

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 648 of 2004

SANTOWERS LIMITED..... PLAINTIFF

VERSUS

STANBIC BANK (K) LIMITED..... DEFENDANT

R U L I N G

In the amended plaint filed on 25.1.2005 the plaintiff seeks various orders against the defendant. The foundation of the plaintiff's claim against the defendant is an alleged breach of duty by the defendant of its contractual obligations to the plaintiff and also as a trustee of the plaintiff. The alleged breach resulted in the defendant overcharging the plaintiff with respect to interest which overcharge continues to accrue and as at 31.10.2004 rested at KShs.8,978,813.63. The plaintiff further alleges that the defendant has acted fraudulently and in breach of its fiduciary legal contractual duties and contractual rights particulars whereof are pleaded. Of special importance to the matter at hand is the averment at paragraph 13 of the said amended plaint which reads as follows:-

“13. By a letter dated 16.9.2003 the Bank agreed to recalculate interest charged at the correct rates and reimburse overcharges. However despite having been supplied with full details of overcharges unlawfully secretly and surreptitiously debited, the Bank has refused to reimburse any amount to the plaintiff.”

The defendant in its amended defence filed on 7.2.2005 has averred that it has executed its contractual duty with all due diligence and in accordance with usual bank practices and customs and did at all material times properly and honestly account for all funds handled by it in the plaintiff's accounts. There is a further averment that the bank customer contractual relationship did not constitute the defendant a trustee of the plaintiff. Of particular importance is however the averment at paragraph 11 of the amended defence which reads in part as follows:-

“11. Paragraph 13 of the plaint is denied. The defendant denies that it did by a letter dated 16.9.2003 or in any other way agree to recalculate interest or reimburse overcharges. The defendant states that it has not at any one time overcharged interest and is therefore not in a position to reimburse any monies to the plaintiff The letter cannot be an admission of liability in any way.”

The plaintiff in an amended reply to defence filed on 15.2.2005 inter alia avers that the defendant has admitted the overcharge of interest. Reference is also made to a letter of 10.9.1003 in which the defendant allegedly agreed to recalculate and reimburse any overcharge of interest for the period 1997 to 2000 only. The entire overcharge of interest for the entire period is alleged to be covered in the letter of 16.9.2003. These averments were maintained in the further amended defence filed on 2.12.2005 and the reply to the same filed on 9.12.2005.

The pleadings were in this state when the defendant's Preliminary Objection was debated before me on 4.7.2006. The basis of the preliminary objection was that the suit is statute barred under the provisions of Section 4(1) (a) of the Limitation of Actions Act, Cap. 22 Laws of Kenya. The alternative basis for the preliminary objection was that the claim for accounts is statute barred under the provisions of Section 4(3) of the Limitation of Actions Act Cap. 22 Laws of Kenya.

On a consideration of the pleadings parts of which have been referred to above, it becomes obvious that a determination of the issue of limitations cannot be made without considering the evidence. The

plaintiff has pleaded that its claim has been admitted in letters dated 10.9.2003 and 16.9.2003. That position is contested by the defendant. To resolve the conflict must of necessity involve a consideration of the evidence. It is now settled that a Preliminary Objection cannot be raised if any fact has to be ascertained. **(See Eunice, Karimi Kibunja –vs. Mwirigi Mringera Kibunja: Nairobi C.A No. 103 of 1996 (UR).**

It is also obvious that the defendant does not admit that the facts as pleaded by the plaintiff are correct. Indeed all the pertinent facts are disputed. Infact the parties have framed two issues for determination of the court with regard to limitations. The issues are framed as follows:-

“5. What is the applicable period of limitation?

6. Is the plaintiff’s claim or any part thereof statute barred?”

The framing of these issues, in my view put the matter beyond the ambit of a preliminary objection. I am fortified in this view by the precedent setting case of **Mukisa Biscuit Manufacturing Company Ltd – vs- West End Distributors Ltd [1969] E.A 696** in which Sir Charles Newbold, P observed at page 701 as follows:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”

It is clear from my above consideration of the defendant’s Preliminary Objection that the same is not a proper Preliminary Objection and is overruled with costs to the plaintiff.

DATED and DELIVERED at NAIROBI this 25th day of July, 2006.

F. AZANGALALA

JUDGE

25.7.2006

Read in the presence of:-