



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL SUIT NO. 88 OF 1996**

**MOHAMED ALI TAIB.....PLAINTIFF**

**-VERSUS-**

**SALIM AGIL SAID.....DEFENDANT**

**RULING**

1. The subject matter of this **Ruling** is the **Notice to Show Cause** issued on **21<sup>st</sup> December, 2020** and taken by the Plaintiff seeking the Defendant to explain why execution should not be commenced against him by having him arrested and committed into a civil jail with respect of a **Decree** in the sum of **Kshs.22,495,622.05**.

2. A brief background of this matter would suffice. This suit was instituted by the Plaintiff vide a **Plaint** dated **22<sup>nd</sup> February, 1996** whereof the Plaintiff claimed against the Defendant **Kshs.3,851,250.00**. It was alleged that the amount was owing by the Defendant to the Plaintiff in respect of goods sold and delivered by the Plaintiff to the Defendant sometimes during the **year, 1994**. The Defendant, on the other hand, filed a Statement of Defence on **27<sup>th</sup> May, 1996**, wherein he admitted being indebted to the Plaintiff but alleged that the value of the goods delivered to him was **Kshs.2,800,000/=** and not **Kshs.3,851,250.00** as claimed in the **Plaint**. He further added that he was experiencing financial difficulties and was willing to settle the debt in monthly installments of **Kshs.250,000/=** until payment in full.

3. The matter culminated into a **consent Judgment** whereby it was agreed that the Defendant pays to the Plaintiff a sum of **Kshs.3,851,250.00** with an interest rate of **12% per annum** until payment in full.

4. Nonetheless, it has now been brought to the attention of this court that the Defendant has never paid the said sum and further that the original court file could not be traced from the court registry.

5. Vide a **Notice of Motion** application dated **20<sup>th</sup> September, 2019**, the Plaintiff sought and was granted orders for the construction of the instant skeleton file which I have keenly read through. The **Notice to Show Cause** was orally argued on **10<sup>th</sup> February, 2021** with **Mr. Mwadzogo** appearing for the Plaintiff whilst the Defendant appeared in person.

6. The Defendant submitted that his means have been diminished and therefore he does not have any capacity to pay the entire amount claimed. He told the court that he can only afford to pay **Kshs.1,200,000/=** in defraying the amount claimed in the **Decree** and further denied the debt of **Kshs.22,497,872.05** being the total amount claimed.

7. On the part of the Plaintiff, **Mr. Mwadzogo**, his Counsel, submitted that

the amount of **Kshs.1,200,000/=** which the Defendant wished to pay in defraying the debt was unreasonable in the circumstances. He sought the court to allow the **Notice to Show Cause** as presented.

**ANALYSIS AND DETERMINATION**

8. Having set out the respective parties' positions as above, while considering the record on its entirety as presented in the skeleton file, it behoves the court which is expected to apply, and not ignore the law in all matters before it, and consider a pertinent and ex-facie point of law which touches on the jurisdiction of this court with regard to the matter at hand.

9. I have noted that the matter was settled by a **consent Judgment** entered way back in the **year 1996**. The **Decree** in favour of the Plaintiff as annexed to the **Notice to Show Cause** was issued way back in the **year 2000** which is over six years ago.

10. **Section 4** of the **Limitation of Actions Act** provides that actions founded on Contract may not be brought after the end of six years from the date on which the cause of action accrued. The law as stipulated by the said Act expects the Plaintiff to exercise reasonable diligence and take steps in his own interest.

11. The gist of my finding above is that the issue of Limitation goes to the jurisdiction of this court to entertain the enforcement of the claim sought by the **Notice to Show Cause**. If the same is found to be time barred, then this Court would have no jurisdiction to entertain the same.

12. I further hold the view that even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court which is expected to apply the law, cannot entertain a suit which it has no jurisdiction over.

13. And to demonstrate this, the decision of the Supreme Court in the case of **Nasra Ibrahim Ibren ...Vs... Independent Electoral and Boundaries Commission & 2 Others, Supreme Court Petition No. 19 of 2018** is relevant. In this case, the court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue *suo motu*. It said:-

***“A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 stated thus:***

***“25. What I understand the Court to have been saying***

***Is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...” (Emphasis supplied)”***

14. This view is fortified with yet another excerpt from the East African Court of Appeal in the matter of **Iga V. Makerere University (1972) E.A 62**, where it was stated that;

***“The limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief.....***

***The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, and no grounds of exemption are shown in the plaint, the plaint must be rejected***

15. For the reasons explained above, I find it reasonable at this stage to call upon the parties to address the court on the issue of limitation of time which touches on the jurisdiction of the court and whether there are any grounds of exemption to the claim with regard to the matter at hand before delving into the determination thereof.

16. In this respect, the Plaintiff is hereby directed to file and serve his submissions within 14 days from the date hereof. Equally, the Defendant shall file and serve his submission within 14 days after being served with the Plaintiff's submissions.

Mention on **27<sup>th</sup> April, 2021** for highlighting.

17. Each party shall bear its own costs.

It is hereby so ordered.

**DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 9TH DAY OF MARCH, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**9/3/2021**