



Mint East Africa Ltd v Kenya Power & Lighting Company PLC (Commercial Case e157 of 2022) [2024] KEHC 2270 (KLR) (Commercial and Tax) (23 February 2024) (Ruling)

Neutral citation: [2024] KEHC 2270 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E157 OF 2022
MN MWANGI, J
FEBRUARY 23, 2024**

BETWEEN

MINT EAST AFRICA LTD PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY PLC DEFENDANT

RULING

1. For determination is the plaintiff's Notice of Motion application dated 31/10/2022 seeking leave to amend its plaint dated 10/5/2022 and the defendant's Preliminary Objection (PO) dated 16/6/2022 seeking to have this suit dismissed for lack of jurisdiction on account of being statute barred. This Court will first and foremost determine the PO as it has the potential of disposing of the main suit.
2. In the PO, the defendant pleaded that the instant suit is a non-starter and bad in law as this Court lacks jurisdiction to entertain the suit as the plaintiff's cause of action is founded on a contract and is barred by effluxion of time by dint of Section 4 (1) of the *Limitation of Actions Act*, Cap 22 and Section 3(2) of the *Public Authorities Limitation Act*, Cap 39. Based on the foregoing the defendant argued that the plaintiff has no cause of action against it and prayed to have these proceedings dismissed with costs being awarded to it.
3. Both parties herein filed written submissions in support of and in opposition to the subject PO. The defendant submitted that the suit was lodged on 12/5/2022 yet the alleged act or default complained of took place on 14/7/2009 when the plaintiff issued a demand notice to the defendant.
4. The defendant submitted that more than 12 years had lapsed, which is beyond the time stipulated in the *Limitation of Actions Act*, therefore the plaintiff is indolent and guilty of laches.



5. On the other hand, the plaintiff submitted that the defendant in various letters and minutes acknowledged its debt which reset the statute of limitation and gave rise to a fresh accrual of rights and/or cause of action. That the defendant requested the plaintiff to hold its claim in abeyance owing to ongoing investigations, which resulted in the prosecution of the plaintiff's director, therefore time for the purpose of the statute of limitations stopped running during the duration of the criminal trial.
6. It was the plaintiff's submission that since the defendant requested it to hold its claim in abeyance, it induced it not to pursue the claim within the required period. Further, that its suit cannot be summarily rejected at this preliminary stage as it pleaded fraud in its plaint and particularized the elements of fraud in the amended plaint.

Analysis & Determination.

7. The suit herein revolves around a contract entered into between the parties in the year 2008. The plaintiff alleged that the defendant was in breach of its terms. Vide a demand letter dated 14/7/2009, the plaintiff demanded settlement of the outstanding sums of money owed to it from the defendant. The defendant responded with a letter dated 12/8/2009 and requested the plaintiff to hold its demand in abeyance in order to enable it to carry out investigations into the complaints raised. The aforementioned letters are found on pages 95-97 of the plaintiff's bundle of documents.
8. A criminal case ensued against the plaintiff's director which was concluded when the Court found that he had no case to answer and acquitted him. The plaintiff then wrote another demand letter dated 29/6/2021 to the defendant.
9. In response to the demand, the defendant wrote to the Directorate of Criminal Investigations vide a letter dated 23/8/2021. In the letter, the defendant acknowledged receiving the plaintiff's demand letter and requested for access/return of its original files pertaining to the criminal case to enable it to advance a cogent response.
10. This Court notes that in both the letters dated 12/8/2009 and 23/8/2021, the defendant did not dispute nor deny the plaintiff's claim. In the first letter the defendant only requested the plaintiff to hold its claim in abeyance, whereas in the second letter, the defendant requested for a return of the original file from the DCI pertaining to the criminal case to enable it to respond to the plaintiff's demand.
11. The defendant in the letter of 23/8/2021 to the DCI, acknowledged receipt of the demand notice from the plaintiff and did not deny being indebted to the plaintiff. I am inclined to perceive this as an acknowledgement of debt. This inclination is buttressed by the fact that the defendant had earlier requested the plaintiff to hold its claim in abeyance pending investigations, without denial of indebtedness. Further the record shows minutes recorded during the defendant's meetings whereby it was acknowledged that payment ought to be made to the plaintiff for the delivery of the poles to it.
12. Section 23(3) of the *Limitation of Action 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”.
13. The defendant's letter of 23/8/2021 amounted to an acknowledgement and therefore there was a fresh accrual of a right/cause of action from that date. The plaintiff's suit is therefore not time barred as stipulated in the *Limitation of Actions Act*.



14. The second issue for determination is whether the plaintiff should be granted leave to amend its plaint.
15. The plaintiff prayed for leave to amend its plaint as it would be necessary to determine the real questions in controversy in this matter. The plaintiff asserted that it is necessary to amend its plaint in order to plead critical facts including elements of fraud by the defendant which led to the breach of contract, the subject of this suit. The defendant did not oppose the said prayer for amendment of the plaint.
16. This Court notes that in the amended plaint (annexed to the subject application) the plaintiff seeks to amend paragraph 23 of the plaint to include particulars of fraud which it had already pleaded in the original plaint.
17. Under Order 8, rule 3(1) of the *Civil Procedure Rules*, the Court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just, allow any party to amend his pleadings.
18. In this case, it would be just to allow the amendment to the plaint in order for the Court to determine the real issues in controversy for determination in this matter. The Court therefore grants leave to the plaintiff to amend its plaint within 21 days of this ruling. The defendant is given corresponding leave to amend its statement of defence, if need be. Each party shall bear its own costs.

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:

Mr. Shammah h/b for Mr. Ng'ang'a for the plaintiff/applicant

Mr. Maanzo h/b for Mr. Ododa for the defendant/respondent

Ms B. Wokabi – Court Assistant.

