



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO.379 OF 2012

REAL MUSIC HOUSE LIMITEDPLAINTIFF

VERSUS

KENYA INSTITUTE OF EDUCATIONAL (K.I.E.).....1ST DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....2ND DEFENDANT

R.D. WAMBUGU.....3RD DEFENDANT

J.N. MUITUNGU.....4TH DEFENDANT

D.M. NYACHIE.....5TH DEFENDANT

RULING

1. Through the amended plaint dated 30th March 2015 the plaintiff herein, a limited liability company incorporated under the Companies Act, sued the defendants seeking *inter alia*, special damages and/or a declaration that the plaintiff is entitled to full compensation for damages arising out of breach of contractual terms.
2. The plaintiff's case is that by written agreement made on diverse dates between 1997 and 1999, the plaintiff, at the defendant's request, agreed to bear all the costs of production, publishing and marketing of 14 school text books.
3. The plaintiff avers that pursuant to the said agreement, it performed its part of the agreement and incurred huge costs but that in the year 2000, it noted that there was a drastic decline in the orders for the said books only to discover that the Ministry of Education had withdrawn Music and Art as examinable subjects. It is the plaintiff's case that the defendant breached the terms of their contract and did not observe due process in purporting to summarily dismiss it from competing with other publishing houses thereby subjecting it to loss and damage.
4. The 1st defendant denied the plaintiff's claim through an amended defence filed on 23rd September 2015. At paragraph 13 of the said amended defence, the 1st defendant raised a preliminary objection to the suit on the ground that it is time barred under the provisions of the Limitation of Actions Act (hereinafter "**the Act**").
5. This ruling is therefore in respect to the 1st respondent's said preliminary objection which the parties canvassed by way of written submissions.
6. **M/S C. N. Kihara advocates** for the plaintiff submitted that the preliminary objection is misconceived as the reliefs sought by the plaintiff are in respect to a continuing breach that cannot be time barred. It was argued that the case concerns the printing, publishing and marketing of music books which fall under copyright work that continue to accrue to date.
7. It was submitted that the 1st defendant's claim that the action is based on a contract is misconceived since the Copyright Act Cap 130 at Section 23(3) stipulates that copyright in literary works subsists until the expiration of fifty years.
8. Counsel cited *Limitation Periods by Andrew McGee- 5th Edition, Sweet & Maxwell, 2006* on the subject of continuing obligations and argued that the breach, by the 1st defendant, is a continuing infringement of contract of copyright that is not time barred and continues for the lifetime of the artist plus 50 years. The plaintiff faulted the 1st defendant for failing to notify it of the termination of the Royalty Agreement on contract of copyright.

9. It is the plaintiff's case that the parties herein engaged in negotiations in an effort to reach an amicable out of court settlement even after the alleged period of filing the suit had lapsed. It was therefore the plaintiff's case that the defendants are stopped from alleging that the plaintiff sat idle from 2003 to 2012 when the case was filed. For this argument, counsel cited the case of **David Stephen Gature v the Headmaster, Nairobi Technical High School & Another**, Civil Appeal No.79 of 1982 wherein it was held:

“that in equitable estoppels, the appellant who had faith in the negotiations with the Attorney General had pursued his claim in reasonable diligence, was not guilty of laches and had negotiated in good faith.”

10. **M/S L.G. Kimani & Co. Advocates** for the 1st defendant submitted that royalty agreement is by their very nature and definition, a contract and that in the present case, the 1st defendant owns the copyright in the work as the author of the books in question while the plaintiff is only the publisher. It was therefore the 1st defendant's case that the publisher (plaintiff) cannot prosecute a claim or infringement of copyright since it holds no proprietary rights in the said works. Counsel submitted that it is illogical to suggest that the holder of the copyright is infringing its own rights.

11. Counsel submitted that the plaintiffs claim against the defendants was specifically predicated on a single and specific act of purported withdrawal of music from the education curriculum which is in no way relates to the issue of copyright or continuing contract of copyright.

12. It was further submitted that even in the case of a copyright, once infringed, the limitation period than begins to run in which case, if the breach is under tort, then the limitation is for 3 years and if the infringement is on a contractual obligation, then the period within which the suit ought to be filed is 6 years.

13. It was submitted that the doctrine of estoppels is not applicable in this case as at no time did the 1st defendant, through its conduct or misrepresentation, induce the plaintiff into believe that it would not plead limitation of actions or that it would make good the plaintiff's claim. Counsel maintained that 1st defendant has always been categorical that the plaintiff's claim is not legitimate as the 1st defendant has always held the position that it would not pay the plaintiff's claim.

