REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.187 OF 2003

PHILIP ATENG OGUL,

STANLEY WANJOHI MWAI, &

FRANK JUMA MWADIME …… PLAINTIFF

(All suing on their own behalf and on behalf of 25 others)

versus

WESTMONT POWER (KENYA LTD) ……ST

DEFENDANT

E.A. POWER MANAGEMENT LTD …….. 2ND DEFENDANT

Coram: Before Hon. Justice Mwera

Mr. Munyithya for Plaintiffs

Mr. Njoroge Mwangi for 1st Defendant

No appearance for

2nd Defendant

Court clerk – Sango

R U L I N G

The 1st Defendant filed a chamber summons dated 20.1.2004 seeking one order under O.25 rr. 1, 6 Civil Procedure Rules and S.3A Civil Procedure Act in that:

1. Plaintiffs provide security for costs put at Sh.5 m. or such other sum as the court may order, before commencement of trial of the suit.

The main grounds on which the application was predicated were that the suit involved a simple question arising out of a contract of employment and that the 2nd defendant had admitted employing the plaintiffs. That the relationship of the 1st and 2nd defendant arose and was governed by an Operation and Maintenance Agreement whose contents were known to the plaintiff. The plant manager of the 1st defendant swore the affidavit that supported the application. The facts deponed therein were not controverted by any replying affidavit, the plaintiffs having opted to file 6 grounds of opposition and to rely on the same in the arguments.

Mr. Mwangi posited that since the plaintiffs themselves in their application dated 31.1.03 had sought Sh.5 m. as security for costs, it can be taken that the costs in this cause would be about there or more. It was however added that the plaintiffs had nonetheless withdrawn that application, by consent. That the defence did admit that the 2nd defendant was the employer of the plaintiffs and they knew it. The applicant thus felt that the issue of who employed who did not have to be determined at the trial even if it had been listed as one of the issues to be determined. So it did not fall to be determined as to who would ultimately be liable to the plaintiffs (see (O.25 r 3 CPR) and the said Operations and Maintenance Agreement was cited in its Clause 3.2.1.

It was added that the plaintiffs had brought a representative suit wherein the 1st defendant did to have information and details for tracing and enforcing payment of costs against those others in the event it succeeded in this suit. That the plaintiffs had pleaded that they were earning income at various levels and should therefore deposit the sought security. Mr. Mwangi did not discern the relevance, extent and basis of the requirement that a corporate veil had to be pierced or lifted as averred.

Mr. Munyithya had a contrary view. That since they had filed agreed issues (i.e. including the 1st defendant/applicant) to determine as to who was the plaintiffs employer, the 1st defendant does not satisfy the court at this point to get the security for costs. That some of the plaintiffs were employed by the 1st defendant while others were employed by the 2nd defendant. That indeed the two defendants were one and the same thing hence the averment to lift the corporate veil. The court was told that the trial herein was set for 23.3.04 and thus that ought to be left to come and pass. In essence the plaintiffs opposition was based only on grounds 2 and 5 of their statement of grounds of opposition.

O.25 r 1 Civil Procedure Rules reads:

> *"1. In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party."*

This is the 1st defendant/applicant's prayer against the plaintiffs. And O.25 r.3 Civil Procedure Rules

says what the plaintiffs would like to put forth in their defence:

> *"3. Where it appears to the court that the substantial issue is which of two or more defendants is liable for what proportion of the liability two or more defendants should b ear, no order for security for costs may be made."*

Beginning with the plaint it is therein averred that the 1st and 2nd defendants are private companies incorporated in Kenya under the provisions of the Companies Act (Cap.486) But the pleadings appear to suggest that the shareholding and directorships of the 2nd defendant are employees and or directors of the 1st defendant. They therefore hold the impression that the entities of the two defendants are not distinct and separate and that they have perpetrated something akin to a fraud when it came to pleading with the plaintiffs' employment and benefits. That further in that course, on 31.3.03 the 1st defendant caused the breach in the plaintiffs' terms of employment by purporting to terminate their employment, an action that greatly aggrieved the plaintiffs hence this action for redress of lifting the corporate veil of the defendants or alternatively holding them jointly liable in this suit. The other prayers were to assess damages arising from the claimed breaches of contracts of employment plus costs and interest.

