



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 286 OF 2013

UBA KENYA BANK LIMITED.....PLAINTIFF

VERSUS

FARM TRANSPORT AND TECHNICAL

SERVICES LTD.....1ST DEFENDANT

TOM OTIENO ONYANGO.....2ND DEFENDANT

NAHASHON HANNINGTON OBIERO.....3RD DEFENDANT

PHILIP JADON.....4TH DEFENDANT

MUMIAS SUGAR COMPANY LTD.....5TH DEFENDANT

FREDRICK OTIENO.....6TH DEFENDANT

RULING

[1] Before the Court for determination is the Notice of Motion dated **7 December 2015**. It was filed by the 6th Defendant, **Fredrick Otieno**, pursuant to **Order 2 Rule 15(1)(a) and Order 51 Rule 1 of the Civil Procedure Rules, 2010** for orders that the Plaintiff's Amended Plaintiff filed on **13 May 2014** as against the 6th Defendant be struck out; and that costs of the suit and the application be awarded to the 6th Defendant. The application was premised on the following grounds:

[a] that whereas the Plaintiff's claim against the Defendants jointly and severally is for payment of **Kshs. 48,580,241.48** allegedly advanced to the 1st Defendant together with interest and costs, the Plaintiff's cause of action against the 6th Defendant (hereinafter, "**the Applicant**"), as pleaded at paragraph 8A of the Amended Plaintiff, is that the 1st defendant through its Board Resolution mandated the Applicant to transact on behalf of the 1st Defendant and to bind the 1st Defendant and its guarantors to pay the aforesaid sum;

[b] that neither the Amended Plaintiff, nor the Plaintiff's Bundle of Documents disclose any cause of action against the Applicant; and that in so far as he has been sued as a Director of the 1st Defendant, the suit against him is misconceived and therefore ought to be struck out with costs.

[2] The application was opposed by the Plaintiff/Respondent, to which end, reliance was placed on the Replying Affidavit sworn by **Fred Chumo**, which was filed herein on **27 April 2016**. The Respondent contended that via a Letter of Offer dated **26 September 2011**, it agreed to grant an Invoice Discounting Facility to the 1st Defendant herein for **USD 250,000** (equivalent to **Kshs. 25,000,000**); and that since the Applicant, at the time of acceptance of the facility, was a Director of the 1st Defendant, it was the Applicant, together with the 2nd Defendant, who were the authorized signatories to the Letter of Offer aforementioned. It was further averred by the Respondent that, in signing the Memorandum of Acceptance, the Applicant demonstrated his mandate to act on behalf of the 1st Defendant in his capacity as a Director, and that it was therefore immaterial that he resigned shortly thereafter. For that reason, it was contended, the Applicant is a necessary party to these proceedings and therefore his application ought to be dismissed with costs.

[3] I have carefully considered the instant application, the affidavit in support thereof, as well as the Replying Affidavit in the light of the pleadings and the proceedings so far held and the written submissions filed by Learned Counsel. It is noted that the application has been filed pursuant to **Order 2 Rule 15(1)(a) of the Civil Procedure Rules**, which provides that:

"At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that--

(a) it discloses no reasonable cause of action or defence in law; ..."

[4] Since what is sought vide the instant application is **"that the Plaintiff's amended Plaint filed on 13th May 2014 as against the 6th Defendant be struck out..."** I would agree with the submissions of Counsel for the Plaintiff that the proper provision to be invoked ought to have been **Order 1 Rule 10(2) of the Civil Procedure Rules**, for the Amended Plaint would still hold as against the other Defendants even if the name of the Applicant were to be struck out. This is evident in the Applicant's Statement of Defence, filed on **9 December 2015**, wherein, apart from denying the averments in the Plaint, it was pleaded thus in paragraph 10(f) thereof:

"That even if the 6th Defendant was still a Director of the 1st Defendant which is denied, under the company law, the Plaintiff can only lift the corporate veil and sue the Directors personally and more so the 6th Defendant either after a Judgment or with leave of Court in very clear circumstances."

[5] It cannot therefore be gainsaid that the Plaintiff has a valid claim in respect of the facility it allegedly offered the 1st Defendant, and it remains to be seen, upon hearing on the merits, whether the Defendants are liable as claimed. Thus, the instant application can only relate to the question of whether or not the Applicant's joinder hereto was warranted, which is what is envisaged under **Order 1 Rule 10(2) and not Order 2 Rule 15 of the Civil Procedure Rules**. That notwithstanding, the key question for the Court's determination is whether, on the face of the pleadings, there is a good cause of action against the Applicant.

