



REPUBLIC OF KENYA



Regional Business Connection (Suing through Charles Mutuma Mbogori) v Tharaka Nithi County Government (Civil Case E002 of 2020) [2024] KEHC 2298 (KLR) (6 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2298 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL CASE E002 OF 2020
LW GITARI, J
MARCH 6, 2024**

BETWEEN

**REGIONAL BUSINESS CONNECTION (SUING THROUGH CHARLES
MUTUMA MBOGORI) PLAINTIFF**

AND

THARAKA NITHI COUNTY GOVERNMENT DEFENDANT

RULING

1. The Plaintiff herein filed a Complaint dated 17th November, 2020 and amended on 15th February, 2021 seeking judgment against the Defendant for the sum of Kshs. 20,716,000/= plus interest at court rates with effect from 15th October, 2015 until payment in full as well as the costs of the suit. The aforesaid sum is allegedly the amount that was agreed by the parties for the provision of event management services by the Plaintiff during the Tharaka Nithi County International Investment Conference and Consumer Fair (T-NIICOF) 2015.
2. The Defendant filed a Notice of Preliminary Objection dated 19th February, 2021 and filed on 26th February, 2021 on the grounds that:
 - a. This Honourable Court lacks jurisdiction to hear and determine the suit herein in light of Section 6(1) of the (*Arbitration Act*, Chapter 9 of the Laws of Kenya) and Clause 11 of the Agreement dated 15th October, 2015 which the Plaintiff seeks to enforce.
 - b. The suit, as presented, is premature, bad in law, incompetent and an abuse of Court Process.
3. The preliminary objection was not heard as the parties consequently, agreed on 8th March, 2021, when the suit came up for directions, that the same goes for arbitration as per the clause contained in the aforesaid agreement and an arbitrator was subsequently appointed. Upon restating that the matter goes for arbitration, this Court ordered for the court file to be closed on 1st July, 2021.



4. By an application dated 19th November, 2021, the Plaintiff consequently sought for a review, variation, or setting aside of the aforesaid court orders dated 1st July, 2021 and prayed for the reinstatement of the suit on the ground that the arbitration process had failed. By consent of the parties, the aforesaid application dated 19th November, 2021 was allowed as prayed. The effect of the consent order is that the suit was reinstated and to proceed for hearing and determination by this court.
5. This ruling is in respect of two applications that followed thereafter. The first application is the Defendant's Notice of Motion application dated 9th June, 2022 (the first application) seeking the following orders:
 - a. That this Honourable Court be pleased to strike out the Plaintiff's suit in its entirety.
 - b. That the costs of this Application and the suit be borne by the Plaintiff.
 - c. That this Honourable Court be pleased to make such other order or further orders as it may deem just and fit in the circumstances of the case.
6. The said first application is premised on the grounds on the face of it and it is supported by the affidavit sworn on the same 9th June, 2022 by Lilian Gatwiri Kiruja, the principal legal officer of the Defendant. The grounds are as follows:-
 - a. On or about 15th October 2015, the Defendant entered into a contract for services with Regional Business Connection Limited (hereinafter 'the company')
 - b. The herein plaintiff, Charles Mutuma Mbogori, is a director of Company. Nonetheless, he is not a party to the agreement between the Defendant and the Company.
 - c. The company has the capacity to sue and be sued in its own name. Accordingly, the herein plaintiff has no locus standi to institute and sustain the herein proceedings, which are anchored on a contract for services between the Defendant and the Company.
 - d. The continued pendency of these proceedings shall only delay and embarrass the process of this Honourable court.
 - e. The suit is an abuse of the process of this Honourable Court.
 - f. Such other and/or further grounds and reasons as shall be adduced at the hearing hereof.
7. The Plaintiff opposes the Defendant's Notice of Motion dated 9th June, 2022 by its grounds of opposition dated 24th April, 2023 which the Plaintiff fully relies upon and adopts. These are:-
 1. The application does not lie is superfluous, incompetent fatally defective, misconceived, lacks merits and tantamount to abuse of the court process.
 2. The application is premised on wrong provisions of the *Civil Procedure Rules* and offends multiple legal provisions as hereunder.
 3. Order 1 Rule 9 of the *Civil Procedure Rules* provides that:-

'No suit shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.'
 4. Order 1 Rule 10 (1) of the *Civil Procedure Rules* where a suit has been instituted in the name of a wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit if satisfied what the suit has been



instituted through a bona fide mistake and that it is necessary for determination of the real matter in dispute to do so, or any person to be substituted or added as plaintiff upon such terms as the court thinks fit.

