



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL CASE NO. 2 OF 2016

GOLICHA GANGE OMAR.....PLAINTIFF

VERSUS

PRINCIPAL SECRETARY MINISTRY OF STATE

FOR DEFENCE.....1ST DEFENDANT

PUBLIC PROCUREMENT OVERSIGHT AUTHORITY.....2ND DEFENDANT

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....3RD DEFENDANT

ABDI OMAR ADAN & ADAN OSMAN GODANA

T/A ELDORET STANDARD BUTCHERY.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1. The 2nd defendant prays that it be *removed* as a *party* to this suit. There is a chamber summons dated 6th February 2017. The 1st and 5th defendants have also raised a *preliminary objection* dated 9th February 2017. The pith of the objection is on a two-strand: that the claim is statute barred by dint of the Public Authorities Limitation Act; and, that the suit is redundant.
2. The plaintiff contests the application and preliminary objection.
3. 26th April 2017, I heard arguments from the plaintiff; and, from learned counsel for the 2nd defendant and the 1st and 5th defendants. I have considered the pleadings, the preliminary objection, the chamber summons and the rival submissions.
4. I will first deal with the chamber summons by the 2nd defendant. The applicant avers that the plaintiff does not seek any relief against it; and, that the plaint makes no reference to the 2nd defendant. Those matters are buttressed by a deposition sworn by *Maurice Juma* on 1st February 2012. The material averments are as follows-

i) That the plaintiff has not demonstrated any cause of action against the 2nd defendant;

ii) That that the plaintiff filed a review before the 3rd Defendant. The 3rd Defendant heard the review and delivered its findings compelling the 1st defendant to reverse its decision; and, award the tender to the plaintiff.

iii) That the 2nd defendant was not a party to the review proceedings or any other proceedings instituted by the plaintiff.

iv) That there are no orders sought against the 2nd Defendant.

5. I have then looked at the replying affidavit sworn on 22nd March 2017. The plaintiff avers at paragraphs 3 and 4 as follows-

“3. That it is true no reference has been made against the 2nd defendant and my advocate has informed and advised me that the omission was inadvertent and a typographical error that is regretted.

4. That the inclusion of the 2nd defendant is to show court at the hearing that the tender in dispute herein was granted by the 2nd defendant.”

6. I have closely studied the plaint dated 22nd January 2016. It is a claim for *loss of business* under a tender number MOSD/423 (348) 2011-2012. The plaintiff pleads that he won the tender to supply beef to the 1st defendant. However, the supply was *diverted* to the 4th defendant, *Eldoret Standard Butchery*. The plaintiff's case is that the action was contrary to procurement procedures; and, that he lost *profits* worth Kshs. 75,600,000 per annum. The arithmetic works out as follows: 1000 kilos of meat x 30 days x Kshs 210 x 12 = Kshs. 75,600,000. The plaintiff now claims the sum of Kshs 75,600,000 as damages from the 1st defendant.

7. Although the 2nd defendant is named in the heading of the plaint, there is *no* reference to it in the body of the plaint or the reliefs sought. In the replying affidavit I set out above, the plaintiff expressly *admits* it. But to be fair to the plaintiff, I have seen a Notice of Motion on the record dated 21st April 2017. It has *no* return date. In that motion, the plaintiff seeks to *amend* the plaint to introduce a new paragraph 2A to describe the 2nd defendant. Even if the amendment is allowed as prayed, it would leave matters where they are: the plaint does *not* sufficiently or at all particularize any claim against the 2nd defendant. The key relief is for Kshs 75,600,000 sought against the 1st defendant. In a synopsis, there is no cause of action disclosed against the 2nd defendant. I thus *strike out* the suit against the 2nd defendant but with *no* orders on costs.

8. I will now turn to the preliminary objection. It is three-pronged. First, that the suit is statute barred; secondly, that the plaintiff's suit as against the 1st and 5th defendants is redundant by virtue of the ruling in the same matter in *Nairobi High Court Judicial Review No. 384 of 2012: Republic -versus- Hon. Attorney General & 2 others ex parte Golicha Gange Omar*; and, thirdly, that there is no *privity* of contract between the plaintiff and the 1st and 5th defendants.

9. Striking out a pleading or a suit is a *draconian* measure to be employed sparingly. See *Wambua v Wathome* [1968] E.A 40, *Coast Projects Ltd v M.R. Shah Construction* [2004] KLR 119. See also *Sankale Ole Kantai t/a Kantai & Company Advocates v Housing Finance Company of Kenya Limited* Nairobi, High Court case 471 of 2012 (unreported), *Francis Ngira Batware v Ashimosi Shatabansi t/a Ashimosi Shatabansi & Associates Advocates and 2 others* Nairobi High Court case 476 of 2009 [2013] e KLR.

10. Ideally, cases should be determined on tested evidence at a full hearing. The words of Fletcher

Moulton L.J. in Dyson v Attorney General [1911] 1 KB 410 at 418 still ring true-

“To my mind, it is evident that our judicial system would never permit a plaintiff to be ‘driven from the judgment seat’ in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad”

11. The dictum of Madan J.A. (as he then was) in D T Dobie & Company (Kenya) Limited v Muchina [1982] KLR 1 is an all-time classic. He said at page 9-

“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 and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it”.

12. This court is also enjoined by article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to do *substantial justice* to the parties. That is the overriding objective. Harit Sheth Advocate v Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR, Stephen Boro Gititha v Family Finance Bank & 3 others. Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR.

13. Applying those principles here, I find that the *third* ground in the preliminary objection is *unsustainable*. A preliminary objection is supposed to raise a *pure point of law*. See Mukisa Biscuit Manufacturing Company Vs West End Distributors Ltd [1969] EA 696. It is *not* feasible to determine whether there is *privity* of contract between the plaintiff and the 1st and 5th defendants without a *deeper analysis* of documentary evidence.

14. But the other two grounds have substantial merit. First, the plaintiff was regurgitating matters that have already been determined by the High Court in Nairobi High Court Judicial Review No. 384 of 2012: Republic -versus- Hon. Attorney General & 2 others ex parte Golicha Gange Omar. The plaintiff was the *ex-parte* applicant. He sought a writ of *prohibition* to restrain the respondents from awarding the tender to any other party other than the *ex-parte* applicant “*as directed by the Public Procurement Administrative Review Board on 11th May 2012*”. There was also a prayer for *mandamus* to compel the ministry to award the tender to the *ex parte* applicant.

15. I have studied the decision. The court dismissed the action primarily due to *effluxion of time*. The tender was valid for *one* year. It had long passed; and, a fresh tender advertised. To that extent, I agree that this suit is *redundant* as against the 1st and 5th defendants. In his arguments before this court, I got the clear impression that the plaintiff thinks the present proceedings are an *appeal* against that decision. He is mistaken. I have no such power over a decision made by a court of *equal* status.

16. It is also not lost on me that there were *other* proceedings against the 3rd defendant in Public Procurement and Administrative Review Board Application Number 15 of 2012. I have seen the proceedings annexed to Juma’s deposition marked MU1. On 11th May 2012, the board ordered the procuring entity to award the tender to Golicha Omar, the plaintiff in this case. It follows as a corollary that there is no basis for suing the 3rd defendant in this court. Under Order 1 Rule 10 (2) of the Civil Procedure Rules, I, *suo motu*, remove the name of the 3rd defendant from the suit with no order as to costs.

17. From the pleadings, it is beyond dispute that as far back as 11th May 2012 the Public Procurement Administrative Review Board directed that the tender be awarded to the plaintiff. The dispute went to the High Court in Nairobi High Court Judicial Review No. 384 of 2012 that I reviewed earlier. A decision was rendered way back on 5th December 2013. This suit was presented to this court on 22 January 2016. It was well over *two years* since the dispute arose. I thus readily find that this suit is *statute barred* by dint of the Public Authorities Limitation Act. No amendment to the pleadings can cure this defect. The suit

has no legs to stand on as against the 1st and 5th defendants.

18. The upshot is that the preliminary objection is sustained on *two* grounds. The plaintiff's suit against the 1st and 5th defendants is struck out but with *no* orders as to costs. The 2nd defendant's chamber summons dated 6th February 2017 is also *allowed*. The 2nd defendant is accordingly removed as a party to the suit but with *no* orders as to costs. Under Order 1 Rule 10 (2) of the Civil Procedure Rules, I, *suo motu*, remove the name of the 3rd defendant from the suit with *no* order as to costs. For the avoidance of doubt, the plaintiff's suit against the 4th defendant remains alive.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 23rd day of May 2017.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Mr. Aseso for Mr. Miyienda for the plaintiff.

Mr. Wabwire for the 1st and 5th defendants.

Mr. Muhoro for Ms. Barno for the 2nd defendant.

No appearance for the 3rd defendant.

No appearance for the 4th defendant.

Mr. J. Kemboi, Court Clerk.