



REPUBLIC OF KENYA

IN HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 498 OF 2018

BARCLAYS BANK OF KENYA LTD.....APPELLANT

VERSUS

JANE WANJIKU NG'ANG'A.....RESPONDENT

(Being an appeal from the ruling and orders of the Chief Magistrates Court of Kenya

at Nairobi delivered on 26/9/2018 by Hon. M. W. Murage

(RM) in Civil Suit No. 1873 of 2017)

JUDGEMENT

1. A brief background of this matter is that on 21/3/2017 the respondent filed a suit in the lower court seeking payment of Kshs. 670,530. It was alleged that the respondent operated bank account number 80xxxxx at the appellant's bank that went dormant after the respondent went and settled abroad.
2. By a letter dated 12/6/08 the appellant through their Moi Avenue Branch Coordinator, Amos Muli wrote to the respondent advising her that further to her previous claims for proceeds from her dormant account, the appellant had processed her cheque for Ksh 670,530 and the cheque was ready for collection within one month and in default the proceeds would be returned to the appellants central account.
3. The appellant was unable to return to the country and collect the cheque and by a letter dated 4/8/08 the appellant wrote a letter reiterating the same. The respondent indicated that she never collected the said cheque and later the appellant refused to release the proceeds. The respondent therefore sought for Ksh 670,530 being the total proceed due to the respondent.
4. The suit was opposed by the appellants who filed the amended statement of defence on 2/3/2018 where the appellant denied the claims by the respondent and indicated that cheques are usually valid for not more than six months after which they expire and having failed to collect the cheque for over 6 months they are estopped from claiming monies drawn on the cheque from the appellant.
5. It was the appellant's argument that the suit filed by the respondent is statute barred by the Limitation of Actions Act as the suit arises out of an alleged breach of the bank customer relationship and the respondent was required to have her suit filed within 6 years of the cause of action as the cause of action arose in August 2008 and more than six years have passed since then.
6. The lower court on 29/5/2018 then issued an order that the issue of the suit being time barred be therefore determined first. Counsel for the appellant, Ms Wanjiru argued that that the respondent was informed about the cheque on 12/6/2008 which she did not collect. Therefore the cause of action arose on 12/6/2008 as no application for extension of time was filed.
7. The application was opposed by counsel for the appellant Mr. Kimathi who argued that the respondent opened an account with the appellant and is still an account holder with them. She never collected the money and therefore their relationship did not end. That the money was still with the bank but was however moved from one account to another. He argued that the limitation would therefore only be from when the client went to the bank and that was on 2016.
8. On 26/9/2018, the court found that the respondent only got a cause to complain when the appellant refused to release the funds that were owed to her by the bank. That although the defendant had done a letter to the plaintiff in 2008 the complaint arose when she did a demand letter to the bank in 2016. Time then started running when the defendant allegedly failed to honour the demand letter. As such the suit could not be time barred and therefore the Preliminary Objection was dismissed.

9. Having been aggrieved by the said decision on 19/10/2018 filed this appeal putting forward the following grounds;

a) That the learned magistrate erred in law in finding that the suit was not statutorily barred by the Limitation of Actions Cap 22 Laws of Kenya for being filed more than 6 years out of time

b) The learned Magistrate erred in law and in act in finding that the cause of action in the suit arose on 7th November 2016 when the plaintiff/respondent issued a demand letter to appellant.

c) The learned magistrate erred in law and fact in finding that the time for purposes of limitation of the suit started running upon the alleged failure by the appellant to honour the respondents demand letter of 7/11/2016.

10. The appeal was dispensed with by way of written submissions where the appellants argued therein that the respondents enforceable claim or right to the proceeds in the dormant account could only arise upon the occurrence of the event which would disentitled the respondents to the said proceeds. That the respondents opportunity to complain against the return of the proceeds in the dormant account to the appellants central registry arose upon the appellants communication vide the letter dated 4th august 2008 and not through the respondent's demand letter of 7th November 2006.

11. The appellant also argued that the respondent in their plaint prays for Ksh 670,530 with the interest from 4/8/08 till payment in full and as such the respondent confirms that the time for purposes of computation of the limitation period started to run on 4th August 2008.

12. The respondents on the other hand argued that the main issue for determination is: when did the cause of action arise? It was argued that according to the Limitation of Actions Act, Section 4 (1) actions founded on contract may not be brought after the end of 6 years from the date the cause of action accrued.

13. In this suit a customer-banker relationship existed and persisted even after 4 August 2008 as evidenced by the appellant's letter addressed to the respondents. By virtue of the said letter the appellant confirmed they would continue to hold the money thereby extending the contractual relationship and at no time did the appellant state that the dormant funds would be transferred to Unclaimed Financial Assets Authority.

14. Having perused the record of appeal and considered the submissions on record, the only substantive issue that arises for determination is **whether the appellant's claim was statute barred?**

15. Section 4(1) of the Limitation of Actions Act provides that:

“(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrues-

(a) actions founded on contract;”

16. The question that was therefore before the trial magistrate was, when did the respondent's cause of action accrue for purposes of Section 4 (1) (a) of the Limitation of Actions Act.

17. It was the appellants main argument that the cause of action arose on 4/8/2008 when the second letter was sent to the respondent as it informed the her that the cheque for the proceeds of the dormant account were ready for collection within one month and that the said proceeds would be returned to the appellants central account if not collected. That the respondents enforceable claim to the proceeds in the dormant account could only arise upon the occurrence of the event which would disentitle the respondents to the said proceeds

18. On the contrary the respondents argued that the contractual relationship between the appellant and respondent persisted even after 4/8/2008 due to the fact that the appellant confirmed it would continue to hold the funds and did not indicate that the funds would be transferred to Unclaimed Financial Assets Authority for them to extinguish their relationship.

19. In **South Nyanza Sugar Company Limited v Diskson Aoro Owuor MGR HCCA No. 85 of 2015 [2017] eKLR** the court held the following on cause of action;

[17] There is no doubt in this matter that the parties entered into a contract and which contract was allegedly breached. What is for determination is when exactly the cause of action accrued since from that time the limitation period of 6 years starts running. I do not find that issue difficult to decide on. I say so because when a party enters into a contract for a specific period of time, it does so in the understanding and belief that each of the parties to the contract will observe its part thereof until full execution of the contract. It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period.

20. In this suit there existed a contractual banker-customer relationship between the appellant and the respondent however the respondents account remained dormant and thereafter the appellant wrote to the respondent and requested that she collect a cheque being her proceeds from her account.

21. The respondent was unable to collect and as indicated by the letters sent to the respondent the proceeds were to remain in the appellant's central account. It is this courts view that a cause of action could not have arisen at this point because there still existed a contractual relationship between the parties and there was no breach of the said contract as the appellant still kept the proceeds in their central account.

22. The cause of action however, arose when the respondent requested for her proceeds in a demand letter dated 7/11/2016 and the appellant refused to grant the same. The suit in the lower court was filed on 21/3/2017 which is within the six year limit set out by Section 4(1) of the Limitation of Actions Act.

23. In light of the above this court finds that the suit was not time Barred. Consequently, the appeal lacks merit and is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
24TH DAY OF SEPTEMBER, 2021.**

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent