



**Kamanja & 6 others v Equity Bank (Kenya) Limited & 3 others (The 2nd, 3rd and 4th Defendants are being sued as Trustees of Equity Bank Share Ownership Plan "ESOP") (Commercial Case E114 of 2018) [2022] KEHC 12857 (KLR) (Commercial and Tax) (30 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12857 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**COMMERCIAL CASE E114 OF 2018**  
**DAS MAJANJA, J**  
**AUGUST 30, 2022**

**BETWEEN**

**ROBERT MAINA KAMANJA ..... 1<sup>ST</sup> PLAINTIFF**  
**JAMES NJERU KABURU ..... 2<sup>ND</sup> PLAINTIFF**  
**NKATHA MBAYA KARICHU ..... 3<sup>RD</sup> PLAINTIFF**  
**BURTON MBIRUIRU KANG'URU ..... 4<sup>TH</sup> PLAINTIFF**  
**ROBERT MACHARIA NJOROGE ..... 5<sup>TH</sup> PLAINTIFF**  
**BRENDA CHERONO RONO ..... 6<sup>TH</sup> PLAINTIFF**  
**MIRIAM WAHETI WARUTERE ..... 7<sup>TH</sup> PLAINTIFF**

**AND**

**EQUITY BANK (KENYA) LIMITED ..... 1<sup>ST</sup> DEFENDANT**  
**JAMES NJUGUNA MWANGI ..... 2<sup>ND</sup> DEFENDANT**  
**MARY WANGARI WAMAE ..... 3<sup>RD</sup> DEFENDANT**  
**GERALD GACHOKA WARUI ..... 4<sup>TH</sup> DEFENDANT**  
**THE 2ND, 3RD AND 4TH DEFENDANTS ARE BEING SUED AS TRUSTEES**  
**OF EQUITY BANK SHARE OWNERSHIP PLAN "ESOP"**

**JUDGMENT**

1. At the time material to this suit the plaintiffs were employees of the 1<sup>st</sup> defendant ("the bank"). The facts giving rise to this suit are largely common ground and can be gleaned from the plaintiffs' Plaintiff



dated August 8, 2018 and the parties' Statement of Agreed Facts dated August 12, 2021 and are as follows.

2. By an irrevocable Trust Deed dated August 29, 2005 ("the Trust Deed") the bank established a scheme called the Equity Share Ownership Plan ("ESOP") to encourage and facilitate the holding of shares in the bank by or for the benefit of its employees. The Trust Deed was varied through a Deed of Variation dated November 11, 2009 ("the Deed of Variation"). As employees of the bank, the plaintiffs were members of the ESOP and also unit holders therein.
3. The ESOP was not initially registered under or subject to the *Capital Markets Act*, chapter 485A ('the *Capital Markets Act*') as the bank was not listed on the Nairobi Securities Exchange at the time of its establishment. When the bank was listed on August 7, 2006, the ESOP was registered by the Capital Markets Authority on June 3, 2009 which considered and approved the Trust Deed and the rules made thereunder.
4. Upon registration with the Capital Markets Authority, the ESOP was now bound by the *Capital Markets Act*, 2013 and the *Capital Markets (Collective Investment Schemes) Regulations, 2001* ('the "Regulations"). Under regulations 109(1), 114, 115 and 116, while units in the ESOP represent shares in the bank, they cannot be traded or transferred in any securities exchange, but the units represented therein may, at the option of the unitholder, be pledged or repurchased by the Trustees for cash subject to the provisions of the Trust Deed and Rules thereunder in force at the material time.
5. It is also common ground that the units in the ESOP held by the members, including the plaintiffs were not shares in the bank and that the relationship between the parties was governed by the provisions of the Trust Deed, rules made thereunder and the regulations. Further, the ownership of the units in the ESOP and the benefits accruing under it was solely based on a person being an employee of the bank.
6. At the time the plaintiffs ceased their employment with the bank, they held the following units in their respective unit accounts with the bank:



