



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO. 54 OF 2012**

**SGS SOCIETIES GENERALE**

**DE SURVEILLANCE SA.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**SGS KENYA LIMITED.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**TRACER LIMITED.....1<sup>ST</sup> DEFENDANT**

**PETER NANYUMBA ECHESSAH.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**AUTOMATED LOGISTICS**

**KENYA LIMITED.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

**INTRODUCTION**

1. The Application before this Court is the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Notice of Motion dated **29<sup>th</sup> October 2014** and filed in Court on **31<sup>st</sup> October 2014**. It is expressed to be brought under **Section 3A** of the **Civil Procedure Act** as well as **Order 50 Rule 1** and **Order 1 Rule 3** of the **Civil Procedure Rules**.
2. The Application sought for the following orders:-
  1. *That this court be pleased to dismiss this suit as against the Applicants with costs.*
  2. *That there be an inquiry on damages arising from the injunction given against the Applicants on 16<sup>th</sup> March 2012 and discharged by the Court on 5<sup>th</sup> December 2013.*
  3. *That the costs of this application and the suit be awarded to the Applicants.*

**THE 2<sup>ND</sup> AND 3<sup>RD</sup> DEFENDANTS' CASE**

3. The Application is based on the grounds stated in the application and is supported by the Affidavit of **Peter Nanyumbah Echessah**, the 2<sup>nd</sup> Defendant and a director of the 3<sup>rd</sup> Defendant Company. It was sworn on **29<sup>th</sup> October 2014**.

4. The suit herein was instituted by the Plaintiffs on 1<sup>st</sup> February 2012 and arose out of two agreements; the teaming agreement dated 10<sup>th</sup> August 2010 and the Reseller Agreement dated 15<sup>th</sup> February 2011 between the Plaintiffs and the 1<sup>st</sup> Defendant.
5. It is averred by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that they were not privy to the aforesaid Teaming Agreement and the Reseller agreement between the Plaintiffs and the 1<sup>st</sup> Defendant. It was therefore their position that they were wrongly joined as parties to this suit. The Defendants further averred that the dispute had since been referred to arbitration before the International Court of Arbitration and that they had not been enjoined to the arbitration proceedings.
6. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants noted that the temporary injunction imposed against them on 16<sup>th</sup> March 2012 was discharged by the Court on 5<sup>th</sup> December 2013. The said injunction was to subsist for one year pending the Arbitral proceedings between the parties. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants further noted that the substratum of the suit against them had collapsed and the suit ought to be dismissed against them.
7. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' case is that they have suffered damages as a consequence of the injunction approximating nine hundred and thirty one thousand eight hundred and eighty five nought five zero US Dollars (US \$ 931, 885.50). It is therefore their contention that they are entitled to relief by way of damages and costs.

### **THE PLAINTIFFS' CASE**

8. The Application is opposed. The Plaintiffs opposed the application vide the Replying affidavit of the Managing Director of the 2<sup>nd</sup> Plaintiff, **Albert Stockell**, and sworn on **3<sup>rd</sup> December 2014**. The Plaintiffs also filed their Grounds of Opposition dated 2<sup>nd</sup> December 2014 on 3<sup>rd</sup> December 2014. The main ground of opposition is that the application in so far as it seeks an order for dismissing the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is res judicata.
9. The deponent acknowledged that there was a temporary injunction imposed against the Defendants on 16<sup>th</sup> March 2012 which was to subsist for one year pending the hearing and determination of the Arbitration Proceedings. It was his assertion that the injunctive orders issued therein were based on sound principles of law and were rightly granted.
10. On the issue of joinder of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to this suit, it was the deponent's assertion that the said Defendants were correctly enjoined as parties to the suit for the following reasons, and which according to him, the Court had addressed in its ruling on 16<sup>th</sup> March 2012:-
  - a. *The 2<sup>nd</sup> Defendant was an employee of the 2<sup>nd</sup> Plaintiff in charge of a programme to set up the Electronic Cargo Tracking Service (ECTS). The 2<sup>nd</sup> Defendant without becoming privy to the said agreements was very closely connected to the execution of both the Teaming Agreement and Reseller Agreement.*
  - b. *The Honourable Court proceeded to create a nexus between the 2<sup>nd</sup> Defendant and the two agreements by stating that, the 2<sup>nd</sup> Defendant became an agent of the 1<sup>st</sup> Plaintiff and was bound by the confidentiality clause in the said agreements which forbade either of the parties directly or indirectly or through their agents, servants or employees, directors, shareholders or affiliated companies from any acts which may hinder the observation of the said agreements.*
  - c. *The Honourable Court determined that the 2<sup>nd</sup> Defendant's involvement as a party in this suit directly affects the province and jurisdiction covered by both the said agreements. The 2<sup>nd</sup> Defendant was therefore correctly enjoined in the proceedings.*
  - d. *The 3<sup>rd</sup> Defendant was found to be equally to be (sic) important as their existence touch on the execution and performance of both the Teaming and Reseller Agreements.*
  - e. *The finding of the Court in terms of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants involvement in the proceedings was quite clear that, they are so closely connected to the contracts that they must be bound by any orders that this Court may give as a temporary measure pending the outcome of the intended arbitration.*

