



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

CIVIL SUIT NO. 17 OF 2010

MIJIKENDA GENERAL BUILDING CONTRACTORS.....PLAINTIFF

-VERSUS-

AFRAKARI LIMITED

CARLO LUIGI SORIANO.....DEFENDANTS

RULING

The Chamber Summons application dated 3rd June 2009 is made under Order XXXVIII Rule 3 of the Civil Procedure Rules and section 3A, seeking to enjoin Francisco Soriano and Antonio Soriano as 3rd and 4th defendants in this suit. To that extent it seeks that applicant be granted leave to amend pleadings in terms of the annexed draft plaint and the said draft plaint be deemed as duly filed and served. The applicant also prays that warrants of arrest do issue against 2nd, 3rd and 4th defendants to be brought to court to show cause why they should not furnish security for their appearance in court on behalf of the 1st defendant as the company directors and further furnish security for the appearance of 3rd and 4th defendants.

In the alternative, and on a without prejudice basis, the applicant prays that 1st defendant do deposit in court in lieu of security Kshs. 17,436,980/- pending hearing and determination of this suit.

It is premised on grounds that defendants have intentionally refused to settle the debt and do not intend to do so.

Secondly, the defendants intend to delay the plaintiff and avoid any process of court.

Thirdly, the amendments sought is purely to bring in relevant claim by the plaintiff.

The application is supported by the affidavit sworn by Julius Mungindi whose relationship with the defendant is not discussed. However he depones that they were contracted by the defendants to undertake construction work at their site. All the modalities quantities, design and cost of the work were agreed upon and parties duly signed on agreement on 16th May 2008 and work commenced accordingly.

The respondent later on allowed some works which were not there before, but the applicants quickly adjusted and carried on with the work.

The applicant had already done 98% of the work when in March 2009, the respondent went into the site and took over, chasing away the applicant's workers, for undisclosed reasons. The respondent did not rescind the negative decision despite complaints raised by the applicant and the next thing applicant received was correspondence from respondent's advocate stating that despite being paid, it had not

completed the work.

The respondents went to the site with a view to evicting applicant's employees and hand over the work to another contractor, and it is this action which caused applicant to file this matter. Recently the respondent blackmailed the applicant's workers to a round table talk, only to scheme on how to arrest and intimidate them using police. Since the respondents are foreigners applicant depones that it is desirable that they deposit in court or in the joint account in the names of their respective advocates, the sum claimed, because the respondents can leave the country any time.

Negotiations and attempts at settling the matter amicably have always ended up with the 2nd respondents renegeing on his promises – one such agreement is annexed as J1. He said J1 was an intended consent to stay these proceedings and refer the matter to arbitration.

Paragraph 19, 21 and 22 are not facts and are pure conjecture.

The application is opposed on the following grounds of opposition.

- (1) Plaintiff has not demonstrated a right to relief as against the parties intend to be enjoined as required under provisions of Order I Rule 10(2) Civil Procedure Rules.
- (2) In any event having described the parties intended to be joined in the suit as directors of the 1st defendant violates the cardinal principal of separate corporate existence of companies as enunciated in the infamous case of **Salmon V Salmon**.
- (3) The application is bad in law as it seeks warrant of arrest against parties who had not been given an opportunity to be heard.
- (4) The application has not properly invoked the jurisdiction of this court for the grant of an order for security of costs as:
 - (a) The individuals from whom the security for costs is sought are not yet parties to the suit.
 - (b) No basis has been presented through the application for the grant for an order for security for costs.

When the matter came up for hearing counsel agreed to dispose of the application by way of written submissions. The respondent's counsel was also granted leave to file a replying affidavit – but this never happened. I don't think that is fatal because he would not have relied on both replying affidavit and grounds of opposition anyway – Order L Rule 16 provides that a replying affidavit OR grounds of opposition I will take into account the grounds of opposition when dealing with the application.

By the date of writing this ruling, Mr. Ghallia for the respondent had not filed his written submissions.

Mr. Omino, for the applicant submitted that the reason why the amendment is sought, is so as to introduce the liquidated sum which was not captured in the earlier pleadings.

The other amendment is so as to include the 1st defendant's directors as they are said to have participated in negotiations and sealing of the contract and they acted ultra vires the memorandum of association of the company by using a Third party without authority of the 1st defendant.

The aspect regarding introducing the liquidated sum is not captured in the pleadings and appears to be evidence from the bar being brought up in the submissions.

Secondly, the 1st defendant is described as a limited liability company and nothing has been demonstrated so far to show that the corporate veil ought to be lifted so as to allow the directors to be sued in their personal capacity and I can do no better than refer to the case of **Salmon v Salmon** which laid down the principles of limited liability company being capable of suing and being sued and has a separate corporate existence from its directors and the question of defendants being the company's alter ego has no legal basis – so I find no reason to allow the amendment sought.

Mr. Omino submits that the prayer seeking that defendants do furnish security for their appearance is because they have so far acted in a manner suggesting delaying of fair disposal of the suit by using strong arm tactics and never honouring their word. He points out that apart from the 2nd defendant, the other defendants are foreigners who can leave his court's jurisdiction at any time and the most appropriate way of securing their presence is require security for costs. It would seem that Mr. Omino has abandoned the pursuit for a warrant of arrest as he does not address it in the submissions. However since it formed part of the prayers then invariably, I must deal with it. It has not been demonstrated that 2nd respondent is avoiding the court process or is likely to abscond or leave the local limits of this court's jurisdiction. Refusing to sign a consent requiring the matter to arbitration does not by any stretch of definition translate into any of the situations contemplated by Order XXXVIII Rule 1.

Secondly the intended parties have not even been served with summons so as to draw the conclusion that their conduct would fit within the situations referred to under Order XXXVIII Rule 1.

Thirdly, having failed to demonstrate that the corporate veil ought to be lifted so as to sue the directors, then the requirement that 2nd defendant do furnish security for costs becomes a non starter and of course the other intended defendants are not yet parties to the suit.

As for the 1st defendant, it has not been demonstrated that it intends to or is in the process of disposing of its assets. The fears about 2nd defendant leaving the jurisdiction of this court's jurisdiction just because he is a foreigner has no justification – such fears would have to be sufficiently demonstrated – has he purchased an air ticket, has he transferred or disposed of his personal belongings? If so this has not been demonstrated to his court.

The upshot is that the application has no leg on which to stand and the same is dismissed with costs to respondents.

Delivered and dated this 10th day of **December 2010** at Malindi.

H. A. Omondi
JUDGE

Mr. Shujaa holding brief for Ghalia for Respondent
Mr. Omino for applicant