



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MILIMANI LAW COURTS

CIVIL CASE NO. E001 OF 2021

BHARMINDER SINGH OSAHAN.....PLAINTIFF

VERSUS

HELICOPTERS INTERNATIONAL LIMITED.....DEFENDANT

RULING ON PRELIMINARY OBJECTION

BACKGROUND

The Plaintiff filed a Plaint dated **24th November 2020** seeking judgment against the Defendant for the sum of **USD. 240,000**. Being cost of services provided and **Kshs.128, 953 plus GBP. 5,911.11**. for the flight tickets purchased by the Plaintiff while on assignment of the defendant. The amount arose from services rendered by the Plaintiff pursuant to the Defendant engaging the Plaintiff as a Partner, shareholder, technical director to fulfil roles of Base maintenance and logistics manager, engineer and quality lead to carry out certain works.

NOTICE OF PRELIMINARY OBJECTION

The Defendant filed a Notice of Preliminary Objection dated **23rd March 2021** on the grounds that; -

- a. The Plaintiff lacks locus to institute this suit against the Defendant for want of privity of contract.**
- b. The Plaintiff's entire suit as against the Defendant is misconceived, incompetent, fatally defective and should be struck out or dismissed.**

DEFENDANT'S SUBMISSIONS

The Defendant submits that the parties to the draft agreement are indicated as Mandeep Sign Osahan and Bharminder Singh Osahan. The doctrine of privity of contract postulates that a contract cannot confer right or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In **Dunlop Pneumatic Tyre Co Ltd versus Selfridge & Co Ltd [1915] AC 847**, Lord Haldane LC rendered the principle thus;

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.

The Defendant submits that it is wrongly enjoined in the plaintiff's suit as it was not a party to the agreement executed between the Plaintiff and Mandeep Singh Osahan.

PLAINTIFF'S SUBMISSIONS

The Plaintiff submits that as regards privity of contract it is trite law that a company being an inanimate body can only act through its directors. It would therefore be absurd and impossible for a company to sign a document. It can only do so through its directors.

Further, that in any event there is clear evidence of privity of contract, the Plaintiff has exhibited various emails which can easily show that the Plaintiff was working for the Defendant. It is not in doubt that Mandeep Singh was a director of the defendant and was the face

of the defendant as it was an inanimate person.

DETERMINATION

After considering the pleadings and submissions filed by the parties the Application shall be determined as follows.

The Plaintiff filed a Plaint against the Defendant for failure by the Defendant to pay for the services rendered by the Plaintiff. The Plaintiff avers that the Defendant engaged the Plaintiff as a partner, shareholder, technical director to fulfill the roles of base maintenance and logistics manager. Further, that the Defendant engaged the Plaintiff through Defendant's Managing director, Mandeep Osahan on several occasions both verbally and in writing.

The Defendant thereafter filed a Notice of Preliminary Objection on the grounds that the Plaintiff lacks locus to institute this suit against the Defendant for want of privity of contract. In addition, that the Plaintiff's entire suit as against the Defendant is misconceived, incompetent, fatally defective and should be struck out or dismissed.

The principle of what constitutes a Preliminary Objection was well laid out in the case of **Mukisa Biscuit Manufacturing Co. Ltd – versus- West End Distributors [1969] EA 696:**

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.’

The upshot of the above stated case is that a proper Preliminary Objection should arise from the pleadings and should arise on a pure point of law which is argued on the assumption that all the facts pleaded by all parties are not contested. There is no Defence filed by the Defendant and in the absence of a Defence, it is presumed that the Plaintiff's assertions have not been controverted at this stage and hence the facts are not yet established.

Privity of contract.

In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In **Dunlop Pneumatic Tyre Co Ltd -versus- Selfridge & Co Ltd [1915] AC 847**, Lord Haldane, LC rendered the principle thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

The Defendant herein is a separate legal entity from its members. The Plaintiff has not furnished any contract which it signed with the Defendant.

The Plaintiff has raised a claim against the Defendant in Paragraphs 4, 5, 6, 7 and 8 that on his part rendering his services to the Defendant Company as Helicopter Engineer with over 20 years experience, he would be engaged as Partner, Shareholder Technical Director from 2014 – 2018.

The agreement is based on writing and verbal conversation with Managing Director of the Defendant Company. To this claim the Defendant failed to respond and raised the Preliminary Objection.

The Plaintiff's claim is not hinged on contract but engagement with Defendant Company through its Managing Director which shall be a triable issue to be determined at a full hearing interpartes and if not interlocutory judgment may be pursued in the absence of a defence to be filed.

On the issue of privity of contract, in **City Council of Nairobi vs Wilfred Kamau Githua T/A Githua Associates & Another (2016) eKLR Pg. 10** the court observed at **Halsbury's Laws of England, 4th Edition, Volume 9 (1) Paragraph 478** states:

“The general rule. The doctrine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose obligations on strangers to it; that is persons who are not parties to it. The parties to a contract are those persons who reach agreement and, whilst it may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties, or both, for example in the case of multilateral contracts; collateral contracts, irrevocable credits; contracts made on the basis of memorandum and articles of a company, collective agreements, contracts with unincorporated association; and mortgage surveys and valuations”.

AFC VS Lengetia, 1982 – 88 I KAR 722 which states:

“As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he maybe considered a party to the consideration does not entitle him to sue upon the contract”.

The issue of privity of contract cannot be fully resolved at this stage; it is not a pure point of law.

DISPOSITION

1. The Preliminary Objection is dismissed

2. The Defendant shall file defence within the requisite statutory period from the date of receipt of the court’s ruling.

DELIVERED, SIGNED AND DATED IN OPEN COURT ON 30TH JUNE, 2021 (VIRTUAL CONFERENCE)

M.W. MUGAI

JUDGE

IN THE PRESENCE OF:

MUCHERU LAW LLP – PLAINTIFF

OMUSOLO MUGAI ADVOCATE – DEFENDANT