



Mbugua v Sigimo Enterprises Limited & 2 others (Environment & Land Case 478 of 2017) [2025] KEELC 727 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELC 727 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 478 OF 2017
MD MWANGI, J
FEBRUARY 20, 2025**

BETWEEN

LEAH NGENDO MBUGUA PLAINTIFF

AND

SIGIMO ENTERPRISES LIMITED 1ST DEFENDANT

VILLA CARE LIMITED 2ND DEFENDANT

VILLA CARE MANAGEMENT LIMITED 3RD DEFENDANT

RULING

(In respect of the 3rd Defendant’s preliminary objection dated 6th December 2024 premised on Section 4 (1) of the [Limitation of Actions Act](#)).

Background

1. The preliminary objection by the 3rd Defendant is dated 6th December 2024. It is based on two grounds, namely;
 - a. That the suit against the 3rd Defendant offends the provisions of Section 4(1) of the [Limitation of Actions Act](#) and which offence deprives the court of the necessary jurisdiction to entertain the suit against it.
 - b. That it is therefore just expedient and in the interest of justice that the suit against the 3rd Defendant be struck out forthwith with costs to the 3rd Defendant.

Directions by the court

2. On the 11th December 2024, the court directed that the preliminary objection by the 3rd Defendant be canvassed before the matter is set down for hearing and by way of written submissions. The 3rd



Defendant, the Plaintiff and the 2nd Defendant filed written submissions which now form part of the record of the court.

. Submissions by the parties

3. The 3rd Defendant submits on two issues namely; whether the 3rd Defendant has raised a valid preliminary objection and whether the suit against the 3rd Defendant ought to be dismissed with costs.
4. On the 1st issue, the 3rd Defendant places reliance on the case of Mukisa Biscuit Company –vs- West End Distributers Limited (1969) EA 696, that defined a preliminary objection as consisting of a pure point of law which has been pleaded, or which arises from clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. The 3rd Defendant submits that its preliminary objection is to the effect that the suit against the 3rd Defendant is time barred; which is a pure point of law premised on Section 4 of the *Limitation of Actions Act*.
5. The 3rd Defendant asserts that Section 4 of the *Limitation of Actions Act* bars a cause of action founded on a contract from being brought after the lapse of 6 years from the date the cause of action accrued. In this case, the Plaintiff has pleaded that the cause of action accrued or crystallized on 28th April 2014. Hence bringing the case against it in 2024 offends Section 4.
6. The 3rd Defendants relies on the Court of Appeal decision in Deposit Protection Fund Board Liquidation of Euro Bank Limited (In liquidation) –vs- Rosaline Njeri Macharia and another (2016) eKLR, and the decision in Gathoni –vs- KCC, Civil Application No. 122 of 1981 to support its arguments.
7. On the 2nd issue, the 3rd Defendant argues that the Plaintiff's suit against it must be dismissed with costs in view of the violation of Section 4 (1) of the *Limitation of Actions Act*.
8. The 2nd Defendant on its part supports the preliminary objection by the 3rd Defendant. It submits that the Plaintiff's claim against the 3rd Defendant as per the amended plaint is founded on contract and therefore ought to have been filed within 6 years from the date the cause of action accrued.
9. Since the 3rd Defendant was joined into the suit by the amended plaint, the operative date is when the amendment was made. The amending order, according to the 2nd Defendant is treated as a fresh writ issued on this date which essentially means that the Plaintiff was bringing a fresh claim against the 3rd Defendant.
10. The 2nd Defendant referred to the case of Waweru Mathenge –vs- Silingi Ole Kuriti, Civil Case No. 554 of 1973 (unreported) cited in the case of Atieno –vs- Omoro & another (1985) eKLR, where Trainor Judge stated that,

“...it would appear from the cases that I have found, and there are many, that time is calculated up to when the proceedings are instituted; in the case of an added party time continues to run until the amendment adding him as a Defendant is ordered.”
11. The above decision was further affirmed in the case of Mushimiyama Aimable -vs- Jonathan Leaky Limited & another (2009) eKLR, where the court stated that the limitation period is calculated up to when the proceedings are instituted. The amendment order should be treated as if there has been a fresh suit on the date the orders are made.



Submissions by the Plaintiff

12. In her submissions, the Plaintiff submits that she could only join the 3rd Defendant as a party to the suit after the other Defendants filed suit denying the Plaintiff's claim and not prior to that since the 1st Defendant was the vendor who denied the claim on the basis that it did not execute the offer letter and laid its claim against the 2nd Defendant who in turn, on being sued, laid its claim against the 3rd Defendant on the ground that it is the 3rd Defendant who received the payment.
13. The Plaintiff further avers that the preliminary objection does not meet the threshold established in the Mukisa case. The Plaintiff makes reference to the decision in Oraro –vs- Mbajja (2005) eKLR, where Ojwang Judge (as he then was) stated that,

“Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement ...that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”
14. The Plaintiff avers that in this case, court will need to look further into the claim and the documents filed to decide when the fraud was discovered by the Plaintiff. The Plaintiff's assertion is that her suit alleges fraud against the Defendants. In her application to amend the plaint, the Plaintiff stated that she only sued the 3rd Defendant once the 2nd Defendant alleged in its defence that the money was received by the 3rd Defendant. Time then would only start running in respect of the cause of action against the 3rd Defendant from the date a claim was laid against it by the 2nd Defendant in its statement of defence dated 20th December 2023. Going by that, six years then have not lapsed.
15. The Plaintiff further asserts that the preliminary objection is based on unpleaded assertions; the issue of limitation having not been pleaded in the 3rd Defendant's statement of defence.

. Issues for determination

16. The issues for determination in this court's opinion are:-
 - A. Whether the preliminary objection by the 3rd Defendant meets the threshold set in the Mukisa Case.
 - B. Dependent on the outcome of (A) above, whether the preliminary objection is merited.

Analysis for determination

17. Both the Plaintiff and the 3rd Defendant have made reference to the Mukisa case in regard to the definition of a preliminary objection.
18. I find it appropriate to restate verbatim the holdings of Law J.A. & Sir Charles Newbold P, in the Mukisa case for emphasis.
19. Sir Charles Newbold P stated that,

“A preliminary objection is in the nature of what used to be a demurrer. It raises 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 to be exercised is judicial discretion.”

20. Law J.A. on his part stated that,

“So far as I am aware, a preliminary objection consists of a point of law, which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

21. I have carefully perused the statement of defence filed by the 3rd Defendant who is the objector for purposes of this preliminary objection. Nowhere in its statement of defence has the 3rd Defendant pleaded the issue of limitation of time.

22. The holding by Law J.A. clearly implies that a preliminary point that qualifies to be raised as a preliminary objection must have been pleaded.

23. I agree with the submission by the Plaintiff that the issue of limitation is a material issue that must be specifically pleaded in terms of the provisions of Order vi Rule 4 (1) of the Civil Procedure Rules.

24. In the case of Stephen Onyango Achola & another –vs- Edward Hongo Sule & another (2004) eKLR, the Court of Appeal upheld the above position and stated that,

“The second Respondent having failed to specifically plead the issue of limitation in its defence it was not entitled to rely on that issue and base its preliminary objection on it, nor will the 2nd Respondent be entitled to rely on that defence during the trial of the suit unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition. It is equally not to be forgotten that a party who is entitled to rely on the defence of limitation is perfectly entitled to waive such defence and thus let the suit proceed to trial on its merit.”

25. This decision by the court of appeal settles the issue of the preliminary objection by the 3rd Defendant. The 3rd Defendant is not entitled to rely on limitation having failed to specifically plead it in its defence. Having arrived at this finding, I do not find it necessary to proceed to assess the merits of the preliminary objection

26. Consequently, the preliminary objection by the 3rd Defendant is hereby dismissed with costs to the Plaintiff.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 20TH DAY OF FEBRUARY 2025

M.D. MWANGI

JUDGE

In the virtual presence of

Ms. Nderitu for the Plaintiff

Ms. Kisotu h/b for Mr. Makumi for the 1st Defendant

N/A by the 2nd Defendant

Mr. Nyamwagwa for the 3rd Defendant

Court Assistant: Mpoye



M.D. MWANGI
JUDGE

