IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, M'INOTI & SICHALE, JJ.A.) CIVIL APPEAL NO. 149 OF 2010

BETWEEN

DIPAK P. SHAH.....APPELLANT

AND

SUDHIR K. SHAH.....1ST RESPONDENT

HARSHIDA S. SHAH.....2ND RESPONDENT

DEEPA S. SHAH.....3RD RESPONDENT

PARAG S. SHAH.....4TH RESPONDENT

VIJAYKUMAR K. SHAH.....5TH RESPONDENT

JAYOTIKA SHAH.....6TH RESPONDENT

MEERA V. SHAH.....7TH RESPONDENT

NAMAN V SHAH.....8TH RESPONDENT

MANDEEP V. SHAH.....9TH RESPONDENT

KAMAL K. SHAH.....10TH RESPONDENT

KASHMINA K. SHAH.....11TH RESPONDENT

SAWAN K. SHAH.....12TH RESPONDENT

NIKITA K. SHAH.....13TH RESPONDENT

KANTABEN C. SHAH.....14THRESPONDENT

RAKSHIT C. SHAH.....15TH RESPONDENT

DIPESH C. KARMAN.....16TH RESPONDENT

VANDANA C. SHAH.....17TH RESPONDENT

GANDABEN K. SHAH.....18TH RESPONDENT

SHEETAL KAPILA.....19TH RESPONDENT

ISHAN KAPILA.....20TH RESPONDENT

LAMA LIMITED.....21ST RESPONDENT

PANACHAND J. SHAH.....22ND RESPONDENT

HANSRAJ F. GUDKA.....23RD RESPONDENT

ABDUL AZIZ LALANI.....24TH RESPONDENT

PANACHAND J. DEDHIA.....25TH RESPONDENT

ATUL H. GUDKA.....26TH RESPONDENT

RELIANCE BANK LTD (In Liquidation).....27TH RESPONDENT

DEPOSIT PROTECTION BOARD.....28TH RESPONDENT

CENTRAL BANK OF KENYA.....29TH RESPONDENT

***(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Emukule, J.) dated 15th September 2004* in**

HCCC No. 728 of 2003)

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JUDGMENT OF THE COURT

The appellant, Dipak P. Shah is aggrieved by the ruling and order of the High Court at Nairobi, ***(Emukule, J.),*** dated 15th September 2004 in which the learned judge declined to strike out ***High Court Civil Suit No 728 of 2003***. The learned judge held, among others, that the said suit discloses a reasonable cause of action and is not an abuse of the process of the court. In this appeal the appellant however, urges us to hold otherwise and find that the suit is statute-barred, allow the appeal, and strike out the suit.

The short background to the suit is as follows. By a plaint dated 12th November 2003, respondents Nos. 1 to 18 (whom, for convenience, we shall refer to as "***the plaintiffs"***), filed suit against the appellant and the respondents Nos. 19to 29 ***("the defendants")***. The plaintiffs pleaded that in 1998 they purchased Bearer Certificate Deposits from ***the 28th Respondent, Reliance Bank (the Bank)*** at a total sum of ***Kshs 176,050,000.00***. In November 1998, the plaintiffs learnt that the appellant and the defendants had, without their knowledge or consent, fraudulently converted to their own use the Bearer Certificate of Deposits thereby occasioning the plaintiffs loss of the Kshs 176,050,000.00. Some of the defendants were sued in their capacities as directors and shareholders of the Bank who allegedly benefitted from the fraudulent conversion, and others as advocates who facilitated the same. The plaintiffs therefore prayed for judgment against the defendants for:

(a) Kshs 176,050,000;

(b) General damages for fraudulent conversion;

(c) Interest at 35% per annum from 5.9.1998 until payment in full; and

(d) Costs.

The defendants filed several defences in which they denied the plaintiffs' claim and all the pleaded particulars of fraud. A common contention in most of the defences was that the plaintiffs' claim was an abuse of the process of the court because it was time barred by ***section 4(2)*** of the ***Limitations of Actions Act (the Act)***.

On 8th March 2004 the appellant applied, principally under the then ***Order VI rule 13 (1)(a)*** and ***(d)*** of the ***Civil Procedure Rules***, to strike out the suit for failure to disclose a reasonable cause of action or otherwise being an abuse of the process of the court. The application was premised on the contention that fraudulent conversion is a tort and that by dint of section 4(2) of the Act, the plaintiffs were obliged to bring their claims within 3 years from the date of the accrual of the cause of action, which they had pleaded to be November 1998. The competence of the suit was also called into question on grounds of alleged defects in the verifying affidavit and misjoinder of parties and causes of action.

The plaintiffs opposed the application, contending that by dint of ***section 26*** of Act, their claim was not time barred because the fraudulent conversion was unearthed after complex forensic investigations in 2002.They also denied misjoinder and the defects alleged in the verifying affidavit.

Emukule, J. was satisfied that the plaintiffs' claim disclosed a reasonable cause of action and was not an abuse of the process of court. He held that there was no misjoinder of parties or causes of action; that the affidavit verifying the claim was not fatally defective; that the period of limitation did not start to run until the plaintiff discovered the fraud which he alleged; and therefore that the suit was not time-barred. Accordingly he found no merit in the application and dismissed the same with costs, thus precipitating this appeal.

By consent of the parties, the appeal was heard through written submissions. Although the appeal is founded on four grounds, we are satisfied that all converge on the question whether the learned judge misapprehended the law and erred by holding that the plaintiffs' claim was not time-barred.

Urging the appeal, ***Mr. Shah*** and ***Mr. Wasuna,*** learned counsel for the appellant, started by addressing issues outside limitation of time, which were neither raised in the grounds of appeal nor determined by the learned judge. They contended that because the plaintiffs were still in physical possession of their Bearer Certificates of Deposit, they could not sustain a claim for conversion, which is essentially a claim for wrongful interference with chattels. Relying on ***Lloyds Bank Ltd v. The Chartered Bank of India, Australia and China [1929] 1 KB 40***, counsel submitted that the relationship between a bank and a customer is that of a debtor and creditor and not a fiduciary relationship; that the directors of the Bank owed fiduciary duties to the Bank and not to the plaintiffs; that no specific money in the Bank belonged to the plaintiffs; that only tangible things may be converted; and that it was not possible for the defendants to convert the Bearer Certificates of deposit, which are still in the possession of the plaintiffs.

Moving on to the proper question of limitation of time, counsel submitted that under section 4(2) of the Act, an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. They however added that where fraud is alleged against the defendant, or where the defendant has fraudulently concealed the right of action, by dint of ***section 26(a)***and ***(b)***, time starts to run from when the plaintiff discovers or could with reasonable diligence, have discovered the fraud. Citing ***Paragon Finance v. DB Thakerar & Co (A Firm)[1998] EWCA civ 1249*** and ***Law Society v. Sephton & Co. [2004] EWCA civ 1627***, the appellant submitted that the burden was on the defendants to show that they could not have discovered the fraud without exceptional measures, which they could not be reasonably expected to take in the circumstances, and that reasonable diligence on their part presupposed an urgent desire to investigate, including through specialist services, whether or not there has been fraud.

On the principles that guide the court in fraudulent concealment, the appellant relied on ***Arcadia Group Brands Ltd & Others v. Visa Inc. & Others [2014] EWHC 3561 (Comm)*** and submitted that they include that section 26 (b) is to be construed narrowly rather than broadly due to the public interest in finality of litigation and certainty in the law of limitation; that the concern is with facts which found the cause of action and not those that improve the prospects of the claim succeeding; that the concealed facts must be only those that are essential to establish a *prima facie* case; and that the provision is intended to cover only cases where, due to concealment the plaintiff is denied sufficient information to plead a complete cause of action. The appellant added that as section 26 is concerned with fraud, the same must be specially pleaded with due particularity.

Applying the above principles, the appellant contended that according to their pleadings, the plaintiffs had full knowledge of the encashment and utilization of their Bearer Certificates of Deposits in November 1998, and that is when their cause of action accrued. He added that the plaintiffs had failed to show any expediency and in particular why they did not file suit soon after November 1998. The appellant then went into a lengthy homily on how the plaintiffs could have easily obtained the information they claim to have been seeking, had they filed the suit in November 1998. In his view, in the circumstances the plaintiffs could not avail themselves the benefit of section 26(a) and as regards section 26(b), he contended that the plaintiffs had not made any averment that the defendants had fraudulently concealed the cause of action or kept them from any information.

It was also the appellant's submission that the issues he had raised in his application to strike out the suit did not call for determination during trial as the learned judge held. In his view, the issue of limitation of time was a straightforward issue of law that could dispose of the suit within the meaning of ***Mukisa Bisquit Manufacturing Co. Ltd v. West End Distributors [1969] EA 696***.

Accordingly the appellant urged us to find that the plaintiff's suit was time barred.

Mr Anyul, learned counsel for ***Panachand J. Shah***, the 22nd respondent, informed us that his client was deceased and had not been substituted in the appeal. Accordingly we marked the appeal against that respondent abated under ***rule 99*** of the ***Court of Appeal Rules***. ***Mr. Wandabwa***, learned counsel for the ***Sheetal Kapila*** and the representatives of ***Ishan Kapila (deceased)***, respectively the ***19th*** and ***20th respondents,*** as well as ***Mr. Wanyonyi*** learned counsel for ***Panachand J. Dedhia***, the ***25th respondent,*** supported the appeal and adopted the submissions made by the appellant. For his part, ***Mr Odera***, learned counsel for the Bank, the ***Deposit Protection Fund Board*** and the ***Central Bank of Kenya***, respectively the ***27th, 28th*** and ***29th respondent*** left the matter to the Court.

