

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CIVIL SMALL CLAIMS APPEAL NO.

E001 OF 2025

SHENG SHUANG QUARRY LIMITED.....

APPELLANT

VERSUS

ARN SECURITY CONSULTANTS AND

TRAINING

SERVICES.....RESP

ONDENT

(Being an appeal against the decision of Hon E. Kemei

(Adjudicator) delivered on 13th May 2025, in Naivasha

Small Claims Court Claim No. E073 of 2025)

JUDGMENT

1. By a statement of claim dated 12th March 2025, the claimant sought for the following orders against the respondent: -

a. Judgment in the sum of Kshs. 487,200

b. Interest on (a) above at court rates until payment in full.

c. Costs of the claim

d. Other appropriate relief

2. The claimant's case is based on the facts that, in the month of April 2017, the claimant and respondent entered into an oral agreement for provision of security services where the claimant was to provide eight (8) security guards to secure the respondent's premises in Umoja and Katani at a rate of Kshs. 17,500 per guard totalling Kshs. 162,400 per month inclusive of VAT.

3. That the claimant provided the services until April 2018 at which time the respondent owed it Kshs. 487,200. That after extensive follow ups the respondent's director, Edward Ng'ang'a informed the claimant that the respondent was insolvent and under receivership thus unable to settle the outstanding payments.
4. That on 4th July 2023 the claimant discovered that the respondent was no longer under receivership but still refused to settle the outstanding payments. The claimant pleaded that the respondent engaged in fraudulent conduct and tabulates the particulars of fraud as being: -
 - a) *Misrepresentation of financial status - The respondent falsely claimed to be insolvent and under receivership to avoid settling the outstanding settling the outstanding payments.*

- b) Failure to Update Financial Status. The Respondent did not inform the Claimant when it ceased to be under receivership, continuing to avoid payment obligations.*
- c) Continued Refusal to Pay - Despite being financially capable, the Respondent refused to make payments, intentionally misleading the Claimant.*
- d) Deception to Gain Services - The Respondent used fraudulent claims of insolvency to benefit from the Claimant's services, without intending to pay.*
- e) Bad Faith in Negotiations - The Respondent engaged in bad faith negotiations by falsely stating an inability to pay, prolonging the Claimant's financial distress.*
5. That on 6th February 2025, the claimant obtained leave vide High Court case; Naivasha HCCMISC E117

of 2024 ARN Security Consultants and Training Services vs Sheng Shuang Quarry Limited to file a suit against the respondent.

6. However, the claim was opposed vide a respondent dated 27th March 2025, wherein the respondent denied the entire allegations contained in paragraph 4(a) to (e) of the claim. The respondent in particular denied the particulars of fraud and termed them as spurious, fictitious whose only intention is to attempt to deceive the Honourable court to sustain a claim evidently time barred by dint of section 4(1) (a) of the Limitation of Actions Act. The respondent sought to raise a preliminary objection at the earliest opportunity to have the claim dismissed and then sought for dismissal of the claim.

7. Pursuant to the aforesaid, the respondent filed a preliminary objection dated 27th March 2025 based on the following grounds: -

a) The Honourable Court lacks jurisdiction to entertain the claim herein as the same is time barred as is evident from the claimant's pleadings in view of the mandatory timelines under section 4(1)(a) of the Limitation of Actions Act.

b) The Honourable Court further lacks the territorial jurisdiction to entertain the claim as neither the cause of action (alleged security services) were offered in Naivasha Sub-County nor is the respondent based in Naivasha Sub County.

c) Accordingly, the claim herein should be dismissed with costs.

8. The respondent filed a replying affidavit dated 23rd April 2025, sworn by Antony Rebo Ngure, a director of

the claimant's company in response to the preliminary objection. He reiterates at paragraph 4, 5, 6 the particulars in the claim.

9. In the rest of the affidavit the deponent avers that the respondent knew it was insolvent and failed to disclose that fact to the claimant, as the claimant continued offering services to it without knowledge of its inability to pay for services rendered. That the said particular or conduct amounts to fraud.
10. Further the respondent represented to the claimant that, it was under receivership as early as 2018, which was untrue as the notice of appointment of the receiver indicates that, it was done in the year 2021. That the misrepresentation was discovered in the year 2023, when the subject receivership ended. Yet the respondent continued to represent itself as still under receivership.

