



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

Civil Case 527 of 2005

COUNTRYSIDE SUPPLIERS LIMITED..... PLAINTIFF

VERSUS

TOM O. K'OPERE T/A T. O. K'OPERE & CO. ADVOCATES..... DEFENDANT

R U L I N G

I have before me an application to strike out the plaint herein. The application is expressed to be under Order V1 Rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application is made on the following principal grounds:-

(1) That the suit is misconceived, scandalous, frivolous, vexatious and an abuse of the court process purely meant to embarrass the defendant and prejudice and/or delay the recovery of legal fees due to the defendant from the plaintiff on several matters already taxed.

(2) That by the time summary judgment was entered in HCCC No.573 of 2004 on 8.3.2005 for the plaintiff (Priscillah Nyambura Njue T/A Moscow Airways) against Countryside Suppliers Limited (the plaintiff herein) the plaintiff had already withdrawn instructions from the defendant on 21.12.2004.

(3) That following the withdrawal of instructions by the plaintiff from the defendant the plaintiff instructed M/S E.K. Mutua & Co. Advocates on the same day 21.12.2004, filed a complaint against the defendant on 24.12.2004 with the Advocates complaints commission, the Law Society of Kenya and the Kenya Police (Bank Fraud Investigation Unit) and the Advocate/Client relationship between the client and the plaintiff ceased.

(4) That the Advocate/Client relationship between the defendant and the plaintiff having ceased in December 2004, before entry of judgment herein on 8.3.2005, there is no legal foundation of this suit and the plaint should be struck out and the suit dismissed with costs.

(5) That the plaintiff had admitted its indebtedness to Priscilla N. Njue T/A Moscow Airways in letters in its brief to the defendant and even after filing of the suit in HCCC No. 573/04 hence no amount of defence, expertise, legal manouvres or delay was going to stop the inevitable judgment being entered in favour of the said creditor.

(6) That the defendant as a matter of abundant precaution even attended court on 26.1.2005 in HCCC No.573/04 and indicated that the plaintiff had withdrawn instructions from the defendant firm and instructed E. K. Mutua & Co. (Mr. Mutua was present in court but had not filed Notice of Change) and a date was given for 9.2.05 convenient between Mr. Mutua & Mr. Kimani who was representing the plaintiff therein.

(7) That the filing of Notice of Change was a simple formality to follow and the refusal by E.K. Mutua & Co. Advocates to file a Notice of Change of Advocates or give professional undertaking for the defendant's fees did not restore any obligations or professional duty upon the defendant.

(8) That the defendant filed his Advocate/client bill of costs on 10.1.05 and the firm of E.K. Mutua & Co. Advocates came on record on 17.1.2005 before the hearing thereof on 19.1.2005 and both the plaintiff and E.K. Mutua should have made adequate arrangements for representation.

(9) That by its written instructions of 2.11.2005, the debt schedule of 7.10.2004 and the letter of 10.1.2005 it is clear that the plaintiff herein had admitted the debt to Priscillar Nyambura T/A Moscow Airways and no magic or legal gimmicks was going to save the plaintiff from the debt hence this suit is spurious and a mere attempt to avoid a clearly admitted debt.

The application is supported by an affidavit sworn by Tom Oduor Kopere the proprietor of the defendant firm of Advocates. The affidavit recites the grounds set out above.

When the application came up for hearing on 4.7.2006, the defendant/applicant was represented by Learned counsel Adere but there was no representation for the plaintiff by counsel or its officers. The application therefore proceeded ex-parte. Counsel for the applicant took me through the grounds on the face of the application and the affidavits emphasizing that the plaintiff seeks judgment for sums entered against it in HCCC 573 of 2004 in which the defendant was initially instructed to represent it. However, bad blood developed between them and the relationship between the plaintiff and the defendant ceased to be one of Client/Advocate. Indeed the plaintiff got the services of another firm of advocates who however did not file a Notice of Change of Advocates. The new firm represented the plaintiff at the taxation of the defendant's Advocate/client Bill of Costs. In those premises the defendant was not obligated to continue representing the plaintiff in the said HCCC No. 573 of 2004. There was therefore no basis for the suit. Counsel further emphasized that the material availed to the defendant by the plaintiff clearly revealed that the plaintiff had unequivocally admitted the plaintiff's claim in the HCCC No.573 of 2004. Indeed the judgment in that case was inter alia entered against the plaintiff herein on its admission. In counsel's view the plaintiff's present claim against the applicant is a vain attempt to pass the buck to the applicant.

I have perused the pleadings, the affidavits, the annexures and have heard counsel for the applicant/defendant. The plaintiff's claim is founded in negligence. The defendant is alleged to have been negligent in the manner in which he represented the plaintiff/respondent in HCCC No. 573 of 2004 with the result that judgment was entered against the plaintiff for the sum claimed herein.

The affidavit evidence reveals that by the time judgment for the sum claimed was entered against the plaintiff in HCCC No. 573 of 2004, the relationship between the plaintiff and the defendant/applicant had ceased to be a relationship that one would normally describe as a professional relationship of an Advocate and his client. The evidence further reveals that by the time summary judgment was entered against the plaintiff (then defendant) in HCCC No.573 of 2004, the defendant was no longer counsel for the plaintiff. Indeed bad blood having developed between the plaintiff and the defendant it was no longer possible for the defendant to competently act for the plaintiff.

I have also perused the ruling of my Learned brother Njagi J dated 1.8.2005 on the application for summary judgment in HCCC No.573 pf 2004. That is the application that the defendant is said to have failed to defend on behalf of the plaintiff. The Learned Judge in his ruling at page 8 stated as follows:-

“The total effect of all these utterances is that the defendant has thereby unequivocally admitted owing the plaintiff the sum of KShs.5,095,000/- claimed in the plaint. The later day denial contained in the defence filed herein on 8.11.2004 is clearly an after thought. As such it is nothing more than a smokescreen to disguise its liability so frankly acknowledged previously.”

It is obvious therefore that the Learned Judge had no doubt that the plaintiff owed the sums being claimed in this suit. The plaintiff has in the circumstances no basis for claiming the same sums from the

defendant. I remind myself that striking out any pleading should only be ordered in plain and obvious cases. In my view however, for one to lodge a claim against a party knowing very well that one has admitted liability for the same claim is scandalous, frivolous and vexatious and a pleading which is scandalous, frivolous and vexatious will obviously prejudice, embarrass and delay the fair trial of the action. Such a pleading also amounts to abuse of the process of the court.

The upshot of this matter is that the plaint herein is struck out with costs to the defendant.

Orders accordingly.

DATED at NAIROBI this 21ST day of JULY, 2006.

F. AZANGALALA

JUDGE

21/7/2006

DATED and DELIVERED on 21ST day of JULY, 2006.

M. KASANGO

JUDGE

21/7/2006

Read in the presence of:-