



Casement Industries Limited v KCB Bank Kenya Limited & another (Commercial Case E494 of 2023) [2024] KEHC 16004 (KLR) (Commercial and Tax) (13 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16004 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E494 OF 2023
MN MWANGI, J
DECEMBER 13, 2024**

BETWEEN

CASEMENT INDUSTRIES LIMITED PLAINTIFF

AND

KCB BANK KENYA LIMITED 1ST DEFENDANT

NCBA BANK LIMITED 2ND DEFENDANT

RULING

1. The plaintiff filed the suit herein vide a plaint dated 9th October 2023 seeking judgment against the defendants jointly and severally for Kshs.10,000,000/= together with interest at the rate of 18% per annum from 1996 until payment in full, costs of the suit and interest. The plaintiff's case is that in the early 1990's, Mr. David Gakuru Kamau, the registered owner of LR No. 3734/750 used the said property as collateral for an overdraft facility from the 1st defendant. The same property was later used to secure a loan of Kshs.7,000,000/= for Tende Drive Villas Ltd, obtained from the 2nd defendant. The plaintiff averred that it was agreed between it, the chargor, Tende Drive Villas Ltd, and the defendants herein that the charges over the suit property would rank in pari-passu, meaning that any recoveries or payments would be shared equally between the defendants.
2. It was stated by the plaintiff that between 1995 & 1996, Tende Drive Villas Limited repaid Kshs.20,000,000/= to the 2nd defendant, thus under the pari-passu arrangement, each bank was entitled to Kshs.10,000,000/=, however, the 2nd defendant did not share this amount with the 1st defendant as agreed. The plaintiff contended that in view of the existence of the pari-passu Agreement, the 1st defendant should have demanded its share from the 2nd defendant but it failed to do so. In the premise, the plaintiff's claim is for Kshs.10,000,000/= being the 1st defendant's share plus 18% interest per annum from 1996. The plaintiff acknowledged the existence of civil suit HCCOMM NO. 175 of



- 2009 between the parties herein and others, but asserted that the reliefs sought therein are different from those being sought in this suit.
3. In opposition to the application, the 1st defendant filed a statement of defence dated 22nd November 2023, and a Notice of Preliminary Objection of even date, seeking that the plaintiff's suit be struck out with costs to the 1st defendant on grounds that -
 - i. The suit herein is time-barred and offends the mandatory provisions of Section 4(3) of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya; and
 - ii. To the extent that the suit herein relates directly and substantially to the same issues and cause of action in Civil Case No.175 of 2019 *Casement Industries Limited v National Industrial Credit Bank Limited & others* that is pending before this Honourable Court, the suit herein is sub-judice pursuant to Section 6 of the *Civil Procedure Act*.
 4. On 4th April 2024, directions were issued by this Court that the 1st defendant's Notice of Preliminary Objection would be determined first, and the same would be canvassed by way of written submissions. The 1st defendant's submissions were filed by the law firm of Macharia-Mwangi & Njeru Advocates on 7th May 2024, while the plaintiff's submissions were filed on 21st May 2024 by the law firm of Nzavi & Company Advocates. On 8th May 2024, Ms. Mwaura Wangari, learned Counsel for the 2nd defendant informed this Court that the 2nd defendant would align itself to the 1st defendant's submissions.
 5. Mr. Kimani, learned Counsel for the 1st defendant relied on the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd*. [1969] EA 696, and the Supreme Court case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR, and submitted that the instant Notice of Preliminary Objection is merited for it raises pure points of law. He cited the provisions of Section 4(3) of the *Limitation of Actions Act* and further submitted that the plaintiff's cause of action dates back to the early 1990's when the charge over LR No. 3734/750 was created in favour of the 1st defendant to secure an overdraft facility advanced to Mr. David Gakuru Kamau, which charge forms the basis of the plaintiff's claim. He stated that the instant suit was filed approximately 33 years later, without any explanation for the delay or an application for an extension of time. Counsel asserted that the suit herein is time-barred, thus this Court lacks jurisdiction to hear it.
 6. Counsel referred to the provisions of Section 6 of the *Civil Procedure Act* and the case of *Edward Moonge Lenguuranga v James Lanaiyara & another* [2019] eKLR, and argued that this suit relates directly and substantially to Civil Suit No. 175 of 2009 – *Casement Industries Limited v National Industrial Credit Bank Limited & 7 others*, which is still pending before Court. He contended that both suits arise from the same cause of action and involve similar issues. He stated that for the said reason, the suit herein is sub judice and ought to be dismissed.
 7. Mr. Nzavi, learned Counsel for the plaintiff submitted that although the charge over the suit property was registered on 11th November 1994, the plaintiff only became aware of the 2nd defendant's breach of the pari-passu Agreement on 3rd September 2021, when the 1st defendant demanded payment of Kshs.3,084,04.17 from the plaintiff. Counsel as such contended that the cause of action in this case arose in September 2021, thus the time within which the plaintiff ought to have filed this suit started running on 3rd September 2021. He stated that this suit is valid, regular, and it was filed within the required time frame.
 8. On the issue of whether the suit herein is sub judice Civil Suit No. 175 of 2009, Counsel argued that this suit is entirely different from Civil Suit No. 175 of 2009. He sought to distinguish the same by pointing out that the issues in this suit concern a claim for Kshs.10,000,000/= from the 2nd defendant,



based on a Consent Agreement about pari-passu charges, whereas Civil Suit No. 175 of 2009 involves reliefs such as injunctive orders, cancellation of land titles, and easement rights, which are unrelated to the current claim. Additionally, Mr. Nzavi asserted that several parties in the case filed in the year 2009 are not involved in this suit, thus this suit is not sub judice Civil Suit No. 175 of 2009. He relied on the provisions of Sections 1A & 3A of the *Civil Procedure Act* and Article 159(2)(d) of the *Constitution* of Kenya, and urged this Court to dismiss the 1st defendant's Preliminary Objection with costs.

Analysis And Determination.

9. I have considered the plaintiff's pleadings, the Notice of Preliminary Objection by the 1st defendant, and the written submissions by Counsel for the 1st defendant and the plaintiff, the issues that arise for determination are –
 - i. Whether this suit offends the provisions of Section 4(3) of the *Limitation of Actions Act*; and
 - ii. Whether this suit is sub judice Civil Suit No. 175 of 2009.
10. A Preliminary Objection ought to raise pure points of law. It should be 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. The Court in the case of *Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors Ltd (supra)* set out what constitutes a Preliminary Objection as hereunder –

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 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 parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

In the said case, Sir Charles Newbold P., stated that-

..... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.” (Emphasis added).

Issue No. 1. Whether this suit offends the provisions of section 4(3) of the Limitation of Actions Act.

11. Section 4(3) of the *Limitation of Actions Act* provides that -

An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action.
12. The plaintiff's case is that in the early 1990's, Mr. David Gakuru Kamau, the registered owner of LR No. 3734/750 and a Director of the plaintiff company used the said property as collateral for an overdraft facility from the 1st defendant. The same property was later used to secure a loan of Kshs.7,000,000/= for Tende Drive Villas Ltd, obtained from the 2nd defendant. The plaintiff claims that it was agreed between it, the chargor, Tende Drive Villas Ltd, and the defendants herein that the charges over the suit property would rank in pari-passu, meaning any recoveries or payments would be



shared equally between the defendants. However, between 1995 & 1996, Tende Drive Villas Limited repaid Kshs.20,000,000/= to the 2nd defendant but the 2nd defendant did not share half of the said amount with the 1st defendant as agreed under the pari-passu arrangement. Thus, the plaintiff's claim is for Kshs.10,000,000/= being the 1st defendant's share, plus 18% interest per annum from 1996.

