



**Njoki v Muiruri (Civil Suit E017 of 2020) [2023] KEHC 19231 (KLR) (5 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 19231 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU**

**CIVIL SUIT E017 OF 2020**

**A MSHILA, J**

**MAY 5, 2023**

**BETWEEN**

**BETH NJOKI ..... PLAINTIFF**

**AND**

**MBUGUA MUIRURI ..... DEFENDANT**

**RULING**

1. The called is called to determine the Preliminary Objection dated August 30, 2022 filed by the defendant herein.

**Background**

2. The background of the matter is the Plaintiff filed a suit against the Defendant by a Plaint dated August 12, 2022, seeking an order declaring the Defendant to have breached the partnership business and ownership of the suit vehicle has failed, an order that motor Vehicle KBW 596H be valued, disposed of, and proceeds be shared equally between the Plaintiff and the Respondent as well as general damages for breach of the contract and costs of the suit.
3. According to the Plaint the Plaintiff states they entered into a contract with the Defendant for a joint purchase of the Motor Vehicle KBW 596H which was to be used for business and the profits were to be shared equally, the Defendant took the management of the suit vehicle and has failed to remit any profits to the Plaintiff nor account for the vehicle. The Defendant breached the Memorandum of Understanding and failed to hand over the management of the vehicle to the Plaintiff.
4. In response, the Defendant filed a Statement of Defence dated August 30, 2022, in which he states the Memorandum of Understanding dated May 30, 2015 is time barred and unenforceable, the Plaintiff failed to institute recovery proceedings. According to the Defendant he took out a loan facility from Chase Bank for the purchase of the motor vehicle which he single handedly cleared while the Plaintiff's contribution was towards the purchase of the motor vehicle was only the sum of Kshs.378,000/=.



5. The grounds of the Preliminary Objection are as follows:
  - a. That the Plaintiff's suit is time barred under Section 4 of the *Limitation of Actions Act*.
  - b. That the Plaintiff seeks to enforce extinguished rights a Memorandum of Understanding dated May 30, 2015 and or partnership agreement contrary to the stipulation of Section 4 of the *Limitation of Actions Act*.
  - c. That the application and suit is an abuse of court process, frivolous and vexatious.
6. The Preliminary Objection was heard by way of submissions. Both parties complied.

#### **Applicant/Defendant submissions.**

7. In support of the Preliminary Objection counsel filed submissions dated February 1, 2023, in which he submitted that the parties agreed to partner together and start a transportation business in the year 2014, and on May 30, 2016 the parties entered into a Memorandum of Understanding to have the Applicant/Defendant transfer the motor vehicle to the Plaintiff/Respondent.
8. According to counsel the suit is time barred as the cause of action arose on May 30, 2016 and thus six (6) years lapsed on May 30, 2022 and cited the Court of Appeal case of *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* (2017) eKLR.
9. In conclusion counsel urged the court to find that the suit arising out of a contract is time barred as per Section 4 of the *Limitation of Actions Act*, and dismiss the suit for want of jurisdiction.

#### **Respondent/ Applicant submissions**

10. Opposing the Preliminary Objection Counsel filed submissions dated February 7, 2023 in which he submits that the Plaintiff filed the first suit in Kiambu Chief Magistrate's court on March 3, 2018 which the court dismissed on June 29, 2022 for lack of jurisdiction and the Plaintiff appealed and the High Court upheld the Ruling of the Magistrates Court on June 16, 2022. The Plaintiff failed to file the current suit as the appeal was still pending and was hoping the appeal would turn in her favour.
11. Counsel submits that time starts to run from the date of the cause of action which accrued on June 15, 2016. The Plaintiff has not slept on her rights as she has been fighting for her rights since 2018 to date.
12. Counsel urged the court to enlarge time for the Plaintiff to pursue the matter as per Order 50 Rule 6 of the *Civil Procedure Rules* and relied on the Supreme Case of *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR which reiterated the principles the court should consider when exercising its discretion to extend time. It states as follows: -
  - a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
  - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
  - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;



- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  - f. Whether the application has been brought without undue delay; and
  - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
13. Counsel urged the court to dismiss the Preliminary Objection as the Applicant/ Defendant will suffer no prejudice if the case proceeds for hearing.

### **Issues for Determination**

14. After carefully considering the Preliminary Objection and the submissions by both parties in support of their various arguments, this court has framed the issue for determination as;
- (i) Whether the Preliminary Objection is meritorious.

### **Analysis and Determination**

15. Before dealing with the issues at hand this court has noted the discrepancy in the date of the Memorandum of Understanding, on the first page it is dated May 30, 2016, while on the second page it is dated May 30, 2015. However, at paragraph 6 it states the Defendant/Applicant is to deliver the motor vehicle to the Plaintiff/Respondent with effect from June 15, 2015. Therefore it would appear that the cause of action arose on either of the three dates.

### **Whether the Preliminary Objection is meritorious.**

16. The case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd*[1969] EA 696 defines a Preliminary Objection to mean:

“So far as I am aware, 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.”

17. The Preliminary Objection as filed consists on a point of law in which the Applicant contends the suit as filed is time bared and ought to be dismissed.

18. Section 4(1)(a) of the *Limitation of Actions Act* provides as follows:-

The following action may not be brought after the end of six years from the date when the cause of action accrued

- (a) actions found on contract

19. The cause of action appears to have arisen on May 30, 2016 as set out of the first page of the Memorandum of Understanding. The Plaintiff/ Respondent states that she moved the court in the year 2018 and the suit was dismissed for want of jurisdiction.



20. In the *South Nyanza Sugar Company Limited v Dickson Aoro Owuor* eKLR MGR HCCA No 85 of 2015 [2017] the court held that:-

“ 17. There is no doubt in this matter that the parties entered into a contract and which contract was allegedly breached. What is for determination is when exactly the cause of action accrued since from that time the limitation period of 6 years starts running. I do not find that issue difficult to decide on. I say so because when a party enters into a contract for a specific period of time, it does so in the understanding and belief that each of the parties to the contract will observe its part thereof until full execution of the contract. It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period.”

21. Whereas it is not in dispute that the cause of action arose on May 30, 2016 and therefore the same lapsed on May 30, 2022, the circumstances of this case are different as it is noted that the Plaintiff/ Respondent had not been indolent in the matters as she tried to get redress from the court only that she approached the wrong court which lacked jurisdiction.

22. In the case of *IGA v Makerere University* [1972] EA, the Court had this to say on the Law of Limitation:-

“ A Plaint which is barred by limitation is a Plaint barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought.

23. In the instance case, the question would be should the Plaintiff/Respondent therefore be punished for the lapse in time in bringing the current suit? Yet the time lapsed when in court seeking redress but through the wrong forum.

24. Article 48 of the *Constitution 2010* provides for Access to Justice it states as follows:

“ The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

25. Further Article 50 provides:-

“ Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

26. The Plaintiff/ Respondent is entitled to fair justice, the same will not be served upon the Plaintiff/ Respondent if she is shunned from the corridors of justice. The Defendant/Applicant has taken advantage of the situation and frustrated the Plaintiff/ Respondent. The Plaintiff/Respondent in her submission urged the court to enlarge the time under Order 50 of the *Civil Procedure Rules*.



27. In the Supreme Court of Judicature Court of Appeal, Civil Division, in *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 645 at paragraph 22 observed: -

“It follows that when considering whether to grant an extension of time for an appeal against a final decision in a case of any complexity, the courts should consider “all the circumstances of the case” including:-

- a. The interests of the administration of justice;
- b. Whether the application for relief has been made promptly;
- c. Whether the failure to comply was intentional;
- d. Whether there is a good explanation for the failure;
- e. The extent to which the party in default has complied with other rules, practice directions and court orders;
- f. Whether the failure to comply was caused by the party or his legal representative;
- g. The effect which the failure to comply had on each party; and
- h. The effect which the granting of relief would have on each party.

In the case of a procedural appeal the court would also have to consider item (g):-

“whether the trial date or the likely trial date can still be met if relief is granted”.

28. This courts considered view is that the real issues in the matter can only be assessed if the Plaintiff/ Respondent is allowed to present her case for trial. The court is satisfied that there are extenuating circumstances that enables this Court to exercise its discretion in favour of the Plaintiff/Respondent. There has been sufficient explanation given as to the cause of delay and therefore closing the court corridors on the Plaintiff/Respondent will not be seen as serving justice.

29. The upshot of the foregoing is that the Notice of Preliminary Objection dated August 30, 2022 is overruled.

### **Findings & Determination**

30. This court makes the following findings and determinations;

- i. The Preliminary Objection is found to be without merit and the same is overruled;
- ii. Time for filing the Plaint is hereby deemed as enlarged.
- iii. The Respondent shall bear the costs thereof.
- iv. Mention June 5, 2023 before the Deputy Registrar for case management.

Orders Accordingly.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 5<sup>TH</sup> DAY OF MAY, 2023.**

**HON. A. MSHILA**

**JUDGE**



**In the presence of:**

**Julia – Court Assistant**

**Kamau for Plaintiff/Respondent**

**Amutallah for Objector/Defendant**

