



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO. 77 OF 2013**

**ISAYA OMETE ANCHINGA (Suing as next friend of A A O (MINOR)...APPELLANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT**

*(An appeal from the judgment and decree of Hon. Ruth Maloba (Acting Principal Magistrate) dated and delivered on the 28<sup>th</sup> day of June 2013 in the Original Kisii CMCC No. 122 of 2010.)*

**JUDGMENT**

1. In a plaint dated 18<sup>th</sup> March 2010 and filed in the lower court on 22<sup>nd</sup> March 2010, (being Kisii CMCC 122 FO 2010), the appellant herein, who was the plaintiff before the trial court sought the following orders:

- a) Kshs. 82,634/= plus interest accrued todate.
- b) Costs of this suit.
- c) Interest on 9a) and (b) above at court rates
- d) Any other relief that the court may deem fit to grant.

2. The appellant, who instituted the suit before the trial court as the next friend of one A A O- MINOR, claimed that on or about 7<sup>th</sup> February 1999, he opened account no. 3505125 for his grandson, the minor herein, at the defendant's Kisii branch, whereupon he deposited he sum of Kshs. 82,634/= in a fixed deposit account for which he was issued with a banking slip No. 0479047. The appellant stated that he subsequently made several unsuccessful attempts to withdraw the said amount as the bank manager told him to check with them later and that upon checking on 7<sup>th</sup> January 2009, he was informed that the amount on account was Kshs. 4495/= only.

3. The appellant's case was that the respondent did not offer him any explanation as to why the amount due to him was only Kshs. 4,495/= thereby prompting him to file the suit before the subordinate court in which he claimed Kshs. 82,632/= together with 7% interest.

4. The respondent filed a defence in the lower court in which it denied the appellant's claim in its entirety while stating that the suit was fatally defective, devoid of merit, vague and unsustainable for want of any contractual relationship with the appellant.

5. After hearing the evidence and the submissions of the respective parties to the suit, the trial magistrate

found inter alia, that the appellant's case was statutorily time barred and hence incompetent and bad in law whereupon she proceeded to dismiss the case with each party bearing his own costs of the case.

6. It is this finding by the trial court that has given rise to the instant appeal in which the appellant has listed the following grounds of appeal in his memorandum of appeal.

**1. THAT the learned trial magistrate erred in law and in fact in dismissing the Appellant's suit when it was obvious that the Appellant had proved his case on a balance of probability.**

**2. THAT the Learned Trial Magistrate erred in not taking into account entirely the submission of the Appellant.**

**3. THAT the Learned Trial Magistrate misdirected herself in law and in fact in concluding that the plaintiff's suit was barred by limitation when it was not.**

**4. THAT the judgment of the Honourable Trial Magistrate has occasioned a failure of justice and/or resulted in a gross miscarriage of justice.**

### Appellant's submissions

7. Through his advocates M/s Ochoki & Company Advocates, the appellant submitted that it had proved its case against the respondent on a balance of probabilities as he had furnished the court with documentary proof of banking slip to show that he indeed opened an account on behalf of the minor and that no withdrawals had been made from the said account which means that the amount deposited was still being withheld by the respondent.

8. The appellant cited the case of **Lazarus Masayi Pujallah vs Kenya Commercial Bank Ltd Civil Appeal No. 259 of 2001** in which the appellant was reimbursed the amount fraudulently paid out to a third party from his personal account.

9. On the issue of whether or not the suit was time barred, the appellant submitted that **Section 26 of the Limitation of Actions Act Cap 22 Laws of Kenya** allows the bringing of actions, being an extension of limitation period in case of fraud or mistake. The appellant stated that the respondent acted fraudulently and it was only after the expiry of the limitation period that the appellant realized that he had actually lost his money and further that **Section 27 (1), (a) & (b)** allows for extension of limitation period in case of ignorance of material facts and in actions of negligence. The appellant submitted that the respondent was ignorant of the facts that were presented to it by the appellant before the institution of the suit and that in any event, the appellant all along believed that the money was safely in the account.

10. The appellant contended that by virtue of the provisions of **Section 39 (2) of the Limitation of Actions Act**, the respondent is stopped, by equity from pleading limitation.

11. The appellant contended that the trial court erred in dismissing the case instead of granting the appellant leave to file suit out of time in order to protect the interest of the minor.

12. The appellant argued that the limitation period could not expire or arise as long as the money was still held in the bank. The appellant also faulted the trial court for failing to assess the damages payable to him in line with the decision in **Selle vs Associated Motor Boat Company Ltd & Another (1968) EA 123** in which it was held:

*"It is always desirable in a suit for damages, for the trial judge to make a finding as to the amount to which he thinks the plaintiff would be entitled if successful, even though he gives judgment for the defendant. Much time and expenses can be avoided if this course is followed."*

13. The appellant also cited the case of **Nyamogo & Nyamogo Advocates vs Barclays Bank of Kenya Ltd Civil Appeal No. 69 of 2005** in which nominal damages of 10,000/= were substituted for general

damages of Kshs. 500,000/= for breach of contract.

### **Respondent's submissions**

14. M/s Miller & Co. Advocates for the Respondent submitted that the appellant did not prove his case on a balance of probabilities on the claim that he held a fixed deposit account with the respondent owing to the fact he needed to have had a current or a savings account before opening a fixed deposit account.

15. The respondent stated that the appellant did not provide documentary evidence to prove that money disappeared from his account.

16. The respondent argued that the appellant's suit was ousted by the provisions of Limitations of actions Act which requires that claims based on contract be lodged within a period of 6 years from the time of the alleged breach of contract. It was the respondent's case that the appellant did not demonstrate that he had sought and obtained an extension of the limitation period or that the delay was justified. It was the respondent's submission that the banking practice is to destroy records after the expiry of 6 years and thus it was unjust for the appellant to lodge his claim after 10 years when the records in question have already been destroyed.

17. This being a first appeal, this court is mandated to analyze the evidence tendered before the trial court afresh with a view to arriving at its own conclusion while bearing in mind the fact that it neither heard nor saw the witnesses testify.

### **Oral evidence**

18. The appellant's testimony was that on 26<sup>th</sup> July, 1996, he opened an account with the respondent on behalf of the minor (his grandson) into which he deposited the sum of Kshs. 82,634/= for which he was issued with a card which was marked as MFI-P1. He also produced 2 bank statements for the period between 13<sup>th</sup> January 1997 to 5<sup>th</sup> June 1996 and 13<sup>th</sup> January 1999 to 7<sup>th</sup> December 1999 as Pexhibits 1 and 2 respectively.

19. The appellant explained that Pexhibit 3 shows that the account was closed in 1999. Pexhibit 4 was a certificate of deposit issued to the appellant on 7<sup>th</sup> February 1999.

20. On cross examination, the appellant denied that the account that he had opened with the respondent was a fixed deposit account and denied knowledge of the fact that the account would expire in 1999. He acknowledged that his exhibits P2 and P3 showed that the balances in his account were 3,958 and 4,499.40 respectively.

21. DW1, Lucas Mbogo Onyinkwa, a customer advisor with the respondent bank testified that Pexhibits 2 and 3 related to a child's account No. 008-3505125 and that Pexhibit 4 was a certificate in respect to a fixed deposit account. His testimony was that a customer needed to first open a current or savings account before opening a fixed deposit account so that the amount to be deposited in the fixed deposit account can be withdrawn from the said savings or current accounts.

22. DW1 explained that the bank had not retained any document of the said accounts since the practice of the bank is to destroy such records after the expiry of 7 years. He added that the appellant had not complained about the balance reflected in the bank statements marked as Pexhibit 2 and 3 as was required of him within 15 days from the date of the receipt of the said statements. He further explained that the appellant made withdrawals from his account and that on 1<sup>st</sup> December 1999, the appellant was paid Kshs. 4,449.40 before the account was closed at his instance.

23. On the fixed deposit account, DW1 stated that the amount of money in the said account is usually credited to either a savings or current account upon maturity.

## **Analysis and determination**

24. I have perused the record of appeal, the parties respective submissions and the authorities that they relied upon. I discern the issues for determination to be as follows:

**a) Whether the appellant proved his case against the defendant to the required standards, on a balance of probabilities.**

**b) Whether the appellant's suit was time barred.**

25. On the first issue of proof of the appellant's case, it was not in dispute that the appellant opened a child's savings account No. 008-3505125 and that on 7<sup>th</sup> February 1999, an amount of Kshs. 82,634 was deposited into a fixed deposit account. Plaintiff's exhibit 3 shows that account No. 3505125 was closed on 1<sup>st</sup> December 1999 after the withdrawal of the amount of Kshs. 4,449.40 that was in the said account, while Pexhibit 4 is deposit receipt No. 0479047 dated 7<sup>th</sup> February 1999 showing that the sum of Kshs. 82,634/= was deposited into a fixed deposit account for a period of 3 months which 3 months were to expire on 7<sup>th</sup> May 1999. The appellant did not furnish the court with any evidence to prove that the fixed deposit account was renewed after the expiry of the 3 months.

26. Upon cross examination, the appellant contradicted himself when he stated that he did not open a fixed deposit account when the claim that he had deposited Kshs. 82,634/= in a fixed deposit account can be seen in paragraph 4 of the plaint. Having deposited the amount of Kshs. 82,634/= in a fixed deposit account that was to expire on 7<sup>th</sup> May 1999, the appellant needed to prove to the court that at the expiry of the 3 months, he renewed the contract and did not withdraw or transfer the money into any other account so as to maintain his claim for the Kshs. 82,634/=.

27. Section 108 of the Evidence Act Cap. 60 laws of Kenya places the burden of proof in a civil suit on the claimant. In the instant case, the burden was even heavier on him considering the respondent's evidence that they had long destroyed their documents and records upon the expiry of 7 years as is their usual banking practice.

28. I am not satisfied that the appellant discharged the burden of proof placed on him by the law. The appellant's claim was for a specific amount of money and in this case, all he did was to show that he deposited the money in February 1999 without showing the court what became of the deposit at the expiry of the 3 months agreed period.

## **Limitation period**

29. The second issue of the limitation period is closely linked to the first issue of proof. It is not lost to me that the nature of relationship between the appellant and the respondent was a contractual relationship in which the appellant deposited the sum of Kshs. 82,634/= on 7<sup>th</sup> February 1999 for 3 months at the interest rate of 7% per annum with an expiry date of 7<sup>th</sup> May 1999 as shown in Pexhibit 4.

30. The appellant did not show the court any proof of the extension of the fixed deposit period and his claim that he made several visits to the bank to make the withdrawal was not accompanied by any document in support thereof. The appellant did not also prove that he made any written requests or demands in time or at all to complain about the balance held on account No. 008-3505125 considering that Pexhibit 3 showed that the said account was closed on 1<sup>st</sup> December 1999 when an amount of 4,449.40 was withdrawn.

31. From the above foregoing, it is clear to me that the contract between the appellant and the respondent in respect to the fixed deposit account expired in 1999 and therefore, it was not open for the appellant to file this suit in 2010, more than 10 years after the expiry of his contractual engagement with the respondent.

32. **Section 4 (a) of the Limitation of Action Act** stipulates as follows:

**“4. Actions of contract and tort and certain other actions**

**(1) 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;”**

33. The appellant submitted that the same Limitation of Actions Act provides at **Section 26**, for extension of the limitation period in case of fraud or mistake and further that **Section 27 (1) (a) and (b) of the same Act** allows for extension of the limitation period in case of ignorance of material facts, in actions of negligence.

34. The instant case was founded on contract and therefore the applicable Sections are Section 4 and 26 of the Limitation of Actions Act. Section 26 of the Act provides:

**“26. Extension of limitation period in case of fraud or mistake 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:**

**Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property**

**which—**

**(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or**

**(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”**

35. **Section 27 of the Act** on the other hand states:

**“27. Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.**

**(1) Section 4(2) does not afford a defence to an action founded on tort where—**

**(a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and**

**(c) the court has, whether before or after the commencement of the action, granted**

leave for the purposes of this section; and

(d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—

(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) in either case, was a date not earlier than one year before the date on which the action was brought.

(3) This section does not exclude or otherwise affect—

(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.”

36. In the instant case, the appellant did not obtain orders of the court to extend time for filing the suit either before or after the commencement of the suit and I therefore find that he cannot benefit from the sections allowing the extension of the limitation period. Furthermore, having found that the appellant had not proved his case against the respondent on a balance of probabilities, even assuming that the limitation period was extended, which was not the case, the appellant’s case will still not have been sustainable.

37. In view of the above finding the order that commends itself to me is an order to dismiss the appeal with no orders for costs for the same reasons that the trial court advanced for not awarding costs in the lower court case.

38. It is so ordered.

**Dated, signed and delivered in open court this 21<sup>st</sup> day of February, 2017**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Oireri for Ochoki for the Appellant
- Mr. Ombachi for Miller for the Respondent
- Omwoyo court clerk