

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCOMM NO. E238 OF 2023**

UNITED ENGINEERING SUPPLIES LIMITED.....PLAINTIFF

-VERSUS-

DINKAR RAMBHAI PATEL.....1<sup>ST</sup> DEFENDANT

PARAG DINKAR PATEL.....2<sup>ND</sup> DEFENDANT

**RULING**

1. This Ruling is in respect to two applications. The first application is the plaintiff's Notice of Motion dated 8<sup>th</sup> December 2023 filed pursuant to the provisions of Sections 1A, 1B, 3A & 100 of the Civil Procedure Act and Order 8 Rules 3, 5 & 7 of the Civil Procedure Rules. The plaintiff prays for an order for leave to further amend its amended plaint dated 3<sup>rd</sup> October 2023 to include additional claims against the 1<sup>st</sup> defendant, as outlined in its further amended plaint. The plaintiff also seeks an order that the further amended plaint be deemed as duly filed upon payment of Court fees.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Sanjay Ramesh Patel, a shareholder and Director of the plaintiff company. He averred that the proposed amendment arises from a discovery in July 2018 that the 1<sup>st</sup> defendant had unlawfully appointed himself as a Director of the plaintiff company without proper company resolutions and while he was residing abroad between 2003 and 2010.

3. Mr. Patel contended that the plaintiff now seeks to recover Director's salary and fees paid to the 1<sup>st</sup> defendant as a result of the his unauthorized actions, which also amount to fraudulent misrepresentation and concealment. Mr. Patel asserted that the amendment is intended to assist this Court in resolving the real issues in controversy. He stated that the instant application has been filed before conclusion of pre-trial directions and the 1<sup>st</sup> defendant will have an opportunity to amend his defence, and he will suffer no prejudice.
4. In opposition to the application, the defendants filed Grounds of Opposition dated 1<sup>st</sup> March 2024 raising the following grounds –
  - i) The plaintiff/applicant's claim and the proposed amendments are time barred by dint of Section 4(2) of the Limitation of Actions Act, (Cap. 22) Laws of Kenya, being a claim founded on tort and having been brought after the end of three (3) years from the date on which the cause of action accrued;
  - ii) The plaintiff/applicant's claim and the proposed amendments are incompetent and a total abuse of the process of this Honourable Court the same being made years after the plaintiff discovered the alleged breach and/or misrepresentation;
  - iii) The proposed amendment would be prejudicial to the defendants; and
  - iv) The application in its entirety is brought in bad faith and should be dismissed with costs.
5. The second application is the defendants' Notice of Motion dated 1<sup>st</sup> March 2024 filed under the provisions of Section 3A of the Civil Procedure Act, (Cap 21) Laws of Kenya, Order 2 Rule 15(1)(b) & (d) & Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The

defendants pray for an order striking out the plaintiff's suit with costs to the defendants.

6. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Parag Dinkar Patel, the 2<sup>nd</sup> defendant herein. He averred that the plaintiff's suit ought to be struck out on grounds that it is frivolous, vexatious, scandalous, time-barred, and an abuse of the Court process. He contended that the plaintiff's claims including allegations of unlawful directorship, lack of work permits, breach of fiduciary duty, and fraudulent conduct, are all based on events that occurred between 2012 and 2018, and are therefore statute-barred pursuant to the provisions of Section 4(2) of the Limitation of Actions Act. Mr. Dinkar contended that the plaintiff is estopped from challenging his directorship, having acknowledged and remunerated him as a Director, and having filed annual returns listing him as such. He further averred that this suit was filed during the pendency of a liquidation petition against the plaintiff, without leave of Court, hence it is defective.
7. In opposition to the defendants' application, the plaintiff filed a replying affidavit sworn on 11<sup>th</sup> April 2024 by Mr. Sanjay Ramesh Patel, a shareholder and Director of the plaintiff company. Mr. Patel contended that the plaintiff's suit filed on 5<sup>th</sup> May 2023 seeks general damages for breach of fiduciary duty, fraudulent misrepresentation, and recovery of Directors' fees that were paid. He averred that the 1<sup>st</sup> defendant unlawfully appointed himself and later his son, the 2<sup>nd</sup> defendant, as Directors of the plaintiff without proper procedure, during periods when the plaintiff's legitimate Director was out of the country. He stated that these appointments were only discovered in July 2018 during the preparation of a response to a winding-up petition being Nairobi HCIP No. E003 of 2018, filed by the 1<sup>st</sup> defendant to wind up the plaintiff company.

8. Mr. Patel stated that the plaintiff's suit against the defendants is also that the defendants incorporated a rival company, United Tools Limited, in breach of their fiduciary duties, thus diverting business and funds. He asserted that the plaintiff's claims are not time-barred because they are based on fraud and breach of trust, which were discovered in 2018, hence they are protected under Sections 20 & 26 of the Limitation of Actions Act. He denied that any company resolutions were passed to validate the defendants' appointments, and asserted that there was no acquiescence or waiver of rights, as the fraud had been concealed. Mr. Patel averred that no leave was required to file this suit despite the pending winding-up petition.
9. The applications herein were canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of A. Thuo Kanai Advocates on 12<sup>th</sup> April 2024 & 26<sup>th</sup> September 2024, whereas the defendants' submissions were filed on 29<sup>th</sup> May 2024 & 15<sup>th</sup> November 2024 by the law firm of Oraro & Company Advocates.
10. Mr. Thuo, learned Counsel for the plaintiff relied on the Court of Appeal case of **Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited** [2013] eKLR and the provisions of Order 8 Rule 3(2) of the Civil Procedure Rules, and submitted that the defendants will not suffer any prejudice if leave to amend their plaint is granted, as the application was made before this suit was set down for hearing and the proposed amendments do not change the substance of this suit, which is based on breach of fiduciary trust. He referred to the Court of Appeal case of **Stephens & 6 others v Stephens & another** [1987] eKLR and argued that the proposed amendments are not time-barred, as they are grounded on fraud and breach of trust, claims protected under Sections 20 & 26 of the Limitation of Actions Act, given that the fraud was only discovered in July 2018.

11. Mr. Thuo cited the case of **Regent Leisuretime Limited v Natwest Finance (formerly County Natwest Ltd)** [2003] All ER (D) 385 and stated that a claim based on fraudulent misrepresentation is a claim based on fraud for limitation purposes. Counsel argued that the defendants have deliberately misrepresented the nature of this claim by wrongly categorizing it as a tort, whereas this suit is based on allegations of fraud and breach of fiduciary duty. He relied on the case of **Lavington Security Limited v Consolidated Bank of Kenya & 3 others** [2021] eKLR, Section 26 of the Limitation of Actions Act and submitted that this claim is not time-barred under Section 4(2) of the Limitation of Actions Act, since fraud is not classified as a tort and is exempt from limitation under the applicable law.
12. Counsel argued that the defendants as Directors, acted fraudulently, dishonestly, and in breach of their fiduciary duties by unlawfully appointing themselves as Directors, concealing the incorporation of a rival company, and misrepresenting work permit status. He referred to the provisions of Section 20 of the Limitation of Actions Act, and the Supreme Court of England in the case of **Burden Holdings (UK) Limited v Fielding & another** [2018] UKSC 14 and contended that as Trustees of the plaintiff's property, their conduct constitute a fraudulent breach of trust, thus this suit is not time-barred and the plaintiff is entitled to recover money fraudulently obtained. He asserted that fiduciary duties of Directors, now codified in Kenya under Sections 140 -147 of the Companies Act, are statutory obligations, not duties of care under the law of torts.
13. Mr. Thuo submitted that the defendants' claim of estoppel is baseless, as they have provided no evidence showing that the plaintiff's innocent Director was aware of their fraudulent self-appointments as Directors. He further submitted that the defendants' signing of annual returns in 2010, 2012, and 2015 was done

without knowledge of the fraud, induced by the defendants' concealment and misrepresentation, which acts he maintains cannot be considered clear representations of fact to support estoppel. Citing the case of **Belmont Finance Corporation Ltd v Williams Furniture Ltd and others** [1979] 1 All ER 118, Counsel argued that a Director cannot rely on his own misconduct to avoid liability, and there is no evidence of waiver or representation by the plaintiff that would justify estoppel.

