



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 20 OF 2015**

**SOUTH COAST PROJECT LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA POWER & LIGHTING CO. LTD.....DEFENDANT**

**RULING**

1. The Defendant through a Notice of Preliminary Objection dated 20<sup>th</sup> July, 2015 notified the plaintiff that it would challenge the propriety of the suit herein on the following grounds of objection:-

- i) That the suit is bad in law, inept, *pressimi exempli* as it offends the mandatory provisions of Section 27 of the Limitation of Actions Act, Cap 22 Laws of Kenya and thus amenable to being struck out;
- ii) That the plaintiff's suit is statutorily time barred and should thus be struck out *in limine*;
- iii) That the suit herein entails an unwarranted choice of Jurisdiction or Judicial forum; and
- iv) The suit should be struck out with costs.

The hearing of the Preliminary Objection proceeded by way of written submissions with counsel for both parties highlighting the same.

**APPLICANT'S SUBMISSIONS**

2. Mr Mbago, Learned Counsel for the Defendant/respondent (respondent) submitted that the suit herein is statutorily time barred and should be struck out as the plaintiff is seeking compensation for house hold goods. He asserted that the cause of action accrued on 12<sup>th</sup> September, 2010 and that 3 years elapsed on 12<sup>th</sup> September, 2013. This being a claim founded on negligence, the suit which was filed on 12<sup>th</sup> February, 2015, was filed 2 years late.

3. It was submitted that although the Plaintiff/applicant (applicant) in his written submissions states that he obtained orders for extension of time, no Court order was served on the respondent to that effect. Counsel added that section 27(1) (b) of the Limitations of Actions Act is clear that extension of time on the tort of negligence can only be granted on a case for personal injury. Mr Mbago cited the case of **Crescent Construction Company Ltd vs Transpares Transporters** [2015] eKLR, where leave to extend time was set aside.

4. Counsel contended that the present suit entails an unwarranted choice of forum as the purported extension of time was sought before the Chief Magistrate's Court in Mombasa, this means that the respondent has chosen to pursue the case in the Chief Magistrate's Court Mombasa yet there is no explanation as to why the matter later found its way to the High Court.

### **RESPONDENT'S SUBMISSIONS**

5. Mr Makaya, Learned Counsel held brief for Mr Bwire for the respondent. He submitted that the applicant was to supply the respondent with a controllable supply of power and bill the respondent. He added that the applicant was also contractually obliged to supply and conduct repairs in a professional manner. Counsel asserted that no civil wrong is a tort if premised on a contract. Counsel cited the case of **Reardon vs Allegheny College** to support the foregoing assertion.

6. Counsel cited the case of **Richmond Metropolitan Authority vs McDevitt Street Bovis Inc**, where the court decided that in determining whether a cause of action is a founded on contract or tort, the source of the duty has to be ascertained.

7. This court was informed that the fire at the respondent's premises was occasioned by failure of the applicant to carry out its duty to the required standard, with the contractual duty being performed negligently. Counsel submitted that section 4(1) of the Limitation of actions Act comes into play as an action founded on contract can be brought within 6 years.

8. Counsel argued that the court should be guided by the doctrine of the source of duty and that the cause of action arose due to a contractual obligation thus section 4(2) of the Limitation of Actions Act is unsustainable in this case. It was further submitted that this court has original unlimited jurisdiction and the legal standing to entertain this suit or of transferring it to the subordinate court. Counsel added that section 4(2) of the said Act is not in mandatory terms and is therefore not meant to extinguish claims. He also stated that leave was sought to extend time. He prayed that the application be dismissed.

### **APPLICANT'S REJOINDER**

9. Mr. Mbago, stated that nowhere in the plaint is the word contract mentioned and that the guiding words in the plaint are negligence thus making it a claim based on tort and that the plaintiff is bound by his pleadings. He further submitted that the court has no Jurisdiction to deal with this matter due to the suit being time barred.

### **ANALYSIS AND DETERMINATION**

The issues that call for determination are:-

- (i) If this suit should be transferred to the subordinate court;
- (ii) Whether the court should strike out this suit for being statutorily time barred.

10. In the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors** (1969) EA 696, at page 700, Law, JA stated thus:-

***"...a 'Preliminary objection' consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of Limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."***

Sir Charles Newbold P., added as follows at page 701:-

***"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 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.”***

11. In the instant case the Preliminary Objection raised by the applicant relates to issues of limitation of action and the Jurisdiction of this court entertain the present suit. Counsel for the applicant contends that the claim by the respondent is with respect to the tort of negligence. A perusal of the plaint at paragraph 9 contains an averment to the effect that a fire broke out at the respondent's suit property which burnt the property to ashes. The cause of fire was allegedly due to faulty and loose power lines which generated sparks at an electric pole adjacent to the suit property and subsequently ignited the makuti roof of the suit property which burst into flames. The respondent at paragraph 10 enumerates the particulars of negligence of the applicant. Paragraph 12 gives the particulars of special damages.

