



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO E063 OF 2024**

**IRENE WAMBUI NDUGO..... APPELLANT**

**VERSUS**

**BOARD OF MANAGEMENT SACRED HEARTS**

**KANGAITA SECONDARY SCHOOL.....RESPONDENT**

*[Appeal from the whole Ruling of Hon. S.K Manyura Adjudicator/Resident Magistrate delivered on the 7th day of May 2004 in Kerugoya SCCOMM NO. E045 of 2024]*

**JUDGMENT**

[1] Before the Court is an appeal from the Ruling of Hon. S. K. Manyura, Adjudicator, Resident Magistrate delivered on 7<sup>th</sup> May, 2024 in Kerugoya SCCOMM E045 OF 2024. The following are the grounds of appeal:

1. That the Learned Adjudicator/ Resident Magistrate erred in law in failing to apply the provisions of Section 23 (3) and Section 24 of the Limitation of Actions Act.
2. That the Learned Adjudicator/ Resident Magistrate erred in law in failing to find the part payment of the debt in 2021 which was filed in court is covered under the provisions of Section 23 (3) and Section 24 of the Limitation of Actions Act and therefore the claim before court was not time barred.
3. That the Learned Adjudicator/ Resident Magistrate erred in law in failing to find that the preliminary objection before court was not a proper one as it called upon the court to determine facts so as to confirm if the same fell under the exceptions set out

under Section 23 (3) and Section 24 of the Limitation of Actions Act.

4. That the Learned Adjudicator/ Resident Magistrate erred in law in failing to apply the decision in **CO-OPERATIVE BANK OF KENYA V PETER KIMANI [2020] EKLK** which was binding on the circumstances of the case.

### **Brief Facts**

- [2] The appellant supplied dry foodstuffs to Sacred Heart Kangaita Secondary School from 2012 to 2020. The Respondent's management failed to pay a debt of Kshs. 267,200 for the dry foodstuff supplied (Refer to the letter dated 28<sup>th</sup> December, 2020, at page 7 of the Record of Appeal). However, on 12<sup>th</sup> February 2021, the Respondent paid Kshs. 10,000/= as part payment for the debt owed. (Refer to page 39, line 2 of the Record of Appeal), leaving a debt of Kshs. 257,200.
- [3] The appellant instituted a suit in the Small Claims Court at Kerugoya via a Statement of Claim dated 20<sup>th</sup> March, 2024, in which the Learned Adjudicator dismissed the suit for being time-barred, thus necessitating this Appeal.

### **Appellant's submissions**

*Whether the Learned Adjudicator erred in law in deciding that the suit was time barred?*

- [4] The time limit for actions based on contracts is provided for in section 4(1) of the Limitation of Actions Act as follows:

#### ***4. Actions of contract and tort and certain other actions***

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

***(a) actions founded on contract...***

- [5] However, Section 23 and 24 of the Limitation of Actions Act provides that a right of action shall accrue freshly on the date of an acknowledgement or part payment of a debt as follows;

**23 (3). Fresh accrual of right of action on acknowledgement or part payment**

**Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a**

**deceased person, and the person liable or accountable therefore acknowledge the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment.**

- [6] The appellant submits that the suit was not time barred as a fresh right of action started accruing on 12<sup>th</sup> February, 2021, when the Respondent made a payment of Kshs. 10,000/= thus the Appellant had a right to institute a claim against the Respondent as 6 years had not lapsed between 12<sup>th</sup> February, 2021 and the time of instituting the suit on 20<sup>th</sup> March, 2024.
- [7] In **Co-operative Bank of Kenya v Peter Kimani [2020] eKLR**, it was held:

**“It is common ground that the Applicant admitted liability by a letter dated 22<sup>nd</sup> August, 2003. In that letter, he also made proposals of a settlement. By dint of Section 23(3) of the Limitation of the Actions Act, the Applicant acknowledged the debt, thus the cause of action arose on that date of acknowledgement. This suit is therefore not time barred it cannot be struck out; it should proceed for trial. The application dated 12<sup>th</sup> April, 2010 is dismissed with costs to the Plaintiff.”**

### **Respondent submissions**

*Whether the trial court erred in law and facts in that the suit was time-barred?*

- [8] The Appellant in her claim stated that she started supplying for the respondents in 2012 and had not been paid since then and that she is basing her claim for money owed and that the breach was in 2015, as such the time limit since 2015 to 2024 has already exceeded the 6-year time limitation period for seeking such orders.
- [9] They submit that the Appellant has no legal ground for seeking award of the money claimed since the Appellant bringing a claim 9 years later was indolent and guilty of laches.
- [10] In the case of **Gathoni vs. Kenya Co-Operative Creameries Ltd. [1982] KLR 104**, Potter, JA at page 107 expressed himself thus:

**“The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute**

**expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”**

*Whether the Magistrate erred in law in failing to apply the provisions of Section 23 (3) and Section 24 of the Limitation of Actions Act.*

[11] The Appellant argues that the suit was revived under Sections 23(3) and 24 due to alleged part-payment in 2021. However, to invoke Section 23(3) the Appellant must demonstrate that a clear acknowledgment or part payment of the specific debt was made in writing or through documented evidence attributable to the Respondent.

