Sea Angel Service Station Limited v Abdul (Civil Appeal E126 of 2022) [2025] KECA 172 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 172 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E126 OF 2022

DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA

FEBRUARY 7, 2025

BETWEEN

SEA ANGEL SERVICE STATION LIMITED ..... APPELLANT

AND

YUSUF ABDUL ..... RESPONDENT

(Being an appeal from the Judgement and Decree of the High Court of Kenya at Mombasa (P. J. O. Otieno, J.) delivered on 3rd May 2017 in H.C.C.A No. 108 of 2013)

JUDGMENT

1. This is a 2nd appeal from the judgment and Decree of P. J. O. Otieno, J. delivered on 3rd May 2017 in determination of the respondent's appeal in HCCA No. 108 of 2013 arising from the judgment and decree of the Senior Resident Magistrates' Court at Mombasa (Ekhubi, SRM) dated 31st July 2013 in SRMCC No. 2957 of 2006.

2. The genesis of the proceedings herein is that the appellant, Sea Angel Service Station Ltd, instituted proceedings against the respondent, Yusuf Abdul, vide a plaint dated 30th August 2006 as amended on 11th August 2009 and filed in SRMCC No. 2957 of 2006 praying for judgment against the respondent for:

   (a) Kshs. 281,604;

   b. Interest on (a) above at 5% from 25th November 2000 until payment in full;

   c. Costs and incidentals of the suit;

   d. Interest on (a), (b) and (c) above at court rates; and

   e. Any other relief which the court may deem just to grant.

3. The appellant's case was that, on diverse dates between 26th May 1998 and 11th June 1998, it supplied the respondent with petroleum products amounting to Kshs. 281,604 on the agreement that, in the event that the respondent does not pay the sum aforesaid of its own motion, then the same became due and payable on demand by the appellant; that, on 25th November 2000, the appellant demanded payment of the entire amount due, and that, in breach of the agreement aforesaid, the respondent refused, failed or neglected to pay.

4. In his defence dated 29th January 2007 and amended on 27th July 2012, the respondent denied the appellant's claim and expressed his intention to have the appellant's plaint struck out on the grounds that it was improperly on record; that the amended plaint had not been served upon him; and that no court fees had been paid in respect thereof. According to the respondent, the claim was statute barred under the *Limitation of Actions Act* (Cap. 22), and that leave to bring action out of time was improperly obtained and ought to be set aside.

5. In its judgment dated 31st July 2015, the trial court entered judgment in favour of the appellant as claimed in the amended plaint, which prompted the respondent's appeal to the High Court on the grounds that the trial Magistrate was at fault: in entering judgment for the appellant in respect of a claim that was manifestly time barred; in refusing to set aside the orders granting leave to file suit out of time; in failing to appreciate that power to extend time under the *Limitation of Actions Act* (Cap. 22) did not extend to actions founded on contract; in failing to appreciate that the appellant's assertion that time began to run on the making of a formal demand was inconsistent with the application for leave to extend time; and in construing the period when time started to run in respect of the appellant's claim.

6. Upon hearing the respondent's appeal, the High Court (P. J. O. Otieno, J.) allowed the respondent's appeal with costs. In his judgment, part of which we take the liberty to replicate here, the learned Judge stated thus:

> "25. Conversely, the plaintiff's cause of action was not held at ransom merely because no demand letter had been served. NO. The obligation to pay was covenanted to be monthly and therefore the last sale having been on the 11.6.1998, the last date the defendant was obligated to pay was the at the latest, regard being had to condition 4 at the reverse of the cash sale receipts, the 15th of July 1998. That is when the breach, failure to pay, occurred.
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> 26. That to me was the day the cause of action accrued when there was no payment. If the plaintiff decided to make a demand, such was made gratis and out of abundant of caution but such was not the determining factor or date for the cause of action to accrue.
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> 27. It therefore follows that the plaintiff cause of action accrued in the month of July 1998 and therefore in terms of section 4(1) of the *Limitation of Actions Act*, the suit for recovery was due for initiation not later than the 31/7/2004. It further follows that on the 4/9/2006 when the suit was filed the same was already statutorily time barred and being a cause in contract there was no recourse at reviving it by an application to extend time. It remained a dead cause of action into which no life could be breathed in the manner and fashion the plaintiff sought to do.
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> 26. In any event and in common commercial balance an invoice is a formal demand for payment with terms of payment. Once issued there would be the need for a demand letter unless contested.

27. I therefore find and hold that to the extent that the suit was filed outside time, it was an act in futility and all the orders issued pursuant thereto were issued without jurisdiction and were a nullity ab initio. As the trial court had no jurisdiction to extend time, it did not matter that leave was granted nor did it matter that the plaint was amended by an order of the court. The court before whom the suit was filed was divested of jurisdiction to entertain it as it did."

7. Aggrieved by the learned Judge's decision, the appellant moved to this Court on appeal on the following 6 grounds set out in its memorandum of appeal dated 29th November 2022, namely that the learned Judge erred in law: by holding that the appellant's suit was statute barred; by making judgment while relying on the issue of limitation of time, which issue had been dealt with finality by the subordinate court; by failing to find that the claim of Kshs. 281,604 as against the respondent became due on 25th November 2000; by failing to uphold the judgment of the subordinate court; by analysing and interpreting the evidence on payments which the Judge ought not to have done without the respondent's evidence; and by failing to consider the appellant's evidence as unchallenged and, hence, the appellant's claim likewise unchallenged.

8. In support of the appeal, which they urged us to allow, learned counsel for the appellant, M/s. S. O. Odingo & Co., filed written submissions and a list of authorities dated 24th April 2023. Counsel cited 5 judicial authorities, namely A lba Petroleum Limited v Total Marketing Kenya Limited [2019] eKLR; and Mawathe Julius Musili v Independent Electoral and Boundaries Commission &Another [2018] eKLR, highlighting the courts' holding that, if an interlocutory decision or order is not appealed against, the issue is considered as definitively settled by judicial decision.

9. Counsel further cited the cases of Charterhouse Bank Limite (Under Statutory Management) v Frank M. Kamau [2016] eKLR; and CMC Aviation Ltd v Crusair Ltd (No. 1) [1987] KLR 103 for the proposition that, where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since, in so doing, the party fails to substantiate its pleadings; and that failure to adduce any evidence in the same vein means that the evidence adduced by the other party against them is uncontroverted and unchallenged; and Kennedy Mokua Ongiri v John Nyasende Mosiona & Another [2022] eKLR, submitting that there was no appeal against the order granting leave to file suit out of time; and that the trial Magistrate who delivered the ruling on the appellant's application to amend the plaint had no jurisdiction to question the ruling extending time.

10. In reply, the respondent filed written submissions, a list of authorities and a case digest dated 5th February 2024 citing 3 judicial decision, namely: D ivecon (EA) Limited v Samani [1995-1998] 1 EA 48, highlighting the principle that it is well settled that in matters contract there is no power to extend time to file suit; Oruta & Another v Nyamato [1988] KLR 590, submitting that the order to extend time was challengeable at the trial on the basis that it was ex parte by nature, and without jurisdiction; and Tiwi Beach Hotel v Stamm [1995-1998] 2 EA 378 for the proposition that a party to a suit need not testify in person if he can make his case through other evidence.

11. Unless otherwise provided, this Court's mandate on 2nd appeal is limited to points of law. Section 72 (1) of the *Civil Procedure Act* provides that:

> 72. Second appeal from the High Court
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> 1. Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—

a. the decision being contrary to law or to some usage having the force of law;

b. the decision having failed to determine some material issue of law or usage having the force of law;

c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

12. In Stanley N. Muriithi & another vs. Bernard Munene Ithiga [2016] eKLR, this Court held that:

> " We are conscious of our limited jurisdiction when dealing with a second appeal. Our reading of Section 72(1) of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, which provides for the circumstances when a second appeal shall lie from the appellate decrees of the High Court, indicates that the appeal must be on matters of law."

13. In the same vein, this Court held thus in Kenya Breweries Ltd vs. Godfrey Odoyo [2010] eKLR:

> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of Stephen Muriungi and another vs. Republic (1982-88) 1 KAR 360, Chesoni Acting JA (as he then was) said at page 366:
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> > "We would agree with the view expressed in the English case of Martin vs Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

14. In our considered view, the following two issues of law commend themselves for our determination, namely: whether the learned Judge was at fault in holding that the appellant's suit against the respondent was statute barred; and whether the trial court had jurisdiction to enlarge time to file suit out of time.

15. On the 1st issue as to whether the appellant's suit was statute barred, counsel for the appellant impliedly concedes that its claim was barred by statute, but argues that the respondent's failure to proffer an appeal against the trial court's order extending time barred him from lodging an appeal in that regard; and that the learned Judge was at fault in finding that the suit was statute barred since the circumstances of the delay had been explained and a proper ruling delivered thereon by a court of competent jurisdiction.

16. On their part, counsel for the respondent submitted that, according to the appellant's own pleadings, the goods that were the basis of its claim were supplied between 26th May 1998 and 11th June 1998; that the claim was supported by cash sale receipts relating to sales made to the respondent, the last of which was dated 11th June 1998; that the reverse of those receipts bore a condition that "account must be paid by the 15th day of the following month"; that, going by the foregoing condition, the last invoice was payable by 15th July 1998; and that the right of action was only valid within six years of that date, to wit, 14th July 2004, more than two years before the appellant's suit was filed.

17. We find no reason to disturb the concurrent findings of fact by the two courts below to the effect that the appellant supplied petroleum products to the respondent during the period between 26th May 1998 and 11th June 1998; and that, in terms of their contract, the last of the invoices raised was payable on or before 15th July 1998, the date on which the cause of action in contract accrued.

18. Section 4(1) of the *Limitation of Actions Act* (Cap. 22) provides that:

> 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; ....

19. In Divecon v Samani [1995 – 1998] 1 EA 48, this Court held that:

> "... to us, the meaning of the wording of section 4 (1) is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done, namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract."

20. Simply put, an action founded on contract, such as the one between the appellant and the respondent could only be brought within six (6) years from the date on which the cause of action accrued.

    Accordingly, the appellant had between 15th July 1998 and 14th July 2004 to institute civil proceedings to recover the sums due under the contract. Instead, it filed suit on 30th June 2006, two years after the cause of action had expired.

21. Section 4(1) (a) of Cap. 22 places a statute bar to any action purported to be brought more than six years after the cause of action accrued. Neither does the Act allow extension of time to file suits founded on contract out of time.

22. The 2nd issue as to whether a trial court has power to enlarge time to file a suit founded on contract finds answer in Part III of the Act, which makes express provision for extension of time in limited cases, namely: in case of disability (section 22); in case of fresh accrual of the right of action on acknowledgement or part payment (section 23); in case of fraud or mistake (section 26); and in case of ignorance of material facts in actions for negligence, etc. (section 27).

23. In Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & Desidery Tyson Otieno [2016] KECA 213 (KLR), this Court held that:

> "By craft and innovation the learned Judge, in grave error extended time by relying on negotiations by the parties and suspending time for this period. Where a statute limits time for bringing an action, no court has the power to extend that time, unless the statute itself allows extension of time. That is what the court stated in Divecon v S 54." amani (1995 – 1998) I EA 48 at p.

24. In Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited

[2017] KECA 152 (KLR), this Court also held that:

> "24. It is common ground that the cause of action in this matter was based on contract and that section 4 of the *Limitation of Actions Act* prohibits suits filed after the end of six years from the date on which the cause of action accrued. As Potter, JA observed in the case of Gathoni vs Kenya Cooperative Creameries Limited (Civil Application No. 122 of 1981):
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> > 'The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.'
> >
> > It is also trite law that the period of limitation cannot be extended."

25. To our mind, the learned Judge was not at fault in concluding, as we do, that the appellant's case and the grounds on which it sought extension of time in its ex parte Summons dated 6th July 2006 do not fall within the cases contemplated in Part III of the Act so as to deserve the trial court's discretion to enlarge time to file suit out of time.

26. Having carefully considered the record of appeal, the grounds on which it is anchored, the rival submissions of respective learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the appeal lacks merit and is hereby dismissed with costs to the respondent. Consequently, the judgment and decree of the High Court of Kenya at Mombasa (P. J. O. Otieno, J.) dated 3rd May 2017 in HCCA No. 108 of 2013 is hereby upheld. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF FEBRUARY 2025.

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR