



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 328 of 2009

GICHUKI VENTURES LIMITED..... PLAINTIFF
AND

1. CHINA NATIONAL ELECTRIC WIRE CABLE

IMPORT AND EXPORT CORPORATION..... 1ST DEFENDANT

2. SINOTIC (K) LIMITED..... 2ND DEFENDANT

RULING

1. By its Notice of Motion dated 5th June, 2012 brought under Order 1 Rules 10 and 13 of the Civil Procedure Act the 2nd Defendant has applied for orders that there be a stay of execution of the order of this court of 11th May, 2012, that the 2nd Defendant be discharged from depositing the decretal sum pending the hearing of the application and that it be struck out from the proceedings.

2. The application was supported by the Affidavit of Jin Hua sworn on 5th June, 2012. The 2nd Defendant contended that there was no contractual relationship between the Plaintiff and the 2nd Defendant, that all the correspondence in the is matter was as between the Plaintiff and the 1st Defendant, that the contract was likewise executed by the 1st Defendant and not the 2nd Defendant, that it was therefore difficult to comply with the order of 11th May, 2012 that had required the Defendants to deposit the decretal sum as a condition for stay. Mr. Oyunge, learned Counsel for the 2nd Defendant referred to the annexures to try and exonerate the 2nd Defendant from the contract the subject matter of these proceeding. Counsel urged that the application be allowed.

3. In opposition to the application, the Plaintiff filed a Replying Affidavit of one Allan Linua Gichuku. The Plaintiff contended that the original contract dated 6th April, 2007 was made between the Plaintiff and the 1st Defendant, that subsequently by an amendment to the contract the 2nd Defendant had agreed to undertake all the rights and obligations of the 1st Defendant in the original contract, that payments under the contract were made to the 2nd Defendant instead of the 1st Defendant by virtue of that amendment. Mr. Ng'ang'a, learned Counsel for the Plaintiff submitted that the 2nd Defendant had been properly served with process and the application should be dismissed.

4. I have considered the Affidavits on record and the submissions of Counsel. The prayers seeking temporary stay of execution being prayer Nos.2 and 3 are already spent. What is remaining for

consideration is the prayer to strike out the name of the 2nd Defendant from the proceedings.

5. This suit is at the execution level. Judgment has long been entered and part of the orders sought by that application is to stay the execution of a valid decree of this court. In the circumstances, I doubt if a party can be struck off the proceedings at this stage. Such a party must first apply to have the judgment entered against it first set aside before an order to be struck off can be made. On that basis alone, I am of the view that the application is without merit.

6. If I am wrong on this, which I think I am not, I have perused the contract Agreement dated April 6, 2007 produced as Exhibit 'A' to the Replying Affidavit. That contract is clearly between the Plaintiff and the Defendant. The same was executed by those parties and the name of the 2nd Defendant never featured anywhere.

7. However, also produced as Exhibit 'B' is a document titled "**AMENDMENT TO THE CONTRACT AGREEMENT BETWEEN CHINA NATIONAL ELECTRIC WIRE AND CABLE IMP & EXP CORPORATION (PART Y A) AND GICHUKI VENTURES (PARTY B)**". That document is dated 13th June, 2007. At clause 19 thereof the same provides:-

"19. All of the rights and obligations of party 'A' under the Contract Agreement are hereafter transferred to SINOTEC (KENYA) LIMITED. Other terms and conditions of the contract will not be affected."

The document is then executed by the Plaintiff, the 1st Defendant and the 2nd Defendant. There is also a letter from the Co-operative Bank of Kenya Limited dated 8th August, 2009 addressed to the Plaintiff enclosing copies of two cheques totaling Kshs.5,280,098/40 being the performance bond paid to the 2nd Defendant. Copies of those cheques were also exhibited. All these documents and the averments in the Replying Affidavit of Allan Gichuki were never denied nor challenged.

8. In view of the foregoing, I am satisfied that he 2nd Defendant had been properly enjoined in these proceedings.

Accordingly, the application dated 5th June, 2012 is without merit and I dismiss the same with costs to the Plaintiff.

DATED and **DELIVERED** a Nairobi this 26th day of September, 2012.

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A. MABEYA

JUDGE