



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 73 OF 2012

LASERVIEW SYSTEMS LIMITEDPLAINTIFF

VERSUS

CRISSAM ACRES LIMITED.....1ST DEFENDANT

NATIONAL HOUSING CORPORATION2ND DEFENDANT

RULING

On 7th February, 2012 the plaintiff filed a suit against the defendants seeking judgment in the sum of **Kshs.3,351,688.92** together with costs and interest. The plaintiff alleged that the 1st defendant had a contract with the 2nd defendant in which the 1st defendant was to undertake the work of computer networking and electrical installation at the 2nd defendant's offices in Nairobi. The 1st defendant sub-contracted the plaintiff to undertake the aforesaid work. The agreement between the plaintiff and the 1st defendant was approved by the 2nd defendant. The agreed consideration between the plaintiff and the 1st defendant was Kshs.3,351,688.92.

The plaintiff averred that upon completion of the work by 15th November, 2011 the 1st defendant declined to make payment of the agreed sum.

Together with the plaint, the defendant also filed an application seeking an order to restrain the 2nd defendant from paying any money to the 1st defendant in respect of the aforesaid work pending hearing and determination of this suit. The 2nd defendant opposed the suit and the application and filed a statement of defence to the plaint as well as a replying affidavit to the plaintiff's application. The 2nd defendant also filed a notice of preliminary objection raising the following grounds:

- “1. The entire suit is misconceived, incompetent, fatally defective and does not lie.**
- 2. The suit offends the mandatory provisions of the Contract Act. (sic)**
- 3. The plaintiff lacks locus to institute this suit as against the 2nd defendant for want of privity of contract.”**

In the statement of defence the 2nd defendant stated that it is a stranger to the agreement that may have existed between the plaintiff and the 1st defendant. The 2nd defendant further stated that the plaintiff lacks

locus to institute this suit against itself (the 2nd defendant) as there was no privity of contract between the two parties.

The preliminary objection was argued on 15th March, 2012. Mr. Abuga for the 2nd defendant submitted that by virtue of the provisions of **Order 5 Rule 1 (1) to (6)** of the **Civil Procedure Rules** the entire suit is misconceived, incompetent and does not lie. This is because the plaintiff's suit was filed on 7th February, 2012 and the plaint as well as the application were served on the same day without any summons and as at the date of hearing the preliminary objection no summons had been filed. It is appropriate that I set out the provisions of **Order 5 Rule 1** which are as follows:

“1 (1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.

(2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.

(3) Every summons shall be accompanied by a copy of the plaint.

(4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear:

provided that the time for appearance shall not be less than ten days.

(5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (2) of this rule.

(6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate.”

Mr. Abuga submitted that since more than thirty days had lapsed without service of summons the plaintiff's suit had already abated. He added that the plaintiff had on 12th March, 2012 filed and served an amended plaint without leave of the court which was also not accompanied by summons.

Regarding grounds 2 and 3 of the preliminary objection, Mr. Abuga stated that there was no privity of contract between the plaintiff and the 2nd defendant. In that regard, counsel cited the case of **MUCHENDU vs. WAITA [2003] KLR 419**, where the court held that a contract cannot confer rights or impose obligations arising out of it on any person except the parties to it.

For the aforesaid reasons counsel urged the court to strike out the plaintiff's suit against the 2nd defendant.

In response, **Mr. Ondabu** for the plaintiff conceded that he had not taken out summons to enter appearance. He said that the summons were submitted to the court together with the plaint but the same had not been signed or issued.

Regarding the issue of privity of contract, Mr. Ondabu submitted that the 2nd defendant had to be included as a defendant since the plaintiff was alleging in its amended plaint that both defendants fraudulently engaged its services but had refused to pay for the same. He cited the provisions of **Order 1 Rule 3** of the **Civil Procedure Rules** which states that:

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

In his view, whether the plaintiff has a cause of action against the defendant or not can only be conclusively determined after the 1st defendant has filed its defence. He added that the plaintiff's claim against the 2nd defendant as per the amended plaint was not entirely based on privity of contract between the two parties.

Lastly, Mr. Ondabu submitted that the plaintiff did not require leave to file an amended plaint since pleadings had not closed on the basis that the 1st defendant had not filed his statement of defence as at the time of filing his amended plaint. He urged the court to dismiss the preliminary objection with costs to the plaintiff.

The 1st defendant did not make any submissions.

I have considered the submissions made by counsel for the plaintiff and the 2nd defendant. My views regarding the preliminary objection raised by the 2nd defendant are as follows.

It is not in dispute that todate summons to enter appearance have not been served upon the defendants. Upon perusal of the court file I realized that there are unsigned summons which I believe were prepared by the plaintiff's advocate for signature by this court's Deputy Registrar. It was upon the plaintiff's advocate to ensure that the summons were promptly signed and collected for service as required under **Order 5 Rule 1 (2)**. When the plaintiff's advocate filed the suit and the application for injunction under certificate of urgency on 7th February, 2012 the court directed that the defendants be served so that the application is heard on 9th February, 2012. The plaintiff's advocate did not make any effort to request the registry to expedite the signing of the summons.

Section 1A (3) of the **Civil Procedure Act** requires a party to civil proceedings or his advocate to assist the court to further the overriding objective of the Act and to that effect, to participate in the processes of the court as may be appropriate in the circumstances of the case. The overriding objective of the **Civil Procedure Act** is set out in **Section 1A (1)** and is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.

Order 5 rule 1 (6) is explicit that every summons (except where the court is to effect service) should be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate. In this case no summons have been issued and consequently there cannot be any notification by the registry regarding collection of the same. Even though thirty days have since lapsed from the date the suit was filed, it is doubtful whether in the circumstances the court can declare that the suit has abated. The plaintiff's advocate cannot entirely bare the blame for failure to have the summons issued. The consequences of making a finding that the suit has abated are drastic. If the court were to make such a finding the plaintiff may be punished for a mistake which is not of his own making.

I further note that the 2nd defendant's notice of preliminary objection was filed before expiry of thirty days from the date of filing the suit. Shortly thereafter the file was before the court for the hearing of the plaintiff's application and the preliminary objection and for that reason the plaintiff's advocate was unable to access the file so as to have the summons signed.

For these reasons, I will not invoke the provisions of **Order 5 rule 1 (6)** to find that the suit has abated.

Regarding the 2nd and 3rd grounds of preliminary objection, it is clear that there was no privity of contract between the plaintiff and the 2nd defendant. The 1st defendant was granted a contract by the 2nd defendant and in turn the 1st defendant sub-contracted the plaintiff. The 2nd defendant is a stranger to the plaintiff. The allegations of fraud that were introduced by the plaintiff against the 2nd defendant in the amended plaint cannot be of any help to the plaintiff in the absence of any contract between itself and the 2nd defendant. I believe the particulars of malice and fraud on the 2nd defendant that were alleged by the plaintiff were made in bad faith and in a desperate attempt to drag the 2nd defendant into this dispute which is essentially between the plaintiff and the 1st defendant.

For this reason, the plaintiff's suit against the 2nd defendant is unsustainable and must be struck out, which I hereby do. The plaintiff shall bear the 2nd defendant's costs of the suit as well as the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL, 2012.

D. MUSINGA

JUDGE

In the presence of:

Alex/Muriithi – Court Clerks

Miss Othelo for Mr. Ondabu for Plaintiff

Mr. Maloba for Mr. Abuga for 2nd Defendant

No appearance for the 1st Defendant