



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 492 of 2012

MULTICHOICE KENYA LIMITED.....PLAINTIFF

VERSUS

MAINKAM LIMITED..... 1ST DEFENDANT

JAMES MAINA KAMAU.....2ND DEFENDANT

R U L I N G

1. By a Motion on Notice dated 25th January, 2013 brought under Order 1 Rule 10 (2) and Order 2 rule 15 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, the 2nd defendant (hereinafter “the Applicant”) seeks an order from this court to the effect that he should be struck out as a party to this suit and that in the alternative, the Plaintiff suit against him be struck out and dismissed with costs. The grounds for this application are set out on the face of the application.

2. The Motion is supported by the 2nd Defendant’s Affidavit sworn on 25th January 2013 and duly annexed to the Application. It is the contention of the Applicant that he was wrongly enjoined as a Defendant in the instant suit as he was not personally liable for the wrongs committed by the 1st Defendant Company. He further contends that the 1st Defendant (“the Company”) is a duly incorporated limited liability company with a separate and distinct legal personality from himself as a director. The Applicant also contends that he never made any representations to the Plaintiff that he would be personally liable for any contract entered into by both the Plaintiff and the Company for provision of clearing and forwarding services of the various consignments imported by the Plaintiff. He further contended that even if he were to be held personally liable for the alleged breach of contract and fraud, he would still not be properly enjoined in the suit as he resigned as a director of the Company in August 2008, well before the Plaintiff’s cause of action arose. The Applicant contended that the insinuation that the Company was incorporated for the sole intention and purpose of defrauding the Plaintiff in 2009 is absurd and lacks basis. The Applicant was also of the view that the claims of the Plaintiff, that he induced it to deal with the 1st Defendant as its principal director lacks credibility as there is no evidence tabled by the Plaintiff to back that claim. The Applicant urges the court to grant the orders sought in the application in the interest of justice.

3. The Application was opposed by the Plaintiff through a Replying Affidavit sworn on 14th February, 2013 by Danny Mucira Njiru. It was deposed that the Plaintiff filed this suit against the 1st Defendant company and the Applicant for payment of Kshs.153,457,809/= being the amount of taxes paid to the

Kenya Revenue Authority (“KRA”) for various consignments which belonged to the Plaintiff and which the 1st Defendant company was obligated to pay under a clearing and forwarding agreement by the parties. That the 1st Defendant failed to pay the taxes as required, which essentially led to damage and loss by the Plaintiff. Further, the plaintiff contended that the Applicant was the principal director of the 1st Defendant and at all materials times represented himself as such. That if indeed he was not a director when the Plaintiff’s cause of action arose as alleged, then his actions and conduct would mean that he fraudulently misrepresented himself to both the Plaintiff and third parties as a director of the 1st Defendant and should therefore be held personally liable for the actions he undertook without the authority of the 1st Defendant when the Plaintiff’s cause of action arose.

4. It was contended for the Plaintiff that the Suit herein should not be struck out against the Applicant as the Plaintiff was of the opinion that the same was merited given that this Court has the power in certain instances to lift the veil of incorporation and hold members of the company accountable for the acts and omissions of the company such as fraud. Accordingly, the Plaintiff reiterated that the Applicant is a proper party to this suit as he was still a director of the Company when the Plaintiff’s cause of action arose. The Plaintiff also contended that the documentation used by the Applicant to illustrate to the court that he was no longer a Director of the company, namely the Applicant’s Exhibit marked as “JMK1”, was suspect and an attempt by the Applicant to exonerate himself from the fraudulent acts he committed in the name of the Company, it was pointed out that the change of directorship documentation was only filed after KRA made its demands to the Plaintiff and more specifically after the plaintiff notified the Defendants of such demands. Further, the Plaintiff contended that the file with regard to the Company went missing at the Companies Registry and when finally traced, the same contained a new entry filed on 4th June 2012 indicating that the Applicant had resigned and transferred his shares four (4) years before the entry was made. The Plaintiff thereby asserts that the instant suit is not actuated by malice and the same should not be struck out against the Applicant as he should be held to account for his purported acts of fraud in his capacity as a director of the 1st Defendant Company.

5. I have carefully examined the Affidavits on record and the submissions of learned Counsel. I have also considered the various authorities relied on. The law on striking out of parties is well settled. The Applicant has relied on both order 1 rule 10(2) and Order 2 rule 15 of the Civil Procedure Rules under Order 1 Rule 10(2). The application can be brought by either party or the court may act on its own, to either strike out or add the name of a party as plaintiff or defendant. On the other hand the grounds for striking out a suit are set out in Order 2 Rule 15 (1).

Having considered the affidavits on record, the authorities supplied and the rival submissions of the parties, I am of the considered view that the following are the issues to be determined;

- a) Whether there are specific claims and allegations against the 2nd Defendant personally and whether the same are plausible in law.
- b) Whether the said claims and allegations can be summarily be decided in the application for striking out.

6. On the first issue, learned Counsel for the Plaintiff Mr. Njogu submitted that there was a reasonable cause of action against the Applicant as he is alleged to have personally induced the Plaintiff to deal with the Company as its clearing agent. Further, the Plaintiff contended that the Applicant received monies on behalf of the company that were to be utilized towards payment of government taxes levied on the Plaintiff’s consignments only for the same to be misappropriated leading the Plaintiff to suffer damage and loss in terms of the payment of such taxes in arrears inclusive of penalties. It was also submitted that the Company was a shell company used by the Applicant as a mere façade and a vehicle to defraud the Plaintiff. On the issue raised by the Applicant that he had ceased being a director in August, 2008, the Plaintiff asserted that the Applicant continued to carry himself in a manner that would suggest that he was still a Director of the Company, given that he even attended meetings between the tax authority and the Plaintiff wherein he represented himself as the principal director of the company and even indicated that he would provide documentation showing how exactly the consignments in issue were cleared.

7. Rebutting the Plaintiff's assertions, the Applicant contended that as a director, he was not personally liable for the acts and omissions of the Company. That further, the Company was a separate and distinct entity from its members. It was submitted that the facts of this case do not justify the lifting of the veil of incorporation. Citing the case of **Ephantus M. Kagomo & 6 Others -vs- Industrial & Commercial Development Corporation (2012) eKLR** the Applicant submitted that for a corporate veil to be lifted all the defendants have to be included as parties to a suit. That in the present suit only one director has been enjoined in the suit as opposed to the requirement of all the directors of the company. The Applicant also contended that the Fraud alleged relate to the actions of the company itself as outlined in paragraph 25 of the Plaint and the same should not be imputed on him.

8. I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make the contract, then only the company is liable on it. To my mind, there is no doubt that ever since the famous case of **Salomon V. Salomon & Co. (1897) A.C, 22** Courts have applied the principle of corporate personality strictly. But exceptions to the principle have also been made where it is too flagrantly opposed to justice or convenience. Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards a subsidiary and its holding company as one entity.

9. In the present case, it is alleged that the Applicant received and misappropriated monies that were to be utilized for the payment of various government taxes that were levied on the consignments belonging to the Plaintiff. The Plaintiff has also accused the Applicant of inducing it to deal with the Company. Further to this, the Plaintiff has alleged that after it notified the Defendants of the anomalies detected in terms of the payments of taxes on its various goods and consignments supposed to be cleared by the Company, the Applicant allegedly transferred his shares to another director. This, in the Plaintiff's contention, was aimed at exonerating the Applicant from wrong doing. In my view, these allegations are serious and cannot be ignored. The question that arises is whether they are plausible in law. I think that to ascertain this at this juncture the court would be required to go into the rigorous exercise of trying to determine whether the Plaintiff has a proper case against the Applicant by assessing the evidence in place. This in my view is premature as evidence can only be tendered at the trial. I am of the view that the merits and demerits of the claims against the Applicant cannot be summarily decided through this application. In so holding, I am guided by the wise words of **Madan. J.A** in the case of **DT Dobie and Company (K) Ltd vs Joseph Mbaria Muchina & Another (1982) KLR 1** wherein he stated-;

“The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”

10. Further, I am of the opinion that the whether or not the Applicant is liable for the purported actions that he is being accused of, namely fraud, the same should essentially be controverted by way of a Defence. I find the case of **Marwaha Vs. Pandit Dwarka Nath Nairobi HCCC No. 599 of 1952 [1952] 25 LRK 45** instructive wherein the Court delivered itself as follows:

“This application under Order 1, Rule 10(2) to strike out the second defendant is misconceived as the ground on which he seeks to be struck out amounts in substance to a defence on a point of law, namely his non-liability upon actions in tort at the time when the cause of action arose. That being so, the proper course would have been to file a defence and to plead this point in it, under Order 6, Rule 27...”

11. In the present case, I associate myself fully with the above finding. The Applicant has denied inducing the Plaintiff to deal with the Company. He has also refuted the claim that the Company is a shell corporation used as a front and a vehicle to defraud the Plaintiff. My view is that liability, if any, with respect to the matter under inquiry will flow from the determination of the issues by the trial court. For the moment, I do not see any prejudice to the Applicant being enjoined in the suit which cannot be adequately compensated by way of costs if he is finally exonerated. In my view, the Applicant will have the opportunity to demonstrate at the trial that as a director he was not personally liable for the acts and

omissions of the Company.

12. As regards the Applicants contention that the other director of the company should have been enjoined in the suit in case of lifting the corporate veil, I think the answer to that is to be found in Order 1 rule 9 of the Civil Procedure Rules. The same provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

13. The other issue which militates against the Application is that it was brought under Order 2 Rule 15. It sought to have the suit struck out for, inter alia, disclosing no reasonable cause of action. The application was supported by an Affidavit in blatant breach of Order 2 Rule 15(2) of the Civil Procedure Rules.

14. Accordingly, the Notice of Motion dated 25th January, 2012 is without merit and is hereby dismissed with costs to the Plaintiff.

DATED and DELIVERED at Nairobi on this 12th day of April, 2013

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A. MABEYA

JUDGE