



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 108 OF 2013

YUSUF ABDULAPPELLANT

VERSUS

SEA ANGEL SERVICE STATION LIMITED.....RESPONDENT

J U D G M E N T

Outline

1. The appellant seeks that the decision of the trial court be set aside

and the decree annulled and be substituted with an order dismissing the Respondents suit before the trial court.

2. The memorandum of Appeal dated 19/8/2013 attacks the judgment of the trial court on the following grounds:-

i. THAT the learned trial magistrate erred in law in entering judgment for the respondent in respect of a claim that was manifestly time-barred.

ii. THAT the learned magistrate erred in refusing to set aside the leave to file suit out of time granted at inception of suit.

iii. THAT the learned magistrate erred in failing to appreciate that the power to extend time under the Limitation of Actions Act did not extend to actions founded in contract.

iv. THAT the learned magistrate erred in construing the period when time began to run for purposes of the respondent's claim and/or in failing to appreciate that the respondent's assertion that time began to run once formal demand was made was inconsistent with the seeking of leave to extend time.

3. Although there are four grounds of appeal the same actually raise only two issues namely:-

(i) Was the suit as filed statute barred?

(ii) Was the Order extending time to file suit out time validly granted?

Historical background pleadings and evidence adduced

4. The plaint dated 30/8/2016 filed in court 4/9/2006 and as amended disclosed the plaintiffs claim against the defendant to be the sum of Kshs.281,604 on account of Petroleum products supplied to the defendant by the plaint at the defendants own request and instance between the 26th day of May 1998 and 11th day of June 1998. It was additionally pleaded that the plaintiff did make a demand for payment on the 25/11/2000 and the plaintiff therefore did contend that it was upon demand that the cause of action accrued and not on the date the debt became due.

5. In answer to that claim, the defendant filed an amended statement of defence (**under protest**) dated the 27/7/2012 which essentially denied any agreement for the supply of the product and denied demand of 25/11/2000 as alleged. It was equally pleaded that the claim as filed was statute barred and the leave to bring it out of time was itself granted without the law and ought to be set aside.

6. The amendment to the plaint was effected pursuant to the Order by the court granted on 16.4.2010 by T. Gesora (SRM). That ruling allowing leave to amend shows that the defense and plea of statute bar was raised because the record reveal the court to have said:-

“Though it is true that the extension of time can be challenged, I am satisfied that all factors were considered when the order was given and that the claim is properly before court. Ammendment can be allowed even though the effect would be to introduce a completely new cause of action or new parties”.

7. That reasoning and decision seems to have held sway all along because even in the judgment the trial court said;

“On the issue of invocation of limitation of actions Act, Cap 22, in regard to the claim being statute barred, I find that the same was settled by my predecessor who intervened and decided on the same”.

8. I have reproduced those portions of the two decisions in the Record of appeal just to underscore how deeply the question of limitation was embedded in the litigation between the parties. It was therefore a core and critical question that the court was properly seized of and ought to have been given due attention and consideration by the court in the judgment appealed against.

The evidence adduced

9. At trial the plaintiff called one witness John Kiio who introduced himself as an employee of the defendant. He produced the receipts he said the defendant signed and relied on the conditions of sale at the back of the receipts to have entitled the plaintiff to claim interest at 5% on the overdue sums. Those receipts were for the period pleaded being between 22.5.1998 and 11.6.1998 and produced as PEXH 1.

10. He also produced a final demand letter dated 17/6/2004 as exhibit P2. On cross examination the witness told the court that there was no formal contract between the parties that the suit was filed in court on 4/9/2006 and that the first demand was made in the year 2000. The plaintiff’s case was then closed and the defendant opted not to call any witness.

11. When the parties were granted an opportunity to file written submissions, the plaintiff filed very brief submissions emphasizing the fact that the defendant did not call any evidence and that the documents produced proved that the sum sued for was owed and that the sum according to the documents attracted interests at 5%. Those submission totally steered clear of the issue of limitation.

12. On behalf of the defendant very elaborate submissions were tendered outlining the pleadings filed and the evidence adduced thereof and decided cases were then cited to support the line of defense that the suit was statutorily time barred. On that defence argument were advanced on two points:-

i) There is no jurisdiction in the court to extend time for a cause of action grounded on contract.

ii) The leave once granted could only be challenged at trial.

13. The defendant then relied on the decided case of *Divecon Ltd vs Sinani [1995-1988] 1 E.A 48* where the Court of Appeal held that the words in section 4(1) left no doubt that no one had the right or power to bring an action founded in contract after the expiry of six years from the date the cause of action accrued.

14. For the proposition that leave once granted is due for challenge at trial the counsel cited the decision in *Aruta & Anor vs Nyanabo [1988] KLR 590* with addition that such would apply where there was a discretion to be exercised like in instances of tort but where there is no jurisdiction the court had the right under its inherent powers to set aside an order given without jurisdiction as of right. The Court of Appeal in *Ngerenyo vs Keri, Civil Appeal No. 9/97(UR)* which followed the English decision in *Craig vs Kanseen [1943] 1KB 256* was cited for the latter proposition.

