



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**COMMERCIAL AND ADMIRALTY DIVISION**

**SUIT NO. 89 OF 2019**

**CHINA WU YI (KENYA) COMPANY LIMITED.....PLAINTIFF**

**-VERSUS-**

**STEVE KITHI T/A STEVE KITHI & CO. ADVOCATES.....DEFENDANT**

**-AND-**

**IN THE COUNTERCLAIM**

**1. STEPHENS KITHI NGOMBO**

**T/A STEVE KITHI & CO. ADVOCATES**

**2. PROPKEN (MAURITIUS) LTD.....PLAINTIFFS**

**-VERSUS-**

**CHINA WU YI (KENYA) COMPANY LIMITED.....DEFENDANT**

**RULING**

1. The application subject of this Ruling is one of joinder and more specifically the test applicable in determining whether or not a party is properly enjoined as a co-Plaintiff. The application is dated **15<sup>th</sup> February, 2021** and brought under the provisions of **Sections 1A, 1B and 3A** all of the **Civil Procedure Act, Order 1 Rule 9, Order 1 Rule 10(2), Order 4 Rule 1(6) and Order 51 Rule 1** all of the **Civil Procedure Rules, 2010** by the Plaintiff in the main cause. It seeks for the following orders:-

- a) A declaration that the 2<sup>nd</sup> counterclaimant has been wrongly enjoined in this suit.*
- b) A declaration that the 2<sup>nd</sup> counterclaimant does not have locus standi to maintain the suit and/or counterclaim against the Defendant in the counterclaim.*
- c) The suit and/or counterclaim by the 2<sup>nd</sup> counter claimant against the Plaintiff be and is hereby struck out.*
- d) In alternative to 3 above, the 2<sup>nd</sup> counterclaimant's name be struck off from these proceedings.*
- e) The counterclaim be dismissed in its entirety for being frivolous, vexatious and an abuse of the process of the court and failing to disclose a triable issue.*
- f) Costs of the application be awarded to the Defendant in the counter claim.*

2. The application is premised on grounds inter alia that no leave had been sought before commencing the suit on behalf of the 2<sup>nd</sup> Defendant by way of counterclaim hence the same is defective and bad in law for failing to obtain the leave of court before the joinder; the 2<sup>nd</sup>

Defendant has no legal capacity to sue since the same is not a duly incorporated corporate with capacity to institute or maintain a suit as it was already wound up; there was no contractual relationship between the 2<sup>nd</sup> Defendant and the Plaintiff for the 2<sup>nd</sup> Defendant to maintain a suit against the Applicant; that it is only the 1<sup>st</sup> Defendant/Respondent who is clothed with the requisite *locus standi* to maintain any claim, if at all, pursuant to the sale agreement dated **30<sup>th</sup> July, 2016** and at no point during the negotiation, signing and/or implementation of the contract did the 1<sup>st</sup> Defendant/Respondent disclose he was acting as an agent; that even if it is presumed that the 1<sup>st</sup> Defendant/Respondent was acting as an agent of the 2<sup>nd</sup> Defendant/Respondent then there should be an unequivocal acceptance by the 2<sup>nd</sup> Defendant taking over the 1<sup>st</sup> Defendant's obligations which has not been done; that even at the time of the negotiations the 2<sup>nd</sup> Defendant was not in existence and there can be no agency relationship with a non-existent principal; and lastly, that the Plaintiff/ Applicant has no claim or liability owing to the 2<sup>nd</sup> Respondent hence it should be struck out.

3. The application was further supported by the **affidavit of Luo Zicheng**, the Applicant's Director in which he reiterated the grounds on the face of the application and annexed a printout marked as "**LZ-1**" showing that the 2<sup>nd</sup> Defendant was a defunct entity.

