IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KOOME & KIAGE, JJ.A.)

CIVIL APPEAL NO. 62 OF 2018

BETWEEN

BHUPINDER SINGH DOGRA.....APPELLANT

AND

ATTORNEY GENERAL.....RESPONDENT

(Being an appeal against the Ruling of the High Court of Kenya at Nairobi *(Amin, J.)*

delivered on 17th day of October, 2016 ***in Civil Suit No. 291 of 2014***)

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JUDGMENT OF THE COURT

1. On 17th October, 2016 **Amin, J.,** delivered a Ruling the subject matter of this appeal and ordered;-

> **"In the circumstances, the court finds and holds that save for the sum of Ksh.3,018,774.27 the claim as set out in the plaint is statute barred and to that extent the preliminary objection succeeds. Chamber summons as a consequence stands dismissed with costs. As stated above the plaint is susceptible to amendment, to that extent it is not dismissed."**

The above order was made pursuant to a suit filed by Brupinder Singh Dogra (appellant) in which he sought the following orders;-

> **"a) A declaration that it is a sound public policy for the defendant to pay all lawful debts to service providers.**
>
> **b) An order for determination of the total cost of the project known as W.P ITEM NO. D08 NB 601 JOB NO. 7059F.**
>
> **c) An order for assessment of the total payment made to the plaintiff by the defendant on account of the project W.P ITEM NO. D08 NB 601 JOB NO. 7059F.**
>
> **d) A sum of Ksh.141,006,193.85.**
>
> **e) Interest on fees at 18% per annum with effect from 1*st June, 2014 until payment in full.***
>
> **f) Costs of the suit."**

2. A glimpse of the background information is that on 3rd July, 2014 the appellant filed suit before the High court in which he claimed that in 1986, his services were retained by the Government of Kenya through the Ministry of Public Works, Housing and Physical Planning (Ministry of Works) which was acting in conjunction with the Office of the President, and Department of Defence to prepare and design architectural works (contract) for an army headquarters in Karen. The scope of the work required the appellant to prepare a master plan of the main army administration office block, with perimeter fence, cookhouse/canteen for CPLS & below, single accommodation for 750 CPLS and below, guardrooms and Armoury (all standard type).

3. The appellant went on to claim that on 9th December, 1987 the Department of Defence requested for additional work to include accommodation for 200 with shower and toilets for warrant officers and sergeants' mess and to provide additional space for 400 officers with

a lounge, TV rooms, bar, dining room for 200 officers with games rooms. It was the appellant's case that he produced the desired product as per specifications which he submitted and there was acknowledgement of receipt by a letter dated 5th October, 1988 by the Ministry of Works.

4. The appellant presented a fee note of Ksh.22, 702,862 as per 1974 edition of the Condition of Engagement of Scale of Fees for Professional Services for Building Work by the Ministry of Works. Since the said sum was not paid, he claimed that it attracted interest at the rate of 18% p.a and as at June 2002 the appellant was claiming Ksh.35,680,767.80. The appellant was however paid some Ksh.14,877,459 on 14th November, 2002 leaving a balance of Kshs.20,803,268.80 but that notwithstanding, in February, 2010 the respondent through the Permanent Secretary Treasury, purported to demand that the appellant should refund a sum of Ksh.3,018,774.27 being an overpayment. The appellant's claim in the suit as aforementioned was principally for among other declaratory orders; a sum of Ksh.141,006,193/85 as at 30th May, 2014 with interest at 18% per annum till payment.

5. When the respondent was served with the aforesaid suit, they filed a preliminary objection dated 29th December, 2014 stating the claim was time- barred under ***Section 3(2)*** of the **Public Authorities Limitation Act**. On the part of the appellant, he filed an application dated 12th January, 2015 seeking leave to enter judgment against the respondent. It seems both the preliminary objection and the application for summary judgment were heard together, the chamber summons was dismissed and the preliminary objection was upheld.

6. This is what precipitated the instant appeal that is predicated on some nine (9) grounds of appeal to wit;-

That the learned Judge erred both in law and fact by;-

I. Employing a draconian method to dismiss the appellant's chamber summons dated and filed on 12th January, 2015.

II. Considering matters outside the jurisdiction of a court considering an application under Order 1 rule 20 of the Civil Procedure Rules 2010.

III. Conducting a mini trial and finding that prayers (e) and (f) of the plaint are statute barred without giving the appellant an opportunity to adduce evidence.

IV. Entertaining the respondent's preliminary objection whereas no defence had been filed by the respondent.

V. Coming to a finding that the dispute between the parties was governed by the Public Authorities Limitation Act rather than the Limitation of Action Act.

VI. Framing issues for the parties while no denials were made by way of defence by the defendant.

VII. Delving in the admissibility and relevance of the documents presented by the appellant as if evidence had been adduced yet the case was not subjected to formal proof.

VIII. Relying on the wrong provisions of the law in disregarding the appellant's application for leave to enter judgment against the respondent.

IX. Weighing on the probative value of the letter dated April 2014 and thereby disregarding the same as invaluable(sic).

On those grounds, counsel for the appellant prayed the appeal be allowed as prayed in the chamber summons dated on 12th January, 2015 or in the alternative, set aside the orders of 17th October, 2016 and order the matter to proceed to formal proof.

7. During the plenary hearing of this appeal, **Mr Munyithya**, learned counsel for the appellant relied on his written submissions and made some oral highlights. While combining the arguments on all the grounds, counsel submitted that the learned trial Judge misapprehended an application seeking leave to enter judgment against the respondent and went beyond by purporting to conduct a mini trial. The Judge was also faulted for lumping together the points of law regarding the issue of limitation of time that were raised in the preliminary objection and leave to enter judgment for undefended suit. According to counsel there was unequivocal admission by the respondent of the claim therefore limitation of time did not apply in the matter. Counsel argued that the appellant was blocked from presenting evidence by the learned Judge by holding that the appellant failed to put forward **"incontrovertible evidence showing *ongoing negotiations between 2010 and the demand letter*."**

8. Counsel for the appellant went on to submit that there was unequivocal admission of the claim, therefore the principle of limitation of time did not affect his clients' claim. In his view, time could not start running in February, 2010 as held by the Judge and when the determination of the claim was communicated after the Pending Bills Closing Committee evaluated the claims and stated that the appellant was overpaid by a sum of Ksh.3,018,774.27. Time started running in 2014 when the negotiations broke down and the appellant filed suit. Although the contract was executed in 1994, there were negotiations and the cause of action arose in 2012 when the appellant made a demand and not in 1994 when he rendered the services. ***Order 2 rule 4 (1)*** of the Civil Procedure Rules require a party to plead limitation of time. Counsel cited among others the case of; - ***Town Council of Awendo v Nelson Oduor Onyango & 13 Others [2013] e KLR*** for the preposition that the issue of limitation should be pleaded before it is canvassed.

9. Opposing the appeal was **Mr. Leteipan**, learned counsel for the respondent. He too relied on his written submissions and made some oral highlights during the plenary hearing. Counsel supported the impugned ruling and submitted that the appellant's suit was time barred by

virtue of the provisions of ***Section 3(2)*** of the Public Authorities Limitation Act which provides;-

> "**No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action occurred**."

On whether it was proper for the learned Judge to allow the preliminary objection, the Judge found that the cause of action occurred on 4th February, 2010 when the appellant was informed by the Permanent Secretary that the Pending Bills Committee had evaluated his claim and found that no further payments were due and outstanding. As a matter of fact the said letter clearly stated that the appellant had been over paid. The appellant disputed that but did not start proceedings then despite his letter to the respondent dated 11th March, 2010 where he threatened to take legal action to recover what he said was due to him with interest at commercial rates. Counsel cited the case of ***Samuel Olunga Odera Owino v Attorney General & Another*** **[2015] e KLR** to bolster the argument that certain prayers in the appellant's suit were statute barred and he could not lawfully pursue them without first obtaining the leave of the court.

10. On whether the appellant's chamber summons was properly dismissed, counsel for the respondent submitted that a preliminary objection consisted of points of law which were pleaded in the Notice that was filed on 29th December, 2014. Counsel cited the case of ***Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors CO LTD*** ***(1969) E.A. 696***, this Court stated that a preliminary objection should raise a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. In the instant case, counsel submitted, in the face of a challenge of the validity of the claim, there was no way the court was going to consider the summary judgment application without first addressing the legality of the claim as a court that was seized with all the matters. Counsel stated that by the time the appellant filed an application seeking summary judgment, the respondent had already objected to the entire suit. Therefore as there was an objection to the entire suit the chamber summons had no leg to stand on. A claim that was a nullity was incurably bad in law and nothing could be done on it. Counsel urged us to dismiss the appeal.

11. This being a first appeal, we are conscious of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of ***Kenya Ports Authority v Kuston (Kenya) limited*** ***[2009] 2EA 212*** wherein this Court differently constituted had this to say:-

> "**On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.**"

12. On our re-evaluation of the record as well as the rival arguments set out above, we think the dispute is centred on whether the Judge erred by allowing the preliminary objection and not the chamber summons that sought summary judgment.

13. The appellant's prayers are as set out in paragraph 1 of this judgment, and it is against that background he sought summary judgment under ***Order 1 Rule 20*** of the Civil Procedure Rules which provides that no judgment can be entered against the Government without the leave of the court. It is not disputed that the respondent entered appearance on 9th September, 2014 but did not file a defence and in its place the respondent filed a notice of preliminary objection which raised the following points of law:-

> "**1. That the claim is statute barred and is incompetent fatally defective and an abuse of the court process as the same offends the provisions of section 3(2) of the Public Authorities Limitation Act.**
>
> **2. That the plaintiff's right to sue the defendant for alleged breach of contract having lapsed, the plaintiff lacks capacity to agitate any cause against the defendant. The claim is therefore an abuse of the court process.**
>
> **3. That the court has no jurisdiction to entertain this claim and the same ought to be struck out with costs to the defendant."**

14. The question we have asked ourselves is whether the Judge erred by dealing with the preliminary objection alongside the application for summary judgment. It appears the preliminary objection was filed earlier than the chamber summons seeking summary judgment. Perhaps it would appear as if dealing with the PO first as an isolated issue would have been tidier than bandwagoning it with the summary application one; again the appellant filed a replying affidavit in opposition to the PO which presented some factual information that the Judge had to consider.

15. On our part we do not think the Judge can be faulted on this as we are not aware of any hard rule on it. Moreover, both the Constitution and the Court Rules command courts to seek to do substantial justice in an efficient, proportionate and cost - effective manner. It would also have been tidier if the learned Judge isolated the issue of limitation of period and dealt with it first as upholding the preliminary objection which was the ultimate result meant the application for summary judgment stood dismissed. Again this is the trial Judge's own style of writing which we cannot substitute with our own unless we find errors of substance that need to be corrected.

16. In our respectful view, the Judge seems to have fastidiously interrogated the matters contained in the plaint and the application for summary judgment, especially the replying affidavit by the appellant in response to the preliminary objection. The Judge examined the contract entered by the parties, payment vouchers and various correspondence exchanged. It is the said correspondence especially the letter dated 4th February, 2010 which informed the appellant that his claim was considered by the Pending Bills Committee and he was found to have been overpaid by Ksh.3,018,774.27. Based on all the analysis thereof the Judge posited as follows in a pertinent paragraph of the impugned ruling;-

