REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC. APPLICATION NO. 358 OF 2008

KAIRU MBUTHIA AND PARTNERS ADVOCATES.....RESPONDENTS/ADVOCATES

VERSUS

NARAN ARJAN T/A NEELCON CONSTRUCTION SERVICES.....APPLICANT/RESPONDENT

R U L I N G

This application is brought by a Notice of Motion dated 13th April, 2011, and taken out under **Section 51 (2) of the Advocates Act; Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act; Order 40 Rule 1 (a) and Order 51 Rule 1 of the Civil Procedure Rules**. By the application, the Applicant/Respondent seeks the following orders –

1. (Spent).

2. That an order for stay of execution do issue to restrain the Respondents/Applicants [Advocates] their duly authorized agents, servants, employees, partners and/or proprietors from attaching, alienating, removing, selling, disposing of by private treaty or public auction any movable property pending the hearing and determination of this application, further court orders and/or directions.

3. That the ex parte judgment entered herein on the 2nd day of March, 2011 be set aside forthwith.

4. That the Certificate of Taxation issued on the 9th day of November, 2009 and the taxation proceedings conducted on or about the 30th day of June, 2009 be set aside forthwith.

5. That the costs of this application be borne by the Respondents/Applicants [Advocates].

The application is supported by the annexed affidavit of Naran Arjan Hirani, a Director of Neelcon Construction Services Ltd. (the Company) sworn on 17th April, 2011 and is based on the grounds that-

(a) The Applicant/Respondent herein was not the Respondents'/Applicants' client in person but was and still is merely the Applicant/Respondent's Director.

(b) The Applicant/Respondent herein is legally distinct from Neelcon Construction Services Ltd. as a legal entity.

(c) There was no privity of contract between the Applicant/Respondent as an individual and the Respondents/Applicants [Advocates].

(d) A requisite Statutory Notice of Entry of judgment was not served pursuant to Order 22 Rule 6 of the Civil Procedure Rules.

(e) The Respondents/Applicants [Advocates] are strangers to the Applicant/Respondent.

The application is opposed by way of a replying affidavit sworn by Kairu Mbuthia, Advocate on 3rd May, and filed in court on 23rd May, 2011. At the oral hearing of the application, Mr. Jaoko appeared for the Applicant while Mr. Kiingati appeared for the Respondent. After considering the pleadings and submissions of Counsel, I note that the main point of contention revolves around the retainer in this case in view of the fact that the Applicant/Respondent herein is legally distinct from Neelcon Construction Services Ltd. as a legal entity. If that be so, then there was no privity of contract between the Applicant/Respondent as an individual and the Respondents/Applicants [Advocates].

The confusion which is alleged in these proceedings was caused by the Applicant from the inception of the filing of this case. It is evident from the plaint which was filed in this matter as well as its verifying affidavit. The plaint indicates that the parties to the suit were **NARAN ARJAN T/A NEELCON CONSTRUCTION SERVICES v. MANDHIR CONSTRUCTION LTD.** Paragraph 1 of the said plaint describes the Plaintiff as **"an adult male of sound mind residing and working for gain in Nairobi …"** On that note, the plain meaning of that phrase is that the Plaintiff is not a limited liability company but an individual. It is only in the verifying affidavit where the parties are described as **NARAN A. ARJAN T/A NEELCON CONSTRUCTION SERVICES LTD. v. MADHIR CONSTRUCTION LIMITED**. In paragraphs 2 and 3 of the said affidavit, Naran A. Arjan makes oath and states as follows –

"2. That I am the plaintiff herein and therefore competent to swear this affidavit.

3. That this suit arises from a debt owed to me by the defendant company herein."

From these statements, it is clear that the deponent, Mr. Naran A. Arjan, regarded himself as the Plaintiff irrespective of whether the limited liability company was a separate entity or not. Secondly, his statement that the suit arises from a debt owed to him by the Defendant is most telling. The debt was owed to him personally and not to the Company.

Furthermore, by a letter dated 4th August, 2009 the Applicants did not raise the issue of the Company being a separate legal entity, even though the letterheads on which the letter was written bears the name of "Neelcon Construction Services Limited". This was followed by another letter dated 4th April, 2011 bearing a similar letterhead by which the Company was described as Neelcon Construction Services Limited. It is very strange that even though the word "limited" denotes that a Company has a separate existence and identity from its members, the issue was never raised despite the use of letterheads bearing the word "limited" in the Company's name.

Against such background, I see no other reason thaN that the Applicant iS invoking that issue at this stage in order to avoid liability to pay. Delay defeats equity and the Applicant's tactics in this matter are an afterthought. From the outset, he considered himself the Plaintiff, and the debt in issue was owed to him personally, and he cannot be heard to deny those facts at this late hour.

At any rate, if indeed, it was a limited liability company which was the true client of the Respondent/Advocates, the Applicant would have produced copies of a resolution by which the Advocates were instructed by "the Company". However, no such resolution has been adduced. In the absence of evidence of any such resolution, it was the Applicant himself who personally instructed the Advocates and who should pay the costs. He cannot have it both ways i.e. giving doubtful instructions and thereafter getting away with it by alleging that it was the Company that instructed the Advocates. The work given to the Advocates was done on instructions of the Applicant, and he alone is liable to pay the

Advocates. He cannot be allowed to evade payment by hiding in the shadows of the "limited liability" company. He ought to have made it clear from the very beginning that the instructing client was a limited liability company. In that way, the Advocates would have been put on notice that they were acting for a limited liability company and therefore needed a resolution of its Board of Directors. They would not have known these details in the absence of disclosure by the Applicant.

As for the allegation that the Advocates did not comply with **Order 22 Rule 6 of the Civil Procedure Rules,** I note that by a letter dated 23rd July, 2009, the Applicant was duly informed that the Advocates' bill of costs against him was taxed on 20th July, 2009, at Kshs.668,501.70. He was requested to urgently forward a settlement cheque in the said sum immediately in order to avoid execution. Therefore, the Applicant was duly aware that the Advocates' bill of costs had been taxed and in default of payment, execution would issue.

For these reasons, I find that there is no merit in this application and the same is hereby dismissed with costs.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 26th day of April, 2012.

L. NJAGI
JUDGE