



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 311 OF 2004

MAE PROPERTIES LIMITED.....PLAINTIFF

VERSUS

JOSEPH KIBE.....1ST DEFENDANT

PLANFARM INVESTMENTS LIMITED.....2ND DEFENDANT

R U L I N G

Before me for determination is the Defendant's Notice of Preliminary Objection dated 20th April, 2012. The same is to the effect that the Plaint filed on 16th June, 2004 ought to be dismissed with costs as it is statute barred contrary to the requirements of Section 4 and 8 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya (hereinafter "the Act").

By its Plaint filed on 16th June, 2004, the Plaintiff pleaded, inter alia, that the 1st Defendant was a director of the Plaintiff and a director and shareholder of the 2nd Defendant, that as a director of the Plaintiff the 1st Defendant owed the Plaintiff the duty to act bona fide in the interest of the Plaintiff and for the proper purposes of the Plaintiff's affairs, that he was a trustee of the assets of the Plaintiff. That the Plaintiff acted in breach of these duties in the acquisition of the Plaintiff's certain properties as a result of which the Plaintiff suffered loss and damage. The Plaintiff claimed as against the Defendants Kshs.9,532,909/- amongst other reliefs.

The Defendants filed a joint Defence. They admitted the 1st Defendant's directorship and shareholding as well as the duties he owed the Plaintiff as pleaded in the Plaint but contended that the Plaintiff's suit was statute barred and reserved the right to have the same dismissed as an abuse of the court process. The Defendants denied breach of statutory duties as contended by the Plaintiff. The Defendants further contended that the dealings complained of between the Plaintiff and the Defendants were conducted at arm's length, that they were regular and duly sanctioned by the Plaintiff's board as well as Annual General Meeting after having obtained independent legal opinion. The Defendants denied acting mala fides and prayed for the dismissal of the suit.

After pre-trials and when the suit was about to proceed for trial, the Defendants gave notice of a Preliminary Objection in the following terms:-

"The Defendants shall at the hearing of this suit raise a Preliminary Objection on the ground that the Plaint filed on 16th June, 2004 ought to be dismissed with costs as it is statute barred contrary to the requirements of Sections 4 and 8 of the Limitations Act, Chapter 22 of the Laws of Kenya."

That Preliminary Objection was argued before me on 21st May, 2012 when Counsels ably hi-lighted their respective written submissions and is the subject of this ruling.

Ms Mbanya, learned Counsel for the Defendant submitted that the contracts, the subject of the suit, were entered into between 25th November, 1994 and 4th June, 1998 whilst the suit was filed on 16th June, 2004 which was well over six years after the cause of action arose. Ms Mbanya further submitted that the Plaintiff's action as pleaded was in breach of Section 4(1) (d) and (e) of the Limitation of Actions Act, Chapter 22 Laws of Kenya (hereinafter "the Act"), the prayers were in the nature of equitable relief thereby falling under Section 4(1) (e) of the Act, that the Plaintiff had not pleaded fraud or mistake and therefore Section 26 of the Act did not apply, that the breach of trust that was pleaded had limitation of strictly three (3) years and no leave had been obtained under Section 27(1) (c) of the Act.

It was Ms Mbanya's submissions that whilst there is no limitation under Section 20(1) of the Act against actions for fraud or fraudulent breach of trust, in which a trustee was privy, Section 20(2) directs that, in any other breach an action must be brought within six (6) years. Ms Mbanya cited the case of **Moses Lesiamon –vs- Commissioner of Lands (2005) e KLR** for the proposition that where no fraud is pleaded and or their particulars given, no issue or claim under fraud can be entertained, she submitted that the reliefs in the Plaint fell squarely under Sections 4(1) (e), 4(3), that there was no leave that had been obtained under Section 28(1) for extension of time. Ms Mbanya further submitted that Section 20(1) of the Act was not applicable as the same applies where there is fraud or fraudulent breach of trust, that the Plaintiffs had in their Plaint pleaded a general breach of trust and have not pleaded fraud. That in any event, Section 20 falls under property of a deceased person whilst the Plaintiff was a limited liability company and not deceased person. Counsel submitted that the Defendant's Preliminary Objection was within the parameters of **Mukisa Biscuits Manufacturing Company –vs- West End Distributors case**, that the 10 years delay constituted acquiescence and laches under paragraph 837 of **Halsburys Laws of England 4th Edition Vol. 28**. Counsel therefore urged that the Preliminary Objection be sustained and the Plaintiff's suit be dismissed.

The Plaintiff filed written submissions dated 3rd May, 2012 in opposition to the Preliminary Objection. The Plaintiff contended that the Preliminary Objection was not well taken at law, that there was a joinder of issue under Order 6 Rule 10 (1) and 4 of the Civil Procedure Rules, that Section 20(1) of the Limitations Actions Act covered the Plaintiff and limitation therefore did not apply in this case.

Mr. Gachuhi, learned Counsel for the Plaintiff relied on **Halsburys Laws of England 3rd Edition Vol. 38 and 4th edition Vol. 28, Palmers Company Law 22nd Edition, Tolley's Company Law** and the case of **In Re-Exchange Banking Company Vol. XXI (1882) Ch. D 519** in the proposition that the 1st Defendant was a trustee in relation to the assets of the Plaintiff. Counsel further submitted that fraudulent breach of trust is dealing with a position of trust in a manner that is mala fides and non- disclosure, that the Plaintiff had pleaded fraudulent breach of trust, that paragraphs 8 and 9 had pleaded the Plaintiff's directorship and his duties to the Plaintiff, paragraph 9 had pleaded trusteeship and paragraphs 10 and 11 of the Plaintiff had pleaded the particulars of breach, that since the Plaintiff had prayed for the making of a finding that the 1st Defendant was in a position of a trust to the Plaintiff which was an issue that had to be addressed before all other issues, the Preliminary Objection was not properly taken in law. Mr. Gachuhi contended that in the agreed issues filed on 24/11/2004, one of the issues for determination was whether there was breach of trust and the consequences thereto and that for that reason limitation can only be established through evidence, Counsel urged that the Preliminary point of law be dismissed.

I have carefully considered the pleadings, the written submissions and the able hi-lights thereof by learned counsel.

Sir Charles Newbold P. in the case of **Mukisa Biscuits Company -vs- West End Distributors (1969) EA 696** observed at page 701 that:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be

raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Are all the facts that constitute the Plaintiff’s cause of action in this case admitted? As set out in the beginning of this ruling, the Plaintiff’s cause of action is that the 1st Defendant as a director of the Plaintiff owed the Plaintiff certain duties, both statutory and otherwise, that he was a trustee of the Plaintiff’s properties, that as such trustee he acted mala fide against the interests of the Plaintiff, that he breached his obligations as a trustee of the assets of the Plaintiff which had resulted in loss and damage to the Plaintiff. Of all these, what is admitted is that the 1st Defendant owed the Plaintiff the duties to act bona fide to its interests and to act for proper purposes of the Plaintiff. It is also not in dispute that the acts complained of took place between 23rd November, 1994 and 4th June, 1994. This suit was filed on 16th June, 2004. The last of the complained acts took place six (6) years and 21 days before the filing of the suit.

From the pleadings the 1st Defendant’s trusteeship to the Plaintiffs assets is disputed, the 1st Defendant has denied owing the Plaintiff any statutory duties, all other wrong doings are also denied.

The Defendant’s contention is that the suit was clearly filed out of the six year period after the cause of action arose. The Plaintiff on its part have contended that its cause of action is fraudulent breach of a trust in respect of which limitation does not arise. My view is that from the pleadings, it is not easy to ascertain whether there was breach of fiduciary duties by the 1st Defendant, the said breaches have been denied, they must first be ascertained before one can state with any certainty that there was a breach of trust by the 1st Defendant. It is only after establishing whether the 1st Defendant was a trustee of the assets of the Plaintiff and whether he had breached that trust that one can conclude that there was a trust that had been breached.

Accordingly, in so far as there are facts to be ascertained, my view would be that the Preliminary Objection may not have satisfied the test put in the Mukisa Biscuits case.

If however, I am wrong on the foregoing, is the Plaintiff’s suit as pleaded covered by Sections 4 and 8 or Section 20 (1) of the Act?

The Defendants contended that the Plaintiff’s suit is covered under Sections 4(1) (a), (d), (e), 4(2) and 8 of the Limitations Act. That for that reason, the same should have been brought before the end of six years after the cause of action arose. The Defendant’s further contended that since no extension of time had been sought under Sections 26 and 27 of the Limitation Act, as no fraud or mistake had been pleaded, the suit was time barred. The Defendants’ further contention is that the Plaintiff’s cause of action in so far as it is pleaded is a general breach of trust and that since no particulars of fraud had been pleaded under Order 2 Rule 10, it is neither fraud nor fraudulent breach of trust in respect of which Section 20 of the Limitation Act applies.

The Plaintiff on its part contends that its cause of action as pleaded is a fraudulent breach of trust, that paragraphs 7 to 17 of the Plaint disclose that it is fraudulent breach of trust and nothing else.

Section 20 of the Limitation Act provides:-

“20. (1) None of the period 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) of this section, 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.”

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 Vol. 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. Trustee’s fraud or fraudulent breach of trust. 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 the trustee was a party or privy, the fraud in question need not amount to dishonesty.”

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. In 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.

In the case of **Kitchen –vs- R.A.F Association and Others (1958) 2 All ER 241** the Court of Appeal of England while considering a matter where solicitors, without any dishonest motive had concealed a gratuitous payment for the benefit of their trustee client, held that such a conduct would be excepted under the English Limitation Act, 1939. At page 249, Lord Evershed M.R observed:-

“Equally, it is clear, having regard to the decision in Beaman –vs- A.R.T.S Ltd [(1949) 1 All E.R 465,] that no moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is unconscionable thing for the one to do towards the other.” (Emphasis supplied)

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. 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.

I am alive to the authorities relied on by the Plaintiff that directors are trustees of the company assets in their hands. See **Palmers Company Law Vol. 1, and Tolleys Company law.**

I have looked at the Plaintiff. The same has pleaded the existence of duties allegedly owed by the 1st Defendant to the Plaintiff, there is a pleading that they were breached, particulars of breach have been pleaded, there is also the pleading that the 1st Defendant acted mala fides. Whilst the Plaintiff did not expressly state that the actions complained of were fraudulent in nature, in my view they point to that end. The issue is that the 1st Defendant acted with full knowledge of the effect of his actions.

On the foregoing, I am satisfied that the Plaintiff as it stands does satisfy the cause of action of fraudulent breach of trust. Accordingly, if proved, the same will be squarely under Section 20(1) of the Limitation of Actions Act thereby excepted from limitation.

In the premises, I am not satisfied that the Preliminary Objection has any merit and I dismiss the same with costs.

DATED and Delivered at Nairobi this 4th day of July, 2012.

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A. MABEYA
JUDGE