REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA. NO. 9 OF 2017

JOSEPH MBITHI KITHEKA T/A JOEKIM TRADING AGENCIES....APPELLANT

-VERSUS-

PETER MUASYA KITUKU.....1ST RESPONDENT

JOYCE KITUKU CHARLES.....2ND RESPONDENT

JUDGEMENT

INTRODUCTION

1. The matter arose out of the Contract of Service between Appellant on one hand and the Respondents on the other.

2. It was alleged that in October 2008, a contractor, the Appellant was to search water or do water survey on instruction of the 1st Respondent on his (1st Respondent) plot or shamba.

3. The agreed contract consideration was for Kshs.135, 800/=. However, after performing his part of contract, the Respondent failed and/or refused to pay the consideration thus Appellant lodged instant suit on 05/12/2014.

4. The Trial Court heard the suit and dismissed it with no orders as costs.

5. The aforesaid verdict attracted the instant appeal in which the Appellant has set out 8 grounds of appeal namely:-

i. The Learned Magistrate erred in Law in misinterpreting the application of Provision of Section 4 (1)(a) of the Limitation of Actions Act to the suit herein.

ii. The Learned Magistrate erred in law in computing time from October 2008 when oral negotiations begun instead of 06/12/2008 when the contract was performed.

iii. The Learned Magistrate erred in law and in fact in failing to appreciate that oral negotiations do not amount to a contract until the parties reduce the agreement into writing or the same is actually performed.

iv. The Learned Magistrate erred in law and in fact by failing to appreciate that the suit was filed on 05/12/2014 was not time barred; the contract having been performed on 06/12/2008.

v. The Learned Magistrate erred in law and in fact in omitting to state in the judgment the issue of limitation of time notwithstanding whether the Appellants would have succeeded.

vi. The Learned Magistrate erred in law and in fact in failing to appreciate that both defendants were aware of the contract as the 1st Defendant even signed the delivery notes on 06/12/2008 when the contract was performed.

vii. The Learned magistrate erred in law and in fact in failing to appreciate the Appellants suit which had been filed within time on 06/12/2008 had been proved on a balance of probabilities.

viii. The Learned Magistrate erred in law and in fact by dismissing the Plaintiff's suit against the Defendants instead of allowing the

same.

6. The parties agreed to canvass appeal via Written Submissions which they filed and exchanged.

APPELLANT'S SUBMISSIONS

7. The Appellant submits that in the absence of a written contract, then the question to determine is whether time begun running from October 2008 when oral negotiations begun or on 06/12/2008 when the actual contract was performed?

8. They submit that in the absence of a written contract, oral negotiations do not amount to a contract and the appropriate date for computing time under Section 4 (1) (a) of the Limitation of Actions Acts is when the contract was performed; that is on 06/12/2008.

9. The cause of action therefore arose on 06/12/2008. The suit was filed in court on 05/12/2008 and was therefore not statutorily time barred.

10. The Trial Court therefore erred by computing time from October 2008 when negotiations begun and stating in its judgment that the suit should have been filed in court on or before October 2008. The Trial Court therefore dismissed the Appellant's suit on the basis that it was time barred.

11. However, it is always appropriate to state in the judgment whether the Appellant's suit would have succeeded notwithstanding any technicalities. Thus the Trial Court failed to do and that was a gross error.

12. The Trial Court ought to have analyzed the evidence and independently conclude whether based on the evidence on record; the Appellant's suit had been proved on a balance of probabilities.

13. From the record both Respondents were aware of the contract and the allegation by the 1st Respondent that he never signed the delivery note was a mere denial.

14. It argued that, PW2 testified that when he went to do geological survey at Mukuyuni on 06/12/2008, he met an old man on the land who was the 1st Respondent.

15. Indeed, PW2 did a report dated 10/01/2009, addressed to the 2nd Respondent informing her that after analysis of the collected geophysical data, no shallow well can be recommended for digging on her farm.

16. In her evidence the 2nd Respondent never denied receiving the said letter (PEXH 4). She did not deny that the postal address of P.O BOX 180 KIBWEZI belong to the school; she was the principal.

17. It is contended that, on analysis of the pleadings, evidence and the exhibits produced, it is clear that the Appellant had proved his case on a balance of probabilities and the trial court ought to have entered judgment in his favor for the sum of Kshs. 135,800/= together with costs of the suit.

18. On the issue of Limitation of time he relies on the following authorities:-

> **1) D.P SACHANIA & ANOTHER VERSUS HIRJI PITAMBER ZANZIBAR HCCC. NO. 34 OF 1958**, where the court held that:-
>
> ***"…… the period of limitation is six years from the time the right to sue accrued; In this case the Plaintiff could not sue before he had examined the accounts ……."***

19. He submits that the right to sue in this appeal accrued from the date the contract was performed on 06/12/2008 and that was the relevant date to compute the running of time under the Limitation of Actions Act.

20. In the case of **PIONEER GENERAL ASSURANCE SOCIETY LTD VERSUS KAMUNYE & OTHERS KAMPALA HCC. NO. 377 OF 1967**. The question which arose was whether the cause action arose on 30/06/1953 when the deceased defaulted by not repaying the mortgaged debt or it arose on 30/09/1958 when the tenants withheld payments of rent which were being applied towards reduction of the mortgage debt.

21. It was held that the cause of action arose in 1958 when the tenants withheld the rents. They submit that in the instant case the cause of action arose when the contract was performed on 06/12/2008 and not at the time of negotiations in October, 2008.

22. Further in the case of **SOSPETER WANYOIKE VERSUS WAITHAKA KAHIRI NAIROBI HCC. NO. 2802 OF 1977**, the Defendant sold land to the Plaintiff in 1965 and the last instalment was paid on 10/03/1969.

23. In 1977, the Plaintiff instituted proceedings seeking to be declared the owner by virtue of adverse possession as 12 years had elapsed from the time the land was sold to him in 1965.

24. It was held the period of limitation for adverse possession did not begin to run until the last instalment was paid on 10/03/1969.

25. The principle enunciated in this authority is that it is the last action which counts in computation of time. The initial sale agreement date of 1965 was not relevant.

26. Consequently, applying the same principle to the Appellant's suit, it is the performance of the contract on 06/12/2008 which is relevant in computing time.

RESPONDENT'S SUBMISSIONS

27. The Respondent submits that this being the first Appellate court, this court is enjoined to consider some aspects; these are as aptly captured by in the persuasive decision in **Kenya Power & Lighting Company LTD –Vs- EKO & Another (2018) eKLR,** thus;

> ***"The appropriate standard of review established in these cases can be stated in three complementary principles;***
>
> ***a) First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;***
>
> ***b) In re-considering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and***
>
> ***c) It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time"***

ON LIMITATION OF ACTION

28. It is submitted that, the suit subject of this appeal was filed in court on the 05/12/2014. It is not denied that the basis of the claim was an alleged contract between the Appellant and the 2nd Respondent.

29. The question that faced the trial court was when was the contract entered into and when was the suit filed in respect thereof. In their view the court answered the questions correctly.

30. The argument advanced by the Appellant that the contract was entered on 06/12/2008, is unsupported by the evidence and the pleadings filed in court. They urge the court to consider the following:-

- On page 3 of the record of appeal (the plaint), at paragraph 3 thereof, the Appellant pleaded that … **on or about October 2008** …
- On page **30** of the record of appeal **line 3,** the Appellant on cross examination stated that the deal was struck on October 2008. Indeed he stated that all aspects of the contract were discussed on that day.
- On page **32** of the record of appeal, in his evidence in chief he stated "I met …. the Defendant Mrs. Kituku on 16/10/2008 … I was to do the work immediately"
- On page **42,** of the record of appeal; in his submissions the plaintiff set as an issue for determination, whether there was a contract between the parties as at October 2008. He answered that in the affirmative.

31. The argument that there cannot have been an oral contract as posited by the Appellant is untenable in the face of the record and candid admissions by the Appellant.

