



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 17 OF 2013

SURAJPUR CONSTRUCTION CO. LTD PLAINTIFF

V E R S U S

SALOME OTUNGA DEFENDANT

AND

1. SOLOMON AMIAN

2. RENATA SERNEELSTHIRD PARTIES

RULING

1. The parties named as the third party in this action that is **SOLOMON AMIANI** and **RENATA SERNEELS** are concerned that this case was filed by collusion and abuse of the Court process.
2. A plaint dated 5th February 2013 was filed in Court on 5th March 2013. By that plaint the Plaintiff pleaded that the Defendant had breached a contract between them. It is pleaded that the Plaintiff entered into a contract with the Defendant whereby the Plaintiff was contracted to demolish a house and to build an office block of four stories on Block Kwale/Diani Complex/1553. The contract amount agreed was Kshs. 18 million. According to the Plaintiff that amount was paid by the Defendant upfront. The Plaintiff commenced its work. When the building was at fourth floor it was pleaded that the Defendant stopped the work thereby breaching the contract. The Plaintiff pleaded that at the time the work was stopped it had installed machines and other equipment for construction of pillars and roofing which machines and equipment could not be removed from site to be used elsewhere. The Plaintiff therefore claimed damages at Kshs. 25,000/- per day from the date of the stoppage.
3. The plaint as stated before was dated 5th February 2013 and was filed in Court on 5th March 2013.
4. On 6th March 2013 a day after the plaint was filed the Defendant filed a Third Party Notice which strangely was dated 6th February 2013. That was a day before the date reflected in the plaint.
5. The defence was dated 6th March 2013 and filed the same dated.
6. On 10th April 2013 the Plaintiff and the Defendant filed a consent in the following terms-

“CONSENT

We the undersigned have the honour to request that the following consent be recorded:-

1. ***THAT the Judgment be and is now entered for the Plaintiff against the Defendant as follows:-***

(a) Damages for breach of contract Kshs. 9,250,000.00

(b) Party & Party agreed costs Kshs. 250,000.00

TOTAL 9,500,000.00

***2. The judgement sum be paid upon conclusion of the
third party proceedings.***

DATED at MOMBASA this 10th day of April 2013.

KIPROP CHERUIYOT & CO. ADVOCATE

ADVOCATES FOR THE PLAINTIFF

OJODE UDOTO & ONJORO

ADVOCATES FOR THE DEFENDANTS.

7. The parties that are named as Third Parties have filed a Notice of Motion dated 19th April 2013 which is under consideration in this ruling. The Plaintiff and the Defendant's Advocates though served more than a month before the hearing date with that Motion did not file any documents in opposition and did not attend the hearing of that Motion.
8. The Third Parties now pray for the striking out of the Third Parties Notice on the ground that leave as required by Order 1 Rule 15(1) of the Civil Procedure Rules 2010 was not sought or granted. Rule 15(1) provides as follows –

“Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)-

- a. ***that he is entitled to contribution or indemnity; or***
b. ***that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or***
c. ***that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them,***

he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.”

9. There was no compliance with that Rule and it is no wonder that the Plaintiff and the Defendant did not oppose the Motion nor attend the hearing. At this stage the Court does not have clear evidence that the Plaintiff and the Defendant in filing this suit were abusing the Court process. The Court however does entertain some suspicion in view of the quick succession of the filing of documents as stated above. This however is just mere suspicion.

10. In the end the Third Party's Notice dated 6th February 2013 addressed

to **SOLOMON AMIANI** and **RENATA SERNEELS** and filed in Court on 6th March 2013 is hereby struck out and expunged from the Court record. **SOLOMON AMIANI** and **RENATA SERNEELS** are granted costs of the Notice of Motion dated 9th April 2013 which shall be paid by the Defendant.

Dated and delivered at Mombasa this 1st day of November, 2013.

MARY KASANGO

JUDGE