REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 35 OF 2013

BLUE BELLS FOODS LIMITED.....APPELLANT

-V E R S U S –

DAYSTAR UNIVERSITY.....1ST DEFENDANT

SERENE CATERERS ..... 2ND DEFENDANT

(Being an appeal from the ruling and order in Chief Magistrate's court civil case no. 1516 of 2011 Milimani Commercial Court delivered by the Honourable Mr. D. Ole Keiwa on the 11th of May 2012)

JUDGEMENT

1. The appellant **Blue Bells food Limited** instituted a suit against the respondents **Daystar University and Serene Caterers** in the chief magistrate's court. The appellant vide its plaint dated 18th May 2011 accused the 1st defendant of terminating a contract entered by the parties and instead entered into a similar contract with the 2nd respondent. The respondents filed their respective responses denying the claim vide statements of defence dated 24th June 2011 and 13th July 2011 respectively. The honourable magistrate upon hearing the aforesaid application dated 13th September, 2011 seeking to strike out the 1st defendant's name from the proceedings, determined the matter. In his ruling, the trial magistrate found that the appellant chose to sign the agreement knowing very well that some money was still owing and therefore he had only himself to blame. He therefore allowed the application and struck out the name of the 1st Respondent from the proceedings.

2. The appellant aggrieved by the trial's court decision filed this appeal on the following grounds.

> ***1. The learned magistrate erred in law and fact in allowing the 1st defendant's/respondent application dated 13th September 2011.***
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> ***2. The learned magistrate erred in law and in fact in allowing the 1st defendant's/respondent name to be struck out from the proceedings making it hard to make a case against the 2nd defendant/ respondent on its own as they blame the 1st defendant for the amount which is the subject matter.***
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> ***3. The learned magistrate erred in law by holding that the 1st defendant/respondent had satisfied the conditions for striking out its name from the proceedings.***
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> ***4. The learned magistrate erred in law and fact by relying on the agreement dated 16th August***

2010 wherein it was expressly agreed that the amount which is the subject matter was not part of what was negotiated and agreed upon in the said agreement.

5. The learned magistrate erred in law and in fact in failing to consider the appellant's replying affidavit and/or case.

3) The appellants case was that it entered into a contract dated 1st February 2006 with the 1st respondent where it was contracted to provide food services for 1st respondents students, staff and faculty at the Athi River Campus. The appellant claims that it performed its part of the agreement diligently until 24th February 2006, when the 1st respondent terminated its services and ordered it to hand over all the 1st respondents property to the 2nd respondent who was instructed to take over from it. The appellant avers that it handed over all its operations to the 2nd respondent as directed together with its final bill of ksh.627,220/= for settlement which it gave to the 1st respondent. However, it's the appellants contention that the 1st respondent only paid a total sum of kshs.286,140/= leaving an outstanding sum of kshs.341,080/= which sum it alleged failed to pay for reasons that some of the food stuffs that it delivered though fresh at the moment went bad due to poor storage. The appellant consequently filed this suit in the trial court to claim the sum of kssh.341,080/= against the 1st and 2nd respondents jointly and severally, plus interest, costs of the suit and any other relief that the court may deem fit to grant.

4) The 1st respondent in its defence denied the claim as far as the outstanding sum is concerned. The 1st respondent averred that it was not responsible for the poor storage and that it's only role was to introduce the 2nd respondent to the appellant to ensure that no university property was lost in the process. Therefore, any agreement or accommodation mutually agreed between the appellant and 2nd respondent are beyond its control and it cannot be held to account. It denied further that it is jointly liable with the 2nd respondent for the sum of kshs.341,080/=. The 1st respondent further asserted that all claims relating to the catering contract between itself and the appellant were resolved through mediation undertaken by one **Martin Munyu of Iseme Kamau & Maema advocates** and a settlement agreement was executed on 16th August 2010 between the two parties. According to the agreement, the parties agreed that the 1st respondent pays kshs.523,093/= on 16th August 2010 to the Appellant, which it did.

5) The 2nd respondent in its defence averred that it only owed the appellant a sum of ksh.286,140/= which amount it paid it vide cheque no. 00046 dated 31st May 2007. It denied being indebted to the appellant for a sum of ksh.341,080/= since the stock supplied to the 2nd respondent had expired and was not used.

6) I have considered the written submissions as filed by the appellant and 1st respondent and I have also re-evaluated the application in the trial court and the resulting ruling of the honourable magistrate. The grounds as listed in the memorandum of appeal can be summarised into one issue which includes whether it was proper for the trial court to strike out the name of 1st respondent from the proceedings.

7) The 1st respondent argues that it should be struck out from the proceedings since the appellant does not have a valid claim against it especially since it was fully discharged from any claims following a settlement agreement reached by both parties before a mediator. The appellant on the other hand is adamant that the respondent should remain a party in the suit since it owes a sum of kshs.341,080/= which sum was allegedly never in the mediation table after the 1st respondent refused to have it settled through mediation.

8) The law governing joinder of parties is laid out under Order 1 Rule 3 of the Civil Procedure Rules which provides that 'All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts of transactions is alleged to exist, whether jointly, severally or in alternative suits were brought against such persons a common question of law or fact would arise.

9) I have perused the annextures to the application subject to this appeal. It is evident that there was a mediation process undertaken by the appellant and the 1st respondent. The outcome of the mediation was canvassed into a **'settlement agreement**.' According to this agreement between the appellant and the 1st respondent, the appellant raised outstanding invoices of ksh.1,198,034 on account of a catering contract between the parties as performed in February 2006 at the 1st respondent's Athi River Campus. Upon deliberating on the matter, the parties as guided by the mediator agreed that the 1st respondent pays the appellant a sum of kshs.523,093 in full and final settlement of all the claimants/appellants claims. A breakdown of the items was listed in paragraph 1. Further to that, in paragraph 3, it read thus:

> **"The claimant hereby confirms that it has no further claims against the respondent with respect to the catering contract performed in February 2006 or any other contract and further confirms that the respondent will stand wholly discharged upon payment of the sum of kshs.523,093 set out herein above."**

This agreement was executed by both parties and is therefore deemed binding.

10) An interpretation of the above agreement in my view was meant to settle any amount that remained outstanding as far as the business between the parties was concerned. The appellant had an opportunity to raise its invoices, which it did in the tune of ksh.1,191,093/= and with the consent of both parties, the same was reduced to kshs.523,093/=. The settlement agreement indicates that it was the intention of both parties to end their contractual relationship by settling any outstanding monies and they proceeded to do so through a mediation process. The appellant went on further to state that it had no further claim against the respondent in respect to the catering contract performed in February 2006 or any other contract. The appellant has also not shown that there were any subsequent contract between the parties other than the one dated 1st February 2006. The appellant cannot therefore turn around at this juncture and institute a suit against the 1st respondent yet any outstanding dues were paid to it following the settlement agreement between the parties. The settlement contract sealed both the parties fate.

11) Furthermore, the 2nd respondent has shed more light on this claim in its defence after it averred that it had an arrangement with the appellant and that it is indebted in the sum of ksh.286,140/= which sum was reached upon after it held a meeting with the appellant to pay up this sum of money.

12) Ultimately, I do not find the 1st respondent a necessary party in the proceedings. I hereby uphold the decision of the trial court and dismiss the appeal in its entirety. Costs to the 1st respondent.

Dated, Signed and Delivered in open court this 25th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent