



**Civicon Limited v Freight Forwarders (K) Limited (Civil Suit  
111 of 2014) [2023] KEHC 27527 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 27527 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 111 OF 2014  
F WANGARI, J  
JUNE 2, 2023**

**BETWEEN**

**CIVICON LIMITED ..... PLAINTIFF**

**AND**

**FREIGHT FORWARDERS (K) LIMITED ..... DEFENDANT**

**RULING**

1. The Applicant moved the court through a Notice of Motion application dated 23<sup>rd</sup> November, 2021 which main orders being sought were to have the suit filed *vide* Plaintiff dated 21/8/2014, and which was later withdrawn *vide* a Notice of Withdrawal of Suit dated 11/9/2014 be reinstated and in the alternative, leave be granted to file a fresh suit out of time.
2. The Applicants avers that after the withdrawal of suit, the Defendant refused to honour the commitment money owing to the Plaintiff/ Applicant, hence the application for reinstatement of the suit.
3. The Defendant/Respondent filed a Preliminary Objection dated 1/12/2021 stating that the suit being sought to be reinstated ceased to exist the moment it was withdrawn.
4. In the meantime, the Plaintiff changed advocates from the firm of Kitoo & Associates Advocates to Odhiambo Tamam & Co. Advocates via Notice of Change of Advocates dated 30/3/2022. The new firm of advocates later filed a Notice of Motion dated 15/9/2022 seeking to be granted leave to cease from acting.
5. On 13/2/2023, directions were taken that the notice of preliminary objection and the application to cease from acting be disposed off by way of written submissions. The Defendant duly complied by filing detailed submissions as well as citing various decided cases in support of their position. I have duly considered the said submissions and I am grateful to Counsel for their industry and time in preparing



the submissions. They are a useful guide to the court in arriving at a just determination on the issues at hand.

### **Analysis and Determination**

6. Having considered the notice of preliminary objection, written submissions, cited authorities and the law, the following are the issues for determination: -

- a. Whether the suit can be reinstated after having been withdrawn.
- b. Whether the Plaintiff may be granted leave to file a fresh suit out of time.
- c. What is the order as to costs?

7. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. At page 700, Law, JA stated: -

“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.”

8. At page 701, Sir Charles Newbold, P added: -

“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 fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

9. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit or application.

10. On the first issue, withdrawal of suits is provided for under Order 25 of the [Civil Procedure Rules](#).

Withdrawal by plaintiff [Order 25, rule 1.] “At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action”.

11. The Defendant in the submissions have widely submitted on the authorities indicating that once a suit is withdrawn, it cannot be reinstated. I need not repeat the authorities quoted. In the case of [Priscilla Nyambura Njue v Geovhem Middle East Ltd & Kenya Bureau of Standards \(I.P\)](#) {2021} eKLR, Mativo J. extensively discusses Order 25 of the [Civil Procedure Rules](#) on the withdrawal and discontinuance of suits. The Honourable Judge went ahead and to uphold a Preliminary Objection on



an application to reinstate a suit where it had been withdrawn. The above authority has also been relied on by the Defendant. I do agree with the Defendant that the withdrawn suit cannot be reinstated.

12. On the second issue, the Plaintiff sought leave to file suit out of time. From the withdrawn plaint, the cause of action arose out of a contractual relationship between the plaintiff and the defendant.

13. Section 4 of the *Limitation of Actions Act* provides as follows;

Actions of contract and tort and certain other actions

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

- (a) actions founded on contract;
- (b) actions to enforce a recognizance;
- (c) actions to enforce an award;
- (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
- (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

14. From the Plaintiff's documents, the cause of action arose in 2012. At the time of filing this application, it was in September, 2022 which is after 10 years. Under the *Limitation of Actions Act*, the suit ought to be filed within 6 years. The Plaintiff however sought for leave to file out of time. Section 27 of the Act provides for the extension of time.

15. In *YH Wholesalers Limited v Kenya Revenue Authority* (2021) eKLR, Mativo J. on the issue of extension of time of filing suit relied on the case of *Mary Osundwa v Nzoia Sugar Co. Ltd* (2002) eKLR which stated in reference to Section 27 of the *Limitation of Actions Act*;

‘The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other course of action other than those in tort..... Even by consent, the judge has no jurisdiction’

From the above, the cause of action arose from a contract. The prayer for extension of time cannot therefore be granted as it is not provided for under the Act.

16. On the issue of costs, Section 27 of the *Civil Procedure Act* decrees that the same follows the event. However, the court retains its discretion to either award or not to award costs. Considering that the application to revive the suit is being made almost 10 years after the suit was withdrawn, I exercise the discretion of the court and award costs to the Defendant.

17. Flowing from the foregoing, I proceed to make the following orders: -

- a. The Notice of Preliminary Objection dated 1<sup>st</sup> December, 202 is merited and the same is allowed.
- b. The application dated 23<sup>rd</sup> November 2021 is dismissed with costs to the Respondents.

Orders accordingly

**DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 2<sup>ND</sup> DAY OF JUNE, 2023.**

**F. WANGARI**



## **JUDGE**

In the presence of:

Ms Akinyi Advocates h/b for Mwangi Advocates for Plaintiffs/ Applicants

Akwana Advocate for Defendants/ Respondents

Guyo, Court Assistant

