



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 1264 OF 2002**

**SIETCO (K) LIMITED.....PLAINTIFF**

**VERSUS**

**FORTUNE COMMODITIES LIMITED.....1ST DEFENDANT**

**THE CO-OPERATIVE BANK OF KENYA LTD.....2ND DEFENDANT**

**RULING**

By an application brought by way of a Chamber Summons under Order VI, rule 13 1(b) (c) & (d) of the Civil Procedure Rules, the 2nd Defendant seeks the orders following:-

- (1) the Complaint dated 19.12.2000 and the suit herein as against the 2nd Defendant be struck out,
- (2) the Costs of the application and of the suit be borne by the Plaintiff.

The application is premised upon the following five grounds. Firstly, that the Complaint is scandalous, frivolous and vexatious and will no doubt embarrass and delay the expeditious disposal of this action. Secondly, the Complaint as filed is an abuse of the process of Court. Thirdly the Plaintiff is non-suited, fourthly, the guarantee upon which the Plaintiff's cause of action against the 2nd Defendant is founded is non-suited, and fifthly, the nullity in the proceedings is not capable of waiver or excuse and no amendment can cure the defect in the Complaint. The application was also supported by the affidavit of Mrs Regina Kajuju Anyika, the 2nd Defendant's Legal Officer, sworn on 1.04.2004.

The Plaintiff, filed a Replying Affidavit sworn by Nancy Yu Yanping on 25.05.2004 in which the Plaintiff avers inter alia that –

- (a) the Plaintiff is a limited liability company incorporated in China but duly registered in Kenya as a foreign company in accordance with the provisions of S. 366 of the Companies Act, (Cap 486, Laws of Kenya),
- (b) the Company's full name is China Sichuan Corporation for International Techno – Economic Cooperation but carries on business in Kenya as SIETCO, and used this name in various suits.
- (c) SIETCO, and China Sichuan International Corporation Co. Ltd are one and the same entity, a fact well known to both Defendants.
- (d) The Plaintiff registered the name "SIETCO" in 1989 to prevent any other person from using the name.

During the hearing of this application, Mr. Ohaga, learned Counsel for the 2nd Defendant referred the

Court to the Ruling of my brother Mr. Justice Njagi of 20.07.2004 pp. 5 - 8 in which he found as a fact that there is no legal entity registered in Kenya in the name of “Sietco Kenya Ltd” and that by virtue thereof, there is now an estoppel, that a non-existent person cannot sue, and the suit is therefore a nullity.

In this regard Counsel for the Defendant referred the Court to the decision of the Court of Appeal in **SHAH vs. APERIT INVESTMENTS SA & Another [2002] LLR 1404 (CAK)** where that Court adopted and applied the English cases of **RUSSIAN AND ENGLISH BANK vs. BARING BROS & CO. LTD [1932] 1 CH 435 [1932] ALL ER 122** in which Eve J. said:-

**“If an artificial person is destroyed in its country of origin, the country whose laws creates it as a person, it appears to me it is destroyed everywhere as a person.”**

The Court of Appeal applied this decision to Kenya and said at p. 5 of the report –

**“We think that the same position applies to Kenya when as in this case, the Panamian or any other foreign company has gone into voluntary winding up or has been dissolved or wound up by the law of Panamia, its domicil, Kenya Courts do not recognize it as an existing entity and cannot sue or be sued in Kenya. In the eyes of our law a defunct corporation seeking to maintain an action or suit is no entity at all but a mere name only, with no legal existence and a non-existent person cannot sue.”**

Dissolution is a question of fact to be decided by the Judge alone on evidence in the particular case with respect to foreign law, and the Court of Appeal also applied the case of **LAZARD BROTHERS & CO. vs. MIDLAND BANK LTD [1932] ALL ER 571**.

The **ratio dandendi** in these cases is that a corporation whose registration has ceased, ceases to be a juristic person, and remains but a name only with no legal existence, and that cloak of legal personality having been removed it becomes a nonexistent person if there is such an expression, a nobody.

In the case at hand, my brother Njagi J. has in his Ruling of 20.07.2004 found as a fact that there is no legal person or entity called “**Sietco Kenya Ltd.**” He also found that the Applicant sought not to amend but to substitute the name of CHINA SICHUAN CORPORATION FOR INTERNATIONAL TECHNO-ECONOMIC CO-OPERATION (SIETCO), in place of Sietco Kenya Ltd, but the application was unfortunately brought under the wrong provisions of the Civil Procedure Rules, and it would enable the applicant (Plaintiff) to steal a march on the respondent (Defendant) pending the application dated 30.03.2004 which is the subject of this ruling.

I have a lot of sympathy for the Plaintiff/Respondent in this matter. Sympathy alone will not help the Plaintiff/Respondent in this matter. The action is brought by or in the name of a non-existent person. Perhaps in fairy tales, but matters of law are matters of flesh, blood and bones, where there is no such person of flesh and bones, or where the law has not created such an artificial person juristic person with separate existence from his creator, the flesh blood and bone material person, no such non-person can institute proceedings of this or any other kind. Such proceedings are from the beginning a nullity, and no amount of amendment can be a cure to a nullity. It is not only bad but incurably bad. And every proceeding founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So I think will this case, unless the Court of Appeal in its wisdom otherwise decides on the appeal preferred by the Plaintiff on the said Ruling of Hon. Mr. Justice, and decides to give the Plaintiff a second chance.

The application herein is premised upon the provisions of Order VI, rule 13(b) & (c) & (d) of the Civil Procedure Rules. To the extent that a person not known to the law of Kenya has purported to institute the suit herein, it certainly qualifies as being scandalous, frivolous and vexatious and will to that extent also prejudice, embarrass and delay the fair trial of the action as the Defendant purported to issue a guarantee dated 12.10.2001 to a non-existent person called Sietco Kenya Ltd, and could be made a subject of examination and investigation as to why such a guarantee was ever issued in the first place.

The rules give the Court a discretion to order the suit to be stayed or dismissed or judgement to be entered, accordingly as the case may be.

As indicated above, the Plaintiff has filed a Notice of Appeal, dated 4.08.2004, and it was lodged in the Court of Appeal on 13.08.2004. I do not know whether an appeal has actually been preferred, but whatever, I would give the Plaintiff a chance in that Court, and order the proceedings herein be stayed pending the outcome of the appeal aforesaid. The Plaintiff shall however pay the costs occasioned by this application.

There shall be orders accordingly.

**Dated and Delivered at Nairobi this 10th day of May 2005.**

**ANYARA EMUKULE**

**JUDGE**