



**Benatech Limited & another v Attorney General (Commercial Civil Case E218 of 2021)
[2021] KEHC 334 (KLR) (Commercial and Tax) (3 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 334 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E218 OF 2021**

**DAS MAJANJA, J
DECEMBER 3, 2021**

BETWEEN

BENATECH LIMITED 1ST PLAINTIFF

TREASURE GENERAL MERCHANTS LIMITED 2ND PLAINTIFF

AND

ATTORNEY GENERAL DEFENDANT

RULING

1. The Plaintiffs' case against the Defendant is for goods sold and delivered. The gravamen of their case as set out in the Plaint dated 23rd March 2021. The 1st Plaintiff states that on diverse dates within the years 2014 and 2018, it supplied goods to the National Youth Service ("NYS") and that it is now owed KES. 41,320,275.00. The 2nd Plaintiff states that it supplied goods to the NYS between 2014 and 2017 and now claims KES. 37,266,650.00. They pray for judgment of KES. 78,586,925.00 together with interest at commercial rates from the date of filing suit.
2. In its Statement of Defence dated 23rd June 2021, the Defendant denies the Plaintiffs' claim and puts the Plaintiffs to strict proof. It also states that the Plaintiffs' claim as pleaded is statute barred by virtue of section 3(2) of the *Public Authorities Limitation Act* ("PALA") and that the suit ought to be dismissed. It is in this regard that it has filed a Notice of Preliminary Objection dated 1st September 2021 seeking to dismiss the suit. Section 3(2) of the PALA which provides as follows:

3(2) No proceedings founded on a 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.
3. Both sides have filed written submissions in support of their respective positions.



4. The thrust of the Attorney General's submission is that the cause of action in this suit accrued when an alleged breach under the contract occurred. In this case and according to the Plaintiffs' own pleading at paragraph 6 of the Plaint, under the terms of the contract NYS was to pay for the goods supplied and works carried out within a period of 30 days from the date of delivery of goods and performance of the works hence the cause of action against NYS accrued 30 days after the alleged non-payment. It therefore contends that the Plaintiffs ought to have instituted proceedings against NYS within three years from the date when the money allegedly owing to them became due.
5. The Attorney General submits that by instituting this claim on 23rd March 2021 and considering when the cause of action accrued with respect to the contracts between the Plaintiffs and NYS, any claim founded on a Local Purchase Order ("LPO") dated before 23rd March 2018 is consequently time barred. It also points out that a look at the LPOs supplied by the Plaintiffs leads to the conclusion that their claim is statute time barred to the extent that the LPOs were issued in the years 2014, 2015, 2016, 2017 and early 2018 which cannot sustain the claim.
6. The Plaintiffs submit that the Preliminary Objection does not meet the threshold of a preliminary objection within the meaning of *Mukisa Biscuit Manufacturers Ltd v West End Distributors Ltd*. [1969] E.A. 696 where Sir Charles Newbold held as follows: -

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 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.

Law JA., observed that:

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 pleading and which if argued as Preliminary Objection may dispose of the suit.

7. The Plaintiffs submit that their claim is based on various supplies made to the NYS amounting to KES. 78,586,925.00 which were supplies that the Plaintiffs continued to make at the request of the NYS as late as 11th May 2018 hence the claim is not barred by section 3(2) of the PALA as the Plaintiffs were actively transacting with NYS. The Plaintiffs further submit that for this court to make a determination as to whether their case is statute barred, it would have to ascertain the dates of the various transactions between the Plaintiffs and the NYS which necessarily involves looking at documentary evidence. They therefore maintain that such an exercise would be outside the scope of a preliminary objection as defined by the in *Mukisa Biscuit Manufacturers Case* (Supra).
8. I have considered the submissions necessary to dispose of the Attorney General's preliminary objection. I agree with the Attorney General that the issue of limitation is a threshold issue that goes to the jurisdiction of the court to entertain the claim. However, in this instance, it does not merit consideration and determination. As was held in *Mukisa Biscuit Manufacturers Case* (Supra), a preliminary objection is founded on pure points of law or uncontested facts that are clearly set out in the pleading.
9. The Plaintiffs' case as pleaded is that they supplied goods worth KES. 78,586,925.00 to the NYS over a period of time as evidenced by LPOs and delivery notes. The Plaintiffs have not pleaded the particulars of these LPOs in order for the court to make out which of them fall outside the limitation period. Indeed, in its submissions, the Attorney General referred the court to the documents filed by the Plaintiffs. The court, in resolving a preliminary objection, cannot proceed to analyse or consider



documentary evidence annexed to the Plaint as the list of documents in order to ascertain which of the LPOs are statute barred.

10. The short conclusion of the court is that the Preliminary Objection raised by the Defendant does not qualify as a preliminary objection within the meaning of the *Mukisa Biscuits Manufacturers Case* (Supra). It is therefore dismissed with costs to the Plaintiffs.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Ochieng instructed by Prof. Albert Mumma and Company Advocates for the Plaintiff.

Mr Bett, Senior State Counsel instructed by the Office of the Attorney General for the Defendant.