[12] It is the Respondent's position that no such valid acknowledgment or part-payment was placed before the trial court to satisfy this legal threshold. The court rightfully found no evidence capable of extending or renewing the limitation period.

[13] The Appellant failed to demonstrate with specificity that the payment allegedly made in 2021 was in respect of the outstanding balance of Kshs. 257.720/=. The mere existence of historical transactions or generic payments does not amount to acknowledgment under the law.

[14] It is trite in law that where facts are in dispute Section 23(3) cannot apply without clear, undisputed evidence of acknowledgment.

### **Issue**

[15] Whether the Magistrate erred in law in failing to apply the provisions of Section 23 (3) and Section 24 of the Limitation of Actions Act.

### **Analysis**

[16] The appeal primarily challenges the finding that the suit was time barred, arguing that the Magistrate failed to apply Section 23(3) and Section 24 of the Limitation of Actions Act, which provide for a fresh accrual of cause of action following acknowledgment or part-payment of debt.

[17] The starting point is Section 4(1)(a) of the Limitation of Actions Act which provides a six-year limit for actions founded on contract. However, the Legislature created exceptions to ensure that acknowledgment or continued dealings between parties do not unjustly extinguish legitimate debts.

Section 23(3) Fresh accrual of right of action

*Fresh accrual of right of action on acknowledgement or part payment*

*“where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefore acknowledge the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment.*

[18] Section 24 Formal requirements of acknowledgment

**(1) Every acknowledgement of the kind mentioned in section 23 of this Act must be in writing and signed by the person making it.**

**(2) The acknowledgement or payment mentioned in section 23 of this Act is one made to the person, or to an agent of the person, whose title or claim is being acknowledged, or in respect of whose claim the payment is being made, as the case may be, and it may be made by the agent of the person by whom it is required by that section to be made.**

[19] The legal consequence is renewal of the limitation period from the date of acknowledgment or part-payment.

[20] The Appellant argues that the Magistrate ignored the fact that part-payment was made in 2021, thus a fresh cause of action arose, making the suit filed in 2024 within time.

[21] On 12<sup>th</sup> February 2021, the Respondent paid Kshs. 10,000/= as part payment for the debt owed. (Refer to page 39, line 2 of the Record of Appeal), leaving a debt of Kshs. 257,200.

[22] The appellant relied on the case of **Co-operative Bank of Kenya v Peter Kimani [2020] eKLR**, where the court held **part-payment or acknowledgment within six years defeats limitation and the dispute must proceed to full hearing.**

[23] The Respondent contends the cause of action accrued in 2015 when breach allegedly occurred, hence suit was out of time and the Appellant was guilty of delay. They emphasised absence of proof linking the 2021 payment to the same debt.

[24] In the case of **Gathoni vs. Kenya Co-Operative Creameries Ltd. [1982] KLR 104**, Potter. JA at page 107 expressed himself thus:

*“The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The*

***statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”***

[25] From the evidence, the Respondent admitted the debt in writing through the letter dated 28/12/2020. He made part-payment of Kshs. 10,000 on 12/2/2021, thereby acknowledging liability for the outstanding balance.

[26] There was no dispute during trial that the 2021 payment related to the same transaction history between the parties. These actions satisfy statutory requirements under Sections 23(3) and 24, by reviving the expired claim and restarting the statutory period for payment of the debt.

[27] Thus, time began to run afresh on 12<sup>th</sup> February 2021 and would elapse 12<sup>th</sup> February 2027.

[28] The filing of the claim in March 2024 was therefore well within time.

### **ORDERS**

[29] Accordingly, for the reasons set out above, the Court finds that the appeal has merit and it is allowed.

[30] The Ruling of the Small Claims Court dated 7/5/2024 is set aside and substituted with an order dismissing the Respondent's Preliminary Objection so that the suit proceeds to hearing and determination on the merits.

[31] Each party shall bear its own costs.

*Order accordingly.*

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF DECEMBER 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

Mr. Magee for the Appellant.

Mr. Mwatsuma for the Respondent.