



**Matibo v Dyer and Blair Investment Bank (Commercial Case E883 of 2021)
[2022] KEHC 10060 (KLR) (Commercial and Tax) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10060 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E883 OF 2021
DAS MAJANJA, J
JUNE 30, 2022**

BETWEEN

NGEI MATIBO PLAINTIFF

AND

DYER AND BLAIR INVESTMENT BANK DEFENDANT

RULING

Introduction

1. Before the court for consideration are the Defendant’s Notice of Preliminary Objection dated 24th November 2021 seeking to strike out the suit on the ground that it is time barred under the Limitations of Actions Act (Chapter 22 of the Laws of Kenya) and the Plaintiff’s Notice of Motion dated 31st January 2022 seeking to amend the Plaint dated 14th September 2021.
2. In order to deal with the objection and application, it is necessary to set out the parties’ allegations as set out in their respective pleadings.

Plaintiff’s Case

3. In his plaint dated 14th September 2021 the Plaintiff seeks KES 19,388,817.59 as special damages, general damages for illegal conduct, failing on their duty of care and carrying out wash sales on the Plaintiff’s share portfolio, costs and interest against the Defendant.
4. The Plaintiff’s case is that he engaged the Defendant’s services to save and invest in shares on his behalf at the Nairobi Stock Exchange (“NSE”). On diverse dates between February and March 2015, the Plaintiff deposited KES 27,287,545.00 into the Defendant’s account to hold it and invest it subject to the Plaintiff’s instructions. The Plaintiff states that as at 25th March 2015 he had not given the Defendant any instructions to trade, utilize or apply the amount deposited.



5. The Plaintiff further states that on 20th June 2015, he was made aware of trades being carried out in his account and he proceeded to question an employee of the Defendant. On 24th September 2015, the Plaintiff states that he was informed that the loss in value was as a result of the Defendant's unilateral decision to clean the portfolio. That upon scrutiny, he discovered that between May and August 2015, the Defendant engaged in a wash sale or fraudulent scheme which led to substantial depreciation of his share portfolio. As a result of the fraudulent scheme, the Plaintiff avers that he lost KES. 19,388,817.59 which it now claims.
6. The Plaintiff states that he lodged a complaint against the Defendant at the Capital Market Authority ("CMA") on 18th July 2019 following the Defendant's negligence in handling his portfolio but the CMA failed to respond leading to the filing of the suit against the Defendant.

Defendant's Case

7. In its Statement of Defence dated 23rd November 2021, the Defendant admits that the Plaintiff opened an investment account with it. That the agreement with it was governed by its General Terms and Conditions. It avers that the Plaintiff was not a first time investor and that he was aware of the nature of the risk inherent in investing on the NSE or ought to have been reasonably aware of that his investment entailed an element of risk and the possibility of incurring loss. The Defendant points out that from the Plaintiff's previous portfolio held at Kingdom Securities Limited and ABC Capital showed that he incurred losses and it is therefore disingenuous for him to state that he expected to earn a profit at all times with the Defendant.
8. The Defendant further states that it carried out the trades in accordance with the Plaintiff's instructions and in accordance with the General Terms and Conditions. It avers that the General Terms and Conditions expressly provided for and acknowledged that the investments were associated with inherent risk of significant losses.
9. The Defendant avers that the Plaintiff was aware of all the trades made by the Defendant carried out on his account through the periodic statements issued to him in accordance with the General Terms and Conditions and the Plaintiff was required to raise any objection thereto within 30 days, failure to which he would be deemed to have approved.
10. The Defendant denies the allegations of fraud and or that the Plaintiff incurred any losses as prayed or at all. It asserts that if any loss was incurred, it was lost as a result of the inherent risk associated with the nature of investment hence the Defendant cannot be liable.
11. The Defendant admits that the Plaintiff lodged a complaint with the CMA to which it responded. It avers that the CMA has not found it liable.
12. The Defendant avers that the cause of action disclosed in the plaint, whether in tort or contract, was made known to the Plaintiff on or before 20th June 2015. It avers that the suit was filed outside the statutory period of limitation. The Defendant prays that the suit be dismissed.

Analysis and determination

13. Whether the court should allow the Defendant's preliminary objection and therefore strike out the Plaintiff's claim depends whether the suit is statute barred and if so, whether the proposed amendment can save it. I shall therefore consider the preliminary objection and the application for amendment together. The preliminary objection and the application were canvassed by written submissions which I have considered.



14. The Defendant's case in support of its preliminary objection is that the Plaintiff filed the Plaint on 29th September 2021 outside the three-year and six-year statutory period for claims in tort and contract respectively. It points out that according to the Plaint, the Plaintiff discovered the alleged fraudulent trades on 20th June 2015 and sought a response from the Plaintiff on 24th September 2015. The Defendant therefore states that the claim was filed outside three-year and six-year statutory period of limitation for causes of action in tort and contract respectively.
15. The Defendant relies on section 4(1)(a) of the Limitations of Actions Act which states that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued and section 4(2) which provides that an action founded on tort may not be brought after the end of three years from the date which the cause of action accrued.
16. The Plaintiff responds that 24th September 2015 cannot be taken to be the date when the fraud was discovered. He contends that the proposed Draft Amended Plaint seeks to change that date to July 2019 when he lodged the claim at the CMA which date he holds, is indicated at paragraph 15 of the Plaint and it is therefore not an afterthought. The Plaintiff contends that time started running in July 2019 when he discovered the fraud and reported it to the CMA hence the claim was within the six-year time frame for contracts provided for in the Limitation of Actions Act.
17. The Plaintiff relies on its application dated 31st January 2022 to which he has annexed a Draft Amended Plaint. The application is opposed through the replying affidavit of Nirmal Pattni, the Defendant's Head of Private Wealth, sworn on 23rd February 2022.
18. The Plaintiff states that the intended amendments are meant to capture certain facts which were left out in the plaint and to introduce new facts which have arisen after the suit was filed. The Plaintiff also seeks to join CMA as a defendant. He accuses CMA of breaching its regulatory duty and failing to take action on the Plaintiff's complaint. He adds that the Defendant's employees and/or agents have been arrested and charged in Criminal Case no. E117 OF 2021 in relation to fraudulent dealings of his shares. The Plaintiff contends that it is necessary to amend plaint in order to determine the issues in dispute and that the amendments will not be prejudicial to the Defendant and therefore the application to amend should be allowed.
19. The Defendant's position is that the proposed amendments were within the knowledge of the Plaintiff as at the time of filing of the suit and that no reason has been advanced for the omission. It contends that the amendments are intended to circumvent the Preliminary Objection and to widen the scope of the case to include a cause of action in breach of statutory duty and to defeat an accrued legal right.
20. It is important to refresh our understanding of what constitutes a preliminary objection. The locus classicus on this issue is the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* [1969] EA 696 where the court held that a preliminary objection is grounded either on matters of law or uncontested facts which if successful would dispose off the suit. Hence, in resolving a preliminary objection, the court considers the facts set out in the pleading, in this case the plaint, as true and correct.
21. It is not in dispute that the Plaintiff's case, as pleaded in the plaint dated 14th September 2021, is for breach of contract hence the time when the action accrued when the breach took place or he was made aware of such breach. In his own pleading, the Plaintiff became aware of the breach in 20th June 2015.
22. In its submissions, the Defendant suggests that the fraud was discovered in 2019 and that the cause of action accrued in 2019 when he lodged a formal complaint with the CMA. According to section 26 of Limitation of Actions Act, time starts to run when the fraud was discovered. It states:
 26. Where, in the case of an action for which a period of limitation is prescribed, either:



- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

23. Looking at the plaint, the cause of action, as pleaded, is based on breach of contract. The key parts of the plaint, paragraphs 7 and 8, state as follows:

[7] [T]he plaintiff avers that on 20th June 2015, he was made aware of the trades being carried out in his account. Due to this, he queried one Duncan Lumwamu, an employee of the defendant, as why the portfolio was being traded and the resultant depreciating in value.

[8] The Plaintiff did not receive a response to his query until 24th September 2015 when he was informed that the loss in value was a result of the defendant's unilateral decision to clean the portfolio.

24. There is no allegation that the breach of contract was concealed or that the Defendant's fraud resulted in the fact of the breach being concealed until it was discovered. In essence, the provision of section 26 aforesaid do not apply to this case. Even if it applied, it is clear from the Plaintiff's own pleading that he discovered the breach of contract, fraud or illegality in 2015 hence the Defendant is correct to submit that this is when the cause of action accrued.

25. The Plaintiff contends that time when the Plaintiff discovered the fraud is a question of fact hence the preliminary of objection should be dismissed. He relies on the decision in *Justus Tureti Obara v Peter Koipeitai* KSI ELC No. 126 of 2021[2014] eKLR where the learned judge held that:

I would wish to point out further that the Plaintiff's case although for recovery of land is based on fraud. The proviso to section 26 (a) of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the Defendant is a matter to be ascertained at the trial. [Emphasis mine]

26. While it is true that the issue when fraud is discovered is a question of fact, the Plaintiff is bound by its pleadings (see *Gandy v Caspair* [1956] EACA 139 and *Galaxy Paints Company Limited v Falcon Guards Limited* NRB CA Civil Appeal No. 219 of 1998 [2000]eKLR). In this instance, the Plaintiff has specifically pleaded the date of when the breach of contract took place, it has not pleaded that the breach was concealed by fraud and even if it was, it has pleaded it was discovered in 2015. I therefore hold that based in the pleading, the suit is time barred since the fraud was discovered in 2015 and this suit filed in 2021, 6 years beyond the statutory limitation period.

27. I now turn to consider the question whether the suit can be saved by the proposed amendment. In *Mavuno Industries Limited and 2 Others v Keroche Industries Limited* ML HCCC No. 122 of 2011 [2012] eKLR, Odunga J., observed that, "This position is in consonance with a long line of decisions that pleadings should only be struck out when they are so hopeless that life cannot be breathed into them by way of amendment."

28. In the Draft Amended Plaint, the Plaintiff introduces another date at paragraph 9 where he states:



- (9) On further scrutiny, in the year 2019, of the transactions carried out, it became apparent that on various dates between the months of May and August 2015. The 1st defendant had in breach of contract and or statutory duty engaged in a wash sale scheme, fraudulent dealings, churning, theft, insider trading, market abuse and trading without order with the plaintiff's shares
29. Apart from the aforesaid date, the Plaintiff contends that time started running in July 2019 when he reported the fraud to the CMA and not 2015 as indicated in his Plaintiff dated 14th September 2021. The Plaintiff urges that the proposed amendment states that fraud was discovered in 2009 as stated in paragraph 9 as shown above hence the claim is within time. He also maintains that it is upon discovery of the fraud that he reported the matter to the CMA on 18th July 2019.
30. The Limitation of Actions Act is clear that time starts running when the right of action concealed by fraud is 'discovered' and not when it was 'reported'. Apart from the finding I have made that this is a case of breach of contract, the Amended Plaintiff does not change the position that it discovered the alleged fraud in 2015 as expressly indicated in the plaintiff and the proposed amended plaintiff. The Plaintiff was informed of or at least knew of the facts constituting the cause of action in 2015 and that is when the cause of action accrued. The time when the claim was reported to the CMA does not affect when the time the cause of action against the Defendant accrued.
31. I am aware that the court should freely allow amendments unless they cause prejudice or injustice to the other side which cannot be compensated by an award of costs (see generally Trishcon Construction Company v Landmark Holdings Ltd NRB CA Civil Appeal No. 225 OF 2014 [2016] eKLR, Eastern Bakery v Castelino [1958] 1 EA 461 (CAK) and Motokov v Auto Garage Ltd and Others [1971] EA 358). In this case, I hold that the plaintiff is very clear when the cause of action accrued. The proposed amendment does not add or change the date when the cause of action accrued. The proposed amendment essentially adds the date the complaint was made to the CMA and includes the cause of action for breach of statutory duty against it. Since the Plaintiff is bound by its pleadings, the only conclusion the court can reach is the claim is statute barred and ought to be struck out.
32. Having reached the conclusion that that the Plaintiff's claim is time barred and that the proposed amendment does not in any way deconstruct the Defendant's defence based on limitation, I hold that no purpose will be served by allowing the amendment. On the issue of joinder, I hold that the cause of action against the CMA is an independent cause of action and may be pursued separately as opposed to being tied up in a suit against the Defendant which is now statute barred.
33. In conclusion, I now make the following orders:
- (a) The Plaintiffs Notice of Motion dated 31st January 2022 is dismissed
 - (b) The Defendant's Preliminary Objection dated 24th November 2021 is allowed.
 - (c) This suit be and is hereby struck out.
 - (d) The Plaintiff shall bear the costs of the application, the preliminary objection and the suit.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2022.

A. MSHILA



JUDGE

Court of Assistant: Mr M. Onyango

Mr Mutua instructed by E. K. Mutua and Company for the Plaintiff.

Mr Mbaluto instructed by Oraro and Company Advocates for the Defendant

