



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CORAM: F. MUGAMBI, J
CIVIL APPEAL NO. E137 OF 2024

BETWEEN
THE CO-OPERATIVE BANK OF KENYA LIMITED ...
APPELLANT

VERSUS

SOCIAL PROMOTION REGISTERED TRUSTEES
T/A BASILICA SELF HELP GROUP
RESPONDENT

(Being an Appeal against the entire Ruling and Orders contained in the Ruling delivered by the Hon. C.A. Ogweno on 18th April, 2024)

JUDGMENT

Introduction and Background

1. The Respondent herein, being the Plaintiff in the proceedings before the lower Court, instituted suit by way of a Plaint dated 22nd April 2022 and filed on 19th May 2022. In the said Plaint, the Respondent sought the following reliefs:

- i. Payment of Kshs. 7,092,000/=, being the amount alleged to have been irregularly withdrawn.*
 - ii. Interest on the aforesaid sum at prevailing commercial rates (currently 13.5% per annum) from 24th June 2014 until payment in full.*
 - iii. Costs of the suit together with interest thereon at such rate and for such period as this Honourable Court may deem just.*
 - iv. Such other or further relief as this Honourable Court may consider appropriate in the circumstances.*
- 2.** Subsequently, the Appellant moved the Court by way of an application dated 27th November 2023, seeking to strike out the Respondent's suit on the ground that the same was statute-barred. The trial Court, in a ruling delivered on 18th April 2024, dismissed the said application, precipitating the present appeal. The Memorandum of Appeal dated 17th May 2024 sets out six grounds of appeal. The Appellant prays that this Appeal be allowed, that the ruling of the Honourable C.A. Ogweno delivered on 18th April 2024 be set aside, that the Respondent's suit be dismissed

and that the costs of both this Appeal and the proceedings in the trial Court be awarded to the Appellant.

3. I have carefully considered the Record of Appeal together with the written submissions filed by the parties.

Analysis and Determination

4. The key issue for determination in this Appeal is whether the Respondent's suit, as instituted in the lower Court, was time-barred under the applicable provisions of the Limitation of Actions Act (hereinafter the Act). **Section 4(1) of the Act** prescribes the limitation period for certain actions and states in part:

“(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”

5. The public policy underpinning limitation of actions has long been settled. As was aptly stated in **Gathoni V Kenya Co-Operative Creameries Ltd, [1982] KLR 104**, Potter, JA at page 107:

“The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable

diligence and to take reasonable steps in his own interest.”

6. Accordingly, the Court must approach the issue of limitation not only from the standpoint of statutory interpretation but also mindful of the broader policy considerations that inform the legislative framework. The balance sought is between the plaintiff’s right to seek redress and the defendant’s right to be free from indefinite exposure to litigation.
7. The appeal is premised upon the contention that the learned trial Magistrate erred in law and in fact by invoking **Section 26 of the Act** in aid of the Respondent, notwithstanding that the Respondent had expressly disavowed reliance upon the said provision. The Appellant takes issue with the trial Magistrate for failing to consider that the Respondent unequivocally stated that they suspected the accrual of the cause of action in August 2014. Consequently, the suit filed on 19th May 2022 was instituted more than 7 years and 11 months thereafter, well outside the six-year limitation period prescribed under **Section 4(1) of the Act**.

8. Further, the Appellant argues that the learned Magistrate failed to appreciate that **Section 26(b) of the Limitation of Actions Act** is narrowly circumscribed, applying only in circumstances where the right of action is concealed by fraud which could not, with reasonable diligence, have been discovered earlier. In the Appellant's view, the Respondent's own admission of suspicion in August 2014 demonstrates that the cause of action was discoverable at that time, thereby rendering **Section 26** inapplicable.
9. In response to the appeal, the Respondent contends that the learned trial Magistrate properly declined to strike out the suit, thereby affirming the overriding principle that justice is best served when matters are determined on their merits rather than disposed of on procedural technicalities. This approach, it is argued, is consistent with **Article 159(2)(d) of the Constitution of Kenya, 2010**, which enjoins courts to administer justice without undue regard to technicalities. The Respondent further relies on the decision of the Court of Appeal in **D.T. Dobie & Company (Kenya) Ltd V Muchina, [1980] eKLR**, wherein it was held that even a single triable issue is sufficient to sustain a suit.

