



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 721 OF 2012

GEOMAX CONSULTING ENGINEERS LIMITED.....1ST PLAINTIFF

MATHU GICHUIRI ASSOCIATES LIMITED.....2ND PLAINTIFF

AND

FRAME CONSULTANTS LIMITED.....PROPOSED 3RD PLAINTIFF

KANJUMBA CONSULTANTS LIMITED.....PROPOSED 4TH PLAINTIFF

VERSUS

KIHINGO VILLAGE (WARIDI GARDENS) LIMITED.....DEFENDANT

AND

WAGEMA LIMITED.....PROPOSED 2ND DEFENDANT

RULING

1. The application dated 4th August 2017 seeks the joinder of 3 more parties to the suit.
2. First, it is proposed to enjoin **FRAME CONSULTANTS LIMITED** as a plaintiff to the suit, because at the material time, they were the Civil and Structural Engineers to the project.
3. Meanwhile, **KANJUMBA CONSULTANTS LIMITED** were the Quantity Surveyors to the said project. Therefore, the court has been asked to have them enjoined to the suit, as plaintiff.
4. Secondly, the court has been asked to enjoin **WAGEMA LIMITED** as a defendant to the suit. The said Wagem Limited has been described as the Special Purpose Vehicle which had been incorporated by **KIHINGO VILLAGE (WARIDI GARDENS) LIMITED**, for the execution and carrying out of the project.
5. The project in issue was the development of a high-end residential estate, comprising 55 houses, which were to be built within **KITISURU** area of Nairobi. The estate was to be named, the **KIHINGO VILLAGE (WARIDI GARDENS)**.
6. The applicants contend that their claims arose from the failure by the Defendant and the proposed

Defendant to honour invoices which were presented to them by the plaintiffs and by the proposed plaintiffs.

7. It was asserted that Frame Consultants and Kanjumba Consultants were appointed at the behest of the defendant.

8. The applicants pointed out that Kihingo Village (*Waridi Gardens*) Limited has the same shareholding as Wagemma Limited.

9. The applicants further pointed out that those 2 companies regularly held joint Board Meetings, during which they discussed matters affecting the 2 companies.

10. The applicants asserted that they had rendered professional services;

“as mandated by the Defendant and the Proposed 2nd Defendant”.

However, those 2 respondents are said to have ignored, refused and/or failed to honour their obligations to pay the plaintiffs and the proposed plaintiffs.

11. It was the contention of the applicants that the claims of the plaintiffs and of the proposed plaintiffs are derived from the same transaction, namely the professional services that each of them had rendered in respect of the project.

12. In the case of **LUCY NUNGARI NGIGI & OTHERS Vs. NATIONAL BANK of KENYA LIMITED & ANOTHER, Hccc No. 517 of 2014**, the court held that the plaintiffs and the proposed plaintiffs had an inextricable relief arising out of the same transaction. In the circumstances it was held as follows;

“Invariably, the determination of the real issues in controversy between the plaintiff and the intended plaintiffs on the one hand, and the Defendants on the other hand, will need all concerned parties to be before the court”.

13. Accordingly, the court allowed 128 persons to be enjoined to the suit, as plaintiffs.

14. In determining the application the court will therefore take into account the question regarding what the real issues in controversy are.

15. If the determination of the said real issues required the presence of the proposed plaintiffs and the proposed defendant, the court could order that they be enjoined to the suit.

16. When the presence of a proposed party is useful when the court was making the determination, then the proposed party was said to be a necessary party.

17. It therefore follows that if the real issues in controversy can be determined without involving the proposed party in the suit, then the said proposed party was not a necessary party.

18. In my understanding of this case, each of the plaintiffs and proposed plaintiffs had entered into contracts with the defendant.

19. Their claims were that they rendered services in accordance with the said contracts, and thereafter they raised invoices.

20. When the invoices were not settled, the plaintiffs filed suit.

21. In my understanding, the claims of each plaintiff or proposed plaintiff was in relation to the invoice raised by that individual entity.

22. For instance, the work done by Mechanical and Electrical Engineers could only be paid to the said engineers.

23. that the engineers had carried out their responsibilities under the contract, they would be entitled to be paid for the work they had done. Their entitlement to payment would not be pegged to whether or not another plaintiff had also done their work.

24. When viewed from that perspective, I would conclude that the claims by the proposed plaintiffs were not inextricably connected to the claims already put forward by the plaintiff.

25. I would also add that there is no basis in law, for holding that a Decree, if any, obtained by the plaintiff could not be executed in the absence of the proposed plaintiff.

26. It is well settled that limited liability companies are legal persons who can sue or be sued in their respective capacities.

27. The fact that 2 or more companies have either the same Shareholders or the same Directors does not negate the fact that the companies were each a distinct and separate legal entity.

