



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.42 OF 2011

NABONGO PHARMACY.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT

RULING

This application is made by way of Notice of Motion dated the 20th December, 2011 and is premised under the provisions of **Order 2 Rule 15(b)** and **(d)** and **Order 541 Rule 1** of the **Civil Procedure Code** and **Section 4 (2)** of the **Limitation of Actions Act**.

The Applicant seeks the following orders:

1. **That the plaint filed in this suit and or the entire suit or claim against the Defendant be struck out as being frivolous or vexatious or it is otherwise an abuse of the process of the court.**
2. **That the costs of the suit and of this application be paid by the Plaintiff.**

The Applicant relies on the grounds on the face of the application and the supporting affidavit of **Evans Juma Matunda** made on the 20th December, 2011.

The Respondent filed a Replying Affidavit opposing the application but at the hearing hereof, Counsel for the Respondent did not attend court, despite having been served with a hearing notice. That notwithstanding, this court will make reference to some of the contents of the Replying Affidavit made by **Kuria Karanja Peter** who depones that he is a director of the Respondent Company.

The Applicant avers that the Respondent's claim is founded on tort and makes reference to paragraph 5 of the Plaint and the Particulars of Negligence which read as follows:

- a) **Failing to control power supply at the premises before and after power went off.**
- b) **Failure to take due care and attention**
- c) **Failure to put necessary repairs and/or replacements on old stipulated electrical appliances.**
- d) **Failure to put out fire in time after due communication**
- e) **The plaintiff shall in so far as will be applicable rely on the doctrine of *Res ipsa Loquitor*.**

Counsel submitted that a claim in tort ought to be instituted before three (3) years from the date of the

cause of action. The cause of action herein having arisen on the 18th day of September, 2007 therefore the Respondent ought to have filed this suit on or before the 18th September, 2010. Instead this suit was filed on the 9th March, 2011 which translates to a delay of seven (7) months. That even though the Respondent's claim was statutory time barred, Counsel for the Applicant submitted that a suit in tort may be brought outside the limitation period provided leave is sought and the conditions set out in **Sections 27, 28 and 30** of the **Limitation of Actions** are fulfilled.

The Respondent having failed to comply with the above provisions, thus rendered the suit fatally defective. This court was urged to strike out the suit with costs to the Applicant.

The Respondent in its Replying Affidavit contends that the cause of action is premised on contract and therefore the period provided for filing suit was six (6) years from the date the cause of action arose. Therefore, the Respondent avers that the suit was filed within time. This court was urged to allow the suit to proceed to full hearing and just determination.

This court having heard the Applicant's submissions and after having perused the Respondent's Replying Affidavit in response finds that the only issue for determination is:

i) Whether the suit was filed in time and is therefore properly before this court?

The court has had occasion to peruse the court record and in particular the Respondent's plaint. At paragraph 5, the Respondent states as a fact and this court quotes:

“.....the accident was caused by the sole negligence of the defendant.....”

The Plaint contains Particulars of Negligence attributed to the Defendant who is the Applicant herein. At paragraph 6 the Plaint it is stated that ‘.....**loss and damage....**’ was suffered by the Respondent herein and there is a final prayer for **general damages**.

This court opines that the Respondent has cleverly attempted to disguise its claim as a breach of contract but the body of the Plaint clearly points to a claim premised on the law of Tort.

That being the case, it is trite that the Respondent ought to have lodged an application seeking leave to extend time to file suit under the provisions of **Sections 22, 26 and 27** of the **Limitations of Action Act** and **Section 3** of the **Civil Procedure Act**. No such application was made by the Respondent.

For the reason stated above, this court finds that the suit was filed out of time and without leave of court being first had and obtained. The court finds that the suit is incompetent and not properly before this court.

CONCLUSION:

The application is found to be meritorious and is hereby allowed. The suit is hereby struck out with costs to the Applicant.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 14th day of July, 2014.

A. MSHILA

JUDGE