



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 543 of 2001

DYNTECH INTERNATIONAL LIMITED.....1ST PLAINTIFF

EXECUTIVE SUPPORT CONSULTANTS LIMITED.....2ND PLAINTIFF

VERSUS

ATTORNEY GENERALDEFENDANT

RULING

The Plaintiffs are the Applicants in this notice of motion application dated 25th January 2006 in which they seek judgment on admission under Order XII rule 6 of Civil Procedure Rules, to the tune of US\$ 8,810,031/= with interest thereon and costs. The ground for the application is that after the suit was filed the Defendant, who is the Attorney General on behalf of the Ministry of Finance has admitted being indebted to the Plaintiff to the sum sought. The application is supported by an affidavit and a supplementary affidavit sworn by Erastus Kivasu Nzioka. The application is opposed. The Respondent has filed a replying affidavit sworn by the Financial Secretary Ministry of Finance, Mutua Kilaka with several annexures.

The brief background of the case is that on the 20th April 1995, 1st Plaintiff herein, Dyntech International entered into a contract with The Ministry of Finance and Planning, hereinafter referred to as the Ministry, for the maintenance and support of the Financial Management and Budget Monitoring Information System. The contract had a lifespan of two years. On expiry of the two years, the contract was extended for a period of six months from March to 19th September 1997, and for a further two years under Agreement No.2 entered into between the parties from 20th September 1997 to 20th September 1999. Upon expiry of the contract the 1st Plaintiff continued to render services to The Ministry until it withdrew them in May 2000. Eventually consultants were contracted to carry out in depth analysis of the value of services rendered by the 1st Plaintiff to The Ministry under the various agreements. Thereafter a meeting was held between the 1st Plaintiff and the Ministry on 19th January 2004. This meeting was followed by a letter written by Financial Secretary then, Mr. J. M. Oyula to the Project Director, Dr. Merlyn Kitering one day after their joint meeting. The letter is annexed to the affidavit sworn in support of this application as "EKNI". That letter forms the basis of this application. The application contends that the letter was an admission of the Respondents indebtedness. The letter is a short one and is set out in full herein below.

"ZZ223/01/30 20th January, 2004

Dr. Merlyn Kettering,

Project Director,

Dyntech International Ltd.

P. O. Box 52524,

NAIROBI

Dear Merlyn,

PAYMENT ISSUED ON FMS PROJECT

QUOTATION NO. TH235/94/95

This is a follow-up of our meeting held in Treasury on 19th January 2004 in respect of outstanding payments on the above contract.

You are aware that the Ministry was not able to sort out the problems regarding the outstanding payments, which have taken a long time to settle. It is as a result of this that the Ministry contracted an independent consultant to review the whole project and come out with recommendations on the way forward.

In our meeting referred to above, the report of the independent consultant was discussed and the recommendation evaluation of systems and services rendered under contract amendment No.2 and 3 by the consultants was accepted by both parties. Accordingly the following outstanding amounts were recommended for payment:-

- a) Training US\$ 1,067,450.00**
- b) Equipment & Networks 637,160.00**
- c) Consultancy services 6,325,901.00**

Total amount US\$8,030,511.00

During the meeting, we were informed by the consultants that they were unable to recommend payment of US\$412,631 because of the following reasons:-

- i) US\$89,333.00 appears to have been charged for twice.**
- ii) US\$323,298.00 in respect of consultancy services were not ascertained hence the validity of consultancy services in his amount need further clarification.**

You will have also noted that the independent consultants recommend a payment of US\$ 779,520.00 to cover the period October, 2000 to January, 2001 when you were held in the Ministry together with your staff while awaiting conclusion of contract extension thereby incurring expenses from the time the intent was originated upto when the contract negotiations were terminated.

The purpose of this letter is to inform you formally of the amounts recommended for settlement and to obtain your acceptance for the same so as to enable the Ministry include these amounts in its budget.

Yours sincerely,

FINANCIAL SECRETARY

Mr. Ngatia argued this application on behalf of the Applicant. It was counsel's submissions that the letter "EKNI" was an unambiguous admission of indebtedness by the Defendant to the Plaintiffs herein. Counsel interprets the letter as one written to pass information to the 1st Plaintiff concerning recommendations made to the Defendant by Consultants after the latter carried out an analyses and evaluation of the services rendered by the Plaintiffs to the Ministry and of payments due for them. Mr. Ngatia submitted that the said letter sought acceptance of the recommendations by the Plaintiffs to enable the amounts to be included in the budget. Mr. Ngatia relied on the supplementary affidavit in which a letter "EKN2" dated 29th October 2003, addressed to the 1st Plaintiff by the Ministry, to say that it was out of the letter that consultants were appointed who in turn made the recommendations communicated to the Plaintiffs in the Ministry letter referred to earlier in this ruling.

The Attorney General on behalf of The Ministry has raised three critical issues for consideration and on the basis of these issues contends that the case is not plain and obvious and one which cannot be dealt with through summary procedure as sought by the Applicants herein. The first issue is that the contract agreement in issue in this matter was entered into between the Ministry and the 1st Plaintiff and that the 2nd Plaintiff did not feature either in the agreement or correspondences exchanged between the parties nor in subsequent meetings. Mr. Mahongo for the Respondent submitted that the 1st Plaintiff was at large and that the 2nd Plaintiff should show how it came to be involved in the matter. In that regard, Mr. Mahongo submitted that the affidavits supporting the application were sworn by a Director of the 2nd Plaintiff and should be ignored.

In answer to that point Mr. Ngatia drew the courts attention to paragraph 4 of the plaint and paragraph 2 of the defence. Paragraph 4 of the plaint dated 11th June 2001 avers thus:-

"By an agreement made on 20th April 1995, the 1st Plaintiff in venture with the 2nd Plaintiff entered into a contract with the Defendant for a project entitled Enhancement of Financial Management Budget Monitoring Information Systems. Inter alia, the Plaintiffs were to provide to the Defendant technical services, equipment and software to further develop and enhance, implement and support its economic and financial information systems. Full particulars are within the Defendant's knowledge."

Paragraph 2 of the Defence avers thus:-

"The Defendant in answer to the Contents of paragraphs 4 & 5 avers that on 20th April 1995 the Plaintiffs entered into a contract with the Ministry of Finance Government of Kenya

he then exchange sum of US\$ 3,818,272.79 at the then exchange rate of 44 to 1 US\$."

It is Mr. Ngatia's submission that the Defendant acknowledged both Plaintiffs in its statement of defence and cannot be heard challenging that issue at this stage. I see two broad issues here for determination.

- (1) Who are the parties to the agreements in issue in this suit.**
- (2) Whether there is an admission of indebtedness by the Defendant to the 2nd Plaintiff.**

On the issue of the parties to the agreement, both parties Annexed various correspondences and documents to their various affidavits to this application.

In the first affidavit sworn by Nzioka in support of this application, one letter was annexed as "EKNI". It is a letter from the Ministry of Finance to Dr. Merlyn Kettering the Project Director,

Dyntech International Limited hereinafter referred to as the 1st Plaintiff. That was the letter upon which the application is made and based. It discusses payment issues on FMS Project quotation No. TH 235/94/95.

In the supplementary affidavit by the same Nzioka, further correspondences are annexed. EKN 2, EKN 3 and EKN4 are copies of correspondences exchanged between Dr. Merlyn Kettering the 1st Plaintiff and the officials of the Ministry of Finance dated between 20th December 2000 and 20th January 2004, on the issue of “Out of court settlement of FMS Project No. TH 235/94/95. None of these correspondences were exchanged between the 2nd Plaintiff and the Ministry.

Mr. Nzioka has annexed correspondences between himself and the 1st Plaintiff marked “EKNI” in his second affidavit. That letter is written by the 1st Plaintiff to the deponent and discusses the same project quotation No. TH 235/94/95 between the 1st Plaintiff and the Defendant. He also annexed with it another letter to the Managing Director of the 2nd Plaintiff written by the Chairman Board of Directors. The latter letter appoints the deponent to act as agent for and on behalf of the 1st Plaintiff to receive and sign legal documentation including affidavits, court papers and others. For purposes of an admission under Order XII rule 6 of Civil Procedure Rules, the letters authorizing the Managing Director of the 2nd Plaintiff to act as agent for the 1st Plaintiff are irrelevant, not only are they written by third parties to the suit but most importantly none are written by the 1st Plaintiff itself. I doubt that the letters gave any legal authority to the 2nd Plaintiff to act for the 1st Plaintiff.

Quite apart from that point the principles governing the entry of a judgment on admission are well settled and very clear. These principles are very clear to Mr. Ngatia who relied on cases which clearly set them out. In AGRICULTURAL FINANCE CORPORATION vs KENYA NATIONAL ASSURANCE COMPANY LTD. CA NO. 271 of 1996 Kwach, Omolo and Tunoi JJA observed thus:-

“Order 12 rule 6

Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

Issue is whether there is a clear unambiguous and unconditional admission and secondly whether the Defendant raised objections that go to the root of the case. The letter forming the admission relied upon by the applicant is set out herein above and I need not repeat it here. It is a clear admission. It states in part **“Accordingly the following outstanding amounts were recommended for payment:”** The letter admitted that the Ministry had an outstanding payment to the 1st Plaintiff to whom the letter was addressed. The admission is clear unambiguous and unconditional.

As to whether the Defendant has raised objections which go to the root of the case. The objection raised is very crucial and goes to the root of the case. To whom was the admission made? or who can invoke the admission the subject of this application? The correspondences annexed to this affidavit including the letter of admission are clear that they were made to the 1st Plaintiff. None of the correspondences written by the Ministry was addressed to the 2nd Plaintiff and neither did it feature anywhere in all discussions and meetings held between the 1st Plaintiff and the Ministry. The 2nd Plaintiff has attempted to demonstrate its involvement in the matter through correspondences exchanged with third parties. As I have already observed, those letters did not create any legal authority nor did they donate any power or right to the 2nd Plaintiff to act as the agent of the 1st Plaintiff in the matter before the court. The letter of admission marked EKNI in the first affidavit sworn in support of this application can only be used by the one it was addressed to, which is the Dr. Merlyn Kettering or the 1st Plaintiff.

I will quote from Halsbury’s Laws of England 3rd Edition Volume 8 at paragraph 110 to prove my

point:-

“As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

I see that there may have been a contractual arrangement existing between the 1st and the 2nd Plaintiff touching on the project the subject matter of the payments herein. That relationship does not entitle the 2nd Plaintiff to a judgment based on an admission made to the 1st Plaintiff. On these grounds alone I find that the Defendants objection raised in this application are substantive, material and go to the very root of the case and that they can only be resolved in a trial.

In the circumstances the Applicant’s application dated 25th January 2006 is dismissed with costs to the Respondents.

Dated at Nairobi this 21st Day of September 2007.

LESIIT, J.

JUDGE

Read, signed and Delivered in the presence of:

Ngatia for Applicant

N/A for Respondent

LESIIT, J.

JUDGE