



R.J Varsani Enterprises Limited v Chelsea Holdings Limited & 4 others (Civil Case E064 of 2019) [2021] KEHC 404 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)

Neutral citation: [2021] KEHC 404 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E064 OF 2019
WA OKWANY, J
DECEMBER 16, 2021**

BETWEEN

R.J VARSANI ENTERPRISES LIMITED PLAINTIFF

AND

CHELSEA HOLDINGS LIMITED 1ST DEFENDANT

COSMOCARE LIMITED 2ND DEFENDANT

INNOVATIVE PLANNING & DESIGN CONSULTANTS 3RD DEFENDANT

TRIDENT ESTATES LIMITED 4TH DEFENDANT

TOWER COST CONSULTANTS LIMITED 5TH DEFENDANT

RULING

1. This ruling is in respect to the application dated 10th February 2021 wherein the applicant seeks the following orders: -

1. THAT the Honorable Court be pleased to strike out the 1st Defendant/ Applicant as a party to the suit herein;
2. THAT the Honorable Court be pleased to strike out the 3rd Defendant/ Applicant as a party to the suit herein;
3. THAT the Honorable Court be pleased to strike out the 4th Defendant/ Applicant as a party to the suit herein;
4. 4, THAT the Honorable Court be pleased to strike out the 5th Defendant/ Applicant as a party to the suit herein;



5. THAT the 1st, 3rd, 4th and 5th Defendant/Applicants have no contractual relationship with the Plaintiff/Respondent;
 6. THAT there is no cause of action against the 1st, 3rd, 4th and 5th Defendants/Applicants;
 7. THAT the suit against the 1st, 3rd, 4th and 5th Defendants/Applicants is frivolous, vexatious and an abuse of the court process; and
 8. THAT the costs of this Application be borne by the Plaintiff/Respondent.
2. The application is supported by the affidavit sworn by Elka Montanya and is based on the following grounds: -
1. THAT the Complaint dated 3rd April 2019 does not disclose a reasonable cause of action against the 1st, 3rd, 4th and 5th Defendant/Applicants;
 2. THAT hence the 1st, 3rd, 4th and 5th Defendant/Applicants have been improperly enjoined as parties in the matter;
 3. THAT the 1st Defendant/Applicant is the Employer and the owner of Trident Grand Riverside on Plot L.R No. 4580/15 (Hereinafter the Project);
 4. THAT the 1st Defendant/Applicant employed the 2nd Defendant as the main contractor of the Project;
 5. THAT through the said contract, the 1st Defendant/Applicant appointed the 2nd Defendant—the main contractor of the Project through the contract that was executed by the parties;
 6. THAT 1st Defendant/Applicant contracted the 3rd Defendant/Applicant to be the Architect for the Project;
 7. THAT the 1st Defendant/Applicant concluded an agreement with the 4th Defendant/Applicant to be the Project Manager;
 8. THAT the 1st Defendant/Applicant also contracted the 5th Defendant/Applicant to be the Quantity Surveyor for the Project;
 9. THAT the 2nd Defendant—main contractor, was generally and specifically the Superintendent of the Project and the 3rd, 4th and 5th Defendants/Applicants and all the specialists and/or subcontractors such as the Plaintiff/Respondent were under its direct authority;
 10. THAT the 3rd Defendant/Applicant, as the Project's Architect, only subcontracted the Plaintiff/Respondent on behalf of the 2nd Defendant—the main contractor;
 11. THAT the Plaintiff/Respondent was hired in the capacity of a sub-contractor to work under the 2nd Defendant—the main contractor;
 12. THAT all specialists and/or subcontractors such as the Plaintiff/Respondent or any other appointed by the 3rd Defendant/Applicant were declared to be the subcontractors employed by the 2nd Defendant;



13. THAT hence the 3rd Defendant/Applicant did not contract the Plaintiff/Respondent with itself or with any other Applicants herein but rather as part of its responsibilities with the 2nd Defendant;
14. THAT the 4th Defendant/Applicant was merely a Project manager who was also under the 2nd Defendant's, main contractor's, authority;
15. THAT the 5th Defendant/Applicant as the Quantity Surveyor only evaluated the Plaintiff's/Respondent's work and;
16. THAT the 3rd, 4th and 5th Defendants/Applicants together with the Plaintiff/Respondent Were directly employed and working under the direct supervision of the 2ND Defendant;
17. THAT hence the 1st, 3rd, 4th and 5th Defendant/Applicants have no any contractual relationship, or any other relationship with the Plaintiff/Respondent to which the alleged cause of action relates;
18. THAT hence the Plaintiff/Respondent's alleged claim is rightly against the 2nd Defendant who is the main contractor of the said project;
19. THAT there is no agency relationship between the 1st, 3rd, 4th and 5th Defendant/Applicants and the 2nd Defendant;
20. THAT it was the 2nd Defendant's obligation that it shall remain wholly responsible for carrying out and completing the Works in all respects;
21. THAT the Plaintiff/Respondent's obligation—to undertake repair and completion works, was thus squarely and the 2nd Defendant's purview and that is the reason, other than being the main contractor, as to why the 2nd Defendant was the entity paying the Plaintiff/Respondent, all the Applicants herein and other subcontractors;
22. THAT as a result, the presence of the 1st, 3rd, 4th and 5th Defendant/Applicants are unnecessary parties to the suit and may only be called as witnesses by the parties.
23. Any other grounds and reasons to be adduced at the hearing hereof.

3. The respondent opposed the application through the replying affidavit sworn by its Managing Director Mr. Ravji Jadv Varsani who states that the pleadings reveal that all the defendants played a role in the dispute thus making it necessary to include all of them in the suit. He avers that the plaintiff received orders/instructions and payments from the defendants randomly thus creating constructive agency. He further contends that the plaintiff was awarded the contract by the 3rd defendant but that it was the 4th defendant who unilaterally terminated the contract. He also states that the plaintiff received payments from the 1st and 2nd defendants and has builder's lien over the 1st defendant thus making it a necessary party. It is the respondent's case that the applicants will not suffer irreparable harm as they can be awarded costs of the suit.
4. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the applicant is entitled to the orders sought. The applicants seek orders to strike out the 1st, 3rd, 4th and 5th defendants from the suit. According to the applicants the plaint dated



- 3rd April 2019 does not disclose a reasonable cause of action as the applicants have been improperly enjoined in the suit.
5. The respondent, on the other hand, contended that all the enjoined parties contributed to the events that led to the filing of the suit. It was submitted that all the applicants were answerable to the various claims made against them in the plaint.
 6. Order 1 Rule 10 of the [Civil Procedure Rules](#) provides for substitution and addition of parties to the suit as follows: -
 - “(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added”
 7. From the above provision, it is clear that the court may order the striking out of any party to the proceedings where it is of the view that the party was improperly joined in the suit. The question before court is whether the 1st, 3rd, 4th and 5th defendants are necessary parties to this suit and whether the plaintiff has disclosed cause of action against them.
 8. In the case of *DT Dobie and Company (K) Ltd vs Joseph Mbaria Muchina & Another* (1982) KLR 1 Madan. J.A stated: -
 - “The power to strike out should be exercised only after the court has considered all the 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 opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”
 9. The case of *Amon vs Raphael Tuck & Sons Ltd* (1956) 1 All ER 273, cited in *Pizza Harvest Limited v Felix Midigo* [2013] eKLR sought to establish who a necessary party is. Devlin, J held at p. 286-287: -
 - “What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.”
 10. The principle that emerges from the above cited cases is that the striking out of a party to a suit should be approached with caution. I have perused the plaintiff's suit and it is apparent that the plaintiff holds the defendants jointly and severally responsible for the breach that is the subject of the suit. According



to the plaintiff, the 1st and 2nd defendants received money on different times while the 4th defendant terminated the contract that the plaintiff entered with the 3rd defendant.

11. Having regard to the facts of this case, I find that in order to establish whether there is a reasonable cause of action against the defendants, it will be prudent to allow the matter to proceed to full hearing. I note that no party will be prejudiced by this position as they can be awarded the costs of the suit in the event they succeed in their claims.
12. In the premises, I find that the application lacks merit and I therefore dismiss it with orders that costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF DECEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Kaaya for Defendant/Applicants.

No appearance for Respondent

Court Assistant: Margaret

