



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 166 OF 2016

MUTURI KIGANO.....1ST PLAINTIFF

VERSUS

JOHN NJENGA MUNGAI.....1ST DEFENDANT

ALICE WAHOME2ND DEFENDANT

BEATRICE KARIUKI.....3RD DEFENDANT

NYABERI PATRICK.....4TH DEFENDANT

EVANS MONARI5TH DEFENDANT

RULING

1. Vide a plaint dated 29th June, 2016 the Plaintiff sued the Defendants jointly and severally for the sum of Ksh.18,000,000/=, costs and interest.
2. It is pleaded in the Plaint that in July 2010, the Plaintiff as an advocate entered into a retainer agreement with the 1st Defendant who was a creditor with a claim of Ksh.58,000,000/= in the Estate of the Late Mbiyu Koinange (hereinafter Estate) in Succession Cause Nbi. HC. No. 527 of 1981 (hereinafter Succession Cause). The claim of Ksh.18,000,000/= is stated to be legal fees and pecuniary advances made to the 1st Defendant by the Plaintiff which sum of Ksh.18,000,000/= was to be deducted by the Plaintiff from the money paid from the Estate.
3. It is pleaded that on 18th April, 2018 the 1st Defendant filed a Notice to Act in person in the Succession Cause and entered into a consent with the 1st-4th Defendants for the payment of Ksh.41,000,000/= from the Estate. That vide a letter dated 12th April, 2012, the 1st - 5th Defendants caused the said sum of Ksh.41,000,000/= to be paid from the Estate's escrow account to the account of the 1st Defendant. That the 1st Defendant failed to remit the Ksh.18,000,000/= to the Plaintiff, hence the claim for breach of contract.
4. In the alternative, the Plaintiff's claim against the 2nd - 5th Defendants as Advocates for the Administrators in the Estate is stated to be for wrongfully and surreptitiously with a view to deceive, induced and procured the 1st Defendant to breach the agreement.
5. That alternatively, the 2nd - 5th Defendants had a contractual duty to fully account and/or disclose to the Plaintiff and to pay the Plaintiff the sum of Ksh.18,000,000/=.
6. The 1st Defendant did not enter appearance and Interlocutory Judgment was entered against him on 21st September, 2016.
7. The 2nd - 5th Defendants entered appearance and filed their separate Statements of Defence denying the Plaintiff's claim. The 2nd - 5th Defendants subsequently filed applications seeking orders that the Plaintiffs suit be struck out.
8. The 2nd Defendant filed application dated 28th October, 2016. The gist of the application is that there is no privity of contract between the 2nd Defendant and the Plaintiff and therefore the 2nd Defendant owes no contractual obligation to the Plaintiff. It is further stated that the 2nd

Defendant acted on the instructions of her client who was one of the Administrators in the estate.

9. The 3rd Defendant filed an application dated 18th October, 2016. The grounds are that the 3rd Defendant was an agent of a disclosed principal; that the Plaintiff has filed other proceedings in the succession cause; that the 3rd Defendant was not a party to the retainer agreement and that the claim for alleged procurement of the 1st Defendant to breach the agreement is time barred.

10. The 4th Defendant's application dated 11th November, 2016 is predicated on the grounds that there was no contractual agreement between the 4th Defendant and the Plaintiff and that the 4th Defendant was retained as an advocate to act in the Succession Cause on behalf of two Administrators.

11. The 5th Defendant's application dated 24th March, 2017 is premised on the grounds that the 5th Defendant is not privy to the agreement between the Plaintiff and the 1st Defendant and owed no legal obligations to the Plaintiff; that the 5th Defendant was handling the brief in the Succession Cause on behalf of the firm of Daly and Inamdar Advocates and the instructions were not personal to the 5th Defendant and that the claim based on inducement of the 1st Defendant is time barred.