NAME	DATE OF CESSATION OF EMPLOYMENT	DATE OF PAYMENTS	ESOP	NUMBER OF UNITS HELD
ROBERT MAINA KAMANJA	December 31, 2015	January, 2016		99,000
JAMES NJERU KABURU	July, 2009	August, 2009		80,000
NKATHA MBAYA KARICHU	December, 2005	January, 2006		
BURTON MBIRUIRU KANG'URU	April, 2009	May, 2009		60,000
ROBERT MACHARIA NJOROGE	August, 2007	October, 2007		
BRENDA CHERONO RONO	August, 2005	August, 2007		
MIRIAM WAHETI WARUTERE	December 30, 2005	August, 2007		

7. Under clause 5.1 of the Trust Deed, a unit holder is deemed to have applied for redemption of the units registered in his or her name the moment he or she ceases to be an employee of the bank. Under clause 6.2 of the Deed of Variation, an employee would redeem his or her units after the vesting date being 5 years from the date of acceptance of the units. The rights to redeem or transfer units upon leaving employment of the bank did not vest in the unitholders until after the 5<sup>th</sup> anniversary of the acceptance date by the unitholders of the units in the ESOP. Clause 6.6 of the Deed of Variation provides that an employee who ceased to be an employee of the bank before the vesting date is only entitled to a refund of the amounts paid or credited as paid by such an employee as at that date less any sums properly owing to the bank or the trustees by the employee by reason of the provisions of the ESOP.
8. It is further common ground that there was a share split of ten (10) shares per share on or about March, 2009 pursuant to the resolution of the bank during the annual general meeting held in December, 2008.
9. In their suit, the plaintiffs claim that upon leaving service with the bank's predecessor, they found out that the amounts of monies that the defendants ought to have refunded to them was greatly concealed as a result of fraudulent misrepresentation, concealments and/or non-disclosure of material facts thereby resulting to the plaintiffs being paid contrary to the provisions of the Trust Deed and rules thereunder, which action was illegal, null and void. They accuse the defendants of undervaluing the plaintiffs' entitlements from the ESOP as a result of not following the provisions of the unit value upon redemption as defined in the Trust Deed and that the defendants blatantly and deliberately failed



to comply with the provisions of regulation 117 which provided that a repurchase of units in an ESOP shall reflect the latest traded price of the company's shares at the securities exchange.

10. The plaintiffs state that the defendants were required by law to exercise due diligence and good faith in dealing with their benefits but that the defendants' breach of their duties have occasioned loss and damage to the plaintiffs. For these reasons, the plaintiffs seek the following reliefs from the court:
- a. A declaration that the plaintiffs' redemption benefits under the defendants' ESOP should be calculated in accordance with the Trust Deed and rules of the scheme
  - b. An order directing the defendants to recalculate the plaintiffs' benefits under the ESOP Scheme in accordance with the Trust Deed and Rules and payment of any shortfalls that may be found due to the plaintiffs be made to them
  - c. An order directing that the declaring that 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> plaintiffs are entitled to share splits on their respective units.
  - d. An order declaring that the plaintiffs are entitled to dividends on the respective units.
  - e. General damages.
  - f. Costs of the suit
  - g. Interest on (b), (c), (d) and (e) at the prevailing commercial rates from the date of leaving employment until payment in full.
  - h. Any other or further relief as this honourable court may deem fit to grant.
11. The defendants responded to the suit by filing a Statement of Defence dated November 15, 2018. They aver that they refunded to the p the amounts paid or credited as paid for the purchase of the units on various dates as follows:

NAME	AMOUNT REFUNDED	DATE OF REFUND
ROBERT MAINA KAMANJA	Kshs 1,485,000.00	January 12,2016
JAMES NJERU KABURU	Kshs 30,000.00	August, 2009
NKATHA MBAYA KARICHU	Kshs 54,400.00	January 14, 2006
BURTON MBIRUIRU KANG'URU	Kshs 54,400.00	May, 2009
ROBERT MACHARIA NJOROGE	Kshs 25,000.00	October 8, 2007
BRENDA CHERONO RONO	Kshs 13,600.00	August 1, 2007
MIRIAM WAHETI WARUTERE	Kshs 13,600.00	August 1, 2007

12. The defendants deny that any breach, loss and damage was occasioned as alleged by the plaintiffs. They aver that the rights and/or benefits under the ESOP only existed and/or accrued to the extent that there



was an existing employment relationship between the unitholders, the plaintiffs and the bank and that no rights or benefits accrued to the unitholders after cessation of employment with the Bank.

13. The suit was set down for hearing where the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> plaintiffs testified on behalf of the plaintiffs (PW 2, PW 4, PW 3 and PW 1 respectively) and the 3<sup>rd</sup> defendant (DW 1) testified on behalf of the defendants. At the close of the hearing, the parties were directed to file written submissions which are on record. Together with the statement of agreed facts, the parties also filed agreed lists and bundles of documents.
14. Since the parties agreed on facts and issues for determination largely concern the interpretation of the Trust Deed, rules and regulations, I do not propose to rehash the testimony of the witnesses and will only do if necessary to resolve a contested fact.

### **Analysis and determination**

15. The parties agreed that the court should determine whether the trustees of the ESOP were entitled to refund the monies paid to the unitholders who ceased being employees of the bank before expiry of 5 years after joining the ESOP and whether the plaintiffs were entitled to the benefits accruing from the units held in the ESOP after they ceased being employees of the bank. Ultimately, the court will also determine whether the plaintiffs are entitled to the reliefs sought in their Plaint.

Whether the trustees of the ESOP were entitled to refund the monies paid under the ESOP to the unitholders who ceased being employees of the bank before expiry of 5 years after joining ESOP

16. The plaintiffs submit that they were bound by the provisions of the Trust Deed which had no vesting date hence the trustees had an obligation not only to refund them the monies used to purchase the units but also to pay the balance standing to the credit of the Unitholder. However, as captured in the introductory part and as stated in the parties' Statement of Agreed Facts, the plaintiffs agree that as per clause 6.2 of the Deed of Variation, an employee would redeem his or her units after the vesting date being 5 years from the date of acceptance of the units. That the rights to redeem or transfer units upon leaving employment of the bank did not vest in the unitholders until after the 5<sup>th</sup> anniversary of the acceptance date by the unitholders of the units in the ESOP.
17. Under clause 5.1 of the Trust Deed as read with paragraph 7.1 of the rules thereon, "Unless otherwise agreed by the trustees with the consent of the company a unitholder who in accordance with the ESOP rules ceases to be employed by the group shall upon such cessation to be deemed to have applied for redemption of the units registered in his name on the register whereupon the trustees shall within 30 days pay the balance standing to the credit of the unitholder's account to the unitholder. Alternatively, in order to implement redemption, the trustees may at the request of the unitholder transfer the shares corresponding to the Units redeemed to the unitholder".
18. Thus, it can be said that under the Trust Deed, the trustees were entitled to refund unitholders within 30 days of ceasing of employment with the bank whereas under the Deed of Variation the trustees were not entitled to refund a unitholder until after the expiry of 5 years from the date when they received/ accepted the units. DW 1 admitted in her testimony that based on the dates when the 2<sup>nd</sup> -7<sup>th</sup> plaintiffs ceased their employment with the bank, the Deed of Variation did not apply to them.



19. I therefore find and hold that save for 1<sup>st</sup> plaintiff, the trustees of the ESOP were entitled to refund the monies paid under the ESOP to the 2<sup>nd</sup> – 7<sup>th</sup> plaintiffs, who ceased being employees of the bank, 30 days after cessation and before expiry of 5 years after joining the ESOP.

Whether the plaintiffs were entitled to the benefits accruing from the units held in the ESOP after they ceased being employees of the bank

20. The parties agree that the plaintiffs were only entitled to hold units in the ESOP and not shares in the bank and that the ownership of the units in the ESOP and the benefits accruing under it was solely based on a person being an employee of the bank. Further, as per clause 6.6 of the Deed of Variation, an employee who ceased to be an employee of the bank before the vesting date was only entitled to a refund of the amounts paid or credited as paid by such an employee as at that date less any sums properly owing to the bank or the trustees by the employee by reason of the provisions of the ESOP.

21. Based on the above concession by the plaintiffs, I have little difficulty in finding that the plaintiffs were not entitled to the benefits accruing from the units held in the ESOP after they ceased being employees of the bank. DW 1's evidence was emphatic that all the benefits and entitlements that flowed from a person being a unitholder including dividends and bonuses only accrued during the subsistence of the unitholder's employment with the bank.

Whether the plaintiffs are entitled to the reliefs sought

22. Based on my findings above, the ultimate issue for determination is whether the plaintiffs are now entitled to the reliefs sought in their Plaintiff.

23. First, the plaintiffs seek a declaration that their redemption benefits under the ESOP should be calculated in accordance with the Trust Deed and rules of the scheme. The plaintiffs contend that they were underpaid as there are some units that are still being held by the defendants to the plaintiffs' detriment. Further, that the defendants ought to have paid the plaintiffs in accordance with clause 5.1 of the Trust Deed. DW 1 confirmed that the defendants were paid the sums they spent for purchasing the units. I agree with the defendants that there was no evidence adduced by the plaintiffs to demonstrate that the defendants were still holding on to some of the plaintiffs' units. There is also no evidence that the sums paid to the plaintiffs by the defendants upon redemption was against clause 5.1 of the Trust Deed as contended by the plaintiffs. Having found that no benefits accrued on the plaintiffs' units after they ceased employment with the bank, the plaintiffs cannot succeed in any claim after ceasing employment.

24. Second, the plaintiffs seek a recalculation of their benefits under the ESOP. However, I note that the plaintiffs were not specific as to how they wanted the recalculations done and to what extent. In any event, I find that this claim has no basis as they never really challenged the respective entries of their share accounts as indicated in the statements produced by the bank. I have also found that there is no evidence of units being held by the defendants and that no benefits accrued on the plaintiffs' repurchased units once they left the employ of the bank. This prayer therefore fails.

25. Third, the plaintiffs seek a declaratory order that the 2<sup>nd</sup> - 7<sup>th</sup> plaintiffs are entitled to share splits on their respective units. The plaintiffs' claim is largely based on their time after employment which I have already discussed above and answered in the negative. Thus, the 2<sup>nd</sup> – 7<sup>th</sup> plaintiffs, having left employment before March 2009 when the share splits took effect cannot obtain any benefit from the same. DW 1 stated in her evidence that the 1<sup>st</sup> plaintiff fully benefitted from the share splits and the plaintiffs have not proved otherwise.



26. Similarly, I make the same findings on the plaintiffs' fourth prayer for dividends on their respective units and reiterate that none accrued after they ceased being employees of the bank. The plaintiffs' sixth prayer is on general damages. This prayer cannot be granted as the plaintiffs never made any case for such an award and even if they did, I am in agreement with the defendants that the relationship between the parties was contractual and if there is any breach, then general damages are not recoverable in cases of breach of contract in addition to quantified damages (*Kenya Tourist Development Corporation v Sundowner Lodge Limited* NRB Civil Appeal no 120 of 2017 [2018] eKLR).
27. Lastly, since the plaintiffs' claim has failed, I do not see any reason why the court should depart from the norm that costs follow the event and as such, they should be condemned to pay the defendants' costs of the suit

### **Disposition**

28. In conclusion, it is my finding that the plaintiffs' claim as set out in their Complaint dated August 8, 2018 fails in its entirety and is hereby dismissed with costs to the defendants.

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

**D S MAJANJA**

**JUDGE**

**\*\*Court assistant: Mr M Onyango.\*\***

**Mr Odoyo instructed by Kipkenda and Company Advocates for the for the plaintiffs.**

**Mr Ohaga, SC instructed by Ochieng', Onyango, Kibet and Ohaga Advocates for the defendants.**

