



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 479 OF 2014

POWERLINK LIMITED.....PLAINTIFF

VERSUS

SEYANI BROTHERS & COMPANY (K) LIMITED.....DEFENDANT

RULING

1. The Defendant, **SEYANI BROTHERS & COMPANY LIMITED**, have requested the court to consolidate this case with **NBI HCCC No. 178 of 2013, SEYANI BROTHERS & CO (K) LTD Vs AFFILIATED BUSINESS CONTACTS LIMITED**.
2. The defendant has pointed out that in the other case, it had sued the EMPLOYER, **AFFILIATED BUSINESS CONTACTS LIMITED**, seeking money which the said employer owes under the main contract.
3. The significance of that fact is that the claim by the plaintiff herein (**POWERLINK LIMITED**), arose out of a sub-contract which the plaintiff was to perform under the main contract.
4. The plaintiff has told this court that the claim of Powerlink Limited had been included in the claim which Seyani Brothers filed against Affiliated Business Contacts Limited.
5. In particular, Seyani Brothers have drawn attention to the fact that in the 2 cases, the claims both make reference Interim Certificates Numbers 13 and 2. Those two certificates were issued in the course of construction works which were carried out on the premises known as **ABCON HOUSE, NAIROBI**.
6. The applicant further pointed out that pursuant to clause 23.1 of the sub-contract between it and Powerlink Limited;

“... procedures for officiating and processing for payments and payment certificates as regards the sub-contract works shall be the same as that prescribed for the contractor in the main contract at clause 34 and that all references therein to the contractor shall be deemed to include references to the sub-contractor”.

7. Seyani Brothers submitted that apart from the foregoing similarities, the issue of law which was to be determined in the 2 cases was similar. That issue, according to Seyani Brothers was;

“Who is in breach of the contract?”

8. For those reasons, I was urged to consolidate the 2 cases.
9. But Powerlink Limited holds a completely different view. They see absolutely no common claims, reliefs or parties, in the 2 cases. As far as Powerlink were concerned, the claims arise from separate contracts, which were between different parties. Therefore, if the cases were

- consolidated, Powerlink thinks that that would confuse issues and also prolong and prejudice the trial.
10. Powerlink concedes that the 2 cases emanate from the construction works that were carried out at **ABCON HOUSE**. However, there was even an express provision in the contract between Powerlink and Seyani Brothers which makes it clear that nothing in this contract would create liability or privity of contract between Seyani Brothers and the employer.
 11. As there was no contract between Powerlink and the employer, it was the view of Powerlink that it could not make a claim against the employer.
 12. On its part, the employer, who participated in this application as an Interested Party, also opposed the application.
 13. Primarily, the employer put forward arguments which were similar to those made by Powerlink Limited.
 14. One of the issues which the employer emphasized is the contention that it was deemed undesirable to consolidate 2 cases when the plaintiff in one case is the defendant in the other case.
 15. In this case, the employer feels that the consolidation of the cases would not just obscure the real issues in controversy, but would give undue advantage to Seyani Brothers whilst causing undue disadvantage to the other parties.
 16. I have perused the records of the proceedings in the two cases which the defendant herein would like to have consolidated.
 17. It is clear that both claims emanate from work that was being done during the construction of **ABCON HOUSE**, which is erected on L.R. No. 209/9346. Therefore, the 2 cases have that fact in common.
 18. In this case, the plaintiff, Powerlink Limited, has based its claim on a **SUB-CONTRACT** dated 14th January 2009. That sub-contract was between Powerlink Limited and Seyani Brothers & Company (K) Limited.
 19. Meanwhile, in Hccc No. 178 of 2013, the claim is based upon an Agreement dated 20th November 2008. The said Agreement was between Seyani Brothers & Company (K) Limited and **AFFILIATED BUSINESS CONTACTS LIMITED**. In effect, Powerlink Limited was not a party to that other Agreement.
 20. Whereas Powerlink Limited was supposed to carry out the task of electrical installation at Abcon House, Seyani Brothers & Company (K) Limited were supposed to carry out and complete works with regard to the erection and completion of the premises named Abcon House.
 21. Powerlink could not assume the role nor the obligations of Seyani Brothers; theirs was a more Limited task.
 22. Secondly, if Powerlink did complete their tasks, of electrical installation, they would expect to be paid for the job they had done, regardless of whether or not the whole project was actually completed.
 23. On the other hand, if the Seyani Brothers had completed all the other tasks, whilst Powerlink had not completed their portion of the work, the employer would be entitled to withhold from Seyani Brothers the payment in respect to the unfinished work.
 24. In this instance, Seyani Brothers are saying that they have sued Affiliated Business Contacts Limited for the money which includes that which is due and payable to Powerlink.
 25. By necessary implication, that means that Seyani Brothers deem Powerlink to have completed their work, so that that would then entitle Powerlink to payment.
 26. Once Powerlink is entitled to receive payment, and if that fact was conceded by Seyani Brothers, it would be highly prejudicial to Powerlink to then ask them to wait for Seyani Brothers to conclude the case between them and the employer.
 27. Of course, Seyani Brothers hope to use the money which they hope to receive from Affiliated Business Contacts Limited to pay Powerlink. If looked at from the perspective of Seyani Brothers, that would be a reasonable thing.
 28. However, it is not lost on the court that the employer has denied the claim made by Seyani Brothers. That means that it will not be known, until the case is determined, whether or not the employer would be found liable to pay Seyani Brothers.
 29. In the event that Seyani were to be unsuccessful in their claim against the employer, Powerlink would have been compelled to wait in vain.
 30. But even if Seyani Brothers did succeed in the claim against the employer, the same may not