13. The 1st defendant submitted that the plaintiff's cause of action arose in the early 1990's, thus the suit herein having been filed approximately 33 years after the plaintiff's cause of action arose, offends the provisions of Section 4(3) of the *Limitation of Actions Act*, and as a result, this Court lacks jurisdiction to hear and determine this suit, hence it should be struck out. The plaintiff on the other hand submitted that in as much as the charge in favour of the defendants over the suit property was registered on 11th November 1994, the plaintiff only became aware of the 2nd defendant's breach of the pari-passu Agreement on 3rd September 2021. The plaintiff asserted that the cause of action in this case arose in September 2021, hence this suit is valid, regular, and filed within the required time frame.
14. On the issue of jurisdiction, in the *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, Nyarangi, JA. held that -

...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.
15. In order to determine whether I have the requisite jurisdiction to hear and determine the dispute between the parties herein, I have to determine whether the present suit was filed within the timelines provided for under Section 4(3) of the *Limitation of Actions Act*.
16. It is not disputed that a charge was registered over the suit property in favour of the defendants as security for an overdraft facility granted to the plaintiff's Director by the 1st defendant and for a loan advanced to Tende Drive Villas Ltd by the 2nd defendant. It is also not in contest that the plaintiff, the chargor, Tende Drive Villas Ltd, and the defendants herein agreed that the charges over the suit property would rank in pari-passu, meaning any recoveries or payments would be shared equally between the defendants. The plaintiff claims that sometime between 1995 & 1996, Tende Drive Villas Limited repaid Kshs.20,000,000/= to the 2nd defendant, but the 2nd defendant did not share the said amount with the 1st defendant as agreed under the pari-passu arrangement. It is however worth noting from the pleadings filed that the plaintiff was not aware that the 2nd defendant failed to honour the pari-passu arrangement until sometime in September 2021 when the 1st defendant wrote to it demanding payment of Kshs.3,084,04.17.
17. I agree with the plaintiff's Counsel that the cause of action in this suit arose in September 2021 when the plaintiff became aware of the payment that had been made to the 2nd defendant by the plaintiff. This is because, prior to receipt of the 1st defendant's letter, the plaintiff had no idea that there was a dispute and/or that the 2nd defendant did not honour the said pari-passu Agreement. The plaintiff had no reason to previously, institute a suit against the defendants herein. I therefore find that the suit herein does not offend the provisions of Section 4(3) of the *Limitation of Actions Act*, thus it is not time barred. I as such have the requisite jurisdiction to hear and determine the dispute herein. In the circumstances, the 1st defendant's Notice of Preliminary objection fails.

Issue No. 2. Whether this suit is sub judice Civil Suit No. 175 of 2009.

18. The 1st defendant submitted that suit between the parties herein is *sub judice* Civil Suit No. 175 of 2009 – *Casement Industries Limited v National Industrial Credit Bank Limited & 7 others*, as it relates



directly and substantially to the said suit, which is still pending before the Court. Further, it contended that both suits arise from the same cause of action and involve similar issues.

19. I am however of the considered view that in order to aptly determine whether or not this suit is sub judice Civil Suit No. 175 of 2009, I will have to ascertain facts and probe evidence. I agree with the Court's finding in the case of *George Kamau Kimani & 4 Others v County Government of Trans Nzoia & another* [2014] eKLR where it was held as follows–

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection.”

20. Although the above decision addressed the doctrine of res judicata, the same reasoning applies when it comes to the doctrine of sub judice. It is therefore my finding that the 1st defendant's contention that this suit is sub judice Civil Suit No. 175 of 2009 does not suffice as a Preliminary Objection as defined by the Court in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (supra)*. This is because determination of the issue of this suit being sub judice calls for rebuttal of evidence by way of affidavits and probing of the said evidence in order to ascertain whether or not the doctrine of sub judice can be properly raised by the 1st defendant. For this reason, the said issue can only be argued in the normal manner by way of an application and affidavit evidence.
21. Given the said circumstances, the 1st defendant's Notice of Preliminary Objection on the ground of the suit between the parties herein is sub judice also fails.
22. The upshot is that the 1st defendant's Notice of Preliminary Objection dated 22nd November 2023 is unmeritorious. It is hereby dismissed with costs to the plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF DECEMBER 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Asiyo h/b for Mr. Nzavi for the plaintiff

Ms Vanessa Njihia h/b for Mr. Kimani for the 1st defendant

Ms Bhullar h/b for Ms Mwaura for the 2nd defendant

Ms B.Wokabi – Court Assistant.

