



St John Chrisootom Kudho Sec. School v Jemique Enterprises (Civil Appeal E063 of 2024) [2024] KEHC 15627 (KLR) (5 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15627 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E063 OF 2024
RE ABURILI, J
DECEMBER 5, 2024**

BETWEEN

ST JOHN CHRISOOTOM KUDHO SEC SCHOOL APPELLANT

AND

JEMIQUE ENTERPRISES RESPONDENT

(Appeal against the judgment and decree in Kisumu Small Claims Court Case No. E070 of 2024 delivered on 22/3/2024 by Hon. G.C.Serem, Adjudicator, Resident Magistrate)

JUDGMENT

Introduction

1. The appellant was sued by the respondent vide a statement of claim dated 15th January 2024 who sought judgement in the sum of Kshs. 216,000 being monies allegedly owed by the appellant to the respondent.
2. The respondent filed a response stating that they did not owe any amount of money and further that the matter was statute barred as per section 3 of the Public Authorities Limitations Act.
3. In her judgement, the trial magistrate dismissed the appellant's claim that the suit was statute barred as per section 3 of the Public Authorities Limitations Act as it was not the attorney general, government department or public officer. The trial court proceeded to find that the respondent had proved that the appellant owed it Kshs. 216,000 and thus awarded it the claimed sum plus costs of the suit.
4. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 28th March 2024 raising the following grounds of appeal;
 - a. The learned trial magistrate erred in both fact and in law by failing to appreciate that the burden of proof was at all times upon the plaintiff.



- b. The learned trial magistrate erred in law by shifting the burden of proof to the defendant.
 - c. The learned trial magistrate erred in fact and in law by arriving at a finding that the claimant produced invoice to show that they supplied the sum of Kshs. 216,000 yet the sum was not supported by an invoice, no delivery note, and local purchase thus arriving at a finding based on no evidence.
 - d. The learned trial magistrate erred in law by ignoring the cardinal principle that special damages claims must be specifically pleaded and proved and the special damage herein was not proved to the required standard.
 - e. The learned trial magistrate erred in fact and in law by completely ignoring the defendant's written submissions and all authorities cited whose copies were availed.
5. The parties agreed to dispose the dispose of the appeal by way of written submissions but only the appellant filed its submissions as at the time of writing this judgement.

The Appellant's Submissions

6. The appellant submitted that the evidence presented by the respondent before the trial magistrate fell short of the standard of proof because the figures the respondent was claiming was not supported by back documents including a local purchase order, delivery note, and invoice, thus there was no evidence that the respondent delivered stationery worth 216,000. Reliance was placed on the case of *E.P. Communications Limited v East Africa Courier Services Limited* [2019] eKLR, where the Appellant therein had produced various invoices but some of them were not supported by delivery notes and the learned Judge, in dismissing the matter and holding that the appellant failed to prove on a balance of probability the Respondent's liability stating interalia that invoices and LPOs alone do not prove delivery or receipt of the goods and that in the absence of a delivery note or evidence of receipt of the goods, it becomes doubtful whether the goods were delivered.
7. The appellant submitted that the court ignored the its submissions particularly on preliminary objection raised on limitation of actions as being a public institution is subject to section 3(2) of the *Public Authorities Limitation Act* which provides that no proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.
8. It was further submitted that the trial magistrates' interpretation of section 3 (2) of the *Public Authorities Limitation Act* particularly sections 43, 53 and 86 of the said Act that speak to the categorization, management and funding of the school.
9. The appellant further submitted that the suit was also defective as the right party which is the Board of management established under section 55 of the *Basic Education Act* was not sued. Reliance was placed on the case of *Tilitei & another v William Kibet Chiboi* [2017] eKLR.
10. It was the appellant's submission that the respondent did not provide sufficient or clear evidence to support and/or prove its claim