4. The application is opposed vide the **Replying Affidavit** of the 1<sup>st</sup> Respondent who is also a Director in the 2<sup>nd</sup> Respondent Company sworn on **30<sup>th</sup> March, 2021**. He annexed a **Certificate of Incorporation** showing that the 2<sup>nd</sup> Respondent was incorporated on **22<sup>nd</sup> August, 2016**. He is however of the view that the allegations that leave had to be sought before enjoining the 2<sup>nd</sup> Respondent is misplaced and has no position in law. He states that under **Order 3 Rule 5(1)** of the **Civil Procedure Rules**, where two or more Plaintiffs have a cause against the 2<sup>nd</sup> Defendant, then they are permitted to unite the causes in the same suit. Indeed, according to **Mr. Kithi, Mr. Luo Zicheng** lacked the authority and the *locus standi* to declare the 2<sup>nd</sup> Respondent as an incorporated entity which had been wound up because that was entirely for the discretion of the office of the Registrar in the Mauritius Government. He then termed such evidence as secondary evidence which was not permitted under the law of Evidence.

5. As regards the printout evidencing the 2<sup>nd</sup> Defendant as a defunct entity, **Mr. Kithi** averred that the person who assessed the said website or its owner was not disclosed and indeed the same contained a disclaimer notice dislodging the accuracy and reliability of the report. However, it is averred that owing to late service of the instant application, he was unable to secure the Company Secretaries at Port Louis, Mauritius or any adequate and original documentary evidence of the legal status of the 2<sup>nd</sup> Respondent. Further, that official searches are only possible on cash payments and following the closure of the Mauritius borders owing to Covid-19 outbreak, no credible evidence on the Plaintiff's legal status could be procured.

6. It is **Mr. Kithi's** case that the Applicant is estopped from denying its knowledge on the existence of the 2<sup>nd</sup> Respondent or there being no privity of contract because at all material times, the 1<sup>st</sup> Respondent indicated that he was conveying for his client and it is the Applicant who failed and/or ignored to make enquiries to ascertain which client was being referred to equity does not allow a party to benefit from its own omissions. All in all, **Mr. Kithi** has maintained that in all transactions he had been acting for undisclosed agent who is the 2<sup>nd</sup> Respondent, a Limited Liability Company duly registered under the laws of the Republic of Mauritius until such a moment when binding and legally admissible evidence is presented to this Honourable Court providing otherwise.

7. Parties were then directed to file written submissions in support of their case and the record shows that they dutifully complied with the Plaintiff/ Applicant filing its submissions on **13<sup>th</sup> January, 2021** whilst the Respondents filed their on **25<sup>th</sup> May, 2021**.

#### **Applicant's Submissions**

8. In its submissions, the Applicant pointed out five issues for determination, which are; *whether the 2<sup>nd</sup> Respondent has locus to institute and maintain this instant suit; whether the 2<sup>nd</sup> Respondent is properly enjoined in this suit as a party; whether the counter claim by the 2<sup>nd</sup> Respondent should be struck out; whether the suit by the 1<sup>st</sup> Respondent is frivolous, vexatious and an abuse of court process and lastly, who should bear the costs of the proceedings?*

9. On whether the 2<sup>nd</sup> Respondent has **locus** to institute and maintain this suit, the Applicant has submitted that the 2<sup>nd</sup> Respondent has failed this test based on two fronts; **firstly**, being that the 2<sup>nd</sup> Respondent is not a going concern hence cannot maintain a suit as there is evidence showing the 2<sup>nd</sup> Respondent as a defunct entity, and just like a dead person, it cannot continue or sustain a suit. **Secondly**, that the 2<sup>nd</sup> Respondent has never transacted with the Applicant and therefore lacks the *locus standi* to claim a right from the transaction. That even assuming the averments are true, the 2<sup>nd</sup> Respondent Company was incorporated on **22<sup>nd</sup> August, 2016** while the sale agreement giving rise to the present suit was executed on **30<sup>th</sup> July, 2016** before the incorporation of the 2<sup>nd</sup> Respondent. This translates to the fact that the 1<sup>st</sup> Respondent could not act for a non-existent principal. In support of this line of argument, the Applicant has relied on the cases of **Michael Osudwa Sakwa –vs- Chief Justice and the President of the Supreme Court of Kenya & Another [2016]eKLR** and **Khelef Khalifa El-Busaidy –vs- Commissioner of Lands & 2 Others [2002] eKLR**.

10. On whether the 2<sup>nd</sup> Respondent was properly enjoined as a party to the suit, it was submitted that this court had already insinuated in the Ruling delivered on **13<sup>th</sup> January, 2021** that the 2<sup>nd</sup> Respondent was irregularly enjoined. In that Ruling, the court expressed itself that a unique aspect of a counter claim is that a Defendant can only add parties with similar characteristics as the Plaintiff and exclude parties who would otherwise be interested in the proceedings and those who require leave of court to be enjoined in the pleadings to sue in the suit. As such, the court is referred to **Order 1 Rule 10** of the **Civil Procedures Rules** which empowers it to strike out parties who have improperly been enjoined in the suit. According to the Applicant, the 2<sup>nd</sup> Respondent is such a party erroneously enjoined and should be struck out of the suit.

11. On whether the 1<sup>st</sup> Respondent's suit is merited, it was submitted that the 1<sup>st</sup> Respondent merely seeks for legal fees but as is trite in law,

legal fees are recoverable through taxation but not a claim of this nature as filed by the 1<sup>st</sup> Respondent. Therefore, the 1<sup>st</sup> Respondent had to first exhaust all material avenues available before approaching this court.

12. For the Respondents, it is submitted that the court in its Ruling dated **13<sup>th</sup> January, 2021** had deemed the suit fit for pre-trial directions to issue and therefore the Applicant could not file an application to strike out without the leave of the court. Be that as it may, it is submitted that the declaratory prayers sought are final in nature and cannot be granted at an interim stage.

13. As regards the issue of joinder/Misjoinder of the 2<sup>nd</sup> Respondent, it is submitted that the same cannot arise in instances of a counterclaim because under **Section 35 of the Limitation of Actions Act**, any claim by way of set off or counterclaim is taken to be a separate action and not part of the main suit. A similar finding was made in the case of **Manju Naul –vs- George Macheho Mungai & 2 Others [2017]eKLR** and **Beatrice Mumbi Wamahu –vs- Mobil Oil Kenya Ltd [2011]eKLR**, where it was confirmed that a counter claim is a separate suit and not depended on the main suit. Relying on those authorities, the Respondent submitted that the principle of joinder of parties cannot arise where a party has resorted to file its own suit by way of counter claim. Such a party could therefore join hands with another party with similar claim against the Defendant pursuant to the provisions of **Order 3 Rule 5(1) of the Civil Procedure Rules** with regard to bringing their causes of action under the same suit.

14. With regard the legal status and *locus standi* of the 2<sup>nd</sup> Respondent, it is submitted that the applicant had intimated in its defence to the counter-claim that it would be raising the question of *locus standi* at the hearing of the matter but has now resorted to raise those issues prematurely to subvert procedural Justice.

15. As for the legal status of 2<sup>nd</sup> Respondent and annexure “**LZ-1**”, the submissions reiterate the position taken in the Replying Affidavit that the contents of “**LZ-1**” are unauthentic and totally ignoring the bare fact that the prevalence of Covid-19 which caused the offices in the Registrar for Companies in Mauritius.

### **Analysis and Determination**

16. In determining the application dated **15<sup>th</sup> February, 2021**, the court has considered the pleadings and submissions by the parties through counsels and found the issues arising for determination being as follows;

*a) Whether the 2<sup>nd</sup> Respondent has locus standi to institute the suit against the Applicant; and if so;*

*b) Whether the 2<sup>nd</sup> Respondent is erroneously joined in this suit; and*

