REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Commercial Civil Suit 34 of 2009

SOUTHERN CREDIT BANKING CO-OPERATION LIMITED……..PLAINTIFF

VERSUS

YASMIN ABDULKARIM

T/A Y. ALI ADVOCATES…….. DEFENDANT

RULING

I have before me an application for an order striking out the plaintiff's suit. The application has been brought under the provisions of Order VI Rules 13 (1) (b), (d) and 16 of the Civil Procedure Rules on the grounds that the suit is scandalous, frivolous, vexatious and an abuse of the process of the court and further that it has been filed way out of the period of limitation.

In the amended plaint sought to be struck out, the plaintiff claims special and general damages arising from an alleged breach of a service contract. The plaint was amended on 29th August 2009 and describes the defendant as an advocate of the High court of Kenya. It is averred, in paragraph 3, that by 1996, there existed between the plaintiff and the defendant a professional legal service contract. It is further averred, in paragraph 4, that implied in the said service contract were terms that the plaintiff would instruct the defendant on various legal matters and the defendant was to act on those matters professionally and not expose the plaintiff to danger, damage and/or loss and further that the defendant was to act diligently and not provide the plaintiff with wrong legal counsel and representation. The plaintiff further avers, in paragraph 5, that on 15th November 1995, it instructed the defendant to prepare a legal charge over plot No. Mombasa/Block X/374 to secure a loan of Kshs. 4,000,000/= to be granted to one Titus James Kisia. The defendant prepared and registered a charge over the said parcel and the plaintiff, relying on the defendant's advice, disbursed the loan funds to the said Titus James Kisia.

In paragraph 6, it is averred that in 2000, there was default and the plaintiff initiated recovery process through the defendant which process was resisted by the said borrower in HCCC No. 467 of 2000 which suit was determined against the plaintiff with the court finding that the charge prepared by the defendant was invalid. It is then averred, in paragraph 8, that on the defendant's advice the plaintiff lodged an appeal against the said decision which appeal was lost because the defendant failed to take the necessary steps to prosecute the same. It is in those premises that the plaintiff has made the various claims in paragraph 10.

In the defence delivered on 19th August 2009, the defendant admits the service contract and the instructions to prepare and register the said charge but avers that she executed the said charge diligently and presented it for registration under the relevant land registry. The proceedings by the borrower in HCCC No. 467 of 2000 are admitted and so is the result thereof. With regard to the appeal, the defendant avers that the plaintiff instructed other advocates and thereby caused the defendant not to proceed with the appeal. In paragraph 13, the defendant avers that the plaintiff's claim is statute barred. In paragraph 15, the defendant avers that if the plaintiff suffered any damage which she denies the same

was caused by its own negligence and the defendant is not liable for the loss thereby suffered. In paragraph 17, the defendant avers that the plaintiff has in any event suffered no loss.

The plaintiff has filed a reply to the defence in which it denies that the suit is time barred and further denies the negligence alleged in the defence. It also reiterates the contents of the plaint. The plaintiff has opposed the defendant's application contending in the replying affidavit sworn by its Manager Recoveries, that its cause of action is founded upon the judgment in HCCC No. 467 of 2000 which was delivered on 4th June 2004 and is therefore not time-barred.

So, should the plaint be struck out on the ground that it is scandalous, frivolous and vexatious? On the basis of the material placed before the court, can it conclusively be said that the plaintiff is seeking damages without having suffered any? A claim which is scandalous may be degrading or may allege dishonest conduct or impute bad faith without any basis (**see the Supreme Court Practice 1985 Volume 1 part page 312**). A pleading which is frivolous or vexatious lacks in seriousness and tends to annoy. Having perused the plaint, I detect no averment which can be described as scandalous, frivolous or vexatious. The attack by the defendant in that regard is in my view without basis.

Does the claim offend the Limitation of Actions Act? The defendant makes that attack on the ground that the charge which is the basis of the plaintiff's claim was registered in 1996 over 13 years ago. The plaintiff's answer is that it had no cause of action before the decision in HCCC No. 467 of 2000 which decision was delivered on 4th June 2004. In that event its claim is not statute barred. There is much force in the plaintiff's argument. There is no way the plaintiff would have made any claim against the defendant based on the invalid charge before the decision in 2004. The defendant's position during the trial of HCCC No. 467 of 2000 was that the impugned charge was valid. It was indeed on the basis of the charge that the defendant counter-claimed in the said suit. It is also the belief in the validity of the charge that an appeal was lodged against the decision in the said case. The defence in the said case was presented and argued by the defendant herein. She is also the one who lodged the said appeal. In this suit, the defendant pleads as follows in paragraph 5 of her defence:-

> **"5. With regard to paragraph 5 of the plaint the defendant avers that she executed the said charge diligently and presented it to the land registry for registration under the relevant Law after approval by the plaintiff."**

The paragraph is a tacit denied of the invalidity of the charge. The defendant maintains that she executed the charge diligently and presented it for registration under the relevant Law. In the premises, there would have been no basis to make any claim against the defendant. She had prepared the charge as instructed and the charge had been presented for registration under the relevant Law and had been duly registered. Prima facie therefore, the plaintiff's cause of action crystallized when the decision in HCCC No. 467 of 2000 was delivered. That being my view of the plaintiff's claim, I do not agree with the defendant that the plaintiff's suit is statute barred under the Limitation of Actions Act.

The defendant has also argued that *"there cannot be damages without damage."* In the defendant's view there is no proof that the action complained of caused the plaintiff loss or damage. To buttress her argument the defendant exhibited statements evidencing payments made for the sums claimed. With all due respect to the defendant, the nexus between the plaintiff's claims and the said statements cannot conclusively be fixed without oral evidence on the entries in those statements. The defendant further seeks to explain why she should not be held liable for certain payments made by the plaintiff such as the legal fees paid to M/S A. B. Patel and Patel Advocates. That explanation may be plausible. It may even succeed at the trial. But it does not render the plaintiff's claim hopelessly unsustainable to qualify as an abuse of the process of the court. Abuse of the process of the court connotes that the process of the court must be used bona fide and properly and not as a means of vexation and oppression (see **The Supreme Court Practice 1985 Vol. I Part 1 page 314**). 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.

To strike out a pleading is a very draconian remedy. In **D. T. Dobie & Company (Kenya) Limited – v – Muchina 1982 1 KLR,** Madan J.A. as he then was held as follows:-

8) The power to strike out should be exercised only after the court has considered all facts but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the cause.

9) The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out."

I have accordingly refrained in this application from expressing opinions that would bind the trial Judge at the trial. I also do not consider the plaintiff's suit so weak that it is beyond redemption. I will therefore dismiss the defendant's application with costs.

It is so ordered.

DATED AND DELIVERD AT MOMBASA THIS 22ND DAY OF APRIL 2010.

F. AZANGALALA
JUDGE

Read in the presence of:-
Hamza for the Applicant and Mutungi for the Respondent.

F. AZANGALALA
JUDGE
22ND APRIL 2010