



**REPUBLIC OF KENYA**  
**HIGH COURT OF KENYA AT MERU**  
**CIVIL SUIT NO. 15 OF 2014**

**ST. LAVINA MEDICAL & LABARATORY**

**SERVICES LIMITED .....PLAINTIFF/RESPONDENT**

**Versus**

**NATIONAL HOSPITAL INSURANCE**

**FUND BOARD OF MANAGEMENT ..... DEFENDANT/APPLICANT**

**RULING**

**Striking out suit**

[1] By the Motion dated 15<sup>th</sup> May 2015 the Defendant has applied that this suit be struck out with costs. The Motion is expressed to be brought under Order 2 Rule 15 (1) (b) and (d) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of the law.

[2] The said application is supported by the affidavit of LUCY KANDE and the grounds set out in the application. The major grounds for applying are that:

(a) The contract sought to be enforced by the Plaintiff is illegal and was procured through fraud. The fraud and illegality arise as follows: Joab Indeché Wakhu who was an employee of the defendant and his wife were the registered owners of a business called St. Lavinias Medical and Laboratory Services for which Joab procured the contract in question. By virtue of Joab's employment with the Defendant, he was barred by law from entering into the contract herein with the employer. As such no rights accrued to the Plaintiff under the illegal contract.

(b) This action, therefore, as long as it is founded on the said illegal contract, arose *ex-turpicuasa* or by transgression of the Constitution and several statutes namely:

- (i) The medical practitioners and Dentist Act, Cap. 253;
- (ii) The Public Procurement and disposal act
- (iii) The Public Officer Ethics Act, Cap. 183; and

(iv) The Leadership and integrity Act, Cap 182.

(c) Ultimately therefore, by this suit the Plaintiff is converting the court into an instrument of enforcing illegal contract and obligations arising therefrom: *ex dolomalo no ovitur action*. The court cannot lawfully enforce such contract: it should only treat this suit as an abuse of court process and dismiss it in order to keep the stream of justice pure and effectual.

[3] The Applicant filed quite elaborate submissions and cited ample judicial decision and eminent literary works in support of their application. The submissions outlined in great details the sequence of events surrounding the procurement of the contract in issue. They emphasized, however, that the Plaintiff did not enter and could not have entered into any contract with the defendant company, and gave reasons: (1) that the said company was not a registered company as at January 2012 when the contract was entered into; it was registered as a limited liability company on 8<sup>th</sup> August, 2012: and (2) the company was not licensed to carry out services of a medical provider under the Medical Practitioners and Dentist Act; it was licenced as such only on 17<sup>th</sup> September, 2012. More reasons for the application were amplified, that is, that the contract herein was entered into between Joab Indeché Wahu and his wife Maureen Angeline Malo under business name St. Lavinias Medical & Laboratory Service on the one hand, and the Plaintiff. The said business firm was not, at the time of entering into the contract herein in January 2012, licensed under the relevant statute law to provide medical services. And one of the term and condition of the contract herein, specifically clause 2.2, was that the health care provider should be licensed under the Medical Practitioners and Dentist Act (see s.14,15 and 17 of the said Act). In addition to the foregoing, the Applicant argued that Joab Indeché Wakhu one of the partners in St. Lavinias Medical and Laboratory Services was an employee of the defendant at the time of this procurement and so he procured the contract in question in contravention of the Constitution, the Public Officer Ethics Act (POEA), the Leadership and Integrity Act (LIA) and the Public Procurement and Disposal Act (PPDA). The Contract was also procured in contravention of the Applicants' Tender Guidelines and Human Resource Policy. All the foregoing complaints make the contract wholly illegal and therefore unenforceable in a court of law. They referred the court to Section 33,41 and 43 of the PPDA, and S. 94 of the POEA, and S. 13,16 and 17 of LIA as read with Articles 10, 260 and Chapter Six of the Constitution. On that basis, the Applicant urged the court to strike out the plaint.

[4] The Applicant specifically cited the following cases and literary works:

- (a) **Mapis Investment (K) Limited vs Kenya Railways Corp [2006]eKLR;**
- (b) **Kenya Railways Limited vs Satwant Singh Flora [2013]eKLR;**
- (c) **Kenya Pipeline Co.Ltd vs. Glencore Energy Ltd (U.K) Limited [2015] eKLR;**
- (d) **Holman v Johnson**
- (e) **Patel vs Singh (No. 2) [1987] KLR**
- (f) **Mistri Amar Singh vs Serwano Wofunira Kulubya [1963] EA 408**
- (g) **Chitty on contracts.**

### **The Plaintiff says its suit should be sustained**

[5] The Respondent is of a different view. It says that it discharged all obligations under the contract entered into in January 2012 between the parties herein; rendered health care and treatment services to Civil Servants and members of the Discipline Services. But the applicant unilaterally, and without notice terminated the said contract vide its letter dated 3<sup>rd</sup> October 2013. At the time of the unlawful termination of contract, the Applicant had rendered services worth Kshs. 13,379,987 out of which the Respondent paid a sum of Kshs. 3,948,625 leaving a balance of Kshs. 9,431,362; this balance forms the cause of action in this suit. The Respondent argued that, in the circumstances, it has a valid and legitimate

claim against the defendant.

[6] The respondent also argued that claims of fraud herein are not against directed to or claimed to have been committed by the respondent but to a third party namely Joab Indeché Wakhu who is not even a party in this suit. They say that they have denied having any link with the said 3<sup>rd</sup> party or any fraud that he may have committed, if at all. They accused the Applicant of not taking any or any necessary steps to enjoin this third party in the suit, if in fact they are serious about these grave allegations of illegality and fraud. As such matters allegedly committed by the third party cannot cause this suit to be struck out or be a basis to challenge a valid and legitimate contract between the parties; so they argued

[7] The Respondent filed two affidavits sworn on 3<sup>rd</sup> July 2015 and 23<sup>rd</sup> August 2015 in which all the above matters are elaborately deposed to. It was deposed to that matters being alleged herein are grave and cannot be determined at face value without production of evidence or judicial discovery in a full trial. They claimed that there is absolute need to test the allegation through a hearing rather than in an interlocutory application. Again, the third party may need to be afforded an opportunity to be heard to establish the truthfulness of the allegations. The respondent concluded that it would be a miscarriage of justice, most unjust, unsafe and unfair to allow this application. On that basis, they asked the court to dismiss it with costs. They cited the following cases:

- (a) **Joseph Ndungu Mwaura vs James Githiga Mwaura (2004) eKLR**
- (b) **Said Hamad Shamisi vs Diamond Trust of Kenya Limited [2010] eKLR**
- (c) **D.T. Dobie & Co. (K) Ltd [1980] eKLR**
- (d) **Kaluma Inv. Ltd vs Muthuri Kihara & another [2015] eKLR**

## **DETERMINATION**

### **The Threshold**

[1] The court has been called upon to strike out the plaint herein for reason that the contract which forms the basis of the Plaintiff's claim is illegal and was obtained through fraud by one Jacob Indeché Wakhu. As a matter of law, any contract that is illegal or designed for illegal purposes is unenforceable. Any attempt to enforce such illegal contract will be ruthlessly resisted by the court, to avoid pollution of the purity of court process. Therefore, a cause of action which is founded on an illegal contract will be struck out forthwith without hesitation. But does this case fit the bill for striking out? From the outset, I must state that the power of court to strike out the plaint is in its very nature draconian comparable only to the drawing of "*the sword of Damocles*" as it decimates the entire cause of action by the Plaintiff. The act of striking out a pleading has been described in most apt phraseology such as "*it drives away the Plaintiff from the seat of judgment summarily or without being heard.*" Therefore courts of law have sounded caution that the power should be used sparingly and cautiously: In cases which are plain and obvious; which the judge can say at once that the claim is a pure demurrer and cannot be revived even by any amount of amendment. There are ample judicial decisions and literally works on this subject which I do not wish to multiply, except I can cite some few, for instance, the famous **D.T. Dobie case, Dysun vs AG [1981] K.B. 410 at 419, HUBDUCK & Sons Ltd vs Wilkinson, Hogwood & Clerk [1899] 1. K.B 86 at 91, aid Hamad Shamisi case, Bulten Leake and Jacobs; Precedents of pleadings 12<sup>th</sup> edition, Chutty on contracts**. That is the test I will apply here.

[2] Is this case such a clear case which I should say at once is a demurrer and should be struck out? In answering this question, I do not wish to fall into error; I am properly minded that in applications such as this I should just say enough for purposes of determining the application and avoid expressing opinion that may prejudice any future trial of the matter. I note that the alleged fraud was committed by one Joab Indeché Wakhu. The said Joab Indeché Wakhu is not a party in these proceedings. The link among the said Jacob Indeché Wakhu, the Plaintiff, the defendant and the contract presents a kind-of-a-squirm scenario which will only be unraveled upon evidence in a trial. I say this because the Plaintiff is a limited

liability company; Joab is an individual and “*the predecessor*” of the Plaintiff was merely a partnership or business firm. The nexus of all these matters is a substantial issue of law and fact for the trial court to determine in a full hearing if one is to say that the contract was illegal or otherwise. I do not wish to pretend to determine the issue in interlocutory application without full facts; that would be superficial justice. Again, matters of illegality and fraud that have been alleged are grave and will need proper analysis and scrutiny for their probative evidentiary value to be appreciated. That is not possible in an application for striking out pleadings whose procedure is very limited in scope and reach. A comprehensive analysis of the allegations requires a broad-based mechanism that is only available in a trial. Accordingly, I do not think the matters complained of bring themselves within the narrow and summary procedure provided under Order 15 of the Civil Procedure Rules for striking out of pleadings. For those reasons, I decline the application dated 15<sup>th</sup> May, 2015. The course I have taken does not prejudice the applicants at all. In closing, I will not order costs in the circumstances of this case; the application was not made out of spite; it was a bona fide legal venture. It is so ordered.

**Dated, Signed and Delivered in open Court at Meru this 10<sup>th</sup> day  
of December, 2015**

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**F. GIKONYO**

**JUDGE**

In the presence of:

Thangicia advocate for the plaintiff/respondent

M/s. Thibaru for Ojiambo advocate for defendant/applicant

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**F. GIKONYO**

**JUDGE**