*c) Whether the counter claim should be struck out.*

#### **a) Whether the 2<sup>nd</sup> Respondent has locus standi to institute the suit against the Applicant**

17. To shine light on this issue, I have read through the counter claim and find that the 2<sup>nd</sup> Plaintiff therein is the 2<sup>nd</sup> Respondent in the instant application and it claims for damages for breach of contract by omissions of the Applicant in the sale transactions entered into by the Applicant and the 1<sup>st</sup> Respondent. More specifically, the prayers which are expressed in the alternative to each other are for Kshs.65,106,000/= purported to be legal fees owing to the 1<sup>st</sup> Respondent; loss of anticipated profit for Kshs.512,780,000/= expected from successful conclusion of the first and second sale transaction; loss of profits on expected project development; and lastly, loss of profit expected upon the completion of the project. The basis of those claims were then stated to be arising from the agency relationship between the 1<sup>st</sup> Respondent and itself in that the 2<sup>nd</sup> Respondent was the undisclosed agent of the 1<sup>st</sup> Respondent.

18. I have also read through the **two sale agreements**, the first is dated **30<sup>th</sup> July, 2016** and the 2<sup>nd</sup> one is dated **29<sup>th</sup> November, 2016**. In the first sale agreement, the parties thereto are **Steve Kithi & Co. Advocates** described as the Vendor while **China WU YI (Kenya) Company Limited** was on the other hand described as the purchaser. In the second sale agreement, **Steve Kithi & Co. Advocates** was the vendor and **China WU YI (Kenya) Company Limited** was the purchaser on the other hand.

19. The Applicant has submitted that **Propken (Mauritius) Limited** was not privy to those contracts and it lacks the *locus standi* to sue on causes of action arising from the said contracts. **Mr. Kithi**, counsel for the Respondents on the other hand pointed out that he has been acting on behalf of the undisclosed Principal whom he now states was **Propken (Mauritius) Limited** and that it was upon the Applicant to dig on and establish the client unnamed in those sale agreements.

20. As an aspect of the general law relating to agency, an agent is ordinarily neither entitled to sue nor liable to be sued on a contract made by him in a representative capacity. And generally, an undisclosed principal may “step into the shoes” of its agent and assume all the rights and obligations of a contract that the agent had entered into on the undisclosed principal’s behalf. However, in my view, the existence of agency relationship and its extent are questions of fact. Generally, the agent is the one who undertakes to manage some affairs to be transacted for another by his authority, on account of the latter, who is referred to as the principal and to render an account. Such authority would be evidenced through a Power of Attorney.

21. In the case at hand, under **Paragraph 5 of the Counter claim**, it is averred that **Propken (Mauritius) Limited** and its promoters were the undisclosed principal of the 2<sup>nd</sup> Plaintiff (**Stephen Kithi Ngombo T/A Steve Kithi & Co. Advocates** who was at all material times the

undisclosed principal of the 1<sup>st</sup> Plaintiff and 1<sup>st</sup> Plaintiff was duly appointed as an agent of and legal advisor. I have also gone through the entire court record, and of all the documents which the Respondents have filed, I find none of them is a power of attorney authorizing **Stephen Kithi Ngombo T/A Steve Kithi & Co. Advocates** to act as agents of **Propken (Mauritius) Limited**.

22. The subject contracts were for the sale of two parcels of land and it is now purported that the 1<sup>st</sup> Respondent having presented himself as the Vendor, was acting as an agent of an undisclosed Principal who happens to be the second Plaintiff in the counter claim. These facts were unknown to the Applicant since the undisclosed principal was not mentioned in the sale agreements at all. Therefore, the assertions of the undisclosed principal rest on dubious grounds which in any case offends the basic principles of our contract law, that only the real parties to a contract incur duties and acquire rights there under. To say that a person can acquire rights and incur duties in respect of another person with whom he has not contracted, is offensive to the basic principles of our law of contract.

23. It would therefore be undesirable to extend the ambit of the doctrine of the “*undisclosed principal*” to the circumstances of this case where no express authority to act in the sale agreements has been shown and where the purported principal was neither the owner of the land being sold by the purported agent or had any form of interests thereto. Therefore, when a party enters into one single contract with another party without being aware of the fact that the latter is acting as an agent, that party is entitled to expect to contract with one person and that only *one* claim will arise against him but not claims which he could not have possibly foreseen at the time he entered into the contract.

