



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 521 OF 2011**

**KAMAU JAMES GITUTHO T/A GITUTHO ASSOCIATES ..... 1<sup>ST</sup> PLAINTIFF**  
**HARRY NJOROGE GAKUYA T/A GAKUYA & ASSOCIATES ... 2<sup>ND</sup> PLAINTIFF**  
**MAXCAD CONSULTING ENGINEERS LIMITED ..... 3<sup>RD</sup> PLAINTIFF**  
**PRIMECONSULT ENGINEERS LIMITED ..... 4<sup>TH</sup> PLAINTIFF**

**V E R S U S**

**MULTIPLE ICD (K) LIMITED ..... DEFENDANT**

**RULING**

1. The Plaintiffs aver in their plaint that by an agreement dated 2nd November 2007 the Defendant **MULTIPLE ICD (K) LTD** appointed them as the Consulting team in the construction of the Defendant's proposed office block on various portions of land parcels at Makupa Causeway.
2. The Plaintiffs state that they rendered the agreed services to the Defendant and raised their fee note for the total amount of Kshs. 259,029,151.70/-. That despite making demand for that amount to be paid, the Defendant had failed to pay that sum.
3. The Defendant denied the allegations that it had entered into an agreement with the Plaintiffs dated 2nd November 2007. Further it denied that it appointed the Plaintiffs as Consulting team as pleaded in the plaint. The Defendant has pleaded other issues in its defence which are not relevant to the Court at present.
4. What is for consideration in this ruling is the Notice of Motion dated 12<sup>th</sup> July 2012. That Motion has the following prayers-

***“1. THAT the plaint be struck out and the suit be dismissed with costs for-***

- a. ***Not disclosing a reasonable cause of action.***
- b. ***Being frivolous, vexatious and an abuse of the court process.”***

5. The Defendant's said Motion is premised on the agreement dated 2<sup>nd</sup> November 2007. It is therefore essential that the agreement be reproduced in this ruling-

P.O. Box 41391,

00100, Nairobi

KENYA

**MULTIPLE ICD (KENYA) LIMITED**

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**ARCHITECTS/TEAM LEADER**

*Gitutho Associates, P.O. Box 82853-08100, Mombasa*

**QUANTITY SURVEYORS**

*Gakuya Associates, P.O. Box 74250-00200, Nairobi*

**STRUCTURAL/CIVIL ENGINEERS/GEOLOGICAL ANALYSISTS**

*Maxcad Consulting Engineers, P.O. Box 40482-80100, Mombasa*

**MECHANICAL/ELECTRICAL ENGINEERS**

*Primeconsult Engineers, P.O. Box 1200-90130, Mombasa*

*Dear Sirs,*

**RE: PROPOSED MAKUPA CAUSEWAY ICD**

**FOR M/S MULTIPLE HAULIERS (E.A)**

**LIMITED**

**LETTER OF COMMISSIONING**

*We hereby confirm your appointment as the Consulting Team for our above project.*

*Your terms of engagement will be as per our discussions and agreement with Mr. Gakuya of Gakuya & Associates on October 26, 2007 in our offices.*

*The total consolidated fees for the Consulting Team was agreed at 8.50% of the cost of the project, plus Value Added Tax and disbursements.*

*Your fees and disbursements will be paid directly the Employer to each team member against tax invoices raised in stages as recommended by the Team Member's respective Registration bodies, and will be paid to each Team Member in the following proportions relative to the total agreed*

fees:-

<u>Team Member/Consultant</u>	<u>Fees</u>
<u>%</u>	
<i>Gitutho Associates, Architects</i>	<i>3.40%</i>
<i>Gakuya Associates, Quantity Surveyors</i>	<i>1.99%</i>
<i>Maxcad Consulting Engineers, Civil &amp; Structural Engineers</i>	<i>1.98%</i>
<i>Primeconsult Engineers, Electrical &amp; Mechanical Engineers</i>	<i>1.13%</i>
<b>TOTAL FEES AGREED</b>	
<b>8.50%</b>	

*The Employer, M/s Multiple Hauliers (E.A) Ltd wish to emphasize the need for the Project Team to abide by the programme agreed during the Employer/Consultants' meeting held in our offices on October 19, 2007.*

*Please feel free to seek for any information and documents you may require from the Employer to enable you to abide by the agreed programme.*

*Could you please indicate your acceptance of the commission by signing on the copy of the enclosure letter attached and dispatching it back to us for my records.*

