



REPUBLIC OF KENYA



**Kurji & 3 others v Lakha & 9 others (Civil Suit 597 of 2002)
[2025] KEHC 5198 (KLR) (Civ) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5198 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 597 OF 2002

SN MUTUKU, J

APRIL 29, 2025

BETWEEN

**NUREZ ZAHERALI KURJI 1ST PLAINTIFF
RAHIM SADRUDIN KURJI 2ND PLAINTIFF
HUSSEIN ZAHERALI KURJI 3RD PLAINTIFF
ABDULALI AKBERALI KURJI 4TH PLAINTIFF**

AND

**AMEER KASSIM LAKHA 1ST DEFENDANT
AMIR REHEMTULLA 2ND DEFENDANT
SHIRAZ ABDULALI KARIM KURJI 3RD DEFENDANT
ALTAF ABDULALI KARIM KURJI 4TH DEFENDANT
MINAZ SHOKATALI KARIM KURJI 5TH DEFENDANT
FIAZ SHOKATALI KARIM KURJI 6TH DEFENDANT
RIYAZ SHOKATALI KARIM KURJI 7TH DEFENDANT
NAWAZ SHOKATALI KARIM KURJI 8TH DEFENDANT
KARIM SHAMSODIN KARIM KURJI 9TH DEFENDANT
ARIF SHAMSODIN KARIM KURJI 10TH DEFENDANT**



RULING

Background

1. Nurez Zaherali Kurji, Rahim Sadrudin Kurji, Hussein Zaherali Kurji and Abdulali Akberali Kurji (hereafter the 1st, 2nd, 3rd and 4th Plaintiffs) instituted the present suit against Ameer Kassim Lakha, Amir Rehemtulla, Shiraz Abdulali Karim Kurji, Altaf Abdulali Karim Kurji, Minaz Shokatali Karim Kurji, Fiaz Shokatali Karim Kurji, Riyaz Shokatali Karim Kurji, Nawaz Shokatali Karim Kurji, Karim Shamsodin Karim Kurji and Arif Shamsodin Karim Kurji (hereafter the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Defendants respectively), by way of a plaint dated 5th April 2002 and sought various reliefs arising out of an agreement dated 16th May 1993 pertaining to the distribution of various assets, shares and properties allegedly belonging to one Karim Kurji (the deceased) being a grandfather to the Plaintiffs as well as the 3rd to 10th Defendants herein.
2. The 1st and the 3rd to 10th Defendants entered appearance and filed their joint statement of defence dated 25th June 2002 whereas the 2nd Defendant upon entering appearance, filed his statement of defence dated 16th July 2002 separately, denying the key averments in the plaint and liability.
3. The records in the court file show that the suit was dismissed by the court suo motu on 25th February 2015 for want of prosecution, but was later reinstated vide a ruling delivered on 28th November 2019 upon an application by the Plaintiffs. The 5th, 6th, 8th, 9th and 10th Defendants sought to challenge the aforesaid ruling by way of an appeal lodged at the Court of Appeal (Civil Appeal No. E118 of 2021), which appeal was dismissed through a judgment delivered on 26th July 2024.
4. The record, further, shows that the 1st Plaintiff herein opted to withdraw his suit against the Defendants, vide a notice of withdrawal dated 30th May 2022. Consequently, the 1st Plaintiff's suit was marked as withdrawn by the court on 14th November 2024, with costs being awarded to the 5th, 6th, 8th, 9th and 10th Defendants.

Preliminary Objection

5. The 5th, 6th, 8th, 9th and 10th Defendants filed a Notice of Preliminary Objection (PO) dated 18th November 2024 challenging the competency of the suit on the following grounds:
 1. The Plaintiffs' Suit is anchored on an agreement dated 16 May 1993 which was entered into more than 8 years prior to the filing of the Plaint.
 2. The Plaintiffs' Suit is time-barred by dint of Section 4(1) (a) of the *Limitation of Actions Act* which prohibits the institution of an action founded on contract after the end of six (6) years from the date on which the cause of action accrued.
 3. This Honourable Court therefore lacks jurisdiction to entertain the suit, and it ought to be struck out with costs to the 5th, 6th, 8th, 9th and 10th Defendants." (sic)

Submissions

6. The parties were directed put in written submissions on the PO, which were later highlighted before this court. From the record, it is apparent that the 1st to 4th and 7th Defendants did not participate in the hearing of the PO or file any documents in that regard.



7. In supporting the preliminary objection, the 5th, 6th, 8th, 9th and 10th Defendants have relied on the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 on what constitutes a preliminary objection, and have argued that the preliminary objection raised here constitutes pure points of law.
8. They have submitted that the present suit, being founded on an agreement dated 16th May 1993, is time barred by dint of Section 4(1) (a) of the *Limitation of Actions Act*, which stipulates that actions founded on contract shall not be brought after the lapse of six (6) years from the date on which the cause of action accrued. They also relied on *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] KECA 3 (KLR) and *Attorney General & another v Andrew Maina Githinji & another* [2016] KECA 817 (KLR) where the Court of Appeal, in sum, defined a cause of action as an act which would give rise to a cause of complaint on the part of an aggrieved party.
9. The Defendants have equally urged the court to consider the case of *Macharia & another v Katua & 4 others* [2024] KEELC 4808 (KLR) and the case of *South Nyanza Sugar Company Limited v Charles M. Nyantahe* [2022] KEHC 688 (KLR) in which the respective courts deemed the suits filed before them to be statute barred, for having been brought outside the stipulated six (6)-year period in respect of claims founded on contract.
10. It is their argument that this court lacks jurisdiction to entertain the present suit and that the suit ought to be struck out with costs, for being time barred and therefore incompetent.
11. The above submissions were reiterated in the oral arguments presented by counsel for the aforesaid Defendants, Mr. Ismael who appeared on behalf of Ms. Sebaiga, who submitted, further, that the cause of action arose in the year 1993 according to the Plaintiffs' pleadings and is therefore time-barred.
12. In response, the Plaintiffs, whilst similarly anchoring their submissions on the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd*, submitted that the grounds raised by the Defendants do not meet the threshold of a preliminary objection as they are not pure points of law and that the facts upon which the preliminary objection is based are contested and hence the preliminary objection is incompetent.
13. The Plaintiffs argued that the suit is anchored on various agreements of varying dates, and is not restricted solely to the agreement dated 16th May 1993, as purported by the Defendants; that in any event, the cause of action here would begin to accrue from the date of breach rather than the date of the agreement and that in the present instance, the Plaintiffs only came to learn of the breach of the various agreements in the year 2002 and hence the suit is competently before this court.
14. In support of their case, the Plaintiffs cited *KCB Group Kenya Ltd v Gillys Security & Investigations Ltd & 2 others* [2024] KEHC 2276 (KLR) as well as *South Nyanza Sugar Co. Ltd v Dickson Aoro Owuor* [2017] KEHC 7669 (KLR) on when a cause of action arises in claims for breach of contract.
15. On the basis of the foregoing arguments, the Plaintiffs have urged that the preliminary objection be dismissed with costs for want of merit.
16. Mr. Chacha Odera, counsel for the Plaintiffs, reiterated the contents of the written submissions, and submitted that at the time of execution of the agreement dated 16th May 1993, the Plaintiffs were minors, and that it is only upon their attainment of the age of majority that they discovered the breach thereof, to which Mr. Ismael rejoined by maintaining that the six (6)-year period ought to run from the date of the agreement.



Analysis and Determination

17. I have considered the PO and the grounds raised therein alongside the competing submissions and authorities cited by the parties.
18. A preliminary objection is defined in *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696, which has been cited by the parties in their respective submissions as raising a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. A PO cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.
19. Further, the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR stated as follows:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

20. From the analysis of the PO raised in the present instance, it is clear that the same rides on the key issue whether the Plaintiffs’ suit ought to be struck out for being statute barred and therefore incompetent before this court.
21. From a perusal of the pleadings on record but without going into the merits thereof, it is apparent that the Plaintiffs’ claim against the Defendants herein contains aspects of alleged breach of trust as well as breach of contract, in respect of certain assets and properties belonging to the deceased and which ought to have been distributed to the Plaintiffs as well the 3rd to 10th Defendants being beneficiaries, pursuant to the agreement dated 16th May 1993. Section 4(1) of the *Limitation of Actions Act* becomes applicable in determining when the cause of action arose. It provides that:

The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

- (a) actions founded on contract;
- (b) actions to enforce a recognizance;
- (c) actions to enforce an award;
- (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
- (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

22. This gives rise to the question when did the cause of action arise or otherwise accrue in this instant case? In *South Nyanza Sugar Company Limited v Charles M. Nyantahe* [2022] KEHC 688 (KLR) cited in the submissions by the 5th, 6th, 8th, 9th and 10th Defendants, the term ‘accrue’ is defined as follows:

“According to Black’s Law Dictionary (10th Edition) the word “accrue” means “to come into existence as an enforceable claim or right.” Therefore, in interpreting the word accrued as per the Statute, the cause of action on breach of contract can only be brought at the time the actual breach occurred. This is when it can be said the time started running.



Courts have defined the period when the alleged breach is said to have occurred and/or accrued. In the case of South Nyanza Sugar Company Limited v Dickson Aoro Owuor (2019) eKLR the court held that;

“...It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period.”

23. The above-referenced term was further elaborated in the case of South Nyanza Sugar Co. Ltd v Dickson Aoro Owuor [2017] KEHC 7669 (KLR) featured in the Plaintiffs’ submissions, with the court reasoning that:

“There is no doubt in this matter that the parties entered into a contract and which contract was allegedly breached. What is for determination is when exactly the cause of action accrued since from that time the limitation period of 6 years starts running. I do not find that issue difficult to decide on. I say so because when a party enters into a contract for a specific period of time, it does so in the understanding and belief that each of the parties to the contract will observe its part thereof until full execution of the contract. It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period.”

24. In the present instance, the court observed that upon a perusal of the Plaintiffs’ pleadings, it remains unclear when exactly the cause of action began to accrue, since the specific date(s) on which the alleged breaches occurred or were discovered as having occurred, are not set out therein. What remains certain is that the cause of action did not begin to accrue from the date on which the subject agreement was entered into (16th May 1993), as is being claimed by the Defendants. As it stands, the court is of the view that no credible material has been tendered to ascertain that the suit is time barred and therefore incompetently before this court.

25. Further, it will require evidence to determine when the cause of action accrued and therefore the PO is not based on pure point of law. The PO dated 18th November 2024, raised herein, has failed to meet the threshold of what constitutes a PO. Consequently, it is my finding that the PO lacks merit and is hereby dismissed with costs.

26. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF APRIL 2025.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Anne Kadima for the Plaintiff

Mr. Sebayinga for the Defendant.

