



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Case 108 of 2007

CRUSH SECURITY GUARDS PRIVATE INVESTIGATORS LTD:....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD:.....DEFENDANT

RULING

By a plaint filed on 12th June 2007 the plaintiff **CRUSH SECURITY GUARDS & PRIVATE INVESTIGATORS LTD** sued **KENYA POWER & LIGHTING CO. LTD** and its main prayer as set out in paragraph 7 of the plaint is:-

“The plaintiff’s prayer against the defendant is for a declaration that the purported termination of contract between them is unprocedural, illegal, null and void”

From the plaint one gathers that the plaintiff and the defendant entered into an agreement where the plaintiff, which is a security firm was to provide security guards to guard the defendants offices and installations. On 12th May 2007 the defendant’s Company secretary wrote to the plaintiff purporting to terminate the contract and hence this suit. Filed stimuniously with the plaint was an application which sought for a mandatory injunction directing the defendant to specifically perform his part of contract. Another prayer was for a temporary injunction to restrain the defendant from awarding the contract to another party.

When the application came up for hearing Mr. Odoto for the defendant/Respondent raised a preliminary objection to the whole suit. He submitted that the suit is duplicity as the plaintiff had, before filing this suit, instituted another suit being Nairobi HC.CC.NO.388 of 2007 where he had sued the defendant over the same issues. He also had filed an application seeking same prayers as the one filed in this suit. He therefore said the affidavit which accompanied this plaint verifying the same was false as it stated there was no other suit pending between the parties. He therefore asked court to strike out the plaint.

Mr. Buluma opposes the preliminary objection. He submitted that the suit in Nairobi is totally different from the present one. The cause of action is different as this; suit arises out of cause of action which arose on 12th May 2007. Nairobi suit was filed on 27th April, 2007.

He further said there are no defects in the verifying affidavit to warrant the whole suit to be dismissed. He further said that if the court finds this suit is similar to the suit in Nairobi, it should duly stay this one until the one in Nairobi is determined and not strike it out.

I have thoroughly considered the rival submissions. The main issue is whether this suit is similar to **NRI.HCCC.NO.388 OF 2007**. The defendant has in his replying affidavit annexed the plaint in that suit. A close look at the prayers in that suit and in the present suit candidly show that the cause of action is the same. The two suits revolve around on agreement entered into between the plaintiff and the defendant and the purported act of the defendant of breaching the same. The suits are against Kenya Power and Lighting though the Nairobi case **PROTUS MUNYENDO LUTOMIA** as a second defendant. The said Protus is an employee of the 1st defendant and is sued in that capacity. He is their Eldoret branch. In paragraph 8 (a) of the suit in Nairobi the plaintiff seeks the defendants more so the said to be barred from breaching the agreement entered in September, 2007. This is the same prayer in paragraph 7 of the plaint in this case. The prayers in both suits may be coached in different words but certainly the cause of action is the same. That also applied to the prayers in the application in this suit kand the one in Nairobi case. True one may be seeking for a mandatory injunction and the other for temporary injunction but the effect would be the same.

Having found that the two suits are similar I now turn to the plaint in this suit and verifying affidavit. Provisions of Order 7 rule 1 CPR comes into focus. Order 7 Rule 1 (e) states:

1. The plaint shall contain the following particulars:-

- a)
- b)
- c)
- d)

e) An averment that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter.”

But what does the plaintiff say in paragraph 8 of the plaint:-

8. The plaintiff avers that there is no other suit pending in court between the parties hereto resulting from the same cause of action.”

That of course is false because as found out above there is suit **NBI HC.CC.NO.338 of 2007** between the same parties over the same issues. It also follows that the averment by **EDWARD SAYA MALOVI JUMA** in the verifying affidavit which accompanied the plaint are also false. In paragraph 3 of the affidavit he avers that the contents of the plaint had been read to them and he confirms that they are correct and according to his instructions. In paragraph 4 he avers that there are no previous proceedings in court relating to the same claim. Those averments are false. The same deponed is the one who had sworn the verifying affidavit in **NBI HC.CC.NO.388 OF 2007**. He knew very well that what he deponed was false. The affidavits therefore offend the provisions of Order 7 Rule 1(2) which states:-

“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint”.

The verifying affidavit is false and therefore cannot stand. Though the court has discretion to strike it out as not the fact that the plaint also contains falsehoods make this court feel that it cannot exercise its discretion in favour of the plaintiff and ask him to care the defendants. The falsehoods are substantive from the pregoing therefore I find that the suit is bad for duplicity and that it offends the mandatory provisions of Order 7 Rule 1 CPR. I therefore uphold the preliminary objection and strike out the suit with costs.

Dated and Delivered at Eldoret on 5th October, 2007.

KABURU BAUNI

JUDGE