



REPUBLIC OF KENYA



**Ethics & Anti-Corruption Commission v Maitai & 13 others (Anti-Corruption and Economic Crimes Civil Suit 8 of 2020) [2023] KEHC 378 (KLR)
(Anti-Corruption and Economic Crimes) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 378 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT 8 OF 2020
EN MAINA, J
JANUARY 26, 2023**

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

**CHARLES NDIRITU MAITAI 1ST DEFENDANT
CHARLES TANUI 2ND DEFENDANT
CHARLES OUKO 3RD DEFENDANT
FREDRICK OGENGA 4TH DEFENDANT
EMILIO MWAI NDERITU 5TH DEFENDANT
SAMUEL ODOYO MIKWA 6TH DEFENDANT
NICHOLAS GITOBU 7TH DEFENDANT
PHILIP KIMELU 8TH DEFENDANT
BRAMWEL WANYALIKHA 9TH DEFENDANT
FRANCIS MUTHAIGA MURAYA 10TH DEFENDANT
PETER MACHUA 11TH DEFENDANT
JANE NAKODONY 12TH DEFENDANT
ALLIED INSPECTION & TESTING 13TH DEFENDANT
AERO DISPENSER VALVES LIMITED 14TH DEFENDANT**



RULING

1. The 9th Defendant/Applicant's Notice of Motion dated 30th October 2020 which is supported by an affidavit sworn by the 9th Defendant/Applicant on the same date and a further affidavit sworn on 15th February 2021, is brought under Order 2 Rule 15 (1) (b)(c) and (d), Section 1A, 1B, 3A, and 63 (f) of the Civil Procedure Act, Cap 21. The application seeks the following orders:

“

2. That this Honourable Court be pleased to strike out the Plaintiff's claim on breach of statutory duty against the 1st to 12th Defendants for being time-barred.
 3. In the alternative and without prejudice to prayers b and c above, this Honourable Court do strike out and/or dismiss the Plaintiff's suit herein.
 4. Costs of this Application be provided for.
 5. Any other remedy and/or orders that the court deems fit and just in the circumstances.”
2. The Application is premised on grounds that:-

- a) The Plaintiff's claim against the 1st to 12th Defendants herein is based on a plea of breach of statutory duty.
- b. The Plaintiff has separately premised its cause of action against all the Defendants on a plea of fraud.
- c. Both the plea of breach of statutory duty and fraud are time-barred.
- d. In the premises, the Plaintiff's claim is a non-starter and a demurer.
- e. Accordingly, this Honourable Court lacks jurisdiction to entertain a demurer.
- f. In the absence of a sustainable cause of action, the suit is frivolous, vexatious, and scandalous.
- g. The suit is otherwise an abuse of the process of the court.
- h. This Honourable Court must maintain integrity of the administration of justice and ensure justice is not only done but seen to be done. Accordingly, this Honourable Court is enjoined to halt this litigation brought for extraneous considerations.
- i. This Honourable Court is further enjoined by the Constitution and the overriding objective in ensuring efficient use of available judicial and administrative resources and hence strike out this suit in limine.
- j. The claim herein is unarguable and cannot succeed and it is in the circumstances a clear case for striking out.
- k. This Honourable Court has the discretion to strike out the suit.



- I. It is in the interest of justice that the instant Application be certified urgent and heard in priority to all other pending applications.”
3. In the written submissions, the 9th Defendant/Applicant contends that the instant suit was commenced through the plaint dated 21st February 2020 and filed on 25th February 2020; that the suit is partly premised on a plea of breach of statutory duty which is time-barred under Section 4(2) of the Limitations of Actions Act, which provides that any action founded on a tort may not be brought after the end of three (3) years.
4. The Applicant avers that based on the pleadings on the record, the alleged breach of duty occurred between 9th December 2014 when the subject tender was approved and 14th July 2015, when the goods were received. That the period of three (3) years started running from the said date of 14th July 2015 to 14th July 2018, and accordingly any cause of action based on the alleged breach of statutory duty was time-barred on 14th July 2018.
5. The Applicant contends further that similarly, the plea of fraud, is time-barred under Section 4 as read with Section 26 of the Limitations of Actions Act, which bars any filing of suits based on fraud after the end of three (3) years of the discovery of the fraud; that the Plaintiff in its pleadings has pleaded that investigation into the alleged fraud commenced on 1st June 2015 and accordingly, the Plaintiff's claim ought to have been filed within three (3) years from the discovery of the fraud to wit July 2018 in line with Section 26 of the *Limitation of Actions Act*. That a breach of statutory duty is a tort as was held in the case of *Kiamokokama Tea Factory Co. Limited v Joshua Nyakoni* [2015] eKLR
6. The Applicant contends further that limitation of actions applies even though there existed a relationship of trust or a fiduciary relationship. Counsel cited the case of Ajay Shah Deposit Protection Fund Board v Liquidator of Trust Bank Limited (in liquidation) and the case of *Haron Onyancha v National Police Service Commission & Another* [2017] to support this submission.
7. Counsel asserted that in view of the foregoing this the Court lacks the jurisdiction to entertain a demurer, and in the absence of a sustainable cause of action, the same ought to be struck out for being frivolous, vexatious, scandalous and otherwise an abuse of the process of the Court. Counsel also placed reliance on the case of Trust Bank Limited v Hermanshusirkat Amin Co. Limited & Another (Nairobi HCC No. 984 of 1999)

