



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL SUIT NO. 409 OF 2012**

**PATRICK WABWILE PAMBA.....1<sup>ST</sup> PLAINTIFF**  
**EDNA WANJIRU MWANGI.....2<sup>ND</sup> PLAINTIFF**  
**ARTHUR D. WASHE.....3<sup>RD</sup> PLAINTIFF**  
**JOHN GITAU KAMAU.....4<sup>TH</sup> PLAINTIFF**  
**JOHN K. THAGANA.....5<sup>TH</sup> PLAINTIFF**  
**JOHN NYUGUTO NDERITU.....6<sup>TH</sup> PLAINTIFF**  
**JACOB OTIENO OBIERO.....7<sup>TH</sup> PLAINTIFF**  
**EDWIN MAINA WAWERU.....8<sup>TH</sup> PLAINTIFF**

**VERSUS**

**EQUITY BANK LIMITED.....1<sup>ST</sup> DEFENDANT**  
**JAMES NJUGUNA MWANGI.....2<sup>ND</sup> DEFENDANT**  
**MARY WANGAI WAMAE.....3<sup>RD</sup> DEFENDANT**  
**KENNETH MBAABU MUCHIRI.....4<sup>TH</sup> DEFENDANT**  
**GERALD GACHOKA WARUI.....5<sup>TH</sup> DEFENDANT**  
**ANDREW MWANGI KIMANI.....6<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. The plaintiffs, **PATRICK WABWILE PAMBA; EDNA WANJIRU MWANGI; ARTHUR D. WASHE, JOHN GITAU KAMAU; JOHN K. THAGANA; JOHN NYUGUTO NDERITU; JACOB OTIENO OBIERO** and **EDWIN MAINA WAWERU** were all ex-employees of the 1<sup>st</sup> Defendant, **EQUITY BANK LIMITED**.

2. The bank set up an Employee Share Ownership Plan Unit Trust (*ESOP*), through which its employees were enabled to own shares in the said bank.

3. The other five defendants, **JAMES NJUGUNA MWANGI; MARY WANGAI WAMAE; KENNETH MBAABU MUCHIRI; GERALD GACOKA WARUI and ANDREW MWANGI KIMANI** were the Trustees of the **EQUITY BANK SHARE OWNERSHIP PLAN (ESOP)**. It is in their capacity as Trustees that the said 5 defendants have been sued.

4. On 13<sup>th</sup> June 2016 the parties recorded a consent order, pursuant to which the issue of liability was resolved in favour of the plaintiffs.

5. Thereafter, on 26<sup>th</sup> August 2016 the parties filed in court, a Statement of Agreed Facts. It is necessary to set out in *extenso*, the particulars of the Agreed Facts, as those will form the basis for the court's determination of the reliefs to be granted to the plaintiffs. The same were as follows;

**“BACKGROUND INFORMATION:**

4. The plaintiffs were, at all material times, employees of the 1<sup>st</sup> Defendant and members of the Equity Bank Share Ownership Plan [ESOP].

5. The parties agree that the plaintiffs are governed by the provisions of the Trust Deed dated 29<sup>th</sup> August 2005 and the Rules made thereunder, and regulations 117 and 119 of the Capital Markets (*Collective Investment Scheme (Regulations 2001)*) as far as redemption of the units is concerned.

6. The parties agree that the plaintiffs held the following units in their respective unit accounts as at 23<sup>rd</sup> April 2007.

Name	Units Held
Patrick Wabwile Pamba	16,545
Edna Wanjiru Mwangi	3,000
Arthur D. Washe	9,816
John Gitau Kamau	2,250
John G. Thagana	16,500
John Nyuguto Nderitu	80,001
Jacob Otieno Obiero	24,750
Edwin Maina Waweru	15,000

7. The parties agree that clause 5.1 of the Trust Deed dated 29<sup>th</sup> August 2005 provided that a unit holder was deemed to have applied for redemption of the units registered in his or her name the moment he or she ceased to be an employee of Equity Bank.

