



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 345 OF 2002

KENYA MEDICAL ASSOCIATION HOUSING

CO-OPERATIVE SOCIETY LTD PLAINTIFF

VERSUS

THE CO-OPERATIVE BANK OF KENYA LTD DEFENDANT

RULING

The Plaintiff is Kenya Medical Association Housing Co-operative Society Limited described as a limited liability company. The defendant is the Cooperative Bank of Kenya Limited and is incorporated in accordance with the Co-operative Societies Act 1997.

It is averred in a plaint filed on behalf of the Plaintiff by M/s Waruhiu K'Owade and Ng'ang'a Advocates that the Plaintiff requested for and received bridging finance in the sum of Kshs.18,750,000/=. The acceptance was contained in a letter dated 1st September, 1997. The Plaint itself is dated 6th March, 2002. It is further averred that the said bridging loan was secured by a legal charge over L R No 18589 which belonged to JACKIM LIMITED.

M/s Oraro & Rachier Advocates acted for the Plaintiff as purchaser, M/s Kimani Kairu & Company Advocates acted for the vendor and M/s Kibuchi & Company Advocates acted for the Co-operative bank which is the defendant herein. The defendant released the loan sum of

Kshs.18,750,000/= directly to the vendor. This must have been in or about May 1998.

At paragraph 10 of the Plaint the Plaintiff pleads its 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 owed by the Defendant to the Plaintiff and amounted to negligence on the part of the defendant.”

Particulars of negligence and breach of duty of care are given at paragraph 10 of the plaint.

The defendant filed its defence on 10th May, 2002 through M/s Ochieng Oduol Onyango & Ohaga Advocates. At paragraph 5 the defendant admits paragraphs 3 and 4 of the plaint but adds that:

“Save that the letter of offer specifically provided that payment was to be made by bank cheque for Kshs.18,750,000/= issued directly to the vendor.”

Again at paragraph 7 of the defence, the defendant avers that:

“It released a cheque for Kshs.18,750,000/= directly to the vendor, Jackim Limited on 12 th May, 1998 in compliance with the express terms of letter of offer and upon notification by its advocates, Kibuchi & Company, that the process of registration had been completed.”

At paragraph 14 the defendant avers that:

“The loss allegedly suffered by the Plaintiff was not within the defendant’s contemplation as the fact of payment of the deposit and additional expenses was not disclosed to the defendant at the time when the plaintiff accepted the terms of t he defendant’s letter of offer on 23 rd September, 1997 and the loss allegedly suffered is consequently remote and unrecoverable.”

In a Reply to Defence filed by M/s Waruhiu K’Owade and Ng’ang’a Advocates on 23rd May, 2002, the Plaintiff at paragraph 3 says:

“In response to paragraph 4, the Plaintiff contends that the dispute is actually between the bank and its customer which dispute can be adjudicated by the High Court which has jurisdiction over the same .

When the pleadings closed, the defendant filed the application dated 4th June, 2002 in which the defendant prays that the plaint be struck out and the suit against the defendant be dismissed. This application is made under Order 6 Rules 13 1 (a) and 16 of the Civil Procedure Rules. The application is based on one ground only namely:

“That the purported cause of action being in negligence and having arisen more than three (3) years prior to the filing of the suit is time - barred and cannot be sustained in view of the express provisions of the Limitation of Actions Act Chapter 22.”

The application was opposed. The Plaintiff’s Counsel filed Grounds of Opposition on 22nd July, 2002. At paragraph 2 of the Grounds of Opposition the Plaintiff’s Advocates state that the “the defendant’s application is misconceived and cannot lie on the basis that the cause of action herein arises out of the negligence performance of contractual obligations.”

Mr Ohaga in support of the said application restated what is contained in the said application. He submitted that under Section 4 (2) of the Limitation of Actions Act Cap 22 any suit founded on negligence or tort must be brought within 3 years of the accrual of the cause of action. In his view the present suit should have been filed at the latest on 19th May, 2001. The suit was filed on 19th March, 2002 which was 3 years and 10 months after the accrual of the cause of action. Mr Ohaga accordingly submitted that the suit was time barred. It cannot be sustained and should be struck out. He further submitted that the Grounds of Opposition filed do not answer the basis of his application.

Mr Njagi in reply, relied on the Grounds of Opposition dated 19th July, 2002 and filed on 22nd July, 2002. He submitted that the negligence relied upon in the Plaint arose from breach of contractual obligations. According to Mr Njagi the limitation period for the Plaintiff’s cause of action is not 3 years.

Under Section 4 (2) of the Limitation of Actions Act Cap 22 an action founded on tort may not be brought after the end of 3 years from the date on which the cause of action accrued. Section 4 (1) (a) of the same act provides that actions founded on contract may not be brought after the end of 6 years from the date on which the cause of action accrued.

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 Plaintiff appears to have applied for a bridging loan of Kshs.18,750,000/=. The defendant by its letter dated 1st September, 1997 accepted to provide the Plaintiff the said Kshs.18,750,000/= and paid the same to JACKIM LIMITED. Paragraph 7 of the defence referred to above confirms the payment which was

made allegedly in compliance with the express terms of the letter of offer aforesaid.

According to the defence, paragraph 14 thereof already referred to earlier, the Plaintiff accepted the terms of the defendant's letter of offer on 23rd September, 1997. It appears from the above that the Plaintiff's relationship with the defendant was a contractual one. A borrower on the one hand and a lender on the other hand.

It is also pleaded in the Reply to Defence already referred to above that the dispute between the plaintiff and the defendant is that of a customer and its bank. In my view that relationship is a contractual one. In my opinion although the plaintiff does not specifically say that the defendant is in breach of an implied term of the contract between it and the defendant that is suggested by the pleadings. I therefore hold that Section 4 (2) of the Limitation of Actions Act is not available as a defence to the Plaintiff's claim which is founded on contract.

The defendant's application dated 4th June, 2002 is accordingly dismissed with costs.

Dated this 6th day of February, 2004.

F. AZANGALALA

JUDGE

6.4.2004