Mburu v Foshan Shengfeng Ceramic Trading Co Ltd & 2 others (Civil Suit 44 of 2018) [2023] KEHC 23123 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23123 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 44 OF 2018

DKN MAGARE, J

SEPTEMBER 20, 2023

BETWEEN

LUCY NJOKI MBURU .... PLAINTIFF

AND

FOSHAN SHENGFENG CERAMIC TRADING CO LTD .... 1ST DEFENDANT

DHL WORLDWIDE EXPRESS KENYA LTD .... 2ND DEFENDANT

KENYA REVENUE AUTHORITY .... 3RD DEFENDANT

RULING

1. The 2nd Defendant reminded me of their Preliminary Objection dated 25th November, 2022 that was due for Ruling. The same was not in the court file. Therefore, I ordered that it be placed before me for ruling. The Preliminary Objection is to the effect that-;

    a. The court lacks jurisdiction to her and determine this suit filed by the Plaintiff by virtue of being time barred, having been filed after the lapse of the statutory period;

    b. The suit is incompetent bad in law and that the same should be struck out.

2. I will not bother with the second ground. It is not a point of law but postulations properly to be raised under order 2 rule 15 of the civil procedure rules. The second limb is thus dismissed in limine, summarily. The said rule provides as hereunder: -

    " 15. Striking out pleadings-

    (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. I dismiss the second limb of the Preliminary Objection. First it does not arise a pure point of law. Secondly, it is generalized. Thirdly and most crucial, I have already heard and determined and application for striking out. The ruling was given on 24th April, 2023. The issue is thus re judicata.

4. The question of what constitutes a Preliminary objection was settled in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, where the former court of Appeal for Eastern Africa held as doth: -

> " A preliminary objection consists of a pure 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."

5. The Court is not involved in the finding of fact as the suit was heard on a preliminary objection. In hearing a preliminary objection, this court and the court below have the same jurisdiction. They proceed on an understanding that what is pleaded in the plaint is true. It is what the English common law used to call a demurrer. The locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd [supra], 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".

6. In a Tanzanian case of Hammers Incorporation Co. Ltd Versus The Board of Trustees Of The Cashewnut Industry Development Trust Fund, where the Court of Appeal, (Rutakangwa, N. P. Kimaro and S. S. Kadage JJA), sitting in Dar es salaam in their decision given on 17/9/2015 regretted that the practice of raising preliminary objections that was frowned upon by the court of appeal in Kampala in the Mukisa Biscuit Case(Supra) still persists. They stated as doth: -

> " It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the "improper practice" never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this

Court in Karata Ernest & Others V The Attorney General, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the Mukisa Biscuit case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate."

7. In the case of Martha Akinyi Migwambo v Susan Ongoro Ogenda [2022] eKLR, justice Kiarie Waweru Kiarie, summarized a 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 vs West End Distributors Ltd [1969) EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:
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> > " ....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.
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> > At page701 paragraph B-C Sir Charles Newbold, P. added the following:
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> > > " 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...."

8. A Tanzania Court of Appeal sitting in Dar es Salaam, in Karata Ernest & Others vs Attorney General (Civil Revision No. 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, J.A., Ramadhani, C.J., Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

> " At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists o f a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.

9. Justice prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro vs 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.

10. It is therefore my view that a preliminary objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or facts that require further enquiry. In determining a preliminary objection therefore only 3 documents are required in addition to *the constitution*. The impugned law, the plaint and preliminary objection. If you have to refer to the defence, then the preliminary objection is untenable

11. Consequently, preliminary objection must proceed on the premises thus what is stated by the plaintiff in the plaint is true.

12. The 2nd Defendant filed a huge bundle of authorities in support of both the application that I ruled on 24th April 2023 and current preliminary Objection. The 2nd Defendant argues that the court has no jurisdiction to determine the matter by dint of time bar.