28. In the case of **CRESCENT DISTRIBUTION SERVICES LIMITED Vs. EGNITE TECHNOLOGIES LIMITED & ANOTHER**, Hccc No. 555 of 2011, Hon. Lady Justice J. Kamau expressed herself thus;

“Whether or not to allow such an application (for joinder of parties) is dependent on the exercise of the discretion by the court. The court’s discretion is, however, not an absolute one. It must be exercised judiciously, upon the court being satisfied that the application has basis on facts and legal principles. The court should concern itself with establishing whether a party against whom an application has been made will suffer prejudice and if so, whether such a party would be adequately compensated by way of costs”.

29. I am in agreement with the said reasoning by my learned sister.

30. Having already concluded that the claim of each plaintiff and each proposed plaintiff could actually be determined separately, should I not simply dismiss the application for joinder?

31. In the case of **STUMBERG & ANOTHER Vs. POT GEITER [1970] E.A 323**, the court said;

“Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action, to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered”.

32. I am alive to the fact that in this application I am not being asked to order for the consolidation of cases. However, I find that even when a party was seeking joinder of another party to the suit, it would be useful for the court to consider whether or not there exists common questions of law or of fact, which have sufficient importance in relation to the claims by the proposed party, to render it desirable to have the proposed party enjoined to the suit.

33. First, I find that the claims by the plaintiff and by the proposed plaintiffs arise from the same transaction. Each of them was engaged in the project in which a high-end residential estate was being constructed.

34. Secondly, I note that whilst the plaintiff had sued the defendant on the basis of a contract allegedly executed by the two parties, the defendant had denied the existence of any such contract.

35. More significantly, the Defence asserted thus;

“2. Save that the plaintiff entered into an agreement with Mathuu & Gichuri Associates Limited to carry out certain works for a company known as Wagemma Limited, the defendant denies that there was any contract entered into between the plaintiff and the defendant as alleged or at all. Thus paragraph 3 of the plaint is denied”.

36. It is therefore, the defendant who introduced **WAGEMMA LIMITED** into the proceedings, by asserting that the work which was to be undertaken by the plaintiff, was for that company.

37. By an affidavit sworn by **FREDRICK GITAHU GETHENJI** on 22nd August 2017, the defendant said that it had been an error to deny the existence of the contract between the 2nd plaintiff and the defendant. In the circumstances, Mr. Gethenji indicated that there was an intention to amend the Defence, so as to reflect the correct position.

38. By the time the application for joinder of parties was canvassed, the defendant had not yet brought its intended application for the amendment of the Defence.

39. Therefore, the situation currently, is that it is the defendant who made the assertion that the plaintiff was supposed to provide services to Wagemma Limited.

40. In the event, I find that the only way to ensure that neither the defendant nor the proposed 2nd defendant does not attempt to frustrate the plaintiff's claim, by each denying the existence of a contract, whilst asserting that any contract was between the plaintiff or the 2nd plaintiff, and the other company, is by having both companies enjoined to the suit.

41. Of course, the flip-side is that when there is only one contract between 2 parties, the court would probably end up concluding that one of the defendants was not a party to the contract. If that were to happen, the plaintiffs would most probably be condemned to pay costs to the party which it did not have a contract with.

42. When a plaintiff has a clear mind regarding the party which it had entered into a contract with, the said plaintiff ought not to be swayed by any denials made by that party. So, ordinarily, the fact that the defendant herein had denied the existence of a contract between it and the plaintiffs ought not to have resulted in an application to add another party.

43. But in the circumstances of this case, where the defendant expressly stated that the works to be carried out by the plaintiff, were for Wagemma Limited, and because the said Wagemma Limited appears to have the same Directors as Kihingo Village (*Waridi Gardens*) Limited, it is appreciated why the plaintiffs have decided not to take chances.

44. If the defendant had not introduced the proposed 2nd defendant into the proceedings (*through the Defence*), I would certainly not have allowed the joinder of Wagemma Limited, on the grounds that the current defendant does not have any known assets, against which execution could be levied.

45. Secondly, just because any 2 or more companies have the same Directors or Share-holders is not reason enough to allow a claim which was against one such company, to be used as a basis for pursuing any other company.

46. Contracts can only be enforced against those who were party to them.

47. In this case, the proposed 3rd and 4th plaintiffs have not demonstrated that the claims of the plaintiffs cannot be determined unless the proposed plaintiffs were enjoined to the case. Similarly, I have seen nothing to persuade the court that the plaintiffs case cannot be determined conclusively unless the court will have enjoined the proposed 3rd & 4th plaintiffs.

48. In the event, I allow the application to enjoin Wagemma Limited to the case, as the 2nd defendant. As a

consequence of that joinder, the plaintiffs will have 14 days from today to file and serve an Amended plaint, which shall incorporate the said Wagem Limited.

49. Meanwhile, the application to enjoin the proposed 3rd and 4th plaintiffs to the case, is rejected.

50. As the application dated 4th August 2017 has succeeded partially and failed partially, I order that each party will bear its own costs thereof.

DATED, SIGNED and DELIVERED at NAIROBI this 22nd day of November 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Wanjiku for Njoki Gachihi for the Plaintiff

Miss Ndirangu for Ms. Kirimi for the Defendant

Collins Odhiambo – Court clerk.