



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO 59 OF 2014

U DESIGN.....1ST PLAINTIFF
 AMAZON CONSULTANTS LIMITED.....2ND PLAINTIFF
 PROFESSIONAL CONSULTANTS LIMITED.....3RD PLAINTIFF

VERSUS

ALEX BAZARA TABULO.....DEFENDANT

RULING

INTRODUCTION

1. The Defendant’s Notice of Motion application dated 16th April 2014 and filed on 22nd April 2014 was brought under the provisions of Section (sic) 4 & 5 Rule 46-53 A3, A5, A6 & A7 of the Architects & Quantity Surveyors Act Cap 525, Section 6 of the Arbitration Act, Article 159 (2)(c) & (e) of the Constitution of Kenya 2010, Section 1 (2), 3 & 3A of the Civil Procedure Act, Order 30 Rule 9 of the Civil Procedure Rules 2010. It sought the following orders:-
 - a. **THAT the Honourable Court do find and hold that it has no jurisdiction to hear and determine the matter as filed.**
 - b. **THAT the suit herein be struck out and or be stayed for being fatally & incurably defective.**
 - c. **THAT the Honourable Court do issue such further orders as it may deem fair and just to grant.**
 - d. **THAT the costs of this application be granted to the Defendant/Applicant.**

THE PLAINTIFF’S CLAIM

2. The Defendant swore Supporting and Supplementary Affidavitson 9th April 2014 and 16th June 2014. He filed a List of Authorities was dated and filed on 16th June 2014. He also filed his written submissions and another List of Authorities were dated 24th July 2014 and filed on 25th July 2014.

3. He contended that the 2nd and 3rd Plaintiffs had no *locus standi* to file the proceedings herein as they were not registered under the Architects and Quantity Surveyors Act making them incompetent to enter any Contract for such services with him or to enforce any such contract. He also averred that the 1st Plaintiff was a firm of architects registered and regulated by the said Architects and Quantity Surveyors Act which precluded it from filing the present suit.
4. He was emphatic that the Plaintiffs in their capacity as “...**the Architect, Quantity Surveyor and Engineers respectively did not render professional services with a degree of ordinary, reasonable care, technical skill, ability or diligence expected of them...**” and that he promptly paid all the fees that he was required to pay. He also averred that he had never declined to have the dispute arbitrated upon as had been contended by the Plaintiffs and that to the contrary, it was the 1st Plaintiff who was frustrating all efforts to amicably resolve the dispute herein.
5. He stated that he had been intent of lodging a formal complaint with the Registration of Architects and Quantity Surveyors under Rule 45 of the Architects and Quantity Surveyors Act but he could not do so as the suit herein was a bar. The suit was therefore an abuse of court process and ought to be struck out.
6. In addition, it was also his contention that there was no proper Verifying Affidavit on record and in the circumstances, it was in the best of interest that the Plaintiff’s suit be struck out.

THE DEFENDANTS’ CASE

7. On 4th June 2014, Paul Wariithi Mutahi, a partner in the Plaintiff’s firm swore a Replying Affidavit on behalf of all the Plaintiffs herein that was filed on even date. Their List of Authorities was dated and filed on 4th June 2014 while their written submissions and Supplementary List of Authorities were dated and filed on 26th August 2014.
8. The Plaintiffs’ case was that the Defendant entered into a contract with them in their capacities as the Architect, Quantity Surveyor and Structural Engineers respectively for the construction of residential apartments on L.R. No Mombasa/Block XXVI/1102 (hereinafter referred to as “the subject property”).
9. After they rendered professional services to the Defendant at his request and instant, which services were rendered to the standard that was expected of them but the Plaintiff had refused to settle their professional fees in the sum of Kshs 10,772,943.20 and had in fact disputed liability. It was their averment that the Defendant had not and had never had a desire to refer the matter to arbitration and the court therefore had jurisdiction to hear and determine the same.

LEGAL ANALYSIS

10. In its written submission, the Defendant identified the following issues as worthy of determination by the court:-

- a. **Whether the 1st Plaintiff had capacity to sue in the manner it had and if not, what the fate of the suit was;**
- b. **Whether the 2nd and 3rd Plaintiffs had *locus* to sue as they were, and if not, what the fate of the suit was;**
- c. **Whether Paul Wariithi Mutahi could swear a Verifying Affidavit, Replying Affidavit or at all to adduce evidence on behalf of the 2nd and 3rd Plaintiffs, and if he could not, what was the fate of the suit that were filed by the 2nd and 3rd Plaintiffs in any event;**
- d. **Whether given the circumstances of this matter, disputes between the Architect and the Defendant were to be resolved by arbitration in the first instances, and if they were to be so resolved, what the fate of the suit before this Honourable Court would be in any event;**

e. Who should bear the costs of this suit and what therefore would be the orders of this Honourable Court.

11. The Plaintiffs identified the following issues:-

a. Whether the jurisdiction of this Honourable Court has been ousted by By Law A7 of the By Laws, under the 4th Schedule of the Architects and Quantity Surveyors Act Chapter 525 of the Laws of Kenya as alleged or at all;

b. In the alternative and without prejudice to issue (A), has the Applicant established sufficient cause to warrant a stay of the proceedings herein;

c. Whether the suit has been properly instituted in the name of the 1st Plaintiff U Design, a firm registered under the Business Names Act;

d. Whether the contract between the Plaintiffs and the Defendant is enforceable on account or purported misidentification of the Plaintiff;

e. Was there privity of contract between the Plaintiffs and the Defendant;

f. Whether the Verifying Affidavit was defective.

12. However, from the pleadings that were filed herein, it was the view of the court that the aforesaid issues could be merged into the following two (2) issues:-

a. Whether or not the jurisdiction of this court to hear the matter herein had been ousted by virtue of the provisions of By Law A7 of under the 4th Schedule of the Architects and Quantity Surveyors Act Chapter 525 of the Laws of Kenya as alleged or at all?

b. Whether the suit could be struck or be stayed for being fatally and incurably defective on the following grounds:

i. Mis-description of the 1st Plaintiff;

ii. Lack of privity of contract between the 2nd and 3rd Plaintiffs and the Defendan

iii. Lack of Authority to the 1st Plaintiff swear the Verification Affidavit and Replying Affidavits on behalf of the 2nd and 3rd Plaintiffs

13. The court found it fit to deal with issue No (a) hereinabove because the question of jurisdiction would ideally go into the root of this matter. Indeed, without jurisdiction, the court would not be able to hear the matter herein.

14. The Defendant's argument was that the 1st Plaintiff was precluded from filing the suit herein in view of the provisions of Sections (4) and (5) of the Architects and Quantity Surveyors Act and the rules cited hereinabove, which were that any dispute regarding fees had to be referred to arbitration in the first instance.

15. The Defendant submitted that a plain reading of the Contract letter dated 24th September 2010 did not expressly provide for the manner in which disputes emanating therefrom could be resolved but that the Architects and Quantity Surveyors Act showed that the dispute fell squarely under the provisions of the said Act.

16. It was its contention that the issues therein were technical in nature and would best be resolved through arbitration by an Architect, whether the same was agreed upon by the parties herein or pursuant to a court order for the reason that there was a statutory dispute resolution mechanism.

17. In this regard, he placed reliance on the cases **of Kenya Ports Authority vs African Line Transport Co Ltd (2014) eKLR** and **Dupoto Group Limited vs Kenya Ports Authority (2013) eKLR** the latter case which cited with approval the holding in the case of **Speaker of National Assembly vs Njenga Karume [2008] 1 KLR** which was that:-

“...where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed...”

