



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO. 20 OF 2009

SASAH GENERAL MERCHANTS LTD.....PLAINTIFF

-VERSUS-

CHRISTIAN CHILDREN'S FUND & ANOR.....DEFENDANTS

R U L I N G

The application before court is dated 25<sup>th</sup> June, 2010 brought pursuant to Order V1 Rule 13 (of the old Civil Procedure Rules). The application seeks for the following Orders:-

- a) That this honourable be pleased to strike out the plaintiff's suit against the 2<sup>nd</sup> defendant on the basis that there exists no privity of contract between the parties, the suit against the 2<sup>nd</sup> defendant discloses no reasonable cause but is otherwise intended to embarrass, vex and scandalize the defendant, hence abusive of the process of the court.
- b) That by an alternative to (a) above this honourable court be pleased to strike out the suit against the 2<sup>nd</sup> defendant on the basis that she was joined to the proceedings without a court order and contrary to the law.
- c) That by way of a further alternative to the foregoing, this honourable court be pleased to order that the plaintiff herein gives possession of the suit premises upon the 2<sup>nd</sup> defendant paying into account or to the plaintiff the sum of Kshs 2,000,528.00 being the difference between the contractual sum and the sums so far paid to it by the 1<sup>st</sup> defendant.
- d) That the costs of this application be provided for.

The application is supported by the affidavit of the 2<sup>nd</sup> defendant sworn on the 25<sup>th</sup> of June 2010 and grounds on the face of the application as follows; that there was no contract between the plaintiff and the 2<sup>nd</sup> defendant; the 2<sup>nd</sup> defendant was not an official of St. Francis Family helper project at the time the contract was executed; the plaintiff, has no contract with the defendant; the contract that was to be executed but was not executed was for Kshs 7,400,528; the plaintiff has been paid Kshs 5,400,000/= and that has received a proposal for payment of the balance.

The respondent object to the application by filing grounds of opposition dated 11<sup>th</sup> November, 2011 and notice of preliminary objection dated 13<sup>th</sup> November, 2011. The grounds of opposition were to the effect that the application is misconceived and bad in-law, incompetent and lacks merit. In the notice of preliminary objection the respondent contended that there is no procedure provided for the order being sought, supporting affidavit is signed by a stranger and that the main suit has already been set down for hearing.

It is not clear from the heading of the application under what rule the application has been brought. Upon reading of the application it appears that the application is brought under Rules 13 1(a) (b) and (d). In that regard, I do agree with the respondent/plaintiffs counsel that the application is muddled up. The court thus finds that this offends the provisions of Order 6 rule 13 making the said application incompetent.

Secondly, the court is cognizant of the fact that the plaint was amended by consent of all the parties on the 26<sup>th</sup> of May, 2010 and the applicant cannot be seen renege on the consent.

Having considered the facts surrounding this case and in view of Sections 1A & 1B of the Civil Procedure Act, the court is of the view that this matter ought not to be disposed off by way of technicalities. The court is also of the view that this is a matter that can be adequately and expeditiously disposed off by way of arbitration.

For the reasons stated above the application is therefore dismissed. Costs in the cause.

This matter is to be mentioned on a date to be fixed for the parties to consider and possibilities of referring the matter to arbitration under Order 46 of the Civil Procedure Rules.

In the meantime the plaintiff should preserve the subject matter without renting out the same to third parties.

**DATED AND DELIVERED IN KISUMU ON 31.01.2011.**

**ALI-ARONI**

**JUDGE**

**In the presence of:**

..... for the plaintiff/applicant(s)

..... for the defendant/respondent(s)