14. Mr. Thuo submitted that the filing of Insolvency Petition No. HCIP No. E003 of 2018 does not bar the plaintiff from instituting the current suit against the defendants. He contended that Section 431 of the Insolvency Act is meant to safeguard company assets from improper dealings during pending insolvency proceedings, not to bar legal claims for redress. Counsel asserted that the pending Insolvency Petition does not strip the plaintiff of legal standing to sue, as no provision in law prohibits a company from initiating legal proceedings in such circumstances. Mr. Thuo further submitted that the provisions of Sections 431, 437 and the Third Schedule of the Insolvency Act only apply when a Provisional Liquidator is appointed, which is not the case here.
15. Ms Lubano, learned Counsel for the defendants relied on the case of **Family Bank Limited v Panda Co-operative Savings Credit Society Limited** [2021] KEHC 6591 (KLR) and submitted that the plaintiff's claims for breach of fiduciary duty and fraudulent misrepresentation are essentially tortious in nature and therefore time-barred under Section 4(2) of the Limitation of Actions Act. She asserted that Directors' duties under the Companies Act are statutory, and any breach of those duties gives rise to a claim in tort. She cited the case of **Sachin Shaha v Jagat Mahendra Kumar Shah & another** [2020] eKLR and asserted that the plaintiff's claim for general damages due to breach of fiduciary duty is a tortious claim, as breach of fiduciary trust is actionable in tort. She

contended that the plaintiff's reliance on Sections 20 & 26 of the Limitation of Actions Act is misplaced.

16. Ms Lubano stated that since the plaintiff admits to having discovered the alleged unlawful appointment in July 2018, the claims in this suit having been filed five years later, are time-barred under the three-year limitation period for torts. She contended that Section 26 of the Limitation of Actions Act, which extends the limitation period for fraud, does not apply to this case since the plaintiff's claim is based on fraudulent misrepresentation not actual fraud. She submitted that the doctrine of estoppel cited in the Court of Appeal case of **John Mburu v Consolidated Bank of Kenya** [2018] eKLR applies in this instance, and argued that the plaintiff cannot now deny or challenge the 2<sup>nd</sup> defendant's appointment as a Director after having consistently recognized and remunerated him in that role for nearly a decade.
17. Counsel stated that the plaintiff is the subject of a pending Liquidation Petition. Further, that under Section 431 of the Insolvency Act, 2015, liquidation of a company is deemed to commence once a liquidation application is filed. Counsel referred to the case of **Dennish Owino Omega v Mumias Sugar Co. Limited (Under Receivership); KCB Bank Kenya Limited (Objector); Ponangipalli Ventata Ramana RAO (Receiver Manager of Mumias Sugar Company Limited (Interested Party)** [2021] eKLR, and contended that in view of the pending insolvency proceedings against the plaintiff company, this suit may be affected by the said proceedings. She referred to the provisions of Section 437 and the Third Schedule of the Insolvency Act and argued that since the plaintiff is pending liquidation, it cannot institute a suit in its own name.
18. Ms Lubano cited the case of **Nduberi Farmers Co. Ltd. (In Liquidation) v Vinubhai Virpal Shah & 2 others** [2019] eKLR and Section 464(1) of the

Insolvency Act and asserted that the plaintiff lacks the legal standing to institute this suit. Counsel argued that the plaintiff's application to further amend the plaint dated 3<sup>rd</sup> October 2023 seeks to introduce claims of fraudulent misrepresentation and breach of fiduciary duty against the 1<sup>st</sup> defendant, but since both claims are tortious in nature and time-barred under Section 4(2) of the Limitation of Actions Act, and they were filed more than three years after the cause of action arose, the proposed amendments are legally incompetent and amount to an abuse of the Court process.

19. She argued that while the plaintiff claims this suit is based on fraud and that it is protected under Section 26 of the Limitation of Actions Act, this provision only delays the start of the limitation period until the fraud is discovered. She submitted that since the plaintiff claims discovery of the fraud in July 2018 but filed this suit nearly five years later, the plaintiff's claim is still time-barred. Counsel urged this Court to allow the defendant's application dated 1<sup>st</sup> March 2024 and dismiss the plaintiff's application dated 8<sup>th</sup> December 2023 with costs.

### **ANALYSIS AND DETERMINATION**

20. I have considered the applications filed herein, the grounds in support of each application and the affidavits thereof. I have also considered the replying affidavits filed by each party to oppose the other's application. I have also considered the written submissions by Counsel for the parties. The issues that arise for determination are –

- i) Whether the plaintiff has the requisite locus standi to institute this suit;**
- ii) Whether the plaintiff should be allowed to further amend its plaint;**  
**and**

**iii) Whether this suit should be struck out for being time barred by dint of Section 4(2) of the Limitation of the Actions Act.**

**Whether the plaintiff has the requisite *locus standi* to institute this suit.**

21. The defendants' case is that the plaintiff does not have the requisite *locus standi* to bring this suit in its own name, since the suit was filed during the pendency of a liquidation petition against the plaintiff, being **Nairobi HCIP No. E003 of 2018** and without leave of Court. The plaintiff on the other hand averred that no leave was required to file this suit despite the pending winding-up petition
22. It is factual that the defendants filed a liquidation petition against the plaintiff company in **Nairobi HCIP No. E003 of 2018**. Section 431 of the Insolvency Act, 2015 provides for when liquidation of a company by the Court commences. It states that –
- 1) *If, before the making of an application for the liquidation of a company by the Court, a resolution has been passed by the company for liquidating the company voluntarily –*
    - a) *the liquidation commences at the time of the passing of the resolution; and*
    - b) *unless the Court, on proof of fraud or mistake, directs otherwise, all proceedings taken in the voluntary liquidation are to be regarded as having have been validly taken.*
  - 2) *If the Court makes a liquidation order under section 534, the liquidation commences on the making of the order.*
  - 3) *In any other case, the liquidation of a company by the Court commences when the application for liquidation order is made.*
- (Emphasis added).

23. In view of the above provisions, this Court agrees with the defendants that the liquidation of a company is deemed to commence upon the filing of a liquidation application. I am however of the considered view that the mere commencement of liquidation proceedings does not automatically strip a company of its corporate personality or bar it from instituting legal proceedings, as it is only upon the issuance of a liquidation order and/or the appointment of a Liquidator that the powers to sue or defend on behalf of the company vest in the Liquidator. Similarly, if a Provisional Liquidator is appointed, he may bring or defend proceedings in the name of, and on behalf of the company, provided that the Court has granted him the power to do so.
24. In this case, although liquidation proceedings have been initiated against the plaintiff, neither a liquidation order has been made against the plaintiff nor has a Liquidator or a Provisional Liquidator been appointed to oversee the affairs of the plaintiff company. I am therefore not persuaded that the plaintiff was required to first obtain leave of Court prior to instituting this suit.
25. I am as such satisfied that the plaintiff has the requisite *locus standi* to bring this suit against the defendants.

