



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, KARANJA & MWERA, JJ.A)**

**CIVIL APPEAL NO. 218 OF 2004**

**BETWEEN**

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

**AND**

**KENYA MEDICAL ASSOCIATION HOUSING CO-OPERATIVE SOCIETY  
LIMITED.....RESPONDENT**

***(Appeal from the Ruling and Order of the High Court of Kenya, Commercial Division at  
Nairobi (Azangalala, J.) dated 6<sup>th</sup> February, 2004***

***in***

***H.C.C.C. No.34 of 2002)***

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**JUDGMENT OF THE COURT**

The appeal herein, which is interlocutory, arose from the ruling of the High Court, *Azangalala, J.* as he then was, delivered on 6<sup>th</sup> February, 2004. By that ruling the learned Judge dismissed the appellant's chamber summons dated 4<sup>th</sup> June, 2002, which was brought under Order 6 rule 13(1) (a), 16 of the Civil Procedure Rules with the main prayer that the plaint filed in the High Court by the respondent be struck out for disclosing no reasonable cause of action. It was argued before the learned Judge that the purported cause of action, which gave rise to filing of the said plaint, was rooted in negligence and so was time-barred as at the time the suit was instituted on 19<sup>th</sup> March, 2002, by virtue of the Limitations of Actions Act (Cap 22). The respondent's main plank in opposing that application was that the cause of action in issue arose out of "*negligent performance of contractual obligations.*" After hearing arguments, the learned Judge found that the relationship between the appellant and the respondent was a contractual one and so Section 4(2) of the Limitations of Actions Act did not avail a defence.

Briefly put, the pleadings were to the effect that the respondent applied for bridging finance of Sh.18,750,000/= from the appellant bank with the purpose of buying a parcel of land LR.No.18589, LANGATA – OTIENDE from M/S Jackim Ltd. The funds were processed and the cheque released directly to the vendor, Jackim Ltd. Therefore the respondent pleaded that: -

**“10. It is the plaintiff’s case against the defendant that the release of the loan cheque directly to the Vendor was contrary to normal process, was unprocedural and the same was in breach of the duty of care by the defendant to the plaintiff and amounted to negligence on the part of the defendant.”** (Underlining supplied.)

The respondent set out the particulars of negligence in the plaint, not relevant for now, served the same and it was the turn of the appellant to file the defence. It averred, *inter alia*, that the letter of offer dated 1<sup>st</sup> September, 1997 from the appellant to the respondent, specifically provided that the payment of the subject sum was to be made directly to the vendor. It was added in the defence that:

**“9. The defendant avers that the plaintiff’s cause of action is founded on the defendant’s alleged negligence in releasing the said cheque of Sh.18,750,000/00 directly to the vendor Jackim Limited.”**

It was further pleaded that the alleged negligence came to the respondent’s knowledge on or about 20<sup>th</sup> May, 1998, yet it did not sue in tort within the 3 year period permitted by the Limitations of Actions Act and so the suit was time-barred. The appellant would thus be at liberty to apply for the suit to be struck out for disclosing no reasonable cause of action against it, which it did by filing the aforesaid chamber summons from whose ruling the present appeal springs.

The appeal contained some nine grounds which **Mr. Echessa**, learned counsel for the appellant condensed into one, namely as to whether the cause of action in the High Court lay in tort or contract. We were told that the plaint specifically stated that the appellant had been negligent in releasing the sum cheque directly to the vendor; that that constituted a tortious act and as such the respondent was bound by its pleadings for tort, and that accordingly, the learned Judge was in error to find that the cause of action was based on contract. It was further contended that indeed at no time did the appellant plead that there was any breach of contract and therefore, the suit based on the tort of negligence was time-barred having been filed later than the 3 years permitted by law.

**Mr. Mbaluto**, learned counsel for the respondent could not agree. He argued that the same set of facts could give rise to 2 causes of action – tort and contract. He submitted that the learned Judge found that the facts herein disclosed a cause of action in contract and so ruled. Counsel cited the case of **Kenya Cargo Handling Services Ltd vs David Ugwang (1982-88) 1 KAR 672** and referred to **Chitty on the Law of Contracts (General Principles)** to stress that there was a definite offer made by the letter of offer dated 1<sup>st</sup> September, 1997 of the loan from the appellant to the respondent which was accepted and the loan was disbursed. This formed a contract between the two, thereby imposing a duty of care in contract as between the appellant (banker) and the customer (borrower/customer) on the execution of payment instructions. Reverting to **Halsbury’s Laws of England (4<sup>th</sup> Edition Vol.37, (paragraphs 19, 20)** **Mr. Mbaluto** concluded that in deciding whether an action is founded on contract or tort, the substance of an action must be looked at; that the form of it as stated in the pleadings is immaterial; and that an action may be said to be founded on contract where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract. Thus the same facts or the same transaction or event, as the case was herein, having given rise to more than one effective cause of action, the learned Judge rightly found that the relationship between the two litigants herein was contractual and thus not one in tort limited by Section 4(2) of the Limitation of Actions Act.

After hearing arguments on both sides, we are satisfied that the learned Judge appreciated the facts of the transaction that gave rise to the cause of action herein. The appellant, the banker, gave a letter of offer to disburse a loan to the respondent – the customer. The loan was disbursed and therefore the benefit was enjoyed. The Judge delivered himself, *inter alia*, that:

**“The question to be determined in this application is therefore whether the plaintiff’s cause of action is founded on tort or on contract. What was the relationship between the plaintiff and the defendant?”**

The learned Judge looked at the substance of the action, and although he remarked that the respondent did

not specifically plead that the appellant was in breach of an implied term of contract, it was his conclusion that the relationship between the two was a contractual one and so the action brought was not time-barred in terms of Section 4(2) of the Limitation of Actions Act.

In the light of the authorities placed before us and the fact that there appears to be no prejudice to befall the appellant if the hearing of the suit proceeds in the High Court, we are inclined to and hereby dismiss this appeal with costs to the respondent.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of October, 2014.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**J. W. MWERA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**