11. It is averred by the deponent that the above findings on the importance of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the present proceedings has not been challenged, reviewed, discharged or set aside. It is therefore the Plaintiffs' case that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are relevant parties to this suit pending the outcome of the Arbitration. He further averred that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were not enjoined in the Arbitration proceedings because the two agreements were clear that the dispute to be resolved concerning the said agreements was limited to the parties in the dispute. The deponent noted that the Arbitral proceedings were yet to be concluded.
12. It is the Plaintiffs' case that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants cannot claim any inquiry as to damages or that they have suffered damage as a consequence of the injunction whereas the Arbitral award is yet to be delivered settling the dispute between the parties. It is their contention that the current application is premature. According to the Plaintiffs the Court can only determine the question of damages or an inquiry into the same upon the determination of the Arbitral proceedings.
13. It is further the Plaintiffs' case that the current application is *res judicata* as the issues being raised were similar to those already determined by this Court on 16<sup>th</sup> March 2012.
14. In view of the foregoing, the Plaintiffs urged the Court that the current application was without merit and that the same should be dismissed with costs.

### **LEGAL ANALYSIS**

15. The application was prosecuted by way of written submissions. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed their written submissions and List of Authorities dated 10<sup>th</sup> March 2015 on even date while the Plaintiffs filed their written submissions dated 1<sup>st</sup> April 2015 on 7<sup>th</sup> April 2015.
16. I have considered the Pleadings on record, the affidavits in support and opposition to the application, as well as the written submissions by Counsel. Having done so, I take the following view of the matter.

### ***Res Judicata***

17. It is the Plaintiffs' case that the current application in so far as it seeks an order for dismissing the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is *res judicata*. The Plaintiffs submitted that this issue had been litigated upon culminating in the ruling delivered on 16<sup>th</sup> March 2012.
18. The ruling of 16<sup>th</sup> March 2012 arose out of the Plaintiffs' Chamber Summons Application dated 19<sup>th</sup> January 2012. The Application sought for temporary reliefs pending reference of the case to Arbitration. In response, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed a Notice of preliminary objection on 8<sup>th</sup> February 2012 on grounds that they were not privy to the Teaming agreement and the Reseller agreement between the Plaintiffs and the 1<sup>st</sup> Defendant and were therefore ill suited parties in the enforcement of any dispute between the parties. These are the very grounds the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have raised in the current application in seeking for orders that the suit be dismissed as against them.
19. It is not in dispute that this Court in its aforesaid ruling dated 16<sup>th</sup> March 2012 addressed the issue of whether or not the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were proper parties to the suit. The Court considered the pleadings and in particular the description of the parties in the Plaint and the allegations made against them. Having done so, this Court was of the view that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were so closely connected to the two agreements and therefore they had to be bound by any orders that the Court would give as a temporary measure pending the outcome of the intended arbitration.
20. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's submission however is that, the current application is precluded from the rule of *res judicata*. It is their position that there has been a change of circumstances since the said ruling. It is their submission that the arbitral proceedings having been commenced against the 1<sup>st</sup> Defendant presents a change in circumstances. The Defendants note that the said proceedings were commenced against the 1<sup>st</sup> Defendant only and that they were not enjoined to the proceedings. It is therefore their position that these are new facts which could not have been relied upon in the earlier application. They relied on the case of **Kanorero River Farm Limited & Others vs National Bank of Kenya Limited, Civil Case No. 699 of 2001 (unreported)** in which

Ringera J, as he then was held that:

***“...in my Judgment provided the fresh application is grounded on new facts which could not have been relied on in the earlier application, it would not be precluded by the doctrine of res judicata.”***

21. It has not been disputed that the arbitration proceedings have been commenced and that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are not party to the said proceedings. On the face of it, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants would be justified to state that there are new facts before the Court. However, the Court was at all times aware that the matter would be referred to arbitration. As to who the parties would be in the said arbitration was not necessarily the concern of the court. The same was to be conducted in accordance to the arbitration clauses in the two agreements which this Court was aware the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were not privy to. The Court in its ruling of 6<sup>th</sup> March 2012 established that the said Defendants were so closely connected to the agreements and therefore they were to be bound by any orders the court would give as a temporary measure. The Court held this view and rightfully so, for the purposes of the interim reliefs which were to last for one year. The said one year lapsed and the injunctive orders against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants discharged. In other words, this Court does not deem the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are not party to the arbitration proceedings to be strictly a new fact to warrant the Court to hold differently with regard to their position to the suit.
22. The principle of *res judicata* is enunciated in section 7 of the Civil Procedure Act as follows:-

***“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”***

The principle has been restated in several cases including **Republic versus City Council of Nairobi & 2 Others (2014) eKLR** in which Odunga J. quoted the case of *Lotta vs Tanaki (2003) 2EA 556* which reiterated the principles of *res judicata* as provided for in section 7 of the Civil Procedure Act. Similarly, the principle of *res judicata* applies not only to suits but to applications as well. In the case of *Uhuru Highway Development Limited versus Central Bank of Kenya & 2 others, Civil Appeal No. 36 of 1996*, the Court of Appeal held that:-

***“there is not one case cited to show that an application in a suit once decided by Courts of competent jurisdiction can be filed once again for rehearing...that is to say, there must be an end to applications of similar nature: that is to say further, wider principles of res judicata apply to applications within the suit.”***

23. In light of the foregoing authorities, it is clear that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' prayer that the suit be dismissed against them is *res judicata*. The Court conclusively determined the position of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the suit while granting the injunctive orders against them.
24. The above notwithstanding, it is apparent that the suit herein having been referred to arbitration, the Court's jurisdiction in resolving the dispute between the parties was ousted. In the circumstances, the court holds the view that there is no suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants or even the 1<sup>st</sup> Defendant in this Court the matter having been referred to arbitration. Therefore, it would be of no consequence whether or not the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants names are struck out from the suit. In the circumstances the role of the Court is limited to enforcement of the award after the arbitral proceedings are finalised.

### ***Damages***

25. On the issue of damages, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that they incurred damages when

their operations were stalled after the injunction was granted on 16<sup>th</sup> March 2012 in favour of the Plaintiffs. They therefore urged the Court to order an inquiry on damages arising from the injunction that was discharged by the Court.

26. On the other hand, it was the Plaintiffs submission that the said order on inquiry as to damages could not issue as the Court in granting the injunction gave the only condition to be that of duration. The Plaintiffs relied on Order 40 Rule 2 (2) of the Civil Procedure Rules which provides that:-

***“The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”***

It was therefore their position that for the Defendants to be entitled to undertake an inquiry as to damages the court ought to have made a specific condition in that regard.

27. It is not in dispute that when the court granted the injunctive orders against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on 16<sup>th</sup> March 2012 there was no order as to the inquiry of damages. The Defendants did not plead for an undertaking of damages from the Plaintiffs in case an injunction was granted. The Court went ahead and granted an injunction on condition that the same was to subsist for one year. Further, when the injunctive orders were discharged, the Court did not make such orders as to the inquiry of damages. The injunction orders granted by the Court on 16<sup>th</sup> March 2012 were well reasoned and were rightfully granted after both parties argued their case. This Court had the jurisdiction to grant the injunctive orders as a temporary relief to the Plaintiffs pending the referral of the matter to arbitration. In addition, this Court has already confirmed its position that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were properly joined to the suit for purposes of the interim relief as they were closely connected to the two agreements in question.

28. Besides, the Defendants have not shown any proof that they suffered damages as a result of the injunctive orders granted on 16<sup>th</sup> March 2012. Their claim was that they had suffered damages as a consequence of the injunction approximating nine hundred and thirty one thousand eight hundred and eighty five nought five zero US Dollars (US \$ 931, 885.50). This has not been substantiated in any way.

### **DISPOSITION**

29. In the circumstances foregoing, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Notice of Motion dated **29<sup>th</sup> October 2014** and filed in Court on **31<sup>st</sup> October 2014** is hereby dismissed with no order as to costs.

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI THIS 23RD DAY OF JUNE 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

No appearance for the Plaintiff

M/s Opiyo holding brief for Kethi Kilonzo for the Defendants

Teresia – Court Clerk

