REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.426 OF 2016

MURIITHI IMANYARA(Suing as the Legal Representative of the Estate of

Winnie Kathurima Imanyara (Deceased)**.....1ST PLAINTIFF**

JOSEPH KITUMA KIMILU.....2ND PLAINTIFF

EDMUND KIMUTAI TERER.....3RD PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....1ST DEFENDANT

JAMES NJUGUNA MWANGI.....2ND DEFENDANT

MARY WANGARI WAMAE.....3RD DEFENDANT

GERALD GACHOKA WARUI..... 4TH DEFENDANT

(2nd, 3rd and 4th defendants are being sued as the Trustees of Equity Bank Share Ownership Plan "ESOP")

RULING

1. Before this Court is the Notice of Motion Application dated **25th July 2013** by which the Defendant/Applicants seek for Orders that:-

> **"1. This Honourable Court be pleased to strike out the Plaintiffs suit against the Defendant.**
>
> **2. This Honourable Court be pleased to dismiss the Plaintiffs suit against the Defendants.**
>
> **3. The costs of this application be borne by the Plaintiffs."**

2. The application which was premised upon **Section 1(1) (e) & 20(2) of the Limitation of Actions Act, Chapter 22 of the laws of Kenya; Order 2 Rules 10 & 15 and Order 51 of the Civil Procedure Rules, 2010,** was supported by the Affidavit sworn on even date by **JOHN NYANJUA NJENGA**, the General Manager, Legal services of Equity Bank (Kenya) Limited (the 1st Defendant herein).

3. The Plaintiffs through their Advocates **KIPKENDA & COMPANY** filed Grounds of Opposition dated **17th August 2018**. The court directed that the application be disposed by way of written submissions. The Applicants filed their written submissions on **17th October 2018**, whilst the Respondents filed theirs on **31st October 2018**. It is important to note at this stage that on **31st October 2018**, the Court directed that the present application be heard together with the Notice of Motion dated **12th July 2018** in **HCCC No.312 of 2014** in which similar orders were sought. It was directed that the Ruling in this application will also apply to the Notice of Motion dated **12th July 2018**.

BACKGROUND

4. The 1st Defendant/Applicant established the "**Equity Bank Share Ownership Plan** (herein after referred to as **"ESOP")** under the Settlement of Deed dated **29th August 2005**, as amended from time to time. Under Clause 5 of the Settlement Deed, dealing with

Redemption of Units, an employee would be deemed to have applied for redemption of units registered in their name upon cessation of his/her employment with the Bank. The Trustees of **ESOP** were then to pay such former employees their full redemption proceeds within thirty (30) days thereof.

5. The Plaintiff/Respondent contends that the above did not happen in their case leading them to file the present suit against the Defendants, in which they sought 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 at the prevailing market rate at the Nairobi Securities Exchange and payment to the Plaintiffs of the shortfall that may be found due to them.**
>
> **(c) Special Damages as claimed in the Plaint.**
>
> **(d) Dividends**
>
> **(e) General Damages**
>
> **(f) Costs of the suit**
>
> **(g) Interest on (c) (d) and (e) at commercial rates of 20% per annum until payment in full.**
>
> **(h) Any other or further relief this Honourable Court may deem fit to grant."**

6. As stated earlier the Plaintiffs opposed the Application through the Grounds of Opposition filed on **20th August 2018** which raise the following grounds:-