14. It was submitted that negotiations cannot act as a bar to the plea of limitation of actions. For this argument counsel cited the case of **Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & Another** [2016] eKLR wherein **Divecon v Samani (1995 – 1998) I EA 48** was quoted with approval and it was held:

“By craft and innovation the learned judge, in grave error extended time by relying on negotiations by the parties and suspending time for this period. Where a statute limits time for bringing an action, no courts has the power to extend that time, unless the statute itself allows extension of time.”

Analysis and determination

15. I have carefully considered the preliminary objection and the parties' submissions together with the authorities that they cited. The main issue for determination is whether the plaintiff's suit is time barred under the Limitation of Actions Act. In determining the said issue, this court has been called upon to examine whether the plaintiff's claim falls under the contract of copyright and is therefore not time barred and whether the 1st defendant is precluded from claiming that the suit is time barred.

Copyright

16. On the issue of copyright, the plaintiff submitted that its action was not based on a contract *per se*, but on a continuing infringement of contract of copyright that has no limitation under the Copyright Act. On its part, the 1st defendant argued that the suit was premised on a single specific act of alleged withdrawal of music and art from the education curriculum that is in no way related to a continuing contract of copyright. The 1st defendant added that it owns the copyright as the author of the books in question.

17. The plaintiff's claim, as contained in paragraphs 3, 5, 9 and 13, was as follows:-

3. By an agreement in writing dated diverse dates in the course of the years 1997, 1998 and 1999 or thereabouts and that include the 16th day of January, 1998, made between the plaintiff and the defendants, the plaintiff agreed to bear all the costs of production, publishing and marketing of 14 books at the defendants' request save for the costs of the defendants' corrections on the proofs in excess of fifteen percent (15%) of the typesetting charges for the work and to pay the 1st, 3rd, 4th and 5th defendants, royalties on all the copies sold as set out in the agreement. The plaintiff will in these proceedings at the trial and/or other appropriate proceedings hereof, refer to the said 14 agreements for their full terms and effect.

5. Pursuant to the said agreements, the plaintiff commenced publishing, production and marketing of fourteen (14) title books and further sought to invest all its savings and income into the project to amongst other purposes: for acquisition/rehabilitation of new premises to cope with the increased demand of production, acquisition of 3 motors vehicles for transportation of books and marketing the project and recruitment of personnel.

9. That sometimes in the year 2000, and without any notice to the plaintiff, and to the plaintiff's consternation, the plaintiff observed that the order for the books had drastically gone down and on investigations the plaintiff came to realize that the Ministry of Education had withdrawn music and art as examinable subjects and as such the defendants in breach of the said contractual terms further I breach of their assurances and undertakings, and the observance of the due process, the defendants purported to summarily dismiss the plaintiff from competing with other publishing houses, thereby putting the plaintiff to suffer extensive loss and damage.

13. By reason of matters aforesaid, the plaintiff has lost the benefits of the said agreements together with the value of its investments as it would have otherwise have received by the defendants' breach of the agreements and as such the plaintiff have suffered loss and damage.

PARTICULARS OF LOSS

a) Loss of business for five years 1997, 1998, 1999, 2000 and 2001 @ Kshs 5,800,000 = Kshs 29,000,000.00

b) Costs of repair and adoption of umbrella house for book Production and publishing = Kshs 8,563, 900.00

c) Wreckage of 3 motor vehicles due to overuse on rough terrain i.e. KWE 902 VW Kombi, KSN 957 Peugeot 505. and KNU 204 Mitsubishi = kshs 1,100,000.00

d) Costs of typesetting of camera ready 14 titles = kshs 629,630.00

e) Marketing cost for 14 titles = kshs 6,207,657.00

f) Loss of security charged to obtain bank facilities KCB Ltd current unsatisfied claims and accruing interest = Kshs 7,658,000.00 Barclays Bank Ltd Facility satisfied through Misk External Loans= Kshs 630,784.00

g) Costs of printing 14 titles as per the orders made by the defendant = Kshs 13,060,900.00

Total loss = Kshs 66,859,971.00.

18. From the averments contained in the above paragraphs and specifically paragraphs 3, it is abundantly clear that the parties herein not only entered into a contract sometime between 1997 and 1999, but that the plaintiff was to pay the 1st, 3rd, 4th and 5th defendants royalties on all copies sold as set out in the agreement.

19. A simple reading of paragraph 9 of the amended plaint shows that as at the year 2000 the plaintiff became aware that the Ministry of Education had withdrawn music and art from its examinable subjects in which case, the purpose for which the plaintiff and the defendant had entered into a contract to produce publish and market the books had been overtaken by events as at the said year.

20. A perusal of the particulars of loss enumerated at paragraph 13 of the plaint shows that the claim is specifically for loss of business for five years from 1997 to 2001 and other losses related to the publishing, production and marketing of the books during the said period. I find that the plaintiff's entire claim accrued as at the year 2000 when the plaintiff realized that its orders for books had drastically reduced due to the withdrawal of music and arts from the education curriculum.

21. I have perused the plaint and the prayers sought therein and I note that nowhere in the plaintiff's entire suit has it made a claim for loss of royalties so as to entitle it to claim that the case was about the continuing infringement of contract of copyrights that cannot be subjected to the limitation of actions. Needless to say, it is trite law that parties are bound by their pleadings. This settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Anor. v Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....”

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

22. The Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another v IEBC & 2 others [2017] eKLR** found and held as follows in respect to the essence of pleadings in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

23. In the present case, the plaintiff concedes that the royalties for the published books were payable to the defendants. It is my finding that the plaintiff's case is founded on breach of contract for which the provisions of Section 22 of the Limitation of Actions Act is applicable. The said Section stipulates as follows:-

“If, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of six years from the date when the person ceases to be under a disability or dies, whichever event first occurs, notwithstanding that the prescribed period of limitation has expired:

Provided that—

(i) this section does not affect any case where the right of action first accrues to a person who is not under a disability and through whom the person under a disability claims;

(ii) when a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under disability, no further extension of time is allowed by reason of the disability of the second person;

(iii) an action to recover land or to recover money secured on a mortgage of land may not be brought by a person by virtue of this section after the end of thirty years from the date on which the right of action accrued to that person or to some person through whom he claims;

(iv) this section does not apply to an action to recover a penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law;

(v) in actions for damages for tort—

(a) this section does not apply unless the plaintiff proves that the person under the disability was not, at the time when the right of action accrued to him, in the custody of his parent; and

(b) this section has effect as if the words “six years” were replaced by the words “three years”.

Estoppel

24. Turning to the doctrine of estoppel, the plaintiff argued that parties engaged in negotiations even after the filing of the suit and that the defendants are therefore precluded from alleging that the suit is that time barred. The 1st defendant denied that there was any such engagement towards a settlement and that at no time did the 1st defendant induce the plaintiff into believing that it would not plead limitation of actions.

25. My finding is that as was held in *Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & Another* (supra) negotiations undertaken towards the settlement of a case *per se*, cannot be construed to mean that the limitation period stopped running during the said negotiations period or form a basis for extension of the limitation period.

26. The plaintiff relied on an unsigned letter dated 23rd August 2005 in support of his claim that the 1st defendant invited it to a meeting slated for 25th August 2005 to deliberate on the issue of breach of contract. I note that besides the said letter, no other material was placed before this court to show that the 1st defendant admitted the debt or that the parties reached a settlement on the alleged breach of contract.

27. Section 39 of the Limitation of Actions Act stipulates as follows on estoppel:

39 *Contract not to plead limitation, and estoppel*
(1) *A period of limitation does not run if—*
(a) *there is a contract not to plead limitation; or*
(b) *that the person attempting to plead limitation is estopped from so doing.*
(2) *For the purposes of subsection (1) of this section, “estopped” includes estopped by equitable or promissory estoppel.*

28. As I have already stated in this ruling, it was not established that the 1st defendant agreed not to plead limitation or, by conduct, induced the plaintiff into believing that it would not plead limitation of actions. Having found that the cause of action herein is founded on contract, it is clear that the suit ought to have been filed within 6 years from the year 2000 when the alleged breach of contract accrued. The suit herein was filed in 2012, 12 years after the cause of action arose and is therefore clearly time barred within the meaning of Section 22 of the Limitation of Actions Act.

29. I therefore find that the preliminary objection, by the 1st defendant, is merited and I allow it with the result that the plaintiff’s suit is hereby struck out with costs to the defendant.

Dated, signed and delivered in open court at Nairobi this 22nd day of January 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Njuguna for the plaintiff

No appearance for defendant

Court Assistant – Sylvia