



**Pioneer Holdings (Africa) Ltd v Francis Thuo and Partners Ltd & 2 others  
(Civil Appeal 34 of 2018) [2019] KECA 711 (KLR) (24 May 2019) (Judgment)**

*Pioneer Holdings (Africa) Ltd v Francis Thuo And Partners Ltd & 2 others [2019] eKLR*

Neutral citation: [2019] KECA 711 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 34 OF 2018  
HM OKWENGU, DK MUSINGA & SG KAIRU, JJA**

**MAY 24, 2019**

**BETWEEN**

**PIONEER HOLDINGS (AFRICA) LTD ..... APPELLANT**

**AND**

**FRANCIS THUO AND PARTNERS LTD ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI SECURITIES EXCHANGE ..... 2<sup>ND</sup> RESPONDENT**

**CAPITAL MARKETS AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

*(Appeal from a ruling and order of the High Court of Kenya at Nairobi  
(Olga Sewe, J) dated 29th September, 2017 in H. C. C. NO. 369 OF 2014)*

**JUDGMENT**

**Introduction**

1. This is an appeal from the ruling and order of the High Court (Olga Sewe,J.) delivered on September 29, 2017 striking out the appellant’s suit on grounds that it was filed out of time and is barred by Limitation of Actions Act and that the appellant should have pursued its claim under the special procedure provided under the Capital Markets Act.

**Background**

2. The appellant, Pioneer Holdings (Africa) Ltd (Pioneer) had for many years engaged the 1<sup>st</sup> respondent, Francis Thuo and Partners Ltd, a stock brokerage firm (the stock broker), to purchase, sell and generally trade in shares in the Nairobi Stock Exchange on its behalf. According to Pioneer, in the years 1993 and 1994, the stock broker failed to deliver to it shares that it had already paid for; that after protracted demands and follow-up, the stock broker made some of those shares available in the year 2004; that



on 5<sup>th</sup> March 2007, the stock broker was placed under statutory management by which time Pioneer's investments purchased through the stock broker in several companies, namely, Barclays Bank of Kenya Limited, Uchumi Supermarkets Limited, Jubilee Insurance Company Ltd, East African Breweries Ltd, Standard Chartered Bank Kenya Limited, Nation Media Group, Diamond Trust of Kenya Ltd, East African Packaging Industries Ltd, and Williamson Tea Kenya Ltd, all valued at Kshs 74,898,960.00 had not been delivered. Pioneer further asserted that dividends declared by the said companies amounting to Kshs 20,300,751.00 had not been paid to it.

3. By a plaint dated 31<sup>st</sup> July 2014 (filed in court on 26<sup>th</sup> August 2014), Pioneer lodged a claim before the High Court at Nairobi against the stock broker, the 2<sup>nd</sup> respondent, Nairobi Securities Exchange (Securities Exchange), and the 3<sup>rd</sup> respondent, Capital Markets Authority (the Authority), seeking judgement for a declaration that there was a breach of contractual, statutory and fiduciary duties owed to it by the respondents. It also sought judgement for Kshs. 95,199,711.00 being the total of the value of the securities that had not been delivered and for declared dividends that had not been paid.
4. In a witness statement filed with the plaint, Andrew Wahinya Kamau, the head of financial services at Pioneer reiterated that "in the years 1993 and 1994" the stock broker had failed to deliver shares that had already been paid for and that after protracted demands and follow-up some of those shares were made available in 2004. He expounded further on the averments in the plaint that the stockbroker improperly handled Pioneer investments in securities; that the Securities Exchange failed in its mandate and subjected Pioneer to losses; and that the Authority failed in its statutory duty as the regulator and facilitator of an orderly, fair and efficient investment and environment for securities as a result of which its investment in the securities exchange was jeopardized.
5. The respondents filed separate statements of defence in which they denied Pioneer's claims. Of relevance to this appeal was a common plea in those defences that Pioneer's claim was time barred under the *Limitation of Actions Act* and that on account of the provisions of the *Capital Markets Act*, the court did not have jurisdiction to deal with the claim. It was also pleaded that as the stock broker had been placed under statutory management, its debts and liabilities would only be dealt with in the manner prescribed under the *Capital Markets Act*. In addition, the Securities Exchange asserted statutory immunity under section 33A(8) of the *Capital Markets Act* contending that jurisdiction over the matter lay with the Investor Compensation Fund Board and the Capital Markets Tribunal pursuant to section 35 of the *Capital Markets Act*.
6. On its part the Authority pleaded that it had discharged its mandate under section 25 of the *Capital Markets Act* and the regulations thereunder; that it had acted against the stock broker by suspending it from trading at the Nairobi Stock Exchange or providing capital market agency services to investors; and that subsequently it appointed the Securities Exchange as the statutory manager of the stock broker on 5<sup>th</sup> March 2007. It pleaded further that on 27<sup>th</sup> March 2007, Pioneer lodged a claim with the Securities Exchange for Kshs 40,956,669.00 on the basis that the stock broker had failed to submit share certificates after purchases; that the Securities Exchange responded to that claim on the 5<sup>th</sup> December 2007 that a report was furnished to Pioneer; and that Pioneer did not pursue the matter further after 23<sup>rd</sup> July 2009. It went on to plead that:
  - “(b) There is untenable delay between 1994 to 2004/2005 or thereabouts when the plaintiff notified the 3<sup>rd</sup> Defendant of its claim as against the 1st defendant.
  - (c) The failure and/or delay by the plaintiff to notify the 3<sup>rd</sup> defendant of its claim herein has occasioned grave prejudice to the 3<sup>rd</sup> defendant who cannot obtain reasonable access to the relevant records of transactions between the



