



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 271 OF 2019

COASTAL KENYA ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

STEPHEN KIPKENDA KIPLAGAT

& DOROTHY CHEPKOECH KIPRONO

T/A KIPKENDA & COMPANY ADVOCATES.....DEFENDANTS

RULING

At the centre of the dispute between the parties herein is a contingency agreement dated 14th July, 2016 which was subsequently varied by other agreements dated 21st March, 2017 ,29th March, 201 and 14th December, 2017. This agreement provided for payment of legal fees by the plaintiff to the defendants.

By dint of a plaint dated 16th and filed on 17th December, 2019 the plaintiff pleaded that the contingency agreement and its variations were contrary to Section 46 of the Advocates Act Cap 16 Laws of Kenya and amounted to an illegal contract, and therefore was illegal and invalid *ab initio* and therefore incapable of conferring any benefits to the defendants in the form of legal fees.

Any payments made thereunder were therefore illegal, null and void and ought to be refunded to the plaintiff together with interest. In addition, the plaintiff has stated there is a pending suit, this being HCCC No. 240 of 2019 (OS,) in which the defendants are claiming legal fees under the said agreement.

The orders sought under this suit (HCCC NO. 271 of 2019) are as follows,

- A. A declaration that the contingency agreement entered into between the plaintiff and the defendants together with all the variations is contrary to Section 46 of the Advocates Act aforesaid and is therefore illegal, null and void;
- B. A declaration that any payment made thereunder amounts to conferring a benefit under an illegal agreement and therefore ought to be refunded to the plaintiff by the defendants;
- C. An order directed at the defendants compelling them to jointly and severally refund to the plaintiff all the monies received under the said agreement with interest;
- D. Costs of the suit and interest;
- E. Any further relief that the court may grant.

Upon service of summons to enter appearance and file a defence, the defendants duly complied and pleaded inter alia that the said agreement and its variations complied with the provisions of the Advocates Act hence it was legal and valid in the circumstances. Any alleged illegality was denied. Further, it was pleaded in the statement of defence that the plaintiff voluntarily entered into the contingency agreement, freely executed the same without any form of undue influence, coercion or duress, and therefore is estopped from disowning the same.

Any payments pleaded by the plaintiff have been denied, and that the defendants having successfully carried out the instructions are entitled to their profession legal fees. The defendants have also cited HCCC No. 240 of 2019 (OS) and stated that, despite knowing the existence of that suit against it, the plaintiff deliberately filed the present suit purposely to delay and or embarrass the trial of the defendants' claim in the said earlier suit. The defendants hence reserved the right to make an appropriate application to have this suit stayed and or struck out.

Having reserved that right, the defendants filed an application by way of Notice of Motion dated 18th March, 2020 and filed on 12th May, 2020 seeking the substantive order that the plaintiff's suit against the defendants be struck out. The grounds upon which the said order is sought appear on the face of the application, alongside a supporting affidavit sworn by Stephen Kipkenda Kiplagat the founding partner of the defendant firm of advocates.

The application is opposed and there are grounds of opposition dated 5th June, 2020 filed on behalf of the plaintiff. Parties have also filed their submissions and cited several authorities. In HCCC No. 240 of 2019 (OS) the applicants have raised a claim against the respondent of the sum of Kshs. 52,705,118.34 being the balance of agreed legal fees. They have set out issues for determination as follows;

1. Whether or not the respondent is bound by the terms of the agreement dated 14/07/2016 and valid on 14/12/2017.
2. Whether or not the respondent was justified to terminate the agreement between it and the applicants as insinuated in the letter dated 30/09/2019.
3. Whether or not the applicants are justified to lay claim for the sum of 96,620,118.34 as their professional fees.
4. Whether or not the applicants are entitled to the sum of Kshs. 52,705,118.34 being the balance of their professional legal fees.
5. Whether or not the applicants are entitled to costs.

Following those issues the applicants sought the following orders.

