



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 60 OF 2016

1. FRANCIS GICHUHI KAMAU..... 1ST PLAINTIFF

**2. TEDWACS CONSTRUCTION CO. LTD.....2ND
PLAINTIFF**

VERSUS

KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME.....DEFENDANT

RULING

1. The Plaintiffs filed this suit seeking payment of Ksh. 36,540,000/= being fees for services rendered to the Defendant pursuant to a contract which was said to have been entered between them and the Defendant. The said contract was for sub division exercise of 35.50 Acres Block of Muthurwa property in smaller plots for sale in open market. That the Plaintiffs were also to carry out joint research on the best use of the proposed development of the area.

2. The Defendant took issue with the 1st Plaintiff's *locus standi* in this suit. As a result thereof it filed a notice of motion dated 20th April, 2016 seeking to strike out the 1st Plaintiff's plaint.

3. The ground upon which the motion is premised is on the body of the motion and the supporting affidavit sworn by **SIMON NYAKUNDI** who is the Chief Executive Officer of the Defendant. He stated that the suit herein is premised on a letter to the 2nd Defendant dated 29th March, 2010. That it is apparent from that letter that the transaction and the subsequent events were between the 2nd Plaintiff and the Defendant and not the 1st Plaintiff and the Defendant. He added that the 2nd Plaintiff is an artificial person capable of suing and being sued on its own name. That there has never been any contract between the 1st Plaintiff and the Defendant and therefore, the 1st Plaintiff has no *locus standi* to sustain a claim against the Defendant.

4. Grounds of objection were filed in response to the motion. The grounds are that; the application is incompetent, misconceived, frivolous and is an abuse of due process of the court since the Defendant never pleaded the issue of locus to sue in its defence; that the 2nd Plaintiff is a limited liability company and has got corporate personality and can only operate through its Agent/Director, one whom is the Plaintiff who was actually the Architect and also the leading consultant and the project manager as per the contract dated 29th March, 2010 for and on behalf of the 2nd Plaintiff. The 1st Plaintiff was at all material times the managing director of the 2nd Plaintiff and therefore competent not only to carry out architectural works and project management as per the contract but was also the architect of the 2nd Plaintiff to whom the contract was entrusted by the Defendant on behalf of the 2nd Plaintiff when giving her the contract on

29th March, 2010; that the Defendant is bound by her pleadings and cannot at this late stage introduce an issue which she has never raised in her pleadings that there has not been compliance so far with Order 11 of the Civil Procedure Rules; that the application is in direct conflict with the provisions of Sections 1A and 1B on the doctrine of overriding objectives and Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to technicalities; that this court is under duty to ensure that the Defendant does not delay justice to the Plaintiffs with frivolous and incompetent application and that the application is made in bad faith and is intended to delay smooth trial.

5. In its submissions, the Defendant maintained that the 1st Plaintiff had no *locus standi* to sue in this case. The Defendant cited the case of **Salmon v. Salmon (1897) AC 22** and **Kuldeep Singh Sehra & Another v. Bullion Bank Limited & 2 Others [2014] eKLR** in which the court was of the opinion that if a right of a company is violated, it is the company which shall bring that action through the majority and that in order to redress a wrong done to the company, the action should be brought by the company. It was further submitted that the only exception available is in cases of fraud on the minority, and the wrong doers are themselves in control of the company. To support this argument, reliance was placed on **James Mbera Macharia & Another v. Samuel Mwangi Macharia & Another [2015] eKLR**.

6. On the issue of costs the Defendant cited section 27 of the Civil Procedure Act and submitted that the issue of costs is always discretionary but the same should be exercised according to law and should always follow the event. That having been dragged to court by the 1st Plaintiff on baseless issues, the Defendant should be awarded costs.

7. The 1st Plaintiff's submissions were a reiteration of the averments in the grounds of objection and I will not belabor on repeating it.

8. I have given due consideration to the motion and the grounds of objection together with the submissions tendered. It is clear to me that two issues fall for my determination.

- a. Whether or not the 1st Plaintiff has *locus standi* to sue in this suit.
- b. Who is liable to pay costs?

Lord Macnaghten at page 51 in the celebrated case of **Salmon Vs. Salmon & Co. Limited (1897) AC** had this to say:

“The company is at law a different person and 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 trustees for them not are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act...When the memorandum is duly signed and registered though there be only seven shares taken, the subscribers are a body corporate “capable forthwith” to use the words of the enactments, “of assuming all the functions of an incorporated company”

9. In **Edward v. Halliwell (1950) 2 All ER 1064** at page 1066 Judge Jenkins had this to say:

“The rule in Foss v. Harbottle as I understand it comes to no more. First, the proper Plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and all its members by a simple majority of the members, no individual members of the company is allowed to maintain an action in respect of the matter for the simple reason that if a mere majority of the members of the company or association is in favour of what has been done, then cadit quastio”

10. Ringera J (as he then was) made a similar finding in **Ultimate Laboratories v. Tasha Bioservice**

Limited Nairobi H.C.C.C. No. 1287 of 2000 while dealing with lifting of the corporate veil:

“However, that fundamental principle of incorporation may be disregarded, lifted, or pierced in exceptional circumstances both under express statutory provisions (of which section 323 of the Companies Act is but one example only) and under judicial interpretation or intervention...the broad principle that the corporate veil will be lifted by the courts if, among other situations, corporate personality is being used as a mask for fraud or improper conduct...The case of Mugenyi & Company Advocates v. The Attorney General [1999] 2 EA 199 following Palmers Company Law Vol. 1 (22 ed) gave a list of 10 instances in which the veil of corporate personality may be lifted or as is sometimes put, look behind the company as a legal persona and these are:-

- a. Where companies are in relationship of holding and subsidiary companies;***
- b. Where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors on the ground that business continued after the membership had dropped below the legal minimum, to the knowledge of the shareholder;***
- c. In certain matters relating to taxation;***
- d. In the law relating to exchange control;***
- e. In the law relating to trading with the enemy;***
- f. In the law of merger control in the United Kingdom;***
- g. In competition of the European Economic Community;***
- h. In abuse of law in certain circumstances;***
- i. Where the device of incorporation is used for some illegal or improper purpose; and***
- j. Where the private company is founded on personal relationship between the members.”***

11. Applying the tests above, it is clear that the Plaintiffs’ claim do not fall under these exceptions considering that it is pegged on a contract. I am in agreement with the Defendant’s submissions with regard to *locus standi*. In view of the above disposition, I find that the 1st Plaintiff had no locus to sue in this suit.

12. Regarding the contention by the counsel for the 1st Plaintiff that the issue of *locus standi* was not raised in the defence. My take on this, is that a party to a suit can raise an issue of law any time. The fact that it had not been raised earlier did not disentitle the Defendant from raising it the time it did.

13. The application dated 20th April, 2016 is hereby allowed as prayed. Costs in the cause.

Dated, signed and delivered at Nairobi this 1st day of December, 2016.

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L NJUGUNA

JUDGE