



**Othman v Consolidated Bank of Kenya & another (Civil Suit E247 of 2023)  
[2024] KEHC 17010 (KLR) (Commercial and Tax) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 17010 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E247 OF 2023  
AA VISRAM, J  
OCTOBER 24, 2024**

**BETWEEN**

**AL AMIN HUSSAN OTHMAN ..... PLAINTIFF**

**AND**

**CONSOLIDATED BANK OF KENYA ..... 1<sup>ST</sup> DEFENDANT**

**JAMES ANDREW PHILIPOWSKY ALIAS ERICK NJUWA MNGOLA  
JUNIOR ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. I have considered the Notice of Motion application dated 22<sup>nd</sup> August, 2023, together with the affidavit in support sworn on even date, the replying affidavit sworn on 19<sup>th</sup> September, 2023, the pleadings, and the rival submissions of the parties.
2. The application seeks to strike out the 1<sup>st</sup> Defendant as a party to the suit, on the basis that the same discloses no cause of action against it.
3. The history of the dispute concerns a purchase of property by the Plaintiff from an individual who purported to be the 2<sup>nd</sup> Defendant. The Plaintiff suffered loss arising out of the fraud, and sought to hold both the Bank, and the fraudster liable.
4. The Plaintiff's view was that the Bank had failed in its duty of care by discharging the security against the property he purchased without first ascertaining if the 2<sup>nd</sup> Defendant was truly a Director of the borrower.
5. The Bank, on the other hand, filed the present application seeking to be struck out as a party to the suit on the basis that it was not a party to the contract between the Plaintiff and the fraudster; and on the basis that it exercised reasonable care prior to carrying out the discharge.



6. Based on the record before me, the Plaintiff filed suit on 29<sup>th</sup> May, 2023, which from the outset I note, is four years after the event.
7. The Plaintiff contains both allegations of fraud, and allegations relating to negligence on the part of the Bank. As regards the allegations of negligence, the Plaintiff claimed that the Bank failed in its duty of care to him.
8. As regards the elements of fraud, the Plaintiff claimed, at paragraph 33 of the Plaintiff, the following acts of fraud on the part of the Bank, which had been recited verbatim below:-
  - i. It knowingly and willingly failed or refused to comply with the banking regulations set by the Central Bank of Kenya resulting to fraud perpetrated by its servant/employee, facilitating the perpetration of, and, benefitting from fraudulent acts carried out by its servant/employee and attempting to cover up the fraudulent and illegal act of execution of the Discharge of Charge over LR. No. 12882/21 (IR 37728) thereby causing actual loss to the Plaintiff and obstructing the course of justice.
  - ii. Breaching standard banking practice and procedure.
  - iii. Failure to make enquiries to uncover or prevent fraud.
  - iv. Failed to ascertain the true identity of the 2<sup>nd</sup> Defendant before executing the Discharge of Charge over LR. No. 12882/21 (IR 37728).
  - v. That the 1<sup>st</sup> Defendant aided the 2<sup>nd</sup> Defendant by fraudulently executing the Discharge of Charge over LR. No. 12882/21 (IR 37728) with intent to defraud the Plaintiff; upon which the Plaintiff relied upon and suffered damages.
9. The Plaintiff did not expand much further in relation to the said allegations, and his position was, in summary, that 1<sup>st</sup> Defendant failed to ascertain the true identity of the 2<sup>nd</sup> Defendant before executing the discharge of charge over the suit property.
10. He contended that he relied on the strength of the 1<sup>st</sup> Defendant's discharge of charge over the suit property issued to the 2<sup>nd</sup> Defendant to proceed with the sale transaction and as a result suffered substantial loss.
11. The sole issue in the application dated 22<sup>nd</sup> August, 2023, is whether to strike out the suit against the 1<sup>st</sup> Defendant?
12. In support of the application, the 1<sup>st</sup> Defendant, in summary, argued that it was not privy to the contractual relationship between the Plaintiff and the 2<sup>nd</sup> Defendant; it did not participate in the sale of the suit property; it was not a necessary party to the suit; it could not aid the court to determine the matters before it; and it did not owe a duty of care to the Plaintiff.
13. As regards the issue of duty, the Applicant explained at length, the various steps that it took prior to discharging the charge, as well as the history of the discharge, which in itself, is a story. I will not reiterate all the details, however, the record shows that the Bank received approximately five letters from various law firms and directors related to the borrower demanding a discharge of the charge over the property. As a result of the said numerous demands from various entities, the Bank hired counsel to advise it on the appropriate action.
14. Following such advice, the Bank took several steps to inquire into the identity of the true owner of the property. The same include:- retaining outside counsel, who undertook a search at the Companies Registry to ascertain the directors of the chargor; counsel undertook two further searches; namely, an



e-citizen search, and a physical search. The two searches however revealed different results. Given the contradictory findings, the Bank accordingly refused to carry out the request for discharge over the property.