Analysis and Determination

11. This is the first and last appeal. Certain principles are established and this court must adhere to them as set out in *Selle and Another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123 that:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
12. I have carefully considered the grounds of appeal, the evidence adduced before the learned trial magistrate as well as the written submissions.
13. The issues for determination herein are thus whether the respondent’s case in the lower court disclosed a cause of action against the appellant herein. If this is in the affirmative, whether the respondent proved its case on a balance of probabilities. Lastly, whether the suit was statute barred.
14. On the first issue, the appellant submitted that the respondent ought to have sued its Board of Management as it is the body established under section 55 of the *basic education act* to manage schools on behalf of the Cabinet Secretary and under the 4th schedule has the mandate to sue and be sued.
15. In the case of *Republic vs The Secretary to the Board of Governors, Musingu High School-Kakamega* [2011] eKLR Lenaola J (as he then was) at paragraph 5 stated that “from the above it is obvious that the body lawfully capable of being sued on behalf of a school is the Board of Governors as a corporate entity and not one of its officials such as the secretary to the board.”
16. In *Kisumu ELC case no,225 of 2014, Evans Otiende Omollo vs School Committee Union Primary School and Another* [2015] eKLR Kibunja J. stated that “the parties described as defendants herein do not exist as they are not legal entities under the *Basic Education Act* capable of being sued or to defend this suit. He further stated at paragraph 5 that “having found that the four named defendants are non-existent as entities capable of being sued, the court finds that to allow the suit as filed to continue to further hearing would be an abuse of the courts’ process”
17. Finally, on this issue of capacity to be sued , *Mativo J* (as he then was) stated in the case of *J.N. and 5 others vs. Board of Management, St. G School Nairobi and Another*(2017) eKLR that “my understanding of the law and the above provision is that the Board of management is a legal entity, capable of suing and being sued and the school Principal cannot be sued in her name or personal capacity for decisions made by the Board. There is nothing to show that she made the impugned decisions made by the board. There is nothing to show that she made the impugned decision in her capacity or acted outside her mandate to warrant personal liability: the petition does not disclose a case against her in her personal capacity and it would be improper, unfair and unjust to drag her through these proceedings when the decision being challenged was arrived at by a legal entity.”
18. Having considered the relevant judicial authorities above, I find that the case did not disclose a cause of action against the appellant as sued in their personal capacities which was improper.
19. The law and procedure are very clear on how to bring suits against public schools. If persons were to sue anybody who interacts with the school in one way or another then the *Basic Education Act* and regulations could have said so. The Act wanted to bring sanity, clarity and accountability on who to take responsibility in case of a wrong.



20. The court is aware of the provisions of Order 1 Rule 9 of the Civil Procedure Rules which states that a suit shall not be defeated by reason of the misjoinder or non-joinder of parties as the court is enjoined to deal with the matter in controversy as between the parties before it.
21. I have dealt with this issue by asking how the enforcement of the judgement will be carried out if the wrong parties are sued. In this case, the misjoinder and non-joinder goes to the heart of the suit therefore it cannot be wished away.
22. The above notwithstanding, the other issue raised by the appellant is that the suit was time barred by virtue of section 3 (2) of the Public Authorities Limitations Act.
23. Section 3 (2) of *Public Authorities Limitation Act*, Cap 39 which provides;
 - (2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.
24. The respondent's claim states that the respondent supplied the appellant with stationery on or about the 1st January 2020 and subsequently thereafter but that the appellant failed to pay for the stationeries supplied.
25. The only date pleaded with certainty as to when the alleged supply was done is the 1st January 2020 accordingly then the respondent was supposed to commence any proceedings against the appellant on or before the end of January 2023.
26. However, the question this court faces is whether the appellant herein is a government or government department within the provisions of section 3 (2) or a local authority.
27. The *Basic Education Act* describes a "school" as an institution registered under this Act that meets the basic prescribed standards and includes institutions offering alternative approaches of multi-grade, double-shift, mobile schooling, out of school programmes, adult and continuing education, distance or correspondence instruction, or accelerated learning and talent-based institutions.
28. Section 43 of the *Basic Education Act* goes on further to set out the categories of schools. It provides: -
 1. Basic educational institutions shall be categorised as—
 - (a) public schools which are schools established, owned or operated by the Government and includes sponsored schools;
 - (b) private schools as those established, owned or operated by private individuals, entrepreneurs and institutions.
 2. A public basic education institution shall not be converted to a private basic education institution or to any other private status without consultation with the National Education Board and approval by the Cabinet Secretary.
29. The appellant herein is a public school sponsored by the Catholic Church and as such an institution as categorized under section 43 of the *Basic Education Act*. Accordingly, the provisions of section 3 (2) are applicable herein.
30. In the circumstances, I find that the appellant's suit was time barred and ought not to have been entertained. The same ought to have been dismissed.
31. The upshot of the above is that I allow this appeal, set aside the judgement of the trial Court rendered on 22nd March 2024 and dismiss the respondent's suit against the appellant.



32. I order that each party shall bear their own costs of the suit in the Small Claims Court and in this appeal as the appellant is nonsuited while the suit was statute barred.
33. Decree to issue and the lower court file to be returned.
34. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 5TH DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE

