



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, M'INOTI & SICHALE, J.J.A.)

CIVIL APPEAL NO. 158 OF 2010

BETWEEN

SHEETAL KAPILA.....1ST APPELLANT

SHEETAL KAPILA &] Legal Representatives of

NASEEM KAPILA] ISHAN KAPILA (Deceased).....2ND 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.....14TH RESPONDENT

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

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

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

GANDABEN K. SHAH.....	18TH RESPONDENT
LAMA LIMITED.....	19TH RESPONDENT
PANACHAND J. SHAH.....	20TH RESPONDENT
HANSRAJ F. GUDKA.....	21ST RESPONDENT
ABDUL AZIZ LALANI.....	22ND RESPONDENT
DIPAK P. SHAH.....	23RD RESPONDENT
PANACHAND J. DEDHIA.....	24TH RESPONDENT
ATUL H. GUDKA.....	25TH RESPONDENT
RELIANCE BANK LTD (In Liquidation.....	26TH RESPONDENT
DEPOSIT PROTECTION BOARD.....	27TH RESPONDENT
CENTRAL BANK OF KENYA.....	28TH RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Ochieng, J.) dated 28th November 2006

in

HCCC No. 728 of 2003)

JUDGMENT OF THE COURT

The appellants, Sheetal Kapila, in her own capacity and as legal representatives, with *Nassem Kapila*, of the Estate of *Ishan Kapila (deceased)* are aggrieved by the ruling and order of the High Court of Kenya at Nairobi, *(Ochieng, J.)*, dated 28th November 2006 in which the learned judge declined to strike out, as against themselves, *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 appellants and the *respondents Nos. 19to 28*(“*the defendants*”). The plaintiffs pleaded that in 1998 they purchased Bearer Certificate Deposits from the *26th Respondent, Reliance Bank (the Bank)* at a total sum of *Kshs 176,050,000.00*. In November 1998, the plaintiffs learnt that the appellants 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 the appellants as advocates who facilitated the same. The plaintiffs therefore prayed for judgment against the appellants and 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 appellants and 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 21st March 2005 the appellants applied, principally under the then *Order VI rule 13 (1)(a)* and *(d)* of the *Civil Procedure Rules*, to strike out the suit as against themselves 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. It was also contended that since, from the pleadings, the plaintiffs were still in possession of the original bearer certificates of deposit, it was impossible under **section 31(2)** of the **Bills of Exchange Act** to discount the certificates or to sustain a case of fraudulent conversion in the circumstances.

The plaintiffs opposed the application, contending that it was an abuse of the process of the court; that the suit raised triable issues; and that the application was bad in law because **Emukule J.** had heard and dismissed a similar application on 15th September 2004, which is the subject of **Civil Appeal No. 149 of 2010**, between the same parties.

Ochieng, J. held that the appellants' application was not barred by estoppel or *resjudicata* because the appellants were not parties to the application determined by Emukule, J. However he concluded that the plaintiffs' claim disclosed a reasonable cause of action and was not an abuse of the process of court, noting that whether the bearer certificates of deposit were fraudulently converted whilst in the possession of the plaintiffs was an issue for trial, not summary determination. Accordingly he found no merit in the application and dismissed the same, thus precipitating this appeal.

By consent of the parties, the appeal was heard through written submissions. Although the appeal is founded on eleven grounds, we are satisfied that all converge on the questions whether the learned judge erred by failing to hold that the suit was time barred; by holding that the suit disclosed a cause of action against the appellants; by failing to hold that a claim for conversion could not be sustained whilst the plaintiffs were in possession of the bearer certificates of deposit; and by misdirecting himself in the exercise of his discretion.

Urging the appeal, **Mr. Wandabwa**, learned counsel for the appellants, reduced the grounds of appeal into two issues only, namely limitation of action and whether the suit disclosed a cause of action against the appellants. On limitation of time, counsel submitted that the learned judge erred by failing to hold that the suit was time barred under section 4(2) of the Act. He contended that the plaintiffs pleaded they learnt of the conversion of their bearer certificates of deposit in November 1998 and to the extent that conversion is a tort, they were obliged to file their suit within three years from November 1998, but instead they filed it after five years. Counsel further submitted that limitation of time was a jurisdictional issue; that the learned judge should have downed his tools; and that under section 4(2) he did not have any discretion to sustain the suit on the basis that it raised triable issues. In support of that proposition, counsel relied on the decisions of this Court in **Owners of the Motor Vessel Lilian S v. Caltex Kenya Ltd (1989) KLR 1** and **Thuranira Karauri v. Agnes Ncheche [1997] eKLR**.

On whether there was a cause of action against the appellants, it was contended that under section 31(2) of the Bills of Exchange Act, a bearer certificate of deposit can only be encashed by presenting it to the bank that issued it and that to the extent that the plaintiffs still had their bearer certificates of deposit in their possession, it was impossible to sustain a claim of conversion. Accordingly the appellants urged us to find merit in the appeal, allow it and strike out the plaintiffs' suit.

Mr. Anyul, learned counsel for **Panachand J. Shah**, the 20th respondent, informed us that his client was deceased and that he had not been substituted in the appeal. Accordingly we marked the appeal against the 20th respondent abated under **rule 99** of the **Court of Appeal Rules**. On their part, **Mr. Shah** and **Mr. Wasuna**, learned counsel for **Dipak P. Shah**, the 23rd respondent, and **Mr. Wanyonyi**, learned counsel for **Panachand J. Dedhia**, the 24th respondent, did not file written submissions, but informed us that they supported the appeal. **Mr. Odera**, learned counsel for the Bank, the **Deposit Protection Fund Board** and the **Central Bank of Kenya**, respectively the 26th, 27th and 28th respondents informed us that his clients were not participating in the appeal and urged us not to award any costs against them.

Mr Kipkorir, learned counsel for the plaintiffs opposed the appeal, submitting that the learned judge had properly refused to strike out the suit. Counsel contended that the plaintiffs' suit was not time barred because they learnt of the conversion of their bearer certificates of deposit in November 1998 but it was only after extensive audit and comprehensive investigations that they learnt of the appellants' fraud in the conversion and filed the suit. That fraud, it was submitted was particularized in the plaint and took the form of incorporation of **Lama Limited**, the 19th respondent, by the appellants, which was used as the vehicle to fraudulently convert the certificates. The plaintiffs therefore submitted that the learned judge did not err in holding that the trial raised triable issues such as whether there was fraud, whether appellants abused their role as advocates and whether they assisted or facilitated the alleged fraud. We were urged to find that the object of the law on limitation is to prevent stale claims but not to shield fraud.

On whether the learned judge erred by holding that the plaintiffs had disclosed a reasonable cause of action, the plaintiffs submitted that the power of the court to strike out pleadings is discretionary and is exercised sparingly and only in the clearest of cases. They relied on **D.T. Dobie Company (Kenya) Ltd v Muchina [1982] KLR 1**, **Crescent Construction Co Ltd v. Delphis Bank Ltd [2007] eKLR, 38**; and **Mitsubishi Corporation v Anthony Massawa [1996] e KLR**, in support of those propositions. The plaintiffs concluded by submitting that the mere fact that the pleadings were highly improbable or difficult to prove or that a case looked weak were not grounds for striking out pleadings.

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 have 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 appellants and 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 (the appellants) 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 (the appellants) 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 filed 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.

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 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 facts of a case before it.” (Emphasis added).

On whether the suit discloses a reasonable cause of action, the appellants’ contention is that the plaintiff’s case, which is founded on conversion, cannot succeed because the plaintiffs admit that they are still in possession of their bearer certificates of deposit. In the appellants’ view, under section 31(2) of the Bills of Exchange Act, it is not possible to encash bearer certificates of deposit, which are still in the possession of the plaintiffs.

In our view, that was a direct invitation to the court to determine contested issues summarily without the benefit of evidence tested by cross-examination. Indeed, in paragraph 18(e) of the plaint, one of the particulars of fraud is that the plaintiffs’ bearer certificates of deposit were

enchased by the appellants and the defendants without production of the original bearer certificates of deposit, which are still in the plaintiffs' possession. The learned judge expressed himself as follows on the issue:

“However, in my understanding of the pleadings by the plaintiffs, there is a contention that there was fraud, because without the bearer certificates of deposit, none of the defendants should have been able to negotiate the said certificates. Therefore, when they were discounted, in the absence of the original certificates, the plaintiffs assert that was fraudulent. In relation to the applicants, the case, as appears at paragraph 19 of the plaint, is that they abused their privileged positions as advocates of the High court, to perpetuate the fraud. And at paragraph 21 of the plaint, it was alleged that the applicants herein were liable as beneficiaries of conversion. Those are serious and important matters of law. By raising them, the plaintiffs have not been shown to have been motivated by any improper motive, such as has been suggested by the applicants.”

We do not perceive any misdirection on the part of the learned judge. The issues raised by the plaintiffs in the suit could only be determined after a proper hearing, not summarily as the appellants contend.

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 (P)

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR