



**Mutua v CFC Stanbic Bank (K) Ltd (Civil Appeal 102 of 2019)
[2022] KECA 1241 (KLR) (4 November 2022) (Judgment)**

Neutral citation: [2022] KECA 1241 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 102 OF 2019
AK MURGOR, P NYAMWEYA & JW LESSIT, JJA
NOVEMBER 4, 2022**

BETWEEN

ALFRED MUTINDA MUTUA APPELLANT

AND

CFC STANBIC BANK (K) LTD RESPONDENT

(Being an appeal from the ruling and order of the High Court at Mombasa, delivered by Hon. D. Chepkwony, J on 28th March 2019 in HC Civil Appeal No.150 of 2016))

JUDGMENT

1. This appeal challenges the decision of the High Court in Civil Appeal No 150 of 2016 (wrongly titled ruling) that was delivered on March 28, 2019, upholding the ruling of the Chief Magistrate’s Court at Mombasa (hereinafter “the trial court”) dated October 14, 2016, striking out the suit filed by Alfred Mutinda Mutua, the appellant herein, on the strength of a preliminary objection raised by his employer the CFC Stanbic Bank (K) Ltd, who is the respondent herein.
2. The appellant’s cause of action was that on July 29, 2004, he sustained severe injuries in an accident which occurred while in the course of his employment with the respondent, which he attributed to the respondent’s breach of duty of care as an employer. The appellant pleaded the particulars of the respondent’s breach of duty of care , and claimed both special and general damages.
3. The respondent thereupon raised a preliminary objection and sought to have the appellant’s suit struck out with costs on grounds that the suit was statute barred being a claim founded on tort, whose limitation period is 3 years under the *Limitation of Actions Act*. The appellant’s position in response was that the question whether the suit was based on a tort or breach of contract is not a pure point of law, but a point of fact which required adduction of evidence. The learned trial magistrate identified two issues for determination, being whether the plaintiff’s cause of action was based on tort or contract; and whether the cause of action was time barred by *Limitation of Actions Act*. The trial court found



- that the claim was founded on tort; that the particulars of the breach of duty of care pleaded clearly demonstrated that the appellant's suit was premised on tort; and that the appellant should have filed his claim within three years from the date the cause of action arose, which he failed to do. The trial magistrate proceeded to strike out the suit.
4. Being aggrieved by the ruling of the trial magistrate, the appellant filed an appeal before the High Court at Mombasa in Civil Appeal No 150 of 2016, challenging the trial magistrate's findings that the suit was founded on tort and not contract. The High Court identified the issues for determination being the same identified by the learned trial magistrate, to wit; whether the primary suit was time barred; and, whether the course of action is a tort or a contract. The High Court, citing *Hassan Charo v Khatib Mwashetani & 3 others*, Supreme Court of Kenya Petition Application No 23 of 2015, observed that a preliminary objection may only be raised on a pure question of law, and proceeded to find that indeed the question raised by the respondent was a pure point of law based on the *Limitation of Actions Act*.
 5. After careful consideration of the submissions by both sides and the law, the High Court found that the further amended plaint of the appellant pleaded that the injuries he suffered were caused by the negligence and/or breach of duty and/or breach of contract of employment by the respondent. That the particulars pleaded in the plaint were breach of duty of care and not of breach of contract. The High Court citing several cases found that a claim could not be two faceted, but could only be either a contract or a tort. And further that since no breach of contract was particularized, and instead what was particularized was the breach of statutory duty of care, the cause of action arose as a tort, and was in the circumstances time barred. The High Court accordingly dismissed the appellant's appeal.
 6. Being aggrieved by the decision of the High Court the appellant preferred this appeal. The appellant challenges the High Court's decision to uphold the trial magistrate's holding that failure to plead breach of contract was not a sufficient reason to strike out the suit; that the pleadings were not in agreement over the facts of the case and that the issue raised was not purely a point of law. The appellant sought to have the order of the High Court dismissing the suit be set aside.
 7. We heard the appeal virtually on the May 16, 2022, with learned counsel Mr Jengo prosecuting the appeal for the appellant, while learned counsel Mr Khagram represented the respondent. Mr Jengo relied on his written submissions dated August 24, 2020, while Mr Khagram briefly highlighted his written submissions dated May 4, 2022.
 8. Mr Jengo faulted the High Court for failing to consider the principles for striking out of the pleadings, and for striking out the suit for failure by the appellant to particularize any breach of contract in his pleadings. Counsel relied on the case of *DT Dobie & Company (K) Ltd v Joseph Mbaria Muchina & another* [1980] eKLR for the proposition that the power of striking out pleadings was not mandatory, and that no suit ought to be summarily dismissed unless it appears so hopeless as not to disclose a cause of action. Mr Jengo urged that the learned High Court judge erred by failing to apply the doctrine of *stare decisis* in the case of *Kenya Cargo Handling Services Ltd v David Ugwang* [1982-1988] 1 KAR 672 which held that an injury at the place of work gave rise to a claim both under contract and tort. Counsel urged that the two courts below gave greater weight to the decisions in *Kenya Power & Lighting Company Ltd v Collins Agumba Aboge* [2016] eKLR; and *Kiamokama Tea Factory Company Ltd v Joshua Nyakoni* HCCA No 159 of 2009 which were different and distinguishable from the instant appeal in that in the latter two, breach of contract had not been pleaded. He urged that *James Omukhala Otiemo & another (suing as the personal representatives of the estate of Wilson Okate Omukhala (deceased) v Lomolo 1962* [2019] eKLR, was given much weight by the two courts below for the proposition that a matter cannot be two faceted, based on both tort and contract. Counsel urged that this court declared that the case relied upon was decided *per incuriam* in *Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others* [2017] eKLR.



9. Mr Jengo further urged that in approaching the question of article 159 as a cure for procedural technicalities and whether the statute of limitation was a technicality issue, the courts below misdirected themselves on what the appellant's argument was all about. It was submitted that the alleged failure to plead the particulars of breach of contract was a purely procedural technicality over which no one had been prejudiced and could have possibly been rectified with an amendment.
10. On his part, Mr Khagram urged that the High Court buttressed the position taken in *Kenya Power & Lighting Company Ltd v Collins Agumba Aboge*, *supra*, where the court held that 'whether a claim is founded on tort or contract is based on the substance of the claim as set out in the pleadings.' Counsel urged that the High Court was correctly persuaded by the pleadings filed by the appellant at particularly paragraphs 5 and 6 of the amended plaint together with the prayers therein, that the presented claim was purely based on breach of statutory duty and the particulars of negligence clearly itemized.
11. Mr Khagram relied on the decision in *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR, Civil Appeal No 60 & 62 of 2017 and submitted that the appellant failed to adhere to principles set out in the above case in lodging a second appeal before this court. That, unless it is shown that the courts below considered matters, they should not have considered or failed to consider matters they should have looking at the entire decision, the court's determination becomes perverse. In responding to the grounds raised by the appellant, the respondent submitted that since the appellant failed to particularize any breach in relation to the employment contract as required under order 2 rule 3(4) of the *Civil Procedure Rules* and in default of pleading a cause of action in breach of contract, the appellant's contention and submissions were wholly misconceived and untenable thus leading to the conclusions made by the trial magistrate.
12. The respondent's counsel cited the decision in *Kenya Power & Lighting Company Limited v Collins Agumba Aboge* [2016] eKLR referred by the High Court in the impugned ruling where it was stated that, a claim under tort or contract is based on the substance of the claim as set out in the pleadings. As such, the High Court was correctly persuaded by the amended plaint together with the prayers sought therein, that the appellant presented a claim purely on breach of statutory duty with particulars of negligence with no particulars of breach of contract.
13. It was therefore contended by Mr Khagram that by merely mentioning the term breach of contract, the appellant's claim could not gain 6 years protection against the *Limitation of Actions Act* since the suit was tortious in nature. In addition, counsel urged, it is trite law that parties are bound by their pleadings and are not allowed to depart therefrom. The respondent argued that in view of the amendments on the pleadings, the appellant intended to bring an action of tort against the respondent which arose during the subsistence of a contractual relationship between the appellant and the respondent and the decision in the *DT Dobie* case offered no sound basis to overturn the High Court's decision in the circumstances since the suit was statutorily time barred depriving the trial court the requisite jurisdiction to hear and make a determination on the appellant's claim.
14. Lastly, Mr Khagram relied on the decisions in *Robin Cabill & 9 others v TS Nandhra & 3 others, Kiamokama Tea Factory Co Limited v Joshua Nyakoni* [2015] eKLR and *Kenya Cargo Handling Services Ltd v David Ugwang* [1982-1988] 1 KAR 672 to submit that the learned judge observed the principles of *stare decisis* in the impugned ruling. However, it was submitted that the preliminary objection raised by the respondent was essentially on whether the suit was time barred under section 4(2) of the *Limitation of Actions Act*, necessitating the High Court to consider whether the claim was tortious or contractual based on the pleadings filed before it which do not raise any issues on technicality as was considered in the Lawrence Amararu case, (*supra*).



