



Kenya Railways Corporation v Telkom Kenya Limited (Civil Appeal 423 of 2018) [2024] KECA 9 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KECA 9 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 423 OF 2018
HA OMONDI, A ALI-ARONI & JM MATIVO, JJA
JANUARY 25, 2024**

BETWEEN

KENYA RAILWAYS CORPORATION APPELLANT

AND

TELKOM KENYA LIMITED RESPONDENT

(Being an appeal from the entire Judgment and Decree of the High Court of Kenya at Nairobi, (Onguto, J.) dated 2nd February 2018 in HCCC 621 of 2016)

JUDGMENT

1. The respondent, Telkom Kenya Limited, an operator of landline Public Switched Telephone Network (PSTN) sued the appellant in HCCC No. 621 of 2016 claiming Kshs.271,100,360.92/- provision of Public Switched Telephone Network (PSTN) voice services and data-oriented telecommunication services to the appellant, Kenya Railway Corporation (KRC) for the period from the late 1980s to November 2006. The claim was made up of Kshs.128,458,420.30 for voice-oriented services whereas data services for the same period amounted to Kshs.88,641,940. KRC was duly invoiced for these services. According to the respondent, after several meetings held in an attempt to settle the matter, the appellant accepted liability for the principal sum but in breach of contractual obligation, failed to pay the bills within the stipulated time.
2. The appellant denied liability, stating that there was no cause of action as the claim was devoid of particulars with regard to the terms of the contract/agreement; lacked precision as to the time the services were supplied; also denied that the respondent supplied both PSTN and Data services for the alleged value or at all; and that in any event, the claim was time barred by virtue of the statute of limitation. Further, the alleged settlement meetings did not have any binding force as they were contrary to the *Kenya Railways Corporation Act*; nor had the appellant acknowledged the respondent's claims which were based on computer generated documents.



3. Upon hearing the matter, the trial court allowed the respondent's claim with costs. The appellant was aggrieved by the outcome and filed this appeal.
4. A brief narrative of what was presented at the trial court will help to put matters in perspective. The respondent through its witness Evelyn Nyaboke Nyaata, PW1, told the trial court that at the appellant's request, it provided services over the years which the latter refused to honor. That after several months of negotiations and reconciliation, the appellant acknowledged its indebtedness to the tune of Kshs.212,100,360.92 as at October 2013. Further, the respondent's witness told the trial court that the reconciliation meetings to amicably agree on the claim were attended by George Muia, head of ICT, and Patrick Ndegwa, head of finance from the appellant's management.
5. It was the respondent's further evidence that despite several follow ups nothing bore fruit until November 2014 when the appellant wrote to the respondent seeking to make part payment of Kshs.58,519,128.41/-, and asked for bills. However, even after the bills were supplied, the appellant still failed to honour the debt.
6. The respondent presented evidence to demonstrate that the bills were supplied every month; and it never retained copies but only relied on what was on the system to print out bills if needed. It was also part of respondent's testimony that the bills prior to the year 2000 were issued by Kenya Posts and Telecommunication Corporation, being its predecessor in title.
7. The appellant on the other hand resisted the claim pleading the defence of limitation and denying that the respondent provided any services worth the alleged value; and denying any knowledge of indebtedness to the respondent. In the alternative, the appellant stated that any acknowledgements, if at all, did not bind it as they were not made under its common seal; or by any person authorized by the Kenya Railways Corporation's board of directors to act for it.
8. The appellant's Managing Director, Athanas Kariuki Maina, DW1, testified that there was no agreement for provision of services by the respondent; that all agreements were to be under common seal for the agreement to bind it; and denied that the appellant or its board of directors had mandated any agent to deal with the respondent and bind the appellant in a settlement agreement. Further, its Managing Director never authorized any person to sign a letter on his behalf committing the appellant to paying the debt to the respondent.
9. Upon being cross examined, DW1 insisted that for any agreement to bind the appellant, it should have been laid before the top management; and sealed. On the other hand, however, the appellant admitted that the settlement agreement had been signed by two of its managers; and that for routine letters to be genuine and authentic, they did not require KRC's board approval or seal. The witness also confirmed that KRC had asked Telkom to avail bills and that there had been a lot of discussion.
10. It was appellant's evidence that the settlement letters of 15th October 2013 and 19th October 2014 were not issued in the ordinary course of business as they were not on the letter head of the service provider. The witness maintained that the settlement letter of 19th November 2014 was a forgery, although no investigation was launched on the said allegation.
11. The trial court found that the evidence revealed that appellant knew about the respondent's claim; the respondent did provide services to the appellant through itself and its predecessor; the respondent had the locus standi to bring the said claim and pursue it; the respondent was all along acting in good faith and seeking a solution on how the appellant was to settle the amounts outstanding; the appellant had acknowledged its liability to a maximum of Kshs.217,100,360.90 after a reconciliation process; and had offered to pay Kshs.58,519,128.41; that even after supply of bills and invoices, no payment was made;



- the respondent's claim was valid and was not time barred; and the appellant having acknowledged and admitted the claim due and owing to the respondent, was bound by the said acknowledgment.
12. Accordingly, the trial court, vide a judgment dated 2nd February 2019, entered judgment in favor of the respondent in the sum of Kshs.217,100,360 together with costs and interest.
 13. In its Memorandum of Appeal, the appellant cites 10 grounds of appeal. However, during the hearing, the appellant abridged the said grounds into two, namely:
 - a. What was the operative provision of law in relation to limitation of actions in this suit and whether the limitation period for filing the instant suit was six years from the date of accrual of cause of action or 12 months;
 - b. Whether the respondent proved its claim for Kshs.217,100,360.92 being the value of the services rendered to the appellant.
 14. Regarding the question whether the applicable provision the law on the issue of Limitation of Actions is section 4(1) the *Limitation of Actions Act* or section 87 of the *KRC Act* and whether the limitation period was 6 years from the date of accrual of cause of action or 12 months, the appellant contends that it is common ground that the proceedings were filed on 10th December 2015. The appellant maintained that the respondent's claims arising in the 1980's, 90s up to the year 2006 are statute barred under section 87 of the KRC; that the minutes of 24th February 2015 did not constitute an acknowledgment as the minutes were prepared and signed only by the respondent within section 23 of the *Limitation of Actions Act*. Further, that if the last correspondence which constituted an acknowledgment was the letter dated 19th November 2014, then the suit should have been filed on or before 19th November 2015, twelve months from the revival of the cause of action.
 15. The appellant also submits that the learned Judge erred in holding that the operative law with regards to limitation was section 4(1) and not section 87 of the *KRC Act* and accordingly the learned Judge was wrong in holding that the limitation period was 6 years and not 12 months as provided in the *KRC Act*.
 16. In addition, the appellant argues that the services provided by Telkom to KRC fell under section 13(2) (a) and k(i & ii); and the services were acts done in pursuance of execution of the duties of the appellant within section 87 of the *KRC Act*. It is further argued that section 31 of the *Limitation of Actions Act* incorporated section 87 of the *KRC Act*, thus giving a solid ground for the position taken that the claim was time barred. The appellant urges us to find that the *KRC Act* supersedes the *Limitation of Actions Act*; and that the *KRC Act* being a specific law governing the affairs of the appellant, it overrides a general law of limitation.
 17. On whether the respondent proved its claim for Kshs.217,100,360.92 against the appellant, it is the appellant's case that the bills submitted in evidence were computer generated, and not signed by any of the parties; and were not original documents, rendering their authenticity totally unsubstantiated. The appellant argues that the trial court based its determination solely on minutes of the settlement meetings and letters between parties, which letters the trial court termed as acknowledgment of debt. The appellant also submits that the trial court was duty bound to examine the source of document, the bills, to decide on the amount payable.
 18. Close on the heels of the foregoing argument, is the appellant's contention that the computer-generated bills did not show any meter readings to demonstrate the quantity of services offered and in return justify the amounts claimed. The appellant argues that it would be impossible to verify the services offered and extent of the said services, and subsequently it would be impossible to verify the alleged bills and values therein. The appellant further points out that the demands were for different



amounts with the meter reading indicating zero and no cost per unit was indicated to determine total amounts.

19. The appellant also argues that the implication of section 23(3) of the *Limitation of Actions Act* is to renew or revive the date the cause of action arises but does not create a new cause of action, and that the acknowledgement of a debt only keeps alive the original cause of action, and as such any such acknowledgement save limitation of the claim is time barred.
20. The appellant maintains that the respondent's pleadings did not disclose the period the alleged services were rendered and also that the respondent did not produce any contract showing the agreement between the parties and that it is trite that special damages ought to be specifically pleaded and proved with a degree of certainty and particularity. The appellant concludes its submissions by reiterating that the bills produced by the respondent lacked authenticity and probative value, and as such the claims were unsubstantiated and ought to be dismissed.

The respondent in its submissions generally agrees with the trial court's judgment. On the issue regarding limitation of actions, the respondent submits that the applicable limitation of actions provision was section 4(1) of the *Limitation of Actions Act*; and that the trial court rightly observed that section 87 of the *KRC Act* specifically provides for the limitation period applicable for specific actions taken against the appellant; and duly considered that the section relates to duties provided, undertaken or executed by the appellant specifically under the *KRC Act* which will ordinarily involve contracts for carriage of goods and passengers, contracts for storages of goods and for railway concessions.

