



**Wagiciengo v Sichangi Partners Advocates & 2 others (Civil Case
247 of 2018) [2024] KEHC 14738 (KLR) (Civ) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14738 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE 247 OF 2018**

**CW MEOLI, J
NOVEMBER 21, 2024**

BETWEEN

ANASTACIA WAGICIENGO PLAINTIFF

AND

SICHANGI PARTNERS ADVOCATES 1ST DEFENDANT

CYRUS MAINA 2ND DEFENDANT

GEORGE SICHANGI 3RD DEFENDANT

RULING

1. Anastacia Wagiciengo (hereafter the Plaintiff) instituted this suit against Sichangi Partners Advocates, Cyrus Maina and George Sichangi (hereafter the 1st, 2nd and 3rd Defendants respectively), by way of the plaint dated 19.10.2018. Therein seeking several reliefs, including declaratory orders; a mandatory injunction compelling the Defendants to pay the sum of Kshs. 17,750,000/- owed to the Plaintiff; and damages, arising out of a claim for breach of trust and fiduciary duty.
2. The 2nd Defendant entered appearance and filed his statement of defence dated 6.12.2018, therein denying the key averments in the plaint and liability. Sometime thereafter, the said Defendant filed the notice of preliminary objection dated 16.02.2024 challenging the competency of the suit on the following grounds:

“TAKE NOTICE that the Cyrus Maina, sued and named as the 2nd Defendant, shall at the earliest hearing raise a Preliminary Objection on points of law to be heard and determined in priority to any other issue herein on the following grounds that:-

- a. The proceedings by the Plaintiff are fatally and incurably defective, for failure to properly invoke the Hon Court’s jurisdiction, the same being statute barred.



The suit being a tortious claim ought to have been filed within three years from the accrual of the cause of action yet the suit has been filed outside of this period in contravention of Section 4(2) of the *Limitation of Actions Act*.

- b. Ergo, the instant suit is an outright abuse of legal and judicial process, incompetent and fatally defective hence should be dismissed in limine with costs to the 2nd Defendant on a full indemnity basis.” (sic)
3. The parties filed written submissions on the preliminary objection.
4. In support thereof, counsel for the 2nd Defendant anchored his submissions on the decisions in *Joseph Murai Kamau v Mawara Investment Limited* [2005] KEHC 1684 (KLR) and *Kiamokama Tea Factory Co. Limited v Joshua Nyakoni* [2015] KEHC 5568 (KLR) where it was held that a claim founded on breach of statutory duty constitutes a tort. Counsel proceeded to submit that the present suit being founded on the tort of alleged breach of statutory duty, ought to have been brought within the statutory period of three (3) years by dint of Section 4(2) of the *Limitation of Actions Act*. Counsel cited the decision in *Jumbo Commodities Limited v B. N Kotecha & Sons Limited* [2022] KEHC 15675 (KLR) to contend that the cause of action in the present matter arose at the time of the alleged breach, being 24.06.2014 and hence the suit against the 2nd Defendant ought to have been brought within three (3) years therefrom, that is by 24.06.2017. That the suit against the said Defendant having been filed outside the stipulated timelines ought to be struck out for being statute barred.
5. In response, the Plaintiff⁷ relied on the cases of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 and *Oraro v Mbaja* [2005] KEHC 3182 (KLR) as to what constitutes a preliminary objection. To argue that the grounds raised by the 2nd Defendant do not meet the threshold of a preliminary objection as they are not pure points of law. Counsel further anchored his submissions on the decision rendered in *South Nyanza Sugar Co. Ltd v Dickson Aoro Owuor* [2017] KEHC 7669 (KLR) regarding accrual of causes of action for breach of contract. Counsel therefore contended that by dint of Section 4(1) of the *Limitation of Actions Act*, a claim arising out of a breach of contract ought to be filed within six (6) years of the date when the cause of action accrued. Counsel maintained that the present claim is in the nature of a breach of contract and therefore urged that the 2nd Defendant’s preliminary objection be dismissed with costs.
6. On their part, the 1st and 3rd Defendants through their counsel, supported the preliminary objection by adopting the submissions made on behalf of the 2nd Defendant; similarly urging that the suit be struck out, and praying for costs thereof.
7. In his rejoinder submissions, counsel for the 2nd Defendant relied on the decisions in *Sohanlaldurgadass Rajput & Soraj Sohanlala Rajput v Divisional Integrated Development Programmes Co Ltd* [2021] KEELC 1427 (KLR) and *Salim Mohamed Salim Tweshe v Khalid Salim Naaman, Said Salim Naaman, Abdunnassir Naaman, Tobani Salim Naaman, Farid Salim Naaman & Al Amin Salim Naaman* [2020] KEELC 745 (KLR) among others. To argue that the issue of limitations goes to the root of a court’s jurisdiction and therefore constitutes a pure point of law. Counsel reiterated his earlier averments that the cause of action against the 2nd Defendant is founded on breach of trust and that no contractual relationship existed between his client and the Plaintiff, at any material time.
8. The court has considered the notice of preliminary objection and the contending submissions and authorities cited in that respect.



