

2. The application is brought under Sections 3 and 3A of the Civil Procedure Act and Order 2 Rule 15 (1)(b), (c), and (d) of the Civil Procedure Rules. The 2nd Defendant seeks orders that the Counterclaim against it be struck out with costs.
3. The Preliminary objection raised is that the claim is time-barred as per the Limitation of Actions Act.
4. The application is premised on the grounds that the Plaintiff in the Counterclaim alleges that between 2nd June 2017 and 26th June 2018, the 1st Defendant in the Counterclaim unlawfully withdrew funds from the account, leading to loss, and further alleges breach of fiduciary duty against the 2nd Defendant, a banking institution. The 2nd Defendant contends that it was not an original party to the suit and was only joined through the Counterclaim filed on 21st October 2024, more than six years after the alleged cause of action arose. It argues that the Counterclaim is time-barred under Sections 4 and 35 of the Limitation of Actions Act, that the Court lacks jurisdiction, and that the Counterclaim constitutes an abuse of the court process.
5. It is further contended that the Plaintiff in the Counterclaim expressly stated that the claim arises from a partnership dispute between himself and the 1st Defendant in the Counterclaim, and that no cause of action has been disclosed against the Bank. The Bank maintains that it duly provided account statements and loan records to the Plaintiff in the Counterclaim.

6. Opposing the application, the Defendant, now Plaintiff in the Counter-claim filed a replying affidavit sworn on 20th December 2024. He avers that during the subsistence of the partnership between himself and one Waweru Njuguna under the firm Capricorn Motor & Risk Assessors, they operated Account No. 031000005947 with the 2nd Defendant, where a fiduciary relationship existed. He maintains that the Counterclaim arises from both the breach of partnership and the Bank's failure to provide accurate records of the withdrawals and transactions. He contends that the claim for the unpaid share of profits and unaccounted funds held in the Bank cannot be defeated by limitation since the cause of action in contract arises upon breach and that the loss continues to subsist.
7. The 1st Defendant in the Counterclaim, in its reply to the Defence and Defence to Counterclaim, raised a preliminary objection contending that the claim is time-barred under Section 4(1)(a) and (e) of the Limitation of Actions Act, which prescribes a six-year limitation period for actions founded on contract and for equitable relief. It is argued that since the partnership lapsed in June 2018, any claim filed after June 2024 is statute-barred.

Analysis and determination

8. I have carefully considered the Notice of Motion dated 29th November 2024, the PO raised by the 1st Defendant in the Counterclaim, the affidavits and annexures filed, and the

respective submissions of the parties. The issues that arise for determination are:

- i. *Whether the PO is merited;*
- ii. *Whether the counterclaim is time-barred and*
- iii. *Whether the suit against the 2nd Defendant in the counterclaim ought to be struck out.*

Whether the Preliminary Objection is merited

9. A Preliminary Objection, as defined in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, is one that:

“...consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point, may dispose of the suit.”

Law JA, further stated that a Preliminary Objection cannot be raised if any fact has to be ascertained or if the court is called upon to exercise judicial discretion.

10. The 1st Defendant’s Preliminary Objection challenges the Counterclaim on the ground that it is time-barred under Section 4(1) of the Limitation of Actions Act. That section provides that actions founded on contract and actions to enforce an equitable claim may not be brought after the end of six years from the date on which the cause of action accrued.

11. It is trite law that no court has jurisdiction to entertain a time-barred action. A limitation period is not a mere

procedural requirement as it goes to jurisdiction. If a suit is time-barred, the court has no jurisdiction to entertain it.

12. In the present case, the alleged acts of withdrawal and breach occurred between 2nd June 2017 and 26th June 2018. The Counterclaim was filed on 21st October 2024, over six years after the latest alleged breach. On the face of it, the claim would thus appear to be caught by the limitation period prescribed under Section 4(1) of the Act. Therefore, I find that the preliminary objection as filed is proper.

Whether the Counterclaim is time-barred

13. **Section 4(1)(a)** of the **Limitation of Actions Act, Cap 22**, provides that:

“Actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued.”

