



KCB Group Kenya Ltd v Gillys Security & Investigations Ltd & 2 others (Commercial Case E046 of 2023) [2024] KEHC 2276 (KLR) (Commercial and Tax) (23 February 2024) (Ruling)

Neutral citation: [2024] KEHC 2276 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E046 OF 2023
MN MWANGI, J
FEBRUARY 23, 2024**

BETWEEN

KCB GROUP KENYA LTD APPLICANT

AND

GILLYS SECURITY & INVESTIGATIONS LTD 1ST DEFENDANT

JOHN WALTER OWINO 2ND DEFENDANT

BEATRICE AKINYI MBOYA 3RD DEFENDANT

RULING

1. The 1st defendant/applicant filed Notice of Motion dated 19th September, 2023 under the provisions of Order 2 Rule 15(1)(b) and(d) of the *Civil Procedure Rules, 2010* seeking the following orders-
 - i. That this Honourable Court be pleased to strike out the plaint herein for being scandalous, frivolous, vexatious and otherwise an abuse of the Court process.
 - ii. That the costs of this application and the suit be granted to the defendants.
2. In the grounds in support of the application, the 1st defendant states that the cause of action herein arose in January 2016, while the suit was filed on 27th January, 2023. That the suit was filed outside the six (6) year limit for actions base on contract and therefore the cause of action is time barred under Section 4(1) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya. The 1st defendant claims that in effect, the suit is scandalous, frivolous and vexations and otherwise an abuse of the Court process.
3. The application is supported by the affidavit of John Walter Owino, the 2nd defendant herein, who is a director of the 1st defendant.



4. In the said affidavit, the deponent averred that the 1st defendant was a customer of the plaintiff and it maintained a loan account and a current account with the plaintiff. That the plaintiff filed suit on 27th January, 2023 against the defendants alleging breach of contractual obligations, claiming a sum of Kshs 82,282,005.41 owed to it. The applicant averred that the contractual obligations being referred to date as far back as the year 2016. The applicant deposed that the limitation of actions is clear on the rue that actions founded on contract may not be brought after the end of six (6) years from the date when the cause of action accrued, but the suit was filed out of time without leave of the Court. The applicant prays for the suit to be struck out for being time barred.
5. On 8th November, 2023 the plaintiff/respondent filed a replying affidavit sworn on 14th October, 2023 by Andrew Warui, its Branch Manager at Prestige Branch. He stated that the applicant's Notice of Motion dated 19th September, 2023, raises no justifiable reason for striking out the plaintiff's plaint dated 27th January, 2023 but only seeks to waste judicial time in dispensing with the suit. The plaintiff contended that the present application is akin to a Notice of Preliminary Objection previously filed by the applicant which was withdrawn per a Notice of Withdrawal dated 9th August, 2023.
6. The plaintiff gave a brief background on what gave rise to this suit, being that the plaintiff and applicant had a banker-customer relationship and that in January, 2016, the applicant overdrew monies against uncleared effects in the total sum of Kshs 81,119,201.74. That the 2nd and 3rd defendants, being directors of the 1st applicant made an application to the plaintiff to convert the overdraft to an unsecured term loan, which culminated into a letter of offer dated 22nd February, 2016 that was executed by the 2nd and 3rd defendants.
7. That in the said letter, it was agreed that the applicant would pay the uncleared effects of Kshs 81,119,201.74 together with interest of Kshs 7,139,224.00 to discharge the applicant from the debt owed to the plaintiff. It was deposed that the loan became non-performing and on two occasions subsequent thereto, the defendants approached the plaintiff to restructure the loan vide letters dated 21st July, 2017 and 7th March, 2019, and the plaintiff acceded to the defendant's request for restructuring. It was averred by the plaintiff that as per the restructuring of 7th March, 2019, parties agreed that the outstanding amount of Kshs.95,658,048.00 would be written down to Kshs.70,200,000/- payable in instalments of Kshs.450,000/- per month for the first 8 month, and Kshs.640,000/- per month for the subsequent 8 months at 0% interest rate from the date of the restructure.
8. That despite the restructure accommodation in the year 2019, the applicant only made part payment and thereafter abandoned, failed and/or neglected the duty to repay the loan owed to the plaintiff.
9. It was stated that the outstanding loan amount of Kshs.84,282,005.41 became due and owing, when the applicant failed to honour the terms of the restructure letter and the agreement dated 7th March, 2019. The plaintiff asserted that the statutory timelines to file suit begun to run at the point of default upon the restructuring of the loan in the year 2019 and that the plaintiff can only be deemed to be time barred in the year 2025.

Analysis and Determination

10. This Court has considered the application, the depositions made and the submissions made in support and against the application. The issue for determination is if the suit between the parties herein is time barred and if it should be struck out.
11. In its written submissions dated 15th December, 2023 filed by the law firm of Odero and Partners Advocates, it was submitted that the plaintiff filed suit herein as against the defendants alleging breach



- of contractual obligations, and claim the sum of Kshs 84,282,005.41 owed to them for contractual obligations referred to the point as going back to the year 2016.
12. The applicant’s Counsel contended that the suit herein was filed out of time without leave of the Court as no suit founded on contract can be brought after the end of six years from the date on which the cause of action accrued, hence the suit was time barred by virtue of Section 4(1)(a) of the Limitation of Actions Act.
 13. Counsel for the applicant relied on several authorities to support his position. Some of the authorities are the case of Gathoni v Kenya Co-operative Creameries Ltd [1982] KLR and Iga v Makerere University [1972] EA P. 62. Counsel cited the decisions in Naeku and 2 others v Narok & 2 others [2023] KEELC 17778 (KLR) and Bosire Ongero v Royal Media Services [2015] eKLR for the proposition that the question of limitation Actions touches on the jurisdiction of a Court.
 14. The plaintiff’s Counsel in written submissions dated 18th December, 2023 argued that its right to sue could only arise in terms of Section 4(1)(a) of the Limitation of Actions, and in this instance it accrued when the applicant failed to honour the terms of the loan agreement dated 22nd February, 2026, after making payments till 2017 when it sought to restructure the loan, which was again restructured in the year 2019. Ms Munga, learned Counsel for the plaintiff cited the case of South Nyanza Sugar Company Limited in Dickson Aoro Owuor [2017] eKLR and Attorney General and another v Andrew Maina Gitbinji and another [2010] eKLR to illustrate when a cause of action is deemed to arise.
 15. The plaintiff contended that the plaintiff’s cause of action accrued on 7th April, 2019, and there was no dispute that the original contract between the parties herein was entered into on 22nd January, 2016 with a clear payment plan being given to the applicant. That the said applicant however defaulted in making good the payments, and the term loan was restructured on 21st July, 2017 and subsequently on 7th March, 2019. Counsel argued that each restructuring led to variation of repayment terms of the previous loan agreement, and that with restructuring of the loan, new legal obligations were created between the parties with the requirement for the applicant to make monthly payments as agreed with the plaintiff.
 16. Section 23(3) of the Limitation of Actions Act states as follows-

“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 therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment” (emphasis added).
 17. This Court has gone through two letters addressed to the applicant by the plaintiff in which the latter agreed to restructure the loan. The applicant wrote to the plaintiff requesting for restructuring of the loan because it acknowledged that it owed the plaintiff the amounts being demanded but it had been unable to remit the monthly repayments as agreed.
 18. I am in agreement with the submissions made by the plaintiff’s Counsel that its cause of action arose after the default in payment of the loan as per the restructural agreement of 7th March, 2019. It is incorrect for the applicant’s Counsel to assert that the plaintiff’s cause of action arose in the year 2016 when the initial letter of offer was executed.



19. In the case of *South Nyanza Sugar Company Limited v Dickson Aoro Owuor* (*supra*), the Court held as follows in regard to when a cause of action is deemed to have arisen: -

“(17) 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”.

20. Like the Court in the above case, the cause of action herein arose when the applicant defaulted in making its monthly repayments to the plaintiff after restructuring of the loan in the year 2019.

21. The plaint in this case was filed on 27th January, 2023. That is a period of about 4 years since the loan was restructured and it renders the claim to be within the statutory timelines of 6 ears for claims based on contract.

22. All in all, this Court’s finding is that the application herein is misconceived and is aimed at the applicant looking for a way to circumvent the course of justice and/or looking for a shortcut to having the suit herein not seeing the light of day in Court.

23. The application dated 19th September, 2023 is dismissed with costs to the plaintiff. It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF FEBRUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Chepkemoi h/b for Mr. Odero for the 1st defendant/applicant

Ms Munga for the plaintiff/respondent

Ms B. Wokabi – Court Assistant.

