



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 209 OF 2017

GOLDROCK CAPITAL LIMITED.....PLAINTIFF

VERSUS

CABINET SECRETARY TREASURY.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

SAFARICOM LIMITED.....3RD DEFENDANT

WEBMASTERS AFRICA LIMITED.....4TH DEFENDANT

WEBMASTERS KENYA LIMITED.....5TH DEFENDANT

RULING

1. This Ruling relates to the application dated 12th April 2018 filed by Webmaster Kenya Limited (hereinafter referred to as Webmaster Kenya); the 5th Defendant. Webmaster Kenya seeks this suit against it be dismissed; all confidential documents executed between Webmaster Kenya and other parties, not parties to this suit, be expunged for having been obtained irregularly; and that costs be awarded to Webmaster Kenya. The application is opposed by all the other parties to this action.

BACKGROUND

2. The genesis of this suit is the contract by the Government of Kenya, through International Finance Corporation (IFC) by which Webmaster Kenya was contracted to develop an Integrated Government Service Provision Platform, commonly known as e-citizen portal. The portal provides mean of collecting payment of the Government of Kenya for services to its citizens. The scope of works for Webmaster Kenya to develop the e-citizen portal was outlined in a Request for Proposal for implementation of a Pilot Transactional Digital Payments Portal from World Bank Group. Under the said Request for proposal Webmaster Kenya was required to incorporate into e-citizen portal, a payment handling functionality to enable the users to effect payment for the services rendered and to have the payments channeled to various Ministries and Agencies of the Government of Kenya. Gold Rock Capital Limited (hereinafter called Gold Rock) the Plaintiff, alleges in its pleadings that Webmaster Africa Limited (hereinafter referred to as Webmaster Africa) was approached on behalf of Webmaster Kenya and was engaged it to offer an end to end integrated mobile financial solution on the portal, which Goldrock pleaded it rolled out on 20th November 2014. The rollout was after Goldrock registered Pay Bill Number 206206. Goldrock registered that Pay Bill Number with all licensed mobile networks in Kenya for purpose of receiving funds from contracting member of the public using the portal eCitizen to access government services. Those users are charged Kshs. 50 per each transaction, which fee is referred to as “convenient fee.” That convenient fee, on being remitted by The Cabinet Secretary Treasurer, is settled between Goldrock and Webmaster Kenya.

3. On or about 26th July 2016 The Cabinet Secretary instructed Safaricom Limited to deny the Plaintiff the convenient fee. Subsequently Goldrock was denied access to the Pay Bill Number. Amongst various final prayers Goldrock seeks from all the Defendants jointly and severally is the release to it of the convenient fee on the Pay Bill Number amounting to Kshs. 127,850,950 as at 20th April 2017.

CHAMBER SUMMONS DATED 12TH APRIL 2018

4. Webmaster Kenya in support of its prayer for it to be struck out of this suit and for the expunging of documents began by contending that there is no cause of action against it; that it had no contract with Goldrock; and that Goldrock illegally accessed Webmaster Kenya's Confidential document.

ANALYSIS AND DETERMINATION

5. The parties filed Replying Affidavits to the application and all parties filed their respective written submissions. I confirm I have considered them.

6. Webmaster Kenya alleges that if there was a contract between Goldrock and Webmaster African, it is not privity to that contract. Webmaster Kenya contends that it is a separate legal entity to Webmaster African even if both entities have common share holder. In this regard the case **ARTHI HIGHWAY DEVELOPERS LIMITED –V- WEST END BUTCHERY LIMITED & 6 OTHERS (2015) eKLR** was relied upon as follows:

“It is a fundamental principle of our law that a company is a Legal Person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled.”

7. It is a fact admitted by all parties that Webmasters Kenya owns and administers the integrated government service provision platform known as e-citizen. Goldrock’s claim is in respect to the convenient fee payable for that service. It would there seen very clear that the claim for convenient fee is inter twinned with the ownership of that service, owned by Webmasters Kenya. The Court in my view would be hard pressed to determine Goldrock’s claim in the absence of the party who owns the service. It is for that reason that I am in agreement with all the Respondent’s submissions that Webmasters Kenya is a necessary party in this action. Just to demonstrate the connectivity of this claim of Webmasters Kenya’s ownership of the service I will reproduce a letter written by Webmasters Kenya as follows:

DATE: JUNE 27TH 2017

Dr. Kamau Thugge, CBS

Principal Secretary

The National Treasury

Treasury Building

P O Box 30007 – 00100

NAIROBI

RE: E-CITIZEN CHARGE OF USD 1.00 FOR ALL DOLLAR DENOMINATED TRANSACTIONS

It has come to our attention that on 21st June 2017, the National Treasury issued directive to the Kenya Commercial Bank (KCB) to immediately stop paying to us or our subcontractors the USD 1.00 Convenience fees charged to support e-Visa services offered by the Department of Immigration and Foreign Number Plates Registration by the National Transport and Safety Authority (NTSA).

Unfortunately, the National Treasury did not consult us regarding an alternative mode of funding or seek to appreciate what the impact of this unfortunate move would be to affected Government services.

For your information, the affected services were wholly funded and implemented by Webmasters Kenya on whose behalf Webmasters Africa Limited has been collecting the aforesaid Convenience fee to offer support services.

The purpose of this letter is to request that you immediately convene a formal meeting with Webmasters Kenya to discuss how the National Treasury proposes to fund continued support and recurrent liabilities relating to those services, going forward, to avoid disruption.

We regret that if this is not done by 1st July, 2017 we shall not be in a position to offer any other or further support due to financial constrains and shall not be responsible for any loss, damages or inconvenience caused by the disruption of the affected services

Yours faithfully,

JAMES O. AYUGI

CHIEF EXECUTIVE OFFICER

WEBMASTERS KENYA, NAIROBI

8. What is clear from the above is that Webmasters Kenya is requesting for payment of the Convenience fee not only for its own benefit but

also of its subcontractors. Who are those subcontractors? Is Goldrock one of them? That can only be determined at full trial. For now I can only say Webmasters Kenya is a necessary party as stated in the case **TOM ODHIAMBO ACHILLAH T/A ACHILLA T.O. & CO. ADVOCATES –V- KENNETH WABWIRE AKIDE T/A AKIDE & COMPANY ADVOCATES & 3 OTHERS (2015) eKLR** Viz:

“The party to be joined must be someone whose presence before the Court is necessary as a party. What makes a person a necessary party?.... the only reason which makes a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectively and completely settled unless he is a party. It is not enough that the intervener should be commercially or indirectly interested in the answer. The person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally. That is by curtailing his legal rights. That will not be the case unless an order may be made in the action which he is legally interested.”

9. On the other limb of the application Webmasters Kenya seek certain documents to be expunged. The Respondent in their response state that those are necessary documents in this case.

10. In my view it is not enough for Webmasters Kenya to state that Goldrock obtained those documents in the dubious way. What does that mean when particularly Goldrock stated that the documents were released to it by consent because they were held by the parties common advocate. In my view there is no sufficient reason shown why that the documents should be expunged and, that prayer is rejected.

11. In the end, the application fails and having failed the costs must follow the event.

12. In conclusion, therefore, the Notice of Motion dated 2nd April 2018 is dismissed with costs to all the Respondents.

DATED, SIGNED and DELIVERED at NAIROBI this 5th day of MARCH, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

..... COUNSEL FOR THE PLAINTIFF

..... COUNSEL FOR THE 1ST DEFENDANT

.....COUNSEL FOR THE 2ND DEFENDANT

.....COUNSEL FOR THE 3RD DEFENDANT

.....COUNSEL FOR THE 4TH DEFENDANT

.....COUNSEL FOR THE 5TH DEFENDANT