



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

CIVIL CASE No 312 of 2014

PETER GACHAU 1ST PLAINTIFF
RICHARD KIMUGUNG2ND PLAINTIFF
STEPHEN MURAGE WACHIRA3RD PLAINTIFF
DICKSON HONGO OKUNGU 4TH PLAINTIFF
JOSHUA NJARIA WAIGERA 5TH PLAINTIFF

VERSUS

EQUITY BANK LIMITED1ST DEFENDANT
JAMES NJUGUNA MWANGI2ND DEFENDANT
MARY WANGARI WAMAE3RD DEFENDANT
GERALD GACHOKA WARUI4TH DEFENDANT

(The Second Third and Fourth Defendant are being Sued as Trustees of the Equity Bank Share Ownership Plan (“ESOP”).

R U L I N G

1. This Matter comes before the Court on the Application of the Plaintiffs to the Suit. The Plaintiffs were former employees of the 1st Defendant and Members of the Equity Share Ownership Scheme (the Scheme). The First Defendant is sued as Employer/Operator and/or Trustee of the Scheme. The 2nd to 4th Defendants are sued in their capacity as Trustees of the Scheme. The Scheme was in fact an employee pension scheme governed by the terms of the Trust Deed and the Rules applicable thereto. The Suit was commenced by 5 Plaintiffs and filed on 18th July 2014. The prayers in the Plaint seek numerous orders including the following:

(a) A declaration that the Plaintiff's redemption benefits under the Defendant's ESOP Scheme should be calculated in accordance with the Trust Deed and Rules of the scheme.

(b) An injunction restraining (sic) the Defendants, their servants and/or agents and each or any of them or howsoever from continuing with the operations of the ESOP commenced on 29/08/2005

until an investigation is carried out by an independent person/authority to ascertain that the Plaintiffs' interests in the Scheme are protected and that the Plaintiffs have been paid the balances of their redemption benefits as at retirement together with interest.

(c) An Order directing the Defendants to recalculate the Plaintiff's benefits under the ESOP Scheme at the prevailing market rate at the Nairobi Securities Exchange and payment to the Plaintiffs of the shortfalls that may be found to be due to them.

(d) Special Damages as claimed in the *Plaint*.

(e) General Damages

(f) Accrued dividends....."

3. The Summons to Enter Appearance was issued on 31st July 2014. The Defendants filed a Memorandum of Appearance on 28th August 2014. It is unclear when the Defence was filed. A copy has not been placed on the file. What is certain is that one exists because the Plaintiffs have filed a Reply to the Statement of Defence. It also must have pleaded the existence of a Deed of Variation. The Reply informs the reader that at least one of the Defendants left the employment of the Bank in March 2010. Subsequently, the Plaintiffs filed an application brought by Notice of Motion pursuant to the provisions of **Section 1A, 1B and 3A of the Civil Procedure Act Chapter 21 of the laws of Kenya and Order 1 Rule 1, Order 8 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the Law**. The Application seeks the following orders:

1. THAT this Honourable court be pleased to enjoin Edwin Munene Kabogo, Joseph Njoroge Muiruri, Richard Kipkorir Maritim, Ernest Morara Mokuu, Joseph Kihara Geita, Nicodemy Wahome Kanyiri, Geoffrey Gachoki Kimani, Victor Ndolo Mutua, Godfrey Barasa, Bernard Muendo Mulwa and Graham Murunga Ahuga in the instant matter as the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th Plaintiffs respectively.

2. THAT this Honourable Court be pleased to grant leave for amendment of the *Plaint* dated 8/07/2014 in terms of the draft Amended *Plaint* annexed to the application

3. THAT costs of this application [be] in the cause.

4. The Grounds relied upon appear on the face of the Motion. In brief they are that the Proposed Plaintiffs were in the same or similar position in relation to the ESOP Scheme as the current Plaintiffs. Also that as a consequence when they retired and "withdrew from the Scheme" they were entitled to certain benefits and certain benefits had accrued under the Scheme. Ground (d) states "That upon leaving service with the 1st Defendant on their respective dates, the proposed Plaintiffs found out that the amounts of monies that the Defendants ought to have refunded to them were greatly concealed thereby resulting to the proposed Plaintiffs being unpaid contrary to the provisions of the Trust Deed and Rules which action was illegal, null and void."

The Application is Supported by the Affidavit of Edwin Munene Kabogo. The Supporting Affidavit relates that the Proposed Plaintiffs were former employees of the 1st Defendant Bank. They joined the ESOP Scheme pursuant to the Trust Deed dated 29/08/2005. The Proposed Plaintiffs applied for and purchased units in the ESOP Scheme. It is the Proposed Plaintiffs' case that the benefits they received upon their withdrawal from the scheme were concealed and were not paid as due contrary to the provisions of the Trust Deed and Rules.

6. By way of argument the Supporting Affidavit makes the following points:

(a) The Proposed Plaintiffs' intended claim against the Defendants raises a common question of law and fact (a Draft Amended *Plaint* is exhibited);

(b) Joinder in the instant matter will avoid multiplicity of suits

(c) No prejudice will be occasioned to the Defendants if this application is allowed;

(d) The inclusion of the Proposed Plaintiffs in the instant matter will assist in promoting an expeditious, proportionate and affordable resolution of the matter as opposed to having separate suits scattered in different courts.

(e) It is in the Interests of Justice that this application be allowed.

The Draft Amended Plaintiff shows that a significant part of the existing Plaintiff, that is paragraphs 1-45 apply to the Proposed Plaintiffs almost without amendment. Subsequent paragraphs relate to the specific circumstances of each Proposed Plaintiff.

7. In response the Defendants have filed Grounds of Opposition.

8. Both Parties have filed detailed and well presented Written Submissions for which the Court is appreciative of the work done. The Court has read and considered them.

9. The Defendant filed grounds of opposition. They are:

1. The Application is misconceived and bad in law;

2. The joinder of the additional Plaintiffs will embarrass and delay the trial of the suit;

3. The joinder of the proposed additional Plaintiffs will be prejudicial to the Defendants;

4. The proposed additional Plaintiffs' cause of action is time barred in view of the express provisions of Section 20(2) of the Limitation of Actions Act, Chapter 22 of the Laws of the Republic of Kenya;

5. The application as filed and the prayers sought thereof are unmeritorious and ought to be dismissed with costs to the Defendants.

10. On 11th June 2015 the Matter came before the Court and the Parties agreed that it should be disposed of by written submissions without highlighting. Directions were given to allow for filing. The Applicants filed their Written Submissions on 19th May 2015 and their Further Written Submissions on 25th June 2015. The Defendants' Written Submissions were filed on 19th June 2015.

11. The Plaintiffs rely on **Order 1 Rule 1** of the **Civil Procedure Rules 2010**. That Rule provides:

“All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise”

The Plaintiffs also rely on **Order 1 Rule 10(2)** which further provides:

“The court may at any stage of the proceedings, either upon or without the application of either party order that the name of any person who ought to be joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

12. The Applicants also rely on on the case of **Stokman Rozen Kenya Limited and Stokman Razen BV**

vs Njagu Limited. That Authority is on point as the same objections to amendment/joiner were raised there as here. The Applicants in particular rely the paragraph that reads:

“The defendant also pleads limitation period and contends the new proposed party is affected by the period of limitation of the cause of action. The defence of limitation cannot be taken away because a new party is added as a plaintiff into the suit. The purpose of allowing amendments is to enable the court to determine the real question in controversy and with a view to avoid/guard against multiplicity of suits over the same subject matter in dispute. The stage of the proceeding, provided that the amendment or joinder will not result in prejudice or injustice to the opposite party with cannot properly be compensated for in costs.

The Learned Judge also went on to quote the Court of Appeal in **Civil Appeal No 222/1998 Central Bank of Kenya vs Trust Bank Ltd and Others**, where it said:

“The jurisdiction of the court under Order 1 Rule 10(2) and Order VI Rule 3(1) of the Civil Procedure Rules is respectively specific. The decision as to who to sue is essentially that of the plaintiff and the court’s duty thereafter is to consider the allegations made against the named defendants and if it considers there are other parties who should have been joined or were improperly joinder give appropriate directions under Order 1 Rule 10(2) above.

...likewise mere delay is not a ground for declining leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs”.

13. The Applicants filed Further Submissions where they deal with the issue of limitation. Paragraph 7 as do the Written Submissions where they says:

*“...the Defendants claim of limitation of time cannot stand as the Applicants would only be added as Plaintiffs into an existing suit. Further, the 1st Defendant are still trading with the Applicants shares knowing very well that they had an obligation to pay the Applicants their accrued benefits within **thirty(30)** days from the date of leaving employment with the 1st Defendant...”* and

“...the Applicants intended claim against the Defendants is not pegged on equitable remedies only. The prayers in the draft amended Plaint include inter alia, special damages as claimed in the Plaint, General damages and accrued dividends...”.

14. In addition to the above Rules, the Defendants rely on **Order 1 Rule 2** which provides:

“Where it appears to the court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the court may either on the application of any party or of its own motion put the plaintiffs to their election or order separate trials or make such other order as may be expedient.”

15. The matters that the Defendants wish to specifically bring to the Court’s attention can be summarised in a list as follows:

- a. The suit was filed in 2014 but the causes of action pleaded “arise from divers years of 2005”. I take that as being a reference to “months” of 2005. That raises the issue of limitation.
- b. The Plaintiffs seek an injunction, an order directing recalculation of their benefits under the ESOP Scheme
- c. An injunction is an equitable remedy and delay defeats equity
- d. The Proposed Plaintiffs claim is solely based on the Trust Deed and Rules made thereunder
- e. The Proposed Plaintiffs are guilty of delay and delay defeats equity. The Defendants rely on the case of **Abigael Marmao vs Mwangi Theuri [2013] eKLR** which itself quotes from a further text,

namely;

“The remedy of injunction is founded in equity and one of the maxims of equity is that “delay defeats equity. I cannot state it better than to quote the text Hanbury and Maudsley, Modern Equity.... where it is stated as follows:

“As we have seen, the plaintiff must come promptly in the cause of an ex parte injunction, as any delay illustrates that his case is not urgent. Where the Plaintiff has voluntarily delayed his motion for an interlocutory injunction, he is unlikely to establish that his case is such that it would be unreasonable to make him wait till trial...” and also a quote from Snell’s Equity which states

A court of equity “has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence, where these are wanting, the court is passive and does nothing.”

f. That the Prejudice to be suffered by the Defendants is incapable of being compensated by monetary compensation as the same is contrary to the maxim of equity. At paragraph 19 it is stated: *“That joinder of the Proposed Plaintiffs would embarrass, prejudice and delay the trial of the suit herein. We submit that the joinder of the Proposed Plaintiffs will greatly prejudice the Defendants as the causes of action of the Proposed Plaintiffs are stale demands being based on equity.”.*

g. The overriding objective is to ensure expeditious determination of disputes

h. The cause of action of the Proposed Plaintiffs is time barred.

i. The draft pleadings do not allege fraud or fraudulent breach of trust and therefore the **Limitation of Actions Act** is applicable.

16. On the issue of limitation, the Defendants rely on **Sections 4(1)(e) and 20 of the Limitation of Actions Act Cap 22 Laws of Kenya** which provide:

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;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

(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:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

20. Actions concerning trust property

(1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is 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.

(2) 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.

(3) A beneficiary against whom there would be a good defence under this Act may not derive a greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

(4) An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action.

The Issues for Determination

17. The Applicant/Prospective Plaintiffs have framed their application as an application for joinder and amendment. In fact, it is an application for the joinder of new parties to an existing suit. As stated above the Suit was filed in July 2014. The Issues that arise for determination are:

- a. Should the Applicants be joined?
- b. Is the Applicant's case against the Defendants sufficiently similar to the existing suit to justify joinder?
- c. Will joinder cause delay?
- d. Is the delay sufficient to cause prejudice?
- e. Would joinder cause any other prejudice that cannot be adequately compensated for by monetary damages?
- f. Have the Proposed Plaintiffs been guilty of inordinate delay in bringing this suit?
- g. Is there a limitation argument?
- h. If so does that militate against joinder?
- i. The overriding objective and access to justice.

Also: Extension - C – *Fraud, Mistake and Ignorance of Material Facts*

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...”

18. The starting point is for the Court to consider whether or not the joinder/amendment should be allowed. Both sides rely on the Court of Appeal decision in ***Central Bank Ltd vs Trust Bank and 4 Others Civil Appeal No. 222 of 1998*** that decision offers guidance on several issues for consideration, however on the issue of amendment, at page 5 their Lordships said “*The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.*”.

19. On the question of amendment, the same authority held that; “It is also trite law that as far as possible a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. Otherwise the court will not later permit him to reopen the same subject of litigation (see ***O. 11 rule 1 of the Civil Procedure Rules***) Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs (See ***Beoco Ltd v Alfa Laval Co. Ltd [1994] 4 All ER. 464.***)”

20. The Applicant’s case is that the joinder and amendment is essential to enable the Court to resolve all the issues in dispute and avoid a multiplicity of suits. The draft Amended Defence demonstrates that all the Plaintiffs and the Proposed Plaintiffs rely on their employment with the Defendants and their membership of the 1st Defendant’s ESOP Scheme to found their claim. They all make allegations as to the management of that Scheme. They all state that they were entitled to the shares they purchased and have received the Shares or the benefit of the shares. That suggests a communality that goes beyond the superficial. The Defendant’s response is that it will suffer prejudice and loss that cannot be compensated. Unfortunately, neither the Grounds of Opposition nor the Submission set out how that loss or prejudice would arise and how it would be quantified as beyond monetary compensation. It is true the Defendant’s will need to incur expense in defending the claims but that is easily compensated by a costs order where justified. On the converse, the Applicants argue that the alternative to joinder would be multiplicity of suits. Again, although the suits that have already been before the Courts are not listed in the Application, the Court takes judicial notice of the fact that there have been at least two in recent years based on the same complaint. Whether the Plaintiffs and Proposed Plaintiffs seek a remedy in addition to damages, which is different from earlier remedies, that is an entitlement they would have to prove at trial.

21. The Defendants complain of delay in two ways. First delay in bringing the suit. It is clear from the pleadings that some of the Applicants left the employ of the 1st Defendant a number of years ago. The delay counts not from when the employment ceased but when the cause of action arose, that must be clear from the pleadings. What is clear here is that the position of all the Proposed Plaintiffs is not the identical. Some retired in 2005 and some as late as 2010. Again, each Proposed Plaintiff will need to clarify his claim and the Defendant respond. The Defendant in argument has raised a defence that the Trust Deed and Rules were varied. If indeed such variation took place does it impact on the whole claim or only some of the Proposed Plaintiffs. The Defendants must have an adequate opportunity to defend the suit. Again, the need to respond to a suit cannot be considered to be a loss that cannot be compensated. The Defendants will have the right to state their case. However, in considering whether amendment and joinder will delay hearing of the suit, the Court takes into account the fact that the Defendants have not complied with ***Order 7 Rule 5, nor Order 11 nor the Practice Direction***. They have not filed their List and Bundle of Documents, nor have they filed witness statements. In the circumstances, it cannot said

that the amendment will cause delay in relation to those aspects. In fact, the Defendants are in the happy position of having to comply with the aforesaid Rules only once.

22. The Defendants argue that the suit as appears in the draft Amended Plaintiff raises causes of action that are statute barred. The Defendant does raise some real questions that the Proposed Plaintiffs have responded to – all in argument. The question of limitation is a substantive question. At this stage of the proceedings the Court can only decide matters on an interlocutory, prima facie basis. The Court does not have the benefit of disclosure or even witness statements. Any decision on the merits of the suit would be inappropriate. In ***Central Bank Ltd vs Trust Bank Ltd & Others*** the Court of Appeal clearly expressed the view that for a judge handling interlocutory matters to prejudge the merits of a party's case would be inappropriate. The Defendant's authorities relating to injunctions are distinguishable as they relate to interlocutory injunctions where the suit went to trial as opposed to final injunctions as sought here (ELC 407 of 2012).

23. In deciding amendment and joinder in the Court has also to take into consideration the changes to the jurisprudential landscape over the last 12 or so years. Under Articles 159(2) and 50 of the Constitution of Kenya 2010, the High Court is charged with the responsibility of providing access to justice without undue consideration of form over substance. In addition the Civil Procedure Rules provide for the overriding objective which has been explained better thus:

“The Parties were required to bear in mind the provisions of Section 1A and 1B of the Civil Procedure Act relating to the overriding objective of the court. The parties were required to assist the court to attain the following aims:-

- a. the just determination of the proceedings*
- b. the efficient disposal of the business of the court,*
- c. the efficient use of available judicial and administrative resources;*
- d. the timely disposal of proceedings and all other proceedings in the court, at a cost affordable by the respective parties; and*
- e. the use of suitable technology”*

per A O Muchelule J in; Sultan Hardware Ltd v William Murithi Kimani and Charles Adongo Civil Appeal No 150 of 2012, High Court of Kenya at Kisumu

For the reasons set out above, the Application for joinder and amendment is granted with costs. The Court also grants the Applicants leave to further amend the Plaintiff to clarify their claim in relation to the dates when the cause of action of each plaintiff arose and how. That should present the Defendants a clearer case to which they can respond. The Plaintiffs to pay the Defendants costs of amendment to the defence consequent upon their own amendments.

Order accordingly

FARAH S. AMIN

JUDGE

Signed and Delivered on the 3rd Day of March 2017

In the Presence of:

Court Assistant: Wangeci and James

Plaintiff/Applicants: Messrs Kipkenda and Co on Record

Defendants/Respondents: Ms Mwika Holding Brief for Mr Ohaga