13. The issue of Jurisdiction was successfully dealt with in the Owners of Motor Vessel Lilian (1989) KLR where Justice Nyarangi, as then he was, stated succinctly as doth: -

> " 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:
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> > " "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

14. I have seen the Respondent's authorities annexed to the submission. In the case of Daniel Kibet Mulai Vs AG (2019) eKLR, the Court of Appeal stayed as follows: -

> " The Appellant have not given any explanation for the delay in bring their action. As was stated by the court in Wellington Nzioka Kiko Vs Attorney General (2018) eKLR, although

there are no times limits in respect of Constitutional petition, and such a petition would ordinary not be defeated by the doctrine lading. However, an unexplained delay of almost 30 years in bringing the action makes it impracticable for the court to properly administer justice…”

15. This authority is not applicable as time in time in contract matters is cast in stone. No amount of explanation can save the same if it is time barred. The next authority is the famous National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR, where the of appeal stated as doth: -

> “ This, in our view, is a serious misdirection on the part of the learned judge. A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.
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> As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported):
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> > “ “It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain”.

16. However, this has been modified by Article 46 of *the Constitution*. Enough said. what is the objection raised? The objection is that the Plaintiff’s suit is time barred. The time bar will be determined on when the cause of action arose. before we decide, what the cause of action is it is important to immortalize certain dates.

17. The plaintiff’s submission were filed on 28/1/2022. She stated that the contract was breached on 22nd January, 2013, when the 2nd defendant failed to deliver the 1st defendant documents to deliver the Plaintiff. The 1st Defendant had done their first part, that is, delivering assorted goods to Mombasa. The contract for supply of the goods was entered on 22/6/2012. Even if the original contract was breached on the same day, time was to stop running on 22/6/2018, by which tome the suit had long been filed. The goods reached safely in Mombasa. In other words, the date of 22nd June, 2012 is irrelevant as the same relates to delivery of good which arrived safely.

18. The suit as filed is for: -

    a. The claim is for general damages for breach of contract

    b. Special damages of Ksh. 11,845,800

    c. Costs.

19. The Applicant is of the view that they delivered the goods to the destination they were authorized. It is not the plaintiff’s claim that the documents were lost or burnt. The 2nd defendant did not perform part of the bargain. Whether, that is even true, is a matter of evidence. I have no doubt in my mind, the claim as pleaded, notwithstanding any nomenclature is not a claim in tort.

20. The plaintiff’s case is a claim in contract. Whether, there is privity of otherwise is the province of evidence. The 2nd defendant cannot set the plaintiff’s case, and then raise an objection on the case they have set up. They should face the case file.

21. The 2nd Defendant was to deliver by dint of the courier agreement, packed shipping documents to enable the Plaintiff clear the goods that had arrived at the port. The documents were not delivered. There was no breach so long as the documents could be availed to avert sale of goods. The date the sale by auction took place, the documents became undeliverable, hence breach. If the documents were delivered a day before the auction, the contract could be salvaged.

22. There is no pleading by the plaintiff that they had notice of breach and informed the 2nd Defendant that breach had occurred.

23. The Plaintiff's goods were advertised on 23rd November, 2013 and sold on 15th January 2013. The cause of action herein did and would not arise till 15th January 2013 when the goods were sold. The time limit for filing suit was 15th January, 2019. The suit herein was filed on 20th June, 2018, that is, a period of over 6 months before lapse of limitation.

24. Drawing of contracts do not lead to limitation period. Limitation arises at the point of breach. A mere delay in supplying the documents is no breach. Once the Defendants ascertained that the documents, cannot be found, that is between the period of advertisement and sale then and only then did the cause of action arise. I was musing as I wrote this ruling on a 37-year building contract for a state body. Can a contract in that matter sue or be sued for anything done last year though the contract as entered in 1986? I digress.

25. The parties had filed submissions together with the earlier application, I was unable to deal with the preliminary objection as the same was not on records. When alerted, I undertook to write the same so long as I was supplied with a copy. Counsel for the 2nd defendant was kind enough to supply a duly filed copy.

26. In fact, without a dispute crystallizing there is no breach for example on 24th April 2023, I allowed DHL Sinotrans Air Courier Limited to be joined to the suit. There had been no demand to then. However, they will be in the suit perfectly. They have never crystalized their dispute.

27. There needs to be evidence on when breach occurred. I was referred to the case filed by the plaintiff of David Karobia Kiiru v Charles Nderitu Gitoi & another [2018] eKLR where the court stated

> " 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."

28. I have seen a pleading from the defendant that the cause of action arose in August 2012. I see no such pleading in the plaintiff's pleadings. The 2nd defendant is also stating that the fact that general damages are sought, then it is a claim for tort. All these are legal arguments which I will deal with on merit. The mere fact that a prayer has been made does not mean it will be allowed. It does not change that the claim as pleaded is based on contract.

