



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 366 & 367 OF 2011

PANGAEA HOLDINGS (K) LIMITED ::::::::::::::::::::: PLAINTIFF

VERSUS

HACIENDA DEVELOPMENTHOLDINGS LIMITED ::::::: DEFENDANT

RULING

INTRODUCTION

1. There are two similar applications before this Court for determination as filed in **Civil suit No. 366 of 2011** and **Civil Suit No 367 of 2011**. In that case I will deal and refer to one application which will be applicable in both suits.
2. The Application before this Court is the Defendant's Notice of Motion dated **27th October 2014** brought under a Certificate of urgency dated on same date. It is expressed to be brought under **Sections 1A, 1B, 3A, 15 and 18** of the **Civil Procedure Act** and **Rule 9** of the **Advocates (Practice) Rules** contained in the Advocates Act.
3. The application is seeking for orders that the firm of Bowyer Mahihu & Co. Advocates by its Partners and Associates be barred from representing the Plaintiff in this suit and that the Plaintiff's suit be struck out with costs as it is an abuse of the Court process. In the event that the suit is not struck out, the Application seeks for orders that the suit be transferred to the High Court of Kenya at Mombasa for hearing and disposal.
4. The application is based on the several grounds stated therein and is supported by the affidavit of ADAM TULLER, one of the defendant's director, sworn on **27th October 2014**.

THE DEFENDANT'S CASE

5. The Defendant's case is that there is sufficient evidence that the firm of Bowyer Mahihu & Co. Advocates attempted together with their client, the Plaintiff, to interfere with one of the Defendant's witness and to have illegitimate access to that witness. The Defendant intends to call representatives of the said firm as witnesses on the issue of the credibility of the Plaintiff's evidence in so far as the Plaintiff attempted to bribe the Defendant's witness. On that note it is the Defendant's case that Rule 9 of the Advocates Practice Rules bars any Advocate who may be called as a witness from representing any party in the suit.
6. With regard to the transfer of this suit to the High Court at Mombasa, it is the Defendant's position that they are based in Mombasa and the property upon which the Plaintiff alleges to have advanced funds for Development is in Mombasa. The Defendant also notes that the Plaintiff's Advocates are based in Mombasa though they handle the matter from their Nairobi branch.

7. On the prayer of striking out this suit, it is the Defendant's case that the Plaintiff cannot proceed with this suit when after 3 years of filing the same, it opted to pursue the claim through arbitration under the umbrella of Pangaea Development Holdings Ltd against Hacienda Development Ltd.

THE PLAINTIFF'S CASE

8. The Plaintiff opposed the Application. There are three Replying affidavits all sworn on **21st November 2014**. The first one sworn by BRUCE BOUCHARD the director of the Plaintiff and the other two sworn by SALLY MAHIHU and GRACE KANYIRI, both being Advocates of the High Court of Kenya.
9. The Plaintiff denied the allegations that it colluded with its Advocates to bribe the Defendant's witness. It is their case that the Defendant's application is premature and offensive as it seeks to determine the Plaintiff's suit even before it is heard. It is also the Plaintiff's case that the Defendant's intention to discredit its Advocates so as not to represent them in Court is a violation of their constitutional rights.
10. With regard to the Defendant's claim that this suit should be transferred to Mombasa, it is the Plaintiff's position that the same is laced with sinister motives as the Defendant had never challenged the jurisdiction of the current court since 2011 when the suit was filed.
11. On the issue of striking out the suit, it is the Plaintiff's case that the presumption that they had abandoned the claim in this suit is false and misleading.

SUBMISSIONS

12. The Application was prosecuted by way of oral submissions on 19th December 2014.

ANALYSIS

13. I have carefully considered the pleadings on record as well as the oral submissions by Counsel. Having done so, I take the following view on the matter.
14. The following in my view are the issues for determination:-
 - a. ***Whether the firm of Bowyer Mahihu & Co. Advocates by its Partners and Associates should be barred from representing the Plaintiff in this suit;***
 - b. ***Whether the Plaintiff's suit should be struck out with costs; and***
 - c. ***Whether the suit should be transferred to the High Court of Kenya at Mombasa for hearing and disposal.***
15. On the first issue, the Defendant averred that the Plaintiff and its Advocates attempted to interfere with one of its witnesses. To this end the Defendant attached to its application copies of affidavits as well as emails sent by the Plaintiff's Advocates to the witness, Mr. E. Mwaniki Ngunyu. The Defendant further averred that one Grace Kanyiri an associate in the firm of Bowyer Mahihu & Co. swore false affidavits of service. It is on the foregoing basis that the Defendant seeks to call the Plaintiff's Advocates as witnesses.
16. The Plaintiff does not deny sending the attached emails to Mr. Mwaniki Ngunyu. It is however the Plaintiff's contention that the said emails were sent between November 2010 to July 2011 in which period there was no case between the parties. Hence, it is the Plaintiff's case that the said Mr. Mwaniki could not have been the Defendant's witness as there was no suit instituted by the Plaintiff at the time. The Plaintiff added that the emails they sent out were enquiries and investigative in nature.
17. I have perused the said emails and I agree with the Plaintiff that the same were enquiries being made on the said Mr. Mwaniki. In addition the said emails were sent before the filing of the current suit. Therefore, the Defendant cannot be heard to say that on the basis of the said emails the Plaintiff tried to interfere with its witness. To say the least, the Defendant has not substantiated the allegations that the Plaintiff interfered with any witness. To that end there is no basis of calling the Plaintiff's advocates as witnesses or even barring them from representing the Plaintiff in this matter.

18. On the issue of striking out the Plaintiff's suit, the Plaintiff noted that the dispute between Pangaea Development Holdings Limited and the Defendant was a separate claim from the current suit and that the parties therein were also different from the parties in the current suit. Indeed, even as the name suggests, Pangaea Holdings (K) Limited and Pangaea Development Holdings Limited are not one and the same. The Defendant has not controverted this fact. In that case, the arbitration proceedings brought against the Defendant by the said Pangaea Development Holdings Limited have no relation to the claim in the current suit. Therefore the Defendant's claim that the Plaintiff has abandoned the claim in this suit is misleading and cannot stand. On those grounds, this suit is not eligible for striking out.
19. The third and last issue is whether the suit should be transferred to the High Court of Kenya at Mombasa for hearing and disposal. The Defendant's argument is that they are based in Mombasa and their Advocates as well. It is the Defendant's case that it is expensive for them to pay for air travel, airport transfers and hotel expenses for its witnesses and its Advocate. This suit was filed in 2011 here in Nairobi only for the Defendant to raise the issue of transfer in 2014. The issue of the Defendant's residence and the cause of action arising in Mombasa were known to the Defendant at the time of filing this suit. In short, the Defendant is raising the issue of transferring this suit late in the day.
20. However I agree that the Civil Procedure Act provides that a suit should be instituted where the Defendant resides or where the cause of action arose. See **section 15 of the Civil Procedure Act**. In addition, under **Section 1B of the Civil Procedure Act**, this Court is enjoined to facilitate the just, expeditious, proportionate and affordable resolution of disputes. I take note that the Plaintiff's Advocates have a branch in Mombasa and the same is not in dispute. Therefore the Plaintiff will not be prejudiced if this matter is transferred to Mombasa for hearing and disposal.

DISPOSITION

21. The upshot of the foregoing is that the Defendant's Notice of Motion dated **27th October 2014** and filed on **29th October 2014** has succeeded only in terms of prayer (d). The Defendant shall bear the costs of this application.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 20TH DAY OF MARCH 2015

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Kanyiri for the Plaintiffs

No appearance for the Defendants

Teresia – Court Clerk