



Mwihuri & 150 others v Kenya Power and Lighting Company Ltd (Miscellaneous Application E089 of 2021) [2023] KEHC 17392 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17392 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS APPLICATION E089 OF 2021**

**M MUYA, J
MAY 11, 2023**

BETWEEN

ANDREW GITHINJI MWIHURI & 150 OTHERS APPLICANT

AND

KENYA POWER AND LIGHTING COMPANY LTD RESPONDENT

RULING

1. In a plaint dated the 21st day of October 2021 the plaintiffs seek compensation for their coffee which was destroyed by fire on April 21, 2002.

It is their contention that the fire was caused by acts of negligence by the Defendants

2. On April 20, 2022 the Defendant filed a notice of preliminary objection dated the 5th day of April 2022 on the grounds:-

1. That the court lacks Jurisdiction to entertain the suit.
2. The plaintiffs cause of action being founded on tort is time barred by effluxion of time by dint of Section 4(2) of the *Limitation of Actions Act* Cap 22 and section 3 (1) of the *Public Authorities Limitation Act* Cap 39 Laws of Kenya
3. That the plaintiffs have no cause of action against the Defendant.
4. That the proceedings are an abuse of the court process, defective, ill-founded and lacking in merit and should be dismissed with costs to the Defendant.
5. That the honourable court has neither Jurisdiction nor discretion to extend time for the filing of any claims predicated on actions founded on tort under any applicable law.



3. The Plaintiffs contends that this court has Jurisdiction to entertain this suit. They do concede the fact that the cause of action took place on April 21, 2002.
4. It is the Plaintiffs contention that investigations by police as to the cause of fire took unduly long and the plaintiffs did not have control on them.
5. The plaintiff avers that he has been ailing for a long time and is still undergoing treatment at various hospitals. That eventually the suit was filed on November 25, 2021.

Issues for Determination

6.

- (a) Whether the Preliminary objection has merit.

The definition of a Preliminary Objection is well captured in the case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* [1963] EA 696 where it was held:-

“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”

Sir Charles Newbold P at page 701 did observe:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts have to be ascertained or if what is sought is the exercise of judicial discretion.”

7. In the celebrated Court of Appeal case of *Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited* [1989] e KLR Nyarangi J held:-

“I think that it is reasonably plain that a question of Jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no Jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without Jurisdiction once a question of Jurisdiction is raised the court must down its tools and determine the issue of Jurisdiction before delving into the merits of the suit and or application before it.”

8. The main contention by the Respondent is that the plaintiffs cause of action is founded on tort and is therefore barred by effluxion of time by dint of section 4 (2) of the *Limitation of Action Act* as read together with section 3 (1) of the *Public Authorities Limitation Act*.

Section 4 (2) of *Limitation of Actions Act* provides:-

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.”



Section 3 (2) of the *Public Authorities limitation Act* provides:- “ No proceedings founded on tort shall be brought against the government or a local authority after the end of twelve months from the date on which the cause of action accrued.”

9. From the pleadings before the court, the plaintiff does not dispute the fact that the cause of action which is in the nature of a tort accrued on April 21, 2002.

The plaintiffs filed their plaint on October 21, 2021 which is 19 years after the fact. Before the plaint was filed there was no application before the court for extension of time. The plaintiffs have tried to explain the cause of delay, in filing the plaint within the stipulated period albeit unsuccessfully.

10. In the case of *Gathoni v Kenya co-operative creameries Limited* [1982] e KLR 104

It was held:-

“The Law of Limitations of Actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. The act does not help persons who, whether through dilatoriness or ignorance do not do what the informed citizen would reasonably have done.”

11. Limitation which is provided for by statute affects the Jurisdiction of the court.

12. In the case of *Bosire Ongero v Royal Media Services* [2015] e KLR, it was held:-

“The issue of Limitation goes to the Jurisdiction of the Court to entertain a claim and therefore if a matter is time barred the court has no Jurisdiction to entertain the same.”

Conclusion

13. Having found that the suit is time barred, by the Statute of Limitation and that this goes to the Jurisdiction of this Court I find that the Preliminary Objection has merit and the suit is accordingly dismissed. It is noted that the plaintiffs filed the suit as paupers. The application for Pauperism seems not to have been heard. The reason could be because they were representing themselves. I will order that each party to bear its own costs.

Ruling read, signed and delivered in open court at Nyeri this 11TH day of May 2023

HON. JUSTICE MARTIN M. MUYA

JUDGE

In the presence of:

Githui: Applicants/Plaintiffs

Respondents/Defendants

Court Assistant: Kinyua

30 days R/A.

