



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 76 OF 2011**

**ORIENTAL COMMERCIAL BANK LIMITED.....PLAINTIFF**

**-VERSUS-**

**CENTRAL BANK OF KENYA.....DEFENDANT**

**RULING**

1. The application before me was brought by the defendant, who is asking the Court to strike out the Plaintiff. The reason why the defendant wishes to have the plaintiff struck out is that the claim was time-barred.
2. The Plaintiff was filed in court on 3<sup>rd</sup> March 2011. At paragraph 6 of the plaintiff the plaintiff indicated that on 26<sup>th</sup> April 1993, the plaintiff agreed to facilitate the sale of US \$ 19 million to the defendant after the plaintiff's customer had deposited that amount in the plaintiff's account at Standard Chartered Bank, New York.
3. It was the plaintiff's case that the two parties herein entered into a contract in respect to the said sale of Dollars to the defendant.
4. However, it appears that the plaintiff's customer credited the sum directly to the defendant's account. Thereafter, the defendant is alleged to have credited the plaintiff's account.
5. Almost 2 months later, the defendant is alleged to have debited the plaintiff's account with the full amount which it had earlier credited to that account.
6. The act of debiting the plaintiff's account was said to have constituted a reversal, by the defendant, of the consideration which the defendant had paid as consideration for the US \$ 19 million.
7. At that point, the plaintiff thought that the whole matter was concluded. But the defendant later demanded Kshs. 6,830,485.90 from the plaintiff, on account of alleged interest, which the sum of Kshs. 1,132,027,600/- would have earned if the US \$ 19 million had been credited to the defendant's foreign currency account, pursuant to the spot sale contract.
8. The plaintiff expressed the view that the defendant had penalized it in a malicious and discriminatory manner. That was because none of the other banks which had similar situations were treated in the same way as the plaintiff.
9. At paragraph 22 of the plaintiff, it was asserted that the defendant's actions were, *inter alia*, unconstitutional.
10. In the result, the plaintiff claimed from the defendant, the sum of Kshs. 122,975,244.15, together with interest at court rates, from 23<sup>rd</sup> June 1993, until payment in full.
11. On 21<sup>st</sup> April 2011, the defendant filed its Defence.
12. The first point taken up by the defendant was that the plaintiff's claim was bad in law as it offends the mandatory provisions of Sections 4 and 27 of the Limitation of Actions Act.

13. In addition, the defendant asserted that the court lacked jurisdiction to adjudicate over the suit in the absence of leave to extend the limitation time.
14. On 4<sup>th</sup> May 2011, the plaintiff filed a Reply to the defendant's Defence. As far as the plaintiff was concerned, the suit was not time-barred.
15. On 19<sup>th</sup> February 2013 the parties recorded a consent order, pursuant to which the plaintiff was granted leave to amend the Plaintiff. The defendant was also granted leave to amend its Defence.
16. On 7<sup>th</sup> March 2013 the plaintiff filed an Amended Plaintiff. In the Amended Plaintiff, the plaintiff pointed out that it was not until 3<sup>rd</sup> of February 2006 that the Report of the Commission of Inquiry which was appointed by the Government of Kenya was made public. It is then that the plaintiff alleges that it discovered that the defendant had committed illegal, fraudulent and discriminatory acts.
17. According to the Amended Plaintiff, the acts of the defendant were unconstitutional, for they deprived the plaintiff of its property.
18. It was further alleged that the defendant, in its capacity as the Regulator of the Kenyan Banking Sector, was a trustee, whilst the plaintiff was a beneficiary. The plaintiff contended that the defendant breached its obligations as a trustee.
19. Having breached its obligations, the defendant continued to detain money which belonged to the plaintiff, and therefore the plaintiff says that the defendant was holding the funds for the benefit of the plaintiff.
20. The breach of confidence; and the breach of its fiduciary obligations by the defendant, were said to have led to the conversion of the plaintiff's property, by the defendant. Consequently, the defendant had, allegedly, become unjustly enriched by the money which they had kept away from the plaintiff.
21. In the final analysis the plaintiff sought the following reliefs from the defendant;

*“a) A declaration that the Defendant breached its fiduciary obligations towards the plaintiff.*

*b) A declaration that the Defendant discriminated against the plaintiff in the manner in which it applied double standards between the plaintiff and other Banks on spot contracts.*

*c) Subject to (b) above, a declaration that the Defendant deprived the plaintiff of the use and benefit of the funds amounting to Kshs. 122,975,234.90.*

*d) Subject to (b) and (c) above, a declaration that the Defendant is liable for unjust enrichment at the expense and to the detriment of the plaintiff.*

*e) A declaration that the Defendant holds on trust to the plaintiff the sum detained of Kshs. 122,975,243.90.*

*f) An order for the restitution of the principal sum – Kshs. 122,975,243.90.*

*g) Interest on (a) at compounded market rates and or court rate from 23<sup>rd</sup> June 1993 until payment in full.*

*h) Costs of this suit plus interest at court rates until payment in full.*

*i) Any other relief that this Honourable Court may deem just and expedient in the circumstances of this case”.*

22. The defendant has invoked the provisions of Section 4 (1) of the Limitation of Actions Act in its quest to have the suit struck out. The said section provides as follows;

*“The following actions may not be brought after the end of six years from the date on which the cause of action accrued –*

- a. *actions founded on contract;*
- b. *actions to enforce a recognizance;*
- c. *actions to enforce an award;*
- d. *actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;*
- e. *actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law”.*

23. Clearly therefore, actions founded on contract cannot be brought after the end of six years from the date on which the cause of action accrued.
24. Accordingly, any claim by the plaintiff herein, which was founded on contract should have been brought to court before the end of six years from the date when the cause of action accrued.
25. As far as the defendant was concerned, the plaintiff’s claim was filed hopelessly out of time, and that therefore, this court lacks jurisdiction to adjudicate over the suit.
26. The defendant submitted that the law barred the plaintiff from bringing the action whether it was founded on contract or an alleged violation of trustee obligation.
27. Meanwhile, as regard the claims founded upon the constitution, the defendant described the same as a belated afterthought, calculated to try and cure the plaintiff’s fatal claim.
28. Furthermore, the suit was said to be frivolous, scandalous and vexatious as the plaint disclosed no cause of action.
29. I pause here to point out that whereas the defendant advanced submissions to try and demonstrate the lack of a cause of action as well as the alleged scandalous, vexatious and frivolous nature of the claim, the said submissions fall outside the ambit of the Limitation of Actions Act.
30. A claim may have been filed within the time allowed by law, but it could still be frivolous, scandalous or vexatious.
31. The converse is equally true; that a case may not be vexatious, scandalous or frivolous, but if it was filed later than is permissible under the law, it would still be unsustainable.
32. In this case, the defendant’s application was premised on the Limitation of Actions Act, which is;

*“An Act of parliament to prescribe periods for the limitation for actions and arbitrations, and to make provision concerning the acquisition of easements by prescription, and for matters incidental thereto and matters connected therewith”.*

33. In effect, that statute deals squarely with issues appertaining to time within which actions can be brought to court. It does not deal with questions of whether or not there was substance in the claims. The Limitation of Actions Act does not provide ingredients which could be used to ascertain whether or not a claim was scandalous, frivolous or vexatious.
34. Therefore, if the plaint herein was not time-barred, this court would not strike it out, even if it did not disclose a reasonable cause of action.
35. I also hold the considered view that, for the purposes of determining whether or not the claim was brought to court late, it was not relevant whether the claim was or was not either very valuable or of great public significance. The law is meant to be applied in equal measure to all those who come to court, as justice is blind to subjective considerations. The weak and mighty deserve justice in equal measure: And so it should be, lest the court be condemned for being selective.
36. In the case of **KOTHARI VS QURESHI [1967] E.A. 564** Gachuhi J.A expressed himself thus, when talking about the obligation imposed on a plaintiff, to prosecute his claim without delay;

*“A plaintiff, in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the Statute of Limitation **vigilantibus et non dormientibus lex securit.** A court of law refuses its aid to stale demands, where the plaintiff has slept upon his rights and acquiesced for a great time. He is then said to be barred by his laches”.*

37. So, what exactly does the statute governing limitation of actions do; does it extinguish the claim?
38. In **IGA VS MAKERERE UNIVERSITY [1972] I E.A. 65**, the Court of Appeal for East Africa said;

*“The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time-barred, the court cannot grant the remedy or relief”.*

39. This same case, (which was cited by the defendant) also makes it clear that even though a case may be time-barred, that fact did not take away the jurisdiction of the court. This is how the Judges of Appeal stated the position;

*“It is perhaps unfortunate that the Judge had used the words*

***‘the court had no jurisdiction to entertain the suit’.***

*It is clear that the Court had jurisdiction; what the Judge meant was that he had no power to grant any relief as the remedy was barred by limitation”.*

40. In the light of that express pronouncement, the defendant cannot have been right to assert, as it did on the face of its application, that the court lacks jurisdiction to adjudicate over the suit which had been filed late.

#### Effect of Amendment of the Pleat

41. It was the position of the defendant that because the original suit was time-barred, it was, effectively, a nullity which could not therefore be brought back to life by an amendment.

42. In **AUTO GARAGE & OTHERS VS MOTOKOV (NO.3) [1971] 1 E A 514**, the Court of Appeal was handling a matter in which the pleat was said to have failed to disclose a cause of action. The question which had arisen at the High Court is whether or not a pleat which did not disclose a cause of action could be amended.

43. When the matter went before the Court of Appeal, Spry V.P. said;

*“I respectfully agree, also, with the Judgment of Sir Joseph Sheridan in Corbellini’s case. What he was saying was, in effect, that where a pleat fails to disclose a cause of action, it is not a pleat at all and you cannot amend a nullity”.*

44. In the light of that fact, could an amendment be allowed if the result of such an amendment would be to defeat the defence of limitation? That question arose in that case, and this is what the Court of Appeal said;

*“There is a long line of East African cases to the effect that discretionary powers should not be exercised so as to defeat limitation. This has arisen particularly in relation to the exercise of the inherent powers of the court”.*

45. However, Spry V.P made the following important statement;

*“As I understand the position, there is no absolute rule preventing the exercise of a discretionary power so as to defeat limitation, but this will be done only in exceptional circumstances”.*

46. Those points of law are important, but I do not think that they have a direct application to the matter before this court. I so find because I am not dealing with an application for leave to amend the pleat.

47. In this case, the pleat was already amended; and the amendment was done with the concurrence of the defendant.

48. The court did not need to exercise its discretion to determine whether the amendment should be allowed or be rejected.

49. As the defendant consented to the amendment, it was no longer available to it to challenge the said amendment. But it is also important to note that just because the defendant had consented to the

amendment, did not imply that the defendant accepted the efficacy of the claim embodied in the amended plaint.

50.Indeed, the defendant herein categorically re-stated its defence founded upon the delay in the institution of the case. It was therefore open to the defendant to still challenge the amended defence.

51.Pursuant to the provisions of Section 20 of the Limitation of Actions Act;

*“1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action-*

- a. *in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or*
- b. *to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.*

*2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued”.*

52.The plaintiff has alleged that the defendant held some money in trust for the plaintiff.

53.At this stage, the court’s role is not for determining the sustainability of that allegation. My role is in determining whether or not such a claim was time barred; that is the task that was thrust upon my shoulders by the defendant’s application.

54.I have no hesitation in holding that the claim founded upon the alleged fraudulent breach of trust was not time-barred.