1. A declaration that the respondent is bound by the terms of the agreement dated 14/07/2016 and varied on 14/12/2017.
2. A declaration that the purported termination of the agreement dated 14/07/2016 and varied on 14/12/2017 by the respondent as insinuated in the letter dated 30/09/2019 is illegal, null and void.
3. A declaration that the applicants are justified to lay claim for the sum of 96,620,118.34 as their professional fees.
4. The applicants are entitled to the sum of Kshs. 52,705,118.34 being the balance of their professional legal fees as agreed by the parties in the agreement dated 14/07/2016 and varied on 14/12/2017.
5. The respondent be and is hereby directed to pay the applicants the sum of Kshs. 52,705,118.34 being the balance of their professional legal fees as agreed by the parties in the agreement dated 14/07/2016 and varied on 14/12/2017 within 7 days from the date of Judgment.
6. The applicants are entitled to costs and interest at court rates.
7. Any other or further relief the court may deem to grant.

Upon service of the applicants' suit, the respondent filed a reply thereto, vide an affidavit by Bhupinder Singh Bhogal sworn on 19th November, 2019. In that affidavit at page 17, the respondent indicated that it shall institute a suit against the applicants to recover all the monies paid to them.

From the pleadings in HCCC No. 240 of 2019 (OS) and HCCC No. 271 of 2019 it is clear the substratum of the dispute between the parties herein is the agreement dated 14th July, 2016 and subsequently varied as pleaded by the parties. In the Notice of Motion seeking to strike out HCCC No. 271 of 2019, the defendants have cited Sections 3 A and 6 of the Civil Procedure Act. Section 6 of the Act aforesaid reads as follows,

“Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or CAP. 21 Civil Procedure [Rev. 2020] 12 any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”

Going by the grounds in support of the defendants Notice of Motion seeking to strike out the plaintiff's suit, it is important to set out grounds d), e), f) and g) which read as follows,

“d) The plaintiff's suit against the defendants seeks to challenge the validity of the contingency agreement dated 14/07/2016. The defendants suit against the plaintiff on the other hand seeks to enforce the contingency agreement dated 14/07/2016.

e) The plaintiffs suit against the defendants therefore raises issues which are directly and substantially in issue in Nairobi HCCC No. 240 of 2019 (OS). The suit therefore violates Section 6 of the Civil Procedure Act hence it should be struck out.

f) The plaintiff's instant suit is an abuse of the court process as it seeks to have two matters with the same parties and same issues tried separately. This might lead to conflicting decisions of the same subject matter being made by different courts hence the need to strike out the instant suit.

g) That directions have since been given in Nairobi HCCC No. 240 of 2019 (OS) as far as filing of pleadings is concerned hence the matter is ready for hearing."

In the grounds of opposition filed on behalf of the plaintiff, it is observed that the application does not meet the test under Section 6 of the Act aforesaid, as the prayers in the two suits are not similar and that the defendants have submitted to the jurisdiction of the court to hear and determine the suit filed by the plaintiff. Further, the plaintiff observes that the application is premature as the court is yet to issue directions to the plaintiff's application seeking to have the two suits consolidated, and in any case, the plaintiff could not raise a counterclaim in the Originating Summons prompting the filing of the plaint.

The plaintiff further states that the remedy that can issue is to have the suits consolidated or the plaintiff's suit be stayed pending the hearing and determination of the Originating Summons. I observe at this point that, there is no pending application seeking the consolidation of the two suits although counsel for the plaintiff has alluded to that step informally. In any case, consolidation is intended to facilitate the efficient and expeditious disposal of disputes and not confer any advantage upon a party seeking the same. – **See Law Society of Kenya vs. Centre for Human Rights and Democracy and 12 others (2014) e KLR.** Directions having been given in HCCC No. 240 of 2019 (OS) the next step is for parties to take a date for hearing.

In HCCC No. 271 of 2019 parties are yet to comply with Order 11 of the Civil Procedure Rules. Any order for consolidation of the two suits is likely to delay the determination of the dispute.

It is common practice that, where the substratum of the dispute between the parties is the same or similar, only one suit should be filed. This is because, the costs of litigation would be minimised and judicial time shall be saved. There are instances where a departure of such practice has led to embarrassment of courts issuing different decisions on the same subject matter. It is always appropriate therefore, for parties to confine themselves to the same platform where the ends of justice shall be met and consistency guaranteed. Where appropriate such disputes should be consolidated. However, where such a step is not possible, then one suit should be prosecuted to the end, provided in so doing, none of the parties are driven from the seat of judgment.

Similar steps have been taken in matters involving claims for damages for personal injuries, where a test case is heard and determined and the decision thereof applied to all such cases, provided the parties are litigating upon the same subject matter and issues. Where a suit is filed after another, but issues to be determined relate or are similar to the suit filed previously, then the subsequent suit is likely to attract an application either to strike out or stay the same.

The marginal note to Section 6 of the Act aforesaid is "**Stay of suit**". The import of that section is that, no court shall go on with the trial if the subject matter is "**directly and substantially in issue in a previously instituted suit or proceedings between the same parties.**"

It is common knowledge that the procedural steps required under Originating Summons are different from a suit instituted by way of a plaint. A respondent in the Originating Summons is required to file an affidavit in response to the issues and orders sought by the applicant as comprehensively as possible so that such a reply would stand as a defence or answer to the applicant's claim. By filing a response to the Originating Summons, the respondent submits to the jurisdiction of the court. When the respondent filed a replying affidavit in HCCC No. 240 of 2019 (OS) it submitted itself to the jurisdiction of the court.

In the same breath, the defendants in HCCC NO. 271 of 2019, in the statement of defence, also submitted to the jurisdiction of the court. The thrust of the application dated 18th March, 2020 however is that, the issues in the latter case, that is HCCC No. 271 of 2019, are directly and substantially in issue in the Originating Summons which was previously instituted, and between the same parties.

Earlier on in this ruling, I set out the respective issues and prayers sought by the parties to the dispute in both cases. I entertain no doubt whatsoever that the issues in the latter suit are directly and substantially in issue in the Originating Summons, HCCC No. 240 of 2019 (OS). – **See William Charles Firyda vs. Lance P Nadeu & Another (2015) e KLR.**

Any court should frown against institution of multiple suits or actions, based on the same subject matter, against the same opponent. It is instructive that the present suit, that is HCCC No. 271 of 2019 was filed on 17th December, 2019 while the Originating Summons that is HCCC No. 240 of 2019 (OS) was filed on 5th November, 2019. That was the period of about 6 weeks in-between.

It may have been an afterthought to file the latter action but the bottom line is that, the issues are directly in issue; they are similar and involve the same parties. It is the belief of this court that the issues raised by the plaintiff in the latter suit are capable of being addressed and determined in the Originating Summons and shall save judicial time, in addition to ensuring that the dispute is resolved expeditiously.

I know Section 3A of the Civil Procedure Act empowers this court to strike out a suit to prevent abuse of the process of the court. See **Tahir Sheikh Said Investment Limited vs. Administrator - TSS Grain Millers Limited & 2 others (2018) e KLR and Kiambu County Tenants Associations vs. Attorney General & Another (2017) e KLR.** However, striking out a suit is a drastic action which should be invoked cautiously, and where it is obvious that a party intends to abuse that process. The plaintiff entertains some hope that it has a case against the defendant, however distant that may be. If the latter suit is struck out, that would be the end of the plaintiff's legitimate expectation to have its day in court..

To ensure that justice is eventually done to both parties herein where cross-reference may be necessary, the best order that commends itself in view of the facts pleaded is that, HCCC No. 271 of 2019 shall be stayed in line with the provisions of Section 6 of the Civil procedure Act

until HCCC No. 240 of 2019 (OS) is heard and determined.

To that extent, the application by the defendants dated 18th March, 2020 is allowed. The costs shall be in the cause.

Dated and delivered at Nairobi this 22nd day of July, 2020.

A.MBOGHOLI MSAGHA

JUDGE