



REPUBLIC OF KENYA



KENYA LAW
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**Osiemo v Kenya Commercial Bank Limited (Civil Appeal 552 of 2017)
[2024] KEHC 2645 (KLR) (Civ) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2645 (KLR)

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

CIVIL

CIVIL APPEAL 552 OF 2017

CW MEOLI, J

MARCH 8, 2024

BETWEEN

JOHN LA OSIEMO APPELLANT

AND

KENYA COMMERCIAL BANK LIMITED RESPONDENT

*(Being an appeal from the ruling and order of D.A. Ocharo (Mr.) (SRM)
delivered on 19th September, 2017 in Milimani CMCC No. 3554 of 2016)*

JUDGMENT

1. This appeal emanates from the ruling and order made by on 19th September, 2017 in Milimani CMCC No. 3554 of 2016. John L.A. Osiemo (hereafter the Appellant) instituted the said suit by a plaint dated 26th May, 2016 and seeking general and special damages against Kenya Commercial Bank Limited (hereafter the Respondent) for alleged breach of contract.
2. The Respondent, upon entering appearance, filed a statement of defence dated 14th July, 2016 denying the key averments in the plaint and liability.
3. Subsequently, the Respondent filed a notice of preliminary objection dated 24th March, 2017 to the effect that the suit was statute barred by dint of Section 4 of the *Limitation of Actions Act* (the Act). The Appellant opposed the preliminary objection by filing Grounds of Opposition dated 12th April, 2017. Upon hearing the parties on the aforesaid preliminary objection, the trial court found that the suit had indeed been filed outside the statutory timelines for instituting claims founded on contract, and proceeded to strike out the Appellant's suit.
4. Being aggrieved by the outcome, the Appellant preferred this appeal via the memorandum of appeal dated 13th October, 2017 containing the following grounds:



1. The Learned Magistrate erred in law and in fact in making a finding that the cause of action arose on 23rd April 2010, when the Plaintiff learnt that the Defendant did not remit the check off forms and when the Defendant demanded for the outstanding arrears.
 2. The Learned Magistrate erred in law and in fact in failing to find that the cause of action arose on 24th January 2011, when the Plaintiff realized that the Defendant had levied a penalty for the arrears accrued when the check off was not operational.
 3. The Learned Magistrate erred in law if failing to take into account the submissions of the Appellant.
 4. The Learned Magistrate erred in law in making a finding that the suit was brought after the statutory limitation period of six years.
 5. The Learned Magistrate erred in law in striking out the suit. sic
5. The appeal was canvassed by way of written submissions. Counsel for the Appellant anchored his submissions on the decisions rendered in *South Nyanza Sugar Company Limited v Joshua Aloo Aloo* [2021] eKLR and *Central Organization of Trade Unions (K) v Eric Wanyoike & 3 others* [2021] eKLR as to when a cause of action arises in contract. Counsel argued that in the present instance, the cause of action did not arise on 23rd April 2010 as claimed by the Respondent and concluded by the trial court, but rather, the cause of action arose on 24th January, 2011 when the Appellant discovered that the Respondent had levied penalties, in breach of the contractual agreement which was entered between the parties. He cited the decision in *Ebrahim & Company Limited v Barclays Bank of Kenya Limited* [2014] eKLR where a similar finding was made.
 6. Thus, counsel contended that the trial court did not properly consider the submissions tendered by the Appellant, else, would have found that the suit was filed within the statutory timelines stipulated under Section 4(1) of the Act. Counsel faulted the trial court for striking out the suit and urged the court to allow the appeal, and to set aside the order made by the trial court, accordingly.
 7. The Respondent's counsel by way of the submissions dated 5th August, 2022 argued that contrary to the contentions by the Appellant, the trial court correctly found that the cause of action herein accrued when the alleged breach took place, citing the decisions in *Muchendu v Waita* [2003] eKLR and *Diana Katumbi Ktio v Reuben Musyoki Muli* [2018] eKLR. Counsel therefore supported the trial court's decision to strike out the Appellant's suit for being time barred. Other decisions relied on included *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR and *Phoenix of E.A. Assurance Company Limited v Simeon Muruchi Thiga t/a Newspaper Service* [2019] eKLR. For those reasons, counsel for the Respondent urged the court to dismiss the appeal with costs.
 8. The court has considered the memorandum of appeal, the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa spelt out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this



court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

9. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278.
10. Upon the court's review of the memorandum of appeal and submissions by the respective parties, it is apparent that the appeal turns on the sole issue whether the learned trial magistrate's finding that the Appellant's suit was statute barred by dint of Section 4(1) of *the Act* was well founded.
11. The Respondent's preliminary objection dated 24th March, 2017 challenged the competency of the Appellant's suit on grounds that it was time barred. In opposition thereto, the Appellant filed Grounds of Opposition containing the following grounds:
 1. Section 4(1) (a) as read with Section 26 and 27 of the *Limitation of Actions Act* CAP 22 Laws of Kenya (hereinafter referred to as "the Act") provides that the time limitation for bringing an action founded on a contract is six (6) years from the date on which the cause of action arose.
 2. The relationship between the Plaintiff and the Defendant in this matter is contractual hence falls within the purview of Section 4(1) of the Act.
 3. The Cause of Action in this matter arose on 24th January 2011 when the Plaintiff realized that the Defendant was in breach of the terms of their contractual relationship created by their loan agreement dated 23rd April 2008.
 4. The suit was filed on 2nd June 2016 which is five (5) years from the date on which the cause of action arose hence within the appropriate legal time limitation.
 5. The Defendant's Preliminary Objection therefore lacks merit and is an abuse of the Court process and ought to be dismissed with costs. sic
12. Upon hearing the parties on the preliminary objection, the learned trial magistrate had rendered his decision as follows:

"The issue is when did the cause of action herein arise? According to the plaint dated 26th May 2016 and filed on 2nd June 2016, the parties entered into a loan agreement on 23rd April 2008 which was to be serviced in equal monthly instalments of Kshs. 99,656/= for 42 months with interest charged at 16% per annum. The loan amount was Kshs. 3,000,000/=. It was a term of the contract that the loan was to be paid directly by cheque off system through the plaintiff employer.

The plaintiff pleads that two years later, he came to learn that the defendant did not remit the checkoff forms to the employer for deduction. When the defendant demanded for the outstanding arrears. Two years from 23rd April 2008 lands us on 23rd April 2010. That therefore is the date the cause of action arose. It's the date when the plaintiff first realized



that the defendant had committed certain acts which gave him the right to sue. The suit was filed on 2nd June 2016. Some six years one month and a few days afterwards. Section 4 (i) of the *Limitation of Actions Act* Cap 22 provides that “action founded on contracts may not be brought after the end of Six Years from the date on which the cause of action accrued...”

The cause of action herein accrued on 23rd April 2010. The suit was filed on 2nd June 2016 which was after the expiry of six years. The suit is therefore brought after the lapse of the statutory limitation period of six years. I uphold the preliminary objection and strike out the suit.” sic

13. From the pleadings, the claim brought by the Appellant and against the Respondent was founded on alleged breach of contract, and arose out of a contractual agreement for certain financial facilities granted to the Appellant by the Respondent. The contract was signed by the parties on 23rd April 2008. The statutory timelines for bringing claims relating to contracts are set out under Section 4(1) of *the Act*, thus:

“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;”

14. Pursuant to the afore-cited provisions, actions founded on contract may not be brought after the end of six (6) years from the date when the cause of action accrued. The chief contention is the date when the cause of action accrued.

15. Firstly, the term ‘cause of action’ was defined by the Court of Appeal in the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another* [1980] eKLR as follows:

“per Lord Pearson in *Drummond-Jackson V.B.M.A.* (1970) 1 W.L.R. 688 at p. 696.

“A cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint.”

16. Furthermore, *Black’s Law Dictionary*, 10th Edition defines the term ‘accrue’ as follows:

“to come into existence as an enforceable claim or right.”

17. The Appellant’s argument is that the cause of action accrued on 24th January, 2011 when he made the discovery that the Respondent had levied penalties on outstanding loan sums, in alleged breach of the parties’ contract. The Respondent for its part maintained that the accrual of the cause of action began on 23rd April 2010 when it demanded payment from the Appellant on the outstanding loan.

18. Without delving into the merits of the suit, the court upon considering the pleadings and the applicable provisions and authorities is of the view that the cause of action accrued on 23rd April, 2010, the date of the Respondent’s demand to the Appellant for the payment of the outstanding loan sums in arrears, followed by the Appellant’s discovery that the Respondent had allegedly failed to remit the completed check off forms to the Appellant’s employer to facilitate deductions in respect of the loan. That marked the accrual point from which time started running in respect of the Appellant’s cause of action.

19. Based on these facts and the statutory timelines for bringing an action founded on contract, the court finds that the Appellant ought to have brought his claim before the lapse of six (6) years from 23rd April 2010, at the very latest on 23rd April, 2016. In filing the suit on 2nd June 2016, the Appellant



moved the court outside the stipulated statutory timelines, which rendered his claim time barred and incompetent.

20. Consequently, the court is of the view that the learned trial magistrate, having reviewed the law and material before him arrived at a correct finding in both law and fact. The appeal herein is without merit and is hereby dismissed, with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 8TH DAY OF MARCH 2024.

C.MEOLI

JUDGE

In the presence of

For the Appellant: Ms. Akinyi h/b for Mr. Moseti

For the Respondent: Mr Kinuthia

C/A: Carol