29. I get that the 2nd defendant's argument that the claim was filed after lapse of statutory period is untenable. Section 4 of the *limitation of actions Act*, provides as doth: -

> " 4. 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.

(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:

30. The most crucial aspect is the debt on which the cause accrued. It is not based on the prayers but the cause of action. There is no date given when any tort accrued. However, failure to complete a contract for carriage of goods is properly pleaded.

31. I note the Plaintiff relied on the case of **Ali Abdi Mohamed v Kenya Shell & Company Limited [2017] eKLR, where the court of appeal stated as doth; -**

> " *In addition to the terms which the parties have expressly adopted, there may be other terms imported into the contract, these latter being generally known as 'implied' terms, ... As a general rule, the Courts will enforce not only the terms expressly agreed between the parties, but also those which are to be logically implied from those express terms including from any recitals... The question of whether a term is to be logically implied from the express terms of the agreement is a matter of construing the intention of the parties".*
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> Atkin LJ in the case of Rose and Frank Co v J R Crompton & Bros Ltd, ([1923] 2 KB at 293, stated:
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> > " *"To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly".*
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> Lord Neuberger in the case of Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] UKSC 72, stated:
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> > " *"In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term".*

32. This is a good authority, but on merits of the case. It does not address the question of time bar.

33. The Plaintiff Also Relied On The Case Of Republic V. Rosemary Wairimu Munene (ex Parte Applicant) V. Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 Of 2004, Unfortunately, They Attached A Different Decision.

34. I find that the words in paragraph 12 of the original plaint and as amended are the foundation of the Plaintiff's claim. The claim crystalized on 15th January, 2013 and not earlier. I equally find that the claim is not a claim in tort.

35. Parties must thus avoid arguing preliminary objections which are basically issues of fact. This has wasted court's time as we have been engaged in suspended animations and endless cul-de-sac reed dance instead of going into the main issues, that is merit based determination of the case.

36. This is because, the suit was even filed within 6 years of the original contract. The subsequent carriage contract cannot be time barred. The plaintiff had up to after 15/1/2019 to file suit. I recall that I had already ruled that I cannot remove a disclosed agent from the suit given the nature of the claim. An agency is a contractual agreement. It is not a tortious claim for vicarious liability. This is because I held that the 2nd Defendant holds a very special knowledge on what happened.

37. In short as pleaded, the 1st defendant sent to sets of intertwined chattels, that is the goods though the shipping line and the title documents through a contract for carriage of documents with the 2nd defendant. The 2nd defendant maintains that the contract is with the 4th Defendant. The first contract was performed but the second is still inchoate. The question I will be asking, is this, the goods were sold since there are no title documents, where are they? Who was the last person seen with them?

38. There is no issue of tortious liability to be determined at all. I agree that the claim could have been pleaded better. However, a claim cannot be defeated simply because it is badly pleaded. The court of Appeal has stated for umpteenth time that striking out claims is a drastic order and can only be done in clearest of cases. In this case, it is clear that the claim is in contract. The use of the words negligence does not, ipso facto, turn a contract into a tort. I have in mind a road traffic accident, even if it is pleaded as a breach of contract, it will remain a claim in tort.

39. Therefore, I find and hold that the claims herein is not time barred. The suit was within time and any subsequent amendment is not affected by the time issue.

40. Therefore, I dismiss the 2nd defendant's preliminary Objection dated 28/1/2022 in limine with costs of 25,000 to the plaintiff.

Determination

41. The upshot is that I make the following orders; -

    a. The 2nd Defendant 's Preliminary Objection lacks merit and is as such dismissed in limine with costs

    b. Costs of Ksh 25,000 to the plaintiff.

    c. Parties are at liberty to apply to amend pleadings within 14 days from today.

    d. The matter do proceed for directions forthwith.

42. It is so ordered

DATED, ISSUED AND **DELIVERED** AT **MOMBASA**, VIRTUALLY THIS **20TH** DAY OF **SEPTEMBER** THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-THREE.

KIZITO MAGARE

JUDGE

In the presence of:

Odhiambo for the Plaintiff

Kanja Njogu for the 2nd Defendant

No appearance for other parties