The plaintiffs, represented by ***Mr. Kipkorir***, learned counsel, opposed the appeal, submitting that they learned of the utilization of their Bearer Certificates of Deposits in November 1998 and only unearthed the fraudulent conversion in 2002 following complex investigations, after the Bank was placed under receivership by the Central Bank of Kenya. They relied on ***Gibbs v. Guild [1964] 1 All ER 699*** and submitted that in the circumstances, their claim was not statute barred as the learned judge correctly concluded. They added that the object of limitation of time is to prevent stale claims and not to promote or shield fraud. The plaintiffs also agreed with the learned judge that most of the matters that the respondents had raised could not be determined in an application to strike out the suit but only through a full hearing entailing adducing of evidence.

The plaintiffs further submitted that striking out a pleading is at the court's discretion, which is used sparingly and only in the clearest of cases. They contended that in determining whether a suit discloses a reasonable cause of action, the court looks only at the pleadings and not at the evidence. Relying on ***D.T. Dobie & Co. (Kenya) Ltd v Muchina [1982] KLR1*** and ***Crescent Construction Co Ltd v. Delphis Bank Ltd [2007] eKLR***, among other authorities, the plaintiffs submitted that a court ought not to deal with the merits of the case in an application alleging lack of reasonable cause of action, which is the province of the trial judge. They accordingly urged us to find that their suit is not time-barred and that it discloses a reasonable cause of action.

We have anxiously considered the pleadings, the application that gave to this appeal, the ruling by the learned judge, the grounds of appeal, submissions by learned counsel, the authorities cited and the law. It is common ground that the plaintiffs' claim was founded on the tort of conversion and that by dint of section 4(2) of the Act, the plaintiffs were obliged to bring their claim within three years from the date when the cause of action accrued. The plaintiffs pleaded as follows in paragraph 16 and 17 of the plaint:

> ***"16 In November 1998, or thereabouts, the plaintiffs jointly and/or severally learnt that their Bearer Certificates of Deposits had been discounted and the deposits thereto utilized without the plaintiff's knowledge and/or consent.***
>
> ***17. The plaintiffs on the afore-said realization proceeded on a complex, technical and hazardous forensic investigation on what***

happened to their deposits and have found that the same was fraudulently converted to the use of and benefit of the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 9th defendants jointly and/or severally and thereby depriving the plaintiffs jointly and/or severally the value thereto in the principal sum of Kshs 176,050,000/= which position was confirmed by the Banking Fraud Investigation Department." (Emphasis added).

In paragraph 18, the plaintiffs set out the particulars of the fraud that they had allegedly unearthed on the part of the defendants, which they contend was confirmed by the Banking Fraud Investigation Department, as follows:

"(a) Incorporation of Lama Limited by the 1st and 2nd Defendants jointly and/or severally for no other purpose other than as a vehicle of fraud in Reliance Bank Limited;

(b) Allowing and account to be opened in the name of the 3rd defendant when the 3rd defendant was not licensed to deal in the business it alleged it was engaged in;

(c) Allowing the said account to be opened in Kisumu when the 1st and 2nd defendants are lawyers based in Nairobi;

(d) Crediting the plaintiff's deposits to the said account, when the plaintiffs had not given permission or consent;

(e) Discounting the said Bearer Certificates of deposits when the plaintiffs still hold the original copies of the certificates;

(f) Allowing the said account to be opened and operate irregularly, unlawfully and illegally and more specifically as a conduit to perpetuate fraud.

It is the appellant's contention that from the above pleadings, the plaintiffs knew of the alleged conversion in November 1998 and therefore they ought to have field the suit by November 2001. Instead they filed the same on 14th November 2003, which was out of time. On their part the plaintiffs contend that they learnt of the conversion in November 1998 but it was only after conducting complex investigations on how the conversion had occurred that they discovered in 2002 that it was perpetuated through fraud. In their view therefore, their cause of action accrued in 2002 when they learned of the fraud, whose particulars they have tabulated in paragraph 18 of the plaint. They urge us to find by dint of section 26 of the Act, their suit is not time barred.

Having carefully considered the pleadings, the application, the response thereto, the pertinent provisions of the Limitation of Actions Act and the ruling of the learned judge, we are not persuaded that that the learned judge erred in the exercise of his discretion and refusing to strike out the suit. We shall, advisedly, not say more in this regard because the issues are still live before the trial court.

The learned authors of ***Halsbury's Laws of England, 4th Ed Vol 36 (1), para 81*** state that:

"A pleading will not be struck out if it is merely demurrable, it must be so bad that no legitimate amendment could cure the defect."

The words of***Madan JA,*** (as he then was), in ***D.T. Dobie Company (K) Ltd v Muchina & Another [1980] eKLR***still ring true today as they did 38 years ago when he urged great circumspection in acceding to applications to strike out pleadings, unless they were the clearest of cases. In his enduring words,

"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 law suit 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 facts of a case before it." (Emphasis added).

Taking into account all the foregoing, we are not persuaded that the learned judge erred by dismissing the appellant's application to strike out the suit. We find no merit in this appeal and the same is hereby dismissed with costs. It is so ordered.

Dated and delivered at Nairobi this 12th day of October, 2018

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR