



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC. APPL. NO. 158 OF 2016

ARISON EXPORT IMPORT LIMITED 1ST APPLICANT

HUELANDS LIMITED 2ND APPLICANT

- V E R S U S -

HARIT SHETH TRADING AS HARIT

SHETH ADVOCATES 1ST RESPONDENT

HIGHBURY CONSULTING SERVICES

INTERNATIONAL LIMITED..... 2ND RESPONDENT

RULING

1) The subject matter of this ruling is the Originating Summons dated 11th April 2016, taken out by the applicants herein whereof they seek for determination of the following issues:

1. Whether after the professional undertaking given on 8th December 2015 by M/S HARIT SHETH ADVOCATES to Highbury Consulting Services International Limited (the second Respondent herein) was cancelled/terminated through the Applicants' letter/notice dated 26th March 2016 and whether the said professional undertaking became null and void and unenforceable against the Applicants or any of the parties herein.

2. Whether after the Second Respondent vanished/failed to undertake consultancy services for architectural Designs and Engineering plans for Drive-in-estate on the Applicants' eleven(11) acre piece of land being part of sub-plot LR no.7879/25 (which Architectural designs including all the engineering plans were supposed to be delivered to the Applicants on or before 15th February 2016) the said professional undertaking given on 8th December 2015 by M/S HARIT SHETH ADVOCATES TO Highbury Consulting Services International Limited (the second Respondent herein) lapsed automatically and the same automatically became null and void and unenforceable against the Applicants or any of the parties herein.

3. Whether or not the court should cancel and/or nullify the terms and conditions of the professional undertaking in issue herein/the professional undertaking given on 8th December 2015 by HARIT SHETH TRADING AS HARIT SHETH ADVOCATES to Highbury Consulting Services International Limited (the second Respondent herein)

4. Whether or not this Honourable court should issue a permanent injunction restraining the Respondents jointly and/or severally, their agents and/or servants and/or employees from acting on and/or effecting and/or executing the terms and conditions of the professional undertaking in issue herein/the professional undertaking given on 8th December 2015 by HARIT SHETH TRADING AS HARIT SHETH ADVOCATES to Highbury Consulting Services International Limited.

5. Whether the first Respondent can effect/act actualize the professional undertaking in issue herein after it was cancelled/terminated by the Applicants.

6. Whether the Respondents have any valid and/or legal basis of objecting to the cancellation/termination of the professional undertaking herein.

7. Who should pay costs of the application.

2) The summons is supported by the affidavit of Francis M. Mburu. When served, the 2nd respondent filed the replying affidavit of Crispin Mwangogo Maganga. When the Originating Summons came up for hearing, learned counsels recorded a consent order to have the summons disposed of by written submissions.

3) I have considered the grounds stated on the face of the Originating Summons plus the facts deponed in the affidavits filed in support and against the summons.

4) I have further considered the rival written submissions. On the question as to whether or not this court should cancel and or nullify the terms and conditions of the professional undertaking dated 8th December 2015, the applicant pointed out that the 1st respondent through a professional undertaking dated 8th December 2015, undertook to pay the 2nd respondent ksh.30 million if the 2nd respondent, their European architects undertook consultancy services for architectural designs and engineering plans for Drive In Estate on the applicants' 11 acre piece of land next to the schools on sub-plot L.R no. 7879/25 (which belongs to the applicants). It is said that the aforesaid consultancy services were to be rendered on or before 15th February 2016. The applicants aver that after when the 2nd respondent was issued with the said professional undertaking it vanished and never offered the said consultancy services. The applicants aver that they consequently served the respondents with the letter dated 16.3.2016 terminating the said consultancy services. The applicants through the firm of N.R Nyamai & Co. Advocates issued a demand notice to the respondents to furnish the applicants within 4 days, with a written confirmation that the consultancy services contract and the said professional undertaking by M/S Harit Sheth Advocates stand cancelled and terminated/nullified, invalidated and, are null and void failing which the applicants had strict instructions to commence court proceedings to have the professional undertaking cancelled, nullified and or invalidated. The letter of demand is dated 6th April 2016. The applicants have submitted that the respondents did not deem it fit to respond to the letter of demand forcing the applicants to file these proceedings.

5) The 2nd respondent filed the replying affidavit of Crispin Mwangogo Maganga. The deponent of the replying affidavit claimed in the replying affidavit that he was the 2nd respondent's agent and that he was duly authorised to swear the affidavit. It is the averment of Crispin Mwangogo Maganga that Francis M. Mburu, the deponent of the supporting affidavit filed in support of the Originating Summons made false averments, hence he should be punished for perjury. The deponent claimed that the applicants are not joint owners of sub-plot L.R no. 7879/25. He further averred that the 2nd respondent was never engaged by the applicants to provide any architectural designs and engineering plans for drive in estate. It is also alluded that there was no iota of evidence that there existed such an agreement at any times, before the Originating Summons was filed on 11th April 2016. The 2nd respondent further argued that it does not offer or provide any such architectural or engineering services but primarily provides consultancy services. The deponent averred that he was aware that the 2nd respondent was specifically contracted and engaged by the applicants to follow up and secure payments of a sum of ksh.1,200,000,000/= from the

Government of Kenya through the office of the president. The 2nd respondent denied that it was required to deliver any engineering plans by 15th February 2016. The deponent further states that as far as the undertaking given to it on 8.12.2015 by the 1st respondent on behalf of the applicants' it had been agreed that the 2nd respondent was to be paid ksh.30 million in full and final settlement for its services within 14 days once a sum of ksh.1.2 billion due from the government was released to the applicants. The 2nd respondent stated that the above payment was payable for the services rendered in following up the payments and not for any architectural or engineering design works contrary to the applicants' allegations. Mr. Crispin Mwangogo Maganga also averred that he received the letter dated 9.3.2016 addressed to the 2nd respondent by the applicants relating to consultancy fees to secure payment of ksh.1.2 billion on behalf of the applicants. He further averred that he on behalf of the 2nd respondent wrote to the applicants stating that the 2nd respondent was willing to accept payment of ksh. 10 million for the services rendered if the same was paid within 7 days from the date of the letter. The deponent denied knowledge of the contents of the letter dated 16.3.2016 which purports to terminate the services of the 2nd respondent.

6) The 2nd respondent further argued that the applicants are seeking through the Originating Summons to unjustly and without any justification legal or otherwise to deny the 2nd respondent the payments due.

7) The applicants have raised a preliminary objection against the affidavit of Crispin Mwangogo Maganga. It is the submission of the applicants that Crispin Mwangogo Maganga has not filed a written authority from the 2nd respondent to permit him to plead or swear the replying affidavit thus the entire affidavit is rendered fatally defective.

8) The 2nd respondent admitted that Mr. Crispin Mwangogo Maganga did not file the written authority as required under the Civil Procedure Rules but it is argued that the same is not fatal.

9) With respect, I think the 2nd respondent is right on this issue. It is not a must for one to file a written authority to swear an affidavit. It is sufficient to merely swear on oath that one has authority to plead as such.

10) Having disposed of the preliminary issue, let me now determine the substance of the Originating Summons. I have already considered the dispositions of both sides. After a careful consideration of the material placed before this court together with the rival submissions it is clear to me that the professional undertaking dated 8th December 2015 does not state that the 2nd respondent was to undertake debt collection. The undertaking talks of ksh.30 million being funds due in respect of services being rendered. A critical examination of the wording of the letter of undertaking shows it leans more towards the submissions by the applicants that it was in respect of an undertaking for the provision of professional services like architectural and or engineering services as opposed to following up payments of debts as suggested by the 2nd respondent. Though the respondents denied knowledge of the letter dated 10.3.2016 terminating the series of the 2nd respondent, I am convinced by the affidavit evidence that the respondents received the letter. On a balance of probabilities, I find that the applicants have established their claim. Consequently, the Originating Summons dated 11th April 2016 is allowed in the following terms:

i. I find that the professional undertaking given on 8th December 2015 by M/S HARIT SHETH ADVOCATES to Highbury Consulting Services International Limited (the second Respondent herein) was cancelled/terminated through the Applicants' letter/notice dated 26th March 2016 and that the said professional undertaking became null and void and unenforceable as against the Applicants or any of the parties herein.

ii. This court hereby issues an order of permanent injunction restraining the Respondents jointly and/or severally, their agents and/or servants and/or employees from acting on and/or effecting and/or executing the terms and conditions of the professional undertaking given on 8th December 2015 by HARIT SHETH TRADING AS HARIT SHETH ADVOCATES to

HIGBURY CONSULTING SERVICES INTERNATIONAL LIMITED.

iii. The respondents to pay the costs the Originating Summons.

Dated, Signed and Delivered in open court this 10th day of February, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant