



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: GITHINJI, MAKHANDIA, SICHALE JJ.A)

CIVIL APPEAL NO. 270 OF 2010

BETWEEN

YASMIN ABDULKARIM

T/A Y.A. ALI ADVOCATES.....APPELLANT

AND

SOUTHERN CREDIT BANKING

CORPORATION LIMITED.....RESPONDENT

(Being an appeal from the Decision of (F. Azangalala J) delivered

on the 22nd April 2010 at the High Court of Kenya Mombasa)

in

(H.C.C.C. No. 34 OF 2009)

JUDGMENT OF THE COURT

This is an appeal from the Ruling of the High Court (Azangalala J, as he then was) whereby the court dismissed the appellant's application seeking the striking out of the respondent's suit.

By plaint dated 28th July 2009 **Southern Credit Banking Corporation Limited, (Bank)**, the respondent herein, claimed from the appellant, an advocate, damages for breach of professional legal services contract by way of negligence. The Bank averred in the plaint, *inter alia*, that it entered into a professional legal services contract with the appellant in 1996 on the terms specified; that on 15th November 1995 the Bank instructed the appellant to prepare a legal charge over plot Title No. **Mombasa/Block X/374** to secure a loan of **shs. 4,000,000/=** to be granted to one **Titus James Kisia (borrower)**; that the appellant prepared the documents and relying on the appellant's professional advice disbursed loan funds to the borrower; that the borrower ultimately defaulted and the Bank demanded payment of arrears, of **kshs. 2,193,377/=** from the borrower; that the borrower objected and filed a suit **HCCC No. 467 of 2000** against the Bank and the Bank instructed the appellant to file a defence and counter claim which she did; that by a judgment dated 4th June 2004 the High Court allowed the

borrower's suit and dismissed the Bank's counter claim holding, *inter alia*, that the charge dated 11th January 1999 was invalid having been registered under the wrong regime of the law; that relying on the advice of appellant the Bank filed **Civil Appeal No. 202 of 2012** which was ultimately dismissed on 25th July 2007 for failure by the appellant to attend court.

The particulars of breach of the professional legal service contract pleaded by the Bank included failure to act diligently in drawing the charge dated 11th January 1996, failing to advise the Bank that the charge was incurably defective and could not protect the interest of the Bank and failing to take the basic necessary steps in the prosecution of the appeal.

In the suit, the Bank claimed shs. **4,550,391/75** comprising of legal fees: shs. **3,357,700/50** paid to the borrower; shs. **825,347,125** as party and party costs paid to borrower's advocates and other charges.

The appellant filed a Defence dated 19th August 2009 in which she admitted that the professional legal service contract was entered into and that it contained the terms pleaded but there averred that were other terms.

The appellant also admitted that she prepared the charge: that the borrower filed the suit and judgement was entered in terms pleaded and that an appeal was filed on her advice.

However, the appellant denied negligence and asserted that she executed the charge diligently; that the High Court also made other findings including that the chargor, (borrower), had fully paid the loan and indeed had overpaid by shs. **2,717,363/64**; that she failed to attend court at the hearing of the appeal because the Bank had withdrawn instructions from her; that the bank did not suffer any loss as a result of the alleged breach and that if the Bank suffered any damages it was due to its own negligence.

The appellant also pleaded the defence of limitation alleging that the course of action relating to improper drawing of the charge arose in 1996 when the charge was registered.

The Bank filed a Reply to the Defence and subsequently filed an Amended plaint to include a claim for damages for breach of contract.

In the meantime, the appellant filed an application under the former order **6 Rule 13 (1) B (1), and 16** of Civil Procedure Rule (CP Rules)

seeking an order that the Bank's suit be struck out on two grounds, namely, that:-

- “ 1. *The suit is scandalous, frivolous and vexatious as plaintiff is seeking damages without having suffered any damage from the alleged cause of action.*
2. *The suit is otherwise an abuse of the process of the court and it has been filed way out of the period of limitation in both contracts and torts.*
3. *The plaintiff's claim does not exist”*

The application was supported by the affidavit sworn by the appellant which dealt with two issues, that is, the issue of limitation and the issue of the damages claimed. She deposed that the claim was time barred; that the Bank was claiming damages on account of moneys it has already been paid and that the damages claim was irrecoverable.