9. Beginning with the definition of a preliminary objection, the court in the renowned case of Mukisa Biscuit Manufacturing Company v West End Distributors Limited (1969) EA 696 stated that:

“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 in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

10. The above definition was further advanced by the Supreme Court in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR as follows:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

11. From a perusal of the pleadings on record but without going into the merits thereof, it is apparent that the Plaintiff's claim against the Defendants herein is based on alleged breach of trust and fiduciary duty, arising from an advocate-client relationship which allegedly subsisted between the Plaintiff and the Defendants. The Plaintiff ultimately seeking various reliefs including declaratory orders and the sum of Kshs. 17,750,000/- being monies allegedly owed to her by the Defendants.

12. It is trite law that trust and fiduciary duty derive from aspects of both common law and equity. The underlying principles were addressed by the Court of Appeal in the case of Pioneer Holdings (Africa) Ltd v Francis Thuo and Partners Ltd & 2 others [2019] KECA 711 (KLR), as follows:

“The editors of Chitty on Contracts, 13th edition, volume II state [para 31-119 at page 74] that although there is dicta indicating that an agent's duties are based entirely on the contract between the principal and agent, fiduciary duties are well established as separate (though not without overlap) and to some extent counterbalance the strict rules on implication of terms at common law.

See Kelly vs Cooper [1993]AC 205, 213-214; Clark Boyce vs Mouat [1994] 1AC 428,437; Liverpool City Council vs Irwin [1977]AC239.

36. Some of the duties Pioneer claims the stockbroker breached are duties which an agent, as a fiduciary, owe to his principal.

According to Black's Law Dictionary, 8th edition, a fiduciary is:

“a person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence and candour; one who must exercise a high standard of care in managing another's money or property.”

37. The duties of a fiduciary are in some respects equitable duties founded on equity and as the editors of Chitty on Contracts, 13th edition, volume II para 31-128 at page 80 note:

“Equity provides much of the reasoning in this area, substantive as well as remedial, and must be invoked when a claim is in respect of one of the equitable duties and is not simply a common law claim for breach of contract or negligence.



In the context of equity, many judges have talked in terms of profits made in breach of fiduciary duty as being held on constructive trust, or of the fiduciary being liable to account for such profits as a constructive trustee. This on the face of it invokes equity’s most typical technique, that of requiring property to be held on trust. The logical consequences of this would be that, the claimant’s claim to profit wrongfully made lying in equity, it is likely to be proprietary in nature. Such reasoning would give the claimant priority in bankruptcy and also entitle him to further profits arising from the money or property so held. In appropriate cases the money or property would also be specifically recoverable, and there would be consequences as regards limitation, for by virtue of section 21(1)(b) of the Limitation Act 1980 its provisions do not apply to actions by a beneficiary to recover trust property from a trustee.” [Emphasis]

38. The editors of Chitty on Contracts go on to state that:

“The basic duty of an agent in equity has always been said to be one to account, and it was said some years ago that some types of constructive trusteeship are nothing more than a formula for equitable relief; and it has recently been said that “accountable as constructive trustee” should be replaced by the less specific “accountable in equity.”

13. Suffice it to say, from a glance at the Plaintiff’s pleadings, that while it is apparent that the Plaintiff’s claim is founded on breach of trust and fiduciary duty, the same appears to be based on a contractual relationship which purportedly existed between the Plaintiff and the Defendants herein at all material times. It is equally apparent that the fiduciary duty here is distinct from the principle relating to statutory duty of care cited in the submissions by the 2nd Defendant. In the court’s view, the breach of trust and fiduciary duty allegedly arising here would primarily derive from a relationship that is contractual in nature; contrary to the arguments by the 2nd Defendant that the same is founded on a tort. Thus, the authorities relied upon by the 2nd Defendant on the subject of statutory duty of care are distinguishable from the matter before this court, which pertains to alleged breach of trust and fiduciary duty.

14. It therefore follows that Section 4(1) of the Limitation of Actions Act becomes applicable. The same 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”.

15. The next question is when the cause of action arose or otherwise accrue. Upon perusing the Plaintiff’s pleadings, it is apparent that the cause of action likely accrued sometime in or around the year 2013 or 2014, though no specific dates were set out therein. Be that as it may, upon considering the provisions



of Section 4(1) (supra), the Plaintiff ought to have brought her suit within six (6) years thereof. As earlier mentioned, the present suit was filed on 19.10.2018 which falls within that statutory timeline.

16. In view of the foregoing, the grounds upon which the preliminary objection is premised cannot hold. Accordingly, the notice of preliminary objection dated 16.02.2024 is hereby dismissed with costs to the Plaintiff.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21ST DAY OF NOVEMBER 2024.

C. MEOLI

JUDGE

In the presence of

Mr. Ikua for the Plaintiff:

N/A for the 1st Defendant:

Ms Maina holding brief for Ms Otunga for the 2nd Defendant:

C/A: Erick

