



**Karanja v First Capital (K) Limited (Civil Appeal E841 of 2022)
[2024] KEHC 9432 (KLR) (Civ) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9432 (KLR)

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

CIVIL

CIVIL APPEAL E841 OF 2022

AM MUTETI, J

JULY 24, 2024

BETWEEN

SAMUEL KONGO KARANJA APPELLANT

AND

FIRST CAPITAL (K) LIMITED RESPONDENT

*(Being an appeal from the Ruling of Hon. Paul K. Koech SPM in
Nairobi MCC No. 6319 of 2015 delivered on 20th September 2022)*

JUDGMENT

Introduction

1. The appeal arises out of a ruling delivered on the 20th September 2022 in which the learned Honourable Magistrate declined to uphold a Preliminary Objection raised by the Appellant against the counter claim lodged by the Respondent through their amended statement of defence dated 26th August 2021.
2. The Respondent's counter claim was objected to an account of the same being statutorily barred having been brought after the six (6) year period allowed in law under Section 4 (1) (a) of the *Limitation of actions Act*.
3. It is this point of law that forms the basis of the Appeal.

The Appellant contends that:-

- a. The Respondents counter claim having been filed on 21st October 2021, the same was statutorily barred the cause of action arose on the 1st October 2015 as per the contents of paragraph 25 of the Defendant's Amended statement of Defence and Counterclaim.



- b. That the learned Honourable Magistrates erred in law by finding that every time interest is debited in a defaulting borrower's account a new cause of action arises.
- c. That the learned Honourable Magistrate erred in law by failing to find that interest debited into a defaulting client's account is intrinsically linked to failure to satisfy the principal and not a cause of action distinct therefore.
- d. That the learned Honourable Magistrate erred in failing to give due consideration to the Appellant's submissions on the Preliminary Objection.

Analysis And Determination

4. The Appeal basically revolves around the issue of competence of the counter claim. The position of the appellant is that since the amount that the Respondent prays for in the counter claim fell due on the 1st October 2015 as per the Respondent's pleading, the counterclaim could not be filed and entertained after the lapse of six years.
5. The sum owed was pursuant to a contract between the Appellant and the Respondent thus the matter fell squarely within the ambit of Section 4(i) of the Limitations of Actions Act. It was time barred when it was filed in 21st October 2021.
6. The Appellant's argument is premised on the fact that the Pleint to which the Respondent filed a defence was dated the 16th October 2015.
7. The defence of the 26th October 2015 did not have a counterclaim in it yet according to the Respondent the cause of action had arisen on the 1st October 2015.
8. The Appellant's argument is that the Respondent waited until the 21st October 2021 to amend and file his counterclaim.
9. The 21st October 2021 was way beyond the 6 years period contemplated under Section 4(i) of the Limitation of Actions Act.
10. A counterclaim by its very nature is an independent suit from that of the plaintiff.
11. A defendant whose answer to a plaint is desirous to Lodge a counterclaim, he must do so within the statutory period allowed in law from the date when the cause of action arises.
12. The Respondent in this matter clearly indicates at paragraph 25 of the statement of Defence and counterclaim that it was entitled to Ksh. 897,456/= which sum fell due on the 1st October 2015.
13. The failure to raise the counter claim on the 26th October 2015 is not explained in the pleadings and in the submissions before the learned Honourable court.
14. The issue was raised as a preliminary objection. It is the view of this court that the issue met the test set out in *Mukisa Biscuits Manufacturing Ltd. v West End Distributors* (1969) EA 696 on the nature of a preliminary Objection. The Court held:-

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of the 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 a contract giving rise to the suit



to refer the dispute to Arbitration..... It cannot be raised if any fact has to be ascertained or if it concerns the exercise of judicial discretion”.

15. The issue taken up by the Appellant is that of limitation which can be discerned from the pleadings.
16. It is trite law that parties are bound by their pleadings.
17. The correctness of the pleadings in this matter is not in contention thus it narrows down to computation of time between the date when the alleged cause of action arose to the date of filing of the counter claim.
18. The Respondent has expressly stated its claim was ripe for action on the 1st October 2015. The Respondent did not take any action to raise the claim in court.
19. The Appellant having had filed its suit within time and served the Respondent in time.
20. The Respondent filed his defence timeously, minus the counterclaim which came long after.
21. Delay defeats equity. The Respondent delayed in filing its counterclaim thus it must suffer the consequences of its inaction. Notably, no reason was advanced for the delay in filing it.
22. The issue having been promptly raised before the learned Honourable magistrate by the Appellant, under duty to deal with the same. The Ruling by the learned magistrate does not address the apparent question of whether the counterclaim was properly filed within six years from the date the cause of action arose.
23. The court below fell into error by finding that every time default interest is added to the plaintiff's loan account a new cause of action arose.
24. The Respondent was unequivocal that the sum of Ksh. 897,456/= was due on 1st October 2021. That clearly is the date the cause of action arose.
25. The position taken by the magistrate appears to me to propound a position that would leave a bank at liberty to lie in indolence for ages only to wake up from its slumber many years after the loanee has defaulted and seek to recover on the strength of interest accumulated overtime.
26. To adopt such a position would not only be an invitation of suits that are already time barred to be filed by lending institutions but also leave borrowers at the mercy of banks in perpetuity. That would certainly not augur well for the economy.
27. The *limitation of Actions Act* serves the purpose of making it certain to all those that have claims that you must pursue your defaulters within a limited period of 6 years and if one does not do so then leave must besought to initiate proceedings outside the stipulated period in law.
28. In *Pius Kimaiyi Langat v The co-operative Bank of Kenya Ltd* (2017) eKLR the court cited with approval the court of Appeal decision in *Deposit Protection Fund Board in Liquidation of Euro Bank Limited (in liquidation) v. Rosaline Njeri Macharia & Another* (2016) eKLR where the court stated:

“As to whether the suit was statute barred under the *limitation of Actions Act*, the suit was filed on 19th July 2007. By dint of paragraphs 24, 25, 26, 28 29 and 30 of the plaint, the cause of action was pleaded to have accrued on 27th July 1999 when the alleged breach of contract occurred. As the breach was of a contract relating to lending of money whose security instrument is contested, Section 4(1) (a) of the *Limitation of Actions Act* Cap 22 requires that an action founded on contract may not be brought after the end of six (6) years from the date on which the cause of action occurred. In this Appeal the “suit” having been



instituted in 2007 when the accrual of the cause of action was July 1997, it was clearly filed outside the six-year period and consequently was time barred, if indeed it was a suit”.

29. In the present case I have no hesitation to find that indeed the Respondent lodged the counter the counter claim long after the lapse of six years from the date the cause of action arose thus the claim was time barred.
30. The learned Honourable magistrate was therefore wrong in his finding that the statutory time line can be beaten by debiting interest into a defaulters account long after the lapse of six years.
31. To entertain such a proposition would be to render our country very unattractive to investors for there would be no telling when one can be sued in respect of breach of lending Agreements.
32. It can result in capital flight which is not good for the economy and business the country. Predictability is key a good business environment.
33. The merit or otherwise of the counter claim notwithstanding, I do find and hold that the same was time barred as the time it was raised by way of amending the defence.
34. Equity assists the vigilant. The Respondent slept on its rights and we need not come to their aid to the disadvantage of the Appellants.
35. The issue raised is one of a pure point of law and thus disposes off the counterclaim.
36. The appeal by the Appellant therefore succeeds with costs to the Appellants. The lower court file is hereby ordered to be remitted to the lower court for hearing and final determination of the suit.
37. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF JULY, 2024.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Mrs Kuria for the Appellant

Ms Akiso holding brief for Mahondo for the Respondent