The High considered the application and made a finding, that the cause of action crystallised when the decision in **HCCC No.467 of 2000** was delivered and was not therefore time barred. Further, the High Court made a

finding that whether damages claimed were recoverable is a matter for the trial court. The trial judge

concluded:

“I cannot say that the plaintiff's claim against the defendant is obviously unsustainable or that it is filed merely to vex the defendant or that it has been filed in bad faith or that it is intended to oppress the defendant.”

The appeal is against those findings.

Mr.Odongo, learned counsel for the appellant condensed the six grounds of appeal into two grounds namely:- whether the suit pending in the High Court is time barred and whether the suit is vexatious, frivolous and an abuse of the process of the court.

On the issue of limitation, **Mr.Odongo** contended that the cause of action arose on 11th January 1996 when the invalid charge was prepared and not on 4th June, 2004 when the High Court delivered the Judgement declaring the charge invalid; that the date of judgment can only be the date when the fact of invalidity was discovered which date can only be a basis for extending the limitation period under section 27 of Limitations of Actions Act.

Mr.Odongo complained that the High Court made a final determination of the issue of limitation.

Mr.Umara, learned counsel for the Bank, maintained that the cause of action arose when Judgement of the High Court was delivered.

By the Judgement delivered in **HCCC NO. 467 of 2000** on 4th June 2004 the High Court held in part:

“This charge is admittedly defective. The land purported to be charged is registered under the Registered Land Act, Cap 300 Laws of Kenya while the purported charge was made under the Registration of Titles Act, Cap 281. The two Acts are quite different and for Registered Land Act, documents of charge must be drawn in the prescribed forms.”

The High Court ultimately declared the charge invalid, *null* and *void*.

The respondent's claim against the appellant was specifically based on breach of professional legal services contract. There was no dispute that the

limitation period is 6 years as provided for section 4(1) (a) of the Limitation of Actions Act. Until the Judgement of the High Court was delivered, the charge prepared on 11th January 1996 was taken by both the Respondent and the appellant as a valid security for the money advanced to the chargor.

The Respondent had instructed the appellant to prepare a charge and was relying on the advice of the appellant. Having entrusted the appellant with the task of preparation of the charge, the respondent would not have known that the charge was invalid unless the appellant advised it so. Apparently, the appellant did not advise the respondent and it was not until the declaration by High Court that it came to the knowledge of the respondent that the charge could not be enforced as a security for the loan. In the circumstances, we agree with the finding of the High Court that the cause of action crystallised when the High Court delivered its decision. In our view, it is the declaration by the High Court that the charge was invalid, *null* and *void* that gave rise to the cause of action.

The appellant by the application asked the Court to strike out the suit on the ground *inter alia* that it was time barred by the Limitation of Actions Act.

The issue of limitation is a point of law which had to be decided in *limine*. After raising the issue the appellant cannot now complain that the High Court determined the issue conclusively. That is what the

High Court was supposed to do to make a preliminary finding whether or not the suit was time barred.

It is apparent from the application filed in the High Court and from the supporting affidavit that the basis of the claim that the suit was frivolous, vexatious, scandalous and an abuse of the process of the court is that the damages claimed are allegedly irrecoverable.

However, it is clear from the plaint that the respondent pleaded substantial facts on which the cause of action is based.

It relies on facts as constituting a cause of action on both liability and damages. Most of the primary facts are admitted by the appellant in the statement of Defence.

Similarly, the appellant has pleaded facts in her Defence on which she relies to show that she is not liable for breach of contract and that the claim for damages does not arise. It is clear that several genuine triable issues arise from the pleadings which should go for trial. It seems that the appellant was asking the High Court to determine the merits of some claims particularly the claim for damages at a preliminary stage. That is the function of the trial court. We find, as the High Court, that the suit is far from being frivolous, vexatious or an abuse of the process of the court.

In the result the appeal is dismissed with costs to the respondent. Orders accordingly.

Dated at Malindi this. 12th day of June 2013.

E. M. GITHINJI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL