



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 221 of 2007

PRISCILLA NYAMBURA..... PLAINTIFF

VERSUS

MARATHON CORPORATION KENYA LIMITED.....1ST DEFENDANT

TADIRAN COMMUNICATION LTD.....2ND DEFENDANT

MOSHE NARKIS.....3RD DEFENDANT

AVI EVRON.....4TH DEFENDANT

RULING

Before me is an application by the defendants made pursuant to the provisions of **Order VI Rule 13(1) (a)** and **Rule 16** of the **Civil Procedure Rules**. The defendants seek to strike out the amended plaint filed on 10th May 2007. The grounds in support of the application are on the face of the application. The defendants contend that the plaintiff claim as pleaded in her plaint to the effect that she influenced the award of the tender upon which she now claims commission is in grave breach of the laws applicable to Kenya and is contrary to public policy. The defendants state that the plaintiff's claim as pleaded is grounded on an illegality as her pleaded action are in breach of the **Exchequer and Audit (Public Procurement) Regulations of 1999** and the subsequent amendment thereto. It was the defendants' contention that the plaintiff's cause of action as pleaded in her plaint was criminal under the provisions of the **Economic Crimes Act 2003** and in any event contrary to public policy. The defendants were of the view that due to the above reasons, the amended plaint did not disclose a reasonable cause of action.

The plaintiff filed a replying affidavit in opposition to the application. She urged the court to look at her pleadings especially the amended plaint dated 10th May 2007 and the answer to the request for particulars filed on 10th March 2008. She deponed that she was approached by the 4th defendant on or about February 2003 with a view to securing her services to assist in procuring the award of a tender that had been floated by the department of the defence. She deponed that she accepted to act on behalf of the 2nd defendant in the tender process on the understanding that she would be paid a commission of 1% of the tender amount. She swore that she undertook her duties as an agent of the defendants in good faith and indeed ensured that the defendants secured the tender. She deponed that her duties as an agent did not involve or include any illegal activities. She denied being involved in any corrupt dealings. She instead stated that it was the 2nd defendant which was involved in corrupt activities by seeking to compromise officers at the department of defence. She reiterated that since her claim was based on a contract of agency whose terms she had performed, she should accordingly be compensated. The plaintiff was of the

view that the defendants had filed the present application to avoid settling the amount that they owed her. She swore that it was the defendants' who were guilty of committing illegal acts during the tender process. She urged the court to disallow the application.

At the hearing of the application, I heard the rival submissions made by Mr. Chacha on behalf of the defendants and Mr. Albert Khaminwa on behalf of the plaintiff. I have carefully considered the said submissions. Apart from basically reiterating the contents of the pleadings filed in support of their respective cases, Mr. Chacha and Mr. Albert Khaminwa cited several decided cases in support of their respective clients' cases. I have also read the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the defendants established that the plaintiff's suit was so fraught with illegality that it failed to disclose a reasonable cause of action.

Before considering the matters in dispute in this application, I have put in mind the cautionary dictum of Madan JA (*as he was then*) in **DT Dobie & Co. (Kenya) Ltd vs. Muchina [1982] KLR 1** at page 9 where he held that:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

In the present application, it was the defendants' case that the plaintiff's suit did not disclose a reasonable cause of action on account that it was based on an illegality. It was common ground that the plaintiff is seeking to be paid commission by the defendants on account of her role in facilitating the award of a defence tender to the defendants. According to the plaintiff, if she had not “*pushed*” the defendants' tender with the right persons in the ministry of defence, the defendants would not have been awarded the tender. It was clear that the plaintiff's role in the entire transaction was to facilitate or make smooth the path of the defendants in securing the said tender awarded by the department of defence. The defendants alleged that what the plaintiff was engaged in what they referred to as influence peddling which was contrary to the **Public Procurement and Disposal Act, the Exchequer and Audit (Public Procurement) Regulations, 2001** and the **Anti-corruption an Economic Crimes Act**.

Does the amended plaint disclose an illegal conduct on the part of the plaintiff? **Section 38(1)** of the **Public Procurement and Disposal Act** provides that:

“After the deadline for the submission of tenders, proposals or quotations –

(a) No person who submitted a tender, proposal or quotation shall make any unsolicited communications to the procuring entity or any person involved in the procurement proceedings that might reasonably be construed as an attempt to influence the evaluation and comparison of tenders, proposals or quotations.

(b) No person who is not officially involved in the evaluation and comparison of tenders, proposals or quotations shall attempt, in any way, to influence that evaluation and comparison.”

In **Heptulla vs. Noormohamed [1984] KLR 380**, the Court of Appeal held that no court ought to enforce an illegal contract where the illegality is brought to its notice and if the person so invoking the aid of the court is himself implicated in the illegality.

In paragraph 8 of her plaint, the plaintiff made the following averment:

“After the appointment by the 1st and 2nd defendants the plaintiff avers that she undertook her duties as an agent and through her industry the Government of Kenya awarded the 2nd defendant a tender for the supply of military equipment worth KShs.10,500,000,000.00 (Kenya Shillings Ten Billion Five Hundred Million)”

In paragraph 10 of the plaint, the plaintiff averred that:

“The plaintiff avers that the 2nd defendant, Saab Grintek Defence (Pty) Ltd and Harris Corporation were bidders for the Department of Defence military tender number DOD/SYS/CNRs/001/2005/2006 for the supply of radio equipment and further that it was due to the plaintiff’s industry that the 2nd defendant was awarded the tender by the Government of Kenya on 27th April 2006.”

In answer to request for particulars made by the defendants in respect of paragraph 8 of the amended plaint, the plaintiff stated that she had arranged for the 3rd and 4th defendants to meet with the then Minister for Defence, probably with a view to influencing the award of the said tender to the 1st and 2nd defendants. The plaintiff averred in paragraph 13 of her plaint that it was due to her influence that the tender which had been awarded to another company was awarded to the defendants.

It was clear from the foregoing that the plaintiff was not an agent of the defendants in the said tender but was actually a broker on behalf of the persons who were awarding the tender. It was apparent that the plaintiff was intimately involved in the tender process with a view to influencing the award of the said tender to persons who in her view would pay her commission for her “industry”. It was clear that the plaintiff was involved in the rigging of the tender bid which is specifically prohibited under **Section 44** of the **Anti-Corruption and Economic Crimes Act**. The plaintiff may have been induced to believe that the defendants would participate in the rigging of the tender process in consideration that she would be paid commission for her “work”.

What emerges from the said plaint is that the plaintiff is basically seeking the intervention of the court to enforce a contract which advances an illegality. The plaintiff is seeking the enforcement of a contract whose purpose was to defeat the legal provisions put in place in the **Public Procurement and Disposal Act, 2005** and the **Anti-Corruption and Economic Crimes Act** to protect the members of the public from wasteful tender processes. The said Acts of Parliament were enacted to promote economy and efficiency in public procurements and to ensure the public procurement procedures are conducted in a fair, transparent and non-discriminatory manner thereby contributing towards the creation of a sound business climate in Kenya (See **Regulation 4** of the **Exchequer and Audit (Public Procurement) Regulations 2001**. Public policy does not allow the courts to be a conduit in which illegal contracts are given stamp of approval. I think where the court is made aware that an illegality was committed by a party who is seeking to enforce an illegal contract, such a court should act immediately and terminate such proceedings. The public policy behind such action is that the court should deter any party wishing or desiring to circumvent the law and then seeking to enforce such breach of the law by the courts acting in its civil jurisdiction.

It is clear from the foregoing that the application is for allowing. The plaintiff’s suit, being based on an illegality, does not disclose a reasonable cause of action. The same cannot be sustained by this court without this court appearing to promote the blatant breach of the laws which have been put in place to guard the tax payers from corrupt and rigged public procurement processes. The plaintiff’s suit is hereby struck out with costs to the defendants.

DATED at NAIROBI this 5th day of NOVEMBER 2008.

L. KIMARU

JUDGE