



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE NO.248 OF 2018**

**CENTRAL ORGANIZATION OF TRADE UNIONS (K).....PLAINTIFF/RESPONDENT**

**VERSUS**

**MR. ERIC WANYOIKE.....1<sup>ST</sup> DEFENDANT**

**BARCLAYS BANK OF KENYA LIMITED.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**MR. CORNEL KALVIN OGUTU NYANGUN.....3<sup>RD</sup> DEFENDANT**

**MRS.MILLICENT OGILA NGESO.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The notice of motion dated 9<sup>th</sup> July 2020 by the plaintiff is brought under sections 4(2) of the Limitation of Actions Act and Order 2 Rule 15(1)(b), (c) and (d) & Order 51 Rule 1 of the Civil Procedure Rules 2010. The application seeks the following orders:

- i. That this honourable court be pleased to strike out paragraph 8 of the plaint and the Plaintiff's suit in so far as it is premised on the cause of action of negligence.*
- ii. That the costs of this application and the suit be awarded to the 2<sup>nd</sup> defendant.*

The application is supported by the following summarized grounds:

- a) The plaintiff's suit is in part premised on the tortious cause of action of negligence and fraud.*
- b) Under section 4(2) of the Limitation of Act, actions founded on tort may not be brought after the end of three (3) years from the date when the cause of action arose.*
- c) According to the plaintiff, it discovered the negligence and fraud on or about 27<sup>th</sup> March 2013. Consequently, the plaintiff ought to have filed its claim for negligence and fraud by 1<sup>st</sup> April 2016*
- d) The plaintiff instituted this suit on 24<sup>th</sup> October 2018, more than two (2) years outside the statute period.*
- e) The plaintiff has not sought and obtained extension of time to institute its suit premised on negligence, neither can such extension be granted in view of the discovery of the alleged fraud in March 2013.*
- f) In the circumstance, to the extent the plaintiff's suit premised on negligence, it is incompetent, bad in law and fatally defective.*

2. It is also premised on the supporting affidavit sworn on 8<sup>th</sup> July 2020 by Milkah Gachanja the legal counsel of the 2<sup>nd</sup> defendant/applicant. She averred that the plaintiff/respondent holds an account no.xxxx at the 2<sup>nd</sup> defendant's Queen's House Branch which was opened in the 1960's. She further averred that a second account known as account no.xxx-xxxx in the same branch was opened and managed unprocedurally. Its through this account that the fraudulent withdrawal of the sum of Kshs.114, 993,443.45 was made.

3. She has deponed that the respondent at paragraph 8 of the plaint has accused the applicant and 1<sup>st</sup> defendant of opening and operating account No. xxxx. The alleged actions are all outlined in paragraph 5 a-g of the outlined supporting affidavit.

4. She avers that the respondent ought to have known about the opening of the second account from the year 2002 if it complied as expected with its constitution annexed as ABL-3. That since their claim is based on negligence the same should have been filed within (3) years in accordance with section 4(2) of the Limitation of Actions Act. That since the discovery was made on 27<sup>th</sup> March 2013 the suit should have been filed by 1<sup>st</sup> April 2016.

5. In opposition to the application, the plaintiff/respondent's national general secretary Dr. Francis Atwoli swore a replying affidavit on 18<sup>th</sup> March 2021. He deposed that the suit is premised on breach of a contractual obligation by the 2<sup>nd</sup> defendant/applicant and fraud and not merely on negligence. He avers that the reference to negligence was to support the fact that the defendants failed to observe the contractual duties bestowed upon them by law in handling the plaintiff's monies as banked with the 2<sup>nd</sup> defendant.

6. He avers that prayer (b) in the plaint seeking damages for breach of contract amongst other prayers is premised on 6 year timelines. He further depones that the application is misconceived and premised on the narrow understanding of the applicable law. That the applicant is misleading this honourable court into believing that this suit is premised on negligence when it is clearly based on fraud, connivance, collusion and breach of contract.

7. He therefore urges the court to dismiss the application to pave way for hearing of the suit on merit.

8. Directions were given that the application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

9. The 2<sup>nd</sup> defendant/applicant through his advocate Mr. Nyaburi submitted that the extent of the plaintiff's cause of action is premised on negligence and the said action is statute barred and in violation of section 4(2) of the Limitation of Actions Act. Further the respondent had acknowledged that the claim is premised in part on negligence but also on breach of contract. Limitation of Actions Act provides that:

*Section 4(2)*

*An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.*

*Section 4(1)(a)*

*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*

10. Counsel submitted that the other issue for consideration is when the cause of action arose with a view of having a starting date for the computation of the limitation period. On this argument counsel relied on the Court of Appeal case of **Diana Katumbi Kiio v Reuben Musyoki Muli (2018) eKLR**, where it was stated as follows: -