Response by the Plaintiff/Respondent

8. The Plaintiff/Respondent vehemently opposed the application vide its replying affidavit sworn by Justus Wangia on 22nd December 2020 and the written submissions dated 20th December 2021.
9. The Plaintiff/ Respondent contends that the main suit is brought under Section 51 of the *Anti-corruption and Economic Crimes Act*; that the Plaintiff/Respondent has pleaded in the plaint that the defendants acted fraudulently and in breach of trust, which acts constitute corruption as defined in Section 2 of the *Anti-corruption and Economic Crimes Act*. Consequently, the suit falls within the recovery proceedings under Section 51 of the *Anti-corruption and Economic Crimes Act* and as such, the *Limitation of Actions Act* does not apply to these proceedings. Learned Counsel for the Plaintiff/ Respondent submitted that in the alternative and without prejudice, to the foregoing under Section 20(1) of the Limitations of Actions Act no period of limitation is prescribed for a cause of action for fraudulent breach of trust, which is pleaded in the suit. That there is no limitation of actions for claims for breach of trust or fiduciary duty and cited the case of *Re Estate of Charles Ngotho Gachunga (Deceased)* 2015 eKLR



10. Counsel defined fraud and contended that the cause of action did not fall within the limitation period; Counsel relied on Halsbury's Laws of England 4th Edition Vol. 28 paragraphs 833 which states:

“Exclusion from protection in certain cases. No period of limitation prescribed by the Limitation Act 1939 applies to an action by a beneficiary under a trust, being an action in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy or to recover from the trustee trust property or the proceeds of it in the trustee's possession, or previously received by the trustee and converted to his use. It no longer makes any difference whether or not the trust is an express trust. If however, the action is not one of these types, the mere fact that property is trust property does not prevent time from running.”

“Trustee's fraud or fraudulent breach of trust. For the purpose of the Provision excluding the operation of the limitation period in the case of actions by beneficiaries in respect of fraud or fraudulent breaches of trust to which the trustee was a party or privy, the fraud in question need not amount to dishonesty”

11. Counsel further submitted that the Defendants, as public officers were bound by Articles 10 and 260 of *the Constitution*; That they held the offices as a public trust and hence their actions leading to the loss of public funds amounts to a breach of trust.

Further that the Applicant has not proved the allegation that the suit is frivolous and vexatious and as such it cannot be terminated under Order 2 Rule 15 of the Civil Procedure Rules. Counsel urged this court to find the Application misconceived and dismiss it with costs to the Plaintiff/Respondent.

Analysis and determination

12. The 9th Defendant/Applicant essentially seeks to strike out this suit on the ground that the same is time-barred and hence it is frivolous, vexatious, and scandalous and an abuse of the court process.
13. The 9th Defendant/Applicant contends that the suit is time-barred for having been filed after the 3-year limitation period prescribed under Section 4(2) and Section 26 of the *Limitation of Actions Act* respectively.
14. On the first ground on limitation of time, it is trite that Section 42(1) (j) of the *Limitation of Actions Act* excludes the application of the Act to recovery proceedings brought under Sections 51,52,55 and 56 of the *Anti-Corruption and Economic Crimes Act*. Section 42(1)(j) states:

“42. Exclusion of certain proceedings

1. This Act does not apply to:

.....

- (j) a proceeding to recover an amount for which a person is liable under section 51 or 52 of the *Anti-Corruption and Economic Crimes Act*, 2003 (No. 3 of 2003) or a proceeding under section 55 or 56 of that Act.”

15. My reading of the pleadings in this case discloses that this is a suit filed by the Ethics and Anti-Corruption Commission under its mandate as provided in *the Constitution*, Section 11(j) of the *Ethics and Anti-Corruption Commission Act* and Sections 51, 52, 53(3), 55 and 56 of the *Anti-Corruption and Economic Crimes Act*.



16. Section 51 of the *Anti-Corruption and Economic Crimes Act* provides as follows:

“ 51. Liability for compensation

A person who does anything that constitutes corruption or economic crime is liable to anyone who suffers a loss as a result for an amount that would be full compensation for the loss suffered.”

17. The claim in this case arises from the award of a tender which the plaintiff alleges was fraudulent. It avers that the Defendants/applicants who were officers of the Kenya Pipeline Corporation acted fraudulently and in breach of statutory duty which led to loss of public funds, which is an offence under Section 45 of the *Anti-Corruption and Economic Crimes Act*. The Plaintiff therefore contends that the Defendants/Applicants are liable to compensate the public body to the extent of the funds lost. The Plaintiff seeks judgment against the defendants jointly and severally, on behalf of the Kenya Pipeline Corporation, for:

- “ 1) A Declaration that the award of Tender No. SU/Q1/3264F/14 for USD 6,409,491.89 (Approximately Kshs. 660,000,000) to the 14th Defendant as the purported agent of Cla-Val was fraudulent, illegal, and void ab initio.
2. A declaration that the purported contract ensuing from tender No. SU/QT/3264F/14 was predicated on illegality and is therefore unenforceable.
3. Judgment be entered against the defendants jointly and severally for the sum of USD 2,546,076.31 (approximately Kshs. 262,000,000/-) paid to the 14th Defendant pursuant to the impugned tender award.
4. In the alternative to (c) above and without prejudice to the foregoing judgment be entered against the defendants jointly and severally for of a sum USD. 1,761,813.53 (approximately Kshs. 182,000,000/- being the amount overpaid as per paragraph 24 above.
5. Costs of this suit.
6. Interest on (c) and (c) above from 31st March 2015 until payment in full.
7. Any other or further relief that the court may deem fit to grant.”

18. The Commission’s mandate under Section 11 of the *Ethics and Anti-Corruption Commission Act* is inter alia to: “institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.” In the circumstances, the recovery proceedings herein are instituted on behalf of the Kenya Pipeline Company, a state corporation established under the Kenya Pipeline Act 1973 and fully owned by the Government of Kenya.

19. The suit, being a recovery suit on behalf of Kenya Pipeline Company undoubtedly, therefore, falls within the exclusion provided under Section 42 (1) (j) of the *Limitation of Actions Act*. The 14th Defendant/Applicant’s contention on limitation of time is therefore misconceived and unfounded and it does not lie. It is accordingly dismissed.



20. On the ground of the suit being frivolous and vexatious, the plaintiff contends that the application is further grounded on Order 2 Rule 15 of the Civil Procedure Act. This law states:

“ 15. Striking out pleadings [Order 2, rule 15.]

- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that —
 - (a) it discloses no reasonable cause of action or defence in law; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
- (3) So far as applicable this r. shall apply to an originating summons and a petition.”

21. The 9th Defendant/Applicant made lengthy submissions on this ground, which I have summarized as follows: That the suit is premised on a tender for supply of hydrants, valves and spares; it was a direct tender and the hydrants and valves were supplied; that they were subsequently inspected and the Ethics and Anti-Corruption Commission authorized their use; that the Plaintiff alleges in the suit that the prices were inflated and the tender process was flawed; the Plaintiff computed 37 items out of 46 which were tendered for, supplied and inspected and in use hence leaving out 10 items. On the taxes and duties payable, the plaintiff did not take into account the cost of insurance, inter alia, 30% corporate tax, Kenya Revenue Authority, Value Added Tax, Kenya Bureau of Standards charges and other costs and as such that the claim based on incomplete documentation and as such non-justiciable. They contended further that the Plaintiff has filed invoices given prior to the tender being conceived and awarded. That the tender for goods that were to be supplied up to and including the delivery to Kenya Pipeline Corporation in Nairobi but the Ethics & Anti-Corruption Commission however relied on factory prices which do not factor agency fees, freight charges, taxes abroad and locally and other charges hence the pricing is erroneous. They submit further that there was nothing illegal about the tender; that there is a letter from the manufacturer to the 13th Defendant. Letter of authority is in conformity to the tender document and it beats logic for the 12 defendants to be charged. On due diligence, they submit that this was properly undertaken. Only 3 of the 12 Defendants were involved as they were members of the Tender Evaluation Committee. That the goods were purchased at the lowest possible cost.

22. I must note, with due respect, that the submissions made by the 9th Defendant were not pleaded in the Application or averred in the supporting affidavit and as such are mere statements from



the bar. That notwithstanding, the pleadings, defences, statements and evidence filed in this suit raise triable issues which should be left for determination during the trial. The suit raises a reasonable cause of action, it is not an abuse of the court process given the seriousness of the issues raised and the amount of public funds alleged to have been lost. It is now settled that a suit with a reasonable cause of action is not one that must succeed and I am very alive to that principle.

23. It is trite that a Plaintiff is entitled to pursue their claim in court however implausible the adverse party conceives it to be: Unless the Defendant can demonstrate conclusively that the Plaintiff's claim is so hopeless that it is bound to fail or is otherwise scandalous or an abuse of the process of the Court, it must be allowed to proceed to trial. (See the case of *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (Civil Appeal No. 35 of 2000))
24. In the case of *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another* [1980] eKLR, the Court of Appeal held:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”
25. Taking into account the principle in the above case and considering further that this is a claim for recovery of public funds, this court declines to strike it out. It is in the public interest that the suit proceeds to full trial so as to determine the pertinent issues raised therein.
26. In the upshot, the Application is dismissed with costs to the plaintiff/Respondent for want of merit. Parties shall be required to prepare for trial by ensuring that they have fully comply with the relevant rules of the Civil Procedure in regard to filing and exchanging documents so as to expedite the hearing.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 26TH DAY OF JANUARY, 2023.

**E N MAINA
JUDGE**

