



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Commercial Courts)**

**Civil Case 685 of 2010**

**HEIFER PROJECT**

**INTERNATIONAL.....PLAINTIFF/RESPONDENT**

**- VERSUS -**

**FOREST CITY SERVICES LIMITED.....1<sup>ST</sup>  
DEFENDANT/APPLICANT**

**ELATT LIMITED.....2<sup>ND</sup>  
DEFENDANT/APPLICANT**

**RULING**

1. The 1<sup>st</sup> Defendant filed the Notice of Motion dated **10<sup>th</sup> May 2012** seeking as the substantive order that the Plaintiff's suit against the 1<sup>st</sup> Defendant be and is hereby struck out with costs to the 1<sup>st</sup> Defendant and that the costs of this application be provided for.
2. The application is supported by affidavit of **MR. ANDREW LAMB**, the 1<sup>st</sup> Defendant's Managing Director. The affidavit is dated **10<sup>th</sup> May 2012** and is filed in court on **5<sup>th</sup> June 2012**. It has several annextures. The application is further supported by a supplementary affidavit of the said **ANDREW LAMB** filed in court on **12<sup>th</sup> June 2012**.
3. The application is opposed by the Plaintiff vide a replying affidavit of **MOSES NYABILA** dated **15<sup>th</sup> June 2012** and filed in court on **18<sup>th</sup> June 2012**. It has several annextures in support thereof. There is no evidence on the court file to show if the 2<sup>nd</sup> Defendant opposes or supports the application. Court records show that Mr. Rutto for the 2<sup>nd</sup> Defendant has stated that the 2<sup>nd</sup> Defendant filed a replying affidavit and submissions on the application. However, I have not seen any of those documents.
4. The brief history of the application as alleged by the Applicant is as follows. The 1<sup>st</sup> Defendant is a company incorporated in England engaged in the manufacture and sale of Forest City generators powered by Perkins engines. It also provides after sale service as separate contracts with individual purchasers but limited only to the supply of any spare parts that may be required for purposes of regular servicing or for repair where necessary, and to co-ordinate any action that may be required under warranty in conjunction with its major component suppliers.

The 1<sup>st</sup> Defendant does not conduct installations, commissioning and maintenance of supplied generator sets.

5. By a contract made in or about **February and March 2009**, the 1<sup>st</sup> Defendant was contracted by the Plaintiff to manufacture and supply to the Plaintiff **eleven (11)** generator sets at a cost of **GBP 141,459.00 (Kshs.19,535,344.00)** inclusive of the sale price, pre-shipment inspection and freight charges. Upon processing of necessary shipment documents, the eleven (11) generator sets were delivered at Mombasa.

6. The contract between the Plaintiff and the 1<sup>st</sup> Defendant was strictly to supply the generator sets on a cost and Freight (C&F Mombasa) basis, from which point the responsibility for clearing the goods from the port and transporting to required sites lay with the Plaintiff or its appointed agents. Upon purchase of the generator sets, the Plaintiff specifically instructed the 1<sup>st</sup> Defendant to forward the shipment documents to the 2<sup>nd</sup> Defendant.

7. As explained in the supporting affidavit of ANDREW G. LAMB, the 1<sup>st</sup> Defendant's Managing /Director, upon arrival of the generator sets at Mombasa Port, the Plaintiff by a formal letter dated **1<sup>st</sup> July 2009** duly instructed the 2<sup>nd</sup> Defendant to release relevant clearing documents for the said generator sets to the Plaintiff's appointed clearing agents, M/s Orient Benko Freighters Limited, to clear the generators from the port.

Those allegations have been denied by the Plaintiff. I have carefully considered the application in light of the Plaintiff and the Defences. On the face of it, it appears to me that the issues for determination are:-

§ Whether the 1<sup>st</sup> Defendant is a necessary party in these proceedings; and

§ Whether there is an agency relationship between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant.

I have noted that there is no single contractual document from which this court can draw a clear answer to determine the above issues. Rather there are a series of correspondences and separate documents including clearing documents which together may provide an answer. I must state very clearly, however, that in any application to strike out a party from a suit, the facts must stand out as clear as day in order for the court to determine the matter at the interlocutory stage. It is not of any help that the 1<sup>st</sup> Defendant's defence filed in court on **26<sup>th</sup> July 2011** is a strong and lengthy 27 paragraph document, while the Applicants affidavit in support of the application, and further affidavit thereto run to a total of 38 strong and lengthy paragraphs. The 1<sup>st</sup> Defendant's defence and supporting affidavit, weighed against the Plaintiff, and the replying affidavit of the Plaintiff and also the annexures raise serious contradicting issues, which nobody can purport to determine through an interlocutory process. It is the position of the law and practice that to strike out a Plaintiff, the reasons and issues warranting the same must be clear. That is not the position in this matter. Indeed, it is not clear to me why the 1<sup>st</sup> Defendant preferred this application in light of the 1<sup>st</sup> Defendant's own statement of defence and the supporting affidavits and annexures thereto. It appears to me that the parties herein prefer to have this matter heard through affidavit evidence. If that was the intention then they need to have been very clear from the outset.

Having considered the issues to be determined in this application, and the contradictory pleadings and documentations in support thereof, I am clear in my mind that those issues cannot be determined through affidavit evidence as presented in this application.

8. The law on joinder of Defendants is set out under **Order 1 Rule 3** of the **Civil Procedure Rules, 2010**, which provides as follows:-

“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 in the alternative, where, if separate suits were brought against such persons any common question of law of fact would arise.”

Accordingly, for a person to be joined as a Defendant in a suit there are two conditions that must be

satisfied:-

- (i) The right to relief has to arise out of the same transaction or a series of the same act or transactions; and/or
- (ii) That if separate suits were brought against such Defendant any common question of law or fact would arise.

9. This principle is further expounded on page 498 of the Code of Civil Procedure Mulla 12<sup>th</sup> Edition as follows:-

“Under the present rule, all persons may be joined as Defendants against whom any right to relief in respect of the same act or transactions is alleged to exist, where if separate suits were brought against such person, any common question of law or fact would arise, though the causes of action against the Defendants may be different, a Plaintiff is entitled under this rule to join several Defendants in respect of several and distinct causes of action subject to the discretion of the court to strike out one or more of the Defendants on the analogy of **Order 1, Rule 2**, if it thinks it right to do so. *“Whatever the law may have been at the time when **Smurthwaite – Vs – Hannay** was decided, joinder of parties and joinder of causes of action are discretionary. In this sense, that, if they are joined, there is no absolute right to have them struck out, but it is discretionary in the court to do so it is thinks right.”* As a general rule, where the whole of the matter to be disposed of at the same time, the court will allow the joinder of Defendants, subject to its discretion as to how the action should be tried.” This passage was cited with approval in the **Kenya Commercial Bank – Vs – Titus Kilonzo Mutua t/a Mbwala Agencies & 24 others [2006] e KRL.**”

10. In this case, there is one cause of action; the breach by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of their contractual obligations to the Plaintiff to deliver the 4 generator sets. And the Plaintiff seeks to recover the loss it has incurred as a result of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant’s non-delivery of the 4 generator sets.

The Plaintiff submits that the cause of action in this case arises out of the same transaction or a series of the same transaction and the suit presents common questions of fact and law.

The Plaintiff submits, in the alternative, that in the event that the court is faced with some difficulty in deciding on the appropriateness of a joinder dispute, the court ought to rule in favour of the joinder in order to avoid courts being faced with what amounts to different cases arising from the joinder of different parties and causes of action which will leave the court in difficulty in determining the suit as a result of what amounts to multiplicity of suits in the same matter as was held in **KENYA COMMERCIAL BANK – VS – TITUS KILONZO MUTUAL T/A MBWALA AGENCIES & 24 OTHERS [2006] e KLR.**

11. In the Classical case of **D.T. DOBIE – VS – MUCHINA (1982) KLR 1**, the Court of Appeal while addressing the issue of striking out pleadings noted that, “. . . **the power to strike out should be exercised only after the court has considered all facts but it must not embark in the merits of the case itself as this is solely reserved for the trial judge . . .**”.

12. I have no hesitation dismissing this application. But at the same time it is my duty to remind counsel that they are the custodian of the law, and in their position they have a rough idea of what issues can pass a particular process. It is the duty of counsel not to bog down our courts with applications which on the face of it cannot see the light of day for the clear reasons that there are conflicting issues which would require a full trial. In this mater the parties are well advised to set out the suit for a full trial in the shortest time possible. In the upshot I dismiss the Notice of Motion application with costs to the Plaintiff/Respondent.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF NOVEMBER 2012.**

**E. K. O. OGOLA**  
**JUDGE**

**PRESENT:**

*N/A for the Plaintiff/Respondent*

*Situma H/B FOR Munyu for the 1<sup>st</sup> Defendant/Applicant*

*Teresia – Court Clerk*