#### Breach of Fundamental Rights.

55.The plaintiff has alleged that its constitutional rights had been infringed. In its submissions, the plaintiff stated that the defendant had infringed its constitutional rights under Articles 27, 40, 75 and 82.

56.In the case of **WACHIRA WENEIRE VS ATTORNEY GENERAL MISC CIVIL CASE NO. 1184 OF 2003**, the Applicant went to court through a Constitutional Reference, pursuant to section 84 (1), (2) and (6) of the Constitution. The claim arose from the arrest of the applicant without a warrant; the unlawful search conducted at his house; his incarceration at Jogoo Police Station; his being locked up at the Nyayo House Basement for 16 days; his physical torture whilst at Nyayo House; and his being forced to confess to false charges.

57.The acts complained of took place in 1986, but it was not until 2003 that the applicant filed the Reference in Court.

58.When the issue of the Reference being time-barred was raised, the Judges said;

*“We find that, although there is need to bring proceedings to court as early as possible in order that reliable evidence can be brought to court for proper adjudication, there is no limitation period for seeking redress for violation of fundamental rights and freedoms of the individual, under the Constitution of Kenya”.*

59.Therefore, the learned Judges held that the claim was not statute barred.

60.However, I find that it is also important to highlight the other clear message which the court delivered in that case, which was cited by the plaintiff. The said message was delivered in the following words;

*“There is no doubt that a person who comes to this court under Section 84 of the Constitution alleging contravention of his fundamental rights, is required to be candid with regard to the alleged contraventions, the sections contravened, as well as facts supporting the contravention. This was clearly reiterated in **Matiba Vs the Attorney General Misc. Application No. 666 of 1990**, as follows:*

*‘An applicant in an application under Section 84 (1) of the Constitution is obliged to state his complaint, the provisions of the constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which, if pleaded with particularity, invoke the jurisdiction of the court under the section. It is not enough to allege infringement without particularizing the details and manner of infringement’.*

61. In this case, the plaintiff has not, in the Amended Plaintiff, set out the particular provisions of the Constitution which were allegedly infringed by the defendant.
62. If it is the specific pleading which would invoke the jurisdiction of the court, (as was held in Matiba Vs The Attorney General Misc Appl. No. 666 of 1990), I do find that the citation of particulars in the plaintiff’s submissions herein cannot have cured the defect which occurred when the Amended Plaintiff did not particularize the provisions of the Constitution which were allegedly being infringed.
63. I have deemed it necessary to make that finding, even though it is not one which is directly arising from the issue of limitation of time, because the authority relied upon by the plaintiff makes the position very clear.
64. The other reason why I have deemed it necessary to point out that fact also comes from the said authority. The learned Judges held that the Issue of the sufficiency of facts ;

*“...was a preliminary issue which ought to have been raised before the hearing of the originating summons, and directions of the court sought”.*

65. In that case, the matter was not addressed at the early stages. The court thereafter held that it was rather later for the defendant to complain when the hearing was proceeding.
66. In this case, the defendant already lodged a complaint about the insufficiency of the pleadings. Therefore, although the application before me currently is one that asserts that the whole claim is statute barred because it was brought too late, I find that the issue of the alleged insufficiency in the pleadings will have to be resolved before the case can proceed.
67. In conclusion, I find that the claims founded upon the contract between the parties to this case are time-barred.
68. The claims founded upon the alleged violation of the fiduciary duty of a Trustee are not time-barred.
69. The claims founded upon the alleged violation of the plaintiff’s fundamental rights are not time-barred.
70. As the claims founded upon the contract are time-barred, any claims which flow directly or by extension, from the said contracts, are equally statute-barred.
71. Accordingly, the defendant’s application is partially successful. As a portion of the application failed, I order each party to bear its own costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 24<sup>th</sup> day of March 2015.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Mwicigi for the Plaintiff

Murgor & Ouma for the Defendant.

Collins Odhiambo – Court clerk.