



**Frontier Optical Networks Limited v Cabinet Secretary Ministry of
Environment and Forestry & another (Commercial Suit E416 of 2022)
[2024] KEHC 870 (KLR) (Commercial and Tax) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 870 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E416 OF 2022
A MABEYA, J
JANUARY 30, 2024**

BETWEEN

FRONTIER OPTICAL NETWORKS LIMITED PLAINTIFF

AND

**THE CABINET SECRETARY MINISTRY OF ENVIRONMENT AND
FORESTRY 1ST DEFENDANT**

THE HONOURABLE ATTORNEY GENERAL 2ND DEFENDANT

RULING

1. The plaintiff instituted this suit against the defendants vide a plaint dated 26/9/2022 seeking judgment against them for a sum of USD 279,978.34 for financial loss and breach of contract.
2. The defendants filed their statement of defence dated 3/1/2023 and on 29/5/2023, they raised a preliminary objection. The preliminary objection is based on the grounds that the plaintiffs suit is barred by Limitation of time. This was based on section 4(1) of the *Limitation of Actions Act* Cap 22 Laws of Kenya and section 3(2) of the *Public Authorities Limitation Act* Cap 39 Laws of Kenya, respectively. That in the premises, the Court was bereft of any jurisdiction to hear and determine the suit.
3. Parties canvassed the preliminary objection by way of written submissions. It was the defendants' submission that the cause of action had accrued between 2014 and 2017 when the plaintiff raised the invoices. That therefore, the claim for those invoices ought to have been lodged on or before 1/8/2021. That the plaintiffs claim was therefore barred by laches and ought to be struck out.



4. It was submitted that the letters that were allegedly received by the plaintiff were of 7 years ago and therefore could not be relied on. That time for filing the suit could not be extended pursuant to section 27 of the [Limitation of Actions Act](#).
5. The plaintiff submitted that the statement of defence contained facts that would have to be ascertained by the Court. That the pleadings demonstrated that there was dispute with respect to whether the Permanent Secretary acknowledged the plaintiff's debt and the authority of doing so. That the plaintiff had failed to sue earlier since there was a letter by the Permanent secretary which gave a confirmation that a debt was owed and that the parties had entered into good faith negotiations.
6. I have considered the preliminary objection and the submissions. The core issue before the court is whether the suit is time barred.
7. A Preliminary Objection was well defined in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 to consist 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. 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 had to be ascertained or if what is sought is the exercise of judicial discretion.
8. In the present case, the objection is anchored on the [Limitation of Actions Act](#) section 4(1)(a) and section 3(2) of the [Public Authorities Limitation Act](#) Cap 39 Laws of Kenya. These provide as follows: -
 - “4(1) 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) ...”And,
 - 3(2) “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.”
9. The defendants' position is that, the cause of action arose from 2014 to 2017 when the defendants failed to settle the plaintiff's invoice for USD 279,978.34. According to the defendants, the plaintiff ought to have brought up its claim on or before August 2021 and therefore the suit was statute barred. In rebuttal, the plaintiff pleaded that the defendants, through the Permanent Secretary acknowledged the amount owed and had negotiations on how to settle the claim.
10. I have looked at the record, the plaintiff's claim is for breach of contract. It is not in dispute that the plaintiff entered into an agreement with the 1st defendant for the supply, installation and commissioning of a dark fiber cable connectivity on 24/11/2011. The plaintiff raised invoices which ran between 2014 and 2017.
11. The limitation for an action for breach of contract as per the [Limitation of Actions Act](#) is 6years. The Public Limitation Authorities Act on the other hand has set out the limitation at 3 years. Time started to run in 2017. The suit was filed in September, 2022. That is 5 years after the time the cause of action arose.



12. The question is, of the two set of times, 6 and 3 years, which one is applicable. I am aware of the decision in *Telkom Kenya Limited v Kenya Railways Corporation* [2018] eKLR, where the court was of the view that the applicable statute in matters limitation was the *Limitation of Actions Act* as opposed to section 89 of the Kenya Railways Act.
13. The court was of the view that since the *Limitation of Actions Act* was the primary statute on matters of limitation and sought to expand access to court and, therefore justice, the same should be the one applicable rather than section 89 of the Kenya Railway Act which provided for a shorter period.
14. Section 42(1) of the *Limitation of Actions Act* excludes the Act from proceedings to which the *Public Authorities Limitation Act* applies. In this regard, the applicable period is the one set out in section 3(2) of the *Public Authorities Limitation Act* Cap 39, Laws of Kenya, that is 3 years.
15. That being the case, the next question is whether there was any acknowledgement of the debt 3 years before September, 2022. Such an acknowledgement should have been made after September, 2019. Although the plaintiff indicated that there had been acknowledgement of the debt, no such acknowledgement was referred to or produced that was made by any of the defendants after September, 2019.
16. The other issue was the plaintiff's contention that the matters set out in the defence requires to be ascertained at the trial. With due respect, that may be so but the objection was purely on law. That, the suit was lodged out of time.
17. In view of the foregoing, I find that the preliminary objection is meritorious and I uphold the same. Accordingly, the suit is hereby struck out with costs to the defendants.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY, 2024.

A. MABEYA, FCI Arb

JUDGE