24. Therefore in this case, there is certainly not enough evidence to support the assertions that the 1<sup>st</sup> Respondent herein and the 1<sup>st</sup> Plaintiff in the counter claim entered into the two sale agreements solely on behalf of the 2<sup>nd</sup> Respondent who is the 2<sup>nd</sup> Plaintiff in the Counter-claim. This court is therefore not persuaded that the 2<sup>nd</sup> Plaintiff in the counter claim gained any right by virtue of the two sale agreements to sue the other contracting party for any alleged breach thereof.

25. But even if it was to be said that the 1<sup>st</sup> Respondent was acting as an agent of the 2<sup>nd</sup> Respondent while negotiating the two sale agreements, it would be perplexing to realize that the 2<sup>nd</sup> Respondent was a non-existent persona when the purported authority to act was issued. Its Certificate of Incorporation annexed which has been produced as Exhibit “**PRPKN-1(a)**” indicates that the 2<sup>nd</sup> Respondent was incorporated on **22<sup>nd</sup> August, 2016** while the first sale agreement dated **15<sup>th</sup> July, 2016** was executed on **29<sup>th</sup> July, 2016** way before the incorporation of the 2<sup>nd</sup> Respondent. As such, the 2<sup>nd</sup> Respondent lacked the legal personality to authorize anyone to act as its agents. Needless, to say the agreements entered into by the promoters of the 2<sup>nd</sup> Respondent were non-binding and could not give any legal effect unless ratified subsequently after incorporation.

26. For the above reasons, it is my conclusion that the 2<sup>nd</sup> Plaintiff in the counter claim lacks the *locus standi* to sue for the purported breach of the two sale agreements. Consequently, the cross suit by the 2<sup>nd</sup> Plaintiff in the counter-claim is unmerited and the same is hereby dismissed.

27. Having found as above, it would be moot to consider the second issue on whether the 2<sup>nd</sup> counter-claimant had been properly enjoined to the present proceedings. In any event, the had court extensively expressed itself on which parties could be enjoined in a counter claim in its Ruling of **13<sup>th</sup> January, 2021**. I will now proceed to the third issue identified for determination, which is whether the entire counter claim should be dismissed for disclosing no triable issue.

28. The principles set down in the case of **D.T. Dobie & Co Ltd – vs – Muchina & Another (1982) KLR 1** are clear that ***if a pleading does not disclose any reasonable cause of action or defence it ought to be dismissed.....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... A court of justice ought not to act in darkness without the full facts of the case before it.***

29. On basis of the above cited authority, a single triable issue is enough to decline the invite to summarily dismiss a suit. The issue must however be a bona fide one, though it need not be one that must succeed at trial.

30. Having read through the counter claim against the assertion of the Applicant that the 1<sup>st</sup> Respondent is merely seeking for legal fees which ought to be determined on taxation, I am of the contrary view that the counter claim raises the issue of whether the applicant was in breach of the sale agreement, and if so, whether the 1<sup>st</sup> Respondent is entitled to the damages being sought. Therefore, it cannot be gainsaid that the cross suit discloses no reasonable cause of action or the same is so weak beyond redemption. Whether or not there was breach of contractual obligation by the Applicant herein as alleged in the counter claim, is an issue worth proceeding for full hearing.

#### **Disposition**

31. In light of the foregoing, it is my finding that:-

***a) 2<sup>nd</sup> counterclaimant has no locus standi to sue for damages arising from sale agreements dated 30<sup>th</sup> July, 2016 and 29<sup>th</sup> November, 2016 and its suit as against the Applicant in the Counter-claim herein is hereby struck out.***

***b) The suit shall proceed as between the Plaintiff/Applicant and the 1<sup>st</sup> Defendant as is in the main cause.***

*c) There shall be no orders as to costs.*

*d) Parties are also granted 14 days leave to appeal.*

It is hereby so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Gichui counsel holding brief for Mr. Eredi counsel for the Plaintiff

No appearance for and by Respondent

Court Assistant - Winny