



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 267 OF 2009**

DOL INTERNATIONAL LIMITED..... PLAINTIFF

VERSUS

**PROF. JAMES OLE KIYIAPI (PERMANENT SECRETARY,
MINISTRY OF MEDICAL SERVICES.....1ST DEFENDANT/RESPONDENT
KENYA MEDICAL SUPPLIES AGENCY.....2ND DEFENDANT/RESPONDENT
THE HON. ATTORNEY GENERAL.....3RD DEFENDANT/RESPONDENT
KENYA ANTI-CORRUPTION COMMISSION.....4TH DEFENDANT/RESPONDENT**

RULING

The two defendants in this case have filed notices of preliminary objections. In his preliminary objection, the 4th defendant raised the following objections:

1. The suit is an abuse of the process of court in that the Plaintiff has filed H.C. Misc. Civil Appl. No. 273 of 2006 (JR) over the same subject matter which raises the same issues for determination between all the parties herein, except the 2nd respondent, and the same is still pending before court.
2. In furtherance of the abuse of the process of this Court and in violation of the orders given by the Honourable Court on 7th May 2009, joining the 4th defendant in this suit, the Plaintiff herein filed yet another suit being HCCC No. 301 of 2009 on 25th May, 2009 against the 4th defendant over the same subject matter.

On the other hand, the 3rd defendant has raised the following objection; the suit is premature, incompetent and does not lie as no Statutory Notice of intention to sue was served upon the Attorney General/Government by the plaintiff prior to the institution of the suit.

During his submissions, the 4th defendant's counsel Mr. Muraya submitted that if the parties were to litigate, each of them except the respondent will be litigating for the second time over the same matter. Further to the above, the learned counsel also submitted that the facts of the existence of that application is acknowledged by the plaintiff in paragraph 18 of the plaint. It was his contention that the plaintiff purports to have discontinued that application and that therefore the same is not pending before the court. According to him there is a clear rejoinder of the allegation by the 4th defendant in paragraph 10 of his defence. To him the issue to be determined is whether the suit is pending or not. In addition to the above, he also submitted that he has annexed the proceedings in that matter as an annexure marked "WS24" from page 549 to 552. The 4th defendant's counsel acknowledged the fact that the plaintiff's counsel had issued a notice to withdraw that application. However, he pointed out that the notice has not been endorsed by this court. In response he issued a notice of objection to the withdrawal of that suit. Besides the above, the 4th defendant's counsel reminded the court that the current suit was filed on 21st April 2009 and that the grounds for objecting to withdraw is the matter to be litigated before the High Court in the Judicial and Constitutional Review Division. Eventually in that case, the parties were directed to take a hearing date. It was his contention that if the objection is rejected, then the withdrawal

of the Judicial Review case will stand. It will only be at that stage that the proceedings before this court will perfectly be in order. However, if the court was of the view that the matter cannot be withdrawn the scenario will be completely different to him. According to the 4th defendant's counsel, that application concerns the entire claim that the plaintiff has brought in this case. Specifically, the application HCCC 273 of 2006 is seeking an order of mandamus to direct the Permanent Secretary, Ministry of Health to accept medical equipments and drugs supplied by the plaintiff as well as Kenpak Colour Printers Limited. In addition to the above, the plaintiff in that case is also seeking an order of certiorari to quash the decision to terminate the contract and a further order directing payment for all the goods. The 4th defendant's counsel further submitted that the principal documents evidencing the products are local purchase orders (LPO). To him they are the same LPO's that are being used in litigation in the current suit with an exception that there was a claim for payment in another tender noted in paragraph 1 of the chamber summons. That apart, the 4th defendant's counsel also submitted that in prayer No. 4 the applicant sought for leave for an order of prohibition directing the Kenya Anti-corruption Commission (KACC) prohibiting them from interfering with the applicant's goods, offices and items of trade which were confiscated in the course of investigations. He further submitted that in paragraph 5 they are seeking an order of prohibition against the AG and KACC to prohibit the two offices from preferring criminal charges in respect of contract of equipments and supplies that are the subject matter of the suit. He informed the court that the said application for leave was allowed and what followed are sizeable proceedings. To him the matter is still pending and is a subject of whether it ought to be withdrawn. According to the learned counsel the very heart of the principle of *res judicata* lies in the fear of inconsistencies in the same court deciding one issue differently. According to him, that would be a recipe for chaos and disorder in our judicial system. He also emphasized that the issue before the Judicial Review division No. 273 of 2006 are in all fours, the same issues for determination in this suit. It was his opinion that the principles of *res judicata* would be applied by proof on a balance of probabilities. He emphasized that the issues are substantially the same in the two cases. Whereas in this case the issue of the tender is number "MOH/04/2005-06" Kenpak claimed the same tender and LPO. In HCCC No. 273 of 2006 the 4th defendant defended the claim and laid down the evidence that it had collected from its investigations. At that stage, the plaintiff/applicant later purported to withdraw that suit and file the current one under the name of Dol International Limited. To support his submissions, the learned counsel quoted the following two cases:

