



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Civil Suit 220 of 2003

CHOICE TEA BROKERS LTD.PLAINTIFF

VERSUS

JAMES THIGE NDEGWA.....1ST DEFENDANT

BERNARD MUHINJA GICHUHI.....2ND DEFENDANT

LUCY WANGARI KIMANGA.....3RD DEFENDANT

BERLUC TEA TRADING CO. LTD4TH DEFENDANT

KIMANI ONYANCHA & CO. (sued as a firm of Auditors)5th DEFENDANT

RULING

The 5th Defendant is sued as a firm of Auditors which had at the material time several partners. The partnership changed from time to time. As a result the representation of the 5th Defendant is not singular as the partners present and past have retained separate Counsel.

In their defence the 5th Defendants have pleaded inter alia that:

“.....

8 These Defendants contend that in so far this action is based in tort the alleged action did not arise within 3 years before this action and is barred by the Limitation of Actions, Act, Cap. 22 Laws of Kenya; and in so far as it is allegedly based on contract the alleged action did not arise within 6 years before these defendants were enjoined pursuant to the Limitation of Actions Act aforesaid.

9 Without prejudice to the foregoing and in the alternative, these defendants contend that any extension of time granted to the plaintiff, if any, to lodge these proceedings against these defendants is irregular in so far as the plaintiffs show that in or about September 1998 they discovered the alleged fraud of their employee and the Managing

Director resulting in the alleged loss of US\$229,936.24. Accordingly, the claims against these defendants, If any expired long before this Honourable Court’s leave was obtained on 31.05.2006. In the premises, these defendants will raise a preliminary objection to the exparte grant of leave of 31st May, 2006.”

At the hearing the 5th Defendant indeed took up the aforesaid Preliminary Objection on Limitation of Actions. As a result the court was invited to decide whether the Preliminary Point of Objection was a matter of a pure point of law or raised factual issues which should be dealt with within the trial and after evidence has been given or tendered.

In the case of **MUKISA BISCUIT CO. –V- WEST END DISTRIBUTORS 1969 E.A. 696**, it was held that:-

“

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 what is sought is the exercise of judicial discretion...”

I have considered the Amended Plaintiff and the defences by Defendants and in particular the 5 Defendants. First and foremost, I would like to dissuade the Defendants from attempting to make me sit on appeal or review of the decision by Hon. Justice Serگون to allow the amendment of the plaintiff on 31st May 2006. Any attack on this decision can only be by way of appeal or review if legally feasible at this stage.

It should also be noted that the effect of the order of leave to amend did not by itself extend the Limitation period. The leave granted was to amend the plaintiff and not to file a suit out of time i.e. extension of Limitation period.

Having considered the pleadings, I am of the view that when dealing with any questions of limitation of actions in this case and in particular as between the plaintiff and 5th Defendants then the court will have as a matter of necessity to delve into the facts of the case. One will have to go into factual issues to determine when the alleged negligence whether in tort or contract took place. If the Defendants are aggrieved that the Amended Plaintiff does not give specific dates then they ought to have either asked for further and better particulars or applied to strike out the plaintiff for not disclosing any reasonable cause of action etc.

I do not agree that the plaintiff’s cause of action against the 5th Defendant is pleaded to have taken place in 1997 or 1998.

This court will have to know when exactly the independent audit was carried out, its revelations, when the audit reports were allegedly manipulated and concealment done or fraud carried out.

The court cannot tell from the pleadings when the alleged negligent acts/omissions took place and when they became known to the plaintiff.

As a result the date of cause of action in this case as against the 5th defendants can only be determined after a full trial of the case.

I do direct that the question of limitation of actions raised be determined in the trial of the suit and not as a Preliminary point of objection.

Dated, Signed and Delivered at Mombasa this 27th day of January 2010.

M.K. IBRAHIM

JUDGE

27/01/2010

Coram:

Ibrahim, J

Court clerk – Robow

Mr. Bwomote K.A for the 5th Defendant

Ms. Juma h/b for Mrs. Mbaabu for one of the 5 Defendants

No appearance for the plaintiff

ORDER

Ruling delivered in their presence.

IBRAHIM, J.