15. Lastly the defendant argued that the amended plaint was never supported by evidence as far as the date the final demand was allegedly made and maintained that the terms of sale at the back of the receipts indicated that the terms were strictly monthly and accounts were due for payment by the 15th of the following month. For those submissions the defendant urged the trial court to dismiss the suit for having been filed out of time and was that statutorily time barred.

Analysis and determination

16. I have commented hereinabove and now repeat that the trial court did give to the question of limitation what I consider to be casual and cursory attention and consideration yet it was a critical and all important matter the court was duty bound to consider before it could go to the merits. I say so because the question of limitation as pleaded in the amended defence went to jurisdiction and if the court was to find that the matter was statutorily time barred then, it had no otherwise but to down its tools.

17. In the decision by the Supreme Court of India in *Rana Vijey Kumar Oberoi thro' GPH vs Sunita Sudam Ranaware, Civil Appeal No. 7732 of 2011* the court said cited with approval the decision in *Pandurang Dhoni Chougule vs Maruti Hari Jadhar* to the effect that:-

“It is well settled that a plea of limitation or plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on those pleas in favour of the party raising them would oust jurisdiction of the court.....”

18. Although decided by a court outside our jurisdiction, that decision is in full consonance with the jurisprudence in this country on jurisdiction and the most commonly cited is the case of *Owners of Motor Vessel Lelian 'S' vs Total (Kenya) Ltd* where the court of appeal stressed the point that where jurisdiction is raised, the court must summount it first before making any further endeavor since jurisdiction is everything.

19. In the Appeal before me the trial court did not only gloss over the matter but equally abdicated its duty in law to consider that forcefully taken matter. That court was duty bound to consider whether or not the leave was validly given. Instead of giving the question the due and merited thought, it took the view and held that his predecessor had dealt with the matter finally in the application to amend the plaint. To that extend the trial court was openly and clearly in error which error ought and must be corrected by this court as a first appellate court relooking the question.

20. I have had a chance to read the limitation of action Act and in particular section 22 and 28 thereof and I am fully persuaded that there is no jurisdiction, in anybody including the court as correctly stated by the Court of Appeal *Divecon Ltd vs Simani (supra)*. This was the funding the trial court was called upon to make but it failed in its duty.

21. That notwithstanding however what do the facts as pleaded in the plaint reveal. It is clear that the only evidence of the dealing between the parties are the receipts produced as exhibits PEXH 1.

22. Those documents particularly the invoice, which I consider to be a demand, and dated the 26/5/1998 has two sets of terms of the contract. On the face of it at the foot, the document gave the term in bold that **TERMS STRICLTLY MONTHLY**. At the reverse of the same document there are four terms and conditions. The relevant one on when the cause of action cross are to this court conditions 3 & 4. The same are worded as follows:-

“3 All accounts are due on demand.

4 Accounts must be paid by the 15th of the following month.”.

23. In law and under the sale of goods Act, Section 29, the right of a seller to be paid the purchase price is concurrent with delivery unless the contrary intention is shown. The Act also defines the term monthly to mean a calendar months.

24. For the transaction between the parties, I am in no doubt that it was agreed that the payment would be monthly and not later than the 15th day of the following month. I understand and interpret those terms to mean that all supplies for the month of May for example would be due for payment by the month of June. I do not consider if a correct interpretation that the defendant in those circumstances and on the terms of sale was excused from making payment merely because a written demand, by way of a letter had not been made.

25. Conversely, the plaintiffs cause of action was not held at ramson merely because no demand letter had been served. NO. The obligation to pay was covenanted to be monthly and therefore the last sale having been on the 11.6.1998 the last date the defendant was obligated to pay was the at the latest, regard being had to condition 4 at the reverse of the cash sale receipts, the 15th of July 1998. That is when the breach, failure to pay occurred.

26. That to me was the day the cause of action accrued when there was no payment. If the plaintiff decided to make a demand, such was made gratis and out of abundant of caution but such was not the determining factor or date for the cause of action to accrue.

27. It therefore follows that the plaintiff cause of action accrued in the month of July 1998 and therefore in terms of section 4(1) Limitation of Actions Act, the suit for recovery was due for initiation not later than the 31/7/2004. It further follows that on the 4/9/2006 when the suit was filed the same was already statutorily time barred and being a cause in contract there was no recourse at reviving it by an application to extend time. It remained a dead cause of action into which no life could be breathed in the manner and fashion the plaintiff sought to do.

28. In any event and in common commercial balance an invoice is a formal demand for payment with terms of payment. Once issued there would be the need for a demand letter unless contested.

29. I therefore find and hold that to the extent that the suit was filed outside time, it was an act in futility and all the order issued pursuant thereto were issued without jurisdiction and were a nullity *ab initio*. As the trial court had no jurisdiction to extend time, it did not matter that leave was granted nor did it matter that the plaint was amended by an order of the court. The court before whom the suit was filed was divested of jurisdiction to entertain it as it did.

30. The upshot is that the appeal is wholly merited, it is allowed and the judgment and decision of the trial court, Hon Ekhubi (SRM) dated 31/7/2013 was erroneously made and is therefore set aside and in its place substituted an order dismissing the suit with costs.

31. I award to the Appellant the costs of both this appeal and the costs before the trial court.

Dated and delivered at **Mombasa** this **3rd** day of **May 2017**.

HON. P. J. O. OTIENO

JUDGE