plaintiff and the 1<sup>st</sup> defendant with a view to ascertaining the facts of the claim and thereby being capable to make a determination of the appropriate administrative action, if any.”

7. On 18<sup>th</sup> November 2014, the stock broker presented a motion to the court dated 17<sup>th</sup> November 2014 seeking an order to strike out the plaint on the grounds that the court lacked jurisdiction to determine the dispute in light of the provisions of the [Capital Markets Act](#); that claims for pecuniary loss arising from alleged breach of contractual obligations by the stock broker ought to be determined pursuant to the mechanisms under that Act; and that the claim was statute barred under section 4 of the [Limitation of Actions Act](#).
8. The Securities Exchange made a similar application dated 28<sup>th</sup> November 2014 filed on the same date also seeking to have the suit struck out on the grounds that the cause of action accrued in 1993 “which is outside the statutory period of limitation of actions”; that the court lacks jurisdiction in light of the provisions of Sections 18, 35 and 35 of the [Capital Markets Act](#); and that claims for pecuniary loss arising from breach of contractual obligations by the stock broker ought to be determined pursuant to the specialised mechanism established under the [Capital Markets Act](#).
9. The Authority was not left behind. It also presented a similar application dated 2<sup>nd</sup> December 2014 seeking to have the suit struck out on the same grounds. In addition to those grounds, the Authority contended that the suit is an abuse of the principle of separation of powers doctrine; and that the purported cause of action being in negligence and having arisen more than three years prior to the filing of the suit is time barred and cannot be sustained in view of the [Limitation of Actions act](#).
10. In opposition to the three applications Pioneer filed grounds of opposition and a replying affidavit. It contended that the applications were misconceived; that there was no bar to the suit under the [Capital Markets Act](#); that Pioneer had sought assistance from the Securities Exchange and from the Authority in vain and was left with no alternative but to file suit; that its claim arose out of breaches of trust and fiduciary duties owed to it by the respondents and the issue of time-bar under the [Limitation of Actions Act](#) did not therefore arise.
11. After considering the applications and submissions, the learned Judge framed two issues, namely, whether the court had jurisdiction to entertain and determine the suit from the perspective of the [Capital Markets Act](#). Secondly, whether the cause of action was time barred.
12. On the question of jurisdiction, the Judge considered the provisions of [the Constitution](#), the relevant provisions of the [Capital Markets Act](#) and the Regulations thereunder and concluded that the procedure set out in the [Capital Markets Act](#) ought to have been pursued to conclusion before the jurisdiction of the court could be invoked. The Judge stated:

“(24) It is therefore manifest from the foregoing that a specific dispute resolution mechanism has been set out in the [Capital Markets Act](#) for the resolution of disputes, including the dispute herein between the Plaintiff and the Defendants. Accordingly, that procedure ought to have been pursued to conclusion before the jurisdiction of this court could be invoked by the Plaintiff. This is notwithstanding the provisions of article 165(3) of [the Constitution](#) which gives the High Court unlimited original jurisdiction in such matters.”



13. With regard to the question whether the claim was barred by limitation, the Judge concluded that the relationship between Pioneer and the stockbroker was a contractual relationship; and that whether or not the cause of action was founded on contract or tort, the suit was filed out of time.

### **The appeal and submissions**

14. Pioneer complains that the conclusions by the Judge on both issues are erroneous; that the Judge was wrong in concluding that the relationship between Pioneer and the stockbroker was contractual when in fact it was that of fiduciary and beneficiary; that contrary to the holding by the Judge, there is no time bar to claims arising from breach of trust; that the conclusion by the Judge that Pioneer should have pursued the dispute resolution mechanisms set out in the *Capital Markets Act* is also erroneous because the remedy provided under that mechanism is practically ineffective and non-existent in relation to Pioneer.
15. During the hearing of the appeal, the parties were represented by learned counsel. Mr AB Shah with Miss A Sebastian appeared for the appellant; Mr Kiche appeared for the stockbroker; Miss Omamo appeared for the Securities Exchange, while Mr Kenneth Wilson appeared for the Authority.
16. Relying on Pioneer's written submissions that he highlighted, Mr AB Shah urged that under section 20 of the *Limitation of Actions Act*, none of the periods of limitation prescribed under the Act apply to an action by a beneficiary under a trust, which is an action in respect of fraud or fraudulent breach of trust to which the trustee was a party or privy or 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; that under section 39 of the same Act, a period of limitation does not run if the person attempting to plead limitation is estopped from doing so; that by reason of section 2 of the *Capital Markets Act*, the stockbroker was an agent of Pioneer, and that an agent owes fiduciary duties to the principal; and that the relationship between Pioneer and the stockbroker was therefore not merely contractual but was also that of a fiduciary and beneficiary; and that in light of the pleading in its plaint that the stockbroker owed Pioneer fiduciary duties, the Judge should not have struck out the suit.
17. It was also submitted that the Securities Exchange, in its capacity as the statutory manager of the stockbroker, and the Authority as a regulator, also owed Pioneer fiduciary duties. In those circumstances, counsel submitted, the statute of limitations could not apply. In that regard counsel cited the High Court decision in *Deposit Protection Fund Board vs Ajay Shah & another*, HCCC No 294 of 2010 in which the English decision in *Flitcrofts's Case* [1882] XXI Ch D 519 to the effect that in an action for breach of trust, no time limitation applies, was adopted.
18. Counsel urged there was material before the Judge demonstrating that from 1998, Pioneer endeavoured to settle its claim with the stockbroker and that it only became clear to Pioneer in 2009 that the respondents would not resolve the matter; but since time went by as the respondents feigned to resolve the claim, they are estopped from pleading limitation. In that regard counsel cited the case of *Gatune v The Headmaster, Nairobi Technical High School & another* [1988] KLR 561.
19. It was submitted that the Judge failed to appreciate that the suit raised several triable and weighty issues that required a trial and that although the Judge referred to the pronouncements in the case of *DT Dobie & Company (Kenya) Ltd v Muchina* [1982]KLR 1, she did not adhere to the principles enunciated therein.
20. With regard to the conclusion by the Judge that Pioneer ought to have exhausted the dispute resolution mechanisms set out in the *Capital Markets Act*, it was submitted that, that mechanism "is practically ineffective and non-existent" in relation to Pioneer; that whereas the claim by Pioneer is for



Kshs. 95,199,711.00, the maximum amount of compensation an investor would receive under that mechanism is Kshs. 50,000.00, a remedy that is “clearly illusory” in relation to Pioneer’s claim; that the mechanism is not capable of redressing the claim in totality and the remedy provided is not effective. Reference was made to the decision of the High Court in *James Kuria vs Attorney General & 3 others* [2018] eKLR for the proposition that a remedy is considered available only if sufficient to redress the complaint. It was also submitted that the mechanism under the Act is not suitable for adjudication of claims based on equitable principles; and that the claim by Pioneer is not justiciable under that mechanism. Reliance was placed on the case of *Abdikadir Suleiman vs County Government of Isiolo & another* [2015] eKLR.

21. The respondents opposed the appeal. Counsel for the stockbroker Mr Kiche rather not filed written submissions, nor made oral submissions. He relied entirely on the submissions by the Securities Exchange and those of the Authority.
22. On the part of the Securities Exchange, Miss Omamo relied on her written submissions which she highlighted. On the question of jurisdiction, it was submitted that sections 18,35 and 35A of the *Capital Markets Act* provide an alternative dispute resolution which Pioneer should have pursued in the first instance.
23. It was submitted that based on the pleadings, Pioneer’s claim against Securities Exchange, was with respect to its failure to settle the claim for pecuniary loss resulting from the failure by the stockbroker to meet its contractual obligations; that section 35(1)(g) of the *Capital Markets Act* provides that an investor aggrieved by the failure of the Authority to grant compensation for pecuniary loss resulting from failure by a licensed broker or dealer to meet its contractual obligations may appeal against such decision; that it is mandatorily required that such an appeal be lodged with the Capital Markets Tribunal; that the mechanism under that Act is clear and sufficient for Pioneer to have sought redress accordingly. The decisions of the Supreme Court in case of *Speaker of the National Assembly vs James Njenga Karume* [1992]eKLR and the case of *Mutanga Tea & Coffee Company Ltd vs Shikara Limited & another* [2015]eKLR to the effect that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed were cited; that as Pioneer failed to follow the alternative dispute settlement mechanism provided, the High Court could not entertain the suit. The case of *Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd* [1989] KLR1 was also cited.
24. Regarding the complaint that the Judge wrongly held that the claimant was time barred, counsel reiterated that the claim against the Securities Exchange was premised on its alleged failure to settle Pioneer’s claim for compensation resulting from loss occasioned by failure by the stockbroker to meet its contractual obligations; that the cause of action against the Securities Exchange was founded on the tort of negligence for which the prescribed limitation period is 3 years; that acts of the Securities Exchange complained of occurred between 2007 and 31<sup>st</sup> July 2009 and consequently the latest the action should have been filed against it was 31<sup>st</sup> July 2012; that by the time the action in this case was filed, the claim had become stale and the Judge was right to so conclude.
25. On behalf of the Authority, Mr. Wilson relied on written submissions which he orally highlighted. He submitted that Pioneer’s claim against the Authority is based on its statutory duties under the *Capital Markets Act* and it ought to seek redress under the mechanism provided under that Act; that the alleged failure on the part of the stockbroker to deliver shares that had already been paid for was in 1999 and 1994; that Pioneer was always aware that it potentially had a claim against the Authority but chose not to pursue it until 5 years after the cause of action had arisen; that based on the complaint, the claim against the Authority is based on alleged breach of duty, a claim in negligence with a limitation period



of three years under section 4 of the [Limitation of Actions Act](#); and that the lower court rightly found the claim to be statute barred.

26. In relation to the complaint that the Judge erred in holding that Pioneer ought to have pursued redress under the mechanism provided in the [Capital Markets Act](#), it was pointed out that the claim against the Authority was its alleged failure as a market regulator to ensure that Pioneer’s securities were preserved and its failure to facilitate an orderly, fair and efficient investment environment; that in light of section 35A of the [Capital Markets Act](#), it was incumbent upon Pioneer to first seek relief in accordance with the mechanism provided under that Act. Counsel cited several decisions including the High court case of [Vania Investments Pool Limited vs. Capital Markets Authority](#), Misc. Application No. 139 of 2014 which was upheld by this court in [Vania Investments Pool Limited vs. Capital Markets Authority](#) Civil Appeal No. 92 of 2014.

### **Analysis and determination**

27. We have considered the appeal and the submissions by counsel. The broad question is whether the decision by the High court striking out Pioneer’s suit should stand. Specifically, two issues arise. First is whether the court was right in concluding that Pioneer’s claim was time barred under the [Limitation of Actions Act](#). Second is whether the Judge correctly determined that Pioneer ought to have exhausted the dispute resolution mechanism provided under the [Capital Markets Act](#) before approaching the High Court.
28. The respondents’ applications on the basis of which Pioneer’s suit was struck out, were based on order 2 rule 15(1)(b)(d) of the [Civil Procedure Rules](#) which provides that at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that: it discloses no reasonable cause of action or defence; or it is scandalous, frivolous or vexatious; or it may prejudice, embarrass or delay the fair trial of the action; or it is otherwise an abuse of the process of the court. Under those provisions, the court is empowered to order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be. The applications were also hinged on section 4 of the [Limitation of Actions Act](#) and sections 11, 18, and 35 of the [Capital Markets Act](#); regulation 69 and 70 of the [Capital Markets \(Licensing Requirements\) General Regulations](#).
29. The principles on which the court acts when dealing with an application, such as was before the court, for striking out a suit were explained by Madan, JA. in [D. T. Dobie & Company \(Kenya\) Limited vs Joseph Mbaria Muchina & another](#) [1980]eKLR, where the court cautioned that a court seized of such application ought to act cautiously and carefully and consider all facts without embarking on a trial; that at that stage the court ought not to usurp the functions of the trial judge by dealing with any merits of the case; and that the court should aim at sustaining a suit rather than terminating it as “normally a law suit is for pursuing it.”. Madan, JA stated that:
- “No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and 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 act in darkness without the full facts of a case before it.”
30. Further, in considering the applications, the lower court was called upon to exercise judicial discretion. As an appellate court, we can only interfere with the exercise of discretion if satisfied that the Judge misdirected herself in law or that she misapprehended the facts or that she considered extraneous



considerations or that she failed to consider relevant considerations or that her decision is plainly wrong. As Sir Charles Newbold P. stated in *Mbogo & another vs. Shab* [1968] E.A. 93 at page 96,:

„...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice....?”

31. In relation to the issue of limitation, Pioneer relies on section 20 of the *Limitation of Actions Act*, cap 22 to support the contention that its claim is not time barred. Section 20 of that Act is in the following terms:

“20. Actions concerning trust property

(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.”

32. In effect, according to Pioneer, its claim against the stockbroker is proprietary and is covered under that provision. What then is Pioneer’s cause of action as borne out by its pleading? In its plaint, Pioneer averred that it engaged the stockbroker, as a stockbroker, for many years to purchase, sell and generally trade in shares and that the stockbroker was under a duty to ensure that it carried out Pioneer’s instructions diligently and with due care. It pleaded further that the stockbroker failed to deliver shares that it had already paid for in the years 1993 and 1984. It averred that in breach of its fiduciary duties, the stockbroker failed, refused or neglected to avail to Pioneer all the share documents in time or at all; that it failed or neglected to remit bonuses and dividends owing to Pioneer; that it failed to fully account for shares purchased and mismanaged Pioneer’s securities account; and that it conducted unauthorised transactions in that it used Pioneer’s money in breach of its obligations as a trustee.



33. Based on the plaint, therefore, there existed, by agreement, a relationship of principal and agent between Pioneer and the stockbroker. Indeed, and as pointed out by counsel, that accords with the definition of a stock broker under section 2 of the Capital Markets Act, namely “a person who carries on the business of buying or selling of securities as an agent for investors in return for a commission”. In effect, the stockbroker was Pioneer’s agent with the mandate to transact in stocks and shares on behalf of Pioneer.
34. Undoubtedly, an agent has duties towards the principal that include the duty to carry out the principal’s instructions; the duty to exercise care and skill (and in that regard the agent must exhibit such a degree of skill and diligence as appropriate to the performance of his duties that he has accepted); the duty of loyalty; fiduciary duties including but not limited to duties to account and to avoid conflicts of interest.
35. The editors of Chitty on Contracts, 13<sup>th</sup> edition, volume II state [para 31-119 at page 74] that although there is dicta indicating that an agents duties are based entirely on the contract between the principal and agent, fiduciary duties are well established as separate (though not without overlap) and to some extent counterbalance the strict rules on implication of terms at common law. See Kelly vs Cooper [1993]AC 205, 213-214; Clark Boyce vs Mouat [1994] 1AC 428,437; Liverpool City Council vs Irwin [1977]AC239.
36. Some of the duties Pioneer claims the stockbroker breached are duties which an agent, as a fiduciary, owe to his principal.

According to Black’s Law Dictionary, 8<sup>th</sup> edition, a fiduciary is:

“a person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence and candour; one who must exercise a high standard of care in managing another’s money or property.”

37. The duties of a fiduciary are in some respects equitable duties founded on equity and as the editors of Chitty on Contracts, 13<sup>th</sup> edition, volume II para 31-128 at page 80 note:

“Equity provides much of the reasoning in this area, substantive as well as remedial, and must be invoked when a claim is in respect of one of the equitable duties and is not simply a common law claim for breach of contract or negligence.

In the context of equity, many judges have talked in terms of profits made in breach of fiduciary duty as being held on constructive trust, or of the fiduciary being liable to account for such profits as a constructive trustee. This on the face of it invokes equity’s most typical technique, that of requiring property to be held on trust. The logical consequences of this would be that, the claimant’s claim to profit wrongfully made lying in equity, it is likely to be proprietary in nature. Such reasoning would give the claimant priority in bankruptcy and also entitle him to further profits arising from the money or property so held. In appropriate cases the money or property would also be specifically recoverable, and there would be consequences as regards limitation, for by virtue of section 21(1)(b) of the Limitation Act 1980 its provisions do not apply to actions by a beneficiary to recover trust property from a trustee.” [Emphasis]



38. . The editors of Chitty on Contracts go on to state that:

“The basic duty of an agent in equity has always been said to be one to account, and it was said some years ago that some types of constructive trusteeship are nothing more than a formula for equitable relief; and it has recently been said that “accountable as constructive trustee” should be replaced by the less specific “accountable in equity.”

39. In our view therefore, it does not follow that merely because Pioneer pleaded breach of fiduciary duties on the part of the stockbroker, does not render Pioneer’s action was “an action by a beneficiary under a trust” for purposes of section 20 of the *Limitation of Actions Act*. The High Court decision on which Pioneer relied for the proposition that limitation of actions does not apply to breach of trust, namely the case of Deposit Protection Fund Board vs. Ajay Shah & another, Milimani HCCC No. 294 of 2010 where Ogola, J referred to an extract from a judgment in the English case of Flitcroft’s case [1882] XXI Ch. D 519 to the effect that “no statute of limitations nor any bar by analogy to the statute can be relied on” in an action for breach of trust by a trustee has since been reversed by this Court.

40. In *Ajay Shah vs Deposit Protection Fund Board as liquidator of Trust Bank Ltd (in liquidation)* [2016] eKLR this Court, in reversing the decision of the High Court, held that limitation of actions applies notwithstanding the fact that there existed a relationship of trust or a fiduciary relationship between the parties. The court held that:

“Section 4(a) of the *Limitation of Actions Act* envisage its application to actions for account. Numerous cases abound where the limitation period has been held to apply in a suit against trustees or liquidators”

and that

“ordinary rules of computation apply and time begins to run when the contractual cause of action or breach of fiduciary duty arose.”

41. Section 4(1)(e) of the *Limitation of Actions Act* provides that actions, including actions claiming equitable relief, for which no period of limitation is provided may not be brought after the end of six years from the date on which the cause of action accrued. In the present case, based on the pleading that the breach on which the appellant relies occurred in 1993 and 1994, and bearing in mind that the suit was not filed until October 2014, we hold, as the Judge did, that the claim is statute barred.

42. We turn to the question whether the Judge erred in holding that Pioneer should have exhausted the mechanisms provided under the *Capital Markets Act*. In that regard, the Judge stated:

“Whereas it is indubitable that the High Court has unlimited original jurisdiction in civil matters such as this, by dint of Article 165(3) of *the Constitution*, it is also trite that where *the Constitution* or an Act of Parliament makes specific provision for the resolution of a particular category of disputes, then the Court ought to defer to and give the body so mandated the opportunity to deal with the dispute in accordance with that prescribed procedure. This is the determination that the Court of Appeal made in Speaker of the National Assembly vs. Hon. James Njenga Karume [1992]KLR.”

And later:

“(24) It is therefore manifest from the foregoing that a specific dispute resolution mechanism has been set out in the *Capital Markets Act* for the resolution



of disputes, including the dispute herein between the Plaintiff and the Defendants. Accordingly, that procedure ought to have been pursued to conclusion before the jurisdiction of this Court could be invoked by the plaintiff. This is notwithstanding the provisions of Article 165(3) of the Constitution which gives the High Court unlimited original jurisdiction in such matters.”

43. Authorities abound for the proposition that where there is a clear procedure prescribed by the law for redress of any particular grievance, that procedure should be followed. In Speaker of the National Assembly vs James Njenga Karume [1992] eKLR this Court stated:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an act of Parliament, that procedure should be strictly followed.”

