



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL SUIT NO. 135 OF 2009
GITHAMBO GENERAL CONTRACTORS.....PLAINTIFF
VERSUS
KAY CONSTRUCTION COMPANY LTD.....DEFENDANT
RULING

By a suit filed in court on 26th August, 2009 and amended on 28th May, 2012, the plaintiff sued the defendant for general damages for breach of contract and for a temporary injunction restraining the defendant from further interfering with the “plaintiff (sic) sub-contract entered into on 14th August, 2007.”

The plaint was subsequently amended on at least two occasions and in its latest version stated to have been amended on 30th May, 2012 and filed in court on 30th May, 2012 the claimant varied the prayers he was seeking to the extent that he dropped the prayer for the temporary injunction.

In its defence dated 24th day of May, 2010 and subsequently amended on 28th May, 2012 and 20th March, 2014 the defendant consistently contested the plaintiff’s capacity to sue and his claim for general damages based on breach of contract. The defendant followed its pleadings with two notices of preliminary objection; in the first notice dated 27th February, 2012, the defendant objected to the suit on the sole ground that the plaintiff’s suit did not disclose any reasonable cause of action since no general damages can be awarded in a claim based on breach of contract. In the second notice dated 14th April, 2014 the defendant impugned the plaintiff’s suit in the following terms:-

1. The plaintiff’s suit is misconceived;
2. The plaintiff is neither a legal entity nor a juristic person capable of suing or being sued;
3. The plaint disclosed no reasonable cause of action; no general damages can be awarded in a claim based on breach of contract;
4. The claim being a special damage claim could not be sustained without the special damages specifically pleaded and particularised; and
5. The plaintiff’s amended plaint was not verified.

This preliminary objection which incorporates the ground raised in the first notice was argued before me

on 2nd December, 2014 and it is the subject of this ruling.

Having listened to the submissions by the supposed plaintiff and the defendant's counsel, it is clear and it is not in dispute that the plaintiff is neither a natural nor a juristic person; it is merely a business name. This is apparent from the documents that have been filed and upon which the plaintiff has sought to rely in the prosecution of his suit; amongst these documents is a certificate of registration of a business name issued under **section 14** of the **Registration of Business Names Act (cap 499)** showing that **Githaiga Muturi** carries on his business under the business name of **Githambo General Contractors**.

The only question for determination in this instance, therefore, is whether one can sue under a business name by which he trades rather than in his own name and whether a suit filed in the name of a business by which one trades is sustainable. This question was raised and answered in the case of **Lakhmani Ramji versus Shivji Jessa & Sons (1965) E.A. 125**. At page **128** of that decision the court (Rudd, J.) said:-

The legal position is quite clear. A sole proprietor of a business cannot sue in the name of that business if that name is not his own name. He should not even sue in his own name trading in the business name. He should sue in his own name simpliciter and then in the body of the plaint he can say that he carries on business in the name of whatever his business name happens to be and is the sole proprietor of that business. That is technically the correct procedure but nowadays rectification is allowed so easily that the matter is merely a technicality.

What the claimant did in the instant suit was the exact opposite of what the learned judge in the cited decision said; he sued in his business name and described himself in the body of the plaint. In paragraph 1 (a) of his plaint he described himself as follows:

“The plaintiff is a registered business man (sic) carrying on business with the Republic of Kenya.”

This defect, as the court noted is not, however, fatal to one's claim; it is, in the court's words, a mere technicality which can be rectified. According to the court:-

The whole matter is one of relatively minor importance since it can easily be rectified at any stage. Nevertheless I am not to be taken as suggesting that it does not matter in such a case whether the plaintiff sues in his own name or not. He must sue in his own name and if he does not this should be rectified. If the plaintiff does not take steps to obtain the rectification the defence can take the point and make an application to force him to do so and may even get costs but normally the plaintiff can obtain rectification by verbal application at some convenient time after giving prior notice of his intention to the other side. If prejudice results it can be compensated by costs but very often no prejudice results and then I would usually allow the rectification without costs.

This statement of the law is consistent with **Order 1 rule 10 (1)** of the **Civil Procedure Rules, 2010** which provides that:-

10. (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

The claimant in the instant case appears not to have taken the defendant's objection on this point seriously; I am inclined to conclude so because although the defendant consistently raised this issue in its defences which as noted have been amended twice and even filed and served the claimant with two notices of a preliminary objection filed at different times but raising the same issue, the claimant never made any attempt to amend the name under which he brought his suit; this he omitted to do despite

having amended his plaint on at least two occasions. He chose to fight on and defend his suit in its present form.

The claimant's action or inaction in this regard may, however, be of no consequence considering my finding on the next issue that the defendant has raised in his preliminary objection.

While the name in which the plaintiff chose to bring a suit to court may not be fatal to his claim, if in the least, it is rectified, such a claim may be beyond redemption if all it is seeking are general damages based on a claim for breach of contract; this is the second issue that the defendant raised in its preliminary objection which, in my humble, view appears to dim the prospects of the claimant's claim. The claimant's plaint is clear that he is seeking damages for breach of contract; in fact to be specific his prayers in the plaint are framed thus:-

Reasons wherefore the plaintiff prays for judgment against the defendant for:-

- a. General damages for breach of contract
- b. (deleted by amendment)
- c. Costs of the suit and interest form (sic) the filing of the suits (sic) at courts (sic) rate.
- d. Any other or better relief the court may deem fit.
- e. Payment paid to Ndiki construction Co. David Madhuva Agnes Muthoni and Joseph Munjuru Kanyugi for hand packing stones on the base course."

The award of damages in claims based on breach of contract is mainly compensatory and compensation is normally achieved by placing the innocent party, so far as money can do so, in the same position as if the contract had been performed (see *Johnson versus Agnew (1980) AC 367* at page 400); general damages cannot achieve this purpose and would not therefore be available for breach of contract. In **Provincial Insurance Company East Africa versus Nandwa (1995-98) 2 EA 288, the Court of Appeal (Omolo, Lakha and Pall JJA)** citing the decision in **Dharamshi versus Karsam (1974) EA 41** held that no general damages can be awarded for breach of contract. The learned judges expressed surprise in their decision that the High Court whose decision was the subject of the appeal "*should have allowed claims for general damages on a breach of contract or made an award for special damages which had never been pleaded*". The Court reiterated this position in **Nairobi Civil Appeal No. 323 of 2002 Securicor Courier (K) Ltd versus Benson David Onyango & Another (2008) eKLR**. Again in its decision in **Kisumu Civil Appeal No. 122 of 1997, Johnstone Mango versus African Ltd**, the Court of Appeal dismissed the appeal on the sole ground that no general damages can be awarded for breach of contract.

As is clear from the plaintiff's plaint, the prayer for general damages appears to me to be the only prayer that the plaintiff is seeking such that without it the plaintiff would have had no reason to institute this suit against the defendant. The only other prayer is prayer (e) which appears to have been irregularly incorporated in the prayers in plaint since it was not part of the original plaint and does not appear to have been included in the amended plaint by way of amendment; in any event, that prayer is not supported by any particulars in the claimant's plaint and is more or less a prayer for unspecified damages. In the light of its uncertainty, it would be difficult for the plaintiff to enforce judgment in terms of that prayer as much it would be impossible for the judgment debtor to satisfy it if the plaintiff's suit was to succeed.

As noted the plaintiff's claim is based on breach of contract, his suit cannot succeed if all he is seeking are general damages which, considering the decisions that I have referred to in this judgment, are not awardable. I would in the circumstances agree with the defendant's counsel that the defendant's claim does not disclose a reasonable cause of action against the defendant company and for this reason I would uphold the defendant's preliminary objection dated 14th April, 2014 and strike out the plaintiff's suit with costs. It is so ordered.

Dated, signed and delivered in open court this 13th day of February, 2015

Ngaah Jairus

JUDGE