*"A cause of action in contract arises from breach of the contract and not at the time it is executed. According to the author in the Journal of International Banking and Financial Law: "What's the Limit" (2007) 11 JIBFL 642:-*

*"In contract the cause of action accrues when the breach occurs, but in tort the cause of action accrues when damage is first sustained. The cause of action, whether in tort or contract, arises regardless of whether or not the claimant could have known about the damage."*

11. He further relied on the case of **Joseph Odira Ombok v South Nyanza Sugar Company Ltd (2018) eKLR** where Majanja J answered the question on when a cause of action accrues as follows: -

*"I adopt the position taken in **South Nyanza Sugar Company Limited v Diskson Aoro Owuor** (supra) in determining when the cause of action accrues. According to **Black's Law Dictionary (10<sup>th</sup> Edition)** the word "accrue" means "to come into existence as an enforceable claim or right." Thus under the outgrowers cane agreement, such as the one subject to the suit, the right to sue could only arise when the respondent failed to harvest the plant crop. This is when the cause of action accrued and when, in terms of **section 4(1)(a)** of the **LAA**, the time begins to run."*

12. Counsel further identified three issues for determination namely:

*i. When did the cause of action arise in this matter?*

*ii. Whether there are circumstances extending the period of limitation.*

*iii. Whether any aspect of the respondent's suit is statute barred.*

13. On the first issue he submitted that from the charge sheet the allegations are that on diverse dates between 21<sup>st</sup> November 2002 and 28<sup>th</sup> March 2013 monies were siphoned and the respondent lost Kshs.114,993,483.45/=. It therefore means the accounts were opened on 21<sup>st</sup> November 2002 and that is the date when the cause of action arose since the respondent's claim is premised on the opening of the account as well as when the actual transactions were taken on the said dates.

14. On the second issue he relied on Part III of the Limitation of Actions Act which provides three instances where the period of limitation may be extended: -

*a) Where the person to whom a period of limitation extends is under a disability.*

*b) Where there is an acknowledgement or part payment.*

*c) Where there is fraud or a mistake, the period of limitation does not begin to run until the respondent has discovered the fraud or the mistake or could with reasonable diligence have discovered it. (Section 26 of the Limitation Act)*

15. He argues that if there was exercise of due diligence including the scrutinizing of the bank statements, then the alleged fraud could have been discovered much earlier and the loss stopped. Further he contends that if the court were to hold that the fraud was discovered on 19<sup>th</sup> August 2013 when the police report was made then the said date would have been deemed to be the start date for purposes of computing time regarding the cause of the action of negligence.

16. On the third issue counsel submitted that the account no.xxxx as indicated was opened on 21<sup>st</sup> November 2002. It follows that the respondent's action in respect of opening of the account, to the extent it is premised on negligence became statute barred on 21<sup>st</sup> November 2005 under section 4 (2) of the Limitation Act. He contends that since the last transaction took place on 28<sup>th</sup> of March 2013 and the cause of action for the last transaction arose on 28<sup>th</sup> March 2016 hence the respondent's claim having been filed on 24<sup>th</sup> October 2018 is statute barred. He further contends that on 19<sup>th</sup> August 2013 when the police complaint was recorded, the claim as it relates to negligence became statute barred under sections (4)2 and 26 of the Limitation of Actions Act.

17. Counsel argues that the allegation that the plaintiff's cause of action is premised on breach of contract is not supported by the pleadings in the plaint.

18. On a without prejudice basis and with the foregoing facts he submitted that the pleadings by the respondent do not support any cause of the action founded on contract. There was no contract directing the applicant to refrain from opening any other account in their name nor allow transactions in respect to the said account.

19. 2<sup>nd</sup> defendant/applicant urges the court to find and hold that: -

*a) The cause of action in respect of the opening of the impugned account arose on 21<sup>st</sup> November 2002.*

*b) The cause of action as relates to any withdrawals from the impugned accounts arose between 21<sup>st</sup> November 2002 until 28<sup>th</sup> March 2013 when each of those actual transactions were undertaken.*

*c) Any extension of the limitation period extended the running of the time to start from 19<sup>th</sup> August 2013.*

*d) The respondent's cause of action based on negligence became statute barred on 19<sup>th</sup> August 2016.*

*e) The respondent's case is not premised on breach of contract.*

*f) Even if the respondent's case was premised on breach of contract, any claims based on transactions undertaken before 24<sup>th</sup> October 2012 are statute barred.*

20. In rebuttal, Mr. Museve for the plaintiff/respondent in his submissions gave a brief background of the matter and identified the issues for determination to be follows:

*a) Whether the actions for negligence and breach of contract are statute barred*

*b) Whether the 2<sup>nd</sup> defendant/applicant has satisfied the criteria for striking out pleadings.*

21. On the first issue counsel submits that the reading of the section 4(1) (a) and (2) of the limitation of Action Act provides for the date on which the cause of action accrued which would be the date when the 3<sup>rd</sup> and 4<sup>th</sup> defendants were convicted of the charges which date is 29<sup>th</sup> January 2018. Therefore, the filing of the suit on 24<sup>th</sup> October, 2018 is within the three (3) year period for actions founded on tort and six (6) years for actions founded on breach of contract.

