



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 590 of 2003

NDAFARA COMPANY LIMITED.....PLAINTIFF

VERSUS

PAUL KIBUGI MUIITE.....1ST DEFENDANT

GEORGE KANGETHE WARUHIU.....2ND DEFENDANT

MBAGE NJUGUNA NGANGA3RD DEFENDANT

R U L I N G

The plaintiff was a client of the defendant who were a firm of advocates. The relationship therefore was a client advocate's relationship.

The plaintiff in paragraph 5 of the plaint pleaded as follows:

“On various dates between 18th May 1990 and 3rd November 1994 the plaintiff deposited with the defendant a total sum of kshs 30, 664, 550 towards the purchase price of the said parcel of land.”

The plaintiff claims for refund of the amount of kshs 25, 374, 500 from the defendants who the plaintiff alleged failed to secure the said parcel of property for purchase.

All the defendants have filed similar applications under 6 Rule 13 (1) (b) (c) & (d) and Rule 16, of the Civil Procedure Rules and Section 4 of the Limitation of action Act. Those applications seek an order that the plaintiff's suit be struck out for being statute barred.

The defendants argue that the plaintiff cause of action arose between 18th May 1990 and 3rd November 1994, as pleaded in paragraph 5 of the plaint. The plaintiff alleges to have paid the amount claimed in the plaint of the firm of Waruhiu & Muite advocates. The defendant argued that the client and advocate's relationship is essentially contractual. That therefore the plaintiff's claim ought to have been filed within 6 years of 3rd November 1996. The defendants stated that the plaintiff's claim, under contract became statute barred on 3rd November 2003.

This present action was filed on 22nd September 2003.

The defendants, therefore submitted that the plaintiff's suit being statute barred, could not be maintained in law and that the same ought to be struck out.

Although the defendants relied heavily on the case: GROOM – V – CROCKER [1939] 1 K.B. 194, this

was later to be declared as not good law in the case of MIDLAND BANK – V – HETT STUBBS & KEMP [1979] Chan. 384 where the court found that a solicitor was not only liable in contract but also in negligence in his relationship with his client. The trend in commonwealth countries has also been to find that a solicitor is liable to their clients both in contract and in tort.

That as it may be, the court does not wish to delve deeply in that argument because what is for consideration may well be considered at final hearing.

The plaintiff opposed the defendant's applications by further adding to the likely liability of an advocate. It was argued on behalf of the plaintiff that the relationship is one in trust. Plaintiff's counsel relied on The Advocates (Accounts) Rules, on the definition of clients money. It is defined as:

“*Client's money*” means money held or received by an advocate on account of a person for whom he is acting in relation to the holding or receipt of such money either as an advocate or, in connection with his practice as an advocate as agent, bailee, trustee, stakeholder or in any other capacity.....”

Plaintiff's counsel argued that the amount paid by the plaintiff to the defendant was to be held by the defendant in trust of the plaintiff. He therefore concluded that the relationship between the plaintiff and defendant is not only contractual but is also in trust.

The parties did submit more arguments than are here in this ruling but I am of the view that in case of applications such as these which are brought by the defendant I cannot reach a conclusive decision whether or not that the relationship of the plaintiff and the defendant is purely contractual or it is also to be found in tort and whether a trust was created.

What I believe is correct is to look at the plaintiff's pleadings, which would include the request and particulars supplied. Looking at those pleadings I find that the plaintiff has pleaded that there existed a trust between the plaintiff and defendant. Whether or not that trust existed must be left to the trial judge to determine after hearing viva voce evidence. Since the plaintiff has pleaded that there existed a trust then under section 20 (b) of the Limitation of Action Act, the claim will not be time barred. That section provides that limitation period will not apply where an action is brought by a beneficiary under a trust which action is

“(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.”

But even if the plaintiff's claim was in contract does it not mean that it would be time barred from the time when the sale transaction failed and not when the last payment was made. It was not clear to me when this was, so I cannot determine when the suit would be regarded as time barred.

The end of the matter is

(1) That the 1st and 2nd defendant's application dated 8th September 2004 is dismissed with costs to the plaintiff.

2. That the 2nd defendant's application dated 8th June 2005 is dismissed with costs to the plaintiff.

MARY KASANGO

JUDGE

Dated and delivered this 28th March 2006

MARY KASANGO

JUDGE