



Mthumbi v Sap East Africa Limited & another (Civil Case E076 of 2022) [2023] KEHC 18110 (KLR) (Civ) (5 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18110 (KLR)

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

CIVIL

CIVIL CASE E076 OF 2022

AA VISRAM, J

JUNE 5, 2023

BETWEEN

MARY WAGAKI MUTHUMBI PLAINTIFF

AND

SAP EAST AFRICA LIMITED 1ST DEFENDANT

DELOITTE CONSULTING LIMITED 2ND DEFENDANT

RULING

1. This Ruling determines the 1st and 2nd Defendants Preliminary Objections dated November 23, 2022 and July 13, 2022 respectively.
2. The 1st Defendant's Preliminary Objection dated November 23, 2022 was based on the following grounds:-
 - a. The Plaintiff does not disclose any cause of action in law.
 - b. The cause of action upon which the Plaintiff seeks to bring the suit is time barred pursuant to Section 4(2) of the Limitation of Actions Act Cap 22 Laws of Kenya as the action complained of, accrued in 2017.
 - c. Accordingly, the court has no jurisdiction to entertain this suit, and it ought to be struck out with costs.
3. The 2nd Defendant's Preliminary Objection was based on the following grounds:-
 - a. The cause of action having allegedly accrued in 2017, the same is expressly time barred by virtue of Section 4 of the Limitation of Actions Act Cap 22 Laws of Kenya.



- b. The Plaintiff's right to sue for the alleged tortious act having lapsed, she lacks capacity to agitate any cause against the Defendants. This suit is therefore an abuse of the court process.
 - c. The court therefore has no jurisdiction to entertain this claim and the same ought to be struck out with costs to the 2nd Defendant.
4. The parties agreed to dispense with the Preliminary Objections by way of written submissions and accordingly exchanged the same. The Plaintiff's submissions are dated March 16, 2023, and the 2nd Defendant's submissions are dated March 1, 2023. The 1st Defendant did not file any submission within timelines as directed by the court. It did however, indicate that it would associate itself with the submissions of the 2nd Defendant on the date of the hearing.

2nd Defendant's Submissions

5. Learned counsel, Ms Kirimi, for the 2nd Defendant submitted that the facts giving rise to the present suit occurred during the year 2017, and at latest, in the year 2018, which means that the Plaintiff ought to have filed suit within three years from either of above dates, 2018 being the outer limit.
6. In support of the above, Counsel outlined the background to the dispute and explained that there had been an inadvertent mix up in the use of the Plaintiff's KRA PIN number, which was assigned to a third party by mistake. This happened in the year 2014, but did not become apparent until the year 2017, when the Plaintiff found she had difficulty obtaining a Tax Clearance Certificate. This was the first time that the Plaintiff admittedly suffered damages arising out of the tax mix up on the part of the Defendants.
7. Counsel pointed out that the Plaintiff, at paragraph 10 of her Witness Statement, further admitted that she undertook her own investigations, and contacted the 1st Defendant in relation to the same in the year 2018. Accordingly, this ought to have been the appropriate time to file suit, and time began to run then up to the year 2021 pursuant to the Statute of Limitations Act.
8. Counsel relied on decision of the High Court of Kenya in *Humphrey Kiriungi Njagi v Aga Khan Health Services Ltd [2005] eKLR* in relation to when time begins to run. The court stated as follows:-

' Generally in negligence actions, the cause of action accrues at the time when the Plaintiff actually suffers the damage, even though its consequences may not become apparent until later, and not at the date of the negligent act or omission.'
9. Counsel submitted the law as stated above is applicable because the present suit was not founded on a continuing tort. Counsel submitted that a continuing tort is founded on the repetition of a wrong over time so as to constitute a series of violations. In such a case, the statute of limitation would 'kick in' when the violation stops, rather than when it began.
10. Further to the above, Learned Counsel sought to distinguish between the 'act' which caused the damage from the 'effect' of the damage. Counsel submitted that the two are distinct and separate, and a court ought to separate the act from the continued injurious effects of the act.
11. In drawing the above distinction, Counsel submitted that a continuing tort may only be regarded as 'continuing' where there is a continuation of the 'act' rather than a continuation of the injurious 'effect'. In support of the above submission, Counsel relied on the persuasive authority of *Freeborn v Leeming 1926 1 KB 160*.



Plaintiff's Submissions:

12. Learned Counsel, Mr Kinura, for the Plaintiff submitted that the data of the 1st Defendant's employee is still in the Plaintiff's PIN to date.
13. Counsel submitted that the Plaintiff has missed out on several business opportunities arising out the said mix up because she has not been able to obtain a Tax Clearance Certificate from KRA. This has caused her much hardship to date.
14. Concerning the Limitation Act, the Plaintiff submitted that the present matter was one of continuing violations. In support of the above, the Plaintiff relied on the decision of the High Court in *Humphery Kiriungi Njagi v Aga Khan Health Services Ltd (2005) eKLR*, where JB Ojwang J as he was, stated:-

' An important question of law has emerged in this objection, which will need to be settled in the course of time. Are the Courts to take at face value the provisions of section 4(2) of the *Limitation of Actions Act* (Cap 22), and indiscriminately require that tort cases must be filed within three years of the occurrence of a particular incident? The answer must be no, because, identifying the cause of action and determining its nature, may be a judicial task performed after taking into account the facts of each case. The cause of action may not be obvious, or may be so extended or so dynamic that it cannot be marked as elapsed over one single day.'

