



**Equity Bank Kenya Limited & 3 others v Imanyara & 2 others (Civil Appeal  
364 of 2019) [2025] KECA 273 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 273 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 364 OF 2019  
S OLE KANTAI, A ALI-ARONI & LA ACHODE, JJA  
FEBRUARY 21, 2025**

**BETWEEN**

**EQUITY BANK KENYA LIMITED ..... 1<sup>ST</sup> APPELLANT  
JAMES NJUGUNA MWANGI ..... 2<sup>ND</sup> APPELLANT  
MARY WANGARI WAMAE ..... 3<sup>RD</sup> APPELLANT  
GERALD GACHOKA WARUI ..... 4<sup>TH</sup> APPELLANT**

**AND**

**MURITHI IMANYARA ..... 1<sup>ST</sup> RESPONDENT  
JOSEPH KITUMA KIMILU ..... 2<sup>ND</sup> RESPONDENT  
EDMUND KIMUTAI TERER ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the ruling of the High Court at Nairobi  
(Maureen Odero J) dated 4th July 2019 in HCC No. 426 of 2016)*

**JUDGMENT**

1. This is a first appeal by Equity Bank Kenya Limited, James Njuguna Mwangi, Mary Wangari Wamae and Gerald Gachoka Warui (the 1<sup>st</sup> to 4<sup>th</sup> appellants respectively), against the ruling of the High Court (Odero, J.) issued on 4<sup>th</sup> July 2019, dismissing their application and ruling in favour of Murithi Imanyara, Joseph Kituma and Edmund Terer (1<sup>st</sup> to 3<sup>rd</sup> respondents respectively).
2. The chronicle of this appeal is that the 1<sup>st</sup> appellant established Equity Bank Share Ownership (ESOP), under the Settlement of Deed dated 29<sup>th</sup> August 2005, as amended from time to time. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants are the trustees of the 1<sup>st</sup> appellant. Clause 5 of the Settlement Deed provides that an employee would be deemed to have applied for redemption of units registered in their name, upon cessation of their employment with the Bank.



3. The respondents ceased being employees of the 1<sup>st</sup> Appellant on 30<sup>th</sup> May 2009, 15<sup>th</sup> May 2009 and 27 December 2006 respectively. The Trustees of ESOP were required to pay them their full redemption proceeds within 30 days upon ceasing to be employees of the 1<sup>st</sup> appellant but they failed to do so.
4. As a result, the respondents filed a Complaint dated 7<sup>th</sup> October 2016 and amended on 24<sup>th</sup> October 2017 in the superior court seeking: that judgment be entered against the appellants jointly and severally: a declaration that their redemption benefits under the appellants' ESOP scheme be calculated in accordance with the Trust deed and Rules of the scheme; an order directing the appellants to recalculate their benefits under the ESOP Scheme at the prevailing market rate at the Nairobi Securities Exchange; and, to pay them the shortfall that may be found to be due to them, together with special damages, dividends, and general damages.
5. In response, the appellants filed a statement of defence dated 7<sup>th</sup> December 2016 and amended on 4<sup>th</sup> July 2018. They denied the averments in the complaint and put the respondents to strict proof thereof.
6. The respondents filed a Reply dated 23<sup>rd</sup> January 2016 to the Defence and amended on 26<sup>th</sup> July 2018 and reiterated the contents of their complaint.
7. Consequently, the appellants filed a Notice of Motion dated 25<sup>th</sup> July 2018 seeking for orders that the respondent's suit be struck out and be dismissed. The application was predicated on grounds: that the respondents' suit disclosed no reasonable cause of action against the appellants: that their suit is time barred in view of section 20 (2) of the *Limitation of Actions Act*; and, that the suit is an abuse of the court process.
8. The respondents filed Grounds of Opposition dated 17<sup>th</sup> August 2018 and averred that their claim relates to recovery of their benefits which are still in the possession of the trustees. That the trust has not been revoked, and the Bank is still trading in their shares to date. Further, that the respondents' rights are protected under section 20(1) (b) of the *Limitation of Actions Act* and their suit raises triable issues.
9. Upon considering the application before her, Odero, J. found no merit in it and dismissed it with costs to the respondents.
10. The appellants were unhappy with the said ruling and they preferred an appeal in this Court vide a Memorandum of appeal dated 6<sup>th</sup> August 2019. The grounds enumerated in the Memorandum of appeal are that the learned Judge erred in law and in fact:
  - I. By failing to uphold the established legal principle that parties are bound by their pleadings.
  - II. By holding that the respondents' suit fell within the exception provided under section 20(1) of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya (the Act).
  - III. By holding that the respondent's suit fell within the exception under section 20 (1) of the Act without finding that the appellants had converted the trust property or proceeds therefrom for their use,
  - IV. By failing to appreciate the effect of the respondents' admission that the appellants refunded to them the amounts they had invested, in reaching her determination that the respondents' suit fell within the exception under section 20(1) of the Act,
  - V. By dismissing the appellants' application without finding that there was unconscionable conduct by the appellants towards the respondents,
  - VI. By holding that the respondents clearly pleaded fraudulent breach of trust,



