

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 149 of 2004

NURTUN BATES LIMITEDPLAINTIFF

VERSUS

MEDIACOM EAST AFRICA LIMITED1ST DEFENDANT

VICTOR MABACHI2ND DEFENDANT

DAVID OLIWA3RD DEFENDANT

RULING

The 2nd and 3rd defendant seek the dismissal of this suit as against them on the basis that it is vexatious, frivolous and an abuse of the court's process. The application is brought under Order 6 rule 13 (1) (b) and (d), Order 1 rule 1 and 10 (2) of the Civil Procedure Rules and section 3A of the Civil Procedure Act.

The 2nd and 3rd defendant's counsel Mr. Mohammed Nyaoga argued that the said parties had been improperly joined as parties, because their presence in this suit breached the principal of law, that an agent cannot be sued where there is a disclosed principal. In support of this preposition counsel relied upon the case of *CIV APP. NO. 5 and 48 of 2003* (consolidated) *ANTONY FRANCIS WAREHAM T/A A.F. WAREHAM & OTHERS and KENYA POST OFFICE SAVINGS BANK* and quoted a portion of it as follows: -

“It was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principle contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued.”

Mr. Nyaoga also argued that the contract, relied upon by the plaintiff, was signed by the 2nd and 3rd defendants as directors of the 1st defendant. He said in this regard that it was a principal of company law that a company has a distinct separate personality to the directors. He relied on the following cases in favour of that argument.

- FRIENDSHIP CONTAINER MANUFACTURER LTD – V – MITCHEL COTTS (K) LTD (2001) 2 E A 338.
- HCCC (MILIMANI) 205 OF 2001 FURSYS (K) LTD V THE DA GAMA ROSE GROUP OF COMPANIES LTD & ANOTHER
- OMONDI – V – NATIONAL BANK OF KENYA LTD & OTHERS (2001) I EA 177.

Counsel for 2nd and 3rd defendant drew the court's attention to paragraph 7 of the plaint specifically stated that the said defendants signed the contract as agents of Mediacom East Africa and accordingly in view of his previous argument he sought that the suit be dismissed as prayed.

The plaintiff's counsel, Mr. Omino, argued that there existed a contract by which Mediacom East Africa, Mr. Victor Mabachi and Mr. David Oliwa were to pay 15% to the plaintiff.

Counsel therefore argued that it is the 2nd and 3rd defendant's application that is misconceived and which ought to be dismissed. He further said that the agency of 2nd and 3rd defendants was as between Kenya Breweries Ltd and 1st defendant. He also drew the court's attention to paragraph 6, 10 and 11 of the plaint; paragraph 6 alluding to verbal and written understandings between the plaintiff and defendants; paragraph 10 referring to documents giving rise to this action which were negotiated between the plaintiff and 2nd and 3rd defendants; paragraph 11 stated that the plaintiff was relying on a contract agreement dated 30th July 1999.

The power donated by Order 6 rule 13 to strike out pleading is a power that is to be exercised sparingly and with circumspection and on rare cases when the conduct of a litigant is very obviously contumacious in intending to keep a litigation alive in court not having jurisdiction or in a matter which is scandalous or vexatious. In the exercise of this power the court needs to be satisfied that there is no chance of the suit succeeding.

Looking at the plaint I accept that paragraph 7 thereof clearly states that the 2nd and 3rd defendants were agents of the 1st defendant; but when one looks at paragraph 6 it is clear that the plaintiff is not solely depending on the written contract it also is relying on verbal agreements; further in paragraph 8 and 9 the plaint alludes to payments received by defendants jointly which money they failed to pay to the plaintiff.

In going through the agreement dated 30th July 1999 one notes that the 1st defendant was not referred to as a Limited Liability Company. There is also a letter written by Kenya Breweries pleading the case of the plaintiff addressed to 2nd defendant as Chairman of Century Advertising; again not a Limited Liability Company. Looking at these documents, considering the submissions before me and the affidavit evidence I am unable to say with certainty that this case will not succeed. Accordingly I am of the view that the application for striking out is not merited at this stage, the suit should be allowed to go into full trial.

Accordingly the 2nd and 3rd defendant's application dated 31st May 2004 is dismissed with costs being in the cause.

Dated and delivered this 16th December 2004.

MARY KASANGO

JUDGE