Jubilee Insurance Company Limited v Nyaema & 4 others (Civil Appeal E124 of 2022) [2024] KEHC 6803 (KLR) (Commercial and Tax) (16 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6803 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E124 OF 2022

DKN MAGARE, J

MAY 16, 2024

BETWEEN

JUBILEE INSURANCE COMPANY LIMITED ..... APPELLANT

AND

COLLINS NYAEMA ..... 1ST RESPONDENT

JARED ORARIE ..... 2ND RESPONDENT

STEPHEN NDEDA JUMA T/A NDEDA & CO ADVOCATES 3RD RESPONDENT

OBINCHU PETER OMINGO T/A OMINGO & ASSOCIATES ADVOCATES ..... 4TH RESPONDENT

HAROLD MBATI T/A MBATI ASSOCIATES ADVOCATES .. 5TH RESPONDENT

JUDGMENT

1. This Appeal arises from the Ruling and Order of Hon. E.M Kagoni Principal Magistrate delivered on 12/8/2022 in Milimani COMMSU No. E748 of 2020.

2. The Ruling arose from the Application dated 28/1/2022. In the Application, the Respondents sought to strike out the Plaint dated 25/9/2020 on the ground that the suit was barred by limitation of actions.

3. It was stated that the purported allegations of fraud took place between 2015 and 2017 with the last date being 30/5/2017. That since the suit was filed on 9/10/2020, it was filed out of time of limitations which was 3 years.

4. In their response, the Appellant contended that the cause of action arose on 21/11/2017 when investigations were completed and fraud determined for the Respondents.

5. The Trial Court considered the Application, and response thereto and rendered its Ruling on 12/8/2022. The court found, in a rather cryptic way that the applicant has pleaded that they suspected fraud sometime in 2017. The court stated in must have been the period the claim started to run. Consequently, in its Ruling, the court dismissed the suit with costs for being statute barred.

6. Aggrieved, the Appellant lodged the Memorandum of Appeal dated 11th August 2020 raising material grounds thus:

   a. The Trial Magistrate erred in law and fact in dismissing the suit for being time barred.

   b. The Trial Magistrate erred in law and fact in failing to find that fraud would only arise after conclusion of the investigations.

   c. The Trial Magistrate erred in law and fact in failing to find that the case of action arose after fraud was discovered.

Submissions

7. The parties filed respective written submissions. The Appellant's position was as stated in the Memorandum of Appeal. It was submitted that the trial court erred in law and fact in finding limitation of actions in favour of the Respondents. They relied on Section 26 of the Act that:

> " 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 much 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

8. The Appellant relied on several cases, which the court shall not regurgitate herein. To them, the decision in Ahmed Siad Mohammed v Municipal Council of Garissa & another [2014] eKLR is in support of their case. They submitted that Section 26 of the *Limitation of Actions Act* makes it clear that for claims for fraud or mistake, time starts to run from the moment such fraud or mistake is discovered.

9. On this, it was further contended that an issue of limitation of actions in fraud matters cannot be determined at preliminary stage and should go to full hearing. They submitted that the Appellant could not be said to have discovered the fraud before the investigation was done. They further relied on Allison & Another v Horner (2014) EWCA Civ 117 in which it was held as follows:

> " The Plaintiff has discovered the fraud in Section 32(I) refers to knowledge of the precise deceit which the Claimant alleges had been [perpetrated on him. It follows that knowledge of a fraud in a more general sense is enough to start limitations period running under Section 32(1).

10. The Respondent on other hand submitted that the lower court was correct in its finding that the suit was time barred. They relied on Section 4 of the *Limitation of Actions Act* to submit that a cause of action based on tort had limitation of 3 years.

11. It was also submitted that Section 26 of the *Limitation of Actions Act* in fraud, the period of limitation does not begin to run unless the Plaintiff has discovered the fraud and therefore, as the Appellant had detected possible fraud by 30th May 2017 but filed the suit only after the 3 years limitation period on 9th October 2020 and so the suit was time barred.

12. They relied among other cases on the case of Justus Tuketi Obara v Peter Koipeitai (2014) eKLR that limitation for fraud would not start to run until the Plaintiff has discovered the fraud but the discovery of the fraud is what lead to the investigations.

13. They urged the court to dismiss the Appeal with costs.

Analysis

14. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. in the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

15. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the law lords held by as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

16. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

17. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

18. However, being a matter that proceeded by way of Affidavits, the court before does not have an advantage of hearing parties. While addressing a scenario where the court below did not have advantage,

Kiage JA stated as follows in the case of *Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018)* [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR:

> " I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge. I think that this further widens our latitude for departure where necessary.
>
> In this matter the court below did not have any advantage of hearing witnesses. The court herein thus has more latitude.

19. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR , the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

20. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document.

21. The issue is whether the lower court erred in law and fact in dismissing the suit on account of limitation of actions.

22. The general factual matrix is largely agreed upon. The parties agree to the means to the end but only disagree to the end itself. I say so because it is common position of the parties that the cause of action in respect of fraud would be brought within 3 years and time begins to run once the fraud is detected. What parties do not agree is whether time for the purpose of limitations in this case started prior to the investigations for the fraud or subsequently after the investigation was completed.

