



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. E114 OF 2018**

**BETWEEN**

**ROBERT MAINA KAMANJA.....1<sup>ST</sup> PLAINTIFF**

**JAMES NJERU KABURU.....2<sup>ND</sup> PLAINTIFF**

**NKATHA MBAYA KARICHU.....3<sup>RD</sup> PLAINTIFF**

**BURTON MBIRUIRU KANG'URU.....4<sup>TH</sup> PLAINTIFF**

**ROBERT MACHARIA NJOROGE.....5<sup>TH</sup> PLAINTIFF**

**BRENDA CHERONO RONO.....6<sup>TH</sup> PLAINTIFF**

**MIRIAM WAHETI WARUTERE.....7<sup>TH</sup> PLAINTIFF**

**AND**

**EQUITY BANK KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**JAMES NJUGUNA MWANGI.....2<sup>ND</sup> DEFENDANT**

**MARY WANGARI WAMAE.....3<sup>RD</sup> DEFENDANT**

**GERALD GACHOKA WARUI.....4<sup>TH</sup> DEFENDANT**

**(The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are being sued**

**as Trustees of Equity Bank Share Ownership Plan "ESOP")**

**RULING**

1. By an irrevocable Trust Deed dated 29<sup>th</sup> August 2005, the 1<sup>st</sup> defendant ("the Bank") established an Equity Share Ownership Scheme (ESOP) scheme to encourage and facilitate the holding of shares in the Bank by or for the benefit of its employees including the plaintiffs.

2. The plaintiffs claim, contained in the plaint dated 8<sup>th</sup> October 2018, is that upon leaving employment with the Bank and their withdrawal from ESOP, their benefits accruing from ESOP were not computed according to the provisions of the Trust Deed and the Rules prevailing at the time of exit. At paragraph 10 of the plaint, the plaintiffs aver that upon leaving service with the Bank on the respective dates, they found out that the amounts the defendants ought to have refunded them were greatly concealed as a result of fraudulent misrepresentation, concealment and/ or non-disclosure of material facts thereby resulting in the Plaintiffs being unpaid contrary to the provisions of the Trust

Deed and Rules. The plaintiffs therefore seek the following reliefs:

- a) A declaration that the Plaintiffs' redemption benefits under the Defendants ESOP Scheme should be calculated in accordance with the Trust Deed and Rules of the Scheme;
- b) An order directing the Defendants to recalculate the Plaintiffs' benefits under the ESOP Scheme in accordance with the Trust Deed and Rules and payment of the shortfalls that may be found to be due to the Plaintiffs be made to them;
- c) An order declaring that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Plaintiffs are entitled to share splits on their respective units;
- d) An order declaring that the Plaintiffs are entitled to Dividends on their respective units;
- e) General damages;
- f) Costs of the suit;
- g) Interest on(b), (c), (d) and (e) at commercial rates from the date of leaving employment until payment in full; and
- h) Any other or further relief as the Honourable Court may deem fit to grant.

3. The defendants filed a statement of defence dated 15<sup>th</sup> November 2018 in which they stated that the plaintiffs were paid in accordance with the Trust Deed and the Rules prevailing at the time of their departure. The defendants therefore claim that as the suit was filed in 2018, the claims by the 2<sup>nd</sup> to 7<sup>th</sup> defendants are statute barred by **section 20(2) of the *Limitation of Actions Act (Chapter 22 of the Laws of Kenya)***.

4. Based on the plea of limitation aforesaid and the provision of **Order 2 rules 10 and 15** and **Order 51** of the ***Civil Procedure Rules***, the defendants filed the Notice of Motion dated 30<sup>th</sup> May 2019 which is supported by the Affidavit of John Nyanjua Njenga sworn on 30<sup>th</sup> May, 2019. The plaintiff opposed the application through Grounds of Opposition dated 18<sup>th</sup> February 2020 and the replying affidavit of James Njeru Kaburu, the 2<sup>nd</sup> plaintiff, sworn on 12<sup>th</sup> March 2020.

5. The parties agreed to canvass the application by written submissions. The issue for consideration is whether the plaintiff's suit should be struck out and dismissed on the ground that it is statute barred under the ***Limitation of Actions Act***.

6. This is not the first time the issue raised by the defendants is coming up in respect of the Trust Deed and Rules. In ***Murithi Imanyara (Suing as the Legal Representative of the Estate of Winnie Kathurima Imanyara & 2 Others v Equity Bank Kenya Limited & 3 Others H COMM No. 426 of 2016 [2019] eKLR***, Odero J., dismissed a similar application after examining the parties' arguments, the learned judge noted as follows:

*[38] I have deemed it necessary to cite the above cases at great length, because as I have stated earlier these terms constitute legal jargon which is often tossed about in pleadings without very clear thought being given as to what the terms precisely mean. My own take is that the Plaintiffs suit cannot in any way be deemed vexatious, frivolous or an abuse of process. The Plaintiffs have a clear and precise grievance upon which they want the Court to adjudicate. As stated earlier the Plaintiffs feel that double standards could be at play as they have seen former colleagues in similar circumstances receive their redemption amounts. I find that the Plaintiffs suit merits a hearing and determination by the Court.*

7. In ***Peter Gachau & 15 Others v Equity Bank Kenya Limited & 3 Others HC COMM No. 312 of 2014 [2017] eKLR***, the same issues were raised in an application to join additional plaintiffs. The defendants specifically raised the issue of limitation in opposition to joinder of the new plaintiffs. Amin J., ruled that, "*the question of limitation is a substantive question.*"

8. Whether the 2<sup>nd</sup> to 7<sup>th</sup> plaintiffs claim is statute barred in light of the provision of the Trust Deed and Rules vis a vis their claims is a substantive issue for trial. Further and in light of these two decisions and without belabouring the point, I think that justice would be served by declining to strike out the suit and directing that the main suit be set down for hearing in the normal way so that the court settles all the issues with finality.

9. I dismiss the Notice of Motion dated 15<sup>th</sup> November 2018 with costs to the plaintiffs.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of JULY 2020.**

**D. S. MAJANJA**

**JUDGE**

Mr Odoyo instructed by Kipkenda and Company Advocates for the plaintiffs.

Mr Kiche instructed by TripleOKlaw LLP Advocates for the defendants.