



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 286 OF 2012**

**KAMAU MUCUHA.....PLAINTIFF**

**VERSUS**

**CHARLES MUNGE.....DEFENDANT**

**RULING**

1. The Defendant filed a preliminary objection dated 22<sup>nd</sup> January, 2013 seeking the striking out of this suit on grounds that the suit is incompetent and totally defective as it offends the provisions of the Limitation of Actions Act, in that it seeks to enforce a void judgment to which the Defendant is not a party and that it is an abuse of the court process and a breach of the rules of procedure and natural justice.
2. Mr. Orege learned counsel for the Defendant submitted that the cause of action in this suit having been pleaded to have arisen on 15<sup>th</sup> October, 2002 out of a tenancy contract, it ought to have been filed within the prescribed period of six years. That since there was no extension of time, the suit is time barred and should be struck out. Secondly, he argued that the Plaintiff seeks to enforce a decretal sum arising out of a Business Rent Tribunal in which the Defendant was not a party and that the same would amount to condemning the Defendant unheard. He further stated that there exists no decree to give rise to that decretal amount and that the decree was issued against a non-existent entity. Counsel referred the court to the bundle of documents filed with the Plaintiff.
3. Mr. Ombete Learned Counsel for the Plaintiff on his part submitted that, the Defendant having pleaded limitation in the statement of defence and filed the preliminary objection on 30<sup>th</sup> January, 2013, the matter ought to have been dealt with on 30<sup>th</sup> September, 2014 during pre-trial. He further submitted that; Section 26 of Cap 22 extends the time within which one can bring a suit once there is discovery of fraud and that Section 4 (1)(a) of Cap 22 is not applicable in this suit; that it is only after cross-examination of the Defendant in the year 2012 that it was discovered that the action was started against a non-existent entity and that the action started running in the year 2012 after discovery of fraud. He contended that this suit is not an abuse of the court process since it was ruled by Ang'awa J that the proceedings were undertaken by the Defendant and the Defendant is liable for the actions of the non-existent entity. He further contended that preliminary objections do not apply to matters of law which are in contention and urged that this preliminary objection be dismissed that since matters of abuse of court process is a matter of law and evidence.
4. In response thereto Mr. Orege stated that Section 26 of Cap 22 is not assumptive and a party must move court to extend time. He further stated that the Plaintiff having known of the existence of the preliminary objection, he ought to have raised it with the court and that nothing stopped the Plaintiff from filing a response to it.
5. I have carefully considered the preliminary objection and the submissions. The issue for determination is *whether in the circumstances of this matter, the preliminary objection should be allowed*. The essence of a preliminary objection was discussed in the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors (1969) EA 696**. At page 700 the court stated:

***“...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 the 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.”** (Emphasis mine)

6. I have considered the Defendant's contentions. My view is that it calls for an inquiry by way of evidence whether or not the Defendant was a party to the case before the Business Rent Tribunal and whether the decree in the said tribunal was issued against a non-existing entity. In fact the Defendant referred the court to a bundle of documents in support of the objection. Clearly, this preliminary objection does not meet the threshold set out in Mukisa Biscuit case and the same is for dismissal with costs as it is hereby done.

**Dated, Signed and Delivered at Nairobi this 10<sup>th</sup> day of July, 2015.**

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**A. MABEYA**

**JUDGE**