12. In his written submissions, the respondent's Counsel indicated that the law firm of Mulei and Company Advocates sought leave to file a suit out of time acting on the belief that the respondent's cause of action was tortious in nature. At a later date, the law firm of Kithi & Co Advocates was instructed and filed the present suit. When highlighting the respondent's submissions, Counsel maintained that the said suit is based on contract. On the other hand, Counsel for applicant maintained that the respondent's claim is based on tort thus the provisions of section 4(2) of the Limitation of Actions Act is applicable in this matter. The said provisions read as follows:-

***"An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:***

***Provided that an action for libel or slander may not be brought after the end of twelve month from such date.”***

13. Counsel for the applicant's submission on the issue of extension of time to file suit under the provisions of section 27(1)(b) of the Limitations of Actions Act on a tort of negligence was that it can only be granted in a case for personal injury.

14. Section 27 of the limitation of Actions Act provides for extension of time in the filing of suits in instances of ignorance of material facts in actions for negligence **in the following terms-**

***1) Section 4(2) does not afford a defence to an action founded on tort where -***

***(a) The action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and***

***(b) The damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and***

***(c) The court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and***

***(d) The requirements of subsection (2) are fulfilled in relation to the cause of action.***

***(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which -***

***(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and***

**(b) In either case, was a date not earlier than one year before the date on which the action was brought.**

**(3) This section does not exclude or otherwise affect -**

**(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4 (2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or**

**(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.**

15. A reading of the above foregoing provisions show that **extension of time only applies to claims made in tort and that even in tort, the claim must be in respect of claims for personal injuries arising from negligence, nuisance or breach of duty.** (emphasis mine). The cause of action herein accrued on 12<sup>th</sup> September 2010 and plaintiff was filed in the High Court on 12<sup>th</sup> February, 2015. The applicant filed a defence on 24<sup>th</sup> March, 2015 and in paragraph 3 thereof, avers that the suit is time barred, thus amenable to being struck out *in limine*. The respondent filed its reply to the defence where at paragraph 2, it avers that leave to file the suit out of time was granted in Mombasa Chief Magistrate's Court Miscellaneous Civil Suit No. 1095 of 2014. I note that the respondent's counsel's submissions counter what is contained in the pleadings he filed on behalf of his client. If at the time of filing the current suit the said counsel was sure footed that the respondent's claim was a contractual one, then there was no need to plead that he obtained leave to file a suit out of time in the Chief Magistrate's Court. I say so as the period of 6 years within which to file a case based on contract had not elapsed by 12<sup>th</sup> February, 2015, when the plaintiff was filed.

16. In **Dhanesvar vs Melita Manilal M Shah (1965) EA 321**, the court was clear that:

***“The object of Limitation enactment is to prevent a plaintiff from prosecuting stale claims.....the effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”***

In similar vein, Bosire J ( as he then was) in **Rawal vs Rawal [1990] KLR 2**, stated thus:-

***“ The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims.”***

17. Can this suit be redeemed? Counsel for the respondent's second line of argument was that the applicant conducted its contractual duty negligently and that section 4(1) of the Limitation of Actions Act comes into play as an action founded on contract can be brought within 6 years from the date when the cause of action accrued. He also asserted that no civil wrong is a tort if it is premised on a contract. Although I find the foregoing argument persuasive, I note that the respondent has not clearly brought out the contractual element in the plaintiff.

18. Taking into consideration the emphasis by counsel for the respondent that the suit is premised on contract, this court notes that it was filed within the statutory time lines provided by law. I have also taken into account the decision in **Richmond Metropolitan Authority vs Mc Devitt Street Bovis Inc.**, that in determining whether a cause of action is founded on contract or tort, the source of duty has to be ascertained. This court pays heed to the provisions of **Order 8, Rule 5(1) of the Civil Procedure Rules** that reads as follows:

***“5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on***

***the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.***"

19. Having considered all the foregoing factors, I decline to strike out the suit *in limine* and hereby grant the following orders:-

(i) The Plaintiff/respondent is granted 14 days within which to amend, file and serve an amended plaint;

(ii) The Defendant/applicant will be at liberty to file an amended defence within 14 days of service of the amended plaint;

(iii) This suit shall be transferred to Mombasa Senior Principal Magistrate's court for hearing and determination, after the duration of the said 28 days; and

(iv) Each party will bear its own costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED at Mombasa on this 7<sup>th</sup> day of September, 2016.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

**Mr Mbayo for the applicant**

**Mr Makaya for the Respondent**

**Rose Echor Court Assistant**