*Yours faithfully,*

**MULTIPLE ICD (KENYA) LIMITED**

*We accept the commissioning under the terms indicated above.*

**Signed:** .....

**Date:** .....

**PARTNER/DIRECTOR**

In support of the application the Defendant deponed through its legal officer as follows-

- “3. THAT the document dated 02/11/2007 clearly shows**
- that the contract if any was between the 1<sup>st</sup>, 2<sup>nd</sup>, and**
- 4<sup>th</sup> Plaintiffs and a company known as Multiple**
- Hauliers (EA) Limited. Annexed and marked as ‘J-1’ is**
- a copy of the said contract.**
- 4. THAT the Defendant herein, Multiple ICD (K) Limited is not a party to the said contract.**
- 5. THAT the said contract dated 02/11/2007 expressly provided that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Plaintiffs**

- fees and disbursements would be paid directly by the employer.*
6. *THAT the said document further provided that the employer of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Plaintiffs was Multiple Hauliers (EA) Limited.*
  7. *THAT the Plaintiffs invoices dated 06/05/08, 01/10/09, 10/05/10, 09/06/10, 15/12/10, 28/03/11, 30/03/11, were raised against the said Multiple Hauliers (EA) Limited. Annexed and marked as 'J-2' are copies of the said invoices.*
  8. *THAT the part payments under the alleged contract were made by the said Multiple Hauliers (EA) Limited. Annexed and marked as 'J-3' are copies of the receipts dated 16/09/11 for the sums of Kshs. 4,800,000/-, Kshs. 2,808,889/-, Kshs. 2,791,111/-, and Kshs. 1,600,000/- respectively.*
  9. *THAT the Defendant herein did not acquire and could not acquire any rights or obligations under the contract to which it is not a party.*

*10. THAT the suit herein cannot be sustained against the Defendant because he is not a party to the alleged contract.”*

6. The Plaintiffs in their replying affidavit pointed out that the contract of 2<sup>nd</sup> November 2007 was written on the Defendant's letter head and it is that contract which had expressly confirmed the engagement of the Plaintiffs as a Consulting team. Accordingly it was deponed that that contract was between the Plaintiffs and the Defendant. The Plaintiffs attached to their replying affidavit invoices that they had raised in the name of the Defendant and stated that the Defendant had not objected nor raised an issue that it was not the contracting party. That it was subsequent to those invoices being raised that the Defendant requested the Plaintiffs to raise their invoices in the name of **MULTIPLE HAULIER (EA) LTD.**
7. The Plaintiff referred to the letter dated 11th May 2010 which they stated reflected a meeting that was held between the Plaintiffs and the Defendant's Manager. That letter is in the following terms-

*Your Ref:*

*Our Ref: GA/435/70/2010*

*Date: 11<sup>th</sup> May 2010*

*The General Manager*

*Multiple I.C.D (Kenya) Ltd*

*P.O. Box 41391-00100*

*Nairobi*

*Attn: Mr. Shreyesh Dave*

*Dear Sir,*

***RE: MULTIPLE I.C.D PROJECT AT MAKUPA CAUSEWAY – MOMBASA***

*This letter is to thank you for having availed yourself together with your Managing Director; Mr. Rajinder S. Baryan for a meeting with the project consultants at our offices on Saturday 8<sup>th</sup> May 2010.*

*During the meeting, we confirm that the following was agreed:*

- 1) *In view of the enhanced project size vis-à-vis what had been*

*previously contemplated, both parties agreed that the total fees for all the consultants will be 6.75% of the project cost reduced from the original 8.5%.*

*2) 75% of the fees which becomes due at tender award stage will be based on a total project cost of Kshs. 3,638,829,626/-.*

*3) Supervisory fees will be 25% of 6.75% of the actual works contracted, and paid in stages as the project construction progresses.*

*4) You offered to pay a portion of the consultants' fees in the sum of Kshs. 25 million + VAT, with the balance of the fees being paid in 12 equal instalments to which the consultants had offered a counter proposal of 40% of the fees (approximately Kshs. 73 million) being paid now, with the balance payable in equal installments over a period of 6 months.*

*5) We finally agreed that you would pay Kshs. 35 million + VAT, Kshs. 25 million + VAT being payable immediately while Kshs. 10 million + VAT will be paid within one month.*

*It was further agreed that you would revert to us with regard to the payment distribution proposal.*

*We do attach herewith the Quantity Surveyor's tabulation of the involved figures for your records.*

*Separate fee notes from the consultants will follow under cover of this office based on Kshs. 35 million + VAT, which can split and pay as per your offered proposal, without attracting any VAT penalties.*

*Apart from the above we also agreed with regard to the project as follows:-*

- 1. Consultants would relook into the issue of redesign to having the whole yard at a +10m level while the office area will remain at level of +15m. Drawings for this effect will follow shortly.*
- 2. You experienced concern about the delay on the part of KPLC in approving the re-routing drawings submitted to them by Primeconsult Engineers and also the delay in supplying of the temporary power. Eng. Njagi confirmed that during his visit to Nairobi on Monday 10<sup>th</sup> May 2010 he will follow up the issues with KPLC.*
- 3. It was agreed that Maxcad Engineers will now follow-up the issue of approval of project roads by the Ministry of Roads in view of the fact that wayleaves are now not required as you have now secured ownership of Plot No. MN/2/4173.*
- 4. It was agreed that Muloy Ltd would fast track the completion of the site offices a schedule of suitable site meetings dates will be confirmed by the Client.*

*Yours faithfully,*

.....

*Arch. Kamau J. G. Njendu*

*Principal: Gitutho Associates*

*Cc Gakuya Associates*

*Maxcad Engineers*

*Primeconsult Engineers"*

8. That letter was acknowledged by the Defendant as confirming the discussion that took place between the Plaintiffs and the Defendant save for Clause No. 3.
9. Further the Plaintiffs deponed that the land upon which the project was being undertaken was registered in the name of the Defendant.
10. The Defendant's defence is amounted on the lack of privity in the contract pleaded by the Plaintiffs. In the book *The Law of Contract Eleventh Edition* by G. H. Treitel the learned author had this to say in respect of privity of contract-

***“There are two aspects of the common law doctrine of privity: no one except a party to a contract can acquire rights under it and no one except a party can be subjected to liabilities under it.”***

11. The Defendant relied on the case **KANYENJE KARANGAITA GAKOMBE**

**-VS- AUTOMOBILE ASSOCIATION OF KENYA & ANOTHER [2006]eKLR** where Justice Ochieng stated-

***“True, if one is not a party to a contract, he cannot seek to enforce it. He could not do so even if the contract was made for his benefit.”***

The Defendant cited that case to support its submission that the Plaintiff could not sue it on the contract of 2nd November 2007.

12. I wish to distinguish this case with the case **KANYENJE KARANGAITA** (supra). In that case as I can fathom from the facts outlined therein the contract in question was between two Defendants in the absence of the Plaintiff. The Plaintiff in that case was seeking to enforce that contract. In this case the contract is between the Plaintiffs and the Defendant for the benefit of Multiple Haulier (EA) Ltd. On prima facie basis I find that the contracting parties in this contract are the Plaintiffs and the Defendant. Indeed in my view, again on prima facie basis it is Multiple Haulier (EA) Ltd who cannot enforce the contract because they lack privity of contract.

13. It is because of that finding that the Court declines to allow the Defendant's application. The Defendant has not shown that the Plaintiffs action cannot succeed after trial as was stated in the case **MURRI -VS- MURRI & ANOTHER [1999]IEA 212** where it was stated-

***“In my judgment, the summary remedy of striking out is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the process of the Court or that it is unarguable.”***

14. This Court has power under Order 1 Rule 10(2) of the Civil Procedure Rules 2010 to order substitution and or addition of a Defendant. In considering the Defendant's application it has become clear to me that Multiple Haulier (EA) Ltd is a party whose presence before Court will be necessary in order for the Court to effectually and completely adjudicate upon and settle all the questions involved in this case. It is for that reason that this Court will order that that party be joined as 2nd Defendant.

15. I make the following orders-

- a. **The Notice of Motion dated 12th July 2012 is dismissed with costs to the Plaintiffs.**
- b. **An order is hereby made that Multiple Haulier (EA) Ltd be joined in this case as the 2nd Defendant. To that end, the Plaintiffs shall within fourteen (14) days from this date hereof amend its plaint to include Multiple Haulier (EA) Ltd as the 2nd Defendant. In making such an amendment the Plaintiff shall be at liberty to amend the plaint so as to plead its case**

**against Multiple Haulier (EA) Ltd. On making such an amendment summons shall issue in the name of Multiple Haulier (EA) Ltd.**

**Dated and delivered at Mombasa this 17<sup>th</sup> day of October, 2013.**

**MARY KASANGO**

**JUDGE**