



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

**Misc. Civ. Appli. 502 of 2007**

**RESTORES CONSULT.....APPLICANT**

**VERSUS**

**SEDCO CONSULTANTS LIMITED..... 1<sup>ST</sup> RESPONDENT**

**ARSHAD-UL-HAQ..... 2<sup>ND</sup> RESPONDENT**

**AL HAQ HOLDINGS LIMITED.....3<sup>RD</sup> RESPONDENT**

**RULING**

The application is a Chamber Summons dated 25<sup>th</sup> March, 2008. It has been brought under Order 1 rule 10(2) and 13 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks the following orders.

1. THAT the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are non-suited in this matter.
2. THAT this Honourable Court be pleased to strike out the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from this suit.
3. THAT costs of this application be provided for.

The grounds for the application are namely:

- (a) The 1<sup>st</sup> Respondent (the Managing agent of the 3<sup>rd</sup> Respondent) instructed the Plaintiff to levy distress for rent arrears upon tenants in the 3<sup>rd</sup> Respondent premises.
- (b) The Plaintiff acted upon these instructions and is now seeking to tax its bill on work done.
- (c) The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were in no way involved in the above and are this strangers to this suit.
- (d) The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents never entered into any contract within the Plaintiff.

The application is supported by an affidavit sworn by ARSHAD UL HAQ dated 25<sup>th</sup> March, 2008. The gist of the affidavit is that the 3<sup>rd</sup> Respondent Company, which owns the suit premises, instructed the 1<sup>st</sup> Respondent to manage and collect rent over the premises. The Deponent avers that he is a director of the 3<sup>rd</sup> Respondent. He deposes that neither he nor the 3<sup>rd</sup> Respondent gave any instructions to the Applicant

to levy distress over the suit premises.

The application is opposed.

The Applicant with the Bill, Simon Kanure Kibue trading as Restores Consult, a firm of auctioneers, swore the replying affidavit dated 7<sup>th</sup> May, 2008. The gist of the affidavit is that the 1<sup>st</sup> Respondent instructed the Applicant with the Bill and was an agent of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who owned the suit premises. Mr. Kibue deposes further that the authority of the 1<sup>st</sup> Respondent was not restricted and that therefore the application should be dismissed.

I have considered the submissions by Mr. Wambugu for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents with the application, and Mr. Kimani for the auctioneer. Mr. Wambugu's submissions were wanting as he made inconclusive submissions. Mr. Wambugu's clients case is however the stronger one.

It has been admitted by the auctioneer that he received instructions from the 1<sup>st</sup> Respondent, to levy distress for rent. The instructions are not exhibited. It is not clear how the auctioneer brought in the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to this miscellaneous application. The 2<sup>nd</sup> Respondent is a director of 3<sup>rd</sup> Respondent which owns the suit premises. That cannot be a reasonable ground to bring him into the suit. As director of the 3<sup>rd</sup> Respondent, bringing him into the suit at this stage amounts to lifting the corporate veil. The lifting of the corporate veil is premature. It can only be lifted on application. The procedure adopted by the Applicant was irregular.

Regarding the 3<sup>rd</sup> Respondent, the auctioneer is clear that he dealt with, the 1<sup>st</sup> Respondent, an Agent of an undisclosed principle. As long as the principle the 3<sup>rd</sup> Respondent is not shown to have been disclosed, then the auctioneer cannot go after the 3<sup>rd</sup> Respondent.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent did not instruct the auctioneer. The auctioneer should file his bill of costs only against his instructing client. That being the case I allow the application dated 25<sup>th</sup> March, 2008 and strike out the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from the Bill of Costs filed herein.

Due to circumstances of the case, each party should bear its own costs.

Dated at Nairobi, this 5<sup>th</sup> day of December, 2008.

**LESITT, J.**  
**JUDGE**

*Read, signed and delivered, in the presence of:*

Wambugu for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Mr. Kimani for the auctioneer

**LESITT, J.**  
**JUDGE**