



Computer Ways Limited v Nairobi City Water & Sewerage Co (Civil Appeal E591 of 2022) [2024] KEHC 9310 (KLR) (Civ) (18 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9310 (KLR)

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

CIVIL

CIVIL APPEAL E591 OF 2022

AB MWAMUYE, J

JULY 18, 2024

BETWEEN

COMPUTER WAYS LIMITED APPELLANT

AND

NAIROBI CITY WATER & SEWERAGE CO RESPONDENT

JUDGMENT

1. The present Appeal arises from the decision of the Trial Court to allow the Preliminary Objection dated 8th July, 2022 raised by the Respondent which contended that the Claim was filed time barred as it was filed outside the time period allowed under Section 4(1) of the [Limitation of Actions Act](#).
2. The Memorandum of Appeal dated 8th February, 2024 encapsulates the Appellant's position in two grounds, namely:
 - i. The learned magistrate erred in law in finding that the Preliminary Objection was merited.
 - ii. The learned magistrate erred in law in finding that the suit was filed out of time and dismissed.
3. The Preliminary Objection revolved around when the cause of action, namely the alleged breach of contract, accrued. It was the Respondent's contention, as the mover of the Preliminary Objection, that the cause of action accrued in March of 2016; and since the Statement of Claim was filed on 25th April, 2022 after the lapse of six years, leave of the Trial Court was required. Since no leave had been sought by the Appellant and granted by the Trial Court, the Respondent contended that the lower court did not have jurisdiction to hear and determine the Claim.
4. The Appellant rejected the factual assertions of the Respondent through the Appellant's Replying Affidavit dated 18th July, 2022. In it, the Appellant argued that the cause of action arose on 1st May, 2016 hence the Claim was filed within the six years' period under Section 4(1) of the [Limitation](#)



of Actions Act. The Appellant's position was that the payment terms on the Local Purchase Orders was that payment was to be done within sixty days after certified delivery, which would run from the confirmation certificate dated 21st April, 2016 and thus have the cause action accruing sixty days therefrom.

5. The Trial Court agreed with the Respondent's position; situating the start of the statutory clock as being 1st March, 2014 when the invoices were issued. In the present Appeal, the parties' respective written submissions mirror their written submissions filed in the lower court.
6. Having considered the rival submissions of the parties and the decision of the lower court, I begin my analysis by answering the question of whether the Preliminary Objection before the lower court was procedurally sound.
7. In *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd*, [1969] EA 696 the nature and scope of a preliminary objection was defined in the following words:

“ A Preliminary Objection consists of 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. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”
8. The Preliminary Objection dated 8th July, 2022 did not assume that all the facts pleaded by the Appellant were true and it also required extensive ascertainment of contested facts by the Trial Court. The point of law being raised by the Respondent had not been pleaded in the Respondent's Response to the Claim, nor could it be said to have arisen from by clear implication of the pleadings. The Respondent's submissions dated 18th July, 2022 introduced facts for the first time, and those facts were disputed by the Appellant both in its Replying Affidavit as well as in its written submissions dated 21st July, 2022. Thus, the Trial Court was obligated to have rejected the Preliminary Objection on the basis that it went beyond the scope set out in *Mukisa Bisquit*.
9. However, even putting aside the fact that the Respondent's Preliminary Objection went beyond the scope of what a preliminary objection should be, the lower court also erred in its factual analysis. The two Local Purchase Orders in the dispute were clear that the payment terms were sixty days after certified delivery. Sixty days from the confirmation certificate dated 21st April, 2016 would be 20th June 2016; making the Statement Claim dated 22nd April, 2022 in time.
10. In view of the foregoing, the Appeal herein is merited and must succeed. Therefore:
 - a. The Ruling of the Small Claims Court in Milimani SCCCOM E2552 of 2022 is hereby set aside;
 - b. Milimani SCCCOM E2552 of 2022 is hereby reinstated;
 - c. The Appellant herein shall have the costs of the Preliminary Objection proceedings before the Small Claims Court as well as the costs of this Appeal; and
 - d. The reinstated lower court file shall be mentioned on 17th September 2024 before the Small Claims Court for setting down for hearing and determination on its merits, with statutory time to begin running from that date.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF JULY, 2024.

BAHATI MWAMUYE

JUDGE

In the presence of:

Mr. Otieno h/b Mr. Ntabo Counsel for the Appellant

Ms. Nyangi Counsel for the Respondent

Mr Guyo, Court Assistant

