



REPUBLIC OF KENYA



**SBM Bank Kenya Limited v Ndungu & 2 others (Civil Case E094 of 2021)
[2025] KEHC 18577 (KLR) (Commercial and Tax) (4 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E094 OF 2021
F GIKONYO, J
DECEMBER 4, 2025**

BETWEEN

SBM BANK KENYA LIMITED PLAINTIFF

AND

PAUL WANDERI NDUNGU 1ST DEFENDANT

GLYNDWR LLOYD CROSS 2ND DEFENDANT

PASICO EASTERN AFRICA LIMITED 3RD DEFENDANT

RULING

Striking out suit

1. The 1st defendant/ applicant's notice of motion dated 20.3.2025 seeks an order to strike out the suit against him for being statute-barred under section 4(1)(a) of the *Limitation of Actions Act*.
2. The application is supported by the affidavits sworn by the applicant on 20.03.2025 and 20.5.2025 and written submissions dated 17.7.2025.
3. The plaintiff/ respondent opposed the application through a replying affidavit sworn by its debt recovery officer, Jonnes Nzivo on 15.4.2025 and written submissions dated 20.5.2025.

Background

4. The respondent advanced to the 3rd defendant a credit facility for Kshs. 30,000,000/- pursuant to a letter of offer dated 4.4.2006. to be secured by a lien over 300,000 Kenya Airways shares in the name of the 1st defendant and joint and several guarantees and personal indemnities for Kshs. 30,000,000/- from the 1st and 2nd defendant.



5. The 1st and 2nd defendants, directors of the 3rd defendant, executed a Deed of Guarantee and Indemnity guaranteeing repayment of the facility.
6. However, the 3rd defendant continually defaulted causing the respondent to issue demands dated 24.2.2009, 10.10.2012 and 5.10.2020.
7. The respondent filed this suit through a plaint dated 2021 seeking recovery of Kshs. 74,159,042.69/-.

Applicant's case

8. The gist of the application is that the suit was brought eight years after the cause of action is alleged to have accrued, which period is outside the 6-year statutory window given under section 4(1)(a) of the *Limitation of Actions Act*.
9. The applicant submitted that in cases of contracts of guarantee, time starts to run against the guarantor from the date demand for payment is made. He argued that the cause of action against him accrued upon issuance of a demand letter dated 10th October 2012 and that the suit which was filed on 15th February 2021 is time barred.
10. The respondent contended that the guarantee and indemnity executed by the applicant constitute continuing security for so long as the debt remains unpaid. It also contended that the cause of action under continuing security never lapses or dies until payment in full.
11. The applicant retorted that the doctrine of continuing security applies only where the underlying financial facilities are extended on materially unchanged terms and remain within the limit defined in the guarantee. He contended that the doctrine does not apply where the financial arrangement is materially altered without the guarantor's knowledge and consent. He asserted that such alteration would discharge the guarantor from liability.
12. The applicant claimed that the respondent unilaterally and fundamentally varied and altered the terms of the principal contract without his consent. That the letter of offer dated 4.4.2006 expressly provided for the import financing facility. That however, the respondent converted part of the facility into a Kshs. 7,500,000/- overdraft and further issued bid bonds, performance guarantees and other instruments amounting to Kshs. 22,500,000/-. That the respondent extended an additional facility of Kshs. 2,500,000/- to the 3rd defendant. That all these were done without his knowledge and consent and their effect was to transform the facility into a general bonding and cash management arrangement.
13. The applicant complained that the respondent also altered the repayment period by the 3rd defendant without his consent. That it also unilaterally granted repeated extensions and indulgences to the principal debtor for over a decade. That it also imposed varying and unauthorized default interest rates that were neither contemplated in the letter of offer or guarantee.
14. The applicant contended that section 19 of the *Limitation of Actions Act* is not applicable to this case. This is because the claim does not arise from a mortgage or charge over property but from a contractual deed of guarantee and indemnity which is purely personal in nature and not tied to any landed security.
15. The applicant asserted that time began to run when the first demand was made on 10.10.2012 and not from any later correspondence.
16. The applicant relied on: -
 1. Eastlands Theatres Limited & 2 others v Kenya National Capital Corporation Limited [2018] KECA 670 (KLR)