15. Further to the above, the Plaintiff relied on the decision of *Emanuel Hatangi Mbabazi v Commissioner of Customs and Excise Mombasa HC Misc Case No 138 of 2003*, where the court defined a continuing tort as follows:

' The doctrine of the continuing tort is founded on the repetition of a wrong over time so as to constitute an inseparable series of violation. In such a situation, the statue of limitation kicks in when the violation stops rather than when it begins'

16. Finally, the Plaintiff submitted that the character of this court was to do justice and it ought to do so.

Analysis and determination

17. I have considered the rival submissions of the parties. The issue is whether the Plaintiff's suit is time barred by virtue of Section 4 (2) of the Statute of Limitations of Actions Act?
18. An objection on the ground that a suit is time barred is ordinarily a pure point of law subject to the test in the case of *Mukisa Biscuit Manufacturing Co Ltd -vs- West End Distributors Ltd (1969) EA 696*, where the court held as follows:-

' 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 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 the contract giving rise to the suit to refer the dispute to arbitration'

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 argued 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.'

19. 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.
20. Applying my mind to the test above, I am satisfied that the facts as set out above are not in dispute. Further, I am satisfied that if successful, the Preliminary Objections will dispose of the suit. Accordingly, the Preliminary Objections are properly before me, and I may proceed to determine the same.
21. The starting point is Section 4(2) of the Act, which reads as follows:

' 4 (2) 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'
22. It is evident that ordinarily, an action in tort ought to be commenced within three years from the time the cause of action arose. The question here is when did the cause of action arise? Here, the parties differ on what I understand to be a question of law.
23. The Plaintiff submitted that the present tort is a continuing tort. The submission was based on the rationale of Emanuel Hatangi Mbabazi (supra), namely, that the present tort has been founded on the repetition of a wrong. This rationale was underscored by the fact that to date, the 1st Defendant's data remains in the KRA system.
24. The 2nd Defendant on the other hand, drew a distinction between the 'act' in terms of the mix up of PIN numbers, and its 'effects' on the Plaintiff, which continued for some time after. The distinction between the above was based on the reasoning that in the present matter, only a single act has occurred even though the injury persisted thereafter.
25. Having considered the two arguments summarized as above, I am persuaded by the rationale put forward by the 2nd Respondent. To find otherwise would beg the question, at what point does the cause of action arise? And how long does it persist for? Based on the Plaintiff's contention, her cause of action would be extended for as long as the effects of her injuries continue. Such an interpretation would have the effect of rendering Section 4 (2) of the Limitation period obsolete because a court would have to first undertake a fact-finding mission to determine whether or not the injury persists; and only then go on to determine if a cause of action subsists. To my mind, this is the very task that the Limitation Of Actions Act sought to avoid.
26. In this regard, in Wycliffe A Swanya V Toyota East Africa Limited and Another [2009] eKLR, the Court of Appeal stated the rationale behind the Limitation of Actions Act, is as follows:

' The Law of Limitation of actions is intended to bar Plaintiffs from instituting claims that are stale and (is) aimed at protecting Defendants against unreasonable delay in bringing of suits against them. The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same'
27. I do not think that a court of law may interpret the said Act in a way that would render it so subjective. I am persuaded that limitations act ought to be applied to all cases in a uniform and consistent manner.



In that regard, the general position as stated in Humphrey Kiriungi Njagi (supra), is that the cause of action accrues at the time when the Plaintiff suffers the damage, even though the consequences may not appear until later. The court stated this in the following terms:-

' Generally in negligence actions, the cause of action accrues at the time when the Plaintiff actually suffers the damage, even though its consequences may not become apparent until later, and not at the date of the negligent act or omission.'

28. Further, I am satisfied that the time the Plaintiff actually suffered the damage was either in 2017, or 2018, when she realized that there had been a mix up with her PIN, and she was unable to obtain a Tax Compliance Certificate. I say so because, based on the undisputed facts as set out above, at that time, the Plaintiff knew of the harm; she contacted the 1st Defendant in relation to the same; and she could have filed suit for compensation. Regrettably, she did not do so.
29. Further, I am not persuaded that the facts in the present matter are the same as set out in the case of Emanuel Hatangi Mbabazi (supra), because the Plaintiff has not disclosed 'a repetition of the wrong' or a series of acts on the part of the Defendants. Based on the undisputed facts, it would appear to me, that there was a single act, with regrettable long-term effects.
30. Based on the reasons set out above, I am satisfied that that the Preliminary Objections dated November 23, 2022 and July 13, 2022 are with merit and the same are upheld.
31. The Plaintiff's suit is accordingly struck out with costs for offending section 4(2) of the [Limitation of Actions Act](#).

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 5TH DAY OF JUNE 2023

**ALEEM VISRAM
JUDGE**

In the presence of;

..... **for the Plaintiff**

..... **for the Defendant**