11. The claimant further avers that, it filed a suit vide SCCCOMM No. E164 of 2024 ARN Security Consultants & Trading Services Ltd vs Sheng Shuang Quarry Ltd, which was withdrawn on the respondent's application based on the grounds that, it was still under receivership and that the said suit was instituted without leave of the court.
12. That subsequently the claimant sought for leave and filed the suit herein being SCCCOM No. E073 of 2025, upon receipt of leave of the High Court and which leave was granted unopposed.
13. Consequently, it is averred that, the respondent's persistent claim of being under receivership was a calculated and fraudulent strategy to waste the claimant's time, frustrate any meaningful attempt of recovery the sum owed and then raise the technical defence of limitation of time.

14. That, the doctrine of fraudulent concealment is applicable herein as time only begins to run upon discovery of the fraud. Finally, it is averred that the claimant's principal office is at Naivasha and therefore this court has the territorial jurisdiction to hear and determine the case. The court was urged to dismiss the preliminary objection.

15. The preliminary objection was disposed of vide filing of submission and by a ruling dated 13th May 2025 the trial court dismissed the preliminary objection on the ground that, it lacked merit.

16. However, the respondent is aggrieved by the said decision and appeals against it on the following grounds: -

a) The Learned Trial Magistrate erred in law by holding that she had jurisdiction to entertain a

matter that was statute barred by the Limitation of Action Act.

b) The Learned Trial Magistrate erred in law in not upholding the preliminary objection that was merited under Section 4 (1) (a) of the Limitation of Action Act.

c) The Learned Trial Magistrate erred in law by finding that the cause of action of the Claimant was based on fraud and yet it is obvious from the pleadings it is an allegation of breach of contract.

d) The Learned Trial Magistrate erred in law by misapprehending and misinterpreting the essence of the leave sought by the Claimant to institute the Claim.

e) The Learned Trial Magistrate erred in law by sustaining a suit that is plainly statute barred.

17. The appeal was disposed of vide filing of written submissions. The appellant in submissions dated 19th August 2025, argued that the respondent's claim was time barred pursuant to the provisions of Section 4 (1) (a) of the Limitation of Action Act which provides that actions founded on contract may not be brought after the end of six (6) years from the date which the cause of action accrued.

18. That, the cause of action of the suit in the trial court was based on a breach of contract of an unpaid amount of Kshs. 487,200 for security services and was due as at April 2018. That, in the circumstances, the respondent was required to institute its suit before April 2024, being six (6) years from the cause of action arising.

19. That the respondent on realizing it was time barred attempted to resuscitate its claim by claiming fraud

which is a ground for extension of a limitation period under section 26 of the Limitation of Actions Act. However, the cause of action is not founded on fraud despite the particulars of fraud drafted in the pleadings.

20. That, the allegation of misrepresentation of financial status where the appellant was insolvent and under receivership is not merited as the issue arose after the cause of action had accrued in April 2018. Further, the respondent did not state when it discovered the misrepresentation so as to establish when time began to run.

21. Moreover, the fact that the appellant was insolvent did not take away the respondent's right to sue or initiate the process of institution of a suit against an insolvent company as provided for under the law. That

in any case the respondent approached the court and sought leave to institute the suit.

22. The appellant argued that, the respondent's claim that the appellant failed to inform it when it ceased to be under receivership does not reveal any fraudulent act. That, the allegation that the appellant has refused to make payments despite being financially stable is misleading and in any event reveals a breach of contract rather than fraud.

23. Lastly, the allegation that the appellant fraudulently used the claim of insolvency to benefit from the respondent's services without intending to pay, is not clear whether it arose before or after the cause of action accrued.

24. The appellant argued the Honourable court to find that the appeal is merited as the trial court disregarded the facts that the claim by the

respondent was time-barred under section 4 of the Limitation of Action Act.

25. The respondent in response submissions dated 28th August 2025, conceded that the contract of service terminated in April 2018, at which time the cause of action arose. Further, that the suit was filed on 13th March 2025, which was after lapse of the six (6) year limitation period for contractual claims, and therefore the suit was automatically time barred.

26. However, the respondent submits that, claim is not time-barred as the cause of action was concealed by fraud and relied on the case of Demutilla Nanyama Pururmu v Salim Mohamed Salim, Civil Appeal No. 138 of 2018 [2021] eKLR, where the Court of Appeal cited with approval the decision of Tunoi JA (as he then was) in Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR where he held that fraud must

be specifically pleaded and the particulars of the alleged fraud must be stated on the face of the pleading. That fraudulent conduct must be distinctly alleged and proved, and cannot be inferred from the facts.

27. The respondent further submitted that the particulars of fraud are expressly set out in its statement of claim which is properly before the trial court. That the appellant consistently alleged it was under receivership from 2018 until 2024 yet it was only under receivership between 2021 to 2023.

28. Further, that when the appointed receiver's role ended, the appellant declined to disclose the identity of its new receiver. Subsequently, in October 2024, the respondent obtained leave from the High Court to sue the appellant in its own name.

29. That the appellant's actions of misrepresenting its legal status were a deliberate attempt to waste time and defeat a legitimate claim through limitation of time, which reveals a deliberate and fraudulent scheme to evade liability. That the trial court correctly held that the pleadings disclosed allegations of fraud which could substantially affect the computation of time under section 26 of the Act.

30. The respondent further argued that the suit was instituted within time. That Section 26 of the Limitation of Actions Act provides that time does not begin to run until fraud is discovered, or ought to have been discovered with reasonable diligence. That time began to run in July 2023 when it only became aware of the fraud and not from April 2018 when the contract was terminated.

31. The respondent argued that the appellant misapprehended the trial court's ruling wrongly believing the trial court dismissed the preliminary objection after holding that the cause of action was based on fraud. However, the trial court dismissed the preliminary objection after it found that the grounds in the preliminary objection raised factual issues such as allegations of fraud which require inquiry into evidence, and therefore could not be sustained as a pure point of law.

32. Further, the trial court did not misapprehend the nature of the leave granted by the High Court but merely acknowledged that the suit was instituted pursuant to leave of the High Court.

33. That additionally, the appellant's defence of limitation can only be tested through a full trial where evidence of fraud will be heard and challenged. That in the

circumstances, the appeal is premature and ought to be dismissed with costs to itself.

34. The appeal is considered in the light of the materials before the court. The parties have delivered into materials that form the basis of the main claim. For the purpose of the decision herein, this court shall restrict itself on the substance of the preliminary objection in particular, the two limbs thereof and the finding of the trial court on the same. In other words, this court will restrict its findings on whether in dismissing the appeal the trial court was well guided.

35. Notably the preliminary objection was dismissed primarily on the ground that, the same was not based purely on the point of law an established *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696* and that it will require evidence to prove whether the allegations of fraud pleaded are

factual or not. Further, the claimant being domiciled in Naivasha, the territorial jurisdiction was established.

36. The appellants cite three main grounds of appeal, being the trial court erroneously upheld section 4(1) of Limitation of Act, misinterpreted the essence of leave and erroneously assumed jurisdiction. It is therefore clear from the said grounds that the appellants are not contesting the trial court's finding on the issue of territorial jurisdiction.

37. Consequently, the appeal rests on whether the court properly addressed the issue of a preliminary objection and/or statutory limitation under section 4(1) of the Limitation of Action Act.

1. The beginning point is to find out whether the preliminary objection herein is indeed a preliminary objection as established under the law. In that regard the case of *Mukisa Biscuit Manufacturing Co. Ltd vs*

West End Distributors Ltd [1969] EA 696 where D-F

Law JA stated as follows: -

“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.”

38. Pursuant to the afore, it is clear that an issue of statutory limitation is a matter of law. However, if the objection thereto calls for evidence to be adduced to rebut it, then it ceases to be a pure point of law. This is because the party responding vide a replying affidavit deposes to factual matters, basically seeking for an opportunity to be heard.

39. That replying affidavit calls for a response (if any) in the form of an affidavit deposing on matters of facts. In the absence of a response affidavit the averments in the replying affidavit remain unchallenged and admitted. That is the case herein.

40. Be that as it may, if the respondent had filed grounds of opposition to the preliminary objection and did not raise factual matters, then the preliminary objection would stand. Notably the applicant of the objection responded to the averments in the replying affidavit vide their submissions, thus complicating the objection by submitting on factual matters.

41. Further, the claimant had from the beginning in the claim clearly indicated that, it was relying on the grounds of fraud. Therefore, the respondent was aware that, the claimant was required to prove the

alleged particulars of fraud. The same could not be proved through a preliminary objection.

42. Furthermore, the issue of leave from the High Court to institute the subject claim cannot be ignored, in that, when the claimant sought for leave, it was incumbent upon the respondent to raise the issue of statutory limitation at that stage. The claimant states that, the respondent chose not to defend that application, therefore the respondent cannot argue that the issue of leave is irrelevant.

43. On that basis of the aforesaid it is the finding of this court that, the trial court was well guided and correctly arrived at the proper decision in dismissing the preliminary objection. However, the issue of limitation remains alive for consideration during the trial of the matter.

44. The upshot of the aforesaid is that, the appeal herein has no merit and therefore, it is dismissed with costs to the claimant.

45. It is so ordered.

Dated, delivered and signed this 2nd day of April, 2026.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Manyara for the appellant

Ms. Matu for the respondent

Ms. Hannah: Court Assistant