- benefit Powerlink, who would have had to wait for long to be paid. Why should Powerlink have to endure the long wait, for Seyani Brothers to conclude their claim against Affiliated Business Contacts Limited, when the claim by Powerlink does not owe its success or failure on the fate of the other case?
31. The procedures for officiating and also for processing of payments and for payment certificates may be similar in both the contract between the employer and the contractor, (on the one hand) as compared to the contract between the contractor and the sub-contractor (on the other hand). However, the said provisions do not have the effect of tying the 2 contracts at the hip.
 32. Similarities in the procedures does not necessarily imply that when the procedures were applied to the main contract and to the sub-contract, the results would be the same. As I alluded to earlier, the sub-contractor may have completed his tasks, and that fact would entitle the sub-contractor to payment. But, in the same view, the main contractor may not have completed some aspects of the construction works, and therefore the contractor would not be entitled to claim payment just because the sub-contractor had become entitled to its payment.
 33. The contractor could be in breach of the contract, whilst the sub-contractor may have met all its contractual obligations. Therefore, it is incorrect to assert, as Seyani Brothers have done, that the issue of law, as to who is in breach of the contract was similar in both cases.
 34. Indeed, the contract is not even the same as between the employer, the contractor and the sub-contractor. The three parties have only one thing in common, the subject matter, which is Abcon House.
 35. But there was no privity of contract between Powerlink and Affiliated Business Contacts Limited. There cannot therefore arise the question as regards an alleged breach of contract between 2 or more persons who did not have any contractual relationship.
 36. For that reason, Affiliated Business contacts Limited could not possibly be a defendant in the suit which Powerlink has filed against Seyani Brothers.
 37. And if Seyani Brothers were to be the Plaintiff in the proposed consolidated suit, that would mean that the defendant can only be Affiliated Business contacts Limited, because Seyani Brothers does not have any claim against Powerlink. In those circumstances, the court is unable to visualize the role which Powerlink would play in the case in which Seyani Brothers had sued Affiliated Business Contacts Limited.
 38. In the final analysis, I find that;
 - a. *The contract between the employer and the contractor is distinct and separate from the contract between the contractor and the sub-contractor. One is dated 20th November 2008, whilst the other is dated 14th January 2009.*
 - b. *The issues of fact and of law are not the same in the two cases.*
 - c. *The two cases do not relate to the same parties. It is only Seyani Brothers & Company (K) Limited who is common to the 2 cases.*
 - d. *The proposed consolidation would not enhance expedition in the determination of the issues arising from the two cases. Instead, the hearing and determination of the issues in contention may become convoluted, and thus prolong the resolution of the matters in dispute.*
 39. In the result, I find no merits in the defendant's application. I therefore reject the request for the consolidation of the two cases.
 40. The defendant will pay the costs to the plaintiff and also to the Interested Party.

DATED, SIGNED and DELIVERED at NAIROBI this 27th day of May 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Akhulia for Litoro for the Plaintiff

Bundotich for the Defendant

Jelle for Gacuhi for Interested Party.

Collins Odhiambo – Court clerk.