



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 368 of 2008

KENYA COUNTRY BUS

OWNERS ASSOCIATION PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD. DEFENDANT

RULING

This application is made by a Chamber Summons dated 8th January, 2010, and taken out under **Order VI Rule 13 (1) (d)** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act**, and all other enabling provisions of the law. The Applicant thereby seeks orders that the suit herein be struck out and that the costs of the application be provided for.

The application is supported by the annexed affidavit of Job Mwangi Thiga, Advocate sworn on 8th January, 2010 and is based on the following grounds:-

1. *that that plaintiff's suit as filed herein is otherwise an abuse of the court process in that –*
 - (a) *the plaintiff has commenced this suit by suing in its own name which is against the Societies Act, Cap. 108 of the Laws of Kenya, that governs it;*
 - (b) *the plaintiff has filed this suit out of time which is against the Limitation of Actions Act, Cap.22 of the Laws of Kenya;*
 - (c) *the suit as filed is bad in law, incurably defective and unsustainable as against the defendant; and*
- 2 *that in the circumstances, it is in the interests of that the orders sought be granted.*

On 4th February, 2010, the plaintiff/respondent filed the following grounds of opposition dated 3rd February, 2010 –

- (i) *that the said application is mischievous and an abuse of the process of the court*
- (ii) *that the plaintiff's suit is not barred by limitation as alleged or at all*
- (iii) *that a claim for rendering of accounts is a continuing action and cannot be the subject of limitation*
- (iv) *that the definition of a society under the Interpretation Section of the Societies Act includes partnerships which can sue or be sued in their firm names under Order XXIX Rule 1 of the Civil Procedure Rules, and*
- (v) *that the said application is therefore frivolous and vexatious*

When this matter came for hearing before this court on 9th February, 2010, Mr. Wachira for the Plaintiff/Respondent told the court that he had had a word with his colleague that there were some documents which he wished to place before the court to enable the court to

reach a fair decision. He had put in some skeleton grounds of opposition and he needed time to put a replying affidavit. He undertook to do so in 7 days. Mr. Thiga for the Defendant/Applicant merely said that the application was a fairly short one which would not take long to dispose of. The Court then granted leave to the Respondent to file and serve a replying affidavit within 7 days with corresponding leave to the Applicant to reply if it so wished. By consent, the application was then fixed for hearing on 3.3.2010.

On 3rd March, 2010, Mr. Thiga appeared for the applicant while Mr. Kariuki held brief for Mr. Wachira. Mr. Kariuki told the Court that Mr. Wachira wished to apply for an adjournment as he had filed an application seeking to substitute one of the parties. He further said that the application seeking to substitute the Plaintiff ought to be heard first.

Opposing the application for adjournment, Mr. Thiga stated that when the parties were last before the Court, the Court gave the Plaintiff 7 days within which to file a replying affidavit. Instead of filing an affidavit, Counsel for the Defendant had filed an application for substituting the Plaintiff. Mr. Thiga therefore opposed the application on the ground that the Respondents were stealing a march on the Applicant.

In his reply, Mr. Kariuki said that subsequent to the filing (he did not specify which filing), they formed the opinion that an application for substitution of the parties would cure any shortcomings and the plaintiff would be left to prosecute its case. No prejudice would be suffered by the Defendant. He urged the Court to grant the adjournment and allow their application to be heard first. In a short ruling, the Court ruled that when this matter last came before the Court on 9th February, 2010, Counsel for the Plaintiffs told the Court that he had put in some skeleton grounds of opposition and that he needed time to put in a replying affidavit. He further said that he would be able to file that affidavit within 7 days. His application was granted as prayed and by consent the Defendant's application by Chamber Summons dated 8th January, 2010 was fixed for hearing on 3rd March, 2010. The Court observed that as of that date, Counsel for the Plaintiff had not filed any replying affidavit to the Defendant's application as he had sought to do. Instead, he came back to Court with a totally different approach, involving the filing of an application which, if granted at that stage, would derail altogether the Defendant's application. In our adversarial system of jurisprudence, such a procedure would amount to stealing a march on the Defendants, and a Court of Equity would certainly frown upon it. For those reasons the Court declined to grant the judgment and fixed the Defendant's application for hearing at 12.15 p.m. of the same day.

When the matter came for hearing at 12.15 p.m., Mr. Thiga appeared for the Defendant and there was no attendance by or for the Plaintiff. Referring to the Defendant's application dated 8th January, 2010, Mr. Thiga reiterated that the Defendant's prayer was that this suit be struck out under **Order VI Rule 13 (1) (b)** of the **Civil Procedure Rules**. The grounds upon which he relied were exhibited on the face of the application. Mainly, the suit was an abuse of the Court process. His affidavit in support of the application raised two main issues. The first one was the issue of the Plaintiff's lack of capacity to sue. He submitted that the Plaintiff was a registered Association under the Societies Act. It being a registered society, the law requires that its registered officials file action in their names. Consequently, the omission to do so was fatal, thereby rendering the suit as filed bad in law, incurably defective and unsustainable against the Defendant. He relied on **JANE NYAMBURA v. APOSTOLIC FAITH CHURCH, Nairobi HCCC No. 2824 of 1997 (OS)**, in which the suit was struck out on the ground that a registered society can only sue or be sued in the names of the registered office holders. In this suit, Counsel submitted, the same scenario lies and the Plaintiff lacks capacity to institute the suit.

The second main issue is that the claim in this suit is hopelessly time barred. The Plaintiff's claim, which is based on a contract between Bank and Customer concerns rendering accounts up to 2.12.1988. It is not a claim on a running account. By filing the suit 20 years down the line on 3rd July, 2008, the claim was unconscionably late. Equity abhors indolence, and the Plaintiff was very indolent, and this is an abuse of the process of the Court.

On those two accounts, the Defendants contend that this suit is an abuse of the process of the Court and urge the Court to strike it out with costs of the suit and this application.

I have considered the pleadings and the submissions of Mr.Thiga. In paragraph 1 of the plaint, the Plaintiff describes itself as a duly registered association under the **Societies Act, Cap. 108 of the Laws of Kenya**. Such registration does not confer upon such an association corporate personality as in the case of a registered company, and the association cannot, therefore, institute Court proceedings in its name. The mode of commencement of such proceedings is aptly summarised in paragraph 239 of Halsbury's Laws of England, 3rd Edition, Volume 18, in which the law is stated as follows –

“the trustees of a registered society or branch, or officers authorized by its rules may bring or defend actions of legal proceedings with respect to any property, right, or claim of the society or branch and may sue and be sued in their proper names without other description than the title of their office.”

That is the manner in which the Plaintiffs in this suit should have come to court instead of filing court action in a society's name. For that reason alone, the purported Plaintiff before the Court is non-existent in the eyes of the law and cannot prosecute this action. Even without going into the 2nd issue of the limitation of time, the action before the Court is incompetent for which reason this suit is hereby struck out. As the Plaintiff is non-existent, I don't feel equal to ordering the payment of costs by a non-existent personality.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 13th day of May, 2010.

L. NJAGI
JUDGE