



**REPUBLIC OF KENYA**

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

**CIVIL CASE NUMBER E033 OF 2024**

**CATHERINE GATHONI OTENYO -----  
PLAINTIFF**

**VERSUS**

**ABSA BANK KENYA PLS -----  
DEFENDANT  
(FORMERLY BARCLAYS BANK KENYA LTD)**

**RULING**

1. The Plaintiff brought this suit against the Defendant bank for judgement as follows;

- a. General damages based on legitimate expectation.**
- b. Special damages in the sum of Kshs. 10,247,485/=**
- c. Costs of the suit**
- d. Interest on a, b and c above.**

**e. Any other or further relief this Honourable court finds appropriate in the circumstances thereof.**

2. The Plaintiff avers in the suit that in a Public Auction conducted on 20/8/2010 the Defendant sold off property known as Nakuru/Municipality Block 18/26 that had been charged to it, to a firm known as Ortama General Supplies which was the highest bidder. 25% of the sum translating to Kshs. 1,925,000/- was paid at the fall of the hammer. With the consent of the Defendant, that firm in turn transferred its interest in the property to the Plaintiff who paid the balance of the purchase price amounting to Kshs. 5,775,000/= directly to the Defendant. A third party later mounted a legal challenge *vide* Nakuru Matrimonial Cause Number 8 of 2017 arguing that the charged property was matrimonial property that could not be a subject of the transaction without spousal consent. The court agreed and nullified the sale and/or transfer of the property to the Plaintiff herein. The Plaintiff faults the

Defendant for the impugned sale of the property in her favour, hence the suit.

3. The Defendant filed a statement of defence acknowledging the transaction. It, however, denies liability contending *inter alia* that the suit is time-barred. The Defendant wants the suit to be struck out with costs.

4. The Defendant subsequently filed a Notice of Preliminary Objection dated 22/11/2024 by which it seeks to have the suit struck out on the ground of limitation. It also brought a Notice of Motion dated 10/7/2025 praying for the same relief on the basis that the court lacks jurisdiction.

5. The preliminary objection is based on the following grounds;-

**1) THAT the court lacks jurisdiction to hear and determine the suit as the same offends Section 4(1) (a) of the Limitation of Actions Act.**

**2) THAT pursuant to the doctrine of *laches*, the Plaintiff has so delayed in enforcing its rights to an extent that it would be prejudicial to the Defendant to do so now and the Plaintiff is no longer entitled to bring such claim.**

**3) THAT in light of the above, the Plaintiff's suit is an abuse of the court process and it should therefore be struck out.**

6. Through Affidavit in support of Motion the Defendant's witness reiterates the averments in the statement of defence and the Notice of preliminary objection on the matter of jurisdiction.

7. The Plaintiff filed an Affidavit in reply. She deposes that the Application is meant to delay determination of the matter. The cause of action arose on 26<sup>th</sup> August 2021 when judgement nullifying the transaction between the parties over the suit property was delivered, according to the Plaintiff. It is therefore averred that the suit was brought 3 years later within the period prescribed under the Limitation of Actions Act.

8. Learned Counsel for the parties file written submissions on the Application. Citing the famous case of **Owners of Motor Vessel “Lillian s’ vs Caltex Oil (Kenya) Limited (1989) eKLR**, the Defendant’s advocates submit that once the court finds that it lacks jurisdiction, it should take no further step in the matter.

9. Further reference is made to the Supreme Court’s determination in **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others, Supreme Court Civil Application No. 2 of 2011**. This decision advises that a court’s jurisdiction flows from the constitution, legislation, or both. According to Counsel, a suit filed outside the statutory limitation period is incompetent *ab initio* and the court has no jurisdiction to entertain it.

10. The Defendant further submits that this suit is based on breach of contract yet there was no privity of contract between it and the Plaintiff who bought the

subject property from a different entity, the said Ortama General Supplies.

11. According to the Defendant, the cause of action arose sometime between 2010 and 2011 when the Plaintiff purchased the suit property from Ortama General Supplies. The court is referred to **Section 4(1) (a) of the Limitation of Actions Act** which requires actions founded on breach of contract to be brought within six (6) years from the date on which the cause of action arose. On this score, the court is therefore said to be bereft of jurisdiction.

12. Still on the question of jurisdiction, Counsel submit that the **Magistrate's Court Act in Section 7** vests that court with jurisdiction to adjudicate pecuniary claims of upto Kshs. 20,000,000/=. As the monetary claim herein is only slightly over Kshs. 10,000,000/= and the general damages claim has not been assessed, the claim is said to fall within the purview of the Magistrate's Court. In support of this contention, the

Defendant also pitches tent on **Section 11 of the Civil Procedure Act** which provides;-

**“Every suit shall be instituted in the court of the lowest grade competent to try it.”**

13. Learned Counsel for the Plaintiff retort in their submissions that the suit cannot in law be struck out or dismissed in *limine* in the circumstances. Counsel rely on various decisions including **Savings & Loans (k) vs Kanyenje Karangaita Gakombe & Another (2015) eKLR** and **DT Dobie Co. Limited vs Muchina (1992) KLR 1**, for the proposition that the power to strike out suits ought to be exercised sparingly and only in obvious cases. Courts in these decisions are exhorted to aim at sustaining rather than terminating suits so as not to drive a party from the seat of justice.

14. In the opinion of the Plaintiff the cause of action arose on 26/8/2021 when judgement in **Nakuru Matrimonial Cause No. 8 of 2017** was delivered. This suit was thereafter brought in 2024 within the

limitation period in compliance with the **Limitation of Actions Act**, adds the Plaintiff.

15. I have considered the submissions against the affidavit evidence and the pleading. The issue for determination is whether this court has jurisdiction to entertain this suit. The parties seem to agree that the suit is based on breach of contract but express divergent opinions as to when the cause of action arose. I concur with the Plaintiff's submissions that a cause of action in such circumstances arises at the end of the breach of a contract in question. In this case, it arose when the court annulled the sale and/or transfer of the suit property to the Plaintiff on 26/8/2021. By dint of **Section 4(1) (a) of the Limitation of Actions Act** adverted to herein above, this suit instituted in 2024 was brought within the 6 years statutory period.

16. The court, however, finds common ground with the Defendant that the claim ought to have been lodged in the Magistrate's Court in light of its monetary value. The Magistrate's Court handles claims of upto

Kshs. 20,000,000/= . The pecuniary claim in this suit is just above Kshs. 10,000,000/= . General Damages also sought have not been assessed and so it is premature to say that they would exceed the magistrate's jurisdiction. I do not however, think that dismissal or striking of the suit is the appropriate order to make in the circumstances. Pursuant to the provisions of **Section 18 of the Civil Procedure Act**, I instead direct that the file be forthwith transferred to the Chief Magistrate's Court at Nakuru for hearing and determination. The parties shall bear their own costs of the Application.

**J. M. NANG'EA - JUDGE**

**Ruling delivered virtually this 16<sup>th</sup> day of February, 2026.**

**In the presence of:**

**Plaintiff's Advocate, Mr. Musembi**

**Defendant's Advocate, Ms Mugambi for Ms Adan.**

**Court Assistant (Jeniffer).**

**J.M. NANG'EA - JUDGE.**