14. Similarly, **Section 4(1)(e)** limits actions for equitable relief to six years. The question of when a cause of action accrues was considered in **Gathoni v Kenya Co-operative Creameries Ltd [1982] KLR 104**, where the Court held that limitation runs from the date the cause of action arose, not when the claimant becomes aware of it. Time is extended when there is an acknowledgement of debt or continuing breach.
15. In the present case, the Plaintiff in the Counterclaim alleges that the loss complained of arose between June 2017 and June 2018. The Counterclaim, however, was filed on 21st

October 2024, more than six years after the alleged breach. The Plaintiff in the Counterclaim contends that he suffered significant setbacks in his personal life, including health challenges, following the frustrations arising from the dispute, which prevented him from filing the claim within the prescribed period.

16. While the Court sympathizes with the Plaintiff's circumstances, limitation of actions is a matter of substantive law and not merely procedural. The Court of Appeal in **Mea Ltd v National Social Security Fund Board of Trustees [2021] KECA 92 (KLR)** reaffirmed that hardship or personal misfortune does not stop the running of time unless the statute itself provides for such exception. No material has been placed before the Court to demonstrate that the running of time was suspended under Section 26 or 27 of the Limitation of Actions Act, or that any acknowledgment or continuing breach occurred to extend limitation.
17. A right of action which is barred by limitation cannot be revived by judicial discretion. Once the statutory limitation period has lapsed, the claim is extinguished and cannot be sustained regardless of the equities of the case or the hardship suffered by the claimant. The Court's hands are effectively tied by the operation of the law.
18. Accordingly, I find that the Counterclaim, whether based on breach of contract, fiduciary duty, or tort, is statute-barred under Section 4 of the Limitation of Actions

Act, and no valid cause of action can therefore lie against the 2nd Defendant.

Whether the Counterclaim against the 2nd Defendant should be struck out

19. The power of the Court to strike out pleadings is provided under Order 2 Rule 15(1)(b), (c), and (d) of the Civil Procedure Rules, which empowers the Court to strike out any pleading that discloses no reasonable cause of action, is scandalous, frivolous or vexatious, or is otherwise an abuse of the process of the Court.
20. In **D.T. Dobie & Company (Kenya) Ltd v Muchina [1982] KLR 1**, Madan JA stated that striking out is a draconian remedy to be exercised sparingly and only where the pleading is plainly hopeless. However, where a pleading is barred by law, the Court has no option but to strike it out.
21. The Plaintiff in the Counterclaim concedes that the alleged loss arose from a partnership dispute between himself and the 1st Defendant in the Counterclaim. No privity of contract or specific duty giving rise to liability has been demonstrated against the 2nd Defendant beyond its ordinary role as banker. The Bank, having provided statements as requested, cannot be held liable for disputes arising between partners in a firm.
22. A bank's duty to its customer is limited to the contractual terms governing the account and does not extend to resolving internal disputes between partners or

directors (see **Co-operative Bank of Kenya Ltd v Peter Ndirangu & Another [2014] eKLR**).

23. The inclusion of the 2nd Defendant, long after the expiry of the limitation period, and in a dispute essentially concerning a partnership breach, amounts to an abuse of the process of the Court.

24. In light of the foregoing analysis, I find that both the Preliminary Objection and the Notice of Motion dated 29th November 2024 are merited. Accordingly, I make the following orders:

- i. The Counterclaim as against the 1st and 2nd Defendants is hereby struck out for being time-barred.***
- ii. The 2nd Defendant shall be discharged from further participation in these proceedings.***
- iii. Costs of are in the cause.***

RULING delivered virtually, dated and signed at **NAIROBI**

This **21st** day of **October** 2025.

P.M. MULWA

JUDGE

In the presence of:

Ms. Muriithi h/b for Mr. Marete for Plaintiff (main suit)

Mr. Gitau h/b for Mr. Muriithi for 2nd Defendant (counter-claim)

Court Assistant: *Carlos*