**"*The* correspondence exhibited by the plaintiff makes it abundantly clear that the cause of action arose when the defendant informed the plaintiff that the PCCB had resolved that no further payments were due and outstanding and in fact there had been an overpayment which was re-claimed. That was by a letter dated 4*th February, 2010 (exhibit 10 of the plaint). Had that not been sufficiently clear and unequivocal, the issue referred to the EACC for investigation and recoupment. Although the plaintiff did dispute the action, there is no evidence before court to show that the defendant said it would consider the matter at that time. Earlier suggestions from the Treasury for the plaintiff to try and resolve the issue with the Ministry of Public Works do not seem to have been heeded.*

…

In the circumstances, consideration must be given to the plaintiff's case in relation to acknowledgement and/ or estoppel. Dealing with acknowledgement, the plaintiff has failed to produce any evidence from the defendant which categorically acknowledges the debt as pleaded that the evidence filed provides (Sic) is the findings of the PCCB which acknowledges work was done. It is valued and the decision is that there has been an overpayment of about Ksh.3,018,774.27. Nowhere in the evidence is there an acknowledgement that any sums are payable. The letter of 18*th March, 2014 is a categorical denial…"*

17. Counsel for the appellant argued that his client was merely seeking leave so as to apply for summary judgment and therefore it was premature for the Judge to interrogate the information in support of the claim especially because there was no defence on record. Although there was no defence on record, we find that the appellant swore a replying affidavit on 4th September, 2015 in which he stated as follows;-

"That in response to the said P.O, this suit is not barred by limitation of time for the following reasons;

i. The defendant has always acknowledged that a debt was payable to me in respect to the project.

ii. This can be evidenced by a letter addressed by myself to the Permanent Secretary, Ministry of Public Works dated 11*th April, 2012. By that letter, which I produce and mark as exhibit BSD-2, I had asked the Ministry to settle the amount I owed them.*

iii. That the Ministry replied vide letter dated 17*th April 2012 acknowledging that indeed the said balance was due to me.*

iv. Subsequently, the Ministry referred me to the Department of Defence which assured me would settle the balance of Ksh.20,803,268.80. I annex this letter and mark it as BSD-3.

v. That as at 17*th April, 2012, a debt of 20,803,268.80 had been acknowledged by the Ministry to be due to me.*

18. It is trite that once an order granting leave to enter summary judgment is granted, judgment is as good as entered. The parameters for the exercise of jurisdiction for summary judgment are generally known. See ***ICDC v Deber Enterprises Ltd* [2006] IEA 75**, the Court stated- *inter alia*, as follows:-

"The purpose of the proceedings in an application for summary Judgment is to enable the plaintiff to obtain a quick Judgment where there is plainly no defence to the claim."

In Kenindia Assurance Co. Ltd v Commercial Bank of Africa & 2 others ***Nairobi CA No. 11 of 2000***, the Court stated that the law on summary procedure is now well settled and that this is a procedure resorted to in the clearest of cases.

19. Bearing in mind that a case for summary judgment should be a clear one, we find the Judge cannot be faulted for interrogating the documents that supported the application and responded to the issues that challenged the validity of the claim. The Judge found there was no evidence of acknowledgement of debt or promise to pay the debt based on the matters deposed to by the appellant in his replying affidavit. What the Judge found as a matter of fact was a letter dated 10th February, 2010 disputing the claim. The appellant also responded to the said letter threatening to take legal action by a letter of March, 2010 but did not do so until he filed the instant suit in July 2014. The Judge found there was no acknowledgement of the debt or an explanation for the lull in filing the suit within the period stipulated under the ***Section 3(2)*** of the Public Authorities Limitation Act. We find no material to contradict this finding.

20. For reasons given above, we find that though the Judge appear to have mixed up the arguments and findings on both issues of the suit being time barred and the application for summary judgment, she nonetheless arrived at the correct conclusion on the matter that the appellant's suit was time barred under the Public Authorities

Limitation Act. Given the suit was time barred, it followed the application for summary judgment also had no merit, a decision we affirm.

In the result, we find no merit in the appeal. It is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 5th day of April, 2019.

P.N. WAKI

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

P.K. KIAGE

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JUDGE OF APPEAL

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