



IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 288 OF 2013

ANASTASIA MULWA.....PLAINTIFF

• VERSUS -

FRIDAH K. RIUNGU.....1ST DEFENDANT

AMLOY ENGINEERING LIMITED.....2ND DEFENDANT

RULING

1. The plaintiff, **ANASTACIA MULWA** has filed suit against the defendants, **FRIDAH K. RIUNGU** and **AMLOY ENGINEERING LIMITED**.
2. It is the plaintiff's claim that the first defendant, Fridah A. Riungu, is a director in the 2nd defendant, Amloy Engineering Limited.
3. According to the plaintiff, Fridah Riungu, in her capacity as a director of Amloy Engineering Limited, requested the plaintiff to assist the company to compile proposals to the **RIFT VALLEY RAILWAYS LIMITED**. The said request is said to have been made in May 2012.
4. A further request was made in September 2012, for the compilation of two Reports. That further request is also said to have been made by Fridah Riungu, in her capacity as a director of Amloy Engineering Limited.
5. Anastacia Mulwa says that she not only accepted the requests, but she also carried out the requisite tasks.
6. It was the understanding between Fridah and Anastacia that the company would employ Anastacia as its Director of Human Resources. The said employment would be the means through which Anastacia was to be rewarded for the services she had rendered.
7. However, when the company failed to employ her, Anastacia raised feenotes.
8. The defendants refused to settle those feenotes, because they insist that they never requested the plaintiff to undertake any services on their behalf.
9. Fridah denied making any representations to Anastacia about the prospect of employment for Anastacia.
10. The company also denied the plaintiff's contention that she undertook some work on its behalf.
11. If the plaintiff did any work, it was in her capacity as an agent for and on behalf of Messrs **ICEA LION GROUP LIMITED**.
12. As the company had paid **ICEA LION GROUP LIMITED** for all the work done, the defendants insist that they owed nothing to the plaintiff.
13. It is within that context that the defendants have now applied to this court, to strike out the plaint. In the opinion of the defendants, the plaint did not disclose any cause of action against them.
14. In any event, if the first defendant, Fridah K. Riungu, was sued in her capacity as a director of

- Amloy Engineering Limited, then she believes that it was wrong to enjoin her into the suit as a separate party.
15. Mr. Tebino, the learned advocate for the defendant, submitted that upon the incorporation of a limited liability company, that entity became separate and distinct from its directors. Therefore, a director ought not to be sued in respect to actions or omissions of the company.
 16. Secondly, the defendants pointed out that the claim could only be sustainable if the plaintiff had demonstrated a resolution made by the company's Board of Directors, assigning the plaintiff the role of an agent for the company. As no such resolution had been produced before the court, the defendants believe that the whole claim was a non-starter.
 17. Mr. Onindo, the learned advocate for the plaintiff, submitted that the question as to whether or not the defendants had engaged the plaintiff to carry out some services, was an issue which ought to be determined by the court.
 18. Another issue, according to the plaintiff, was in relation to the question as to whether or not the plaintiff rendered services for and on behalf of the defendants.
 19. In trying to persuade the court that there were triable issues, the plaintiff pointed out that in the profile for Amloy Engineering Limited, the plaintiff was cited as the "Director Human Resources".
 20. She also pointed out at several emails which suggested that the plaintiff was communicating with Amloy Engineering Limited about the steps and procedures which the company ought to take when handling its employees.
 21. As the emails emanated from Anastacia, the defendants pointed out that the plaintiff did not demonstrate that the defendants responded to them.
 22. To my mind, the fact that the defendants had not responded to the emails does not advance the defendants case.
 23. In the case of **SALOMON VS. SALOMON & COMPANY LIMITED [1895 – 1899] ALL ER 33** it was held that a company which had been legally incorporated was an independent person with rights and liabilities appropriate to itself. The House of Lords made it clear that the motives of the persons who took part in the promotion of the company were absolutely irrelevant when discussing the rights and liabilities of the company. Those persons could not be held liable for the actions of the company.
 24. It is for that reason that I understand Fridah to be saying that the plaintiff could not sustain any claim against her, because she (Fridah) was a separate entity from Amloy Engineering Limited.
 25. In the case of *D.T. Dobie and Company (Kenya) Ltd Vs Joseph Mbaria Muchina and Another [1982] KLR 1*, the Court of Appeal held that the Courts ought to exercise their jurisdiction to strike out pleadings with extreme caution, so that it is only in plain and obvious cases that the power is exercised.
 26. Therefore, the learned Judges of Appeal made it clear, after analyzing previous decisions from several jurisdictions, that before striking out a plaint,

"...the court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he filed with a view to amendments".

27. In effect, the court was not being called upon to weigh the strength of the plaintiff's claim against the strength of the defence. That function should be left to the trial court.
28. If a plaintiff has an arguable case, he must be permitted to prosecute his case to its logical conclusion.
29. If a court were to strike out a claim that was arguable but weak, that would constitute an improper use of the court's power, when called upon to exercise its summary jurisdiction.
30. Madan J.A expressed himself thus, (at page 9);

"If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind, summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond

redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it”.

31. Bearing in mind that legal pronouncement, I now ask myself if the plaint discloses any cause of action.

32. In the case of *D.T. DOBIE* the Court of Appeal adopted the following words of Lord Pearson in *Drummond – Jackson Vs. British Medical Association [1970] 2 WLR 688*, at page 696;

“A cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint”.

33. But, of course, it cannot be just any complaint: it must be a reasonable complaint.

34. In this case I understand the plaintiff to be saying that she was asked to undertake some specified tasks. She did undertake the said tasks, on the understanding that she would then be employed by the company.

35. I also understand the plaintiff to be saying that the company made representations, through its profile, that the plaintiff was its Director, Human Resources. However, the company thereafter offloaded the plaintiff unceremoniously.

36. Following the actions of the 2 people, the plaintiff believes that she has a reasonable claim against both of them.

37. Whereas a limited liability company has a separate legal entity from its shareholders and managers, I understand the plaintiff to be saying that each of the defendants herein acted in ways that gave rise to specific claims against them, individually.

38. The plaintiff would have to prove that Fridah made representations to her. If Anastacia proves those representations, and also proves that she acted on the strength of the said representations, there would follow further questions.

39. At that stage, the plaintiff would have to prove either that Fridah alone or Fridah and the company benefitted from her services, for which they or either of them had requested her.

40. It is possible that Anastacia may prove that Fridah made representations to her, purporting to be doing so on behalf of the company.

41. Anastacia may also be able to prove that Fridah was acting on behalf of Amloy Engineering Limited.

42. On the other hand, Anastacia may prove that Fridah made representations; but then Anastacia may fail to prove that Fridah was mandated by Amloy Engineering Limited to act as she did.

43. The averments in the plaint are not plainly and obviously impossible. They cannot therefore be dismissed at this stage.

44. Nor can the first defendant, Fridah, be excused from the proceedings, at this stage.

45. Accordingly, I find no merit in the application seeking to strike out the plaint or the application seeking the striking out of the first defendant’s name from the suit. I therefore dismiss the Notice of Motion dated 10th September 2013. Costs of that application are awarded to the plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of September 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mr. Onindo for the Plaintiff.

No appearance for the 1st Defendant.

No appearance for the 2nd Defendant.

Mr. C. Odhiambo, Court clerk.