- Rift Valley Sports Club vs. Patrick James Ocholla
- Ochomodoi Itaruk & Others vs. John Lindinyo

Apart from the above, the 4th defendant's counsel also submitted that the plaintiff has filed HCCC No. 301 of 2009 against the 4th defendant alone. He further explained that the suit is on the same subject and that the design in filing this suit and HCCC No. 301 of 2009 was to separate the parties despite the fact that there were common issues. To him all the three suits raised the following issues:

- a) Whether the subject contracts are valid or not.
- b) Whether the 4th defendant's conduct in investigations was the cause of the breach herein complained of.
- c) Whether damages, special and general are payable to the plaintiff.

The learned counsel explained that the above allegations have been mentioned in all the three suits. In conclusion, the 4th defendant's counsel submitted that the plaintiff acted in bad faith and in abuse of the process of the court in filing all the above issues. It was his considered opinion that the plaintiff clearly intended to deny this court the advantage of considering the evidence gathered by the 4th defendant in the course of the investigations by locking them in separate proceedings. To him the plaintiff opted to litigate in installments in a subject matter that he should have filed in one suit.

On the other hand, Ms. Mbiu for the 1st and 3rd defendants fully associated herself with the submissions made on behalf of the 4th defendant. As far as the issue of lack of notice as provided by the Government Proceedings Act is concerned, Ms. Mbiu submitted that the suit before the court does not lie since no notice was served by the plaintiff upon the Attorney General in accordance to Section 13(A) (1) of the Government proceedings Act Cap 40. She further contended that the notice that was served dated 27th November, 2009 was actually made by Dol International Kenya Limited but the same was received on 16th March, 2009. Following the above, the 1st and 3rd Defendant issued a notification to their client on 20th March, 2009. She further submitted that on 21st April 2009, the plaint was filed by an entity known

as Dol International Limited that described itself as the plaintiff. It was her opinion that since they were never given any notice the suit is incompetent. As far as the issue of limitation of time was concerned, the learned counsel submitted that even assuming that the above are the same entities, the suit which is predicated on a contract of supply medical equipment to the Ministry of Medical Services, the claim is statute barred by virtue of Public Authorities Act Cap 39. Apart from the above, she also submitted that from the statutory notice issued by Dol International Kenya Limited as well as the plaint filed, the cause of action was said to have arisen on 28th October, 2005. She referred the court to section 3(1) of the Public Authorities Limitation Act which according to her provides that no proceedings based on contract shall be brought against the Government after three years after the cause of action accrued. She also stated whereas the plaintiff is seeking a sum of Kshs.636,870,610/50 the plaint itself was filed on 21st April 2009. To support her submissions, she quoted the case of **Edgar vs. Makerere University EALR 1992**. In that case the court struck out the same since it was time barred. On the other hand Mr. Nyaanga the 2nd defendant's counsel wholly associated himself with the submissions by the 1st, 3rd and 4th defendants. That apart he also submitted that if the court finds any merit in their submission, then no case will lie against the 2nd defendant.

On his part Mr. Arwa, the plaintiff's counsel opposed the objections raised by the 1st, 3rd and 4th defendants. He relied on seven main grounds. Firstly, he submitted that the 4th defendant lacks any *locus standi* since the plaintiff never sued him. He also pointed out that they have not sought any relief against the 4th defendant who is actually not in fault. The learned counsel referred the court to a letter dated 27th April 2006 and submitted that by that time, payments had already been made on all the two tenders. Further to the above, the letter from KACC also stated that other tenders should be treated with suspicion. However, the said letter never stated that any payments should be withheld. According to Mr. Arwa it followed that the 4th defendant never withheld any payments in regard to the contracts in the suit. Apart from the above, the learned counsel also referred the court to a letter dated 9th March, 2007 from KACC which clearly stated that the issue of deliveries is a matter of contractual obligation. The learned counsel described the 4th defendant as a busy body in these proceedings and that therefore they cannot ask the court to strike out proceedings that does not concern them. In support of his submission, he quoted the case of **Elizabeth Gachuhi vs. Nderitu Gikaria HCCC No. 34 of 2008**. In that case the court stated that a party which has no interest in a suit has no *locus standi* to seek any relief in the same. Secondly, Mr. Arwa submitted that a preliminary objection can only be taken if a party admits the facts as put forward by the other side. To him, if there is any dispute of the facts, then the proper procedure would be to go through a hearing. Besides the above, he also submitted that all the objections raised by the 1st, 3rd and 4th defendants are contested issues of facts and cannot be contested as preliminary issues. In support of his submissions, he quoted the case of **Mukhisa Biscuits Manufacturing co. ltd. vs West End distributor [1969] EA pages 96-701** (the highlighted portion). On the basis of those submissions, the learned counsel urged this court to overrule all the objections as the facts are contested. As far as the issue of jurisdiction is concerned, the learned counsel submitted that the jurisdiction vested in this court can only be exercised through an application filed under Order VI rule 13(1) (d). The learned counsel also submitted that though the defendants had contended that there was an abuse of the process of the court, they should have filed an application as provided by the rules. He referred the court to Order VI rule 16 of the Civil Procedure Rules, which to him states that any such application should be brought through Chamber summons. He emphasized that the provision has been framed in mandatory terms by the use of the word "shall". To support he above submissions, he quoted the case of Ahmed **Mulji vs. Shirinbhai Jadaiyi [1965] EA page 217** and **Salome Namukasa vs. Yozefu Bukya [1966] EA 433**. Mr. Arwa also denied that the plaintiff has abused the process of the court by filing the same matters and seeking similar reliefs. While admitting that the plaintiff has previously filed **Misc. Appl. No. 273 of 2006** he informed the court that the same dealt with a completely different cause of action involving totally different parties and seeking completely different reliefs. He also pointed out that at the time these proceedings were filed there was no dispute between the Ministry of Health and plaintiff about the validity of the subject contract. According to Mr. Arwa the position of the Ministry was that the contract was valid and binding and that the allegations of procurement irregularities had already been considered and found without any merit by the public procurement and review board. He further contended that if the 4th defendant wish to conduct any investigations, they were free to do so but the ministry should be allowed to honour their obligations pursuant to their contract. Specifically, he stated that the parties in

that case were as follows: the Ministry of Health, the Attorney General, KACC as respondents. In that case the applicants were Dr. Shadrack G. Mwiti, Dol international Kenya Limited, Kenpac Colour Printers Kenya Limited. He emphasized that the cause of action was to resolve an administrative dispute. While the Ministry of Health wanted to pursue the contract, on the other hand KACC insisted that the contract should not be concluded pending some investigations that they had commenced. According to Mr. Arwa, Dol International had brought goods worth millions of shillings which were facing imminent expiry while KACC was supposed to complete their investigations. By then there was no dispute between the plaintiff and the Ministry since they were speaking the same language. He referred the court to a letter on page 64 of their bundle in which KACC stated that the Ministry of Health should go ahead with their contractual obligations. In this suit, the Permanent Secretary has been sued in his official and personal capacity. However in the case **HCCC No. 273 of 2006** it was the Permanent Secretary, Ministry of Health who had been sued. By that time the minister had already directed that the contract should go ahead. The learned counsel also submitted that in this case the cause of action relates to damages and that is because in a judicial review application you cannot claim for damages. Finally, the application in **HCCC No. 273 of 2006** had already been withdrawn. In any event the two suits could still exist lawfully. The learned counsel also referred this court to a book known as “Judicial Review in Kenya” by Dr. P.L.O. Lumumba.

As far as the issue of statutory notice is concerned, the learned counsel submitted that the claim is without any basis or merit because the notice was actually served. He referred this court to a letter from the AG to the 1st defendant that acknowledged that they had been served with the notice. As far as the issue of Dol International (K) Limited changing its name to Dol International Limited, the Attorney General was aware of the same. He also pointed out that the service was made by Dol International (K) Limited through the firm of Rachier and Amolo Advocates. Secondly, he referred to section 13(a) (1) of the Government Proceedings Act which does not specifically require that the notice must be served by the intended plaintiff. To him it is sufficient if the government is served with the notice that a suit is likely to be filed with regard to a subject matter to an existing dispute. Thirdly, the learned counsel submitted that as a matter of fact Dol International (K) Limited is the same entity as Dol international Limited. He pointed out that the company merely dropped the letter ‘K’ from its name. As far as the issue that the proceedings are time barred the learned counsel submitted that the time the contract was advertised was irrelevant. The learned counsel referred the court to page 18 of the application which shows the LPO dated 27th March, 2006. Similarly he also referred this court to the LPO on page 20 which shows that the same is dated 22nd February 2006. According to him the dates that were referred to the court was not correct. He emphasized that the provision that his learned friend was relying on does not restrict the date to the entering of the contract. His interpretation of section 3(2) of the Public Authorities Limitation Act is that what is important is the date of the cause of action. That does not refer to the date that the contract was entered into. He emphasized that the cause of action accrued when the contract was breached. The learned counsel further submitted that in this case, the cause of action accrued when the Permanent Secretary declined to implement the instructions of the Minister as was contained in the letter dated 6th January 2009. While referring to that letter on page 70 of their bundle the learned counsel submitted that up to that particular date the Ministry had promised to perform their part of the contract but had asked the plaintiff to give them time. While referring to the letter 31st August 2006 on page 50 of their bundle, the learned counsel stated that the Ministry was pleading for time to perform their part of the contract because there were no allegations which had been made at that particular time. In support of his submissions, he quoted the case of **Ghela Manek Shah & Two others vs. Mohamed Haji Abdulla & Another [1962] EA page 769-770** highlighted portion. While concluding his submissions, the learned counsel stated that the cause of action in judicial review was an application which is different from a cause of action for damages. He emphasized that the two can be filed separately. Secondly, he also submitted that what they are applying to in this suit is different from what has been applied in the Judicial Review Application. As far as **HCCC No. 301 of 2009** is concerned, his submission applied to the same. He also clarified that when that suit was filed the 4th defendant had not come to this proceedings. And even if they had been sued that would not have formed the basis for the orders that his colleagues have prayed for. According to Mr. Arwa the most that the 4th defendant would have done is to stay the proceedings pending the finalization of these proceedings as provided by section 6 of the Civil Procedure Act. Since the subject matter of this suit is different from the other suit the learned counsel has urged this court to overrule the objections raised by the 1st, 3rd and 4th defendants with costs to his client.

This court has carefully considered the submissions which have been made by the learned counsels relating to the preliminary objections. As far as the issue of abuse of the process of the court is concerned, it cannot be denied that the plaintiff filed **HCCC Misc. Civil Application No. 273 of 2006 (JR)**. At the outset it is very obvious that the parties in that suit are completely different from the ones in this suit. In that suit, there are three applicants. These are: Dol International (K) Limited, Kenpac Colour Printers (K) Limited and Dr. Shadrack Ithinji Mwitii. On the other hand, the respondents were also different. In that case the respondents were the permanent secretary Ministry of Health, the Kenya Anti-Corruption Commission and the Atone General. Secondly, in that case the prayers being sought are completely different from the prayers which are being sought in this particular case. Needless to state in Misc. Civil Application No. 273 of 2006 there are no prayers for special damages. In contrast, in this particular case the plaintiff has claimed special damages of 636,870,610.50/-. One does not need to emphasize the differences between the two suits. Besides the above, the issue of *res judicata* and/or *sub judice* rules do not arise under the above circumstances. In any event, the plaintiff has not sought for any orders at all against the 4th defendant and one wonders why they are objecting to his suit being decided on merit. Whereas the 4th defendant has a right to mount and conduct investigations within Government Agencies and private institutions, the same cannot be used to interfere with contracts which have been entered voluntarily by different bodies. Secondly, I do hereby concur with the plaintiff's counsel that a preliminary objection can only be raised if the facts as presented by the parties are admitted. However, in this particular case, the parties have differed greatly about the facts and hence it would be in the interest of justice for this case to proceed to enable the court make a reasoned decision. Thirdly, though the 1st and 3rd defendants contend that the statutory notice on record was served by Dol International (K) Limited, this court is satisfied that the same refers to Dol International Limited. This court has had the advantage of going through the correspondence which has been exchanged between the parties. It is very clear that those two names have been used interchangeably without any party complaining. In any event, during the trial the defendants will have the opportunity to raise the issue about the proper identity of the plaintiff. It would be unfair for this case to be terminated at this stage due to the description of the parties. Fourthly, though the defendants had contended that this suit was statute barred, it is clear from the correspondence that the cause of action actually arose when the Permanent Secretary, Ministry of Health refused to pay the consideration for the medical equipment which had been supplied by the plaintiff. That was despite the advice by the Attorney General and the Minister for Medical Services. This court is satisfied that the suit was filed within the statutory period envisaged by the law. However, the defendants are at liberty to raise any misuses that they wish during the trial as to the precise date that the cause of action arose. The court is prepared to hear both sides on that issue and to make a proper and reasoned finding. The upshot is that I hereby wish to dismiss all the preliminary objections which have been raised by the defendants. The total circumstances of this case, the amount of money involved, the public policy issues raised require that the parties must be given a chance to ventilate their case. Ultimately the court will be required to write a fair and impartial judgment to determine the rights of all the parties. Costs to the plaintiff in any event.

Those are the orders of this court.

MUGA APONDI

JUDGE

Ruling read signed and delivered in open court in the presence of

Ms. Gichobi for Attorney General for 1st and 3rd Defendants

Mr. Olola for Muraya for 4th Defendant – present

Mr. Mungo for Arwa for Plaintiff

Oluga for Nyaberi for 2nd Defendant – present

MUGA APONDI

JUDGE

14TH MAY, 2010