



Turn Key International Trade Limited v Sunmatt Limited (Sundip Shah) (Civil Suit E406 of 2022) [2024] KEHC 2701 (KLR) (Commercial and Tax) (1 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2701 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E406 OF 2022
MN MWANGI, J
MARCH 1, 2024**

BETWEEN

TURN KEY INTERNATIONAL TRADE LIMITED PLAINTIFF

AND

SUNMAT'T LIMITED (SUNDIP SHAH) DEFENDANT

RULING

1. The gist of this application is the issue of whether the plaintiff has the locus standi to bring the suit between the parties herein. Through a plaint dated 13th October, 2022, the plaintiff filed suit against the defendant claiming the sum of USD 440,221.00 together with interest and costs of the suit, for goods allegedly supplied and failure by the defendant to make payments between the months of September and October 2016.
2. The defendant entered appearance on 21st March, 2023 through the firm of Abdullahi Gitari & Odhiambo Advocates LLP. A defence dated 4th April, 2023 was subsequently filed challenging the legal capacity of the plaintiff to institute the suit.
3. The defendant also filed an application dated 10th May, 2023 seeking to amend the defence, and the another one dated 11th May, 2023, seeking to have the plaint struck out. Alongside the applications was a Notice of Preliminary Objection dated 9th May, 2023.
4. This Court gave directions on 31st July, 2023, that the Preliminary Objection would be heard first by way of written submissions. The said Preliminary Objection is grounded on the following:
 - i. That the plaintiff is not an incorporated body established under the Companies Act No. 17 of 2015 and is therefore devoid of the requisite locus standi to commence, originate and/or otherwise maintain the present suit;



- ii. That the plaintiff's cause of action being founded on contract is barred by effluxion of time by dint of Section 4(1) of the [Limitation of Actions Act](#). The Court therefore lacks jurisdiction to hear and determine the suit; and
 - iii. That the suit is bad in law, incurably defective and should be dismissed with costs to the defendant.
5. The defendant filed written submissions dated 11th August, 2023. Mr. Githinji. Learned Counsel for the defendant submitted that the plaintiff lacks the locus standi to bring the suit between the parties herein as its registered offices are in Guangzhou China, thus it is a foreign company with no registered offices in Kenya. Counsel argued that Section 974 of the [Companies Act](#) prohibits a foreign company from carrying on business in Kenya unless the company is registered.
6. Mr. Githinji contended that the plaintiff had failed to demonstrate that it was lawfully incorporated either in the Republic of Kenya or in the People's Republic of China as per the provisions of Sections 973 to 985 of the [Companies Act](#), 2015. He submitted that only a jurist person can sue and be sued and a non-existent person cannot maintain a cause of action in Court. He cited the case of [Housing Finance Company of Kenya Ltd vs Embakasi Youth Development Project](#) [2004] eKLR.
7. The defendant urged this Court to find that the plaintiff lacks the locus standi to bring the suit in issue and urged this Court to dismiss the suit with costs.
8. In opposition to the Notice of Preliminary Objection, the plaintiff filed its submissions dated 16th January, 2024. Mr. Osiemo, learned Counsel for the plaintiff argued that the Notice of Preliminary Objection as filed was on mis-description of the parties and it raises factual issues, and as such, it fails to meet the threshold of a Preliminary Objection which is purely on a point of law.
9. The plaintiff's Counsel submitted that the error in mis-description of the parties can be cured by Article 159 of [the Constitution](#) of Kenya and Sections 1A and 1B of the [Civil Procedure Act](#). He contended that the absence of the plaintiff's record at the Registrar of Companies' database can be resolved by calling for the evidence.
10. He argued that the contract forming the core of the instant litigation is anchored within the statutory time limit and that the plaintiff's suit was filed within the 6 years prescribed by law and is therefore not time-barred.

Analysis and Determination.

11. I have considered the Preliminary Objection raised, the submissions made and the authorities relied on by the parties' Advocates. I have also looked at the pleadings giving rise to the suit as filed. The following issues arise for determination:
 - i. Whether the preliminary objection is merited;
 - ii. Whether the plaintiff has the locus standi to bring the instant suit;
 - iii. Whether the suit is time-barred; and
 - iv. What relief should this Court grant?



12. A Preliminary Objection was defined in the case of *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd* (1969) EA 696, as follows:

“So far as I am aware, a Preliminary Objection consists of a pure 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.....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.”

13. It follows therefore that a Preliminary Objection ought to be raised on pure points of law and when argued it is likely to dispose of the suit.

14. In the instant suit the Preliminary Objection raised by the defendant is based on the issue of locus standi. The attention of the Court was drawn to the provisions of Sections 973 to 985 of the [Companies Act](#) on foreign companies and the requirement for them to be registered in Kenya in order to retain legal status.

15. A claim that one lacks locus standi contests a party's right to a trial by a Court, and if a decision is rendered in favour of the said argument, the suit may be dismissed. A claim that a party lacks locus standi is a purely legal matter that must be brought up and resolved as soon as possible. In the circumstances, I find the Preliminary Objection as filed is proper as it raises pure points of law. I will now proceed to determine the issue of whether the plaintiff has the locus standi to institute the suit herein.

16. In the plaint, the plaintiff describes itself as a limited liability company duly registered in Kenya under the provisions of the [Companies Act](#). The plaintiff averred that it was duly registered and the same can be proved by calling evidence. The plaintiff further argued that a description of the parties can be cured by Article 159 of [the Constitution](#) of Kenya, 2010 and Sections 1A and 1B of the [Civil Procedure Act](#). I have perused the pleadings and noted that no certificate of incorporation was attached by the plaintiff as evidence to prove its registration with the Registrar of Companies. Its nature of business in Kenya is unknown and the place of its registered office is also unknown.

17. The defendant's Counsel submitted that the provisions of Section 975 of the [Companies Act](#) were also not complied with. He relied on the response letter by the Business Registration Service dated 9th May, 2023 which stated that “... Turn Key International Trade Limited does not appear in our database of registered business/companies.”

18. Despite the allegation of non-registration of the plaintiff being raised by the defendant, the plaintiff did not see the need to adduce evidence to counter the defendant's contention. It is trite law that in civil cases the balance of proof is on a balance of probabilities and the law of evidence is that he who alleges the existence of certain facts must prove their existence.

19. This position is anchored in the provisions of Sections 107, 108 and 109 of the [Evidence Act](#) which state as follows

“Section 107: Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.



- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108: Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109: Proof of particular fact

The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person.”

20. Mr. Osiemo argued that the plaintiff is registered in Kenya and that the said assertion could be ascertained by calling evidence.
21. It is trite law that a non-existent person cannot sue, and once the Court is made aware that a plaintiff is non-existent, and therefore incapable of maintaining a cause of action, it cannot allow the action to proceed.
22. The plaintiff’s plaint should have been clear on the issue of the plaintiff’s registration status in Kenya with the Registrar of Companies.
23. On the material placed before this Court, it is my finding that the plaintiff lacks the locus standi to bring the instant suit.
24. In regard to the said issue of effluxion of time, had this Court found that the plaintiff had the locus standi to institute the cause of action in issue, my finding would have been that since the cause of action is founded on contract, with a time limit of 6 years as per the provisions of Section 4(1) of the *Limitation of Actions Act*, and since the goods that form the subject of the dispute herein were supplied in the months of September and October, 2016; the cause of action would have accrued from the time when the demand was made. Since the suit was filed in October 2022, my finding would have been that it was filed within the statutory period.
25. I therefore find that the Preliminary Objection is partially merited only to the extent of the plaintiff not having the locus standi to institute the cause of action.
26. The upshot is that the plaintiff’s suit is struck out for want of locus standi. The defendant is awarded half the costs of the Preliminary Objection.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF MARCH, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Osiemo for the plaintiff

Ms Kimani for the defendant

Ms B. Wokabi – Court Assistant.