44. See also, Mutanga Tea & Coffee Company Ltd vs Shikara Limited and another [2015] eKLR. In Vania Investments Pool Limited vs Capital Markets Authority & 8 others [2014] eKLR, this court upheld a decision of the High Court declining relief by way of judicial review in a matter arising under the Capital Markets Act on the grounds the applicant should have, in the first place, resorted to the Tribunal established under section 35A of that Act. In upholding the decision of the High Court, the court stated:

“We agree with a learned Judge that the appellant failed to demonstrate that the circumstances of its case qualified as exceptional to warrant a hearing by way of judicial review before the statutory procedure had been exhausted.”

45. Similarly, in the case of Secretary, County public service Board & another vs Hulbhai Gedi Abdille [2017]eKLR, this court stated:

“Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum.”

See also Republic vs National Environment Management Authority Ex Parte Sound Equipment Ltd [2011] eKLR to the same effect.

46. The Authority is established under Section 5 of the Capital Markets Act. Some of the principal objectives of the Authority under Section 11 of the Act are protection of investor interests and facilitation of a compensation fund to protect investors from financial loss arising from the failure of a licensed broker or dealer to meet his contractual obligations. Under section 18 of the Act is established the Investor Compensation Fund for the purposes, among others, of granting compensation to investors who suffer pecuniary loss resulting from the failure of a licensed stockbroker or dealer to meet his contractual obligations. For purposes of discharging its functions, the Authority is conferred with extensive powers of intervention. Under section 33A(2) of the Act, it has the power, which it invoked, in appointing the 2<sup>nd</sup> respondent, the securities Exchange, to assume the management of the Stockbroker.

47. In the replying affidavit filed in opposition to the applications in the lower court, it was deposed that Pioneer had through extensive correspondence sought the assistance of the Securities Exchange and of the Authority “to settle its claims” but that they did not meaningfully act on the appellant’s complaint;



that as Pioneer did not “claim for compensation from the Investor Compensation Fund” and “since there has been no refusal of any such claim or any directions in respect thereof made or given by the [Authority], there was never any question of [Pioneer] preferring any appeals to the Capital Markets Tribunal under section 35 of the *Capital Markets Act*.”

48. It was stated that Pioneer could not avail itself of the provisions of Section 35 of the Act as the Authority or the Investor Compensation Fund made no decision or give any directions as regards Pioneer’s complaint. It was also submitted that considering that Kshs. 50,000.00 is the maximum amount of compensation an investor could receive from the Investor Compensation Fund, that remedy is illusory and does not provide an effective remedy for Pioneer.
49. Regulation 69 of the *Capital Markets (Licensing Requirements) General Regulations* provides that whenever an investor has suffered pecuniary loss due to the failure of a stockbroker, dealer or on investment bank carrying out stockbroking business or dealing, operations, to meet its contractual obligations, which loss has not been compensated-
- (a) from the bank guarantee or securities furnished by such licensed person to the securities exchange or central depository as the case may be of which such licensed person is a trading participant; or
  - (b) from the Compensation Fund of the securities exchange of which such licensed person is a trading participant; or
  - (c) from any payment made by a statutory manager appointed under section 33A(2)(a) of the Act, (hereinafter referred to as “the net loss”) the investor shall apply to the Authority for compensation from the Compensation Fund in cash or securities equal to the net loss.
50. In light of those self-explanatory provisions we are unable to fault the Judge for concluding as she did that Pioneers’ first port of call should have been to pursue that avenue. However, the Judge does not appear to have had regard to regulation 70 (1) of those Regulations which provides that the net loss to an investor shall be subject to a maximum of fifty thousand shillings and neither did the Judge address the question of the efficacy of the remedy, an issue that was raised by Pioneer. Had the Judge done so, we think she would have arrived at a different conclusion.
51. However, in light of the conclusion that we have reached that the claim is barred by limitation, this appeal fails and is accordingly dismissed with costs to the respondents.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MAY, 2019.**

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**H. M. OKWENGU**  
**JUDGE OF APPEAL**

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**D. K. MUSINGA**  
**JUDGE OF APPEAL**

.....

**S. GATEMBU KAIRU, FCIArb**  
**JUDGE OF APPEAL**



I certify that this is a true copy of the original.

Deputy Registrar

