Case Number:	Civil Case 621 of 2016
Date Delivered:	02 Feb 2018
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Judgment
Judge:	Onguto Joseph Louis Omondi
Citation:	Telkom Kenya Limited v Kenya Railways Corporation [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Commercial Tax & Admiralty
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Judgment for entered for the Plaintiff
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL AND TAX DIVISION AT NAIROBI

CIVIL CASE NO.621 OF 2016

TELKOM KENYA LIMITED ……PLAINTIFF

Versus

KENYA RAILWAYS CORPORATION ……..……DEFENDANT

JUDGMENT

Introduction

1. In this action, the Plaintiff seeks judgment against the Defendant in the sum of Kshs. 217,100,360.92 together with interest thereon at the court rate of 14% per annum from 15 October 2013. The claim is made on the footing of services allegedly rendered to the Defendant by the Plaintiff.

2. The Plaintiff is a limited liability company incorporated in accordance with the laws of Kenya. The Defendant on the other hand is a state corporation, constituted under the Kenya Railways Corporation Act (Cap 397) Laws of Kenya. The Plaintiff's core business is the provision of telecommunication services while the Defendant's main business is the provision in Kenya of rail and inland waterways transport services for both passengers and goods.

3. The Plaintiff is also the successor in title of the undertakings of the now defunct Kenya Posts and Telecommunication Corporation ("KPTC") while the Defendant is the successor in title of the undertakings of the also now defunct East African Railways Corporation.

4. I shall refer to the Plaintiff and the Defendant simply as "Telkom" and "KRC" respectively.

The Claim

5. Telkom claims that as an operator of landline Public Switched Telephone Network (PSTN), it provided voice-oriented and data oriented telecommunication services to KRC from late 1980s through 2007. Telkom contends that the value of the PSTN voice services aggregated more than Kshs. 128,458,420.31 while data services for the period in question grossed more than Kshs. 88,641,940.00. For all the services, Telkom billed and invoiced KRC.

6. At all material times KRC is stated to have accepted that it is liable for the principal sum claimed but has, in breach of its contractual obligations as well as its acceptance and promise to pay, failed to pay the sum claimed. Telkom insists that a meeting held between Telkom and KRC in 2013 settled the issue of the amount due to Telkom. Further, Telkom claims that KRC acknowledged the debt in 2014 as well as in 2015 and made a promise to pay.

The Defence

7. KRC has resisted the claim on various fronts.

8. The claim is stated to have been caught up with the statutory limitation of action. KRC also denies that Telkom supplied KRC with both PSTN and Data services in the alleged value or at all. KRC finally denies that it acknowledged or admitted any indebtedness to Telkom. Alternatively, it is KRC's plea that the acknowledgments, if any, do not bind KRC as they were not made under the common seal of KRC or by a person authorized by KRC's board of directors to act on behalf of KRC.

The course of proceedings

9. The proceedings were not issued until 2015. The claim and voluminous documentation relate to periods even prior to 2000, giving rise to the limitation defence.

10. With the witness proof of evidence (witness statements and documents) filed and admitted, the trial took place on 30 March 2017. Further hearing, of the defence case, took place on 31 July 2017. Mr. Martin Munyu assisted by Ms. Weru represented Telkom while Mr. Geoffrey Nyaanga appeared for KRC.

The evidence

11. Only one witness Evelyn Nyaboke Nyaata (PW1) testified on behalf of Telkom. KRC also called one witness.

PW1 testifies

12. An employee of Telkom, PW1 largely adopted her witness statement filed on 10 December 2015 together with the bundle of documentary evidence.

13. PW1's testimony was that Telkom had at KRC's request supplied the latter with PSTN voice and Data services over the years but for which services KRC had failed to pay. PW1 further testified that after several months of negotiations and reconciliation of the accounts, KRC acknowledged its indebtedness to the level of Kshs. 217,100,360.92 in October 2013. However, that follow ups for payments did not bear any fruit until November 2014 when KRC wrote to Telkom seeking to make a part-payment of Kshs. 58,519,128.41. PW1 added that KRC then asked for the bills and even after all the bills were supplied in February 2015 and followed up with meetings, the payments were still not made.

14. In cross-examination, PW1 testified that the bills were always supplied monthly and that the claim related to services rendered between the late 1980s and November 2006. Ms Nyaata further testified that bills prior to the year 2000 were issued by KPTC, which was Telkom's predecessor in title. Ms. Nyaata also pointed out that Telkom never retained any hard copies of the bills sent to its many customers who included KRC and only relied on the system to reprint bills where necessary.

