IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, ONYANGO OTIENO & VISRAM, JJ.A.)

CIVIL APPEAL NO. 249 OF 2003

BETWEEN

KANTARIA INVESTMENTS LIMITED .... APPELLANT

AND

ATTORNEY GENERAL .... RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Milimani Commercial Courts (Mwera, J.) dated 4th October, 2002

in

H.C.C.C NO. 854 OF 1999)
****

<u>JUDGMENT OF THE COURT</u>

This is an appeal from the Ruling of Mwera, J. delivered on *4th October, 2007* in which the learned Judge ruled on a preliminary point of law.

The background to this appeal may be briefly stated. The appellant herein ***<u>KANTARIA INVESTMENTS LTD.</u>*** (as the plaintiff in the Superior Court) filed a suit against the respondent (as the defendant) seeking judgment for the following:-

"a) Mesne profits @ Kshs.20,000/= for period 1-8-95 to 31-4-97 Kshs.10,080,000/=;

b) Kshs. 479,621/= unpaid Electricity and Water;

c) Kshs. 3,029,60.65 for repair charges;

d) Damages for breach of contract;

e) Interest on a, b, c, and d, at 36% per centum per annum;

f) Such further or other relief as this Honourable Court may deem fit to grant."

The respondent filed a defence denying the appellant's claims and asked the superior court to dismiss the suit with costs.

When the trial of the suit was about to commence Miss Odongo the learned Counsel for the respondent was allowed to argue ***paragraph 14*** of the defence which stated:-

"14. The defendant files this defence without prejudice to his right to raise an argument at the hearing hereof that this suit is time-barred under the Public Authorities Limitation Cap 39 (sic) of the Laws of Kenya."

The relevant part of that Act which was relied on provides:-

"3(1) No proceedings founded on contract shall be brought against the Government or local authority after the end of three years from the date on which the cause of action accrued."

It was argued before the learned Judge by the respondent's counsel that the cause of action was based on tenancy contract between the appellant and the Ministry of Public Works over some flats in Nairobi between *July 1993* and *July 1995* – i.e. a term of 3 years. It was further argued that since the expiry date (*July, 1995*) the appellant had up to July, 1998 to file its suit and that instead the appellant filed the suit on 4th June, 1999 – about a year later. For that reason, so submitted the respondent's counsel, the claim was caught up by the provision of the statute.

Mrs. Ndungu, the learned Counsel for the appellant submitted that the suit was not time-barred on the ground that the respondent did not vacate the premises until *6th June, 1996* and that the respondent did not repair the premises to a tenantable level when it left and the appellant had to do that at a cost, part of which was paid as late as *2002*. It was Mrs. Ndungu's submission before the leaned Judge that time began to run as from *6th June, 1996*, hence the suit was filed within time as it was filed on *4th June, 1999.*

The learned Judge considered the rival submissions presented by counsel appearing for the parties and it would appear that he was not clear whether to allow the preliminary point of law or not. In concluding his ruling the learned Judge said:-

"The preliminary point of law is thus partly upheld and partly rejected. Parties to reconsider their positions before further action.

Without appearing to say this or the other, the court is however of the strong view that for the sake of good image in the eyes of the public and that the Government should never appear to hurt its own citizens, the defendant should think seriously about settling the matters raised here but locked out by time and the law, if such matters/claims are properly laid and justified. This however is by the way.

As said earlier, the preliminary point is partly upheld and partly rejected."

It is the foregoing that provoked this appeal which was based on the following ***15 grounds***:-

"1. THAT the learned Judge erred in law and in fact in finding that the reliefs sought on the basis of breach of contract and the sum representing the cost of repair could not be granted in the said case.

2. THAT the learned trial Judge erred in law and in fact in holding that the suit ought to have been filed latest on 31st July, 1998.

3. THAT the learned Judge erred in law in partly upholding the preliminary point of law which point of law was misconceived.

4. THAT the learned Judge erred in law and in fact in failing to find that the Defendant was estopped from denying liability having held the premises up to 6thJune, 1996.

5. THAT the learned Judge erred in law and in fact in disallowing the plaintiff's actions based on breach of contract and cost of repair as having been statutory barred while indeed there was no

evidence before him of a written lease or tenancy agreement.

6. <u>THAT</u> the learned Judge erred in law and in fact in concluding that there was a lease agreement for period July 1993 to July 1995 as between the plaintiff and the Ministry of Public Works in the absence of any evidence as to reject the Plaintiff's argument that there was a monthly tenancy and consequently that the suit filed on 4th June, 1999 was properly filed.

7. <u>THAT</u> the learned Judge erred in law and in fact in finding in the absence of evidence that the Ministry of Public Works did not hold over between 31st July, 1995 to 6th June, 1996 yet states in the ruling that the Ministry of Public Works informed the Attorney General that the property of Twenty Four (24) flats was handed over to the Landlord on 6th June, 1996.

8. <u>THAT</u> the learned Judge erred in law and in fact in holding in the absence of evidence that the Ministry of Public Works became a tenant will (sic) effective from 31st July, 1995 and hence that the tenancy expired on 31st July 1995 and that, that tenancy could not be revived and hence a claim on the said tenancy could not be sustained in law.

9. <u>THAT</u> the learned Judge erred in law and in fact in arriving at the conclusion that there was no tenancy between the Ministry of Public Works and the plaintiff after 31st July 1995 when no evidence was adduced to support the same.

10. <u>THAT</u> the learned Judge erred in law in failing to give the plaintiff an opportunity during trial to proof (sic) that sum of Shs.1,108,80/= paid by the Ministry of Public Works on 12th August, 1997 was in respect of rent and therefore there was an acknowledgement of the debt.

11. <u>THAT</u> the learned trial Judge erred in law and in fact in failing to find that the effect of the part payment made by the Ministry of Public Works on 12th August, 1997 of Shs.1,108,800/= and on 11th January, 2002 of Shs.2,292,184 which was an acknowledgement of the debt and had not only the effect of postponing the period of limitation but also of reviving an otherwise statute barred claim and having the right of action accruing on the date of the part payment.

12. <u>THAT</u> the learned Judge erred in law and in fact in barring the plaintiff from the reliefs based on contract and cost of repair particularly when the cost of repair was negotiated between the parties and indeed the Defendant agreed to pay the amounts found due by the Ministry of Public Work's valuers.

13. The learned Judge erred in law and in fact in not finding that the Ministry of Public Works engaging in mutual correspondence with the plaintiff after the alleged limitation period the parties kept the claim alive and thereafter the part payment of rent had the effect of reviving the claims.

14. The learned Judge erred in law in not finding that the acknowledgement of the debt through part payment had the effect f taking away that defence of limitation.

15. The learned Judge erred in law in failing to apply the proviso to section 23(3) of The Limitation of Action Act therefore arriving at a wrong decision."

When the appeal came up for hearing on *6th July, 2011* Mr. Kirimi appeared for the appellant while Mr. Bitta appeared for the respondent.

Mr. Kirimi submitted that the facts were in dispute since the respondent held over after expiry of the lease and that even if the lease had expired the tenant became a month to month tenant. Mr. Kirimi referred us to the plaint and the defence which in his view demonstrated that facts were in dispute. Finally, Mr. Kirimi was of the view that this was not a clear case for a preliminary objection.

In response to the foregoing, Mr. Bitta submitted that the judge did not uphold the preliminary objection but ruled that the cause of action accrued from the termination of the lease and hence the appellant could

not rely on the lease agreement. Mr. Bitta further submitted that the issue of holding over and the rights arising there from were still open to the appellant to pursue in the superior court. He invited us to hold that the learned judge was right in his ruling and that we should dismiss this appeal.

As already pointed out elsewhere in this judgment the dispute herein was based on a plaint filed by the appellant in the superior court. The pertinent paragraphs of the plaint were as follows:-

"3. In or about July 1993, the said Ministry of Public Works Hosing Section entered into tenancy agreements with the plaintiff thereby renting Twenty Four Flats on L.R. 1870/IV/75 David Osieli Road Nairobi belonging to the plaintiff and which tenancies were to expire in July 1995.

4. It was an express term of the said agreement that the said Ministry of Public Works would hand over to the plaintiff the said premises in vacant possession at the expiry of the term created and in a tenable repair thereby clearing all outstanding Electricity and Water Bills.

5. At the expiry of the lease on 31st July 1995 the Ministry of Works failed to hand over the premises and remained in occupation up to 6th June 1996. During this period 1st August, 1995 to 6th June, 1996 the monthly rent due and payable for similar flats were Kshs.20,000/= per flat which the said Ministry submitted itself into paying when it remained in occupation and denied the plaintiff rental income from other interested persons.

6. In breach of the conditions of tenancy the Ministry of Public Works handed over the premises without restoring them to the condition in which they were at the commencement of the lease which repairs were done at a cost of Kshs.3,029,640.65. That this was the cost of repair agreed upon by the Ministry's assessor and the plaintiff.

7. In further breach of the agreement the Ministry of Public Works refused to clear Water and Electricity Bills accounting to Kshs.479,621/=.

8. To mitigate it's loss of rental income following the Ministry's failures to carry out the requisite repairs the plaintiff commenced repairs to the premises which were completed on 31st April, 1997 at a cost of Kshs.3,029,640.65.

9. The Plaintiff has lost rental income at a monthly rent of Kshs.20,000/= per flat for period 1st August, 1995 to 31st April, 1997 amounting to Kshs.10,080,000/= and which the plaintiff now claims from the defendant. This is rent for period the Ministry's officials held over (1.8.95 to 6.6.96) and the period the premises were under repair by the Plaintiff, the Ministry of Public Works having refused to undertake the same.

10. The Plaintiff therefore claims from the Defendant a total of Kshs.13,589,261.65/= being mesne profits at Kshs.20,000/= for period 1-8-95 to 31-4-97 – Kshs.10,080,000/=. The sum of Kshs.479,621/= being the total unpaid water and Electricity and KShs.3,029,640.65 being the repair charges. The plaintiff further claims general damages for breach of contract.

11. Despite demand and notice of intention to sue having been given to the said Ministry of Public Works and the Defendant none of them have settled the said such of Kshs.13,589,261.65/=."

In reaction to the plaint the respondent filed a defence in which it was averred, inter alia:-

"3. The defendant denies paragraph 3 and 4 of the plaint and puts the plaintiff to strict proof thereof.

4. The defendant avers that the plaintiff is non suited and will seek to have the plaint struck out with costs.

5. *IN THE ALTERNATIVE* ***the defendant avers that the plaintiff's claim is bad in law and will seek***

to have the same struck out with costs.

6. The defendant denies paragraph 5 and 6 of the plaint and puts the plaintiff to strict proof thereof.

7. In the alternative and without prejudice to the foregoing ***the defendant denies that the yielded up the said premises out of the repair as alleged in the plaint or at all, or that he was guilty of the alleged or any breach of covenant.***

8. The defendant denies paragraph 7 of the plaint and avers that the water and electricity bills totaling to khs.479,621/= should be demanded by the plaintiff from the relevant individuals who entered into contract with the relevant authorities for the supply of water and electricity.

9. The defendant further avers that neither the landlord nor the Ministry of Public Works, as a party to those contracts.

10. The defendant denies that the plaintiff has suffered special damages as alleged at paragraph 10 of the plaint or any damage.

11. The defendant admits paragraph of the plaint and avers that the same is not payable in light of the aforestated.

12. The defendant admits paragraph of the plaint and avers that the same is not payable in light of the aforestated.

13. The jurisdiction of this Honourable court is admitted.

14. The defendant files this defence without prejudice to his right to raise an argument at the hearing hereof that this suit is time-barred under the Public Authorities Limitation of Actions Act Cap 39 of the Laws of Kenya."

The foregoing set out the nature of the dispute between the parties. It was the respondent's stand that the appellant's suit was time barred as it was filed out of time. This was the issue that was raised as a preliminary point of law. We have considered the background to this appeal, the rival submissions by counsel and we are of the view that the issue that we think falls for determination is whether what was urged before the learned Judge was a preliminary objection on a point of law. Taking into account the pleadings and the submission of counsel, we do not think what was raised qualified as a preliminary objection on a point of law. It is to be observed that most of the issues were in dispute. For example, the parties are not in agreement as to the date of expiry of the lease. There was the issue of holding over. When did the cause of action accrue? All these matters can only be settled after taking of evidence. In the present case, it cannot be said that all the facts pleaded by one side are correct. As already stated, facts were in serious dispute. Hence, in our view, this was not a proper case for determination by way of preliminary objection on a point of law.

In ***MUKISA BISCUIT MANUFACTURING CO. LTD. VS. WEST END DISTRIBUTORS LTD. (1969) E.A. 696 at p. 701, Newbold P.*** said:-

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

The foregoing applies to what is before us since the preliminary objection on a point of law was raised when the facts were in serious dispute. We therefore allow this appeal, set aside the decision of the

superior court and direct that the suit be heard on merit in the superior Court. The appellant shall have the costs of this appeal. It is so ordered.

Dated and delivered at NAIROBI this 29th day of July, 2011.

E.O. O'KUBASU
....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
....
JUDGE OF APPEAL

ALNASHIR VISRAM
....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.