



**Willer Technical Agency Company Limited v Board of Management,  
Kaptengewet Secondary School & 2 others (Civil Appeal  
E064 of 2023) [2025] KEHC 47 (KLR) (13 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 47 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL E064 OF 2023  
RL KORIR, J  
JANUARY 13, 2025**

**BETWEEN**

**WILLER TECHNICAL AGENCY COMPANY LIMITED ..... APPELLANT**

**AND**

**THE BOARD OF MANAGEMENT, KAPTENGWET SECONDARY  
SCHOOL ..... 1<sup>ST</sup> RESPONDENT  
PRINCIPAL SECRETARY, MINISTRY OF EDUCATION ..... 2<sup>ND</sup> RESPONDENT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Ruling of Senior Principal Magistrate, Kimtai B. at  
the Senior Principal Magistrate's Court at Sotik, Civil Suit Number E055 of 2023)*

**JUDGMENT**

1. The Appellant (then Plaintiff) sued the Respondents (then Defendants) for breach of contract and for specific performance. The Appellant sought to be paid Kshs 926,521.60/= being the balance of payment for construction of two classroom blocks for the 1st Respondent.
2. The Respondents filed a Preliminary Objection dated 26th July 2023 where they sought to have the suit dismissed as it was time barred by dint of section 3 of the *Public Authorities Limitation Act* and section 4 of the *Limitation of Actions Act*.
3. In a Ruling dated 21st November 2023, the trial court upheld the Preliminary Objection and dismissed the suit.
4. Being aggrieved with the Ruling of the trial court, the Appellant filed its Memorandum of Appeal 13th December 2023 appealing against the Ruling and relied on the following grounds:-



- I. That the learned trial Magistrate erred in law and fact in finding that the Appellant's claim was time barred.
  - II. That the learned trial Magistrate erred in law and fact in failing to consider the pleadings of the Appellant thus arriving at the wrong decision that the suit was time barred.
  - III. That the learned trial Magistrate erred in law and fact in failing to take judicial notice of Gazette Notice No. 13355 dated 29th September 2023 setting up pending Bills Verification Committee and whose mandate went back to June 2022.
  - IV. That the learned trial Magistrate erred in law and fact by failing to take cognizance of the entire circumstances leading to the delay of bringing the suit to court.
  - V. That the learned trial Magistrate erred in law and in fact in failing to take into consideration the acknowledgment of debt by the 1st Respondent vide letter dated 4th October 2018 which in essence extended the limitation period in favour of the Appellant.
  - VI. That the learned trial Magistrate erred in law and fact in failing to analyze the evidence tendered by the Appellant herein.
  - VII. That the learned trial Magistrate erred in law and in fact in failing to take into consideration that the action for relief from the Appellant was as a result of the mistake of the District Works Officer who had not issued a Certificate of Practical Completion.
  - VIII. That the learned trial Magistrate erred in law and in fact in failing to take into account that time started running on 11th November 2021 when the District Works Officer issued the Certificate of Practical Completion.
  - IX. That the learned trial Magistrate erred in law and in fact to have applied wrong provisions of law without taking into consideration the circumstances surrounding the suit and the provisions extending limitation of time that were raised by the Appellant hence rendering the Ruling against the Appellant as erroneous and a proper candidate for setting aside.
5. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions. See *Gitobu Manyara, Njehu Gatabaki & Bedan Mbugua v Attorney General* [2016] KECA 557 (KLR).

#### **The Plaintiff's/Appellant's case.**

6. Through its Complaint dated 27th April 2022, the Appellant stated that the 1st and 2nd Respondents advertised a Contract to construct two classroom blocks at the 1st Respondent's institution for the sum of Kshs 2,612,544.80/=. The Appellant further stated that they won the tender, signed an Agreement on 13th July 2012 and began construction.
7. It was the Appellant's case that they completed the construction within the agreed period and the 1st Respondent occupied and begun using the classrooms. It was their further case that despite finishing the construction of the classrooms, the 1st Respondent did not contact the District Works Officer to inspect the classrooms and issue a Certificate of Practical Completion.
8. The Appellant stated that they were paid Kshs 1,503,416/= and a balance of Kshs 926,521.60/= remained. That the Appellant sought to have the balance paid by making several visits, making calls and writing e-mails to the 2nd Respondent to follow up on the payment of the balance to no avail. They further stated that they were shocked when they received a letter from the 2nd Respondent dated



25th January 2022 which stated that the Ministry of Education could not pay their balance as their suit was time barred by dint of the *Limitation of Actions Act*.

9. The Appellant claimed breach of contract and the particulars of the breach of contract were contained in paragraph 21 of the Plaintiff.

### **Preliminary Objection.**

10. In response to the Appellant's suit, the Respondents filed a Preliminary Objection dated 26th July 2023. The Respondents stated that the Appellant's suit was time barred courtesy of the provisions of section 3 of the *Public Authorities Limitation Act* and section 4 of the *Limitation of Actions Act*.
11. As earlier stated, the trial court upheld the Preliminary Objection and dismissed the Appellant's suit.
12. On 10th July 2024, parties took directions to have the Appeal canvassed by way of written submissions.

### **The Appellant's submissions.**

13. Through its submissions dated 12th August 2024, the Appellant submitted that the cause of action arose when the District Works Officer inspected the classrooms and issued the Certificate of Practical Completion on 11th November 2021. That the District Works Officer had delayed inspecting the classrooms and this left the Appellants hamstrung and that the 1st Respondent could not pay the balance before the Appellant obtained the Certificate of Practical Completion. They relied on *South Nyanza Sugar Co. Ltd vs Dickson Aoro Owuor (2017) eKLR*.
14. It was the Appellant's submission that they engaged in good faith with the Respondents and the letter dated 13th August 2018 acknowledged that the Appellant was owed Kshs 1,109,128.80/=. It was their submission that after receiving the Certificate of Practical Completion, they wrote letters to the 2nd Respondent following up on the payment of their balance but the 2nd Respondent stated that they could not pay as the Appellant's claim was time barred. That the Respondents admitted liability and on the same breath, accused the Appellant of indolence.
15. The Appellant asked this court to take judicial notice that the 1st Respondent's facilities were closed in the year 2020 due to the Covid-19 pandemic.
16. It was the Appellant's submission that the Respondents made them believe that they were going to pay the balance and the Respondents were estopped from disowning their past actions and deeds. They relied on section 39 of the *Limitation of Actions Act*.
17. The Appellant submitted that the trial court did not consider its pleadings and was in error when it stated that the Appellant did not reply to the Preliminary Objection. That the Appellant sent his submissions to the trial court through their e-mail address. They further stated that they filed a Notice of Motion Application on 17th November 2023 where they sought to amend their Plaintiff.

### **The Respondent's submissions**

18. Through their submissions dated 24th October 2024, the Respondents submitted that the Appellant's claim was time barred by dint of section 3 of the *Public Authorities Limitation Act* as the cause of action arose in the year 2014 after the purported handing over of the classrooms to the 1st Respondent and 9 years had lapsed since. That the Appellant slept on his right to sue and had not provided any reason why they filed the suit without seeking leave to file the suit out of time. They relied on *Mary Osundwa v Sugar Company Limited [2002] KECA 203 (KLR)*.



19. The Respondents submitted that the Appellant's suit was contractual in nature and the Appellant's assertion that the time limitation was extended due to the 1st Respondent's acknowledgement of debt did not hold water.
20. It was the Respondents' submission that the Appellant handed over the project in the year 2014 which was 2 years after signing the Contract and past the agreed period of performance. It was their further submission that the period of limitation was not based when the Certificate of Practical Completion was issued but when the Contract was executed. That the Appellant was indolent in enforcing his rights. They relied on *Paul K. Langat vs Kenya Defence Forces 9th Battalion & another (2021) eKLR*.
21. The Respondent submitted that the Appellant's claim was also time barred by dint of section 4 of the *Limitation of Actions Act* as the suit ought to have been instituted within a period of 6 years.
22. It was the Respondents' submission that the trial court ruled after considering pleadings before it and that it was the trial court's duty to dispense with the Preliminary Objection first. That the Appellant's assertion that the trial court did not consider its pleadings was an attempt to divert the court's attention. It was their further submission that there was no evidence to indicate that the Appellant filed his pleadings as the documents attached in the Record of Appeal bore no stamps. That the said documents ought to be expunged.
23. The Respondents submitted that the Gazette Notice alluded to by the Appellant could not be used to extend time. That the only way to extend time was clearly spelt out in section 3(2) of the Public Authorities Limitations Act. The Respondents further submitted that the Appellant violated the terms of his contract by not delivering the classrooms within the contractual period of 16 weeks. That had he done so, he would have received full payment.
24. It was the Respondents' submission that the Appeal lacked merit as the Appellant failed to seek leave to file his suit out of time and this court lacked jurisdiction to entertain the same. They relied on *Bosire Ongero vs Royal Media Services (2015) eKLR*.
25. I have gone through and carefully considered the Record of Appeal dated 10th January 2024, the Appellant's written submissions dated 12th August 2024 and the Respondent's written submissions dated 24th October 2024. The sole issue for determination was whether the trial court erred when it upheld the Preliminary Objection dated 26th July 2023.
26. What constitutes a Preliminary Objection was set out in the oft cited case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696*, where it was held 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 the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. 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.” (Emphasis added)
27. The Court of Appeal in *Attorney General & Ministry of State for Immigration & Registrar of Persons v Andrew Maina Githinji & Zachary Mugo Kamunjiga [2016] KECA 817 (KLR)* held:-

“The test to be applied in determining whether the appellants' Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the Mukisa Case (supra).”



That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”

28. Further, the Supreme Court in Independent Electoral & Boundaries Commission v Cheperenger & 2 others [2015] KESC 2 (KLR) held:-

“.....The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.” (Emphasis added)

29. In the present case, the Appellant claimed that he was owed Kshs 926,521.60/= by the Ministry of Education (2nd Respondent). The Respondents on the other hand stated that the Appellant could not be paid as he lodged his claim late and was time barred by virtue of section 3 of the *Public Authorities Limitation Act* and section 4 of the *Limitation of Actions Act*.

30. Having gone through the Preliminary Objection dated 26th July 2023, it is my finding that it did not meet the threshold of a Preliminary Objection as described by the authorities above. I say so because for one to determine whether the Appellant’s claim was time barred, one had to determine when the cause of action arose i.e. this being a contractual matter, one had to determine when the contract was breached. This could only be done in the trial court through production of documents and the said documents to be subjected to examination. In essence, these are facts that needed to be proved.

31. I must note that both parties erroneously submitted on the substance of the suit in this Appeal. As earlier stated, this court was only limited to determine whether the trial court was in error when it upheld the Preliminary Objection dated 26th July 2023 and it will not delve into the substratum of the matter as that was the province of the trial court.

32. Flowing from the above, it is my finding that the trial court erred when it upheld the Preliminary Objection dated 26th July 2023. Whereas the plea of limitation was a pure point of law, the parties’ pleadings demonstrated that there were facts pertaining to the Contract in question that had to be ascertained before a definitive finding on limitation could be made. It was also evident to me that what the parties pleaded called for a trial.

33. In the end, the Appeal dated 13th December 2023 succeeds. The Ruling dated 21st November 2023 by Senior Principal Magistrate, B.M Kimutai is set aside. The matter is remitted back to the Magistrate’s Court, Sotik for trial by a magistrate other than Hon. Kimtai in accordance with the procedural and substantive law.

Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED THIS 13<sup>TH</sup> DAY OF JANUARY, 2025.**

**R. LAGAT-KORIR**

**JUDGE**

Judgement delivered in the presence of Mr. Kipkirui for the Appellant, Ms. Chepkemai for the Respondents and Siele (Court Assistant).

