



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. E.027 OF 2018**

**GLOBALCAST AFRICA LIMITED.....PLAINTIFF**

**VERSUS**

**WANANCHI GROUP (K) LIMITED (trading as ZUKU).....1<sup>ST</sup>DEFENDANT**

**WANANCHI PROGRAMMING LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The decision in D.T Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina & another [1980] eKLR is often cited for the holding that:-

*“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it”.*

2. This must be the mindset of the Court in determining prayer 1 of the Notice of Motion dated 20<sup>th</sup> August 2018 which, in its entirety, is for the following prayers:-

1. THAT the name of the 1<sup>st</sup> Defendant be struck out from the suit.
2. THAT Creative Works Communication Limited be enjoined as a Defendant in the proceedings herein.
3. THAT the 1<sup>st</sup> Defendant be awarded the costs of this application and the loss of the entire suit together with interest
4. The Honourable Court do grant any other or further orders as may be deemed fit in the circumstances.

3. In a Complaint presented to Court on 30<sup>th</sup> May, 2018, Globecast Africa Limited (Globecast or the Plaintiff) brings this suit against Wananchi Group (K) Ltd (Wananchi or the 1<sup>st</sup> Defendant) and Wananchi Programming Limited (the 2<sup>nd</sup> Defendant) for a claim of USD 118,614.54, general damages for breach of contract and costs. Interest is also sought.

4. Globecast is engaged in the business of, *inter alia*, provision of live broadcasting, content distribution, production and transmission of news and sporting events worldwide. On the other hand, Wananchi is engaged in the business of, *inter alia*, provision of PAY TV and Internet services to its customers through its Zuku, ISAT and Simba net brands. It is common ground that Wananchi and the 2<sup>nd</sup> Defendant are affiliates.

5. Globecast avers that it and Wananchi have had an ongoing business relationship. That between March 2015 to August 2016, Globecast provided Wananchi with satellite news, gathering and capacity services for live transmission of various sporting events and games. Wananchi would procure the services by contracting Globecast through email or telephone. Once satellite capacity feed was available, Globecast would send quotation to Wananchi who would confirm the request.

6. It is the case of Globecast that upon completion of the services and upon end of live broadcast, it would issue and forward invoices to

Wananchi for settlement. The latter then transfer electronic funds to the account of Globecast. Globecast avers that the Defendants owe it a sum of USD 118,814.54 for services rendered between March 2015 to August 2016.

7. An important aspect of the case by Globecast is that it addressed its invoices to the 2<sup>nd</sup> Defendant in accordance with instructions of Wananchi.

8. Wananchi denies the claim, and while admitting that both it and the 2<sup>nd</sup> Defendant are subsidiaries of Wananchi Group (Holdings) Limited, it asserts that they are separate legal entities which enter into contracts independently. Its defence is that the invoices of Globecast had been erroneously addressed to it as it was not a party to the transactions between the Plaintiff and the 2<sup>nd</sup> Defendant. It avers that it merely redirected Globecast to the 2<sup>nd</sup> Defendant and had no capacity to issue instructions as alleged.

9. Wananchi further avers that at no point has it had any relationship with Globecast and that any dealings between Globecast and its employees are in their individual capacity.

10. This line of defence is reiterated in the Motion before Court. However, there is an additional defence revealed in the application.

11. That during 2014, the 2<sup>nd</sup> Defendant contracted Globecast, on an *ad hoc* basis, to provide satellite uplink services to enable the 2<sup>nd</sup> Defendant produce content to its subscribers. As the arrangement was not commercially tenable, the 2<sup>nd</sup> Defendant entered into an agreement dated 22<sup>nd</sup> May 2015 with Creative Works Communication Limited (Creative).

12. In an affidavit sworn by one Michael Maina on 20<sup>th</sup> August 2018, he states that, invoices addressed by Globecast to the 2<sup>nd</sup> Defendant have already been settled. Secondly, that correspondence between it and Globecast clearly shows that its representatives requested it to amend all its invoices and direct them to the 2<sup>nd</sup> Defendant being the procuring entity. The position of Mwananchi is that Globecast is attempting to take advantage of its own mistakes in seeking to find it liable.

13. The Court has read the applications and also given regard to the Plaintiff's Bundle of documents accompanying the Plaintiff which have been referred to in the application under consideration. Due consideration has been given to the rival submissions of Counsel.

14. It seems to me that a determination of the Plaintiff's claim will have to involve resolution of at least two issues. One, did the Plaintiff have a contractual relationship with Wananchi or the 2<sup>nd</sup> Defendant or both? Secondly, is the amount sought in the Plaintiff true and owing?

15. The Plaintiff's case is that it is Wananchi and not the 2<sup>nd</sup> Defendant who engaged it to provide services and invoices were addressed to the 2<sup>nd</sup> Defendant only at the request of Wananchi. Wananchi on the other hand deny the existence of a contract and contend that the relationship was between Globecast and the 2<sup>nd</sup> Defendant.

16. Looking at the correspondence between Globecast and Wananchi it does not seem unequivocally clear as to which of the two affiliates was the contracting party. I will only take three examples. On 19<sup>th</sup> June, 2014, one Julia of Globecast writes the following invoice to one Salma Jeneby:-

*"Salma, please use this attached invoice for the ZUBL Nairobi Job. GCA 13716 (so many versions...) would it help if I created a folder with having copies and delivered it all to you? We are coming through to Wananchi next week for some meetings and I would be happy to drop it off. Kind regards".*

17. On 27<sup>th</sup> June 2014 Salma writes as follows to Julia,

*"Hi Julia,*

*My sincere apologies. I have been on leave and I am catching up with my emails. If you could have all the invoices delivered that would help reduce the confusion.*

*Kind regards*

*Salma"*

18. Salma, it would seem, is an employee of Wananchi and had earlier on 17<sup>th</sup> June 2014 send out this mail,

*Hi Julia,*

*Thank you. Just one thing. Kindly note that all invoices are to be addressed to Wananchi Programming Limited, Mauritius. Thanks.*

*Kind regards*

*Salma.*

19. What is not clear, and would be an issue that deserves further interrogation, is whether this instruction by Salma was merely an internal arrangement between the two affiliates or whether it was the 2<sup>nd</sup> Defendant or Wananchi that was the contracting party. This is a matter that should go for trial. It would be far too drastic for this Court to strike out the suit against Wananchi without hearing the parties on it.

20. There is a second limb of the application. It seeks the joinder of Creative into the proceedings but as is clear from pleadings filed, it is the 2<sup>nd</sup> Defendant and not Wananchi that introduces the alleged role of Creative in this dispute. The application before Court is not by the 2<sup>nd</sup> Defendant. It seems logical, and i so hold, that only the 2<sup>nd</sup> Defendant can mount a plea for that joinder.

21. The fate of the Notice of Motion dated 20<sup>th</sup> August 2018 is as follows:-

21.1. Prayer 1 is dismissed

21.2. Prayer 2 is struck out.

21.3. Costs of the Motion to the Plaintiff.

**Dated, Signed and Delivered in Court at Nairobi this 12<sup>th</sup> Day of July, 2019.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Kimala for Plaintiff

Kiruri for Defendant

Nixon – Court Assistant