



**Kinyanjui v Modern Ways Limited (Civil Suit E052 of 2024)
[2024] KEMC 155 (KLR) (16 July 2024) (Ruling)**

Neutral citation: [2024] KEMC 155 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL SUIT E052 OF 2024
PA NDEGE, SPM
JULY 16, 2024**

BETWEEN

CHARLES KINYANJUI PLAINTIFF

AND

MODERN WAYS LIMITED DEFENDANT

RULING

Background

1. The plaintiff herein brought a suit vide a Complaint dated 01st February, 2024 seeking the following orders;
 - a. Payment of Kes 787, 127/= being the total amount of goods paid for and not delivered.
 - b. Payment of Kes 60,000/= being rent deposit for the first 6 months.
 - c. Payment of Kes 240,000/= being rent paid for a period of 2 years
 - d. Costs of this suit
 - e. Interest on (a), (b), (c) and (d) above at commercial and/or court rates from the date of the suit until payment in full.
2. The brief facts of the case are that the plaintiff and defendant entered into a contract for the supply of animal feeds in December 2017, which products formed part of the Defendant's portfolio. The plaintiff's case as per the Complaint is that he made 2 payments on 17.12.2021 vide bankers' cheque for Kshs. 500,000/= and Kshs. 287,127/= respectively in respect to the order placed. That the cheques cleared and the plaintiff was assured that the goods would be delivered to him. That the defendant thus breached the contract between them, which breach has put the plaintiff to loss and therefore entitles him to damages in respect thereof.



3. The defendant filed a preliminary objection, dated 27/02/2024, on a point of law that the plaintiff's cause of action being founded on contract or tort is barred by effluxion of time by dint of Section 4 (1) (a) of the Limitations of Actions Act, Cap 22 Laws of Kenya, thus the court does not have jurisdiction as the suit is bad in law, incurably defective and should be struck out with costs to the defendant.
4. On 15/03/2024, apparently in reaction to the defendant's preliminary objection, the Plaintiff, instead of amending his Complaint, opted to file a Notice of Motion application for leave to file this suit against the defendant out of time. The application was brought pursuant to sections 27 and 28(3) of the Limitation of Actions Act, amongst other provisions. It is however noteworthy that despite the plaintiff pleading in the Complaint and deposing in his supporting affidavit to the application that the payments herein were made in the year 2021, the evidence in both the application and the documents accompanying the Complaint prove and indicate that the payments which were dishonored were made on 17/12/2017. That has also been confirmed by his learned counsel's submissions filed herein. I thus from the outset agree with the learned defendant's submissions that the filing of the application herein, is an acknowledgement by the Plaintiff that this suit is time-barred. In fact we ought not say much. However, for the sake of the learned counsel for the plaintiff's submissions, let me analyze the issues herein in a proper manner.
5. Learned counsel for the plaintiff appears to rely on the provisions of section 26 (a) and (c) of the Limitation of Actions Act which relates to actions based on fraud or mistake, and that the period of limitation in such instances does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it. That in this case the plaintiff ordered for the goods and made payments in respect to the same on 19/12/2017 under an oral assurance that the goods would be delivered and that there were no timelines provided for delivery. That he kept on promising the plaintiff that he would deliver the goods till 16/10/2018 when he realized that he had been defrauded. That according to section 26 of the Limitation of Actions Act, the cause of action herein accrues when the fraud is discovered on the 16/10/2018 in which case the 6 years limitation period ends on 16/10/2024. The learned counsel for the defendant relied on the case of Odero & Another Vrs Ndivo & Another [2021] KEHC 289 (KLR) where the High Court held that: -
 11. Considering the full import of the particulars listed hereinabove, it is clear that the plaintiffs' suit is founded on fraud, negligence, theft and breach of duty. I note that even though the defendants argued that the particulars of fraud were not pleaded, I find that the particulars listed at paragraph 14 of the Complaint include fraud among other claims made against the defendants. However, even assuming that particulars of fraud were not pleaded, I note that pleadings had not closed as at the time that the instant application was filed and one can therefore say that the plaintiffs still have the opportunity to amend their pleadings so as to include the particulars of fraud.
 12. In sum, looking at the Complaint that is sought to be struck out, I cannot see any clear averment that conclusively shows that the Plaintiff's action is statute barred. At paragraph 6 of the Complaint the plaintiffs state that the 1st defendant appeared at a board meeting held on 31/03/2020 and casually expressed his wish to retire as the Managing Director. At paragraph 12 of the Complaint, it is averred that the audit report that exposed the fraudulent activities was obtained on 21st December, 2020. The instant suit was filed one year later.
 13. I find that a conclusive decision on whether or not the Plaintiff's action is time barred will depend on the construction of the documents availed before the court and further evidence to be adduced at the hearing. I therefore cannot, at this stage, hold that the Complaint, as drawn, attracts the penalty of being struck out for being statute barred.



14. Consequently, I decline to grant the orders sought in the instant application which I hereby dismiss with orders that costs shall abide the outcome of the main suit.

Analysis and Determination

6. I have carefully considered the Preliminary Objection and read submissions by both parties and the one issue that emerges for determination is whether the Preliminary Objection is meritorious. The Notice of Preliminary objection is anchored on *Limitation of Actions Act* Section 4 (1). A Preliminary Objection was well settled in the *Mukisa Biscuits Manufacturing Co. Lts Vrs West End Distributors Ltd* (1969) EA 696 to mean: -

So far as I am aware, 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.

7. Further Sir Charles Newbold, JA stated in the same case that: -

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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.

8. It is evident that a Preliminary Objection, raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.

9. In the case of *Oraro Vrs Mbaja* (2005) 1KLR 141, the Court held that ‘anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.’

10. It has been submitted that the suit is statute barred. It is not in doubt that the issue of limitation goes to the jurisdiction of the Court and the same does not require ascertainment of facts. The Court is only required to determine what the law says and whether indeed the suit is barred by Limitation of Action will not require the probing of evidence. All that the Court is expected to do is determine what the law says and this means that the same raises a pure point of law.

11. As per the description of Preliminary Objection in the MUKISA BISCUITS case (supra), the Court finds that the said ground raised by the Defendant meets the test of what amounts to a Preliminary Objection. It raises pure points of law and it can be determined without ascertainment of facts from elsewhere. The Court is now left to determine whether the same is merited as provided for by the *Limitation of Actions Act*.

12. Section 4 (1) of the *Limitation of Actions Act* provides:

4 (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued:

actions founded on contract;

(b)



- (c)
- (d)
- (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

13. It has been admitted by both parties herein that the cause of action accrued in 2017 and I find that that is the time that time started running. Why did the plaintiff wait all these times to lodge his claim, even admitting that he became aware of the breach 10 months later? His statements and documents filed herein however betrays him. In his statement, he confirmed that he became aware of the breach after a couple of days. As per section 4 of the Limitation of Actions Act the causes of action founded on Contract have time limit of 6 years, time having begun to run in 2017, naturally it would mean it lapsed in 2023. The essence of limitation of actions is that claims should be lodged promptly so that people move on with their lives.
14. As to the authority cited by the learned counsel for the defendant, I do find that pleadings herein had closed and the plaintiff, instead of amending his pleadings before the closure of pleadings, sought to file a belated and/or misadvised application for leave to file this suit out of time, even though this suit had already been filed. I thus find the circumstances herein distinguishable from the ones in the case cited by the learned counsel for the plaintiff. As aforesaid, I need not say much. The suit herein is affected by Limitation of Actions Act.
15. There has been no sufficient explanation as to the cause of delay, nor evidence that the defendant is estopped in any manner whatsoever from raising a preliminary objection of the claim being statute barred. The upshot of the foregoing is that the Notice of Preliminary objection dated 27th February, 2024 succeeds to the extent that the claim is statute barred as per Section 4 (1) of the Limitation of Actions Act. This suit ought to be, and is hereby, struck out with costs to the defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY/PHYSICALLY AT NAKURU THIS 16TH DAY OF JULY, 2024

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ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of; -

Plaintiff's counsel: Mwangi

Defendant's Counsel: Rombo

Plaintiff: n/a

Defendant: n/a