- VII. By failing to appreciate the distinction between breach of trust and fraud as well as fraudulent breach of trust as against sections 4(1) (e) and 20 (1) of the Act,
- VIII. equating breach of duties to fraudulent breach of trust,
- IX. By dismissing the appellant's application in reliance of the respondents averments of alleged double standards in the appellants paying similar claims - High Court Civil Case No. 409 of 2012 – Patrick Wabwile Pamba & 7 Others vs Equity Bank Limited & 3 Others and High Court Civil Case No. 502 of 2012, Papius Kirogothi vs Equity Bank Limited & 3 Others without distinguishing the facts in the said cases from the present suit,
- X. By improperly exercising her discretion in declining to strike out the suit.
11. The firm of MS Triple O Law LLP filed written submissions dated 31<sup>st</sup> August 2020 on behalf of the appellants and Mr. Kiche learned counsel appeared for the appellants during the plenary hearing. No submissions were filed on behalf of the respondents, neither was there appearance on their behalf during the plenary hearing.
  12. On ground I and VI, Mr. Kiche urged that in the amended plaint the respondents pleaded and provided particulars of the alleged fraudulent misrepresentation, concealment and/or non-disclosure of material facts by the appellants. He contended that parties are bound by their own pleadings and that the respondents' cause of action is not based on fraud or fraudulent breach of trust, to which the trustees were parties or privy. It was urged that the court failed to appreciate the distinct and very specific nature of the causes of action pleaded by the respondents. Further, that the court erred in finding that the particulars supplied by the respondents were adequate to establish a cause of action for fraudulent breach of trust on the part of the appellants.
  13. On ground II, III and IV, the appellant urged that the superior court erred in holding that the respondents' claims are based on fraudulent breach of trust. It was contended that the respondents' claims do not fall within the exception provided in section 20 (1) of the Limitation of Action Act. That the provision is applicable to fraud or fraudulent breach of trust, or actions to recover from trustees trust property, or the proceeds in possession of the trust, converted to a trustee's use.
  14. It was also contended that the respondents sought an equitable relief which has a prescribed time limit of six years from the date on which the cause of action accrued, under section 4(1) (e) of the Limitation of Action Act. Since the respondents did not plead or demonstrate that the trustees were dishonest, or converted to their own use trust property or proceeds, section 20(1)(b) of the Act does not apply.
  15. The appellants further submitted that the respondents pleaded that they left employment and received refund from ESOP. As such the respondents were aware, or ought to have been aware of the alleged fraudulent misrepresentation at that time and Section 26 of the Act cannot apply to them.
  16. On ground V, VII and VIII it was contended that the learned judge failed to distinguish between fraudulent breach of trust and breach of trust. Hence she arrived at a wrong conclusion. Counsel clarified that breach of trust is simply an act or failure to act by a trustee that is not authorized by the trust document or by law. Fraudulent breach of trust on the other hand involves fraud or deceit.
  17. Counsel posited that the court in finding that the appellant's conduct was unconscionable, did not show any of the elements as provided for in LTI Kisii Safari Ltd & 2 Others vs Deutsche Investition



– Und Entwicklungsgesellschaft (‘Deg’) & Others (2011) eKLR where it was held that for a conduct to be unconscionable the party must show that:

“...there was inequality in the position of the parties due to ignorance, need or distress of the weaker party which would have him in the power of the stronger, coupled with proof of substantial unfairness in the bargain.”

18. On ground IX, counsel contended that the Judge agreed with the averments of the respondents, without distinguishing or making a demonstration of the similarities of the cases relied on by the respondents. He argued that the cases quoted to show the appellant’s alleged double standards are easily distinguishable. For example, in HCCC No. 409 of 2012: Patrick Wabwile Pamba & 7Others vs Equity Bank Limited & 3 Others, the claim by the plaintiffs was not time barred, while HCCC No. 502 of 2012: Papius Kirogothi vs Equity Bank Limited & 3 Others was largely settled by consent and did not go on to hearing on the issue of liability.
19. Accordingly, it is submitted that by not properly applying herself to the law and the facts of the case, the judge ended up improperly exercising her discretion in declining to strike out the suit.
20. This is a first appeal and our duty is to subject the whole evidence to fresh and exhaustive scrutiny to draw our own conclusions, bearing in mind, that we did not have the opportunity to see and hear the witnesses first hand.
21. The role of the court on first appeal was espoused in the decision of this Court in Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2 EA 212 as follows:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
22. The mandate of this Court on first appeal is reposed in Rule 31 (1)(a) of the Court of Appeal Rules, 2022 and states as follows:

“On appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power to re-appraise the evidence and to draw inferences of fact.”
23. We have considered the record of appeal, the submissions on record and the law applicable. In our considered view this appeal can be disposed of by determining two issues: whether the superior court was correct in finding that the suit was not time barred: and whether the Notice of Motion should be struck out.
24. On the first issue, as to whether the superior court was correct in finding that the suit was not time barred, the appellants assert that the respondents’ claim does not fall within the exception provided in section 20 (1) of the Limitation of Action Act.
25. The learned Judge in holding that the suit was not time barred, pronounced herself as follows:

“

“(27) Authorities on this point are clearly legion. A look at the plaint reveals that the plaintiffs have indeed pleaded the existence of duties allegedly owed by the 2<sup>nd</sup>



to 4<sup>th</sup> defendants to themselves. They have pleaded that there was a breach of such duties and paragraph 9 of the Plaintiff dated 7<sup>th</sup> October 2016 clearly sets out particulars of the fraudulent, misrepresentation, concealment and non-disclosure as follows:

“Particulars of fraudulent misrepresentation, concealment and non-disclosure

- a. Failing to calculate the plaintiffs’ redemption amounts that were due to them as is required under Clause 5.1 of the Trust Deed.
  - b. Failing to use the prevailing unit price value for redemption under ESOP as defined by the Trust Deed.
  - c. Concealing from the plaintiffs the ESOP Trust Deed and Rules and the factors used in calculation of the plaintiff’s redemption amounts.
  - d. Failing to calculate the plaintiffs’ accrued benefits in accordance with Trust Deed and Rules and the law or at all.
  - e. Failing to discharge their duties of good faith and disclosures to the plaintiffs regarding their unit-holdings in “ESOP”.
28. The plaintiffs have contended that the 2<sup>nd</sup> and 4<sup>th</sup> defendants acted willfully and with full knowledge of the effect of their actions. They have pleaded double standards by demonstrating how the defendants paid out similar claims to the plaintiffs’ colleagues.

The plaintiff clearly pleads a fraudulent breach of trust. As such it falls squarely within the exception provided by section (20) 1. of the *Limitation of Actions Act*. Accordingly, I find that the suit herein is not time barred.”

26. The provision in contention is section 20 of the Limitation of Action Act. This section is in relation to trusts and it provides as follows:

- “(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.”

27. We note that the respondents in their pleading accused the appellants of fraudulent misrepresentation, concealment and non- disclosure. Section 20 of the Limitation of Action Act applies to fraudulent breach of trust. We have considered the context of the accusation in the plaint and it is evident that the respondents’ claims fall under fraudulent breach of trust. Accordingly, we find that the respondents’ claims fall within the exception provided in section 20 (1) of the Limitation of Action Act. Therefore, the superior court was correct in finding that the respondents’ claims were included in the category of causes of action that were not time barred.
28. The second issue is whether the suit should be struck out. The appellants submitted that the respondents’ claims were time- barred, not based on fraudulent breach of trust, and that the Judge incorrectly applied the law. In sum, the appellants contended that the learned Judge improperly exercised her discretion in declining to strike out the suit, because she did not properly apply the law and facts of the case.
29. Order 2 Rule 15 (1) of the Civil Procedures Rules which clothes the court with the discretion to strike out a suit provides that:
- “At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
- i. it discloses no reasonable cause of action or defence in law; or
  - ii. it is scandalous, frivolous or vexatious; or
  - iii. it may prejudice, embarrass or delay the fair trial of the action; or
  - iv. it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”
30. This Court in numerous decisions, some of which the court below was guided by, has been crystal clear that the power of the court to strike out a suit is draconian and should only come into play where a suit appears so hopeless that it plainly and obviously discloses no reasonable cause of action. We call to mind the decision of this Court in *DT Dobie & Co. (K) Ltd v Muchina* (1982) KLR 1, to which the learned Judge adverted in the impugned judgment and in which this Court pronounced itself thus:
- “If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a lawsuit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full fact of the case before it.”
31. The learned Judge in dismissing the application to strike out the suit expressed herself in the following erudite manner:
- “(38) ..... My own take is that the plaintiffs’ suit cannot in any way be deemed vexatious, frivolous or an abuse of court process. The plaintiffs’ have a clear and precise grievance upon which they



want the court to adjudicate. As stated earlier the plaintiffs’ feel that double standards could be at play as they have seen former colleagues in similar circumstances receive their redemption amounts. I find that the plaintiffs’ suit merits a hearing and determination by the Court.”

32. The appellants in their submissions faulted the Judge for agreeing with the averments of the respondents that there was a double standard in how they were handled compared to the claimants in the two cases: Patrick Wabwile Pamba (supra) and Papius Kirogothi (supra), involving their colleagues. They also posited that the court did not indicate the elements of what was found to be unconscionable on their part.
33. We observe that the appellants’ submissions in this appeal are geared towards defending their case against the plaint filed by the respondents. We therefore, have no hesitation in holding that the respondents have causes of action worth defending. We agree with the learned Judge that the plaint raises causes of action that deserve to be heard and determined by the court and thus, she was correct in declining to strike out the suit.

Consequently, this appeal is found to lack merit and is destined to suffer its allotted fate of dismissal. Reasons wherefore, this appeal is dismissed. Costs shall abide the outcome of the main suit.

It is so ordered.

**DATED AND DELIVERED IN NAIROBI THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2025.**

**S. Ole KANTAI**

.....

**JUDGE OF APPEAL ALI-ARONI**

.....

**JUDGE OF APPEAL**

**L. ACHODE**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

