject of the Appeal herein.

The Appeal was conversed by way of written submissions.

#### **Appellant's case and submissions.**

6. It is the Appellant's case that the trial Magistrate erred in law by striking the 2<sup>nd</sup> Respondent from the suit for reasons that it was time barred having been sued six years after the alleged cause of action and there having been no principal – agent relationship between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent upto 14/09/2021 when it come to know of said the relationship.
7. It is the main issue before the trial Court as raised by the Appellant that time did not start to run until the Appellant learnt of the relationship between the Respondents citing Section 26 (1) of the Limitations of Actions Act, wherein it is provided, in actions based on fraud that the Defendant or his agent or any person through whom the fraud or the mistake could with reasonable diligence have discovered it.
8. The case of Benja Properties Ltd vs. Syedna Mobammed Burbannudin Sabed & 4 others [2015] eKLR was cited in support wherein the court held that time started running when the fraud was discovered on 14/09/2021 hence faults the trial court for finding that the claim against the 2<sup>nd</sup> Respondent was time barred.

#### **1st Respondent's case and submissions**

9. The 1st Respondent's case is purely on a point of law under the Limitations of Actions Act Section 4(1) where Limitations of Actions are provided and particularly, that provides 4(1) 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; and Section 26 (c) that provides; -
  - c) The action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.



10. In support, the 1<sup>st</sup> Respondent relied on the case *Michael Benhardt Otieno V. National Cereals & Produce Board [2017]* eKLR for the position that no one has a right to bring a suit based on contract after the end of six years; *Gathoni v Kenya Cooperative Creameries Ltd [1982] KLR 104* and *Iga v Makerere University [1972] EA* that a plaint which is barred by Limitation is a plaint barred by law; among others. The 1<sup>st</sup> Respondent has urged the court to sustain the trial court's ruling.

## **2nd Respondent's Case and Submissions.**

11. APA Insurance Company Ltd case is that the Insurances policies issued by itself through the 1<sup>st</sup> Respondent were done between 2003 and 2004, and therefore, at all the material times, the Appellant was aware that the Insurance covers for its vehicles were issued by the 2<sup>nd</sup> Respondent, and therefore, the covers having been cancelled by the 2<sup>nd</sup> Respondent in 2004, the cause of Action arose in 2004.

12. It is its further case that the suit was not based on fraud as purported by the Appellant but on breach of contract.

Cases cited in support are similar to those cited by the 1<sup>st</sup> Respondent being; *Alba Petroleum Limited v Total Marketing Kenya Limited [2019] eKLR* *Iga vs. Makerere University [1972] EA (supra)* and *Fredrick M. Waweru & Another v Peter NGure Kimingi[2007]* eKLR.

13. The 2nd Respondent submits that the Appellant's failure to join it in the suit in good time, and waiting for 18 years to do so cannot be excused by the court and urges dismissal of the Appeal with costs to itself.

## **Issues for determination**

### **1.**

Whether the ruling of the trial Magistrate on the Preliminary Objection based on Limitation of Actin Act should be set aside

### **2.**

Which party bears costs of the application.

## **Analysis and Determination**

14. It is evident from the pleadings, evidence and submissions by the Respondents that the cause of action before the trial court is grounded on breach of contract.

The Appellant's submissions is that there was fraud between the Respondents by their failure to disclose the relationship between them.

15. This confusion was laid bare by the 2<sup>nd</sup> Respondent that at all material times, the Appellant knew that it's vehicles had been insured by the 2nd Respondent through the 1<sup>st</sup> Respondent, and when their relationship collapsed, the contract was cancelled in 2004. It is therefore not true that the Appellant only came to know of the relationship after the expiry of the statutory period to file suit based on contract. Section 4(1) *Limitation of Actions Act* provides clearly that a suit based on Contractual relations stands time barred after six years.

However, that period may be extended upon application in terms of Section 26 (C).

16. Section 26(C) provides; -



- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it.
17. The court in *Michael Benhardt Otieno v National Cereals & Produce Board (Supra)* rendered itself on S. 4(1)” ..... That it is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action found on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done, namely an action that is brought in contract six years after the cause of action ---- in light of these clear provisions it should be unacceptable to imply as the learned judge of the superior court did that the wording of section 4(1) of the *Limitation of Actions Act* suggests as a discretion cannot be invoked”.
18. Additionally, the law of Limitation of Actions is intended to protect defendants against unreasonable delay in bringing suits against them. The statute expects the intended Plaintiff to exercise reasonable diligence and take reasonable steps in their own interest as ably rendered in Court of Appeal cited case *Michael Benhardt Otieno (supra)*
19. The same position was taken in the *Gathoni vs. Kenya cooperative creameries Ltd [1982]* that a litigant ought to exercise some reasonable diligence before filing a suit that is time barred by statute to prevent Defendants being dragged to court on statutory barred suits.
20. As ably submitted by the Respondents, a matter based on statutory limitation is a matter that goes to the jurisdiction of the court. Once it becomes clear to the court that the suit against a defendant is time barred, that court must down its tools, and refuse to entertain the suit as ably held in owners of motor vessel “Lillians” case.
21. Further, the Court of Appeal rendered that
- “The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage using such evidence as may be placed before him by the parties...”
22. For the above, I need not move further, as by a long line of superior courts’ decisions, the principles laid down in the “Lillian’ owners of motor vessel” have been upheld and others thereafter.
23. However, the court is minded that had the Appellant sought leave of court to bring the action out of time, the court could have probably exercised its discretion conferred to it under Section 26(c), upon sufficient reasons and exercise of reasonable diligence.
24. Summing up, it is clear to this court that the trial Magistrate’s ruling delivered on 23/06/2022 was based on clear interpretation of the law on Limitation of Actions and the material facts placed him at the time.
25. I therefore find and hold that the learned trial Magistrate cannot be faulted for striking out the 2<sup>nd</sup> Respondent from the suit.
26. Having made the above findings, I come to the inevitable conclusion that this Appeal is devoid of merit and must be dismissed, which I hereby do, with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
- Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF FEBRUARY, 2024.**



**J. N. MULWA**  
**JUDGE**