32. The subordinate court cannot be faulted on a finding based on the evidence of the Appellant. There was no evidence tendered that the alleged contract was still being negotiated as of 05/12/2008.

33. In reckoning time, the court considers when the contract was entered into. This is because in determining the rights of the parties, the court can only draw from the contract itself. This position found favour with the court of appeal in **Pius Kimaiyo Langat –Vs- Co-operative Bank of Kenya Limited (2017) eKLR** where the court after considering limitation of time in a contractual relationship had this to say, ***(paragraph 32)***.

> **"We must therefore fall back on the pleadings where the bank pleaded a loan facility contract entered into on 25th August, 1997. It does not say when default, and therefore the cause of action, arose but the evidence of Chege is instructive. They may quote him:-**
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> ***"We did not honor any cheques from 25th August 1997. The defendant could not get any more funds from that account. From 25th August 1997, 6 years elapsed in August 2003. I am aware that suit should have been filed within six years. The plaint was filed in September 2004. There have been no statements of loan account. Only the overdraft account.***

The bank could only supply the statements upon request of the debtor. The bank could supply upon request. I am not aware that any of the statements was supplied to the debtor.

And so it is that the bank knew it had a cause of action as at 25th August, 1997, at any rate for recovery of Kshs.500,000/=, but took no action to seek recovery of the debt. Instead, it was making an offer for a fresh loan and overdraft to the Appellant. We shall say more on this later in this judgment". As regards limitation, it is our finding, upon consideration of the facts and applicable law, that the suit filed 15th September 2004 was statutorily barred as at 24th August, 2003."

34. They therefore submit that the date of the contract is the crucial date in reckoning the limitation of time.

35. Unlike in the authorities relied upon by the Appellant, the situation facing the Appellant was markedly different and there are no ambiguity as to when he stated he entered into the contract, his rights started accruing then and the strictures of Limitation of Action under Section 4 were squarely against him.

CLAIM WAS NOT PROVED

36. Further it is stated that, the Appellant did not prove his claim even on the facts laid before the court. They wish to refer the court to the Respondent's submission before the subordinate court on page **44** of the record of appeal and put reliance thereon as relates the lack of prove of the claim.

37. For purposes of clarity they isolate the following aspects to demonstrate that there was no contract between the parties neither was there any performance by the Appellant;

- The Appellant conveniently tailored some documents (invoices on 05/12/2008) apparently to hoodwink the court as to limitation of the claim. They say so because he admitted that they were never delivered, he did not meet the person he purported to have addressed the invoices i.e. the 1st Respondent.

- The purported delivery notes delivered nothing and there was no report delivered thereby (see page **30**).

- The purported report dated 09/01/2009 was admittedly never delivered to the 2nd Defendant even as it purported to address her. It was apparently being done, long after the purported delivery note.

- The Appellant admitted that he never met the 1st Defendant (see page 30 of the record) yet this is the person he purportedly interacted with in his alleged visit to the land. Indeed stated that he gave the invoices to the 1st Defendant, how contradictory can this be?

- The Appellant admitted that the local water office was never involved, he never got any permit to survey for water and did not even know the particular parcel of land he was dealing with.

- The Appellant never debunked the position taken by the 2nd Defendant that they met in June 2008 and not in October 2008, and no contractual relationship was established.

THE DUTY OF THE 1ST APELLATE COURT

38. The Appellant called two witnesses. PW1 Engineer Joseph Mbithi testified that in October 2008, he met the 2nd Defendant who told him that she was on a water search. He did the work and told the 1st Defendant that there is no water. He did a letter to that effect.

39. On cross-examination, PW1 testified that he met the Defendants in 2008 in the month of October and that all the aspects of the contract were discussed then.

40. He further testified that he visited the area that he was supposed to explore.

41. PW2 David Mathenge a hydrological surveyor testified that in 2008, he was approached by the Plaintiff to do a hydrological survey at Mukuyuni. On cross-examination, DW1 testified that he has never seen the Plaintiff and that the hydrologists did a test in 2008 and said that there was no water.

42. DW2 Joyce Mumbi Muasya a retired teacher testified that in June 2008, the Plaintiff approached her with a view of drilling water in her school. She told him that she will meet the Board of the school to discuss the issue. She further testified that she did not send the Plaintiff to her home because she had put up a big tank.

43. On cross-examination, DW2 testified that she met the plaintiff in 2008 and that it was not possible for him to drill water in her home because she stays near the hills.

ANALYSIS

44. I analyzed the evidence that was adduced by both parties. I went through the written submissions that were filed by the parties herein. My points of determination are;

a) Whether there was any contract between the parties herein.

b) If so, whether this suit was filed within time.

45. PW1 Engineer Joseph Mbithi testified in court that in October 2008, he was approached by the 2nd Defendant to do some work for her. On 6th December 2008, he told the husband to the 2nd Defendant that there was no water on site.

46. PW2 David Mathenge a hydrological surveyor confirmed before court that he was approached by the Plaintiff to do hydrological survey at Mukuyuni which he did and came up with a report to the effect that there were no chances of getting water.

47. The Plaintiff produced a copy of the delivery note which was addressed to the 2nd Defendant, but I note that the 2nd Defendant did not append her signature on it. The delivery note was received by Peter Muasya, who is the 1st Defendant herein and yet on cross-examination, the plaintiff testified that he has never seen the 1st Defendant. The invoice was addressed to the 2nd Defendant.

48. The 1st Defendant denied ever seeing the Plaintiff or entering into any agreement with the Plaintiff. This was confirmed by the Plaintiff on cross examination.

49. The trial court dismissed the Plaintiff's claim as against the 1st Defendant but with no orders as to costs. This court finds that on evidence on record, the dismissal was justified. The trial court was convinced that there existed some contract between the Plaintiff and the 2nd Defendant.

50. The Respondent has not impugned that finding, thus this court upholds that finding.

51. Then the trial court having established above, moved on to address issue, of whether the suit had been brought within time.

52. The court noted that, Section 4 (1) (a) of the Limitations of Actions Act stipulates that an action founded on contract should be brought within 6 years. It noted that, from the plaint that the suit was instituted on the 5th day of December 2014.

53. The Plaintiff testified before court that he entered into a contract with the 2nd Defendant in October 2008. The Trial Court concluded that the suit was caught up in the structures of Section 4 (1) (a) of the Limitations of Action Act. It held that, the suit ought to have been filed on or before October 2014. For that reason, it dismissed the Plaintiff's claim as against the 2nd Defendant.

54. In the case of **MARIA MACHOCHO -VS- TOTAL (K) INDUSTRIAL CAUSE NO. 2 OF 2012,** the court expressed as follows:

"……the statutory limitation period for causes of action based on breach ……of contract of service was that provided for contracts in general, in Section 4(1) of the Limitation of Actions Act, and it was 6 years……. …….. The precedent in this regard was set out by the Court of Appeal in DIVECON LTD V SAMANI [1995-1998] 1 EA 48 at 54 that section 4(1) of the Limitation of Actions Act was clear beyond any doubt and that the section meant that no one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose……..."

55. Further **D.P SACHANIA & ANOTHER VERSUS HIRJI PITAMBER ZANZIBAR HCCC. NO. 34 OF 1958,** where the court held that:-

"…… the period of limitation (in contract claims) is six years from the time the right to sue accrued…"

56. The Trial Court holding that, the suit ought to have been filed on or before October 2014 was erroneous in view of the above authorities cited. The right to sue in this appeal accrued from the date the contract was performed on 06/12/2008 and that was the relevant date to compute the running of time under the Limitation of Actions Act.

57. The Trial Court went into error on dismissing the suit on that ground alone. The court thus makes the following orders;

i. The Trial Court order dismissing suit as against 2nd defendant is set aside.

ii. The suit is remitted back to the subordinate court to evaluate the evidence on the basis that the claim was filed within time and make determination thereof.

SIGNED, DATED AND DELIVERED THIS 3RD DAY OF OCTOBER, 2018 IN OPEN COURT.

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C. KARIUKI

JUDGE