



REPUBLIC OF KENYA



**KENYA LAW**  
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**Arungu v SBM Bank (Kenya) Limited (Civil Case E498 of 2022)  
[2025] KEHC 1807 (KLR) (Commercial and Tax) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1807 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E498 OF 2022  
F GIKONYO, J  
FEBRUARY 13, 2025**

**BETWEEN**

**SHEM ERIC ARIWI ARUNGU ..... PLAINTIFF**

**AND**

**SBM BANK (KENYA) LIMITED ..... DEFENDANT**

**RULING**

**Limitation of time: action against transferee of business**

1. This Ruling determines the Defendant's Preliminary Objection (PO) dated 20<sup>th</sup> May 2024 which is seeking the court to strike out the Plaintiff's suit on the following grounds: -
  1. The Court lacks jurisdiction to hear and determine the Plaintiff's suit on the basis of Section 8 of the *Transfer of Businesses Act*.
  2. The Plaintiff's suit is an abuse of the Court process.
2. The PO was canvassed through the Defendant's written submissions dated 12<sup>th</sup> July 2024. There were no submissions filed by the Plaintiff despite the Court's directions of 15<sup>th</sup> July 2024 and 7<sup>th</sup> November 2024.

**Analysis and Determination**

**Nature of the PO**

3. The PO challenges the court's jurisdiction on the basis of limitation of actions under Section 8 of the *Transfer of Businesses Act* (hereafter the TBA). Section 8 of the TBA is a limitation of actions clause.



See the short title thereof; ‘Limitation of actions’ as well as its core and purport. The defendant claimed that this suit is time-barred, and should be struck out.

4. A PO must be on a pure point of law, not requiring ascertainment of facts through evidence, and which is capable of decimating the suit. *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Ltd.* [1969] EA 696 that:-

“... 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

5. Limitation of actions has been raised as a jurisdiction regulating incident.
6. Does the PO meet the threshold in the *Mukisa Biscuits* case [ibid]?

### **The context**

7. The point of law being argued as a preliminary objection must, among other things, be one ‘which has been pleaded, or which arises by clear implication out of pleadings’ *Mukisa Biscuits* case (supra)
8. In very clear and express terms, at paragraph 19 of the Statement of Defence; ‘The Defendant admits the jurisdiction of this Honourable court’.
9. Also, hugely significant; at paragraph 12(iv) of the Statement of Defence, the defendant expressly stated that: ‘The Transfer of Business Act (the TBA) did NOT apply to the transaction that is the subject of this suit...’
10. And, the defendant reinforced the position taken in paragraph 12(iv) by re-stating it at paragraph 20(d) of the Statement of Defence.
11. The said Statement of Defence was filed on 15.2.2023.
12. The court has not been shown any amendment to the Statement of Defence.
13. Against this backdrop; the defendant, in a PO dated 20<sup>th</sup> May 2024 -filed subsequent to the Statement of Defence-argued that, by dint of section 8 of the TBA, this suit is time barred and should be struck out.

### **Limitation of actions be specifically pleaded**

14. Be that as it may, limitation of actions as a defence must be specifically pleaded. Order 2 rule 4 of the Civil Procedure Rules.
15. The requirement is founded in sound legal and policy reasons: -(a) the defence, if successful, makes the plaintiff’s case not maintainable; and (b) the defence, if not specifically pleaded, might take the opposite party by surprise.
16. In addition, proof of limitation of actions requires probing of evidence.
17. Making limitation of actions a matter for trial; and which may not be determined in limine.
18. It bears repeating that, there has not been any amendment to the Statement of Defence impleading the defence of limitation of actions.



19. Although it may be argued that, a challenge to the jurisdiction of the court may be raised at any time, in this case, however, application of the TBA to this suit has been denied by the defendant and there is a joinder of issues thereto. These legal imperatives make application of the TBA to this suit a matter for trial. Limitation of actions is provided in section 8 of the said Act; is also a matter or issue for trial.
20. Thus, matters constituting the PO are for trial rather than a summary procedure attending the practice of a Preliminary Objection. Accordingly, the PO will be tried in the trial. As parties had complied with Order 11 of the Civil Procedure Rules, the suit shall be set down for hearing with these issues being given their due prominence during trial.
21. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2025.**

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**F. GIKONYO M**

**JUDGE**

In the presence of: -

1. Mr. Oduk for Mr. Ojwang for the plaintiff
2. Ms Mutisya for Defendant

