



**REPUBLIC OF KENYA**

**IN THE HIGH REPUBLIC OF KENYA**

**CIVIL APPEAL NO. E065 OF 2024**

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

**VERSUS**

**BOARD OF MANAGEMENT SACRED HEARTS**

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

*[Being an appeal from RULING in original civil suit in Kerugoya SCCCOMM No. E032 OF 2024 delivered on 7/5/2024 by Hon. S.K. Manyura Adjudicator/RM]*

**JUDGMENT**

[1] Before the Court is an appeal from the Ruling of Hon. S.K Manyura Adjudicator, delivered on 7<sup>th</sup> May, 2024 in Kerugoya SCCCOMM No. E032 OF 2024 on the following of the grounds of appeal:

- a) *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.*
- b) *That the Learned Adjudicator/ Resident Magistrate erred in law in failing to find the respondent's acknowledgement of debt through text messages by principal of the respondent dated 8<sup>th</sup> September, 2022 and 27<sup>th</sup> February, 2023 whose screenshots were 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.*
- c) *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.*

d) *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 Kiarugu Secondary School from 2015 to 2017. The Respondent's management failed to pay a debt of Kshs. kshs 257,150 for the dry foodstuff supplied since 2016.
- [3] However, the respondent acknowledged the debt via a letter from the respondent's principal dated 13<sup>th</sup> November, 2015 and undertook to settle the same in instalments as funds became available through student fee payments, with full payment to be completed by the end of the first term in 2018.
- [4] 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.
- [5] The Claimant/appellant had sought judgment for the sum of Kshs. 257.150 allegedly owed for supply of dry foodstuffs between 2015 and 2017. The 1<sup>st</sup> Respondent raised a Preliminary Objection dated 17<sup>th</sup> April 2024 arguing that the claim was time barred pursuant to Section 4(1) of the Limitation of Actions Act. Cap 22. Laws of Kenya. After hearing both parties' written submissions, the trial court upheld the Preliminary Objection and dismissed the Claimant/appellant's suit for being statute-barred on 7<sup>th</sup> May, 2024. The Claimant now appeals that decision.

### **Appellant's submissions**

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

- [6] 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..."***

[7] 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. The aforementioned sections read 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.*”**

[8] The respondent acknowledged the debt via a letter from the respondent’s principal dated 13<sup>th</sup> November, 2015 and undertook to settle the same of kshs 257,150 in instalments as funds became available through student fee payments, with full payment to be completed by the end of the first term in 2018.

[9] The appellant relies on *Co-operative Bank of Kenya v Peter Kimani* [2020] ekLR:

***“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.”***

[10] The appellant submit that the suit was not time barred as a fresh right of action started accruing on 13<sup>th</sup> November, 2015 thus the appellant has a right to institute a claim against the respondent.

### **Respondent’s submissions**

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

[11] Section 4(1)(a) of the Limitation of Actions Act provides that actions founded on contract may not be brought after the expiry of six (6) years from the date on which the cause of action accrued.

[12] The Claimant's own pleadings state that the supplies were made between 2015 and 2017. Therefore, the latest possible accrual date of the cause of action would be 2017. Consequently, any valid claim ought to have been filed by 2023 at the latest.

[13] The Claimant instituted her claim on 20<sup>th</sup> March, 2024, well beyond the statutory limitation period. The trial court rightly held that the suit was brought nine years after the alleged breach, and was therefore time-barred.

*Whether acknowledgment extended the limitation period*

[14] The Claimant argued that the alleged debt was acknowledged via a letter dated 13<sup>th</sup> November, 2017 and subsequent text messages, and thus relied on Sections 23 and 24 of the Limitation of Actions Act.

[15] However, as the trial court found, the Claimant did not satisfy the legal requirements for an acknowledgment that would reset the limitation clock. Specifically: There was no formal written and signed acknowledgment as required under Section 24(1); The alleged acknowledgments were not shown to be unequivocal admissions of a legally enforceable debt; and The documentary evidence (including payment vouchers) demonstrated that the Claimant had in fact been overpaid and was not owed the amount claimed.

[16] Moreover, as noted in the decision, acknowledgment cannot revive a time-barred claim where there is no clear and valid acknowledgment in compliance with statute.

[17] **The Issue for determination** is the singular question 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**

[18] 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.

[19] 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.

[20] However, the Legislature created exceptions to ensure that acknowledgment or continued dealings between parties do not unjustly extinguish legitimate debts.

[21] Section 23(3) of the Act on Fresh accrual of right of action provides as follows:

***“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.”***

[22] Section 24 of the Act provides for the Formal requirements of acknowledgment as follows:

***“(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.”***

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

[23] The Appellant argues that the Magistrate ignored the fact that the respondent acknowledged the debt via a letter from the respondent’s principal dated 13<sup>th</sup> November, 2015 and undertook to settle the same in instalments as funds became available through student fee payments, with full payment to be completed by the end of the first term in 2018.

[24] 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.

[25] The respondent submits that the appellant instituted her claim on 20<sup>th</sup> March, 2024, well beyond the statutory limitation period. The trial court rightly held that the suit was brought nine years after the alleged breach, and was therefore time-barred.

[26] 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.”***

[27] The respondent submits that the appellant did not satisfy the legal requirements for an acknowledgment that would reset the limitation clock. Specifically: There was no formal written and signed acknowledgment as required under Section 24(1).

[28] The Appellant relied on a letter dated 13<sup>th</sup> November 2015; and text messages dated 8<sup>th</sup> September, 2022 and 27<sup>th</sup> February, 2023 from the Respondent's principal. The trial court dismissed these as insufficient.

[29] However, the law does not require overly technical compliance so as to defeat substantive justice. Article 159(2)(d) of the Constitution obligates courts to administer justice without undue regard to procedural technicalities.

[30] There was a written admission of the existence of the debt by the respondent and an intention to settle the same. Further, at the preliminary stage, the court was not required to conclusively determine the evidentiary weight of those messages but only to ascertain whether they disclosed evidence that would defeat a limitation of action objection.

[31] As in **Oraro v Mbaja** [2005] 1 KLR 141 (Ojwang J, as he was then was) advertent to the well known **Mukisa Biscuits** case [*Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696]:

***“...The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”***

In such a matter which requires ascertainment of facts, it ceases to be a pure point of law and cannot be determined as a preliminary objection.

[32] The trial court, therefore, erred in upholding the preliminary objection without allowing parties to ventilate by evidence on acknowledgment of the debt by the

respondent on the question whether there was fresh accrual of the cause of action. The preliminary objection was improperly raised and upheld.

**ORDERS**

[33] **Accordingly, for the reasons set out above, the Court finds merit in the appeal and it is allowed.**

[34] There shall be no order as to costs.

[35] The trial court file shall be return to the trial court for hearing of the suit on the merits.

*Order accordingly.*

**DATED AND DELIVERED THIS 16<sup>TH</sup> DAY OF APRIL 2026.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Mr. Kathigi for Mr. Magee for the Appellant.

Ms. Chege for Mr. Mwatsuma for the Respondents.