



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO 43 OF 2017

JENNIFER

MBETI

WALILI.....PLAINTIFF

VERSUS

DWA ESTATE LTD.....DEFENDANT

RULING

THE PRELIMINARY OBJECTION

This is a determination on a preliminary objection raised by the defendant herein. The objection was initially raised under paragraph 3 of the statement of defence in the following words:

“The Plaintiff’s suit is time barred by virtue of statute and the Defendant will be raising a preliminary objection on a point of law to have the suit struck out with costs to the defendant.”

Subsequently, the defendant filed a formal notice of preliminary objection dated 15/11/2017. The notice was filed on 16/11/2017. The notice is in the following words:

“TAKE NOTICE that the Defendant will raise a preliminary point of law at the hearing of this suit, to be determined in limine, that by virtue of section 4(2) of the Limitation of

Actions Act, and section 90 of the Employment Act, 2007 no suit can lie against the Defendant since it is time barred."

RESPONSE BY THE PLAINTIFF

The plaintiff filed grounds of opposition in response to the Preliminary objection. The grounds of opposition were actually a Replying affidavit disguised as grounds of opposition. I say so because the grounds of opposition contain matters of fact and annexures. In my view, grounds of opposition are purely legal objections that contain points of law only. Grounds of opposition cannot contain factual evidence and have no evidentiary value. The purported grounds of opposition basically indicate that the plaintiff obtained leave to file the suit out of time and that the order of leave was filed in this proceedings and a copy served upon the defendant.

MAIN ISSUE FOR DETERMINATION

In my opinion, the main issues for determination are:

- a) Whether the preliminary objection was properly raised;
- b) Whether the preliminary objection should be upheld;
- c) What other orders can the court make?

SUBMISSIONS BY THE DEFENDANT

The defendant filed written submissions in support of the preliminary objection. The defendant annexed copies of authorities relied upon. I will not delve into the submissions and authorities for reasons that are given herein below.

SUBMISSIONS BY THE PLAINTIFF

The plaintiff did not file submissions. Instead, she filed grounds of opposition twice on different dates, the latter being after the defendant had filed their submissions.

ANALYSIS AND DETERMINATION

I have carefully considered the preliminary objection and given due regard to the submissions made by the parties. The question of what constitutes a preliminary objection

was well answered in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v Westend Distributors Ltd [1969] E.A. 696* where at page 700 D – E Law J.A. stated: -

“So far as I am aware, Preliminary objection consists of a pure point of Law which has been pleaded, or which arises by clear implication out of the 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.”

At page 701 Sir Charles Newbold, P. said: -

“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 has to be ascertained or if what is sought is the exercise of judicial discretion”.

Ordinarily, the issue of limitation of a suit can properly be raised as a preliminary point of law. I have considered the opposing arguments by both parties. When the defendant raised the issue of limitation in its defence, the plaintiff filed a reply to defence but avoided addressing the issue. The plaintiff did not even disclose in her plaint nor reply to defence that she had obtained leave to file the suit out of time. The plaintiff filed what she called a list of agreed issues in which she did not list the issue of the suit being time-barred as an issue. It would appear that the plaintiff was not bothered by the issue. After the defendant had filed the notice of preliminary objection on 16/11/2017, the plaintiff filed a supplementary list of documents in which she listed an order granted on 15/6/2016 in Misc. Civil suit No. 161 of 2016. However, the purported order mentioned in the list was not attached.

It therefore follows that the purported order of leave to file suit out of time is not part of the court record, although the plaintiff in her “Grounds of opposition” indicated that the same had been filed. It is not clear whether the defendant was served with the said order. I must deprecate the casual manner in which the plaintiff has handled this matter. Assuming that the plaintiff obtained leave to file the suit out of time, can the defendant challenge such leave?

In the authority of **MARY WAMBUI KABUGU v KENYA BUS SERVICE LIMITED [1997] KECA 402 (KLR)**, the Court of Appeal made the following observations:

- a) The question whether or not the plaintiff was entitled to the extension can only be challenged in the proceedings. This is one of the exceptions to the general rule that a party against whom an *ex parte* order has been made can only apply to the court which made the order to set it aside;
- b) When the court grants leave to file suit out of time, there is nothing final about it. It is merely provisional. The defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by the provisional view expressed by the judge in chambers who gave leave;
- c) The only time when such a defendant can challenge the order granting extension of time is at the time of the trial, either on facts brought out at the trial, or by way of arguments at the trial if circumstances and facts allow such arguments at the trial, that is to say if there is no dispute as to facts;
- d) It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the limitation of Actions Act particularly where leave to file an action against the defendant has been granted *ex-parte*.

In view of the foregoing, it follows that where leave is granted to file a suit out of time, such leave cannot be challenged by the defendant by way of a preliminary objection. It should be challenged during the hearing. However, where no such leave is granted, the defendant may raise the issue of limitation as a preliminary point. Noting that the plaintiff did not file the order granting leave, it is probable that the defendant was not served with the order. The plaintiff ought to have filed the order and proceedings in the matter in which leave was purportedly granted so that the defendant may appreciate the facts and reasons for granting leave to file suit out of time. The facts will also enable the defendant properly challenge the order of leave, if it wishes to do so.

In the interest of justice and there being a possibility or indication that the plaintiff obtained leave to file the suit out of time, I will refrain from dealing with the issue of limitation at this stage. The defendant will have an opportunity to challenge the order granting leave to file suit out of time during the hearing. However, since the leave was obtained *ex parte*, it will be necessary for the defendant to be supplied with copies of all the relevant documents in respect of the proceedings leading to the grant of leave.

DISPOSITION

Consequently, I direct as follows:

- 1) The preliminary objection will be held in abeyance;
- 2) The plaintiff is directed to file and serve a further list of documents comprising of the pleadings, proceedings and orders made in Makindu Misc. Civil Suit No. 161 of 2016 within 21 days from today;
- 3) If the plaintiff fails to comply with order (2) above within the stipulated period, the court will proceed to determine the preliminary objection;
- 4) If the documents aforesaid are filed and served upon the defendant, the preliminary objection will be marked as spent but the defendant will be at liberty to challenge the order of leave at the hearing of the suit;
- 5) There shall be no orders as to costs, for now.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 31ST DAY OF MARCH,
2026.**

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.