



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 2613 OF 1991**

**BROLLO KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**THE ETHIOPIAN SHIPPING CORPORATION**

**THRO' DODWELL SHIPPING KENYA LTD.....DEFENDANT**

**RULING**

This is a preliminary objection to the plaintiffs claim. Defendant contends that the claim is time barred. Plaintiff claims shs 141,370/35 from the defendant being damages for breach of contract of carriage of goods by the sea. According to the plaint, the goods were delivered to the plaintiff on 10.7.89. By Article 111 (6) (3) of schedule to the carriage of goods by Sea Act. - Cap 392, the suit in respect of loss or damage of goods must be brought within one year after delivery of the goods or the date when the goods should have been delivered otherwise the carrier and the ship shall be discharged from all liability. Clause 5(c)(II) of the applicable Bill of lading contains a similar provision. Therefore the suit should have been filled on or before 9.7.90.

The present suit was filed on 24.5.91. Firstly plaintiff contends that defenant is estopped from pleading limitation or alternatively that defendants conduct amounted to a waiver. Plaintiffs counsel further contends that by the GOLD CLAUSE AGREEMENT, if one applies for extension of time, time is automatically extended for one year. Defendants counsel contends that the Gold clause does not apply.

The correspondence produced by plaintiffs counsel show that plaintiff and defendant were corresponding in respect of the claim from 6.2.90 and on 21.6.90, plaintiffs insurers asked for extension of time. By then the 12 months limitation period had not expired. By a letter dated 13.7.90, defendants Agents informed plaintiffs insurers that defendant had extended the period by three months from 1.8.90 without prejudice. The three months period expired on or about 30.10.90. It is true that on 15.11.90 and on 11.12.90 defendants agent informed plaintiffs agents that as defendant had not replied they were contacting defendant and would never to the plaintiffs agents. That answer was given in reply to the plaintiffs agents inquiry. Does that mere reply amount to an estoppel or waiver? In my view it does not. It perhaps could have been a waiver or estoppel if defendant represented to the plaintiff that it would settle the claim or took concrete steps towards settling the claim and which representations caused plaintiff not to file the suit. Indeed defendant did not tell plaintiff not to file the suit. Plaintiff should have filed the suit within the stipulated time awaiting settlement if any in view of the long periods It had taken to get an answer from the defendant.

In none of the relevant correspondence did defendant indicate to the plaintiff that it was going to settle the claim. It was not without surprise that on 11.1.91 defendants agents informed plaintiffs lawyers that the claim was time barred.

The Gold Clause has not been shown to be applicable. In any case, plaintiff requested for extension of

time under either the Gold clause or under the carriage of goods by Sea Act. Defendant extended time under the carriage of goods by Sea Act for three months. Plaintiff did not ask for more extension. If the extension given by the defendant which applies. Even when the defendant informed plaintiffs advocates that the suit was time barred by a letter of 11.1.91, plaintiff took over four months to file the present suit.

Plaintiff's counsel alternatively contends that the time for filing the suit was extended by this court under S. 27 of the limitation of Actions Act on 10.10.91. Defendant filed its Defence on 21.8.91. One of the defences is that the claim was time barred. The copy of the application filed to extend the limitation period was not exhibited. The extracted order of the court was not exhibited. It is doubtful that plaintiff disclosed in that application that a suit had been filed and that defendant had pleaded limitation.

In any case, if the court extended the limitation period under S. 27 of the limitation of Actions Act, the order was made without jurisdiction and is a nullity because section 27 only applies where there is a claim for personal injuries arising from the defendants negligence etc.

If the order given by the court extending the limitation period is a nullity ab initio, the grant of leave to file suit outside the limitation period can be challenged before the hearing of the suit unlike cases where the court has jurisdiction to extend time but it has improperly extended time. For those reasons I uphold the preliminary objection with costs. I rule that the plaintiffs suit is time barred and strike it out with costs to the defendant.

**E. M. Githinji**

**JUDGE**

**11.12.98**

Mr. Ongicho holding brief for Omolo present

Mrs Diaz absent

**Mr. Ongicho**

I apply that costs be awarded on High court scale

**Order:**

As the suit was filed in the High Court and as by the time of filing the subordinates courts did not have jurisdiction to entertain the claim costs have been awarded on High Court scale

**E. M. Githinji**

**Judge**

**11.12.98**