> **1. The Application is incompetent, frivolous, vexatious and an abuse of the court process as the claim relates to recovery of the Plaintiff's benefit which are still in the possession of the Trustees. The trust has not been revoked and the bank is still trading on the Plaintiff's shares to date.**
>
> **2. That the Application is misplaced, misguided and lacks merit as the Plaintiff's rights are protected by the provisions of Section 20(1)(b) of the Limitations of Actions Act, Cap 22 Laws of Kenya hence the issue of limitation of time does not arise.**
>
> **3. The Application is ill advised and made in bad faith solely to delay the process and frustrate the Plaintiffs. The Trustees had an obligation to ensure that the unit-holders redeemed their shares in accordance with the Capital Markets Authority Act and the Trust Deed of 25/08/2005.**
>
> **4. The Application is made in bad faith and amounts to double standards the Defendants having set a precedent by paying other former employees in *Nairobi High Court Civil Suit No.502 of 2002, Paipus Kirongothi Muhindi & another Vs. Equity Bank Limited and 4 others*.**
>
> **5. The Plaintiff's suit disclose reasonable cause of action as the Defendants breached their fiduciary duty to ensure that there was no delay in effecting redemption of the Plaintiff's units.**
>
> **6. The Plaintiff's suit raise salient triable issues to wit:**
>
> > **a. Whether the Plaintiffs were deemed to have applied for redemption of their units upon leaving employment with the 1st Defendant;**
> >
> > **b. Whether the Plaintiffs units in ESOP would be held in perpetuity upon cessation of employment with the 1st Defendant;**
> >
> > **c. Whether the 1st Defendant is still trading on the Plaintiffs shares even after their exit from the Bank;**
> >
> > **d. Who is to benefit from the Plaintiffs' unredeemed units?"**

7. It is not in dispute that the three Plaintiffs left the employ of the 1st Defendant as follows:-

a. The 1st Plaintiff – Winnie Kathurima (deceased) left on **30th May 2009.**

b. The 2nd Plaintiff – Joseph Kituma Kimilu left on **15th May 2009.**

c. The 3rd Plaintiff – Edmund Kimutai Terer left on **30th July 2007**

It is also common ground that the present suit was filed in court on **18th October 2016**.

8. The Applicant contends that the Plaintiff were required to file their suit within a period of six (6) years following the lapse of thirty (30) days upon cessation of their employment with the Bank. The Applicants argue that the present suit was not filed within the requisite period and is therefore time barred. The Applicants further contend that under **Order 2 Rule 10(1)** of the Civil Procedure Rules, 2010 every pleading is required to contain the necessary particulars of any claim or other matter pleaded, including particulars of misrepresentation, fraud, breach of trust, willful default, or undue influence which may be relied upon in a party's pleadings.

9. It is submitted for the Applicants that since the Plaintiffs have relied on fraudulent misrepresentation as a ground in their pleadings, it is pertinent to note that there is a time limitation for fraudulent misrepresentation. The Plaintiffs have pleaded that upon leaving service they discovered that the amounts the Defendants should have refunded to each Plaintiff was concealed which resulted in the Plaintiffs not being paid contrary to the Trust Deed and Rules. The Applicants submit that in those circumstances the burden of proof is on the Plaintiffs to show that they could not have discovered the fraud. The Applicant maintains that on the basis of the Plaint it is clear that the Plaintiffs had knowledge of the alleged fraudulent misrepresentation at the time they each left employment. For this reason **Section 26** of the **Limitation of Actions Act** in respect of extension of the limitation period in case of fraud or mistake would not apply.

10. The Applicant submits that by dint of the express provisions **Section 20(1) (b)** of the **Limitation of Actions Act**, the Plaintiffs claim is time – barred given that the Plaintiffs have not pleaded that the trustee converted trust property or proceeds therefrom to their own use or at all. The Applicant reiterates that the Plaintiffs are bound by their pleadings. It is submitted that trust property cannot be said to have been **"converted"** to the use of the trustee merely because it is property paid to a trustee who is entitled to it qua beneficiary nor because it is property lent on a mortgage to enable the mortgagor to repay the debt owed.

11. On their part the Plaintiffs insist that their Plaint discloses a reasonable cause of action against the Defendant. They state that the suit relates to recovery of the Plaintiffs' benefits which are still in the possession of the 2nd to 4th Defendants. That the Trust has not been revoked and the 1st Defendant still continues to trade on the Plaintiffs shares to date.

12. The Plaintiffs deny that their suit is time –barred and insist that their claim was instituted within the time frames provided by law. They submit that the 2nd to 4th Defendants as Trustees of **ESOP** acted fraudulently against them in the following manner:-

a. Failing to calculate the Plaintiffs' redemption amounts that were due to them.

b. Failing to use the prevailing market rate for redemption under ESOP.

c. Concealing from the Plaintiffs the ESOP Trust Deed and Rules and the factors used in calculating the redemption amounts.

d. Failing to fulfil the Plaintiff's accrued benefits

e. Failing to discharge their duties of good faith and disclose to the Plaintiffs regarding the unit holding in ESOP.

13. They submit that they are entitled to future benefits accruing from their shares and place reliance upon the proviso to **Section 20(2)** of the **Limitation of Actions Act**. They maintain that time cannot be said to have been running from the date when they ceased employment with the Bank as they are still entitled to future interest in the shares they each hold. The Plaintiffs submit further that the **ESOP Scheme** is still governed by the Trust Deed dated **29th August 2005** and the **Capital Markets Authority Act, Cap 485 laws of Kenya**.

14. The Plaintiffs submit that under the aforementioned provisions it was incumbent upon the Trustees to pay the Plaintiffs their redemption amount within thirty (30) days of leaving employment with the Bank. That Clause 3.7 of the Trust Deed provided that each every unit - holder would be entitled to be issued with a non-transferable certificate(s) of ownership. They rely on the letter dated **22nd December 2005** from the Chief Executive Officer of the 1st Defendant to all Equity Staff Shareholders, which is annexed to their bundle of documents, confirming that recognized unit holders, including the Plaintiffs were regarded as investors. That the letter also confirmed that each investor has been allocated units in the trust and a certificate issued. The said letter also confirmed that each unit was equivalent to one share of the bank and each subscriber would under **ESOP** receive dividends and other benefits determined by the Directors of the bank. That the letter also recognized that the unit holders were entitled to bonus shares of four to every 1 dividend and other benefits.

15. The Plaintiffs contend that the 1st Defendant declared dividends for the years 2005 to 2017 and enumerated the same. The same varied from Kshs.0.40 to 3.00 dividends declared per share. The submit that at the Annual General Meeting for the year 2005, it was resolved to increase the number of shares by a further bonus of two for each for the years 2006. That the shares were further increased by ten in the year 2009 hence the ratio 1:10 thus the share grew 150 times. They further contend that **ESOP** has 15,018,400 shares in the years 2007 and 2008 and after the split of 2009 the shares increased to 150,184,000 shares. Accordingly the Plaintiffs contend that the amount not paid on dividends for the years 2005 to 2017 amounts to over Kshs.2.4 billion, hence the matter before the court cannot in any way be said to be trivial.

16. The Plaintiffs also contend that their claim arises from the breach by the Defendants of their fiduciary duty owed to the Plaintiffs to ensure that there was no delay in effecting the redemption of the Plaintiffs units upon the latter ceasing to be employees of the Bank, contrary to clause 16 of the Trust Deed.

17. Lastly the Plaintiffs raise the fact that in a previous suit being **Nairobi High Court Civil Suit No.409 of 2012 PATRICK WABWILE PAMBA & Others – Vs – EQUITY BANK LIMITED & 3 Others,** the Defendants admitted liability in a similar claim filed against them. Further vide a witness statement dated **14th May 2014**, the Defendants have admitted to having paid out redemption sums on the Plaintiffs'

request in Nairobi High Court **Civil Suit No.502 of 2012 PAPIUS KIRONGOTHI MUHINDI & Another –Vs – EQUITY BANK LIMITED & 3 others**. Both above cited cases involved Plaintiffs who left the employ of the Bank in **December 2010**, i.e after all the Plaintiffs in this application and they accuse the Defendants of double standards the present suit. The Defendants deny that their suit amounts to an abuse of court process. They insist that their suit is founded on the particulars of fraudulent misrepresentation, concealment and non-disclosure all of which have clearly been set out in their Amended Plaint dated **24th October 2017**. The Plaintiffs therefore urge the court to dismiss the present application and allow the suit to proceed to a full trial at which the relevant issues will be fully ventilated.