15. On the meetings, it was Ms. Nyaata's testimony that several meetings had been held prior to October 2013 with a view to amicably agreeing on the claim. The meetings culminated in the one of 15 October 2013 where an agreement was struck. The meetings, according to Ms. Nyaata, were always held within KRC's premises. Ms.Nyaata was familiar with the KRC officers who consistently attended the meetings. She identified them as George Muia-head of ICT and Patrick Ndegwa- head of finance.

16. In answer to a question by Mr. Nyaanga as to whether the rest of KRC's management was also involved, Ms. Nyaata answered in the affirmative. She confirmed that KRC's then acting chief executive officer one Mr. Matheka was always involved.

17. In the brief re-examination session by Mr. Munyu, PW1 reiterated that KRC had never denied that there was an agreement to supply services and further that even the current head of KRC's management; that is to say the managing director, had acknowledged that he was aware of the debt.

18. The documents discovered and presented by Telkom in evidence ran about 495 pages. A good chunk - upwards of 470 pages – was mostly bills and invoices, which were not objected to but only contested on the ground that some of the bills were not on the letterheads and had been raised by Telkom rather than its predecessor KPTC. One particular letter dated 19 November 2014 purportedly signed on behalf of the managing director of Telkom was specifically contested and dubbed a forgery. I will return to the documents shortly.

19. I found Ms. Nyaata to be clear and honest in her testimony which was void of any contradictions or inconsistency. Her recollection of the events and meetings was with ease. Her answers to questions both during the examination in chief and cross-examination were not guarded thus exhibiting, in my view, the mark of a reliable witness. I found no reason not to rely on her testimony.

KRC's story

20. The sole witness called by KRC was Mr. Athanas Kariuki Maina. He is the managing director of KRC. He filed a detailed witness statement on 10 February 2017 and for purposes of his evidence-in-chief, he simply adopted the statement.

21. The testimony of Mr. Maina, in short, was as follows.

22. There was no agreement between KRC and Telkom for the supply of the PSTN and Data services and that Mr. Maina had not seen any agreement. KRC is a statutory body and is required to make all agreements intended to bind it, under its common seal as provided for under the Kenya Railways Corporation Act (Cap 397) ("the KRC Act"). Mr. Maina denied that KRC or its board of directors had mandated any agent to deal with Telkom and bind KRC through a settlement agreement. Mr. Maina also denied that he had authorized any person to sign a letter on his behalf committing KRC to paying a debt to Telkom.

23. Mr. Maina termed the alleged settlement agreement and letter of admission dated 15 October 2013 and 19 November 2014 respectively as "*not valid to bind the corporation in any manner*". He concluded his evidence by also dismissing the invoices and bills presented by Telkom as "*merely computer generates*" before dismissing the claim as a" *hopelessly time-barred*" claim.

24. During his cross-examination, Mr. Maina insisted that any agreement to bind KRC should have been laid before the KRC top management and then sealed. He however admitted that the alleged settlement agreement had been signed by two managers of KRC and further that for routine letters to be genuine and authentic, they do not require the KRC board's approval or the KRC seal. Mr. Maina also confirmed that KRC had asked Telkom to avail the bills and further that there had been "*lots of discussion*". Again, Mr. Maina insisted that the letter of 19 November 2014 was a forgery but quickly added that he had not launched any investigations into the alleged forgery.

25. In a brief re-examination session, Mr. Maina confirmed that the two individuals who signed the minutes of the 15 October 2013 meeting were still employees of KRC. Mr. Maina also pointed out that, according to him, the bills and invoices produced in support of Telkom's claim were " *not issued in the normal course of business*" as they did not bear the letterheads of the service provider.

26. Again, I found Mr. Maina to be candid and clear in his testimony. He was guarded (not evasive, but rather impatient to detail) in answering questions during cross-examination. I however understood his guarded nature in the context of his association with KRC. He had worked as an employee of KRC since 2004. He then quit his employ in 2011 only to return in 2014 as the chief executive of KRC. In short, he was absent when Telkom turned the heat on KRC between 2012 and 2013.

Discussion and determination

Issues

27. From the pleadings as well as the evidentiary hearing and the final submissions made by counsel, the following issues developed:

27.1. Is the claim validly before the court"

27.2. Did Telkom provide PSTN and Data services to KRC"

27.3. Was there an agreement by KRC acknowledging a debt in theSum of Kshs. 217,100,360.92 and, if so, whether the agreement is binding on KRC"

27.4. Did KRC agree, admit and bind itself to pay to Telkom the amount of Kshs. 58,519,128.41"

27.5. What relief(s), if any, is Telkom entitled to"

27.6. Who bears the costs of the suit"

28. As will be apparent, I have sort of (at the risk of some awkwardness) reorganized the sequence and structure of the issues that I have dealt with. I have sought though to answer all the issues

Analysis

29. For starters, the documentary evidence which ran nearly 500 pages and which Telkom discovered in evidence may not be said to be far from complete. The evidence disclosed that there was a significant amount of communication through written correspondence and meetings between Telkom and KRC. To its credit, Telkom does not appear to have retained any relevant correspondence or documentation. I hasten to add that the evidence, both oral and documented revealed that there were dealings between the parties and or between Telkom’s predecessor and KRC.

Dealings between the parties

30. I turn first to look at the evidence of the dealings between the parties in more detail.

31. Telkom contended that it supplied PSTN and Data telecommunication services (“ the Services”) to KRC. KRC in its defence statement as well as the evidence (both oral and through the witness statement) contended that there was no agreement for the supply of the Services. DW1 expressly stated that he had not sighted any agreement to like effect.

32. I did not understand Telkom’s claim to be based on any written agreement. Besides, an agreement for the supply of services need not be formal and in writing for obligations to arise on either party. That a contract for the supply of services may be made in writing or by word of mouth or may be implied by the

conduct of the parties, should not be doubted. In my judgment as well, it can not be doubted that if services have been rendered to and appropriated by a party, he must pay a reasonable price for them if there was no express agreement on a price.

33. Telkom gave evidence of the Services having been rendered. Telkom also gave evidence of meetings held by the parties to agree on the amount ultimately payable for the Services rendered to and appropriated by KRC. The documents indicate expressly that KRC benefited from the Services as contended by Telkom. The evidence as well as the documents also reveal bills and invoices being sought and exchanged.

34. This, in my judgment, is conduct consistent with the existence of an agreement to supply services and indeed the post-supply of services when the parties are then in the process of discussing the quantum of both services and price payable.

35. As I listened to DW1 and also read the defence advanced by KRC, it became clear to me that the important point for KRC was not whether the services were supplied but whether the supply was to be fetched to Telkom and also whether the claim was time-barred. This position is also evident in DW1's testimony and the closing submissions by Mr. Nyaanga that services billed in 1980s and 1990s were prior to Telkom's existence.

36. I therefore now turn to the first issue as to the validity of the claim and these proceedings.

Validity of claim and proceedings

37. The exception taken by KRC to the validity of the claim, its particulars and these proceedings is twofold.

38. First, KRC takes exception to the claim by Telkom on the ground that the cause of action, if any, does not vest in Telkom. Secondly, it is submitted that even if the cause of action vests in Telkom, the action was commenced outside the limitation period and thus cannot be sustained.

39. It is common ground that until 1999, the provision of the telecommunication services underlying the claim herein was exclusively by the KPTC. It is also not in controversy that Telkom was incorporated under the Companies Act (Cap 486) (now repealed) and that the incorporation was pursuant to the provisions of the Kenya Information and Communications Act No 2 of 1998 (" the KICA").

40. Section 5(1) of the Third Schedule to the KICA provided for the transfer of assets and liabilities to, among other entities, Telkom through a gazette notice issued by the Minister for Finance. The assets and liabilities to be transferred to Telkom were only those relating to telecommunication services. The assets and liabilities relating to telecommunication services were not to be transferred to any other entity.

41. It cannot be disputed and this court is entitled , pursuant to *ss.* 59 and 85 of the Evidence Act (Cap 80), to take judicial notice of the fact that the Minister for Finance on 24 February 2014 published two Kenya Gazette Supplements No 59A and 59B to transfer the assets and liabilities of KPTC relating to telecommunication services to Telkom.

42. I take judicial notice of this fact. It was also common cause between the parties. In the result, I find that Telkom had the requisite standing as the successor in title to KPTC on telecommunication services to lay claim to and seek relief on the outstanding payments.

The limitation issue

43. Under *s.*4(1) of the Limitation of Actions Act (Cap 22), the limitation period for actions founded on contract is six years. KRC however contends and submits that the limitation period in the instant case was one year. In this regard, KRC relies on *s.*87(b) of the Kenya Railways Corporation Act (Cap 397).

44. So far as is relevant, *s.*87 of the Kenya Railways Corporation Act (Cap 397) provides as follows:

87. Limitation

Where any action or other legal proceeding commenced against the corporation for <u>any act done in pursuance or execution or intended execution, of this Act or of any public duty or authority</u>, the following provisions shall have effect

(a) …

(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage within six months next after cessation thereof.

45. While Telkom's take is that its claim could only be time barred after the lapse of six years, KRC insists that it is one year. To buttress its contention KRC made reference to *s.*31 of the Limitation of Actions Act which alludes to limitation period as may be provided by any other written law.

46. Besides the contractual aspect of the claim, Telkom relies on a series of agreements, signed minutes of meetings and a letter allegedly signed by KRC as "acknowledgments" falling under and within *s.*23 of the Limitation of Actions Act to stake its claim and submit that the claim is not barred. The last of the acknowledgments is said to have been made on and dated 24 February 2015. If I was to confirm this as an acknowledgment it would bring the claim within time, whether the applicable limitation period is that provided for under *s.*4(1) of the Limitations of Actions Act or under *s.*87 of the Kenya Railways Corporation Act.

47. I will shortly discuss "acknowledgments" in the context of limitation of actions. The issue now is whether the operative provision for purposes of limitation is the former statute or the latter.

48. In reviewing the limitation of actions provisions in both statutes, I am conscious of the fact that limitation statutes limit the right of access to court and thus justice. Such statutory provisions must thus be given meanings which do not intend to avoid the right of access to justice or to court. It ought to be a construction which seeks to promote the right, even as I a aware that the same statutory provisions seek to promote and preserve the quality of adjudication by requiring actions to be instituted without delay.

49. The Limitation of Actions Act which was enacted in 1967 is the statute which provides generally for periods of limitations for actions in tort, contract and other actions. The Kenya Railways Corporation Act as enacted in 1978, at *s.*87 specifically provides for limitation period for specific actions taken against KRC. My reading of *s.*87 reveals that it governs actions commenced under the said statute. The section , in my view, relates to duties provided, undertaken or executed by KRC specifically under the Kenya Railways Corporation Act even if it involves third parties. Such duties and undertakings will ordinarily involve contracts for carriage of goods and passengers, contracts for storages of goods and for railway concessions.

50. In my judgment, *s.*87 of the Kenya Railways Corporation Act was not intended by the legislature to amend *s.*4(1) of the Limitation of Actions Act, which still enjoys primary effect over other written limitation laws unless expressly stated or provided otherwise in such written law.

51. In my view too, *s.*87 was inserted by the legislature to protect the very nature of the core business of KRC; the transportation and carriage of both passenger and goods. This must have been the legislative intent and interest there being no rational relation with matters outside the scope of the Kenya Railways Corporation Act.

52. Evidence as to the dealings between the parties including as between KRC and Telkom's predecessor KPTC was to the effect that the services supplied were to be billed and paid monthly. The services supplied and the obligation on the part of KRC to pay for the appropriated services were not, in my view, acts done in pursuance or execution of the duties of KRC under the Kenya Railways Corporation Act or in pursuance of a public duty or authority.

53. I conclude that the operative provision of the law for purposes of the limitation period was *s.*4 of the Limitation of Actions Act. The claims would be barred by statute upon expiry of six years from the time Telkom or its predecessor was entitled to obtain a remedy from the court against KRC for any non-payment.

54. The right of action on some or part of the claim accrued variously in 1980s, 1990s and 2000s. Indeed, PW1 testified that the Services concerned ran till late 2006. The proceedings were however not issued until 10 December 2015 effectively leading to a bar. The relevant limitation period is six years from the date when the right of action accrued, it not being suggested that KRC was guilty of fraud or that Telkom was under some ignorance of material facts,in which case no limitation period would have applied.

55. As already alluded to above, at [46], Telkom relies on acknowledgments made by KRC to revive the action.

56. By *s.* 23 of the Limitation of Actions Act :

"(3) where a right of action has accrued to recover a debt or other liquidated pecuniary claim…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 acknowledgment or the last payment…"

57. To qualify as an acknowledgment for the purposes of *s.*23(3) of the Limitation of Actions Act, *s.*24 requires that it-

" *must be in writing and signed by the person making it*".

58. The Act does not however provide whether the period of limitation may be repeatedly extended under *s.*23 by further acknowledgments. The Act does not also expressly provide whether a right of action once barred may be revived by any subsequent acknowledgments, as in the instant case where the alleged acknowledgments were made after the limitation period had lapsed.

59. In both **Laemthong Rice Co. Ltd *v* Principal Secretary Ministry of Finance [2002] 1 EA 119** and **Shire *v* Thabiti Finance Co. Ltd [2002] 1 EA 279**, the appellate courts of both Tanzania and Kenya respectively addressed the issue of revival of a cause of action post the limitation period. Both courts

held that an acknowledgment of debt made after the expiry of the limitation period gave rise to a fresh period of limitation.

60. The court in ***Shire*** (supra) was more explicit. The court held that an acknowledgment under *s.*23 resulted in not only the accrual of a fresh action which meant the revival of an otherwise statutorily barred claim but also the extension of limitation period where the acknowledgment was made prior to expiry of the limitation period. The court in citing, with approval, the English case of **Bush *v* Stevens [1963] 1 Q B 1** quoted Lawson J as follows:

" It seems to me as a matter of syntax the right which shall be deemed to have accrued is a right of action to recover any debt or any other liquidated pecuniary claim. The subsection does not change the nature of the right; it provides that in specific circumstances of an acknowledgment or payment, the right shall be given a notional birthday and on that day, like the Phoenix of fable, it arises again in renewed youth and also like the Phoenix, it is still itself"

61. The decision in ***Shire* (supra)** is binding upon this court. I am also convinced with the reasoning and would agree with it wholly. An acknowledgment in the absence of a contrary provision in the statute gives an already barred action a new birthday. The action is revived *de novo*. The acknowledgment need not be made when the time is running. It may be made after expiry of time and will still suit the purposes of *s.*23 of the Limitation of Actions Act.

62. I turn then to the issue as to whether the "acknowledgments" relied on by Telkom are indeed acknowledgments for the purpose of *s.*23 of the Limitation of Actions Act (Cap 22).

63. As already indicated, to qualify as an acknowledgment under *s.*23, *s.*24 requires that it be in writing and signed by the person making it. There is no prescribed format to be taken by the acknowledgment. It may be a letter. It may be a note. It may be an agreement. It may even be, as was held in **Bertam Ltd v Consolidated Agencies Ltd [1962] 1 EA 212**, in a signed balance sheet of a company. It may take any form. The document must however be signed.

64. I take the view that to amount to an acknowledgment, a document ought to contain an unequivocal recognition and acceptance of the claim being made. A promise to pay makes it even stronger and better but is not necessary. So too, a reference to the exact amount claimed is not mandatory. The essence is to meet the rationale of acknowledgments in reviving or extending limitation periods. Acknowledgments indeed tend to lead to admissions which in essence avoid the prejudice that limitation statutes seek to contain; the prejudice of fading memories and of lost documents or missing witnesses.

65. The first acknowledgment relied on by Telkom is an agreement eked out of a meeting held on 15 October 2013. The minutes were reduced into writing and finally signed by two representatives of Telkom and also of KRC. It was not denied that the meeting, which was called to help reconcile the accounts, was held. PW1 testified that the meeting took place and that she was in attendance. She signed the minutes. As signed, the minutes revealed the services supplied as PSTN and Data services. The original amount claimed for these services was Kshs 131,446,554.76 and Kshs. 104,675,723.10 respectively. The amounts were then respectively reduced to Kshs. 128,458,420.31 and Kshs. 88,641,940.61 at the meeting.

66. The minutes also reveal that part of the debt was to be followed up with another entity only referred to as "RVR" and then go on to state:

" Further to reconciliation thus agreed as per these minutes, being representatives of Telkom

Kenya Ltd and Kenya Railways Corporation we hereby confirm through a sign off agreement to the payable amounts of Kshs 217,100,360.92 in favour of Telkom Kenya Ltd"

67. The minutes were followed up on by various correspondences exhorting KRC to agree on the mode of settling the agreed amount. A letter dated 25 February 2014 by Telkom talked of payment proposals made by KRC which proposals " *were found unfavourable*" by Telkom. The particulars of the proposals were however not detailed. The letter then also sought to a have a meeting convened to resolve the payments issue. To this letter of 25 February, KRC responded on 17 March 2014.

68. The letter of 17 March 2014 signed by KRC's Managing Director was the next document that Telkom relied on as an acknowledgment of the debt by KRC. The letter was in these terms:

"***RE Request to Discuss Debt Settlement.***

Thank you for your inspiring congratulatory message.

While I am aware of the debt settlement issue between KRC and Telkom Kenya, Kindly allow some time for discussion with my team.

I will confirm an appropriate date and time for our meeting at the earliest."

69. As PW1 testified, there followed a series of letters and meetings including meetings on 15 February 2015 and 24 February 2015.The factual background is not in dispute. Proof of such meetings having taken place was placed on letters written by Telkom and on minutes for the meeting of 24 February 2015. Telkom also sought to rely on the minutes of 24 February 2015 as an acknowledgment and admission of the debt.

70. Telkom further contended that prior to the two meetings, KRC had written a letter on 19 November 2014 acknowledging and admitting the debt and further offering to advice on the payment of Kshs. 58,519,128.41 in thirty days. The letter read as follows:

"***RE: OUTSTANDING DEBT- KSHS. 217,100,360.92***

We make reference to your letter dated 10 November 2014.

Following our previous discussion, you submitted to us bills totaling Kshs. 97,280,424.56 from which our analysis shows that only bills amounting to Kshs. 58,519,128.41 are verifiable and due for settlement. We will advice you in the next thirty days our proposal for settling the verified bills of Kshs. 58,519,128.41.

Meanwhile, for any outstanding amount please submit the bills.

Yours sincerely,

[signed]

for A.K. Maina

MANAGING DIRECTOR"

71. It is submitted for KRC that, on two grounds, the letters as well as the minutes did not constitute an acknowledgment within the meaning of *s.*23(3) of the Limitation of Actions Act.

72. First, KRC took issue with the contents. KRC submitted that there was no acknowledgment or admission of the debt, for that matter.

73. Secondly, KRC took issue with the manner the minutes as well as the letter of 19 November 2014 was signed. During the evidentiary hearings, DW1 termed the letter " a forgery" but did not elaborate. DW1 only stated the obvious; that he did not sign the letter. DW1 was also to testify that KRC is only bound by documents signed under a common seal duly affixed and authenticated. DW1 however also confirmed that letters did not require KRC's common seal to be affixed.

74. According to KRC, the contents and terms of the documents did not amount to an acknowledgment in terms of *ss.* 23(3) and 24 of the Limitation of Actions Act. This according to both DW1 as well as Mr. Nyaanga was evident from the subsequent demands for bills and invoices by KRC some of which were supplied by Telkom.

75. My reading of the relevant provisions of the statute (*ss.23* & 24) does not reveal that acknowledgments must be confined to admissions of debts in terms of quantum. A recognition and acceptance of liability will suffice. In my view, an acknowledgment in terms of statute does not have to say " *I acknowledge that X amount is due and owing to you".* It simply needs to get as far as being an admission of liability and that something is due. That something, as was held in the English case of **Dungate *v* Dungate [1965] 1 WLR 1477** at **1483**, may be ascertained extrinsically outside the acknowledgment.

76. In sum, the debtor must be viewed simply to have acknowledged his indebtedness in terms of liability and not necessarily in quantum form.

77. I have read the documents relied on to prove acknowledgment. The signed minutes expressly affirm that KRC is indebted to Telkom. There was also a confirmation of the amount due to Telkom.

78. The letter of 17 March 2014, which DW1 admitted, was a clear follow on to the previous minutes. The context of this letter was an assembly of the various letters written to KRC by Telkom urging for payment. KRC as of 17 March 2014 was now discussing debt settlement, not legal liability. Debt settlement could only, in my view, be a subject of discussion when acknowledged liability was already in place. All the letter asked for was time, not to ascertain liability but to engage and discuss the medium of debt settlement. In my judgment, both the minutes and the letter of 17 March 2014 constitute acknowledgments.

79. There is then the contested letter of 19 November 2014.

80. A general denial had been made to this letter in the pleadings. A Reply to Defence was subsequently filed, effectively joining issue. During the evidentiary hearing, DW1 termed the letter a mere forgery. It was however not clear from his testimony whether the forgery was being fetched on Telkom or, given that the letter was contained in KRC's letterheads, on a staffer from KRC. DW1 confirmed that he had however not launched any investigations into the alleged forgery.

81. In my view, the context of the letter as well as its contents would not lead me to presume on a balance of probabilities that it was a forgery.

82. The evidence revealed that the parties had been exchanging correspondence at this point in time. Telkom wanted to know about payments, KRC still wanted to see some additional bills. I am unable to identify what would have been achieved by this alleged forgery, on which no evidence was led. Additionally, Telkom admittedly acted on the contents of this letter when in early 2015, following meetings with KRC, Telkom availed more bills and invoices to KRC. I have found no reason therefore not to admit this letter of 19 November 2014 in evidence. The letter originated from KRC and was duly received by Telkom.

83. As to whether the letter of 19 November 2014 was an acknowledgment, I am convinced that it was for purposes of *s.*23(3)of the Limitation of Actions Act.

84. Finally, are the minutes of a meeting held on 24 February 2015 which was also submitted by Telkom to constitute an acknowledgment. My very short answer is that the set of minutes availed before the court would not constitute an acknowledgment for the purposes of *s.*23(3) of the Limitation of Actions Act. The minutes were prepared by and only signed by Telkom's representative.

85. Put into context, the simple facts revealed that Telkom made demands and put pressure on KRC with regard to the debts in question. The demands prompted meetings. The parties met. The parties agreed to reconcile their accounts. The parties' appointed representatives then met. They agreed upon a figure. The agreement as to KRC's liability and extent thereof was then reduced into writing. It was signed and stamped by KRC whose management was briefed. There were follow-ups. There were subsequently admissions. I would in the circumstances return the verdict that KRC acknowledged its indebtedness and liability.

86. It leads me to the submission that KRC is not bound by any of the acknowledgments as the acknowledgments were not signed by KRC as dictated by statute.

87. It is KRC's submission that its operative and guiding statute dictates that it executes or signs documents under its common seal. Reference was made to the First Schedule of the Kenya Railways Corporation Act as to the affixation of the common seal of KRC which is to be authenticated by KRC's chairman or director and an employee of KRC authorized by KRC's Board of Directors. It was then submitted that as this was not the case and as a power of attorney had also not been donated to any person to bind KRC, the minutes signed by two employees of KRC was not binding.

88. Telkom's answer was two-old.

89. First, the minutes which constituted an agreement and thus the acknowledgment did not require KRC's seal. In this regard, reference was made to *s.* 14 of the First Schedule to the Kenya Railways Corporation Act. Secondly, Telkom relied on the rule in **Royal British Bank *v* Turquand [1856] 6 E & B 327** to submit that Telkom was entitled to assume that KRC's representatives at the meeting of 15 October 2013 were duly authorized to bind KRC to any agreement on the subject matter.

90. I understood KRC's submission to be to the effect that an acknowledgment is not present for the purposes of *s.*23(3) if it is " *not in writing and signed by the person making it*". These formalities are prescribed by *s.*24 of the Limitation of Actions Act and according to KRC , KRC had not 'signed' any acknowledgment. KRC urged me to give the word 'signed' in *s.*24 of the Act its ordinary meaning, that is; the inscription of one's name or characteristic mark in one's own handwriting or in the case of a corporation affixation of a seal.

91. In my view, *s.*24 of the Limitation of Actions Act ought to be interpreted in the context of the purpose

of the provision and the general intent of the statute.

92. Generally, a document is deemed signed by the maker when his name or mark is attached to it in a manner which objectively indicates his approval and authentication of the document. It is all about the recognition and approval of the contents of the document.The medium of signing varies. There are documents that will have a signature in the form of a typed name of the signatory. The signatory may also put his characteristic mark. There may also exist electronic signatures. It simply depends on the document to be executed. As DW1 confirmed, even within KRC not all documents must be under the KRC common seal. In this era of electronics where contracts, agreements and letters are wrapped up through the email, it would suffice if depending on the context, the traditional signature was not pinned to *s.*24 of the Limitation of Actions Act.

93. Acknowledgments take the form of letters. It may take the form of a written note. It may also take the form of a formal agreement. I would not be in a hurry to insist that every document drafted as an acknowledgment to be executed by a corporate entity for purposes of *s.*23(3) of the Act be under the common seal of the entity. In my judgment, the purpose of *s.*24 is to be sure that the person said to be acknowledging the debt has in truth done so. I am unable to see why officers of a corporate entity may not sign a letter in acknowledgment of a debt, whether under express or ostensible authority. It is only commercially sensible that this be so.

94. It brings me to the signatories now impugned by KRC.

95. According to Telkom, KRC assigned its officers to close the reconciliation of the outstanding amounts. KRC does not deny that it did assign the officers. DW1 confirmed that indeed the two officers – George Muia and Patrick Ndegwa- are still under the employ of KRC as managers. In Telkom's submissions, KRC was bound by the actions taken by the two staffers on its behalf, including the reconciliation and confirmation of figures. To Telkom, it had no notice that the two staffers were not authorized as now contended by KRC.

96. Lord Simmonds summarized the rule in **Turquand's case** as follows in **Morris *v* Kanssen [1946] AC 459,474 :**

" Persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular."

97. Mr. Nyaanga for KRC submitted that the rule in *Turquand's* case does not apply to corporate entities established by statute. I was personally unable to find any local or foreign authority for this proposition and none was presented by counsel. In my view, a body corporate established by statute is subject to and bound by an agent's ostensible authority. The rule in Turquand's case together with its exceptions therefore applies with the same force.

98. KRC in the instant case presented its staffers to Telkom to reconcile accounts and agree on the amount due- as that is the purpose and essence of any reconciliation of accounts process. The parties met and did agree. They signed the resolution which constituted an acknowledgement of the debt due and legal liability of KRC. KRC, admittedly received and kept custody of the agreement and minutes. KRC thereafter engaged Telkom on the basis of the same minutes. I am unable to find in favour of KRC that it is not bound by the agreement in the form of the signed minutes.

99. The acts of KRC taken as a whole, in my view, constituted a representation that its two staffers had

authority to bind it. Telkom, on the other hand, dealt in good faith and had no knowledge of any limited authority on the part of KRC's representatives. It was not irrational for Telkom to assume as it did and get the two staffers or KRC's representatives to voluntarily put pen to paper.

100. In my judgment thus, there was acknowledgment of liability on the part of KRC on no less than three occasions. On 15 October 2013, on 17 March 2014 and on 19 November 2014. Accordingly, the running of limitation period re-started pursuant to *s.*23(3) of the Limitation of Actions Act and will expire on 14 October 2019.

101. I come to the question as to whether Telkom rendered services.

102. This question, in my judgment, is easily answered by the acknowledgments made by KRC. Pre 1999 the services were definitely rendered by Telkom's predecessor in title; that is to say, KPTC. Post 1999, the services were by Telkom who controlled the PSTN. The acknowledgments point to this fact as proven. The evidence by PW1 regarding the meetings and minutes of meetings which were availed in proof of evidence,would also corroborate the fact that the services for which payment was being sought were rendered by Telkom. I hasten to add that DW1 did not testify to the contrary.

103. What then is the quantum of the services rendered"

104. Telkom has laid claim to Kshs. 217,100,360.92. It is stated that this is the quantum as regards the reconciled accounts. Telkom also availed various bills and invoices, which KRC contested as " computer generates" and nothing more. PW1 testified that the original invoices and bills had been sent to KRC and hence the reliance on the records.

105. There is evidence that bills and invoices seemed to have formed the basis of reconciliations. In view of the acknowledgments as well as request for bills by KRC which request was honoured and the bills partly accepted by KRC, I have great doubts about KRC's case that the bills are false and merely "computer generates" and no more. The bills and invoices , in my judgment, on a balance of probabilities are genuine and relate to the services provided to KRC by Telkom. The contemporaneous documents upon which Telkom relied to support its case, in my view, support this finding.

106. One such document was the letter of 19 November 2014.

107. KRC at trial simply dismissed the letter as a forgery. I have already determined that in the absence of any proper pleading of the allegation of fraud and in the absence of any evidence to support such allegation, I must reject KRC's stand and submission of forgery. I hold the letter good to its words.

108. The letter of 19 Novemebr 2014, in my judgment, constituted an express admission of KRC's liability to the amount of Kshs. 58,519,128.41. The admission was clear and unequivocal after the ascertainment and perusal of bills and invoices supplied to KRC by Telkom. I do not find it proper that KRC may be allowed to renege on the contents of this letter of 19 November 2014.

109. Post November 2014, Telkom again in pursuit of settlement of the debt by KRC supplied bills and invoices to KRC. PW1's testimony which I have no reason to doubt and which was not contested was that both KRC's and Telkom's representatives met. Again, the parties agreed on time-lines for payment and for KRC to provide proof of any previous payments. KRC honoured none.

110. I must also state that in my judgment, contested or erroneous invoices or bills do not necessarily defeat claims made for services rendered. Proof of services having been supplied and appropriated by

the defendant is enough to entitle a claimant to the price for the same. Where the price is not shown to have been agreed or that the price claimed is the market price, the claimant will be awarded such price as constitutes a reasonable compense.

111. KRC may raise questions on the invoices but ,in my judgement, the invoices did not solely constitute Telkom's proof of the amount claimed. This is well founded in the acknowledgements.

Conclusion, summary and disposal

112. Let me now finally draw the threads together.

113. The evidence has revealed that KRC knew of Telkom's claim. KRC had issues. KRC acknowledged its liability to a maximum of Kshs 217,100,360.90. KRC did this after a reconciliation process. KRC then expressly admitted to pay Telkom the amount of Kshs 58, 519,128.41. Even after supply of bills and invoices as requested by KRC, Telkom never got paid. Consistently, Telkom continued to supply the bills when requested, even long after KRC had acknowledged its indebtedness. Telkom was all along acting in good faith and seeking a solution on how KRC was to settle the amounts outstanding.

114. As to the issues reserved I answer them as follows in summary:

114.1. As to whether the claim by Telkom is validly before the court, the answer is yes. The claim is not time-barred and Telkom have the standing to bring and pursue it.

114.2. As to whether Telkom provided PSTN and Data services to KRC, the answer is yes. Through self and through its predecessor in title.

114.3. As to whether KRC acknowledged and admitted the debt due to Telkom, the answer is yes. KRC is bound by the acknowledgments and admissions.

115. For all the reasons given in this judgment, I am satisfied and now conclude that the claim by Telkom is valid and has been established to the required standard.

116. I accordingly enter judgment for Telkom in the sum of Kshs 217,100,360.90 together with interest. I see no reason to depart from my jurisdiction to order that costs should follow the event. Telkom will have the costs of the suit to be taxed, failing any agreement on the same.

117. Decree accordingly.

Dated, signed and delivered at Nairobi this 2nd day of February 2018.

J.L.ONGUTO

JUDGE