



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 35 OF 2014

ECONOBUILD LIMITED.....PLAINTIFF

Versus

NORTHCOTE BUSINESS CENTER LIMITED.....1ST
DEFENDANT

AFRICAN NETWORK FOR THE PREVENTION AND

PROTECTION AGAINST CHILD ABUSE AND NEGLECT2ND
DEFENDANT

ZEDEKIA ONYANGO.....3RD
DEFENDANT

PHILISTA PRUDENCE MINJAL ONYANGO.....4TH
DEFENDANT

MARY WAMBUI NJUGUNA.....5TH
DEFENDANT

DR. FLORENCE MULI.....6TH
DEFENDANT

JUDGMENT

Costs

[1] The 1st Defendant says that the Plaintiff does not deserve to be paid costs of this suit. The Plaintiff on the other hand says it is entitled to costs. The plaintiff filed this suit on 31st January 2014 based on a contract entered into between the plaintiff and the 1st Defendant dated 26th February 2013. The contract was executed by both parties. The Plaintiff alleged that the breach of the contract by the Defendants is the subject matter of the suit. According to the Plaintiff, the claim arose sometime in May 2013 when the 1st Defendant refused and/or neglected to honor the plaintiff’s Notice of Intention to Suspend Works for Non-Payment. As a result the plaintiff was forced to halt the construction works for lack of funds and

thereafter repudiated the contract after numerous requests by the Plaintiff for payment bore no fruit. The works undertaken by the plaintiff were certified by the 1st Defendant's consultant and two interim certificates issued; one on 22nd April 2013 for Kshs. 29,223,955.85 and the second one was issued on 31st May 2013 for an amount of Kshs. 8,908,793.65. These amounts continued to accrue interest as per clause 5 of the Agreement and Conditions of Contract of Building Works.

[2] The Plaintiff submitted that it adhered to clause 39 of the said Agreement and Conditions of Building Works which provided specifically the terms of termination of the contract by the contractor. The plaintiff terminated the contract at the lapse of 14 days from the date of issuance thereof as provided by clause 39.3 of the Agreement. This is a suit for the recovery of a debt owed by the defendant to the plaintiff. The existence of a debt has never been in dispute; it was acknowledged by the 1st defendant and paid out to the plaintiff. The Plaintiff asserted that it had the right to seek for justice from a competent court and it is not being accused of fraud or malice or mala fides in the institution of suit. The matter was subsequently settled out of court, but the Plaintiff contended that the fact that the matter was settled out of court does not mean they are not entitled to costs. On those reasons, it argued that it should be paid costs of the suit. They relied on the case of **Morgan Air Cargo Limited vs. Evrest Enterprises Limited, HCCC NO. 179 OF 2013.**

The 2ND to 6TH Defendants opposed application

[3] The 2nd to 6th Defendants opposed the application. they say that they are just shareholders off the 1st Defendant and they were not privy to the contract between the Plaintiff and the 1st Defendant. They stated that the 1st Defendant is a separate legal entity which is separate from the shareholders. In any event, they were acting for a disclosed principal and they should not be sued on the company's debts. In fact, they are asking for costs and they are the ones who should be paid costs of Kshs. 410,000.

THE DETERMINATION

[4] The issue on costs fell for determination by the Court following the consent among the parties recorded in Court on 21st November, 2014. Parties informed the court that they had reached a substantive agreement on all the issues in the suit except for costs. Save for the admission that the debt has been paid; I will not bother myself with the content of the substantive agreement on the issues herein as it was not even filed in court. Nonetheless, two things are not in doubt. One; the 1st Defendant is a legal person and was the party in the agreement made on 26th February 2013 between the Plaintiff and the 1st Defendant. Second; the 2nd to 6th Defendants are mere shareholders of the 1st Defendant. Based on the already too familiar legal innovation of corporate separate legal personality of a company, the 2nd to 6th Defendants cannot be sued for the debts of the company unless the suit falls within circumstances which entitle the Court to lift the corporate veil. This is not such case. Therefore, they cannot even be liable for costs. They are instead entitled to costs from the Plaintiff; to be taxed by Court or agreed upon among the parties. I so order. See **Mukua Tutuma vs. Alex Munene Tutuma & Anor Nrb Civil Case 96 of 2006.**

[5] What about the 1st Defendant's liability on costs? Costs follow the event. The event is determined by looking at the entire circumstances of the proceeding. The Plaintiff has admitted there were compromises made on the matter in an out of court arrangement and as a result of which the debt herein was paid. On that admission, I take there were compromises in the matter. And in the absence of evidence to the contrary, where compromises are made between the parties, like the ones made here between the Plaintiff and the 1st Defendant, the law presumes that all matters of the case have been buried beneath the surface of the compromise. See what David Foskett, Q.C of Gray's Inn states at page 77 of his book ***In the Law and Practice of Compromise***;

“An unimpeached compromise represents the end of the dispute or disputes from which it arose. Such issues of fact or law as may have formed the subject-matter of the original disputation are buried beneath the surface of the compromise. The court will not permit them to be raised afresh in the context of new action.”

See also the case of **HCC NO. 416 OF 2010(NAIROBI) RUFUS NJUGUNA & ANOTHER - V- MARTHA MURIITHI & 2 OTHERS [2012] eKLR - JUSTICE P. NYAMWEYA.**

[6] If parties intend costs to be payable, they should expressly state so in the compromise. And perhaps state the quantum of such costs or that it shall be determined by the Court. For completeness of this argument, it is sufficient if parties provide in broad terms that the issue of costs is not agreed upon or that it shall be determined by the Court. On that basis, the compromise does not bury the issue of costs under its surface. In this case, the Plaintiff has not placed before the court any form of intimation that costs were to be paid or were to be determined by the court. Similarly, other arguments coming through on existence of arbitration agreement and the conduct of Plaintiff would still affect the decision of the court when awarding costs. Accordingly, I dismiss the Plaintiff's request for costs. It is so ordered.

Dated, signed and delivered in court at Nairobi this 17th day of March 2015

F. GIKONYO

JUDGE