15. This being a second appeal we are restricted to determining points of law and not of fact as set out in section 72(1) of the *Civil Procedure Act*, and explained by this court (Waki, Karanja & Kiage, JJA) in the case of *Stanley N Muriithi & another v Bernard Munene Ithiga* [2016] eKLR as follows:

“...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.

We hasten to observe, however, that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law.”

16. The issues before us are firstly, whether the learned judge of the High Court erred in her findings that the appellant’s cause of action was in tort and not contract and, that the claim was time barred. Secondly, whether the learned judge of the High Court 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.
17. In regard to the issue of whether the High Court erred in its finding that the appellant’s cause of action was in tort and not contract, and that it was time barred, Mr Jengo for the appellant urged that the High Court misdirected itself and struck out the suit first of all by finding that a claim could not lie in both tort and contract, and secondly for failure on the appellant’s part to plead the particulars of the breach of contract. It was urged, citing the case of *Kenya Cargo Handling Services Ltd, supra*, that injury in the work place gave rise to a claim in both contract and tort. Before we examine the cited case let us first set out what the *Civil Procedure Rules* prescribes on pleadings under order 2 rule 1 and 3.

“Pleadings generally [order 2, rule 1.]

1. Every pleading in civil proceedings including proceedings against the Government shall contain information as to the circumstances in which it is alleged that the liability has arisen and, in the case of the Government, the departments and officers concerned.
3. Facts not evidence, to be pleaded [order 2, rule 3.]
 - (1) Subject to the provisions of this r and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.”

18. The rules are explicit that a party should provide information as to the circumstances in which it is alleged that the liability has arisen and should plead in a summary form the material facts on which he relies for his claim. We have noted from the Further re-amended plaint upon which the appellant based his claim that at paragraph 6 it is pleaded:

“These injuries, loss and damages were caused by the negligence and or breach of duty of care and or breach of contract of employment by the defendants, their servants or agents



and or the defendant's negligence in allowing the appellant work in an office that was under renovation..."

19. In essence, the appellant specifically pleaded "particulars of breach of duty of care and or negligence." Nowhere in the plaint does the appellant plead particulars of breach of contract. This Court in *Michael Mbogo Kibuti v Attorney General* [2020] eKLR cited with approval the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3, in which the learned judges quoted with approval an article by Sir Jack Jacob entitled "*The Present Importance of Pleadings*." The same was published in [1960] Current Legal Problems, at p 174 whereof the author had stated;

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...."

20. The import of the above case must be, and it is clear that a plaintiff is expected to plead his case, by providing all the material facts alongside the particulars he or she intends to rely on and that it is those pleadings that determine the basis of his claim. He or she cannot venture outside what is pleaded even when adducing evidence. The reverse is also correct, that a party cannot rely on what they did not plead. From a close scrutiny of the appellant's pleading the cause of action lies in tort, the particulars of which were specifically pleaded. The appellant made it clear in his pleading that the respondent breached the duty of care he owed him and then went on to state what those duties were.
21. Mr Jengo urged that the High Court misdirected itself and relied on the case of *James Omukhala Otieno & another (suing as the personal representatives of the estate of Wilson Okate Omukhala (deceased) v Lomolo 1962* [2019] eKLR, to find that a claim cannot be two faceted in both contract and tort, which counsel urged, the Court of Appeal declared were decided *per incuriam* in *Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others* [2017] eKLR.
22. In the case relied upon by the appellant of *Kenya Cargo Handling Services Ltd, supra*. the plaintiff therein pleaded as follows:

"4) It was a term of the said contract of employment between the plaintiff and the defendant and/or it was the duty of the defendant to take all reasonable precautions for the safety of the plaintiff while he was engaged upon the said employment, not to expose the plaintiff to a risk to damage or injury of which they knew or ought to have known and to provide a safe and proper system of working and effective supervision of the same.

6. the said accident was caused by breach of the aforesaid implied term of the contract by the defendant, its servant or agents"



23. The plaintiff there pleaded five sets of particulars of the breach of the implied terms of the contract, but none were given for any breach of duty or failure to provide a safe and proper system of working or effective supervision of it. The defendant therein pleaded that the plaintiff's claim was out of time under section 4 (2) as well as section 27 (1) of the *Act*. It then raised a preliminary objection on those grounds. The learned judge of the High Court ruled that the case was based both on contract and tort; that the plaintiff could pursue his remedies on contract of employment. That the period of limitation in respect of the cause of action founded on contract had not expired when the suit was filed, and that sections 4 (2) and 27 (1) of the *Act* did not apply. The defendant's preliminary objection was therefore dismissed.
24. We have outlined the facts above at length to demonstrate that the plaintiff in the cited case, unlike the appellant in this appeal, specifically pleaded that it was a term of the contract of employment between the plaintiff and the defendant that the defendant would take all reasonable precautions for the safety of the plaintiff, and set out particulars of the breach of the (implied) term of the contract. It was the finding of the court that even though the claim under tort was time barred, under contract, it was not. The same cannot be said of the appellant's pleadings, as there was no related averment in the plaint on the alleged breach of contract. The two cases are not the same, and the cited case does not aid the appellant in this appeal.
25. For the above reason, the main issue before the trial court was not whether a claim could not lie both in tort and contract, but whether the claim was barred by limitation. In that regard reliance on *James Omukhala Otieno & another (suing as the personal representatives of the estate of Wilson Okate Omukhala (deceased) v Lomolo 1962* [2019] eKLR, given the finding on limitation, did not affect the final outcome of the preliminary objection. Likewise the appellant's argument that stare decisis was ignored by the two courts below does not in the circumstances apply.
26. This brings us to the next argument by Mr Jengo, that the courts below misapprehended the appellant's argument in regard to article 159 of the *Constitution*. Counsel urged that what the appellant meant was that the alleged failure to plead the particulars of breach of contract was a purely procedural technicality over which no one had been prejudiced and could have possibly been rectified with an amendment, and therefore ought not to have been struck out. Counsel relied on the case of *DT Dobie & Company (K) Ltd v Joseph Mbaria Muchina & another, supra*, for that proposition. Mr Khagram did not agree with that proposition urging that the defect in the appellant's pleading was not merely technical but jurisdictional. He urged that it is trite that jurisdiction must exist at the time of filing a suit or at commencement of trial.
27. The defect in the appellant's plaint was jurisdictional on account of limitation because the appellant's claim, which lay in tort was time barred at the time of filing suit, having been brought over three (3) years after the cause of action arose. It was not one that could be cured by an amendment. This position was echoed in *Anadet Kalia Musau v Attorney General & 2 others* [2020] eKLR where this court observed that whether the suit before the High Court was statutorily time barred, time limitation is a jurisdictional question and that if a matter is statute-barred a court has no jurisdiction to entertain it.
28. We find that the High Court exercised its jurisdiction guided by the law, it did not consider extraneous matters, nor did it fail to consider relevant factors. There is thus no basis upon which to interfere with its findings.
29. The upshot therefore is that this appeal has no merit and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 4TH DAY OF NOVEMBER, 2022



AK MURGOR,

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JUDGE OF APPEAL

P NYAMWEYA

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JUDGE OF APPEAL

J LESIIT,

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