Analysis

21. This being a first appeal and as has been reiterated in several decisions of this Court, our primary duty is to evaluate the evidence on the record in order to come at our own independent conclusion on the evidence and the law, as provided under Rule 31 (1) (a) of the *Court of Appeal Rules*. This duty has been reiterated in *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR.

Whether The Claim Was Time Barred And What Is The Applicable Law?

22. The crux of the appellant's case is that the respondent's claim is time barred and that the applicable law is section 87 of the *KRC Act* and not section 4(1) of the *Limitation of Actions Act*, as the *KRC Act* is a specific law with regard to the functions of the appellant whereas the *Limitation of Actions Act* is a statute of general application.
23. The appellant points out that the pleadings were filed by the respondent on 10th December 2015, yet the alleged breach arose in the 1980's, 90s up to the year 2006, and are therefore overtaken by time pursuant to section 87 of the *KRC Act*. The appellant also contends that the minutes of 24th February 2015 and the letter under reference did not constitute an acknowledgment as the minutes were prepared and signed only by the respondent within section 23 of the *Limitation of Actions Act*.
That if the last correspondence which constituted an acknowledgment of the debt, was the letter dated 19th November 2014, then the suit should have been filed on or before 19th November 2015, twelve months from the date of revival of the cause of action.
24. The appellant's argument is that in relation to limitation of time, the learned trial Judge erred in holding that the operative law section 4 (1) and not section 87 of the *KRC Act* and thus giving wide latitude regarding filing of causes.



25. We take note that the proviso to section 13 (a) of the [KRC Act](#) confers powers on the KRC to include business arrangements, construction and acquisition of property while Section 87 (b) on the other hand gives the timeline in which any action or proceeding can be commenced against the appellant. Our comprehension of section 87 is that it specifically provides for the limitation period applicable for specific actions taken against the appellant in relation to duties provided, undertaken or executed by the appellant specifically under the [KRC Act](#) which will ordinarily involve contracts for carriage of goods and passengers, contracts for storages of goods and for railway concessions. We concur with the respondent that a plain interpretation of the said provision shows that there is no express indication of the fact that the supply of telephone network and data services would be termed as one of the powers of the appellant under the [Act](#). Indeed, section 13(2) (k) (ii) indicates that the appellant has the power to enter into agreements with other persons for the performance or provision of any of the services or facilities which may be performed or provided by the corporation, which basically revolves around communication. What does communication mean in this context? A look at the ordinary meaning given to that terminology in the [Concise Oxford Dictionary \(Twelfth Edition\); 289 \(Stevenson: Waite, Eds\) Oxford University Press](#) is that:

- “2. communications - means of sending or receiving information such as telephone lines or computer;
3. communications – the means of travelling or of transporting goods, such as goods or railways”

26. The trial court at paragraphs 49 finds that the [Limitation of Actions Act](#) was enacted in 1967 and is the statute which provides generally for periods of limitations for actions in tort, contract (emphasis mine) whereas the [KRC Act](#) specifically provides for limitation period for specific actions (emphasis mine) taken against KRC. The trial courts also held that the duties carried out by KRC only involved contracts for carriage of goods, passengers, contract for storage of goods and railway concessions, and that section 87 was not intended to amend section 4(1) of the [Limitation of Actions Act](#), leading the trial court to the conclusion that the operative law for purposes of the limitation period was the [Limitation of Actions Act](#) and that the claims would be barred by statute upon expiry of 6 years from the time Telkom was entitled to obtain a remedy against KRC.

27. Drawing from the ordinary dictionary definition, our understanding is that the ordinary course of business, the appellant performs or provides travel or transport; which communication must not be confused with providing means of sending or receiving information, which is certainly the mandate of the respondent. Therefore, the provision of telephone network services and data services is not a service contemplated to be performed or provided by the appellant in its mandate under the [KRC Act](#). Certainly, the appellant is involved in communication, but not the kind of service involving telephone network and data services which we find does not correspond to its core mandate.

To argue that the appellant (a goods and passenger transport company) has a mandate with regard to provision of telephone and data services would be giving a rather outlandish interpretation of the functions of the appellant.

28. We are alive to the provisions of Section 3 of the [Civil Procedure Act](#) which states:

“in absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred or any special form or procedure prescribed by or under any law for the time being in force.”



We recognize that KRC Act has its own limitation clause which may in appropriate instances supersede the Limitation of Actions Act; and certainly section 87 of the KRC Act although a procedural section, is a provision of a substantive statute which cannot be made inoperative by a procedural statute, but in our considered view, that is only in relation to its core business.

29. We therefore hold, as did the trial court, that the appellant's reliance on the provisions of section 13(2) (k) of the KRC Act to argue that provision of PTN and data services by the respondent is one of the powers of the appellant under the KRC Act, hence the limitation period under section 87 would apply has no footing. The learned trial Judge did not err either in fact or in law on this limb that section 87 of the KRC Act was inserted by the legislature to protect the very nature of the core business of KRC; that is, the transportation and carriage of both passenger and goods.
30. As to when the cause of action arose, it is a fact that the suit was filed on 10th December 2015 the trial Judge having found that the last acknowledgment was dated 19th November 2014. Citing the finding in the case of Joel Kiprono Langat v Kenya Posts and Telecommunications [2000] eKLR, that section 109 of the Kenya Posts and Telecommunications Corporation Act, Cap 411, (being in *pare materia* with the KRA Act), required any claim including dismissal, and discipline of staff to be filed within 12 months from the date the cause of action accrued, the appellant argues that the KRC Act in particular being in operation, then the claim ought to have been filed on or about 19th November 2015 after 12 months. Our considered view is that the minutes of 24th February 2015 constituted an acknowledgment of the debt, and revived the cause of action within the meaning of section 23 of the Limitation of Actions Act, the relevant time begun after the appellant acknowledged being indebted to the respondent, and undertook to pay, then failed to make payment, which would put the onset of events within the 6-year limit. We do not agree with the appellant's argument that the respondent's suit is time barred and that the operating law is KRC Act, and in particular section 87 (b) and section 13(2) (k) which vests the corporation with contractual powers, as part of the powers of the corporation under section 13.
31. Whereas the preceding argument holds true, it would only apply if the Statute of Limitation of Actions was ousted; and we have pointed out that the nature of services supplied by the respondent and the obligation placed on the appellant to pay for the appropriated services; and we are in agreement with the respondent that those services cannot be considered as statutory functions or powers of the appellant under the Act. They therefore cannot be construed to be acts done in pursuance or execution of the duties of appellant under its statute or in pursuance of a public duty or authority. We thus uphold the findings of the trial court, that the applicable limitation statute in this case is the Limitation of Actions Act which provides for a limitation period of 6 years and not the Kenya Railways Corporation Act which provides for a limitation period of 12 months.
32. The other ground is whether the claim against the appellant was proved. It is trite law that that special damages must be pleaded and strictly proved. Chesoni J, in quoting Bowen L.J.'s judgment at pages 532-533 in Ratcliff v Evans [1892] QB 524, an English leading case of pleading and proof of damage, "...the character of the acts themselves which produce the damage and the circumstances under which those acts are done, must regulate the need of certainty and particularity with which the damage ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principle. To insist upon more would be vainest pedantry."
33. The appellants have submitted that the bills produced in evidence were computer generated, were not original nor were they signed by any of the parties. This according to the appellant cast aspersions on the veracity and authenticity of said bills. The appellant also raised the issue that on said bills the meter



readings are all zero and there is no cost per unit shown leading, the appellant to submit that it would be then difficult to ascertain proper readings and in turn ascertain the amount owing.

34. The trial court in its judgment came to the conclusion that it is these computer generated bills that formed the basis of reconciliation, and that in view of the acknowledgements and request for bills by the appellant, the trial court was of the opinion that on a balance of probabilities the bills were genuine and related to the services provided to the appellant by the respondent, and that said bills supported respondent's case.
35. The trial court also in its judgment noted that the letter of 19th November 2014 constituted an express admission of appellant's indebtedness to the respondent in the sum of Kshs. 58,519,128.41; and that the appellant could not renege on the said admission.
36. Certainly, the nature of the amount owing is capable of being specifically pleaded and proved, they are damages capable of being assessed with certainty, vide proof bills/invoices which showed the various meter readings, and cost per unit to properly ascertain what was due and owing to the respondent. Yet were we to wind matters here, then we will be blind to the fact that out of its own volition, surrounded by a cloud of senior management personnel, the appellant acknowledged owing the sum claimed. We opine that the appellant is being rather economical with the truth, taking into consideration that two senior officials, i.e. the Director of Finance; and the Finance Manager – no less; attended the meetings with the respondent; and entered into an agreement executed by the appellant's own officers. It is rather staggering, that the appellant can now come to court to rile the respondent about this negotiated arrangement; yet the appellant did not categorise this in its pleadings. In addition, it does not help the appellants position, that it had already admitted to owing a sum of Kshs.58,519,128.41; and which the trial court could have awarded ab initio on the basis of judgment on admission.
37. Ultimately, we are unable to detect any fault or error on the part of the trial court. The learned Judge duly considered all issues of fact, and correctly applied the legal principles, and the relevant law. We confirm the findings by the trial court; and consequently, we dismiss this appeal award costs of the appeal to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2024.

H. A. OMONDI

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