**Whether the plaintiff should be allowed to further amend its pleadings.**

26. Upon perusal of the defendants' Grounds of Opposition and their submissions in opposition to the plaintiff's application, it is clear that their primary objection to the proposed further amendment of the pleadings is based on the argument that both the original cause of action and the amendments sought to be made, are statute-barred under the provisions of Section 4(2) of the Limitation of Actions Act. The said provisions state as follows-

***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.***

27. It is not in dispute that Section 4(2) of the Limitation of Actions Act applies solely to actions founded on tort. It is however important to note that in this case, while the defendants argue that the plaintiff's cause of action is tortious in nature, the plaintiff maintains that the claim is premised on fraud and breach of trust, and therefore falls within the ambit of Section 20 of the Limitation of Actions Act which provides as hereunder -

***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.***

28. In order for this Court to determine whether the plaintiff's suit is statute-barred, it must first establish whether the claim by the plaintiff is based in tort or grounded on fraud and breach of trust. Upon perusal of the plaintiff's amended plaint dated 3<sup>rd</sup> October 2023 and the proposed amendments, it is clear that the plaintiff's claim is premised on the allegation that the 1<sup>st</sup> defendant who was entrusted with the day-to-day management of the plaintiff company, fraudulently appointed himself and the 2<sup>nd</sup> defendant as Directors of the plaintiff without any Board resolution, when Mr. Patel, a Director of the plaintiff company was out of the country. The plaintiff contends that the defendants unlawfully received salaries from the company and incorporated a competing business, United Tools Limited, through which they diverted the plaintiff's clients and funds. As such, the plaintiff claims that the defendants breached their fiduciary duties, warranting the institution of this suit.
29. In response thereto, the defendants deny the allegations that they fraudulently assumed directorship or unlawfully drew salaries from the plaintiff company or breached any of their fiduciary duties to the plaintiff company. They assert that United Tools Limited was formed with the intention of acquiring Mr. Patel's shares in the plaintiff company, but the transaction did not materialize. From the foregoing, the main issue for determination of the dispute in the main suit is whether the defendants legally became Directors of the plaintiff company and collected salaries from the plaintiff, and whether they breached their fiduciary duties to the plaintiff company.

30. From the above paragraph, this Court finds merits in the plaintiff's position that its cause of action against the defendants is anchored on fraud and breach of trust rather than on tortious liability. I am therefore persuaded that the plaintiff's claim falls within the exceptions outlined under Section 20 of the Limitation of Actions Act and it is therefore not subject to the limitation period prescribed under Section 4(2) of the Limitation of Actions Act. Consequently, this Court holds that neither the plaintiff's current claim nor the proposed amendments are time-barred.
31. I shall now determine whether the plaintiff should be allowed to further amend its amended plaint dated 3<sup>rd</sup> October 2023.
32. Amendment of pleadings with leave of Court is provided for under Order 8 Rule 3 of the Civil Procedure Rules, 2010 which states that –
- 1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the Court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.**
  - 2) Where an application to the Court for leave to make an amendment such as is mentioned in sub - rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the Court may nevertheless grant such leave in the circumstances mentioned in any such sub - rule if it thinks just so to do.**
  - 3) An amendment to correct the name of a party may be allowed under sub - rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied**

*that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.*

*4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.*

*5) An amendment may be allowed under sub - rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.*

33. It is trite that this Court has the discretion to order for the amendment of any document pursuant to the provisions of Order 8 Rule 5(1) of the Civil Procedure Rules, 2010 which provides as hereunder –

*For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the Court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and, on such terms, as to costs or otherwise as are just.*

34. The plaintiff asserts that the proposed amendment arises from the fact that the 1<sup>st</sup> defendant unlawfully appointed himself as a Director of the plaintiff company without the requisite company resolutions, during a period when Mr.

Patel was residing abroad. Consequently, the amendment seeks to introduce claims against the 1<sup>st</sup> defendant for fraudulent misrepresentation and breach of fiduciary duty, and to recover Director's salaries and fees paid to him as a result of his unauthorized and concealed actions. The plaintiff maintains that the amendment is aimed at enabling the Court to effectively determine the real issues in dispute.

35. The defendants assert that the plaintiff's application to further amend its plaint aims to introduce claims against the 1<sup>st</sup> defendant for fraudulent misrepresentation and breach of fiduciary duty. They contend that these claims are tortious in nature and are time-barred under Section 4(2) of the Limitation of Actions Act, having been brought more than three (3) years after the alleged cause of action arose. As such, the proposed amendments are legally untenable and constitute an abuse of the Court process.
36. It is trite law that amendments should be allowed freely at any stage of the proceedings as long as such amendments do not cause prejudice or injustice to the opposing side which cannot be remedied by costs. In the case of **Kassam v Bank of Baroda (Kenya) Limited** [2002] 1 KLR 294, the Court laid down the factors to be considered when dealing with an application for amendment of pleadings as hereunder –
- a) *The party applying is not acting mala fides;*
  - b) *The amendment will not cause some injury to the other side which cannot be compensated by costs;*
  - c) *The amendment is not a device to abuse the Court process;*
  - d) *The amendment is necessary for the purpose of determining the real questions in controversy between the parties and avoid multiplicity of suits;*

*e) And that the amendment will not alter the character of the suit.*

37. In the case of **Joshua Kimani v Kiso Enterprises Ltd & 3 others** [2020] eKLR, the Court held the following on amendment of pleadings-

*The Learned Authors of Halsbury's Laws of England, 4th Ed (Re-Issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings: -*

*".....The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the Court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.*

*...The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it, it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side..."* Emphasis added.

38. Upon examining the draft further amended plaint attached to the plaintiff's supporting affidavit for the instant application, it is evident that the plaintiff seeks to introduce the claim that the 1<sup>st</sup> defendant fraudulently appointed himself as a Director of the plaintiff company without a Board resolution, and without the knowledge of Mr. Patel, during a period when Mr. Patel was residing in the United States. The amendment aims to include details of the amounts paid to the defendants as Directors' salaries, specifically, seeking recovery of Kshs.111,260,561.00 allegedly unlawfully paid to the 1<sup>st</sup> defendant.

39. From the foregoing, I am persuaded that the proposed amendments align with the original cause of action and serve to clarify the plaintiff's case, and the said amendments will assist this Court to effectually resolve the key issues in dispute between the parties herein. It is noteworthy that the application seeking leave to amend the plaint was filed before this matter was set down for hearing, therefore, should the Court grant the plaintiff leave to amend its plaint, the defendants will still have an opportunity to amend their statement of defence.
40. It is my finding that given the said position no prejudice will be occasioned to the defendants that cannot be adequately compensated through an award of costs. It is my finding that it is in the wider interest of justice to allow the plaintiff to further amend its plaint.

**Whether this suit should be struck out for being time barred by dint of Section 4(2) of the Limitation of the Actions Act.**

41. This Court has already found that that the plaintiff's claim falls within the exceptions outlined under Section 20 of the Limitation of Actions Act and it is therefore not subject to the limitation period prescribed under Section 4(2) of the Limitation of Actions Act. I am therefore not persuaded that the plaintiff's suit should be struck out for being time barred by dint of Section 4(2) of the Limitation of the Actions Act.
42. The upshot is that this Court finds that the plaintiff's application dated 8<sup>th</sup> December 2023 is merited, whereas the defendants' application dated 1<sup>st</sup> March 2024 is bereft of merits.
43. I therefore make the following orders -

- i) The defendants' application dated 1<sup>st</sup> March 2024 is hereby dismissed;

- ii) The plaintiff is hereby granted leave to further amend its amended plaint dated 3<sup>rd</sup> October 2023 to include additional claims against the 1<sup>st</sup> defendant, as outlined in its draft further amended plaint;
- iii) The plaintiff shall file its further amended plaint within 14 days from the date of this Ruling;
- iv) The defendants will within 14 days of service file and serve their amended statement of defence;
- v) The plaintiff will have 14 days to file and serve a reply to the amended statement of defence, if it so wishes; and
- vi) Each party shall bear its own costs. This is informed by the fact that the defendants have not been successful in their application, had they been, then they would have been entitled to costs for both their application and the application by the plaintiff.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI on this 26<sup>th</sup> day of September 2025. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Thuo for the plaintiff

No appearance for the defendants

Ms B. Wokabi – Court Assistant.