ANALYSIS AND DETERMINATION

18. I have carefully considered the present application, the Affidavit in support, the submissions of both parties as well as the relevant statute and case law. The following issues arise for determination:-

1. Is the Plaintiffs suit time –barred.

2. Should the suit be struck out.

19. (1) LIMITATION OF TIME

The Defendant/Applicant submits that the Plaintiffs suit cannot be sustained as the same is time-barred, having been filed six (6) years after the lapse of 30 days from cessation of their employment with the 1st Defendant. The Applicants further contend that exception in **Section 20(1)(b)** of the Limitation Actions Act is not available to the Plaintiffs on account of their failure to specifically plead that the trustee had converted trust property or proceeds to their own use.

20. On their part the Plaintiffs insist that they instituted their suit within the time frames provided by law.

21. As a general principle the law does provide certain timelines within which a suit may be filed. The reason for this was clearly set out in the case of **DHANESVAR V. MEHTA –Vs- MANILAL SHAH [1965] E.A 321,** where the Court held that:-

> **"The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand and on the other hand to protect a Defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims."**

22. The Applicants place reliance on **Snells Equity 29th Edition Page 292**, wherein it is stated that the general rule is that except when the Act (here being the Limitation Act 1980) prescribes some other period, an action by a beneficiary to recover trust property or in respect of any breach of trust may not be brought after six years from the date upon which the right of action accrued.

23. The Applicants rely on **Section 20(2)** of the **Limitation of Actions Act, Cap 22** in support of their contention that the Plaintiffs suit is time –barred whilst the Plaintiffs cite the provisions of **Section 20 1(a)** and **20(1)(b)** of the same Act to urge that their claim is tenable under the law. S.20 of the Limitation of Actions Act provides as follows:-

> **20(1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which an action-**
>
> **a. In respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or**
>
> **b. To recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.**
>
> **1. Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued:**
>
> **Provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest falls into possession."**

24. In **MAE PROPERTIES –VS- JOSEPH KIBE & ANOTHER [2012] eKLR** my learned brother **Hon Justice Alfred Mabeya** found as follows:-

> **"Section 20 of the Limitation Act provides:-….**
>
> **From this section, what is excepted from limitation is fraud or fraudulent breach of trust. Any other breach of trust is covered by limitation. Can it be said that what the Plaintiff had pleaded amounts to fraud or fraudulent breach of trust?**

In Halsburys Laws of England 4th Edition Vo. 28 paragraph 833 it is observed that:-

> **Exclusion from protection in certain cases. No period of limitation prescribed by the Limitation Act 1939 applies to an**

action by a beneficiary under a trust, being an action in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy or to recover from the trustee trust property or the proceeds of it in the trustee's possession, or previously received by the trustee and converted to his use. It no longer makes any difference whether or not the trust is an express trust. If however, the action is not one of these types, the mere fact that property is trust property does not prevent time from running."

In paragraph 834, the writers have tried to define what a trustees fraud or fraudulent breach of trust is. They state:-

"**834. <u>Trustee's fraud or fraudulent breach of trust</u>. For the purpose of the Provision excluding the operation of the limitation period in the case of actions by beneficiaries in respect of fraud or fraudulent breaches of trust to which <u>the trustee was a party or privy, the fraud in question need not amount to dishonesty</u>."**

In BLACKS LAW DICTIONARY 9TH EDITION, Fraud has been defined as:-

"**A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment…"**

In the same text, fraudulent act has been defined as:-

"**Conduct involving bad faith, dishonesty, a lack of integrity or moral turpitude."**

From the foregoing, it can be safely said that a fraudulent breach of trust would be a conduct in bad faith that violates ones obligation while in a position of trust. <u>My view therefore, what is to be established in a pleading is that the party against whom a claim is being made is or was in a position of trust but whilst in such a position, he acted in bad faith in violation of the obligation entrusted upon him</u>……..