15. As a result of the said refusal on the part of the Bank, litigation proceedings were commenced against the Bank in Milimani Civil Suit No. 1414 of 2019 by Wesu Holdings Limited, by the borrower, seeking to compel the Bank to discharge the property. The parties eventually compromised the suit and filed a consent, the terms of which, led to the Bank discharging the charge over the property.
16. Having considered the history of the matter, the affidavits sworn in support and in opposition to the application; and the pleadings; I will address the question of whether or not the Plaint ought to be struck out against the Bank?
17. The starting point requires a consideration of the cause of action, and whether or not the same is time barred. The *Limitation of Actions Act* provides for a filing of suit within three years in respect of tort claims. Section 4 (2) of the said Act expressly provides for the same, and this has been articulated in numerous authorities, including Kenya Power & Lighting Company Limited v Collins Agumba Aboge [2016] eKLR (Majanja, J), where it was stated that a suit based on tort becomes statute-barred three years after the cause of action arose, as prescribed by section 4(2) of the *Limitation of Actions Act*.
18. Looking at the Plaint, the cause of action is alleged to have occurred in or around the months of August to September in the year 2019. Notably, the Plaint seeks damages from the date of 30<sup>th</sup> August, 2019, to present date; and the Plaint was filed on 29<sup>th</sup> May, 2023.
19. Based on the dates set out above, it is evident the Plaint was filed more than three years after the date the cause of action arose. Accordingly, I am of the view that all the claims based on tort against the Bank are time barred. This includes all the claims set out in the Plaint with the exception of allegation (v), listed in paragraph eight above. Allegation (v) is the only allegation by the Plaintiff that relates to fraud rather than negligence.
20. The remaining allegation (v) above states that the Bank aided the 2<sup>nd</sup> Defendant to carry out the fraud. I will therefore address this ground alone for the purpose of the application, bearing in mind, that at this point, the court is considering the same for the purpose only of striking out the suit as against the Bank. Looking at the history of the claim and the sequence of events that took place, it seems unlikely on a balance of probability that the Bank would have taken so many precautions if it intended to aid in the fraud. These precautions, again, included retaining outside counsel, and even engaging in a civil suit, prior to acquiescing to the numerous demands to release the security in question.
21. The evidence on record further shows that a duly executed authority to act, and to appear on behalf of Wesu Holdings Limited was provided to the Bank; which it relied on, and a further search at the company registry indicated that Erick Njumwa Mngola Junior was a director of the Wesu Holdings Limited. The same are found at Exhibit 'FW-4' in the 1<sup>st</sup> Defendant's supporting affidavit sworn on 22<sup>nd</sup> August, 2023. Given all the above, I am persuaded that the Bank was not involved in the alleged fraud.
22. In any event, other than merely stating that the Bank aided in the fraud, neither the pleadings or the evidence before the court at this point provide a sufficient basis for the claim. I cannot help but wonder if the said allegation was included with the sole intent to extend or defeat the statutory period of limitation, given that the same had already expired prior to the commencement of the suit in relation to the claims made in tort.
23. Additionally, I am of the view that the suit may not be sustained against the Bank because it was not a party to the contract for sale and purchase. The Court of Appeal in Savings & Loan (K) Limited



v Kanyenje Karangaita Gakombe & Anor [2015] eKLR cited with the approval of Redington Kenya Limited v Thomas N. Nabende & Anor [2021] eKLR which held: -

“The doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.”

24. Further, I do not think that a buyer may rely on a discharge by a Bank to verify the identity of a seller. That is not the purpose of a discharge. A Purchaser is bound to carry out his or her own due diligence in the process of purchasing property from a seller. To hold otherwise would shift the principle of caveat emptor from the buyer to the Bank simply because the Bank is holding the title of the subject property as security for its own reasons. This would not be a tenable position in law.
25. Moreover, once the Bank had discharged the security, its role in the sale and purchase of the property came to an end. The Plaintiff was free to either proceed or abandon the purchase. Had he wished to proceed, the burden of ensuring that the property was free from all defects of title belonged to him alone. This is in line with Esther Ndegi Njiru & Anor v Leonard Gatei [2014] eKLR and affirmed in Harrison Kiambuthi Wanjiru & Anor v District Land Registrar Nairobi & 3 others [2022] eKLR, where the court stated as follows:-

“The law places a responsibility to purchasers of titled properties to carry out proper due diligence in order to ascertain the status of a property beyond carrying out an official search. The Plaintiffs’ claim if any lies with pursuing the person whom they allege sold the suit land to them for the requisite legal action.”

26. Having found that the claims against the Bank relating to tort are time barred, and based on the further reasons set out above, I find that application is with merit. The suit against the 1<sup>st</sup> Defendant is hereby struck out with costs.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24<sup>TH</sup> DAY OF OCTOBER 2024**

**ALEEM VISRAM, FCIArb**

**JUDGE**

In the presence of;

.....For the Plaintiff

.....For the 1<sup>st</sup> Defendant

.....For the 2<sup>nd</sup> Defendant