8. The parties agree that it was the duty of the Trustees to pay the balance standing to the credit of the Unit holder's Account to the Unit Holder within thirty (30) days of leaving employment with Equity Bank.

**9. The parties agree that the plaintiffs were only refunded the amount of money they had spent in the purchase of their respective units as hereunder.**

<b>Name</b>	<b>Amount Refunded</b>
<b>Patrick Wabwile Pamba</b>	<b>Kshs. 150,008.00</b>
<b>Edna Wanjiru Mwangi</b>	<b>Kshs. 27,200.00</b>
<b>Arthur D. Washe</b>	<b>Kshs. 89,000.00</b>
<b>John Gitau Kamau</b>	<b>Kshs. 20,400.00</b>
<b>John G. Thagana</b>	<b>Kshs. 149,600.00</b>
<b>John Nyuguto Nderitu</b>	<b>Kshs. 2,000,000.00</b>
<b>Jacob Otieno Obiero</b>	<b>Kshs. 224,4000.00</b>
<b>Edwin Maina Waweru</b>	<b>Kshs. 150,000.00</b>

**10. The parties agree that there was a share split of ten (10) shares per share in the year 2009 pursuant to the resolution of the Bank's Annual General Meeting held in December, 2008.**

**11. The parties agree that Equity Bank declared dividends in the years 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013 and 2014 as per the Annual Reports and Financial Statement for the respective years?.**

**6.** Based on those agreed facts, the plaintiff submitted that the defendants were obliged, under clause 5.1 and Rule 7.1 of the Trust Deed dated 29<sup>th</sup> August 2005, to pay the Redemption Amount equivalent to the units held by the plaintiffs, within 30 days of the plaintiffs leaving employment.

**7.** As the defendants did not pay the Redemption Amounts to the plaintiffs, it was the case of the plaintiffs' that the defendants omission had caused them to suffer losses.

**8.** The plaintiffs also reasoned that they were all entitled to the benefits accruing from the share splits, between 2006 and 2015.

**9.** Thirdly, as regards the Redemption Amount, the plaintiffs submitted that the same was to be based on the latest traded price at the Nairobi Stock Exchange. That submission is said to be based upon Regulation 117 of the Capital Markets Authority Collective Investment Scheme, 2001.

**10.** The plaintiffs pointed out that at the time they left the employment at the Equity Bank, the share price had reached an all-time high of Kshs.341/-. Therefore, the plaintiffs submitted that the calculation of the Redemption Amounts payable to each of them should be calculated based on the share price of Kshs.341/-.

**11.** It was noted by the plaintiffs that as at December 2014, the share price was Kshs. 51/-: but that was attributed to the fact that there had been a share split, as had been approved by the Board of Equity Bank.

**12.** The plaintiffs submitted that by failing to pay the Redemption Amounts, the defendants were in breach of the contract between them and the plaintiffs. Therefore, the plaintiffs urged the court to award

them sums equivalent to the plaintiffs' accrued benefits, together with interest on the Redemption Amounts, and interest on the dividends.

13. To support their case, the plaintiffs cited the case of **PAPIUS KIROGOTHI MUHINDI & ANOTHER Vs EQUITY BANK LIMITED & 4 OTHERS Hccc No. 502 of 2012.**

14. In answer to the plaintiffs' case, the defendant asserted that this is a case in which the claims are for Special Damages. Therefore, each of the claims ought to have been specifically pleaded and thereafter each of them had to also be specifically proved.

15. The defendants pointed out that the plaintiffs had lodged a claim for the Redemption Amount plus interest thereon at 20%.

16. In the light of the well settled law that parties are bound by their pleadings, the defendants submitted that the court cannot therefore be required nor expected to make a determination on anything which the plaintiffs had not incorporated into their plaint.

17. In the case of **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER Vs STEPHEN MUTINDA MULE & 3 OTHERS, CIVIL APPEAL No. 219 of 2013,** the learned Judges of Appeal quoted with approval the following words of Sir Jack Jacob, in his article entitled **"The Present Importance of Pleadings?."**

**"As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation.**

....

**In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial, by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business?, in the sense that points other than those specified may be raised without notice?."**

18. In the light of that legal standing, the Court of Appeal reiterated that;

**"...the proper legal position (is) that parties are bound by their pleadings, which in turn limits the issues upon which a trial court may pronounce?."**

19. The Court of Appeal also addressed a situation in which evidence was led by the parties on matters which did not arise from the pleadings. They did so by readily agreeing with Judge Pius Aderemi JSC, when he held as follows in **ADETOUN OLEDAJI (NIG) LIMITED Vs NIGERIA BREWERIES PLC, S.C. 91 of 2002;**

**"...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties, which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings, goes to no issue and must be disregarded?."**

20. In the circumstances, the defendants submitted that because the plaintiffs' claim was for the Redemption Amount, together with interest at 20%, the plaintiffs cannot now ask the court to award them

more than what was pleaded in the plaint.

21. Furthermore, because the contract did not provide for interest to be payable at 20%, the defendants asked the court to award interest at Court Rates: That submission is said to be founded on the provisions of Section 26 of the Civil Procedure Act.

22. Secondly, the defendants pointed out that although the plaintiffs provided documents to support a claim for BONUS, the Plaint did not include any claim for Bonus.

23. Thirdly, the defendants said that the Plaint did not contain any claim pegged on Share split. Therefore, the documents that make reference to the Share Split would be irrelevant, said the defendants.

24. The next contention of the defendants was that the only relationship which existed between the plaintiffs and the defendants was created out of employment of the plaintiffs. Therefore, it was the defendants contention that the plaintiffs could only enjoy benefits under the ESOP when they were employees of the bank.

25. According to the defendant, when the plaintiffs ceased to be employees of Equity Bank, the benefits under the Equity Share Ownership Plan (**ESOP**) ceased.

26. If that implied that after the plaintiffs had ceased to be employees of Equity Bank, they could not lay claim to the benefits which had accrued to them under **ESOP**, I would have made it clear that the defendants were wrong. In fact, such an assertion may have been construed to imply that the defendants were clawing back the concession which they had made when they consented to the grant of judgement against them, on the issue of liability.

27. The defendants, perhaps in an endeavour to clarify what they meant, went on to submit as follows;

**“The bank was to pay the employees based on the units which each employee held at the time of leaving employment?.**

28. To the extent that the defendants acknowledged that the plaintiffs were entitled to payment after leaving employment, that is the correct legal position.

29. The defendants had, however, only paid to the plaintiffs, the sums of money equivalent to the sums which each of the plaintiffs had spent in the purchase of their respective shares. Therefore, the plaintiffs are all entitled to the sums of money equivalent to value of the units they owned.

30. The parties are, however, not in agreement about the date when the number of units should be calculated. The plaintiffs suggest that they are entitled to assume that they continued to own their respective units until the defendants pay the values thereof, at current rates.

31. If the defendants are found to have continued holding onto the plaintiffs’ share units, that would, in the opinion of the plaintiffs, explain why the Bonuses and Share Splits would become an entitlement to the plaintiffs.

32. But even assuming that the plaintiffs’ reasoning was sound, the difficulty that the plaintiffs face is that the plaint was never amended so as to reflect claims in respect to Bonuses and Share Splits.

33. Secondly, if the plaintiffs insist that the value of each share be deemed to be Kshs. 341/-, that would imply that the plaintiffs have chosen a rate which was in place on 29<sup>th</sup> April 2008.

34. It would, in my considered opinion, defy logic to insist that the bonuses and Share Splits be applied, even though they occurred after 29<sup>th</sup> April 2008, but then insist that the value of each share unit be static, when it was at its peak.

35. And in any event, the Plaintiff does not contain any prayers relating to either bonuses or Share splits. In the case of **DAVID SIRONGA OLE TUKAI Vs FRANCIS ARAP MUGE & 2 OTHERS, CIVIL APPEAL No. 70 of 2014**, the Court of Appeal said;

**“It is well established in our jurisdiction that the court will not grant a remedy which has not been applied for, and that it will not determine issues which the parties have not pleaded?.**

36. The said court also quoted with approval the following words of the former Court of Appeal for Eastern African, in **GANDY Vs CASPAR AIR CHARTERS LIMTIED [1956] E.A.CA 139**;

**“As a rule, relief not founded on the pleadings will not be given?.**

37. In this case, the plaintiffs sought a declaration that Redemption Benefits under the Equity Bank Share Ownership Plan [ESOP] should be calculated in accordance with Trust Deed and Rules of the Scheme.

38. The plaintiffs also sought an Order directing the Defendants to recalculate the plaintiffs’ benefits under the **ESOP**, and to thereafter make payment to the plaintiffs, of the sums established to still be owing.

39. If the reliefs sought were limited to those 2, it may have been possible to reason that the defendants were obliged to recalculate the plaintiffs’ benefits in accordance with the terms of the Trust Deed and the Rules of the Scheme.

40. But in this case, the plaintiffs also specifically prayed for Special Damages, which they then calculated using the terms of the Trust Deed and the Rules of the scheme, as they understood them.

41. Having chosen the route of seeking Special Damages, and having calculated the same, the plaintiffs cannot now be heard to fall back on the more generalized request for a declaration that the defendants should recalculate the benefits.

42. The plaintiffs are bound by their pleadings. Therefore, the plaintiffs can only be granted the reliefs they pleaded for specifically, subject to proof of the said specific reliefs.

43. Therefore I find and hold that the Trustees should have paid to each of the plaintiffs, the Redemption Amounts calculated using the value of the units as at the 30<sup>th</sup> day from the date when each plaintiff ceased to be an employee of Equity Bank.

44. The evidence shows that the plaintiffs ceased to be employees of the Equity Bank on the following dates;

- a) 1<sup>st</sup> plaintiff - 28<sup>th</sup> March 2007
- b) 2<sup>nd</sup> plaintiff - 16<sup>th</sup> January 2008
- c) 3<sup>rd</sup> plaintiff - 26<sup>th</sup> June 2007
- (d) 4<sup>th</sup> plaintiff - 31<sup>st</sup> January 2008
- e) 5<sup>th</sup> plaintiff - 30<sup>th</sup> June 2007
- f) 6<sup>th</sup> plaintiff - .....July 2007
- g) 7<sup>th</sup> plaintiff - 3<sup>rd</sup> July 2007

**h) 8<sup>th</sup> plaintiff - 21<sup>st</sup> April 2007**

**45.** Each plaintiff will be entitled to interest at 20% from the 31<sup>st</sup> day after he or she ceased to be an employee, until the date when each of them was paid the refund of the money they spent when purchasing the units.

**46.** After deducting the money paid to them, the plaintiffs' remaining balances will continue to attract interest at 20% until the balances were paid in full.

**47.** For the avoidance of any doubt, the sums paid are to be found in the Statement of Agreed Facts, whilst the dates when payments were made are to be found at paragraph 8 (e) of the Defence.

**48.** The plaintiffs are also awarded the costs of the suit.

**49.** The court hereby allows the parties 2 weeks to enable them agree on the final calculations, in line with the findings hereabove.

**50.** If the parties are unable to agree on the final figures, the court will calculate the same, provided the parties hand over evidence to demonstrate the value of the shares on the dates when each plaintiff should have been paid his or her benefits, by the Trustees.

**DATED, SIGNED and DELIVERED at NAIROBI this 25<sup>th</sup> day of January 2017.**

**FRED A. OCHIENG**

**JUDGE**

***Judgement read in open court in the presence of***

*Ooyo for the Plaintiffs*

*Kiche for Ohaga for the Defendants*

*Collins Odhiambo – Court clerk.*