[6] On behalf of the Applicant, it was submitted by Learned Counsel, **Mr. Bundotich**, that the 1st Defendant is a limited liability company incorporated under the Companies Act, Chapter 483 of the Laws of Kenya, as separate legal entity; and therefore, to the extent that the Plaintiff/Respondent had not established that the company had lost the capability of settling its debts through its assets, the joinder of the Applicant hereto in his personal capacity as a Director, is improper. In support of this argument, Counsel relied on the case of **Salomon vs. Salomon & Co. Limited [1897] AC 22** and quoted the following excerpt from the Judgment of **Lord Halsbury L.C.**:

"Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not Salomon. If it was not, there was no person and nothing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not."

[7] It was further urged on behalf of the Applicant that he resigned from his position as a Director of the

1st Defendant in **October 2011**, a couple of days after the Letter of Offer dated **26 September 2011** was executed, and thereupon transferred his shares to the 2nd Defendant. It was therefore posited that the concept of limited liability, which limits liability to either shares or amounts guaranteed by the members of a company, would come into play to protect the Applicant, granted that he no longer holds any shares in the 1st Defendant.

[8] The Applicant also took issue with the Plaintiff's averment to the effect that he was the authorized signatory for the purposes of the execution of the Memorandum of Acceptance to Letter of Offer, contending that a board resolution was incapable of conferring liability on a Director in the absence of a binding contract executed by such a Director committing him to pay the sums in issue; and that in any event, such a resolution would, at best, only be indicative of a Principal/Agent relationship, in respect of which no liability would attach as long as the Agent acted within his authority or power given under the agency relationship. On the authority of **Gadd vs. Houghton (1876) 1 Ex D 357**, the Applicant argued that an agent for a named principal acquires or incurs neither rights nor liabilities under the contract and drops out of the contract as soon as the contract is made.

[9] It is a tested and tried principle that a limited liability company is a legal entity in its own right, and entity that is distinct and separate from its shareholders and directors; notwithstanding that as a juristic person, it operates through human members, directors and employees. The principle was enunciated in **the Salomon Case** (supra) thus:

"The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act..."

[10] On the face of it therefore, it would appear that the joinder of the Applicant may have been misguided. I however that the Amendment was made by consent of Learned Counsel for the parties who were then on record as per the Court Order made on 10 June 2014. In this connection, Counsel for the Plaintiff/Respondent, **Mr. Mugisha**, urged the Court to take into account the provisions of **Order 1 Rules 3, 4, 5, 6, and 7** with regard to joinder of Defendants. He highlighted the point that a Defendant so joined need not be interested as to all the relief claimed in the suit against him, for the precise reason that sometimes a Plaintiff may be in doubt from whom redress ought to be sought.

[11] I would accordingly be of the view that, given the provisions of **Order 1** aforesaid, it is cannot be said that the joinder of the Applicant is altogether misconceived, granted that the Court is not, at this stage, required to examine closely the merits of the Respondent's case against the Applicant. In the case of **Departed Asians Property Custodian Board vs Jaffer Brothers Ltd [1999] 1 EA 55** it was held that:

"A clear distinction is called for between joining a party who ought to have been joined as a Defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter..."

[12] Secondly, it is now trite that in an application of this nature, caution is always advised. In the case of **D.T. Dobie and Company (Kenya) Limited vs Muchina [1982] KLR 1**, the Court of Appeal made this point thus:

"The court ought to act very cautiously and carefully and consider all the facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the

court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra)) As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right."

[13] A consideration of the Applicant's Defence and written submissions confirm that the issues raised in support of the instant application are issues that would best be dealt with at the trial. For instance, it will require proof to demonstrate that the Applicant signed the Memorandum of Acceptance of the Letter of Offer; or that he resigned from his position as Director and had his shares transferred to the 2nd Defendant as alleged by him. Thus, whereas it was the submission of the Applicant's Counsel that the Plaintiff/Respondent had not established any of the grounds under which the Applicant, as an agent could be held personally liable; those very arguments appear premature, granted that the trial is yet to be had. I would thus agree with the expressions of the Court in Marwaha vs. Pandit Dwarka Nath [1952] 25 LRK 45 that:

"This application under Order 1, rule 10(2) to strike out the second defendant is misconceived as the ground on which he seeks to be struck out amounts in substance to a defence on a point of law, namely his non-liability upon actions in tort at the time when the cause of action arose. That being so, the proper course would have been to file a defence and to plead this point in it, under Order 6, rule 27 ... The point was premature because upon the plaint alone it was not unequivocally clear that he is being sued in tort at all...If the nature of the liability is not made clear in the plaint, as indeed it is not, then the proper remedy would seem to be an application for particulars, or alternatively a denial of tortious liability in a statement of defence..."

[14] In this instance, the Applicant has already filed a Defence and there being no indication that it will suffer such prejudice as cannot be adequately compensated by way of costs if he is finally exonerated, I would take the view that the ends of justice, in this matter, require that the contested issues be resolved at the trial after hearing on the merits. Accordingly, I would dismiss the application dated **7 December 2015** with an order that the costs thereof be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JANUARY 2017

OLGA SEWE

JUDGE