



REPUBLIC OF KENYA



KENYA LAW
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Bandari Development Company Limited & another v Trustees of the Kenya Ports Authority Pension Scheme (Civil Case E074 of 2021) [2023] KEHC 22165 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KEHC 22165 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE E074 OF 2021
F WANGARI, J
JULY 7, 2023**

BETWEEN

BANDARI DEVELOPMENT COMPANY LIMITED 1ST PLAINTIFF

EPCO BUILERS LIMITED 2ND PLAINTIFF

AND

**TRUSTEES OF THE KENYA PORTS AUTHORITY PENSION
SCHEME DEFENDANT**

RULING

1. The plaintiff instituted suit against the defendant jointly for : -
 - a. The liquidated claim for Kshs. 102,121,007.26 together with interest of Kshs. 116,882,389.02 at July 21, 2021;
 - b. Interest at 14% from July 22, 2021 until payment in full and;
 - c. Costs of the suit and interest thereon at court rates from the date of judgement till payment in full;
 - d. Any other relief that the Honorable Court deems fit to grant.
2. Upon service of the pleadings, the Defendants filed a joint statement of defence dated September 22, 2021 wherein they denied the claim. The firm of JP Ngoya came on record vide a notice of change of advocates dated March 16, 2022. Contemporaneously, the Defendants filed a notice of motion application dated June 16, 2022 together with a notice of preliminary objection of even date challenging the jurisdiction of this court. The preliminary objection was based on section the provisions of section 4 (1) (a) of the *Limitations of Action Act*, chapter 22 of the Laws of Kenya.



3. Directions were taken that the preliminary objection be disposed off by way of written submissions. Both parties duly complied by filing submissions and cited various authorities in support of their rival positions.

Analysis and Determination

4. I have considered the parties' pleadings, the preliminary objection, the submissions together with the authorities relied upon by the parties as well as the law and in my view, the following issues are for determination;

- a. Whether the preliminary objection is merited;
- b. Who bears the costs?

5. On the first issue, the defendants have raised a preliminary objection on the basis of section 4 (1) (a) of the *Limitations of Action Act*. The cited part provides as follows: -

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- (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)
- c)

6. 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.”

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...”

7. 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.



8. I am satisfied that as per the case of Mukisa Biscuit (above), limitation of action is a point of law which is enough to dispose off a suit. If the court finds in favour of sustaining an objection, it is automatically stripped of jurisdiction to consider the matter further. In the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi, J.A. had the following to say: - "... 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction..."
9. The Defendant contends that the suit was filed out of time. Having looked at the contract exhibited by the parties, it is not in dispute that the same was strictly between the 1st plaintiff and the defendant. Without much ado, the principles enunciated by the Court of Appeal in *Zenith Steel Fabricators Limited v Continental Builders Limited & Another* [2018] eKLR as cited by the defendant holds sway. As per the hierarchy of courts, I am bound by the said decision. In their submissions, the plaintiffs vehemently refuted the claim that their suit was filed out of time. They submit that no final account and final certificate were issued. On the other side, the defendant submitted that the cause of action arose after the architect certificate of practical completion was issued on September 1, 2010. Therefore, as per section 4 (a) of the *Limitations of Action Act*, any suit touching on the contract ought to have been instituted on or before September, 2016 and in the alternative, if May 6, 2013 is taken as the point when the cause of action accrued, any suit ought to have been brought on or before May, 2019.
10. In *Eliud Gatundu Wanjobi & 3 others v Kenya Railways Corporation* [2014] eKLR cited by the plaintiffs, the court while dealing with an almost similar issue of limitation had the following to say: - "...that limitation of action, and particularly by virtue or ground of a time bar is not an issue that can clearly and absolutely be determined by way of a preliminary objection. This must be interrogated and evidence adduced to support the various diverse factual positions of the parties. It requires a physical interrogation of facts and evidence..." I note that there are contested facts. As held in Mukisa case (above), if certain facts have to be interrogated, a preliminary objection cannot be sustained.
11. I am entirely in agreement that the issue of when the cause of action arose will require evidence to be adduced. Though there is a contract exhibited, it is my respectful view that a cause of action on the said contract could only arise upon non-payment of the contract sum or part thereof. It would be mechanical to apply the six (6) year limitation as per the issue herein without hearing parties. I think I have said enough to show that this preliminary objection is not merited. Whether the claim is time barred or not shall be determined through evidence as postulated under sections 107 – 109 of the *Evidence Act*.
12. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of Jasbir *Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. This is a preliminary application and having sustained the suit, the only order that lends itself on costs is that the same shall abide the outcome of the suit.
13. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. The notice of preliminary objection dated June 16, 2022 is without merit and is hereby dismissed;
 - b. Costs to abide the outcome of the suit.Orders accordingly.



DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY, 2023.

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F. WANGARI

JUDGE

In the presence of;

Luther Advocate for the Plaintiffs/ Respondents

Ngoya Advocate for the Defendant/ Applicant

Barile, Court Assistant