5. Order 1 rule 10(2) of the Civil Procedure Rules provides that the court may at any stage of the proceedings either upon or without the application of either party and on such terms as may appear to the court to be just order that the name of any party improperly joined whether as plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added.
 6. Order 1 Rule 12 of the Civil Procedure Rules provides that the court may give the conduct of the suit to such person as it deems proper.
 7. According to CR. 12 by Registrar of Companies, it is only Charles Mutuma Mbogori who is the Director/Shareholder, and who was the natural person and consultant of the suit subject matter.
 8. The Applicant has raised the issue after close of pleadings hereof.
 9. The Applicant did not raise the issue thereat its pleadings.
 10. The Applicant frustrated the Arbitration proceedings as ordered by the court hereof.
 11. Article 159(2) (d) of Constitution provides that justice shall be administered without undue regard to procedural technicalities.
 12. The Defendant/Applicant's application is fatally defective, lacks merits and must fail.
8. The second application is the one dated 22nd June, 2022. The second application is supported by the affidavit of Henry Kurauka sworn on the same day. The second application seeks for the following prayers
- a. Spent.
 - b. That the Court be pleased to order that Regional Business Connection Limited and Charles Mutuma Mbogori be added in this suit as the 1st Plaintiff and 2nd Plaintiff, respectively, in substitution of Regional Business Connection Limited (Suing through Charles Mutuma Mbogori).
 - c. That the Court be pleased to make further orders as it may think fit and order that the suit be heard on priority basis.
 - d. That the cost be in the cause hereof.

The application is based on similar grounds as those raised in the preliminary objection. The applicant contends that the court has jurisdiction to entertain the application and issue orders sought. That there was a misjoinder of parties as a result of a bona fide mistake by the applicant's advocate who treated the company as a business due to the fact that they did not have the certificate of incorporation at the time of drafting the pleadings. That the mistake by the advocate should not be visited on the party. That the intended party Charles Mutuma Mbogori is the sole director of the Regional Business connection limited and rendered personal services through it. It is his contention that the respondent will not suffer any prejudice if the application is allowed.



The Submissions

9. Counsel for the Plaintiff submitted that this Honourable Court is clothed with jurisdiction to enjoin any party that it is necessary for the determination of the real matter in dispute to do so, order any person to be substituted or added as plaintiff upon search terms as the court think fit. The Plaintiff thus urges this Court to consider its submissions, allow its Notice of Motion Application dated 22nd June, 2022 and dismiss the Defendant's Notice of Motion application dated 9th June, 2022. Further, that the costs of both applications be in the cause.
10. On the other hand, no submissions were filed by counsel on record for the Defendant.

Issues for Determination

11. I have considered the two applications aforesaid, the respective affidavits in support thereof, as well as the respective responses thereto. I have also considered the written submissions that were put in by counsel for the Respondent. The only issue for determination is whether the Application dated 9th June, 2022 is merited, and if not, whether the Application dated 22nd June, 2022 should be allowed.

Analysis

12. In the first application, the Defendant invoked Sections 1A, 1B and 3A, and Order 7, Rule 13(1)(b), and (d) of the *Civil Procedure Rules*, 2010 (the "Rules"). I agree with the submission of counsel for the Plaintiff that the first application is premised on wrong provisions of the Rules. Firstly, Order 7, Rule 13(1)(b), and (d) does not exist under the Rules. In addition, the provision under Order 7, Rule 13 of the *Rules* does not relate to the main prayer sought herein as the same reads as follows:

“[Order 7, rule 13.] Discontinuance, stay or dismissal of suit.

13. If, in any case in which the defendant sets up a counterclaim the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with.”

Section 1A and 1B provides for the overriding objectives of the *Civil Procedure Act* and Rules which is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

On the other hand, Section 3A of the *Civil Procedure Act* provides for the inherent powers of the court to make such orders as may be necessary for the ends of justice and to prevent the abuse of court process. The section gives court wide powers to issue orders that would best serve the interests of justice.

13. Moving to the grounds in support of the application, it is clear that the Defendant is seeking the striking out of the Plaintiff's suit on the main basis that the Plaintiff, Charles Mutuma Mbogori, is a director of the Regional Business Connection Limited (the "Company") and therefore not a party to the agreement that was made between the Company and the Defendant.
14. The doctrine of privity of contract is established in law of contract as one of the fundamental principles of the English Contract law. The fundamental nature of the privity rule is that only the parties that actually who negotiated a contract (who are privity to it) are entitled to enforce its terms. This basically means that a contract cannot impose obligations or confer rights on any person other than the parties that are subject to the contract. It follows that a contract cannot be enforced by or against a third party.



In *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, Lord Haldane LC rendered the principle thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.

15. In this case, it is not disputed that the subject agreement was entered into between the Company and the Defendant. It is also not disputed that the Plaintiff herein, Charles Mutuma Mbogori, is a Director of the Company. Charles Mutuma Mbogori was therefore not privy to the said agreement as it is trite that a company is a separate legal entity or person from its owners unless there has been the lifting of a veil through the established procedure. It is trite law that once the registration of a company has been successfully completed a legal person separate from its members is created. The company acquires the veil of incorporation that completely separates the members from the company and from being held liable for acts of the company. See *Salmon v Salmon & Co. Ltd* [1897] AC 22. The effect of this principle is that there is a veil between the company and its members protecting them from being personally liable from the company’s debts and other obligations.
16. This is notwithstanding, the company being a legal person, it can only act through human persons or agents. In this case though Charles Mutuma Mbogori is a director of the company, he is not a party to the agreement between the defendant and the company. To this extent the defendant’s application is based on sound grounds.
17. The parties agreed that the two applications be heard together and I must consider the plaintiff application to amend its pleadings, that is the plaint.
18. In the application, the Plaintiff sought the substitution of Regional Business Connection (Suing through Charles Mutuma Mbogori) as the Plaintiff with Regional Business Connection Limited and Charles Mutuma Mbogori as the 1st and 2nd Plaintiffs respectively. In this second application, the Plaintiff invokes the provisions of Order 1, Rule 10(1) of the [Civil Procedure Rules](#) which relates to the substitution and addition of parties and provides that:
 - “ 1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.”
[Emphasis added]
19. Further Order 1, Rule 10(2) of the Rules provides that
 - “The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added.”
20. In this case, there is no response on record from the Defendant in respect of the second application. Looking at the express naming of the Plaintiff in this case, it is evident that the same was a bona fide mistake that can be cured by allowing the amendment of the Plaint as prayed in the second application.



21. In any event, Order 1, Rule 9 of the Rules provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in disagreement so far as regards the rights and interests of the parties actually before it.
22. In addition, Order 8, Rule 3(1) of the Rules provides that, subject to other rules including Order 1, Rules 9 and 10, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

The applicant seeks to strike out the plaintiff's suit under Section 1A & 1B and 3A Civil Procedure Act and Rule 7 Rule (13 (1) (b) and (d) Civil Procedure Rules.

I find that striking out of pleadings involves exercise of discretion which should exercise only in the clearest of cases and sparing. It has been held that striking out of pleadings is a draconian act which may only be resorted to in plain cases and must be exercised judicially. See Postal Corporation of Kenya v I.T. Inamdar & 2 Others [2004].

The Court of Appeal in the case of The Co-operative Merchant Bank Ltd v George Fredrick Wekesa C.A No.54.1999. Stated "striking out of proceeding is a draconian act which may only be resorted to in plain cases."

In Yaya Towers Limited v Trade Bank Limited (In liquidation) Civil Appeal No. 35/2000. The Court of Appeal stated –

"A Plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and how improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's objectionable as an abuse of process of court, it must be allowed to proceed to trial."

In this case, the plaintiff has applied to amend the plaint to include the second plaintiff. The plaintiff is entitled to pursue the claim in court. The court has wide discretion to allow a party to amend his pleadings other than to strike them out. Apply in the principles in the above cited cases in this application before me, I find that the application by the defendant to strike out the suit lacks merits.

23. Given that the suit in this case has only began and only an amendment to the Plaint is desired, it follows that the second application is meritorious as the amendments sought will facilitate the determination of the real question in controversy between the parties and will do substantive justice in the matter. In addition, there is no prejudice or injustice that has been demonstrated to be occasioned to the Defendant should the second application be allowed.

Conclusion

24. From the foregoing analysis, I order at follows:-
 1. The Plaintiff's application dated 22nd June, 2022, is allowed as prayed.
 2. The amended plaint be filed and served within seven (7) days.
 3. The application dated 9th June, 2022 is dismissed.
 4. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 6TH DAY OF MARCH 2024.

L.W. GITARI

JUDGE