12. In the replying affidavit filed in opposition to the applications, it is stated that the plaint clearly brings out the claim of inducement for breach and/or failure to account which acts were perpetrated by the Applicants in their personal capacity. That the said cause of action is not statute barred. It is stated that the suit raises *bona fide* reasonable causes of action and that the applications have been brought after inordinate delay.

13. I have considered the application, the responses to the same and the written submission filed by counsel for the respective parties.

14. Striking out a pleading is a discretionary power. The principles applicable are set out for example in the Case of **Abubakar Zain Ahmed v Premier Savings and Finance Limited** (formerly Known as **Mombasa Savings & Finance Limited**) & 4 others CA No. 109 of 2004 where the Court of Appeal stated as follows while quoting from the case of **D.T Dobie & Co (K) Ltd v Muchina [1982] KLR**:

“the discretion will be exercised by applying two fundamental, although complementary principles. The first principle is that the parties will not lightly be driven from the seat of judgment, and for this reason the court will exercise its discretionary power with the greatest care and circumspection, and only in the clearest cases. The second principle is that a stay or even dismissal of proceedings may “often be required by the very essence of justice to be done, so as to prevent the parties being harassed and put to expense by frivolous vexatious or hopeless litigation.”

15. As stated by Madan, J in the case of **D.T.Dobie (supra)**:

“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

16. It was argued on behalf of the 2nd -5th Defendants that there was no privity of contract between them and the Plaintiff. However, the claim for breach of contract as stated in paragraph No. 10 of the plaint is against the 1st Defendant only.

17. The claim against the 2nd – 5th Defendants is in the alternative. Paragraph No. 11 of the plaint reflects that the 2nd – 5th Defendants have been sued as the Advocates for the administrators of the estate of the Late Mbiyu Koinange. Thus the 2nd -5th Defendants are agents of disclosed principals, as advocates for the Administrators of the estate. In the case of **Victor Mabachi & another v Nurtun Bates Ltd [2013] eKLR** the Court of Appeal while referring to its own decision in the case of **Anthony Francis Wareheim T/a Wareheim & 2 others v Kenya Post Office Saving Bank Civil Appl. No. Nai. 5 & 48 of 2002** stated as follows:

“it was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principal of common law that where the principal is disclosed, the agent is not to be sued. Furthermore, the court having found on the evidence that the second and third appellants were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the first appellant who had been sued as the principal.”

18. The consent order that is the genesis of this case is stated in paragraph No. 8 of the plaint to have been entered into on 18th April, 2012. Paragraph No. 9 of the plaint reflects that vide a letter dated 12th April, 2012, the 2nd - 5th Defendants caused the sum of Ksh.41,000,000/= to be paid from the Estate's escrow account to the 1st Defendant's account. Bearing in mind that the claim against the 2nd – 5th Defendants is that they induced and procured the 1st Defendant to breach the contract, the claim was time barred. By the time the plaint was filed on 29th June, 2016 more than three years had lapsed.

19. Section 4(2) of the Limitations Act Cap 22 Laws of Kenya stipulates as follows:

“An Action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.”

20. The plaint in paragraph 8 and 9 states the cause of action accrued in April, 2012. Although the Plaintiff’s counsel submitted that time starts to run after the discovery of the inducement, no other dates have been stated in the plaint in respect of the inducement.

21. In paragraph 14 of the plaint, it is pleaded that the 2nd – 5th Defendants breached their contractual duty to fully account and/or disclose to the Plaintiff and pay to the Plaintiff the sum of Ksh.18,000,000/=. The agreement referred to in the plaint is stated to be between the Plaintiff and the 1st Defendant. The 2nd - 5th Defendants are not parties to the said agreement.

22. With the foregoing, the applications have merits and I allow the same. The suit against the 2nd – 5th Defendants is hereby struck out with costs.

Date, signed and delivered at Nairobi this 3rd day of Dec., 2019

B. THURANIRA JADEN

JUDGE