



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NUMBER 220 OF 2015

GEO CHEM. MIDDLE EAST LIMITED. PLAINTIFF

VERSUS

KENYA BUREAU OF STANDARDS. 1ST DEFENDANT

KENYA REVENUE AUTHORITY. 2ND DEFENDANT

RULING

The Ruling herein relates to costs, and the court is called upon to determine who should pay the costs of the suit.

A brief history of this matter is that by a plaint filed on 15th June, 2015, the Plaintiff **GEO CHEM MIDDLE EAST LIMITED** claims a sum of Kenya Shillings Two Hundred Ninety Six Million, Nine Hundred Sixty Thousand, Two Hundred Nineteen Thirty Seven Cents only (Ksh.296,960,219.37) from the Defendants. The Plaintiff has also sought compound interest thereon at the rate of 5% per month with effect from 5th June, 2009 for each day it remains unremitted until payment is made in full.

The claim is based on an alleged agreement that was entered into between the Plaintiff and the 1st Defendant wherein the 1st Defendant would inspect and give a Certificate of Quality to the 1st Defendant on all hybridized Petroleum Products by putting laboratory testing facilities duly accredited to ISO/IEC/7025.

The Plaintiff and the 1st Defendant also agreed to appoint the 2nd Defendant to undertake collection and remit to the 1st Defendant the Plaintiff's monthly royalty, inspection and testing fees.

The Plaintiff and the 1st Defendant, further agreed that the remittance would be done monthly in arrears and that it would become due and payable to the Plaintiff on the 15th day of subsequent month.

Between October, 2009 and 30th April, 2010 the 2nd Defendant collected on behalf of the Plaintiff a total sum of Ksh.296,290,219.37 and a total sum of Ksh.87,988,213.15 on behalf of the 1st Defendant which it failed and/or neglected to remit to the Plaintiff hence this suit.

The suit was filed under a certificate of urgency and accompanying the plaint is a Notice of Motion dated

15th June, 2015 which Application sought the release of Ksh.296,960,219.37 owing and due to the Plaintiff, or in the alternative, the Defendant, be ordered to deposit the said amount of money in court pending the hearing and determination of the Application.

On the 2nd July, 2015 the 1st Defendant filed an Application seeking to strike out the suit or in the alternative its dismissal with costs thereof. The main ground of that Application is that under the contract entered into between the parties, and in particular clause 1 the settlement of disputes accruing under the agreement shall first be settled amicably using the best efforts, failing which the same shall be referred to arbitration in accordance with the agreement.

In the meantime, the 2nd Defendant filed its defence, the list of documents and a Notice of Preliminary Objection. The Objection was on points of law in the that the suit contravenes Provisions of Section 3(2) of the Public Authorities Limitation Act, the Provisions of Section 3(2) and Section 5 of the Kenya Revenue Authority Act as read with Order 36(3) (2) of the Civil Procedure Act and Section 16 of the Government Proceedings Act Cap 40 Laws of Kenya.

The Plaintiff's Application dated 5th day of June, 2015 came up for hearing on the 8th July, 2015 before Justice Onyancha when Mr. Ngatia Advocate representing **GEO CHEM MIDDLE EAST** informed the court that his client entered into an agreement with the 1st Defendant on 5th June, 2009 to inspect all Petroleum Products imported to Kenya and a sum of Ksh.296,000,000/- is currently being held by either the 1st or 2nd Defendants arising from the services rendered by his client.

He further informed the court that his client is currently in arbitration with the 1st Defendant and strangely the suit seeks that the amount be paid to the Plaintiff **GEO CHEM MIDDLE EAST (LIMITED)** in the pretext that it is the same as **GEO CHEM MIDDLE EAST** without limited. **GEO CHEM MIDDLE EAST** is based in Dubai, while the Plaintiff is based here in Nairobi.

On the same day and by consent of the parties, several orders were recorded inter alia: -

- a) The Application and the suit proceedings be are hereby stayed pending further orders of the court.
- b) At the next court session the Advocate on record for the Plaintiff (Nairobi Company) to attend court in person to tender evidence regarding his instructions to file this suit and Application.
- c) At the next court session the deponent of the verifying Affidavit to the Plaintiff one **KENNY KIOKO** to attend court in person to adduce evidence in relation to
 - (i) Board resolution authorizing commencement of the suit.
 - (ii) Evidence of him being a Director of the Company.
 - (iii) Original Certificate of Incorporation of the Company.

On the 30th July, 2015 when the matter was next in court Mr. Ngatia Advocate informed the court that pursuant to the orders of the Court made on 8th July, 2015 Mr. Nzioka Advocate for the Plaintiff had on 27th July, 2015 forwarded to him a number of documents. The court was also informed that on the same date of the letter aforesaid, the alleged local agents of the Dubai Company sent a letter to **GEO CHEM MIDDLE EAST** (the company in Dubai) which sought to validate the process before the court which letter, once it was attended to, would substantially show the way forward.

Mr. Ngatia made some proposals which the Hon. Judge recorded which were: -

- (i) That **GEO CHEM MIDDLE EAST** a company based in Dubai, do respond to the letter from

Nzioka & Co. Advocates dated 27th July, 2015 as well as the letter from Dr. Kioko Mang'eli dated 27th July, 2015 within the next 15 days from the date thereof.

(ii) That the Response be in an Affidavit which shall be filed and served upon all the parties on or before 15th August 2015.

(iii) The other parties be at liberty to file an Affidavit in response to the Affidavit by **GEO CHEM MIDDLE EAST** within 14 days of Service.

The matter came before me on 28th September, 2015 when Counsel for the 1st Defendant informed the court that the Plaintiff had filed a Notice of Withdrawal of the suit dated 14th September, 2015. Upon perusal of the said Notice Mr. Ngatia Advocate noted that the Plaintiff in the notice of withdrawal is different from the Plaintiff in the plaint and yet the notice had been prepared by the Advocate for the Plaintiff. In the absence of a representative from the firm of Nzioka & Co. Advocates, the court ordered that the matter be mentioned on the 15th October, 2015 for the firm of Nzioka & Co. Advocates to shed light on why the Plaintiff in the plaint is different from the one in the Notice of Withdrawal. Unfortunately, on the said date there was no attendance despite the fact that they had been served with a mention notice.

The issue that arose on the 15th October, 2015 was that of costs. Parties could not agree on who is to bear the costs of the suit and the court heard the parties on that issue.

On his part Mr. Ngatia Advocate submitted that his client entered into an agreement with the 1st Defendant for inspection of Petroleum Products which started and continued for some time until it was discontinued by the 1st Defendant by which time his client was entitled to a fairly substantial sum which has not been paid to date.

He submitted that this fact was well known by the Senior Officers in the Employment of the 1st Defendant.

That his client and the 1st Defendant are currently in an arbitral process which will determine the respective rights and obligations of the parties and it was while he was in one of the sessions at the arbitral tribunal that through the Advocate on record for the 1st Defendant, he became aware of the fake suit and immediately made an Application which culminated to a consent and in his submission, it was because of this Application that the case collapsed. His reasons for saying the claim was fake are that the person who filed had no authority to file the same and that were it not for the intervention that he took, there was a real risk that the money would have been paid out and if that had been done it would have been paid out to the people who were not entitled to it.

He argued that he saved the 1st and 2nd Defendants from arguing the matter. According to him, the Defendants ought to have known that they were dealing with a party that is not genuine and if any party was to be condemned to pay costs, then it would be **GEO CHEM MIDDLE EAST LIMITED**. The said company was used by human beings for an illegitimate purpose and if the law firm was to be held to account, they will argue that they were instructed by the company. His client should not be held liable for costs because, it is the innocent party and it prevented a fraudulent claim. Though his client spent quite a bit of time and expense in getting the Pleadings sworn in Dubai, his client will be contented with an order that each party bears its own costs.

On behalf of the 1st Defendant, it was submitted that, the 1st Defendant was served with the summons and the plaint in the case pursuant to which it filed an appearance and a defence. In the plaint, the company described itself as having its registered offices in UAE. The Plaint indicated that the Cause of Action arose from an alleged breach of contract dated 15th June, 2009 for inspection of Petroleum Products entering the country. Annexed to the suit papers was a copy of the Agreement, a Certificate of compliance issued by the Registrar of Companies dated 13th March, 2015 reference number CFU/2015/181306 and

P.I.N. Certificate for **GEO CHEM MIDDLE EAST**. On the basis of these documents, the 1st Defendant had no basis to doubt the authenticity of the claim being brought against it and subsequently instructed a counsel to defend the suit and for this reason the 1st Defendant should get the costs of the suit.

In Mr. Lusi's further submissions, the party to pay costs should be **GEO CHEM MIDDLE EAST** because the fraud that was prevented was against it. He argued the said company should pay costs and seek indemnity from **GEO CHEM MIDDLE EAST LIMITED** or firm of Nzioka and Co. Advocates or from the people who put themselves as the Directors of **GEO CHEM MIDDLE EAST LIMITED**.

He further submitted, in the alternative, should the court be persuaded not to award costs against **GEO CHEM MIDDLE EAST LIMITED**, an order should be made to lift the corporate veil that would prevent enforcement of a possible award of costs against the parties who have put themselves as the Directors of **GEO CHEM MIDDLE EAST LIMITED**.

On her part, M/s Ondundo for the 2nd Defendant associated herself with some of the submissions made by Mr. Lusi, but she added that, since her client had filed the relevant pleadings in the case including a preliminary objection which had it been argued, would have terminated the case against her client, her client should get costs of the case.

She further argued that her client was dragged into the case because it was not a party to the agreement between either the Plaintiff and the 1st Defendant or **GEO CHEM MIDDLE EAST**. She submitted that costs should be borne by either **GEO CHEM MIDDLE EAST** or **GEO CHEM MIDDLE EAST LIMITED** and if court condemns the latter to pay, then the corporate veil should be lifted and the directors be held personally liable.

In reply to the submissions made by the counsels for the Defendants, Mr. Ngatia submitted that the contract was between his client and the 1st Defendant and both Defendants dealt with Arabs. The Directors of the **GEO CHEM MIDDLE EAST LIMITED** are remarkable people Peter Mang'eli and Kenny Kioko and this should have raised some suspicion on the part of the Defendants.

On the other hand the 2nd Defendant, participated in the execution of the agreement although they were not parties to it. The Defendants took no time to verify the documents that were presented to them. Both Defendants were content to look at the Certificate of Compliance issued on 13th March, 2015 five years after the transaction was done. The Defendants failure to exercise due diligence disentitle them to costs.

The court has carefully perused the pleadings filed in this matter. I have also considered the submissions made by the learned counsels on the issue of costs. The issue before me is who is liable to pay the costs of the suit.

Section 27 of the Civil Procedure Act Cap 21 gives the court or the Judge full power to determine by whom and out of what property and to what extent such costs are to be paid and to give necessary directions for the purposes aforesaid provided that the costs of an action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order.

From the pleadings and the submissions by the parties, one thing is clear, that the Plaintiff in the suit **GEO CHEM MIDDLE EAST LIMITED** is different from **GEO CHEM MIDDLE EAST**. The suit herein was filed by **GEO CHEM MIDDLE EAST LIMITED** and not by **GEO CHEM MIDDLE EAST**. The contract referred to by the parties was entered into between the 1st Defendant and **GEO CHEM MIDDLE EAST** and not **GEO CHEM MIDDLE EAST LIMITED**. It is interesting to note that whereas the Plaintiff is **GEO CHEM MIDDLE EAST LIMITED**, the contract that they have based their claim and a copy of which is annexed to the Affidavit of **KENNY ALOIS KIOKO** in support of the Notice of Motion dated 15th June, 2015, is between the 1st Defendant and **GEO CHEM MIDDLE EAST**. The same is also noted of some of the documents annexed to the Plaintiff's list of documents.

This clearly shows that the Plaintiff in the suit and the real beneficiary to the contract dated 5th June, 2009 are very different entities and to this extent I do agree with Mr. Ngatia's submission that the claim was fraudulent.

Mr. Ngatia only learnt about the existence of the suit through the Advocate for the 2nd Defendant and immediately thereafter took the necessary steps to prevent what would have been a fraudulent claim.

On the other hand, the Defendants were misled into believing that they were dealing with the genuine party to the contract dated 5th June, 2009, though had they been abit diligent, they ought to have discovered that they were dealing with the wrong entity.

Be that as it may, the Defendants incurred costs in defending the suit to the stage that it reached before it was withdrawn and the same applies to **GEO CHEM MIDDLE EAST**. These three parties are entitled to costs and the only party liable in this case is the Plaintiff. **GEO CHEM MIDDLE EAST** and the Defendants were dragged into the case by the Plaintiff and they had no choice but to defend the case.

Mr. Ngatia had suggested that the law firm of Nzioka & Co. Advocates be condemned to pay the costs but the challenge here would be that the Advocates will argue that they were instructed in the matter by the Plaintiff.

In the submissions made by the parties, the court was asked to award costs against the directors of the Plaintiff but in view of the celebrated case of **Aron Salomon Vs Salomon & Company Limited** the hands of the court are tied because a company is very separate and distinct from its directors. A limited liability company is a legal entity capable of suing and being sued as it's the instant case.

The court cannot, therefore, order the Directors to pay the costs of the case. However, should it become impossible for the parties to recover the costs from the said company, they can use the avenues open to them in law to lift the corporate veil and pursue the Directors personally.

In the upshot the Plaintiff is condemned to pay the costs of the suit which are awarded to the Defendants and **GEO CHEM MIDDLE EAST**.

Orders accordingly.

Dated and delivered at Nairobi this 3rd day of December, 2015.

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L. NJUGUNA

JUDGE

In the presence of

None appearance for the Plaintiff.

Mr. Lusi for the 1st Defendant.

None Appearance for the 2nd Defendant.

Mr. Ngatia for Geo Chem Middle East