



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL CASE NUMBER 481 OF 2010**

**PAULINE CHERONO KONES.....1<sup>ST</sup> PLAINTIFF**

**LILY CHEPKEMBOI KONES.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA CIVIL AVIATION AUTHORITY.....DEFENDANT**

**R U L I N G**

This is a ruling to a Preliminary Objection dated 30<sup>th</sup> November, 2010 and filed in court on the 2<sup>nd</sup> day of December, 2010. The preliminary objection is on a point of law and it's to the effect that the suit is time barred and that it was filed without the leave of the court.

The defendant avers that the cause of action arose on the 10<sup>th</sup> June, 2008 and the suit was filed on 19<sup>th</sup> October, 2010. Counsel for the Defendant submitted that pursuant to Section 7 (e) of the Civil Aviation Act Cap 394, the suit ought to have been filed within one year from the date the case of action arose which was on the 16<sup>th</sup> June, 2008 but it was filed two years after. The Defendant has urged the court to dismiss the suit with costs.

The Plaintiff has opposed the Preliminary Objection and submitted that the Civil Aviation Act was repealed and with that, the Act was deemed dead and buried. According to him, the New Civil Aviation Act No. 21 of 2013 has no saving provision, as such, no Section or Provision in the Repealed Act was saved by the New Act. He relied on Section 83 of the Act and urged the court to find that the suit is properly before the court.

The court has considered the submissions by the counsels. The essence of a preliminary objection was given by Law JA Old Sir Charles New Bold P, in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West-End Distributors (1969) EA 696** where Law JA stated: -

***“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 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 facts are to be ascertained or if what is sought is the exercise of judicial discretion.”***

This court has looked at the relevant provisions of the law. The plaint herein was filed in the year 2010 when Civil Aviation Act Cap 394 was still in force. Section 7E of the said Act provided: -

***“The action or legal proceedings shall not lie or be instituted unless is commenced within twelve months next after the act, neglect, omission or default complained of or in the cause of a continuing injury or damage, within six months next after the cessation thereof.”***

That Act was repealed by the Civil Aviation Act No. 21 of 2013 whose commencement dated was on the 25<sup>th</sup> January, 2013 which provides as hereunder with regard to the Limitation of actions.

***“No action or legal proceedings shall not lie, or be instituted unless it is commenced within three years next after the act, neglect omission or default complained of or in the case of a continuing injury or damage, within six months next after the cessation thereof.”***

Part VII of the new Act, contains the transitional provisions. In Section 83 (1) provides: -

***“The Civil Aviation Act is repealed.***

***(2) While Section 83 (2) provides in Subsection (1) —***

***a. any proceedings taken against or by the former Authority or pending against it or any other person immediately before the commencement of this Act may be continued by or against the Authority as if instituted under this Act”***

The Defendant has relied on the provisions of the Repealed Act to support his contention that the suit is time bared while the Plaintiffs have relied on the New Act to contend that the provisions of the New Act should apply with regard to the Limitation of Actions.

It is worth noting that the suit was filed long before the Act was repealed. It was filed under the provisions of the Old Act and even then, it was filed out of time because it ought to have been filed within one year from the date when the cause of action arose. This in my view, means that even before the Act was repealed the suit was incompetent as it had been filed out of time.

The transition Clause i.e. Section 83 (2) (a) applies to pending suits and it provides that such suits should be continued as if instituted under the New Act. My understanding of the provisions of the two Acts is that, a suit that had been filed before the New Act came into force were governed by the old Act with regard to the Limitation of Actions while the proceedings filed under the Old Act should proceed as provided for in the New Act. The Limitation of Actions period provided for in the New Act only affects the causes of action that had not been filed by the commencement date and not before. As rightly argued by counsel for the Defendant, an Act of Parliament cannot apply retrospectively.

In view of the foregoing, the suit as filed is incompetent and it is hereby struck out with no orders as to costs.

Dated, signed and delivered at Nairobi this 6<sup>th</sup> day of October, 2016.

.....

**L NJUGUNA**

**JUDGE**

**In the presence**

..... **for the Plaintiffs**

..... **for the Defendant**