



**Tile & Carpet Centre Limited v Auto Continental Limited (Civil Suit 44 of 2020) [2023] KEHC 22183 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 22183 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 44 OF 2020  
F WANGARI, J  
JULY 14, 2023**

**BETWEEN**

**TILE & CARPET CENTRE LIMITED ..... PLAINTIFF**

**AND**

**AUTO CONTINENTAL LIMITED ..... DEFENDANT**

**RULING**

1. The preliminary objection dated and filed on February 17, 2023 refers. It seeks to have the plaintiff's suit be struck out on grounds that it is time barred on account of section 4 (2) of the *Limitation of Actions Act*. There is only one point of law. The other points are matters within the compliance of order 2 rules 15.
2. The said rule provides as follows: -  
Striking out pleadings [order 2, rule 15]
  - (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
    - (a) it discloses no reasonable cause of action or defence in law; or
    - (b) it is scandalous, frivolous or vexatious; or
    - (c) it may prejudice, embarrass or delay the fair trial of the action; or
    - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
  - (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.



- (3) So far as applicable this rule shall apply to an originating summons and a petition.”
3. In the *locus classicus* case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, on preliminary objections, the court made this pertinent observation. It said: -
- “The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop”.
4. In the case of *Martha Akinyi Migwambo v Susan Ongoro Ogenda* [2022] eKLR, Justice Kiarie Waweru Kiarie, summarized the preliminary objection as seen from two of the judges in *Mukisa Biscuit Manufacturing Co Ltd*(supra):-
- “A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:
- .... 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 page701 paragraph B-C Sir Charles Newbold, P. added the following:
- 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....”
5. Justice Prof J.B Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of *Oraro v Mbaja* [2005] eKLR:
- “I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.
6. To be able to ascertain the cause of action. The court will rely on the plaint. In the paint filed on June 19, 2020 the plaintiff stated that the plaintiff was an importer while the defendant was a bailee/ carrier/ transporter. The claim was for special damages suffered as a result of the negligence of the defendant, where the defendant failed to ensure the plaintiff’s consignment was delivered in the condition as placed in its possession.
7. The defendant on the other hand denied the existence of a contract of consignment between it and the plaintiff. The defendant pleaded negligence on the part of the plaintiff for the damage caused to the consignment.



8. The preliminary objection was disposed of by way of written submissions. The defendant submitted that the plaintiff's claim was based on tort, as it pleaded on negligence and breach of duty of care on the part of the defendant, which led to the damage of the plaintiff's consignment. This being a tortious claim, the suit was therefore time barred by dint of section 4 of the Limitation of Actions Act.
9. The plaintiff submitted that the claim was based on a breach of contract, pursuant to an agreement between the parties, where the defendant as common carriers/ transporters and or bailee failed to ensure the safety of the consignment placed before it by causing it to be damaged.

### **Analysis And Determination**

10. The preliminary objection proceeds on the premise that the suit is time barred. I will set out paragraph 7 of the plaint that they raise as being a source of tort: -

“the plaintiff avers that the loss/damage was occasioned by reason of negligence/or breach of duty and /or contract on the part of the defendant and the plaintiff holds it liable”.

11. From the above, it is clear that the claim as pleaded, is a claim for breach of contract. The loss is said to have occurred on February 17, 2015. The plaintiff had up to February 17, 2021 to file civil suit. This suit was filed on June 19, 2020 and which was filed within time.

12. Section 4 (1) of the Limitation of Actions Act states;

‘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’

13. It is the defendant who pleaded particulars of negligent in tort, but not the plaintiff. The upshot of the forgoing is that the preliminary objection is misplaced and untenable in law.

14. 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, costs are awarded to the plaintiff.

15. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

- a. The notice of preliminary objection dated February 17, 2020 is without merit and is hereby dismissed;
- b. Costs to the plaintiff.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14<sup>TH</sup> DAY OF JULY, 2023.**

.....

**F. WANGARI**

**JUDGE**

**In the presence of;**

Chamwada Advocate for the Plaintiff

Achola Advocate h/b Bitok Advocate for the Defendant



Abdullahi, Court Assistant

