



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

Civil Suit 446 of 2005

ADVENTIST DEVELOPMENT AND RELIEF AGENCY KENYA.....PLAINTIFF

VERSUS

MATIC GENERAL CONTRACTORS LIMITED.....1ST DEFENDANT

STEPHEN KINYANJUI MBURU.....2ND DEFENDANT

RULING

The plaintiff's claim is based on the agreement of sale between the plaintiff and the 1st defendant. The 1st defendant, it is alleged is the registered owner of the property L.R. NO. 209/11822. The plaintiff pleads that the 2nd defendant is the director of the 1st defendant company. The plaintiff further alleges in the plaintiff that the two defendants jointly and severally held themselves to be in a position to transfer the aforesaid property but that they both breached the agreement for sale, and failed to complete the sale. The plaintiff further pleads that both defendants were paid kshs 6 million as deposit. The plaintiff further stated that more money was paid to the defendants a result of the fraud perpetrated by both defendants.

In the defence the 2nd defendant alleges that he was wrongly sued by virtue of section 2 and 16 of the Companies Act, on the basis that he was sued because he is a director or owner of the 1st defendant. The 2nd defendant did state in his defence that it would move the court to strike out its name on that basis.

The 2nd defendant true to his aforesaid pleading filed a chamber summons seeking orders: -

1. That the plaintiff's claim against the 2nd defendant be struck out for want of disclosure of a cause of action;
2. That in the alternative to (1) above the plaintiff's claim against the 2nd defendant be dismissed

That application is brought under Order VI Rule 13 (a) of the Civil Procedure Rules and section 2 and 16 of the Companies Act.

The application is based on the grounds: -

- That the 2nd defendant is a distinct person from the 1st defendant company and is therefore not obligated to meet the 1st defendant's obligations as articulated in the case of Salomon – V – Salomon and CO.;

· That the plaintiff has joined the 2nd defendant in this action without reasonable cause.

The application was not supported by an affidavit but relied on the aforesaid grounds and pleadings. The plaintiff did not oppose the application nor was he represented on the day of hearing.

Although the plaintiff states that the 2nd defendant is a director and owner of the 1st defendant company, it is not clear that the 2nd defendant is sued in his capacity of a director of the 1st defendant only. The plaintiff pleads that both defendants failed to complete the sale, further it pleads that kshs 6 million, kshs 200, 000, kshs 2.5 million was fraudulently received by both defendants. The plaintiff does not state that the 2nd defendant received those sums in his capacity as a director of 1st defendant, as it does seem that the allegations are that he received the same in his individual capacity. The court therefore find it difficult, in the absence of oral evidence at trial, to state that the plaintiff's claim against the 2nd defendant discloses no reasonable cause of action. The orders therefore sought by the 2nd defendant cannot be granted.

The order of this court is that the chamber summons dated 24th February 2006 is dismissed with no orders as to costs.

MARY KASANGO

JUDGE

Dated and delivered this 5th day of May 2006.

MARY KASANGO

JUDGE