



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**HCCC NO. 156 OF 2019**

**ROYAL NGAO HOLDINGS LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**N. K. BROTHERS LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ALLAN ODHIAMBO OTIENO.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. In the Notice of Motion dated 16<sup>th</sup> December 2019, Allan Odhiambo Otiemo (the 2<sup>nd</sup> Defendant) seeks that the suit against him be struck out.

2. Royal Ngao Holdings Limited (Royal Ngao or the Plaintiff) contracted N. K. Brothers Limited (**N. K. Brothers or the 1<sup>st</sup> Defendant**) to construct an office block on L. R. No. 209/11077. The firm of Dimensions Architects and Interior Designers Limited (Dimensions Limited) was engaged by the Plaintiff as the project architect. It seems, common ground, that the 2<sup>nd</sup> Defendant was appointed by Dimensions Limited to oversee the project on its behalf.

3. In the Plaintiff of 12<sup>th</sup> July 2019, which is the target of the striking out application, the Plaintiff complains that the project was plagued by delays which it attributes to the 1<sup>st</sup> Defendant. Royal sees a role of the 2<sup>nd</sup> Defendant in that delay and in Paragraph 9 of the Plaintiff sets out purported extensions of time which were fraudulently granted by him to the 1<sup>st</sup> Defendant. In that paragraph are listed particulars of the alleged fraud and incapacity:-

- i. Failure to consult and obtain the written approval of the Plaintiff, the Project Manager and the Managing Director of Dimensions Architects and Interior Designers Limited prior to purportedly granting any extensions to the 1<sup>st</sup> Defendant.
- ii. Granting purported extensions of time to the 1<sup>st</sup> Defendant whimsically and without sufficient of any basis or grounds.
- iii. Granting purported extension of time to the 1<sup>st</sup> Defendant even after having been terminated from employment by Architects and Interior Designers Limited.
- iv. Granting purported extension of time to the 1<sup>st</sup> Defendant in an attempt to aid them escape their obligations under the Construction Agreement as revised by the Plaintiff and the 1<sup>st</sup> Defendant.

4. As an illustration of the wrongdoing on the part of the 1<sup>st</sup> Defendant, the Plaintiff avers that he (the 1<sup>st</sup> Defendant) continued to issue extension of time even after disengaging from Dimensions Limited. In the documents filed accompanying the Plaintiff are a letter of disengagement of 27<sup>th</sup> March 2015 and a certificate of extension dated 3<sup>rd</sup> March 2015.

5. The gist of the application by the 2<sup>nd</sup> Defendant is that Dimensions Limited were the project architects and Dimensions Limited are a distinct legal entity. That the contract was between the Plaintiff and Dimensions Limited, and that he is not privy to that contract. Further, that the Applicant was only an employee of Dimensions Limited.

6. On the other hand, the Plaintiff alleges a wrongdoing of a personal nature in the 2<sup>nd</sup> Defendant.

7. Striking out of a pleading is drastic. At this stage, the Court is called upon to terminate a suit on affidavit evidence that is untested. For that reason it is a power to be used sparingly and only in the clearest of cases that no cause of action exists.

8. In the matter before me, one of the allegations is that the 2<sup>nd</sup> Defendant personally made unlawful and fraudulent extensions to the 1<sup>st</sup> Defendant after he had disengaged from Dimensions Limited. In the letter of 27<sup>th</sup> March 2015 he writes as follows:-

“27<sup>th</sup> March 2015

RE: DISENGAGEMENT FROM DIMENSIONS ARCHITECTS & INTERIOR DESIGNERS LTD.

This is to inform you that I Arch, ALLAN OTIENO will cease to be a member of Dimensions Architects and Interior Designers Ltd from 1/4/2015. I take this opportunity to thank you for your continued support. I hope this support and relationship continues, going forward. I shall be reachable as follows:

1. Cell 0722724934

2. Email: [allan@craftanddesignslimited.com](mailto:allan@craftanddesignslimited.com)

Yours faithfully

Allan Otieno”

9. Yet four or so days later, on 31<sup>st</sup> March 2015, he issues an extension in which he signs off as a director of Dimensions Limited. An issue raised, and which I think deserves interrogation through tested evidence is whether, for instance, the 2<sup>nd</sup> Defendant had the capacity to issue that extension. And if not, whether on this and other allegations of wrongdoing, he is personally liable.

10. While it is not for this Court to say that the Plaintiff will successfully prove its assertions against the 1<sup>st</sup> Defendant, it thinks that on the material currently before Court, a triable issue is disclosed. One that deserves further scrutiny after evidence has been tested but which does not necessarily have to prevail.

11. The Notice of Motion of 16<sup>th</sup> December 2019 is dismissed with costs.

**DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 1ST DAY OF MARCH 2021**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>TH</sup> April 2020, this Ruling has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Mr Onyango holding brief for Mr Okatch for the Applicant.

Ms Omamo holding brief for Ms Abuya for 1<sup>st</sup> Respondent.

Mr Onyango for 2<sup>nd</sup> Respondent.