2. Halsbury's Law of England Volume 20 (1) p. 175 para. 269
3. Export Import Bank of America v Royal Media Services Limited & 4 others [2020] eKLR
4. Bosire Ogero v Royal Media Services [2015] eKLR
5. Equip Agencies Limited v I & M Bank Limited [2017] eKLR
6. Virchand Virpal & Sons Limited v NIC Bank Limited & 4 others [2020] eKLR
7. Kurian v The Alleppey (1974)
8. Rajnikantkhetshi Shah v Habib Bank A. G. Zurich [2016] eKLR
9. David Harris v Middle East Bank Kenya Limited & 3 Others [2019] KECA 820 (KLR)
10. Holme v Brunskill (1878) 3 QBD 495
11. Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR

Response

17. The respondent's core arguments are that: -
 1. the debt that it seeks to enforce is secured;
 2. the charge and the guarantee and indemnity executed by the applicant constitute continuing security for so long as the debt remains unpaid;
 3. the cause of action under continuing security never lapses or dies until payment in full.
18. The respondent asserted that the applicant's claim that the letter of offer dated 4.4.2006 was materially altered without his knowledge or consent is the foundation of his defence. It therefore argued that the issue ought to be examined within its legal and evidentiary context before the court can determine whether it affects the enforceability of the securities.
19. The respondent relied on section 19 (1) of the *Limitation of Actions Act* to support the position that the lien remains valid security and the right to enforce it is not extinguished by the passage of time.
20. The respondent highlighted that payments were made towards the loan as late as June 2011, with a cheque deposit having a value date of 24.6.2011. It also highlighted that it issued demand letters in 2009, 2012, 2016 and 2020 that were not denied or disputed by the applicant, thereby constituting either express or implied acknowledgment of debt within meaning of section 19 (1) of the *Limitation of Actions Act*.
21. The respondent contended that the applicant has conveniently omitted to disclose that a further demand letter was issued to him on 5.10.2020, which would mean that the cause of action accrued on that date and the suit was filed within the statutory timeframe.
22. The respondent further contended that the applicant has not rebutted the fact that there may have been communications or acknowledgments after 2012, whether verbal or in correspondence which revived the limitation period under section 23 (3) of the *Limitation of Actions Act*.
23. The respondent also relied on: -
 1. Mrao Ltd v First American Bank of Kenya Limited & 2 others [2003] eKLR
 2. Mbutia v Jimba Credit Finance Corporation & Another [1988] KLR 1



3. Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR
4. China and South Sea Bank Ltd v Tan Soon Gin 1 AC 536
5. Kenya Commercial Bank Ltd v Osebe [1982] KLR 296
6. National Bank of Kenya Ltd v Pipelastic Samkolit (K) Ltd & Another [2001] eKLR
7. Morgan Air Cargo Limited v Evrest Enterprises Limited [2014] eKLR

Analysis and Determination

24. Falling squarely for determination is whether the suit against the 1st defendant should be struck out for being statute-barred under section 4(1)(a) of the *Limitation of Actions Act*.
25. However, a preliminary issue has been raised by the respondent on whether the court can determine disputed factual issues at the interlocutory stage. The said issues are the foundation of the application to have the suit struck out.
26. According to the respondent, the applicant's claim that the letter of offer dated 4.4.2006 was materially altered without his knowledge or consent is the foundation of his defence. The respondent therefore contended that the allegation goes to the root of contractual interpretation and authorization. It also contended that the issues are best resolved through viva voce evidence and cross-examination, not through affidavit evidence alone.
27. I am content that, "...where there is a serious dispute as to the facts and the court cannot decide the matter on affidavit evidence alone, then such a matter must be referred to trial for hearing and determination." (Mrao Ltd v First American Bank of Kenya Ltd & 2 others [supra])
28. The issue of the variation of the letter of offer is hotly contested. It forms the basis of the applicant's prayer for striking out the suit against him for being statute-barred. This is because the applicant argues that the doctrine of continuing security is not applicable to this case because the letter of offer was varied without his knowledge and consent.
29. These matter can only be fully ascertained and determined in the trial.
30. In any event, this courts view is that limitation of action is required to be specifically pleaded in the defence making it a matter for trial rather than of preliminary disposal. (Order 2 rule 4(1) of the Civil Procedure Rules)
31. For those reasons, I am inclined to agree that the issue of whether the claim against the 1st defendant is statute-barred ought to be determined in the trial of the case.

Disposal

32. On the basis of the reasons given and the context ascertained, the application to strike out the suit summarily is rejected. However, the issue whether the suit is time-barred shall be determined in the trial.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 4TH DAY OF DECEMBER, 2025

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F. GIKONYO M



JUDGE

In the presence of: -

Ms. Kyumu for Muchemi for Plaintiff

Ms. Wangari for Kamunde for 1st defendant

CA Kinyua