18. On the other hand, the Plaintiffs referred the court to the case of **Davies & Another vs Mistry [1973] E.A. 463** where the applicant therein had applied to strike out the suit on the ground that the architects claim could only be made by Arbitration under the Architects Quantity Surveyors By-Laws. Justice Spry V.P. stated as follows:-

“ There is not a word in the Act that suggests that it is intended to govern contractual relations of architects and their client...I cannot accept that a by-law which purports to compel architects and client to go to arbitration and deprive them of their right of recourse to the courts is incidental to the fixing of scales of fees...But in my opinion S. 5 gives the Board no power to interfere in the contractual obligations between architect and client and no power to deprive either of his access to courts to resolve any dispute with the other...”

19. It also placed reliance on several other cases where the common thread was that there was nothing in the Architects and Quantity Surveyors Act that seemed to suggest that it intended to withdraw from the jurisdiction of the court, disputes between architects and their clients relating to the payment of fees and charges.

20. Section 5 (f) of the Architects and Quantity Surveyors Act stipulates that:-

“The Board may from time to time subject to confirmation of the Minister, make by-laws for all or any of the following purposes-

for the scale of fees to be charged by architects and quantity surveyors for professional advice, services rendered, and work done.”

21. Clause A.7 of the 4th Schedule of the Architects and Quantity Surveyors Act provides as follows:-

“Where any difference or dispute arising out of the conditions of Engagement and Scale of Professional Fees and Charges cannot be determined in accordance with paragraph (a) of Clause A.6 it shall be referred by a person to be agreed upon between the parties, or failing agreement within 14 days after either party has given the other a written request to concur in the appointment of an arbitrator, to a person to be nominated at the request of either party by the President of the East Africa Institute of Arbitrators.”

22. It is clear from the aforesaid Clause A.7. a difference or dispute arising out of the conditions of Scale of Professional Fees and Charges must first be determined in accordance with Clause A.6 therein before parties can proceed to arbitration.

23. Clause A.6 of the 4th Schedule provides as follows:-

Any difference or dispute may by agreement between the parties be referred to the Board for an opinion, provided always that such an opinion is sought on a joint statement of undisputed facts, and the parties undertake to take it as final.

24. The Defendant did not provide the court with any evidence to demonstrate that it had firstly, attempted to have the dispute determined in accordance with Clause A.6 and secondly, that it had written to the Plaintiffs to concur in the appointment of an arbitrator.

25. It did not annex copies of any documents it was relying upon to buttress its arguments about the matter being referred to arbitration and instead relied to copies of documents that were relied upon by the Plaintiffs in opposition to the Defendant's application. Notably, it was the Plaintiffs who, in their letter of 3rd September 2013 Exhibit marked "PWM 4," proposed that parties resort to arbitration to resolve the dispute alongside the dispute between the Defendant and Shree Haree Builders Limited that was pending before the Hon Arbitrator Walter Odundo.

26. The Defendant did not attach any response to this letter which made the court doubt its sincerity in its assertion that the matter be referred to arbitration. As the Defendant did not respond to the said proposal, the Plaintiffs could not therefore be faulted for having filed the present suit. On this ground alone, it would appear that the Defendant was merely latching on a mere allegation without demonstrating his good will to have the dispute resolved by way of arbitration.

27. The court also concurred with the Plaintiffs' submissions that there was nothing in the Architects and Quantity Surveyors Act that seemed to suggest that the only mode in which a dispute or difference on fees could only be determined through arbitration and that its jurisdiction had been ousted. This court took the view that Clause A.6 of the 4th Schedule was a condition precedent of Clause A.7. In other words, one could not proceed to arbitration unless he had first tried to have a dispute or difference referred as provided for under Clause A.6 of the said 4th Schedule.

28. In addition, the court wholly concurred with the holding in the case of **Davies & Another vs Mistry**(Supra) that its jurisdiction had not been ousted and could only be ousted if the Constitution, Statute or Regulation provided for the express ousting of the court as was held in the case of **Speaker of National Assembly vs Njenga Karume**(Supra) and which is not the case herein.

29. Having said that, the procedure for referring a matter which has been filed in court to arbitration must be done as has been provided for under Section 6 of the Arbitration Act Cap 49 (Laws of Kenya). Such referral also not automatic and the court can decline to refer the matter to arbitration in the circumstances shown hereinbelow:-

“A court before which proceedings are brought in a matter which is the subject of an arbitration shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay of proceedings and refer the parties to Arbitration unless it finds-

a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or

b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration...”

30. It could not be said that there was in fact a dispute to be referred to arbitration in view of the provisions of Clause A.6 of the 4th Schedule of the Architects and Quantity Surveyors Act. Additionally, it was not lost to the court that the 3rd Plaintiff was neither an architect nor a quantity surveyor for whom the Architects and Structural Engineers was intended to govern. The 3rd Plaintiff was a Structural/Civil Engineer and Mechanical/Electrical Engineer. It would be a travesty and miscarriage of justice if the 3rd Plaintiff was to be shut from accessing the courts, a right that it was entitled to under Article 50 of the Constitution of Kenya, 2010.

31. Appreciably, it is clear that under Section 6 of the Arbitration Act, a suit had to be stayed to enable parties proceed to arbitration for the determination of their dispute. The court was unable to understand the Defendant's prayer No 2 as he had sought to have the **suit stayed and or struck out it** for being fatally or incurably defective as the same was not hinged on any provision of the law and if there was any, the Defendant did not point out to the court. For the foregoing reasons, the court found and held that the jurisdiction of the court could not have been ousted in this matter.

32. Turning to issue (b)(i) hereinabove, the Defendant submitted that "U Design" was not a juristic person that could sue and be sued as it was a registered business name rendering the suit fatally defective. It referred the court to the case of **Agatha Kaluki Mutiso vs The Director St Teresa's Academy (2013) eKLR** in which it was held as follows:-

"...a sole proprietor of a business of a business cannot sue in the name of that business if that name is not his own...He should sue in his own name simpliciter and then in the body of the plaint he can say he carries on business in the name of whatever business happens to be and is the sole proprietor of that business."

33. The Plaintiffs argued that Order 30 Rule 2 (1) of the Civil Procedure Rules, 2010 provided that where there are two (2) or more can institute a suit in their own name. It placed reliance on the case of **Mehul Nemchand Haria vs Hombe Saw Mills & Another [2013] eKLR** in which the Court of Appeal held as follows:-

"It is clear from rule 1 of Order 29 (now Order 30) that where a firm has two or more partners, a suit can be instituted in the firm's name. If, however, the firm is a sole proprietorship, the rule does not apply and consequently a suit against a sole proprietor must be in the name of the proprietor as opposed to the name of the firm..."

34. In the case of **Agatha Kaluki Mutiso vs The Director St Teresa's Academy**(Supra) it is evident that it is **"a sole proprietor**(emphasis court) **of a business of a business who cannot sue in the name of that business if that name is not his own"**which is the same position that was held in the case of **Mehul Nemchand Haria vs Hombe Saw Mills & Another** (Supra).

35. In its Amended Plaint dated 9th April 2014 and filed on 10th April 2014, the Plaintiffs attached a Disclosure of Partners' names pursuant to Order 30 Rule 2 (1) of the Civil Procedure Rules showing the partners' names as Paul Mutahi Wariithi, Anthony Thomas Gachunge Thimangu and Stephen Khisa Simiyu. This was not a fact that was rebutted by the Defendant.

36. In the absence of any evidence to the contrary, the court found and held that the suit was filed by the 1st Plaintiff was quite in order and could not be struck out as had been contended by the Defendant.

37. In respect of issue (ii) (b) hereinabove, the court noted the parties' submissions and case law as regards the question of privity of contract. However, this is not an issue that can lead the court to strike out a suit or find that a suit is defective merely because parties who another deems not to have been part of the transaction have been enjoined in the suit.

38. It was the view of the court that this was an issue that was substantive in nature and was best left for ventilation at trial as there was no sufficient evidence for the court to make such a final and conclusive finding. Indeed, making a determination at this juncture would not only be pre-empting the parties' respective cases but the court would also be analysing affidavit evidence when it was quite clear to the court that there were weighty and triable issues that would require to be ventilated in a full trial.

39. On issue No (iii) (c) shown hereinabove, the Defendant argued that there was only one (1) Verification Affidavit sworn by Mutahi Wariithi on his own behalf and on behalf of the 2nd and

3rd Plaintiffs yet contrary to the provisions of Order 4 Rules 2, 3 and 4 of the Civil Procedure Rules. He contended that the 2nd and 3rd Plaintiffs had not given the 1st Plaintiff any written authority to prosecute the case on their behalf necessitating the striking out of the suit herein.

40. He referred the court to the case of **Mulusiah Land Consultants & Another vs Industrial Development Bank Limited & 2 Others (2005) eKLR** in which it was held that a plaint could not stand alone once the Verification Affidavit had been struck out.

41. The court agreed with the Defendant that the Verification Affidavit as filed by Paul Wariithi Mutahi was incompetent and fatally defective as he sought to act for 2nd and 3rd Plaintiffs which were corporate entitled without any written authority to do so. There can be no other option but for the court to strike the same out.

42. Being distinct and separate corporate entities, the court did not see any reason why each of the Plaintiffs could not file their respective Verification Affidavits and the necessary documentation to demonstrate that the parties who had sworn the said Verification Affidavit had authority to do so and to act on behalf of the Plaintiffs herein.

43. However, the court was not in agreement with the Defendant's submissions that without the said Verification Affidavit, the suit would have no limb to stand on. This is because the provisions of Article 159 (2)(d) of the Constitution of Kenya, 2010 mandates the court to administer justice without undue regard to technicalities as its duty is to sustain rather than terminate a suit. Appreciably, striking out of a suit is a draconian step and must be exercised cautiously and only as a last resort.

44. Indeed, in the case of **HCCC No 1439 of 2001 Janmohamed Verjee & 2 Others vs Samaki Limited & 2 Others** (unreported), it was held as follows:-

“In this case, as I have stated the Plaint partially complied with the requirements of Order 7 Rule 1 (2) so that even if I have to strike out the Plaint, it would not be fair to strike out the same plaint...”

45. A similar finding was also made in the case of **Akaba Investments Limited vs Kenroad Limited [2006] eKLR** as in the other several other cases that were referred to by the Plaintiffs. This court would not take any different position from the said courts in view of the

46. The manner in which the Defendant tried to strike out the suit herein was to say the least not properly presented before the court. Notably, it could only purport to strike out of suit as provided for under the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010 which stipulates that:-

1. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

- a. It discloses no reasonable cause of action or defence in law; or**
- b. It is scandalous, frivolous or vexatious; or**
- c. It may prejudice, embarrass or delay the fair trial of the action; or**
- d. It may be otherwise an abuse of the court process of the court,**

And may order the suit to be stayed or dismisses or judgment to be entered accordingly as the case may be.

2. No evidence shall be admissible on an application under subrule (1) (a) but the

application shall state concisely the ground on which it is made.

47. Having considered the pleadings herein, the affidavit evidence and the written submissions and case law in respect of the parties' case, the court found and held that the Defendant's application was disjointed and could not be granted as had been sought. Prayer No (1) appeared to have been a declaration while Prayer No (2) was contradictory. Suit could either be struck out or stayed but not both. Indeed, suit could not be stayed for being fatally and incurably defective. There would be no purpose to be served to stay a suit that was incurably defective.

DISPOSITION

48. Accordingly, the upshot of this court's ruling is that the Defendant's Notice of Motion application dated 16th April 2014 and filed on 22nd April 2014 was not merited and the same is hereby dismissed. The Verification Affidavit that was sworn by Paul Wariithi Mutahi on 17th February 2014 is hereby struck out. The Plaintiffs are hereby directed to file fresh Verification Affidavits and documentation to show that the deponents of those Affidavits have authority to so act on their behalf within the next fourteen (14) days from the date hereof.

49. Costs shall be in the cause.

DATED and DELIVERED at NAIROBI this 28th day of January 2015

J. KAMAU

JUDGE