- 10.** The Respondent submits that the Appellant’s core argument, that the cause of action accrued in August 2014 when suspicions arose, is untenable both in law and equity. It is emphasized that the mandate cards, being the only documents capable of verifying the authenticity of signatures, were at all material times in the exclusive custody of the Appellant bank. In the absence of access to these documents, the Respondent could not reasonably have discovered the alleged fraud until the forensic report of the Directorate of Criminal Investigations (DCI) was issued in October 2018.
- 11.** In support of this position, the Respondent cites the Court of Appeal decision in **Jennifer Nyambura Kamau V Humphrey Mbaka Nandi, [2013] KECA 423 (KLR)**, citing with approval from its earlier holding in **Mutsonga V Nyati**, that “*whether there is evidence to support an allegation of fraud is a question of fact.*” The Respondent therefore maintains that the determination of when the alleged fraud or breach of contract occurred is a factual question that can only be resolved upon the tendering of evidence at trial. It follows, in their submission, that the issue of limitation cannot be

conclusively determined at the interlocutory stage, and that time under the Limitation of Actions Act is suspended until the fraud is discovered.

- 12.** The Respondent also argues that the issue is a public interest one that transcends the narrow confines of the dispute between the parties. According to the Respondent, it raises questions of systemic importance touching upon the integrity of Kenya's banking sector. Specifically, the Court is called upon to consider whether a bank may, with impunity, disregard the Prudential Guidelines on Consumer Protection issued by the Central Bank of Kenya, thereby exposing unsuspecting customers to the attendant risks and losses that inevitably follow such conduct.
- 13.** So, what is the position in law? **Section 26 of the Act** provides exceptions to the ordinary limitation periods prescribed under **Section 4(1)**. It stipulates that where:

“(a)the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

- (b) the right of action is concealed by the fraud of any such person as aforesaid; or***
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”***

14. According to the Appellant, the learned trial Magistrate fell into error by failing to appreciate that the law of limitation does not extend the prescribed period in respect of claims founded in contract or negligence, even where such claims are accompanied by allegations of dishonesty. The Appellant maintains that **Section 26 of the Act** is confined to actions where the right of action is concealed by fraud or where relief is sought from the consequences of a mistake, and does not operate to enlarge the limitation period for ordinary contractual or negligence claims.

15. In any event, the Appellant contends that the Respondent expressly disaffirmed reliance on **Section 26** in their written submissions, wherein they stated in clear terms that their claim was not anchored upon the said provision. It is therefore argued that the learned Magistrate erred in invoking **Section 26** to salvage the Respondent's suit, notwithstanding the Respondent's own position.

16. I have taken the liberty to review the Respondent's submissions before the trial Court which read in part:

“The Applicant has argued that the pleadings filed by the Plaintiffs do not expressly indicate that they are relying on section 26 of the Limitation of Actions Act, hence the plaintiff cannot rely on the same. The fact is that the Plaintiff is not relying on section 26 of the Limitation of Actions act as there is no need to in view of the fact that this is purely a case for breach of the Banker-Customer Contract and having only arisen in 2018 time started to run on 5th October, 2018. ...”

- 17.** I do however note that at page 3 of the written submissions in this appeal, the Respondent confirms that *the Appellant's conduct in withholding these documents, while simultaneously assuring the Respondent that investigations were ongoing, amounts to fraudulent concealment within the meaning of Section 26.*
- 18.** This apparent inconsistency is material. On the one hand, the Respondent distances itself from **Section 26**, asserting that its claim is purely contractual. On the other hand, it invokes fraudulent concealment under **Section 26** to explain why limitation should not run from 2014. The Court must therefore determine whether the Respondent can properly rely on **Section 26**, notwithstanding its earlier disavowal, and whether the facts pleaded and evidence tendered bring the claim within the ambit of that provision.
- 19.** The question as to what guides the Court in determining the Respondent's case is as clear as can be. I am guided by the Court of Appeal's decision in **David Sironga Ole Tukai V Francis Arap Muge &**

2 Others, [2014] KECA 155 (KLR) and more particularly the holding that:

“... the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made.”

