REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

CIVIL CASE NO. 1440 OF 2000

WALTER KIMANI NDUNGU T/A WAKIM QUANTICONSULTS……..PLAINTIFF

VERSUS

MOUNT KENYA ROSES LTD & 2 OTHERS……DEFENDANTS

R U L I N G

By plaint dated 7th August, 2000 (amended in minor ways on 12th September, 2000) the Plaintiff, **WALTER KIMANI NDUNGO (t/a WAKIM QUANTI CONSULTS)**, sought the following reliefs against the three Defendants, **MOUNT KENYA ROSES LIMITED, PAUL KIBUGI MUITE and MIGWI KARUGU (t/a MIG CONSULT):-**

> ***"1. As against the Defendants jointly and severally for:***
>
> ***(a) a declaration that the Plaintiff was engaged by or on behalf of the 1st Defendant as a quantity surveyor in accordance with the Architects and Quantity Surveyors Act, Cap. 525..;***
>
> ***(b) a declaration that the Plaintiff as such quantity surveyor duly engaged is entitled to be paid according to the Architects and Quantity Surveyors Act, Cap 525…..; and***
>
> ***(c) payment of such sum as the court shall determine to be fees for services rendered.***
>
> ***2. In the alternative against the 1st and 2nd Defendants for payment of such sum as the court shall determine to be the professional fees due and owing to the Plaintiff for services rendered to the said defendants' flower processing project at Murang'a.***
>
> ***3. Against the Defendants jointly and severally for damages for false misrepresentation and causing undue financial embarrassment and economic hardship on the Plaintiff as a result of the Plaintiff being engaged by the Defendants professionally and not being paid his fees.***
>
> ***4. Interest on the amount found due to the Plaintiff in this suit at such rate as the court deems just and equitable.***
>
> ***5. Costs and further or other relief and interest on the costs awarded."***

The plaint is very lengthy and contains evidence and arguments that should be presented at trial. I am surprised that it was drawn by a firm of advocates.

The 1st and 2nd Defendants duly entered appearance and filed a joint statement of defence. They denied the Plaintiff's claims. The 3rd Defendant apparently never appeared nor filed defence. A request for interlocutory judgment for Kshs.2,844,739/00 dated 21st September, 2000 was made against him. No such liquidated demand appears in the reliefs sought in the plaint. On 11th December 2000 interlocutory judgment was entered against the 3rd defendant **"as prayed in the plaint" but with costs to "await judgment upon the remainder of the claim…**…." Given the nature of the reliefs sought in the plaint interlocutory judgment was clearly not available under any of Rules 3, 4, 5 or 6 of Order IXA of the Civil Procedure Rules. The judgment entered against the 3rd Defendant on 11th December, 2000 is manifestly unlawful. Having come to the notice of the court it cannot be left undisturbed. It is hereby set aside.

The 1st and 2nd defendants have applied by notice of motion dated 22nd April, 2004 for various orders (and upon grounds) as follows:-

1) That the suit be struck out and dismissed with costs for being statute-barred under the Limitation of Actions Act.

2) That the suit be dismissed as against the 2nd defendant for disclosing no cause of action known in law.

3) That the suit be struck out and dismissed as against the 1st Defendant as it was filed after a winding up order was made against it on 18th July, 2000 by this court, and without leave of the court.

4) That in the alternative this suit be stayed in terms of Order 24, Rule 4 of the Civil Procedure Rules until the Plaintiff pays the costs in HCCC No. 4512 of 1994.

5) That in the alternative this suit be stayed pursuant to section 6 of the Civil Procedure Act in that there is pending before this court a previously instituted suit or proceedings, being HC Miscellaneous Civil Application No. 368 of 1998, in which the matter in issue is also directly and substantially in issue in the present suit.

6) That the suit be struck out and dismissed on the grounds that it is scandalous, frivolous, vexatious and an abuse of the court process.

7) That the Defendants do have leave of the court to correct (by amendment) the typographical error appearing in paragraph 2 of the defence by deleting "2nd" and substituting "1st" therefor.

8) That the costs of this application be provided for.

The application is lengthy not only because of the number of prayers it contains but also because arguments in support thereof have been set out on the face of the application, rather than merely stating in general terms the grounds of the application as required by Rules 3 and 7 of Order 50. It is said to be brought under Order VI, Rule 13(1) (a), (b) and (d) Order VIA, Rules 3 and 5 and Order 24, Rule 4, all of the Civil Procedure Rules (the Rules). It is also stated to be brought under sections 6 and 7 of the Civil Procedure Act (the Act) and the inherent powers of the court. There is an affidavit sworn by the 2nd Defendant on 22nd April, 2004 in support of the application. A supplementary affidavit sworn by the same 2nd Defendant was filed with the leave of the court on 8th February, 2005. To it are annexed documents that were inadvertently not annexed to the supporting affidavit.

By a replying affidavit sworn and filed on 2nd March, 2005 the Plaintiff has opposed the application upon the grounds that it is an abuse of the court process, that it in is incompetent for having been brought by notice of motion rather than by chamber summons; that HC Miscellaneous Civil Application No. 368 of 1998 is not between the same parties or parties under whom the parties in this suit are suing, and that therefore section 6 of the Civil Procedure Act does not and cannot apply, furthermore, the said miscellaneous application is under the special judicial review jurisdiction of the court where liquidated

damages could not be claimed; that there is no evidence before the court that the 1st Defendant has been wound up by order of court; at any rate there was no winding-up order against the 1st Defendant when the suit was filed; that there are triable issues raised by the pleadings; that the suit is not statute-barred under the Limitation of Actions Act; that the suit is not vexatious; that no costs have been taxed in any previous suit between the parties; and that it is only proper that the suit do proceed to hearing.

I have carefully read the supporting and replying affidavits. I have also perused the main pleadings. Finally, I have given due consideration to the submissions made. The 2nd Defendant is an advocate of this court and a director of the 1st Defendant. He submitted for both himself and the 1st Defendant. The Plaintiff was represented by counsel. No authorities were cited. I will deal with the prayers as they appear in the application.

Is the suit statute-barred under the Limitation of Actions Act? From what is pleaded in the plaint it is not clear and certain exactly when the cause of action may have arisen. Various dates between 7th February and 17th August, 1994 are pleaded. The defence filed by the 1st and 2nd Defendants is of no assistance in this regard as it is a denial that there was a contract as pleaded. Suit was filed on 11th August, 2000. I think the issue whether the suit is barred by limitation should be left to evidence at the trial.

Does the suit disclose a reasonable cause of action against the 2nd Defendant? An application under paragraph (a) of subrule (1) of Rule 13 of Order VI does not depend on evidence. Indeed evidence is expressly excluded by subrule (2) of the same rule. A submission that a particular pleading does not disclose a reasonable cause of action or defence ought to be plain and obvious from a perusal of such pleading. My reading of the plaint herein is that various issues are raised whose determination will depend on the evidence adduced at the trial. There is a reasonable cause of action disclosed against the 2nd Defendant.

Had the 1st Defendant been wound up by the time the suit was filed? Has the 1st Defendant indeed been wound up? Although it is said that the winding –up order was given by court on 18th July, 2000, the order annexed to the supplementary affidavit of the 2nd Defendant was issued on 4th February, 2005. No gazette notice of the winding –up cause or the winding-up order has been exhibited. It appears to me that such evidence of the 1st Defendant's alleged winding-up as is before the court now is tenuous at best. It cannot form a proper basis for the very drastic remedy of striking out suit.

Is an order of stay of suit under Rule 4 of Order 24 warranted? Under that rule, if any subsequent suit shall be brought, before payment of the costs of a discontinued suit, upon the same or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid. It appears to be common ground that the Plaintiff discontinued his previous suit, HCCC No. 4512 of 1994, and that the same was upon the same or substantially the same cause of action as the present suit. But it is equally common ground that the costs in that previous suit have never been taxed. So, how can the Plaintiff be expected to pay, or to have paid, costs that have never been taxed? If the 1st Defendant has never bothered to tax its costs in the previous suit how can it complain of non-payment of those costs. An order of stay of suit such as is sought is clearly not warranted.

What about stay of the suit under section 6 of the Civil Procedure Act? That section prohibits proceeding with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instated suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. The previous suit or proceeding in question here is HC Miscellaneous Civil Application No. 368 of 1998. The copies of the pleadings in that case annexed to the 2nd Defendant's supplementary affidavit show that this is an application under Order 53, Rule 1 of the Rules for leave to apply for judicial review, the relief to be sought being an order of mandamus to compel the Chairman of the Architectural Association of Kenya to appoint an arbitrator in terms of clause A-7 of the 4th Schedule to the Architects and Quantity Surveyors Act. It has not been indicated if such leave was granted, and if it was, whether a substantive notice of motion was filed under rule 3 of Order 53. So, the long and short of it is that there is no evidence of a previously instituted suit or proceeding as is envisaged in section 6 of the Act. There is no basis for

granting stay of suit under that section.

Is the suit scandalous, frivolous, vexatious and an abuse of the court process? The grounds advanced for this complaint are that the 2nd Defendant had not been joined in the discontinued suit, HCCC No. 4512 of 1994; that a motion filed by the Plaintiff in the discontinued suit for a "declaration" that he was entitled to his fees or claim and for an order for appointment of an arbitrator was heard and dismissed; that an application for a review of that dismissal was also dismissed; that a notice of appeal filed subsequent to that dismissal has not to date been withdrawn; and that HC Miscellaneous Civil Application No. 368 of 1998 has never been prosecuted. It has already been pointed out that HCCC No. 4512 of 1994 was discontinued; it was never heard and determined on merit. It has also been pointed out that HC Miscellaneous Civil Application No. 368 of 1998 is an application for leave to apply for judicial review, and that the relief to be sought is an order of mandamus to facilitate arbitration of the dispute that is pleaded in the present suit. It has also been pointed out that it is not apparent from the material now before court that such leave was granted or that the necessary substantive motion for judicial review was filed. With regard to the notice of appeal, as pointed out by learned counsel for the Plaintiff, a notice of appeal lapses after a certain period under the Court of Appeal Rules. Also, the suit in which it was lodged having been withdrawn, it too must be deemed to be also withdrawn. In all these circumstances I am not satisfied that this present suit is scandalous, frivolous, vexatious or an abuse of the process of the court.

The last order sought is for leave to effect some very minor amendment to the statement of defence in order to correct a typographical error. That particular prayer (No. 7 in the application) was not opposed and I will grant it.

Otherwise the application is hereby dismissed with costs to the Plaintiff.

Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF MAY, 2005.

H. P.G. WAWERU

JUDGE

DELIVERED THIS 27TH DAY OF MAY, 2005.