



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Civil Case 135 of 2009**

**GITHAMBO GENERAL CONTRACTORS ...PLAINTIFF**

**Versus**

**KAY CONSTRUCTION CO. LTD. .... DEFENDANT**

**RULING**

The subject matter of this ruling is the summons dated 22<sup>nd</sup> October 2009 in which Kay Construction Co. Ltd. the defendant herein, applied for inter alia the plaint herein to be struck out. The summons is taken out pursuant to the provisions of Order VI rule 13(1)(a) and (d) of the Civil Procedure rules. The application is supported by the affidavit of Dennis Maithya Mwangangi and Joel Nderitu Kiongo. When served with the summons, Andrew Githinji Mwihuri filed a replying affidavit to oppose the same. The defendant also filed the further affidavit of Joe Nderitu Kiongo to buttress the summons.

Mr. Njeru, learned advocate for the defendant urged this court to strike out the plaint on the basis of the following reasons:

First, that the suit was filed by Andrew Githinji Mwihuri, using the business name of One Githaiga Muturi known as Githambo General Contractors yet he was not authorised.

Secondly, it is said that Andrew Githinji Mwihuri swore a verifying affidavit claiming he is the proprietor of the plaintiff firm yet that is not true.

Thirdly, that there is a prayer for general damages yet the dispute is in respect of a breach of contract. For the above reasons Mr. Njeru urged this court to find that the suit discloses no reasonable cause of action. Mr. Andrew Githinji Mwihuri opposed the summons on the following reasons:

First, that he signed the agreement dated 14<sup>th</sup> August 2007 which commenced the subcontract on behalf of the plaintiff firm. He said he used to run the affairs of the plaintiff firm.

Secondly, that Joe Nderitu Kiongo entered into a subcontract with the defendant using his company construction co. Ltd. hence his affidavit evidence cannot be relied on. It said that if Joe Nderitu Kiongo was the proprietor of the plaintiff firm then he would not have used Ndiki Construction Co. Ltd. to secure a similar subcontract like that of the plaintiff firm. Andrew Githinji Mwihuri, claimed that Joe Nderitu Kiongo was his former employee as a manager who deliberately carried away the certificate of registration of the plaintiff firm. In the further affidavit Joe Nderitu Kiongo claimed that Andrew Githinji Mwihuri had been appointed as the Manager of his firm. He said that he had been authorized in his capacity as a manager to sign the agreements on behalf of the plaintiff firm. Joe Nderitu claimed he is the sole proprietor of the plaintiff firm. He annexed to the further affidavit a copy of the certificate of registration of the plaintiff.

I have considered the submissions tendered by the defendant's advocate as well as those of Andrew Githinji Mwihuri. I have carefully examined the material placed before me. It is not in dispute that at the time of filing this suit, the records at the Registrar of Business names indicated that Githaiga Muturi

traded in the name of Githambo General contractors. There is also no dispute that the aforesaid firm secured a sub-contract for hand packing stones on behalf of the Defendant along St Marys-Nyakahura-Kiamara Muringato-Irima-Gitugu road. There is no dispute further that Andrew Githinji Mwihuri signed the agreement on behalf of the plaintiff. The issue in dispute is whether Andrew Githinji Mwihuri was authorised to file this suit and to swear a verifying affidavit. He claims he bought the firm from the owner, Githaiga Muturi, who has since then relocated to Southern Sudan. Joe Nderitu Kiongo has annexed to the further affidavit a copy of the certificate of change of particulars showing that he took over the ownership of Githambo General Contractors on 28<sup>th</sup> October 2009. This was done while this suit was pending. By then this court had issued orders of injunction to restrain the defendant from breaking the contract. There is evidence that Joe Nderitu Kiongo has secured a similar contract like that given to the plaintiff using his company known as Ndiki Construction Co. Ltd. If indeed Joe Nderitu Kiongo was the proprietor of Githambo General Contractors then why did he sign another contract to compete with his firm. I am unable to believe the averments of Joe Nderitu Kiongo.

I have come to the conclusion that he has colluded with the defendant to frustrate the plaintiff firm for purposes of obtaining the same sub-contract using his new firm known as Ndiki Construction Company Ltd. The circumstances surrounding this dispute has made me to infer that Andrew Githinji Mwihuri was authorised to file this suit and to deponed the verifying affidavit on behalf of the firm and or its proprietor. I am not convinced that Joe Nderitu Kiongo was candid. By the time of filing suit he was not the registered proprietor of Githambo General Contractors. Strictly speaking, he had no legal authority to transact using the name of the plaintiff in view of the fact that the change of particulars had not been effected until 28<sup>th</sup> October 2009.

The above ground raised is to the effect that general damages cannot be claimed in a suit where an order of injunction has been asked. I agree with the aforesaid argument. However I do not think the same is fatal in the sense that the defect can still be cured on an amendment at the appropriate moment before the substantive suit is heard.

In the end I am convinced that the application must be dismissed which I hereby order with costs to the plaintiff.

Dated and delivered this 13<sup>th</sup> of November 2009.

J.K. SERGON

JUDGE.

In open court in the presence of the plaintiff in person Muthui for the defendant.

J.K. SERGON

JUDGE