In my view, the pleading by the Plaintiff and the particulars supplied are adequate to establish a cause of action of fraudulent breach of trust on the part of 1st Defendant. <u>In my view, it was not necessary that the Plaintiff should have used the specific words "fraudulent breach of trust" in the Plaint for its claim to be under Section 20(1) of the Limitation of Actions Act. To my mind, it was sufficient enough to plead the facts that will establish a special relationship between the parties and an unconscionable conduct by the 1st Defendant towards the Plaintiff</u>." [own emphasis]

25. Similarly in **STEPHENS & 6 others –Vs- STEPHENS & Another 1987 K.L.R 125** the Court of Appeal held that:-

"**The period of limitation as prescribed in the Limitation of Actions Act (Cap 22) Section 20(1)**

(b) <u>Does not apply to actions by a beneficiary under a trust which is an action to recover from the trustee property or proceeds thereof converted by the trustee for his own use</u>. [own emphasis]

26. Again in **RE ESTATE OF CHARLES NGOTHO GACHUNGA (deceased) 2015 eKLR**, **Hon Justice Musyoka** stated:-

"**There is no limitation of action where the institution of trust or fiduciary relationship is involved as is made clear by Section 20(1) of the Limitation of Actions Act."**

27. Authorities on this point are clearly legion. A look at the Plaint reveals that the Plaintiffs have indeed pleaded the existence of duties allegedly owed by the 2nd to 4th Defendants to themselves. They have pleaded that there was a breach of such duties and paragraph 9 of the Plaint dated **7th October 2016** clearly sets out particulars of the fraudulent, misrepresentation, concealment and non-disclosure as follows:-

"**<u>Particulars of fraudulent misrepresentation, concealment and non-disclosure</u>**

a. Failing to calculate the Plaintiffs' redemption amounts that were due to them as is required under Clause 5.1 of the Trust Deed.

b. Failing to use the prevailing unit price value for redemption under ESOP as defined by the Trust Deed.

c. Concealing from the Plaintiffs the ESOP Trust Deed and Rules and the factors used in calculation of the Plaintiff's redemption amounts.

d. Failing to calculate the Plaintiffs' accrued benefits in accordance with the Trust Deed and Rules and the law or at all.

e. Failing to discharge their duties of good faith and disclosures to the Plaintiffs regarding their unit-holdings in "ESOP".

28. The Plaintiffs have contended that the 2nd to 4th Defendants acted willfully and with full knowledge of the effect of their actions. They

have pleaded double standards by demonstrating how the Defendants paid out similar claims to the Plaintiffs colleagues.

The Plaint clearly pleads a fraudulent breach of trust. As such it falls squarely within the exception provided by **Section 20(1)** of the **Limitation of Actions Act**. Accordingly I find that the suit herein is **not** time –barred.

29. (2) STRIKING OUT

The Applicants have prayed that the Plaintiffs suit be struck out as an abuse of court process. **Order 2 Rule 15(1)** of the Civil Procedure Rules 2010 provides thus:-

> **"(1) At any state of the proceedings the court may order to be struck out or amended any pleading on the ground that:-**
>
> **a. It discloses no reasonable cause of action or defence in law; or**
>
> **b. It is scandalous, frivolous or vexatious; or**
>
> **c. It may prejudice, embarrass or delay the fair trial of the action; or**
>
> **d. It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."**

30. The Defendants/Applicants did not submit on either of these two issues. However the Court of Appeal in the **DT Dobie & Co. (K) Ltd case V Muchina (1982) KLR 1** held as follows:-

> **"If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A Court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a lawsuit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it."** [own emphasis]

31. Likewise in **GIRO COMMERCIAL BANK –VS – ALI SWALEH MWANGULA [2016] EKLR** the Court of Appeal held that:-

> **"Striking out pleadings as has been held in a long line of decisions, is a draconian power that must sparingly be resorted to, only in clear cases, cautiously and carefully considered without embarking upon trial when considering whether it discloses reasonable cause of action or where it is alleged that it is otherwise an abuse of the court process. Even one triable issue will be sufficient to spare a suit from being struck out [see DT DOBIE & CO. LTD –Vs- MUCHINA [1982] KLR 1]** [own emphasis]

32. Similarly in **TRANSEND MEDIA GROUP LIMITED –VS – IEBC [2015] eKLR**, **Hon Lady Justice Aburili** held thus:

> **"In my understanding triable issues are those that are subject to judicial examination in a Court, for determination on their merits. From the foregoing, this Court concludes that the power to strike out pleadings is not a mandatory but permissive one and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances of the offending pleading."**

33. The gist of the Plaintiffs case as contained in their Amended Plaint is that they, as former employees of the 1st Defendant, were unit holders of the Equity Bank Share Ownership Plan (ESOP), of which the 2nd and 4th Defendants are Trustees. They contend that as unit holders they were entitled to dividends and redemption benefits upon their exit from the 1st Defendant. They contend further that their benefits were not calculated in accordance with the Trust Deed and Rules of the Scheme which required the same to be calculated at the prevailing market rate at the Nairobi Securities Exchange. They contend that this was not done in attempt to defraud them.

34. Now, as the above -mentioned authorities attest this claim need not be successful, especially given that the Defendants deny the same in their Amended Defence. However it appears from the face of it to be genuine, arguable and bona fide claim as the Plaintiffs are seeking to enforce their rights to get what they contend are their proper and full benefits.

35. The Court of Appeal in the case of **Irene Wangui Gitonga V Samuel Ndungu Gitau [2018] eKLR** held as follows:-

> **"The law is that, one bona-fide issue is sufficient to entitle a defendant to a right of defence. There are certainly more than one triable-issue in this matter."**

36. The Applicants have also submitted that the Plaintiffs suit ought to be struck out for being frivolous, vexatious and amounting to an abuse of court process. These are generic terms which often have not been clearly explained. However in **LAW SOCIETY OF KENYA -Vs - MARTIN DAY & 3 others [2015] eKLR, Hon Justice Aburili** ventured to explain these terms as follows:-

"Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See Bullen & Leake and Jacobs Precedents of Pleading (12th Edn.) at 145.

c. A matter is said to be vexatious when (i) it has no foundation or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v) where it can really lead to no possible good. See Willis Vs. Earl Beauchamp (1886) 11 PD 59

d. Pleading tend to prejudice, embarrass or delay fair trial when (i) it is evasive; (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) it is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies. (Emphasis mine). See Strokes Vs. Grant (1878) AC 345; Hardnbord Vs Monk (1876) 1Ex. D. 367; Preston Vs Lamont (1876).

e. A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issue which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the court machinery or process. See Trust Bank Limited Vs Hemanshu Siryakat Amin & Company Limited & another Nairobi HCCC No.984 of 1999.

f. A pleading is an abuse of the process where it is frivolous or vexatious or both."

37. In **MUCHANGA INVESTMENTS LTD –VS- SAFARIS UNLIMITED (AFRICA) LTD & 2 others [2009]eKLR**, the Court of Appeal gave an even more elaborate definition of what constitutes to an abuse of court process, relying on decisions from jurisdictions other than Kenya.

"To re-inforce the point, abuse of process has been defined in WIKIPEDIA, the free encyclopedia:

"The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice."

In BEINOSI Vs WIYLEY 1973 SA 721 [SCA] at Page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows:-

"What does constitute an abuse of process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process." It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective."

Again the Court of Appeal in Abuja, Nigeria in the case of ATTAHIRO V BAGUDO 1998 3 NWLL pt 545 Page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case of KARIBU-WHYTIE J Sc in SARAK v KOTOYE (1992) 9 NWLR 9PT 264) 156 AT 188-189 (e) the concept of abuse of judicial process was defined:-

"The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. It's one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice……"

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

a. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

b. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

c. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.

d. (sic) meaning not clear)

e. Where there no loti of law supporting a Court process or where it is premised on frivolity or recklessness.

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.

39. Finally I find that the present application has no merit. The same is hereby dismissed with costs to the Plaintiff/Respondents.

Dated in Nairobi this 4th day of July 2019.

……..

Justice Maureen A. Odero