



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 18 of 2004

DONHOLM RAHISI STORES(suing as a firm).....PLAINTIFF

-VERSUS-

EAST AFRICAN PORTLAND CEMENT LTD DEFENDANT

FIVE STAR AGENCIES LTD..... 1st APPLICANT

KENJORO ENTERPRISES LTD..... 2nd APPLICANT

RIFLO TIMBER AND GENERAL LTD..... 3rd APPLICANT

POP METAL FABRICATORS &

HARDWARE HARDWARE..... 4th APPLICANT

RULING

This is an application by way of chamber summons dated and filed in court on 24th February, 2004. It is brought under 0.1 Rule 10(2) and O.XXXIX Rule 4 of the Civil procedure Rules, the inherent jurisdiction of the court and all other enabling provisions of the law.

The application seeks orders that the applicants, FIVE STAR AGENCIES LIMITED, KENJORO ENTERPRISES LIMITED, RIFLO TIMBER AND GENERAL LIMITED AND POP METAL FABRICATORS

AND HARDWARE LIMITED, be added as defendants in the suit herein as second, third, fourth and fifth defendants, respectively; that the order of injunction granted to the plaintiff and issued on 14th January, 2004 and any other or further or consequential order or orders be discharged or set aside, and that the costs of the application be provided for.

The application is based on the annexed affidavits of MOHAMMED SHARIF, GEORGE KIARIE NJORO, RICHARD MUCHAIKIBATHI and PAUL NJOGU NJUGUNA and on the grounds that

- (a) the appearance of the applicants before the court is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit;
- (b) that the applicants have sufficient interests in the suit;

- (c) that the suit raises issues and concerns which are of public interest and touch on public policy;
- (d) that the contract between the plaintiff and the first defendant is in breach of the Exchequer and Audit Act, Chapter 412 of the Laws of Kenya and the Exchequer and Audit (Public Procurement) Regulations;
- (e) that the contract between the plaintiff and the first defendant contravenes the Restrictive Trade Practices, Monopolies and Price Control Act, Chapter 504 of the Laws of Kenya; and
- (f) that the contract is null and void ab initio.

Appearing for the four applicants, Mr. Orengo said that as the application is under 0.1 Rule 10, he did not even need to come by way of chamber summons as the application could be made orally in court. The applicants are appointed distributors who have been buying and distributing throughout the country, some from as early as 1984. Their position is that the agreement between the plaintiff and the defendant herein is in breach of the Exchequer and Audit (public Procurement) Regulations, and contravenes the Restrictive Trade Practices, Monopolies and Price Control Act. By execution of that agreement, the applicants have been shut out and driven out of business which they have been carrying out over the years. Whereas the plaintiff is making colossal profits, the defendant, which is a statutory public body, continues sustaining heavy losses and yet, the other distributors are not getting to that level playing ground offered to the plaintiff, and all this is due to the fact that the defendant is in breach of the, Restrictive Trade Practices, monopolies and Price Control Act.

Mr. Orengo further submitted that in a report on the management practices at East African Portland Cement by an Audit Inspectorate Team, there was a specific observation against the plaintiff herein. Counsel urged the court to join the applicants as defendants so that all these matters can be brought out to the open, and in order that all issues can be effectively adjudicated.

Responding for the plaintiff, Mr. Oraro, appearing with Mr. Ahmed nasir, argued that whether there was a breach of the Exchequer and Audit Act, and Restrictions Trade Practices, Monopolies and Price Control Act are matters between the plaintiff and the defendant in this suit, and the issues therein cannot be determined in a suit concerning the plaintiff and other defendants. In the event, the applicants have already filed suit No. 154 of 2004. There are now two suits, and this court is being asked to exercise concurrent jurisdiction over the same matter. By seeking to be joined in this suit, the applicants merely wish to gang up to fight the plaintiff, and the issue of a conspiracy with the defendant can't be ruled out, Mr. Oraro submitted. He then posed the question as to whether the applicants, having filed suit challenging the contract, can now join in another suit filed and involving alleged breach of contract between the plaintiff and the defendant. Whether the contract was valid and whether the defendant is incurring losses are issues for determination between the plaintiff and the defendant. He concluded by submitting that since the applicants have filed their own suit, they should proceed with it.

On his part, Mr. Oyatsi for the defendant explained his client's position in both suits. He argued that in the present suit, the defendant has been sued for alleged breach of contract, and the defendant has filed a counterclaim. The defendant itself alleges the contract is invalid. Both issues of validity and breach have been raised, and it is clear that the central issue in both suits is the validity of that contract. He therefore submitted that the applicants have a choice - if they want a pronouncement in case No. 154 of 2004 as well as in this one, they can consolidate, otherwise the courts might make conflicting decisions on both matters. The defendant, he said, is already in a difficult position because of the injunction. There are two conflicting ex parte orders, and to avoid conflict the decent thing to do is to join the two suits. However, Mr. Oyatsi concluded, the conspiracy theory advanced by Mr. Oraro has no basis as the defendants' interests and those of the applicants are not the same. Should the applicants succeed, the defendant might be called upon to pay heavy damages and, therefore, for the defendant to conspire with them is akin to the defendant conspiring against itself. Such a scenario would not arise as it can't help the defendant.

In reply, Mr. Orengo concurred with Mr. Oyatsi that what is in issue is a contract out of which the plaintiff is making claims, and if they succeed, the applicants will be adversely affected. The issues in the case in

the Central Registry and those in this case are likely to be addressed by two courts of concurrent jurisdiction and arrive at different conclusions. This is a danger to be circumvented. One solution lies in consolidation. But under Order 1 Rule 10, all applicants have to show that they have sufficient interest in the matter in order to be joined as parties. Counsel then pleaded for the applicants to be joined as defendants.

I have listened to the rival submissions of counsel for the respective parties. The gap between them is not very wide. It can be bridged. The choice lies between joining the applicants as co-defendants in this case, or consolidating this case with High Court Civil Suit No. 154 of 2004. Counsel are agreed that if these two suits were to be determined, each independently of the other, there is every danger that two courts of coordinate jurisdiction might come to two different and conflicting decisions. That is an eventuality which should be avoided.

If the defendants are joined as co-defendants in this case, and as long as the other case is also proceeding independently and concurrently with this one, I don't think that it will help matters. The risk of the two courts exercising concurrent jurisdiction over a matter raising similar issues will persist. The most logical and decent way out, I think, would be to consolidate the two suits so that all the issues therein can be effectively and completely adjudicated upon, and all the questions involved in both suits would be answered in one judgment. That procedure will save the court's time too.

O.X1 Rule 1 of the Civil Procedure Rules states-

"Where two or more suits are pending in the same court in which the same or similar questions of law or fact are involved, the court may either, upon application of one of the parties, or of its own motion, at its discretion, and upon such terms as may seem fit-

- (a) order a consolidation of such suits, and
- (b) direct that further proceedings in any of such suits be stayed until further order."

This court has not been availed the pleadings in High Court Civil Suit No. 154 of 2004, and is not, therefore, in a position to confirm that the same or similar questions of law or fact are involved in both suits. The court is consequently of the view that the best way forward is for the applicants to file a formal application for the consolidation of the two suits. It is so ordered. Costs will be in the cause.

Dated and delivered at Nairobi this 1st day of March 2004

L. NJAGI

JUDGE