23. The law on limitation of actions in respect of fraud stipulates under Section 26 of the Limitation if Actions Act as follows:

> " 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 much 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. It was never the intention of the legislature to condone fraud. However, plaintiff must be vigilant on their claims. Sometimes parties just sit on their claims until it is stale. In other times, it is the potential defendants who conceal fraud. The legislature was aware of such temptation. This is where, unlike tort

rctesnion of limitation is limited to one year after. In Gathoni vs. Kenya Co-Operative Creameries Ltd [1982] KLR 104, Potter, JA at page 107 expressed himself thus:

> " The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."

31. In Iga vs. Makerere University [1972] EA it was held:

> " A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Section 3 and 4 of the Limitations Act Cap 21 together with Order 7 Rule 6 of the Civil Procedure Rule of Uganda which has same provisions with Limitations Act of Kenya seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations 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."

24. The Respondents' position is that per the Investigation Report dated 21st November 2017, the Appellant by own admission stated that the fraudulent activities occurred between 2015 and 2017 with the majority of the activities in 2016. Therefore, it was submitted that the Appellant failed to exercise reasonable diligence after the discovery of the fraud. This does not take into consideration a fact that some of the incidents of fraud were pleaded to have occurred on 30/6/2017; it is unclear how this fraud was to be discovered in May yet it was a continuing fraud occurring after May 2017.

25. Fraud is criminal in nature. There must be discovery of not only the actions but the actors. Even the discoverer is an actor in the whole scenario. If we believe that mere suspicion by the company is enough, then the officers of the company who perpetuated it can be said to have bound the company. Without understanding the factual interconnectedness of the fraud it is not possible to rely on suspicion alone. Discovery of fraud is a process. There could be mere suspicions. However strong those suspicions are, the fraud must be discovered. In the case of R.G Patel -V-Lalji Makanji [1957] EA 314 where the former Court of Appeal for East Africa stated doth: -:

> " Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

26. Pray, if fraud is suspected but not discovered, is there fraud". To discover requires a process of uncovering the acts that the perpetrators wished kept in the dark. Before the faces are put to the fraudsters, fraud has not been discovered. This includes the extent and depth. Reckless disregard by the discoverer or failure to exercise diligence cannot be covered in non- discovering the fraud.

27. As a general rule suspicions is the gravamen for many of the safeguards companies put in place. Mere suspicion cannot found a claim of fraud. The law cannot be based on paranoia or suspicion. Discovery must include proper finding of the fraud. The entire complex details may not be found. Nevertheless, when the defendants are unknown, time cannot run. The court treated all appellants as one. It could turn out in evidence that each respondent carried their own fraud. For example, a cheque that was issued but unbanked by the time the fraud was discovered, can still be subject of the fraud, given that the fraudulent deposit had not been completed.

28. I agree with the respondents that the Appellants pleadings are not the best, especially having regard to order 2 rule 10(1). However, those are issues that can be cured by amendments. The rule provides as follows: -

> " Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing-
>
> (a) particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and
>
> (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies."

29. In the case of D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another[1980] eKLR Justice Madan stated as doth:

> 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable. Accordingly, it is necessary to consider whether or not this plaintiff has an arguable case.'

30. To this court, I do not agree with the position and submission by the Respondents that the Appellant would have filed the proceedings merely after perceiving fraud. Fraud, in my view, is conduct that requires proper investigation and sometimes those who perpetrated it are involved in the detection of fraud."

31. Therefore, proper investigation was key before imputing fraud on the part of any participants. As such, it was necessary for the Appellant to conduct forensic and other investigations to avoid proceeding on unfounded suspicion. It is the investigation report that founded a cause of action to be presented for judicial determination and I so find. As was held in Mususa vs. Dhanani [2001] 2 EA 471:

> " Mere suspicion is not enough, there must be circumstances incompatible with honest dealing and fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from facts.

32. Therefore, in my view, the Appellant exercised reasonable diligence by initiating investigations to found basis for a cause of action. The learned magistrate thus erred in finding that the Appellant would have moved to institute a cause of action based on fraud before the investigation of the alleged fraud. Equally, the court erred in its finding that the discovery of the fraud was before the investigation because it is only the investigation that traced the Respondents as culpable. The suit must thus be reinstated to allow the Appellant and the Respondents to ventilate their respective cases.

33. I find and hold that the court was wrong in finding that fraud occurred or accrued earlier than some dates that are indicated in the Plaint. The claim was time barred by dint of section 26 of the *limitation of Actions act*.

34. The ruling of the lower court is accordingly set aside. The application dated 28/1/2022 was unmerited and ought to have been dismissed. The Appeal is merited and is accordingly allowed.

Determination

35. In the upshot, I make the following orders: -

    a. The Appeal is allowed.

    b. The Ruling and Order of Honourable E.M Kagoni, Principal Magistrate dated 12th August 2022 is hereby set aside. The Application dated 28/1/2022 is dismissed with costs.

    c. The lower court file shall be placed forthwith before the Chief Magistrate for Directions on the hearing and determination of the suit on 30/5/2024.

    d. The appellant shall have costs of 455,000/= for the Appeal payable within 30 days in default execution do issue.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 16TH DAY OF MAY 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Walker Kontos Advocates for the Appellant

Maingi Musyimi & Ass. for the 1st & 2nd Respondents

Court Assistant - Brian