On 19.8.2003 a defence was filed on behalf of the 1st defendant/applicant. It said inter alia that the 2nd defendants were separate legal entities whose relationship only arose from an Operation and Maintenance Agreement (the Agreement). It added:

> *"7. The 1 st defendant ref ers to paragraph 8(a) (b) and (c) and deny employing the persons listed in paragraph (a) and (b) ---------- "*

That although in the initial stages of setting up the power production plaint, the 1st defendant knew that its letter-heads were used to advertise for jobs and some staff were recruited but that all that changed with the said contract whereby all personnel recruitment and responsibility shifted to the 2nd defendant. Other claims in the plaint were equally strongly denied.

Come the 2nd defendant's defence filed here on 4.9.2003 and it was pleaded:

> *"5. With reference to the contents of paragraph 8 of the plaint, the 2 nd defendant admits that between March 1997 and June 2001 the 2 nd defendant employed the plaintiffs on terms and conditions set out in the plaintiffs respective letters of appointment -----."*

Just like the 1st defendant, the 2nd defendant averred that it was a separate legal entity (from the 1st defendant) and denied all claims made against it requiring that the plaintiffs strictly prove them.

By the Agreement dated 9.6.97 the 1st and 2nd defendants stated at Clause 3. 2.1, wherein the "Operator" is the 2nd defendant the "Owner" is the 1st defendant"

> *"3. 2.1. Operation : The Operator shall manage, operate, and maintain the Plant Contract in accordance with the Standards of Performance and shall recruit and provide manpower as it expected to be reasonably necessary to support continuous and successful operation of the Plant. (underlining added)*

It can be gleaned from the whole story and pleadings that it was at this point of the agreement when the 2nd defendant issued letters of appointment even to the staff that the 1st defendant was aware of having been recruited using its letter-heads, that the plaintiffs trace their problems to. It is not being so determined at this point but a whole six (6) years went by with the plaintiffs having their appointments and things going all well before breaches and this suit came along. Be that as it may.

For now this court is satisfied that the plaintiffs should in 45 days do deposit security for costs worth some Sh.5 m. in favour of the 1st defendant. After all the plaintiffs themselves by their application dated 31.3.03 which was withdrawn by consent on 18.9.03 did seek under O.38 rr. 5, 12 Civil Procedure Rules

of the defendants to deposit Sh.60 m. as security. Only after depositing Sh.5 m. as directed above will a trial be set in this matter.

It is added that issues only fall to be determined (see O.25 r 3 CPR) if a given thing is not admitted. An issue is formed when no party accepts what the other seeks. The court was told that there is a question of liability to be determined at the trial between the defendants. It does not appear so from the pleadings. While the plaintiffs appear to say that the defendants are jointly liable for employing them, the 1st defendant denied such a state of things and the 2nd defendant admitted that it was the plaintiffs' employer since mid 1997. Now if the matter of employee-employer arises, that cannot form an issue since all concerned know that the 2nd defendant is the employer. The agreement between the 1st and 2nd defendant says so and this court is prima facie satisfied from the plaintiffs' plaint's opening descriptive paragraphs and the defendants' responses, that the two defendants are separate legal entities incorporated under Cap 486 Laws of Kenya. With the 2nd defendant having admitted to be the plaintiffs' employer this court is unable to see what the 1st defendant will be doing here after all.

In sum the prayer is granted; security for costs worth Sh.5 m. to be deposited in 45 days and no trial to go on until that is done.

Coasts to the 1st defendant/applicant.

Orders delivered on 17.3.04.

J.W. MWERA

JUDGE