22. On the second issue he submitted that they have established that the plaint was filed within time and the same discloses a reasonable cause of action that warrants the full hearing of the matter since the trial court in Criminal Case No.890 of 2013 found the defendants guilty of the respective charges against them. He submits that the trial court in criminal case No 890 of 2013 in its Judgement at paragraph 77 stated

as follows: -

*“...Finally ,he opined that there was collusion and a commission between the said bank employees and COTU (K)” staff with respect to the opening and operation of this account this resulting to the embezzlement and loss of the aforesaid sum of which a total sum of Kshs.2,591,670/= benefited the bank in terms of their charge levied. All these revelations were never put to PW-11 during cross examination by the defence counsel to controvert the same. In my humble opinion all these revelations prove beyond any shadow of doubts that this sum of money was stolen with the assistance of the staff from the said bank.”*

23. He further submitted that the 2<sup>nd</sup> defendant/applicant filed a defence dated 21<sup>st</sup> December,2018 and as per paragraph 15 and 16 stated as follows: -

*15. The 2<sup>nd</sup> defendant denies the contents of paragraph 8 and the particulars of negligence set out in paragraph 8(1) to (viii) and puts the plaintiff to strict proof.*

*16. In further answer to the particulars of negligence in paragraph 8 of the plaint, the 2<sup>nd</sup> defendant avers that the averments contained in that paragraph are embarrassing and vague. The 2<sup>nd</sup> defendant is accordingly not sure what specific defects are being alluded to and reserves the right to request for better particulars to enable it respond fully.”*

24. It is counsel’s contention that a triable issue needs not be one which will succeed but one that raises a prima facie case which ought to go to trial for adjudication and as such the negligence of the 2<sup>nd</sup> defendant/applicant can only be determined upon full hearing of the matter based on evidence.

25. Counsel relied on the following authorities; -

**i. Drilling spares & Services Limited v National Water Conservation and Pipeline Corporation (HCC No. 637 of 2012)** and he submitted that in a similar application to strike out the plaint, the honourable court stated that the case put forth by the defendant for striking out of the suit was such that the court would be invited into the realm of hearing and determining the matter based on affidavit evidence without considering the evidence on both parties.

**ii. National Social Security Board of Trustees v Geoffrey Chege Kimathi & 3 Others (HCC No. 104 of 2007)** where in an application to strike out the plaint, the honourable court observed as follows: -

*“I believe the issue of fraud on matters touching land may not have a limitation period.Nonetheless this may be raised in the main suit and as stated by the plaintiff the same issue arises within the agreed issues”*

### **Analysis and Determination**

26. I have considered the application, affidavits, pleadings, submissions by counsel, the law and the cited authorities. The issue for determination is whether the suit herein was filed outside the statutory period as alleged by the 2<sup>nd</sup> defendant.

27. The principles applicable for striking out a suit under Order 2 Rule 15(1) of the Civil Procedure Rules were set out in the Court of Appeal decision in **D.T. Dobie & Co (K) Ltd – Vs – Muchina (1982) KLRI** which held thus:

*“(a) The court should not strike out a suit if there is a cause of action with some chances of success*

*(b) The power should only be used in plain and obvious cases and with extreme caution*

*(c) The court should not engage in a minute and protracted examination of documents and facts*

*(d) If a suit shows semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward.”*

28. The same principles were adopted in the subsequent cases of **Dr. Murray Watson – Vs – Rent-A-Plane Ltd HCC 2180/94 (UR); Lynette Oyier – Vs – Savings & Loan (K) HCC 891/96 (UR); and Bank Credit and Commerce Int’l (Overseas) Ltd – Vs – Giogio Fabuse & Another HCC 711/85** among others.

29. Provisions of Section 4 of the Limitation of Actions Act relied on by the 2<sup>nd</sup> defendant/applicant in seeking to have this suit struck out for being statute barred have been cited at paragraph 9 of this Ruling. The word used herein is **May**. My interpretation is that the section does not prohibit the bringing of such suit after the expiry of such period if there is good reason for the delay. This is in being cognizant of the provisions of sections 26, 27, 28, 29 and 30 of the said Limitation of Actions Act. Part C section 26 provides for extension of limitation period in case of fraud or mistake.

30. Section 26 of the said Act provides:

*“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 such 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.”

31. To determine this issue, I must examine the pleadings in support thereof. By the plaint dated on 6<sup>th</sup> September 2018 the plaintiff/respondent sued the defendants for loss of Kshs.120, 493,483/=. It alleged fraud, connivance and collusion by the 1<sup>st</sup> Defendant (an employee of the 2<sup>nd</sup> defendant) and the 3<sup>rd</sup> and 4<sup>th</sup> defendants (employees of the plaintiff) which led to the loss of the said amount.

32. Thereafter criminal charges were preferred against the said 3<sup>rd</sup> and 4<sup>th</sup> defendants who were convicted and sentenced to imprisonment. It is after the conviction that the plaintiff/respondent filed the present suit on 24<sup>th</sup> October 2018. According to the defendants the suit is time barred under the Limitation of Actions Act for contract and tort which is six (6) years and three (3) years respectively. Further the defendants contend that the transactions took place between 2002 and 2013 hence the cause of action is time barred.

33. According to the plaintiff/respondent the date on which the cause accrued should be the date when the 3<sup>rd</sup> and 4<sup>th</sup> defendant were convicted for the charges. That due to presumption of innocence the plaintiff/respondent argues that the cause of action accrued on 29<sup>th</sup> of January 2018 hence their filing of suit on 24<sup>th</sup> October 2018 was within the 3 year period for actions founded on tort and 6 years for actions founded on breach of contract.

34. A perusal of the plaint confirms that the prayers sought are as follows:

a) Judgment for the sum of Kshs. 120 million

b) General damages for breach of contract

c) Damages for loss of opportunity to invest the lost sums

d) Costs with interests

e) Interest accrued on the above sum at commercial rates for the period 2002-2017.

According to the defendants the suit is premised on negligence and fraud which is pleaded under paragraph 8 of the plaint. They also believe that it was brought after 3 years from the date of cause of action.

35. It is worth noting from the above prayers sought by the plaintiff, that the suit is based on breach of contract and not on the tort of negligence. The element of fraud has also been pleaded. On whether they are time barred, the law is very clear that actions based on contract should be filed within six years.

36. The question that arises from the above undisputed facts is when the cause of action arose. I do note that the two parties have not agreed on the alleged date of the cause of action. It is worth noting that the alleged transactions took place on diverse dates between 2002 and 2013. The plaintiff was able to discover the alleged fraud in March 2013 and the suit was filed on 24<sup>th</sup> October 2018. In the case of **Diana Kathumbi v Reuben Musyoki CA 211 / 2015 (2018) eKLR** the court referred to Lord Diplock's definition of a cause of action in the case of **Letang v Cooper (1964)2 ALL ER 929 at page 934 which stated: -**

*“a cause of action is simply a factual situation that existence of which entitles one person to obtain from the court a remedy against another person.”*

37. Again in the case of **Diana Kathumbi Kiio (supra)** the court stated: -

*“According to the author in the Journal of International Banking and Financial Law, “What the Limit “(2007) 451BFL642, “in contract the cause of action accrues when the breach occurs when damage is first sustained. The cause of action, whether in tort or contract, arises regardless of whether or not the claimant could have known about the damage.”*

38. In the case of **Zadock K. Danda vs. South Nyanza Sugar (2018) eKLR** the court stated:

*“It will therefore be without any basis to hold to the argument that the cause of action arose 24 months post the commencement of the contract since by then, the contract had not been formally executed. The date a cause of action accrues depends on the nature and the provisions of that contract. There are some straight forward and clear contracts which speak for themselves on such and such issue.”*

39. My take is that the issues raised in the plaint are triable issues that can only be canvassed at the full hearing of the case. Needless to say, courts have taken the position that striking out of pleadings is a very drastic measure which ought to be taken very sparingly and in the clearest of cases. My finding is that this is not one of those clear cases as I find that there are valid questions that ought to be interrogated at the hearing.

40. Furthermore, counting from when the fraud was discovered the suit was filed within the six years period. The plaintiff and 2<sup>nd</sup> defendant were in a contractual relationship hence the application of section 4 (1) (a) of the Limitations of Actions Act.

41. For the above reasons I find that the instant application is not merited and I therefore dismiss it. Costs to abide the outcome of the main suit.

Orders accordingly.

**Delivered online, signed and dated this 21<sup>st</sup> day of September, 2021 Nairobi.**

**H. I. ONG'UDI**

**JUDGE**