20. Turning now to paragraph 11 of the Plaintiff the Respondent pleads in clear terms that:

“As a result of the defendant's breach of its duty of care to the Plaintiff, various fraudulent

activities were undertaken in the operation of the Plaintiff's accounts which fraudulent activities were undertaken with the participation, connivance, complacency and negligence of the defendant's employees, servants and/or agents. As a result of these fraudulent activities, the Plaintiff suffered immense loss and damage."

- 21.** At paragraph 11(a) through (e), the Respondent set out the particulars of fraud with specificity. That is all that was required of the Respondent in its pleadings. In **Kuria Kiarie & 2 Others V Sammy Magera, [2018] eKLR** the Court of Appeal cited with approval from the case of **Vijay Morjaria V Nansingh Madhusingh Darbar & Another, [2000] eKLR**, where Tunoi, JA. (as he then was) stated as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be

stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

22. There is therefore no doubt in my mind that the pleadings as filed did anchor the claim firmly within the ambit of **Section 26 of the Act**, which suspends the running of time until discovery of the fraud. Even though the cause of action rests substantially on breach of duty as well as breach of contract, by pleading the element of fraud on the face of the plaint and particularizing the acts set out therein, the Respondent met the required threshold for pleading fraud. The Respondent’s submissions, even if inconsistent or equivocal, cannot override the pleadings that it filed. Submissions are not pleadings, and the Court is bound to determine the case on the basis of the pleadings as filed.

23. Accordingly, I find no fault in the learned Magistrate’s conclusion that: *considering the full*

import of the contents of the plaint as above summarized, it is clear that the plaintiffs' suit is founded on fraud, negligence and breach of duty.

- 24.** That being the case, the next issue for determination is when time can be said to have begun running. According to that provision, the limitation period for bringing claims founded on fraud does not commence until the claimant has discovered the fraud, or could, with reasonable diligence, have discovered it. The question of accrual in fraud claims is neither straightforward nor mechanical. It is often contested, as is the case here. The Court must therefore interrogate, as a matter of fact, when the Respondent discovered the alleged fraud, or when, exercising reasonable diligence, they ought to have discovered it. It is only upon ascertaining the same that the Court can determine when time began to run.
- 25.** In the present case, the Respondent asserts that discovery occurred only upon receipt of the forensic report from the Directorate of Criminal Investigations in October 2018, whereas the Appellant contends that suspicion in August 2014 amounted to discovery. Equally contentious is the question

whether mere suspicion constitutes a sufficient substitute for knowledge of fraud.

26. Looking at the above divergences, I do not fault the learned Magistrate for the finding that: *after going through the very extensive and detailed responses and submissions by parties, there is no meeting of minds on when the fraud was discovered and when time started run.*

27. I am equally in agreement with the findings that:

“Looking at the plaint that is sought to be struck out, I cannot see any clear averment that conclusively shows that the Plaintiff's action is statute barred. There appears to be evidence that the Plaintiff engaged different entities like the Directorate of Criminal Investigations (DCI) and the Central Bank of Kenya (CBK) in a bid to establish the said fraud and breach of contract on the part of the Defendant. There also appears that parties were involved in talks over the said transactions

subject of the claim herein. I am of the view that a conclusive decision on whether or not the Plaintiff's action is time barred will depend on the construction of the documents availed before the court and further evidence to be adduced at the hearing. I therefore cannot, at this stage, hold that the plaint, as drawn, attracts the penalty of being struck out for being statute barred."

28. The learned Magistrate was correct in allowing the matter to proceed to trial, where the contested factual issues can be properly ventilated and adjudicated.

Disposition

29. In light of these considerations, I find no basis to interfere with the learned Magistrate's ruling. The ruling of the learned Magistrate declining to strike out the plaint is upheld. The appeal is hereby dismissed with costs awarded to the Respondent.

**DATED, SIGNED AND DELIVERED IN NAIROBI
THIS 23RD DAY OF MARCH 2026.**

**F. MUGAMBI
JUDGE**

Delivered in presence of:
Mr Gichuru for the respondent
Court Assistant: Lillian

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