



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**

**AT MOMBASA**

**Civil Appeal 25 of 2007**

**AFROFREIGHT FORWARDERS LTD.....APPELLANT**

**AND**

**AFRICAN LINER AGENCIES.....RESPONDENT**

**(An appeal from the judgment of the High Court of Kenya at Mombasa**

**( Sergon, J) dated 3<sup>rd</sup> November 2006**

**in**

**H.C.C.A NO 200 of 2003)\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is an appeal from the judgment of the superior court (Sergon, J) delivered on 3<sup>rd</sup> November 2006. The dispute has its origin in the plaint dated 23<sup>rd</sup> July, 2002 in which the appellant herein, Afrofreight Forwarders Ltd, (as the plaintiff), sued the respondent African Liner Agencies Ltd claiming a sum of Kshs. 359,686/- in respect of railage services the appellant provided to the respondent in the year 1997. The respondent filed a defence denying the claim. After a trial before the Resident Magistrate's Court at Mombasa judgment in the sum of Kshs. 342,625/- was entered in favour of the appellant. Being aggrieved by that decision of the Resident Magistrate's court the respondent herein preferred an appeal to the superior court challenging the learned Resident Magistrate's judgment on the following main grounds:-

- (i) That the trial court erred in law in holding that the appellant was not acting for a disclosed principal.**
- (ii) That the trial magistrate erred in law and in fact by failing to consider that the plaintiff's claim being a liquidated one, ought to have been specifically pleaded and proved.**
- (iii) That the trial magistrate erred in law by holding that the plaintiff had proved its claim to an extent of Kshs. 342,625.**
- (iv) That the learned trial Magistrate erred in law and in fact by failing to find that the plaintiff's claim is time-barred under the Limitation of Actions Act.**

The appeal was placed before Serгон, J for determination. In his judgment delivered on 3<sup>rd</sup> November, 2006, as already stated, the learned Judge dismissed the first three grounds of appeal set out above but allowed it on the last ground of appeal. In concluding his judgment the learned Judge stated:-

“The trial Magistrate further came to the conclusion that the action could have been time-barred save that the appellant acknowledged the same in its faxed letter of 4<sup>th</sup> July 2000. I have carefully examined the contents of the aforesaid letter. It is imperative to reproduce the relevant contents of the letter in order for one to appreciate its applicability and relevance to the dispute at hand. The letter which was produced by the plaintiff (respondent) as exhibit No. 14 reads as follows:

“We acknowledge receipt of your letter 1/7/2000. Since it is a very old outstanding issue and we do not have all invoices available with us our accounts department will communicate with you for the full details which please assist once we have fully reconciled your account we will revert back to you.”

A close perusal of the above quoted fax letter will reveal that it amounts to nothing but a request for particulars of the debt. It cannot be said to amount to an admission of the debt under Section 23(3) of the Evidence Act. The appellant in that letter does not admit the claim but it is requesting to be given invoices for reconciliation and thereafter revert back to the respondent. That is where the learned Resident Magistrate misapprehended the point. Since there is no dispute that the debt arose sometimes in 1996 and the action was filed on 23<sup>rd</sup> July 2002 then the action was time barred hence incompetent. From the invoices and debit notes tendered by the appellant’s witness, it is clear that the cause of action arose between 1<sup>st</sup> April 1996 and 1<sup>st</sup> July 1996. By the 23<sup>rd</sup> day of July 2002 six (6) years 22 days had lapsed for the last debt.

In the final analysis I am satisfied that the appeal should be allowed on this ground. Consequently the appeal is allowed with the result that the learned Resident Magistrate’s judgment of 12<sup>th</sup> November 2003 is set aside and substituted with an order striking out the suit with costs to the appellant. The appellant shall also be entitled to the costs of this appeal”

Being dissatisfied with the foregoing decision the appellant now comes to this Court seeking to reverse that decision of the superior court on the following three grounds:-

- (i) That the Honourable judge erred in law in his finding on the last ground of the appeal in holding that the respondent action in RMCC 2525 of 2002 was time barred hence incompetent, as a consequence of which he ordered that suit be struck out with costs.
- (ii) That the Honourable judge erred in law in that he(sic) wrong and mistakenly invoked section 23(3) of the Evidence Act instead of section 23(3) of the Limitation of Actions Act hence considered issues which were not relevant or applicable to the suit at hand as a result of which he arrived at the wrong conclusion.
- (iii) That the Honourable judge erred in law in misconstruction of an acknowledgment letter by appellant and treated it as a request for particulars.”

When the appeal came up for hearing before us on 22<sup>nd</sup> July 2009

Mrs V. Maina appeared for the appellant while Mr. O Abeed appeared for the respondent. The only issue that was canvassed before us was whether the suit in the Resident Magistrate court was time-barred or not.

In her submissions Mrs Maina relied on the letter of 3<sup>rd</sup> July 2000 in which the respondent stated:-

“We acknowledge receipt of your letter 01/07/00. Since it is a very old outstanding issue and we do not have all invoices available with us. Our Accounts Dept. will communicate with you for the full details, which please assist once we have fully reconciled your account we will revert back to you”

It was Mrs Maina's submission that in view of that letter the respondent acknowledged indebtedness. For that reason, so she submitted, the right of action accrued on 4<sup>th</sup> July 2000 hence when the suit was filed on 29<sup>th</sup> July 2002 it was so filed within limitation period. She therefore asked us to allow the appeal, set aside the judgment of Serگون, J and reinstate the judgment of the Resident Magistrate.

On his part, Mr Abeed acknowledged the fact that the issue was whether the letter of 3<sup>rd</sup> July 2000 revived the claim and it was his submission that it did not since the letter merely made inquiries. It was his submission that the letter did not acknowledge a debt. He asked us to consider the contents of the letter which, in his view, did not amount to admission of the debt. He therefore asked us to uphold the decision of the superior court and dismiss this appeal.

We have now considered the history of this dispute and the submissions of counsel appearing for the parties. As can be seen from the Memorandum of Appeal the main issue for determination is whether or not the appellant's claim was time barred under the Limitation of Actions Act ( Cap 22 Laws of Kenya). The learned Resident Magistrate was of the view that the appellant's claim was not time barred. In the course of his judgment where he dealt with this issue the learned Resident Magistrate stated:

"I will start with the issue of limitation of the action. From the records/evidence there is no document to show the defendant was given 6 months period to settle its debts. The plaintiff said it was agreed so verbally. However PW 1 (Mwaura) was not involved in negotiating the contract.

It can therefore be safely assumed that the invoices were payable on demand hence time started running in 1996. Given that finding here that this suit is time barred. However, there is a fax dated 4<sup>th</sup> July 2000 where the defendant was asking for more time to reconcile its accounts. This implies the defendant had not declined to pay. I agree with the plaintiffs counsel submission that s.23(3) of the Limitation of Actions Act applies in favour of the plaintiff. The date/time started running from 4<sup>th</sup> July 2000. This means the claim is not time barred."

The respondent's appeal in the superior court was dismissed on all grounds except the ground relating to Limitation of Actions Act. The learned Judge was of the view that in the letter of 4<sup>th</sup> July 2000 the respondent did not admit the claim but was merely asking for invoices for purposes of reconciliation. With due respect to the learned Judge, we think the learned Resident Magistrate was right in reaching the conclusion that time started to run from the date of the letter in which the debt was acknowledged. We have looked at the contents of the letter of 4<sup>th</sup> July 2000 and in our view the said letter acknowledged the debt. What the respondent was uncertain about was the exact amount which was owing. Section 23(3) of the Limitation of Actions Act provides:-

"(3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim or a claim to movable property, of a deceased person and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement as the last payment."

In our view, the above provides an answer to this appeal. We are satisfied that in view of the conclusion we have come to about the letter dated 4<sup>th</sup> July 2000 time started to run from that date. Hence when the appellant filed his suit on 23<sup>rd</sup> July 2002 he was clearly within the six year period. That being our view of the matter it follows that this appeal must be allowed, and we accordingly order that the judgment of the superior court is set aside and we reinstate the judgment of the learned Resident Magistrate. The appellant will have the costs of this appeal and the costs of the appeal in the superior court. These shall be our orders in this appeal.

Dated and delivered at Mombasa this 16<sup>th</sup> day of October, 2009

**R.S.C. OMOLO**

.....

**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

.....

**JUDGE OF APPEAL**

**E.O. O’KUBASU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**