REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 172 OF 2007

CHRISTOPHER WANYOIKE NDUNG'US t/a HOTEL NOMAD KITENGELA…PLAINTIFF

VERSUS

LYRIC INVESTMENTS LIMTIED …….....……1ST DEFENDANT

COAST PARADISE IVNESTMENTS LIMITED.....2ND DEFENDANT

RULING

By Chamber Summons dated 30th March and filed in Court on 4th April 2007. the 2nd defendant, Coast Paradise Investments Limited sought a Court order to strike out the suit against the 2nd defendant and the payment of costs thereof to the said 2nd defendant by the Plaintiff.

The grounds in support of this application are set out in the body thereof and also the averments in the supporting affidavit.

On the face of the application the applicant states that the plaint discloses no reasonable cause of action against the 2nd defendant, that the 2nd defendant was not privy to the transactions between the and the 1st defendant, that plaintiff has no contract with the 2nd defendant, that the suit is frivolous and vexatious and that the suit is otherwise an abuse of the Court process.

The supporting affidavit filed at the same time with the application was deponed to by one ***Nasra A. Salim*** the business Manager of the 2nd defendant duly authorized to do so.

He avers that the 2nd defendant is in the gaming and betting industry, that the plaintiff filed the suit on 20th day of February 2007; that the 2nd defendant's defence was filed on 19th March 2007; that on information he received from an advocate from the firm of advocates representing the 2nd defendant, which information he believes to be true, the 1st defendant had by letter dated 25th January 2007 offered to lease its premises to the plaintiff which offer the latter accepted and that the 2nd defendant was not privy to this letter of offer.

That the 2nd defendant was not aware of any transaction between the plaintiff and the 1st defendant and was not privy to those transactions; that the 2nd defendant does not have any contract with the plaintiff in respect to the subject matter of this suit.

The deponent avers further that by a letter of offer dated 15th December 2006 the 1st defendant offered a tenancy to the 2nd defendant in respect of the 1st defendant's premises situated on ***L.R. No. 209/623*** and

that the 2nd defendant executed the acceptance and made a promise to pay a sum of ***Kshs.4,403,700/=*** as consideration.

That the plaintiff was not privy to this second letter of offer.

That on information received from one ***George Gitonga Murugara***, an advocate from the firm of lawyers representing the 2nd defendant, which information he believes to be true, that as the 2nd defendant is not a party to the contract, the plaintiff has no cause of action against the 2nd defendant.

That this was stated by ***Judges Kihara Kariuki*** and ***Khamoni*** in their rulings dated 22nd February 2007 and 13th March 2007.

And that on information from the same advocate which he believes to be true, the claims against the 2nd defendant are frivolous and vexatious and an abuse of the Court process.

Counsel for both parties appeared before the Court on 18th July 2007 and submitted on the application and relied heavily on either the grounds set out on the application and/or the supporting affidavit and the replying affidavit.

Firstly where a party files an application under ***Order VI Rule 13(1),*** he is expected to elect whether to go under ***13(1)(a)*** alone or ***13(1)(b)(c)*** and ***(d)*** of the Rule.

This is so because under Order 13 of the Rules,

"***No evidence shall be admissible on an application under sub-rule 1(a) but the application shall state concisely the grounds on which it is made."***

Now when one combines ***sub-rule 1(a)*** and ***1(b)(c)*** and ***(d)*** and sworn an affidavit to support the application it is difficult to tell if that affidavit really excludes ***sub-rule 1(a).***

However as I see it, I want to believe that the grounds set out on the body of the application were all meant to support the application under ***Order 13 1(a)*** while the affidavit is intended to support the application under ***13 (1)(a) (b) (c)*** and ***(d).*** I believe this to be the intention of the applicant gazing from the manner those grounds have been set out.

This being the position, I really do not understand what the respondent's opposition to this application is all about, given the rulings of ***Judges Kihara Kariuki*** and ***Khamoni*** dated 22nd February 2007 and 13th March 2007 where they both cite lack of privity of contract between the plaintiff and 2nd defendant.

There is no substantial claim in the plaint against the 2nd defendant except for the plaintiff stating that the 2nd defendant is a necessary party to the case, having been let the same premises intended for the said plaintiff.

This does not amount to a claim against the 2nd defendant at all.

Here is a case of a rather greedy landlord entering into two agreements with two different parties separately over the same premises one of whom, the 2nd defendant, secured possession first on the basis of a willing Landlord/willing tenant.

He has nothing at all to do with the contract entered into between the plaintiff and the 1st defendant.

Even if we were to assume the 2nd defendant knew of the arrangement between the plaintiff and the 1st defendant, it would make no difference given that business people compete and at times even outwit one another.

The plaintiff should so against the 1st defendant and if he succeeds, the Court order will be implemented as per the Court direction.

Given that no injunction of a temporary nature was issued against the 2nd defendant, that he is already in possession of the suit premises and the alternative remedies sought in the plaint do not affect it, continuing with the main suit against it is a futile exercise which will yield nil result.

Consequently I allow the application dated 30th March 2007 and filed herein on 4th April 2007 and strike out the plaintiff's suit against the 2nd defendant.

On costs, I wish to state that if the previous rulings on this issue had been acted upon by the plaintiff it would have done the said plaintiff a lot of good but to wait for this application to be made is simply to ignore the obvious. Hence the plaintiff should pay costs of this application to the 2nd defendant.

These shall be the orders of this Court.

Delivered, dated and ***signed*** at Nairobi this 19th day of July 2007

D. K. S. AGANYANYA

JUDGE