REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 777 of 2006

JESSE KAMAU TANU……..PLAINTIFF

VERSUS

J.A. GUSERWA…….……DEFENDANT

RULING

The Respondent to the present application has filed suit against the applicant seeking damages for professional misconduct, interests of costs and of damages for the professional negligence. The applicant has a defence and counter claim for the sum of Kshs 125,000.00 in respect of party and party costs in a previous proceeding where she had represented the plaintiff in the lower court.

The defendant/applicant has come to this Court under Order V1 Rules 13 (1) (a) (b) and (d), order XXV rules 1,5,6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law seeking orders that the Plaintiffs suit be struck out.

(2) In the alternative that the plaintiff be ordered to provide security for costs in the sum of Kshs 500,000.00 in respect of party and party costs.

(3) That the aforesaid sum be paid into a joint account in the names of the plaintiff and Counsel for the defendant.

(4) That upon failure to deposit security ordered the plaintiff's suit be dismissed.

(5) That costs for the application be provided for.

Both parties have made representations for and against the application which representation touch on the common grounds of the dispute and is therefore better to set them out as such. It is common ground that:-

(1) The defendant's professional services as were hired by the plaintiff/respondent in proceedings initiated, heard and finalized in Milimani CMCC 1353/2003 which had initially started off as a High Court matter.

(2) The matter arose out of a Road Traffic accident involving the plaintiff Respondents motor vehicle in respect of which the Respondent sought damages for cost of repairs and loss of user. The lower court found for the plaintiff on cost of repairs and costs. The claim for loss of user was disallowed although the reason is not indicated in the judgment as per annexture J.A.G 1 and 2. The court has been informed that the decree there is yet to be executed.

(3) Party and party costs were agreed and or taxed at Kshs 125,000.00. Before these were paid the

Respondent engaged another lawyer who gave an undertaking to pay the same as soon as they received the proceeds of the lower court's judgment.

(4) Before the decree was executed the Respondent withdrew instructions from the incoming lawyer and applied and was granted leave to act in person.

(5) In pursuance to number 4 above the Respondent moved and filed this suit seeking damages for professional negligence. The defendant applicant has filed a defence and counter claim accompanied by an application subject of this ruling seeking the reliefs specified therein.

(6) Regarding the claim for damages for professional negligence it is their stand that the matter was conducted professionally and so there are no triable issues to be taken up by this court and so the claim is frivolous and the same should be struck out.

(7) As for security for costs the applicant contends that the Respondent has failed to pay costs in the lower court proceedings and this being the case he might be unable to pay costs of these proceedings hence the need for this court to secure costs. That he be called upon to deposit costs in the sum specified failing which the claim be struck out. They maintain that there is nothing to show that the applicant is capable of paying costs.

(8) The stand of the Respondent is that he still maintains that it is the fault of Counsel that his claim for loss of user of the vehicle was not allowed as the documents relating to the same were not availed. He suspects corrupt deals between counsel and his opponent in the lower court shown by the fact that after judgement the applicant started avoiding him.

(9) That they had agreed that the applicants costs would come from the amount paid as the decretal sum which he has not been paid up to now. He has been walking the corridors of justice for the last 7 years. It is his stand that the proceedings herein are linked to the lower court proceedings and the two should be treated as one.

On the courts assessment of the facts herein it is clear that there is no dispute that proceedings herein stems from the lower court case MILIMANI CMCC 1335 of 2003. The stand of the applicant as regards those proceedings is that the same were conducted professionally and so there is nothing that can go to trial in respect of the same. While the stand of the Respondent is that he is genuinely aggrieved and he is entitled to be heard on the same and if proved to be paid damages. He blames the loss on his claim of loss of user on the advocate defendant.

The defendant applicant has moved to fault the plaint under order VI rule 13(1) a) (b) and (d). In other words she is contending that the plaint has not disclosed

(a) A reasonable cause of action.

(b) It is scandalous, frivolous or vexatious

(c) It is otherwise an abuse of the due process of the Court.

What amounts to and what does not amount to a reasonable cause of action has been explained by Madan JA as he then was in the case of DT DOBIE AND COMPANY (KENYA) LTD VERSUS MUCHINA [1982] KLR1. In this case it was held inter alia that a cause of action means an act on the part of the defendant which gives the Plaintiff his cause of complaint. While a reasonable cause of action means an action with same chance of success when the allegation only in the plaint are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer. Hayanga J. as he then was in the case of **HORKAN INVESTMENTS LTD VERSUS NAMAYUK SELF HELP GROUP NAIROBI. HCCC 2185/2001** what amounts to a scandalous, frivolous and vexatious pleading. At pages 3 – 6 of his ruling a scandalous pleading is one which states matters that are:-

(1) Indecent

(2) Offensive

(3) made for the mere purpose of abusing or prejudicing the opposite party.

(4) Immaterial or unnecessary and which contains imputation on the opposite party.

(5) Matters that charge the opposite party with bad faith or misconduct against him or any one else.

(6) Matters that contain degrading charges.

(7) Though necessary are accompanied by unnecessary details.

Frivolous matters are those that:-

(1) Have no substance.

(2) Are forceful

(3) Or where a party is ruffling with the court.

(4) Matters that waste the court's time.

(5) They are not capable of giving rise to a reasoned argument.

Matters become vexatious when:-

(a) They have no foundation

(b) They have no chance of succeeding

(c) Have been brought merely for purposes of annoyance

(d) For purposes of getting some forceful advantages.

(e) The action is incapable of leading to any possible good.

Where as pleadings which tend to prejudice, embarrass or delay fair trial are those that:-

(1) are evasive in nature

(2) which are obscuring or concealing the really question in issue between the parties.

Further guidance on the subject is from the holding in the case of **COAST PROJECTS LTD VERSUS MR. SHAH CONSTRUCTION (K) LTD [2004] 2 KLR 119. Holding 1 – 3 are relevant and these are:-**

(1) A plaintiff is entitled to apply to strike out a defence in a situation where the defence is frivolous and or vexatious. A mere denial is not a sufficient defence in most cases.

(2) An application to strike out a defence is intended to give quick remedy to a party that is being denied its claim by what may be described as a sham defence. It is however a procedure which is to be resorted to in very clear, plain and obvious cases.

(3**)** In an application to strike out a defence the court ought not to deal with any merits of the case, for

that is a function solely reserved for the judge at the trial as the court itself is not usually, fully informed so as to deal with the merits without discovery and without oral evidence tested by cross-examination in the ordinary way.

This court has applied the foregoing provisions of law and principles and makes findings that:

(1) The plaintiff's claim has foundation in the lower court proceedings as there is no dispute that the defendant applicant indeed represented the plaintiff/respondent in the lower court proceedings. The plaint shows clearly that indeed the claim for loss of user of the vehicle was pleaded but was not allowed by the lower court. The proceedings are not exhibited for this court to determine on what basis the same was disallowed. If it turns out that indeed there were documents which had been handed over to the defendant applicant in her professional capacity which were with held from the lower court, either deliberately or in advertently, is a matter for trial to decide whether the documents were with held or were non existent.

(2) There is no doubt that an advocate acting on behalf of a client at a fee is expected to display high standards of professionalism in the conduct of his/her clients, litigation and where a complaint arises as a result of that conduct leading to proceedings such as these ones, this raises a triable issue as regards whether the said counsel acted to the best of her best ability and displayed expected standards of professionalism or not is a trial issue. This cannot be dealt with by affidavit evidence. It calls for the calling of evidence, such evidence being tested in cross-examination and then a decision being made as to which is which.

(3) As to whether damages are payable to the magnitude claimed or any other amount is payable or not is a triable issue.

It is trite law that where there is even one triable issue the pleading should be spared. When determining sparing or not sparing a pleading it matters not whether it will succeed or not so long as it is not a sham.

While still on this prayer it has to be borne in mind that indeed the use of the ward "*dishonestly*" is a very strong word but from the decision by Hayanga J. in the **HORKAN INVESTMENTS LIMITED** case supra, it cannot be said that that answers to indecent, offensive abusive, unnecessary or bad faith. It is inter twined with the issue of whether there were document which were with held deliberately or not. In this regard the word does not answer the title scandalous.

As for frivolous it does not arise because where a client alleges to be aggrieved by the advocates handling of a matter he/she has been hired for which the client feels was not properly done and seeks vindication for, cannot be said to be frivolous. It is not frivolous because a cause of action based on professional negligence where a duty of care is owed exists in this country's legal system. In this respect it cannot be said that the Plaintiff/respondent is just trifling with the court. If evidence is tendered at the trial it will attract a reasoned argument as to whether there exists professional negligence or not.

As regards the test of a vexatious claim, where it is proved that a client and advocate relationship existed and the client is complaining about the rendering of professional services where the law allows such complaints to be raised and adjudicated upon, raising such a claim cannot be termed vexatious.

For the reasons given above prayer1 has been faulted and cannot be granted.

As for prayer 2, it is not disputed that party and party costs are owed to the defendant in the lower court proceedings. It is on the basis of this inability to pay met the defendant/applicant that security for payment of costs is being sought. Order XXV rule 1 under which security for costs is sought states "*In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party*". In view of this provision jurisdiction and the discretion to grant security for costs exists.

The foregoing provision has been explained in case law which can offer further assistance on the subject. In the case of **FARRAB INCORPORATED VERSUS BRIAN JOHN ROBSON AND OTHERS**

[1957] EA 441 CONNELL.J at page 442 quoting Lord HALISBURY, IN RE APOLLINAR IS COMPANY TRADE MARKS (2) [1891] 1 Ch.1 Paragraph had this to say:- "*His being so resident (i.e. abroad) makes a prima facie case for requiring him to give security; but it is subject to a well known ordinary exception that if there are goods and chattels of his in this country, which are sufficient to answer the possible claim of the other litigant and which would be available to execution the Courts will not order him to give security for costs*" *In the case of* ***SOUTHERN OIL SUPPLIES CO.LTD VERSUS SGS KENYA LTD [1991] KLR 131*** *Wambiliang J. as he then was at page 132 paragraph 10 had this to say* "*under rule 1 of Order XXV the Court has a discretion to order that security be furnished in any case where it thinks fit. The discretion is unfettered, subject only to the implied fetter upon all such discretion namely that they should be exercised judicially. As I see it there is a burden on the applicant for security to show cause why the relief should be granted"*. This observation gave rise to the holding in the quoted case which are:-

(1) Under rule 1 of order XXV the court has discretion to order that security be furnished in any case where it thinks fit.

(2) The discretion is unfettered, subject only to the implied fetter upon all such discretions, namely that they should be exercised judicially.

(3) There is a burden on the applicant for security for costs to show cause why the relief should be granted.

Applying the foregoing principles on security for costs to the facts herein it is apparent that in order to succeed the applicant has to lay before the court the following:

(1) That the Respondent or party sought to give security for costs has no attachable goods in the country of residence. Herein the plaintiff/respondent resides in Kenya. The reason why the defendant applicant asserts that the plaintiff/respondent has no attachable goods is firstly because he has failed to pay party and party costs, and secondly that although he has deponed that he is a teacher no proof of earnings has been exhibited. Neither has he given proof of existence of any attachable property. The courts findings on the defendant/applicants ascertain is that indeed it is common ground that party and party costs in the lower court has not been paid. The only excuse that he plaintiff respondent has given is that these were to come from the decretal sum as agreed by parties herein. This is correctly submitted as shown by annexture JKJI. However it is not disputed that the decree in the lower court has not been enforced and it is not knew when the same will be enforced. The respondent knew that the services were not rendered free of charge and were to be paid for. He has not displayed alternative means to pay for the same. He has not pleaded in his plaint presented to this court that party and party costs at the lower court await the outcome of this suit. In the absence of that the defendant/applicant is entitled to doubt the Respondents ability to pay and be anxious about costs for these proceeding should the plaint fail. Further justification is based on the fact that despite pleading that, he is a teacher and has means proof of such deponents are not supported by documentary proof such as display of a bank statement or recent pay slip or evidence of ownership of any other property.

In view of the above the court is therefore satisfied that the application has discharged the burden placed on her to show course why security for costs should be furnished. In the circumstance of the facts herein an order for security for costs is inevitable.

Having arrived at the conclusion that an order for security for costs is inevitable, the court has to bear in mind the cardinal principle governing issuance of the same that firstly it has an unfettered discretion to grant the same though with the usual accompanying caution that the same should be exercised judiciously. In exercising this discretion this court has to take into consideration the amount suggested by the applicant. In deciding whether to allow the amount suggested or any other, the court has to bear in mind the fact that it is not bound to order security based on the figure suggested. The court has a discretion to order an amount that is commensurate to the circumstances prevailing in the matter. Although there is no authority for this, same principles for awarding damages apply were namely that the same should not be inordinately high to make the relief prohibitive and in the process shut out a litigant

from the seat of justice for failing to meet the target. On the other hand the award should not be too low as to make the granting of the relief too ridiculous and inconsequential. Applying that to the facts herein, ordering a deposit of shs 500,000.00 to be provided by a party who has failed to pay costs of 125,000.00 will be too prohibitive and will in effect shut the respondent out from the seat of justice and prevent him from pursuing this matter. It should also be borne in mind that ordering provisions for security in favour of a litigant does not mean that that party's costs will be pegged or sealed by the amount ordered. There is room to execute for the amount over and above that which has been provided.

Taking the relevant circumstances pertaining to this case into consideration, ordering deposit of Kenya

ings 50,000.00 as security for costs in this matter is fair and reasonable and will serve ends of justice.

In conclusion the court finds that:-

(1) Prayer 1 of the application dated 31.8.2006 is refused because the plaint raises triable issues as outlined above.

(2). Prayer 2 is allowed to the extend that the plaintiff/respondent is allowed to deposit Kshs 50,000.00 as security for costs into court within 90 days from the date of the reading of this ruling.

(3) The said amount for security for costs will be deposited into court.

(4) The defendant applicant was justified in seeking security for costs and so will have costs of the application.

DATED, READ AND DEL**IVERED AT NAIROBI THIS 29TH DAY OF JUNE 2007.**

R. NAMBUYE

JUDGE