



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 2 OF 2019

JACKSON SAGLIGRAM BABURAM,

SIRIRAM BABURAM, DAVID JAGATRAM BABURAM,

and CAROLSATYA BABURAM STADEL

(Suing as the Legal Representatives of the Estate of

RAEL CHEMELI BABURAM)PLAINTIFFS

VERSUS

SUERECA EAST AFRICA LIMITED 1ST DEFENDANT

LAKE VICTORIA SOUTH WATER SERVICES BOARD..... 2ND DEFENDANT

RULING

The 1st Defendant filed a Chamber Summons application dated 31st May 2019 seeking to be struck out from the suit, any other orders as fit to meet the ends of justice and that the costs of this application be provided for. According to the 1st Defendant, it entered into a contract with the 2nd Defendant to provide consultancy services for the supervision of a project known as Long Term Action Plan (LTAP) Phase I Works, Kisumu supply and sanitation project; and it was merely an agent of the 2nd Defendant not involved in any disbursements of any monies to any persons.

The Defendant avers that the compensation paid to individuals in whose lands the pipes were laid down was done by the 2nd Defendant and its contractor Zhonghao Overseas Construction Company Limited. That the Plaintiffs have admitted and duly pleaded that the 1st Defendant was an agent working for a disclosed principal, therefore no cause of action has been disclosed against the 1st Defendant. That the case against the 1st Defendant is an abuse of the court process, frivolous and vexatious.

The General Manager of the 1st Defendant swore a supporting affidavit averring that the Plaintiffs have admitted in their plaint that the 1st Defendant was only the agent of a disclosed principal. That the Plaintiffs and their Advocates have always known and referred to the 1st Defendant as agents of the 2nd Defendant. A series of letters was attached to show that this was the position. That the project included intrusion into private lands to lay pipes and compensation of the owners by the 2nd Defendant. A schedule of compensation of persons affected by the project was attached.

PLAINTIFFS' RESPONSE

One of the Plaintiffs, Siriram Baburam, swore a replying affidavit dated 20th June 2019 in opposition to the application. He averred that the joinder of the 1st Defendant was proper, having been a party that carried out the actions that form part of the instant suit and from whom they sought various reliefs.

That although the 1st Defendant was an agent of the 2nd Defendant, there was no guarantee that the illegal actions the Plaintiffs raised against the 1st Defendant – trespass, nuisance, illegal acquisition of property, and breach of constitutional right to property - were authorised by the 2nd Defendant, particularly in the absence of an admission to that effect by the 2nd Defendant. That it was apparent from the 1st Defendant's supporting affidavit that it was seized with the responsibility issuing compensation for acquisition of the suit property which made it a necessary party.

That the 1st Defendant in its statement of defence admitted to holding an alleged compensation of Kshs 244,550/= and that in the event that the 1st Defendant is to deposit the sums in court, it shall be necessary that it remains a party to this suit.

1st Defendant's Submissions

Counsel for the 1st Defendant filed written submissions, submitting that the 1st Defendant was wrongly joined in this suit as it was merely acting as the duly authorised agent supervising works for a disclosed principal. That the Plaintiff have also admitted this fact in Paragraphs 8 and 15 of their plaint. That no evidence had been adduced to show that the 1st Defendant acted in its own capacity.

Counsel submitted that there had been a disclosure by the 1st Defendant to the Plaintiffs of the principal on whose behalf its actions were undertaken. That the general rule is that an agent of a disclosed principal cannot be held personally liable with few exceptions being where fraud, misrepresentation or deceit are alleged; commission of murder; and where a liability of the principal is discharged. That none of the exceptions arises in this case.

Counsel cited **Victor Mabachi & Another v Nuturn Bates Ltd [2013] eKLR** and **Anthony Francis Wareheim t/a Wareham & 2 others v Kenya Post Office Savings Bank Civil Application Nos. Nai 5 & 48 of 2002.**

Plaintiffs' Submissions

Counsel for the Plaintiffs filed written submissions, submitting that the general rule that an agent of a disclosed principal cannot be held personally liable for wrongful acts committed in the course of its contract was subject to exceptions, one of them being where fraud, deceit, criminal or tortious acts are committed by the agent.

Counsel cited **National Social Security Fund Board of Trustees v Akhan Holdings Limited & 2 others [2006] eKLR** for the proposition that someone acting on behalf of a principal may incur personal liability in tort as well as imposing vicariously or attributed liability upon his principal.

Counsel submitted that this suit is predominantly about the manner in which the 1st Defendant entered and acquired the suit property, damaged the Plaintiffs property thereon, and illegally laid pipes on the property.

Counsel submitted that the 2nd Defendant had not even entered appearance or confirmed the 1st Defendant's averments. That without the admission of the 2nd Defendant on the actions of the 1st Defendant, no other conclusion could be arrived at other than that the 1st Defendant acted on its own and ought to be held liable, and thus the 1st Defendant was a necessary party.

Counsel cited **Pizza Harvest Limited v Felix Midigo [2013] eKLR** and **Elisheba Muthoni Mbae v Nicholas Karani Gichoni & 2 others [2014] eKLR** on the issue of what makes a party necessary – that there must be a right to some relief against the party and it should not be possible to pass an effective decree in the absence of such a party.

Counsel submitted that the 1st Defendant is aware of the illegalities committed against the Plaintiffs, is seized of the issue of compensation for the acquisition of the property, and it has indicated that there is an alleged sum of Kshs. 244,500/= to be deposited in court. That presence of the 1st Defendant was necessary and helpful to the complete and effectual determination of the issues in dispute. That it was therefore necessary for the 1st Defendant to remain a party to this suit.

Issues for Determination

1. General liability of an agent for a wrongful act

Regarding the general liability of an agent for a wrongful act, *Halsbury's Laws of England Vol. 1 (2017)* at Paragraph 165 provides guidance as follows:

“Any agent, including a public agent, who commits a wrongful act in the course of his employment, is personally liable to any third person who suffers loss or damage thereby, notwithstanding that the act was expressly authorized or ratified by the principal, unless it was deprived of its wrongful character. It is immaterial that the agent did the act innocently and without knowledge that it was wrongful except in case where actual malice is essential to constitute the wrong.”

The court in **National Social Security Fund Board of Trustees v Ankhan Holdings Limited & 2 Others [2006] eKLR** cited with approval the decision of the House of Lords in **Williams and another v Natural Life Health Foods Ltd and another [1998] 2 All ER 577** at 582 which held that:

“Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal.”

It follows therefore that an agent may be personally liable for tortious acts committed in the course of its employment. The cases cited by Counsel for the 1st Defendant in which the courts held that an agent to a disclosed principal may not be sued involved causes of action arising from contracts.

2. *Whether the alleged wrongful acts are attributable to the 1st Defendant*

The 1st Defendant averred that its contract with the 2nd Defendant was for the supervision of the water supply and sanitation project, and that compensation for landowners of properties where the pipes were laid was handled by the 1st Defendant and the contractor, Zhonghao Overseas Construction Company Limited. Among the affidavit evidence was the 1st Defendant's letter in response to the Plaintiffs' demand letters which read as follows:

"...we wish to inform you that our role during the Construction Works you indicate in the letter was clearly outlined in the Works Contract for the project."

The position of the 1st Defendant, as it had also pleaded in the Statement of Defence it filed in the main suit, is that its role in the project was strictly limited to supervising the laying of the pipes and rehabilitation and refurbishment of water supply pumps; and not the acquisition of property and/or compensation of landowners.

The burden of proving this fact lay squarely on the 1st Defendant, and this burden would have easily been discharged if the Works Contract was produced to show the terms of the contract between the 1st Defendant and the 2nd Defendant. The 1st Defendant failed to tender any evidence shedding light on its exact role in the project.

As is provided under Section 109 of the Evidence Act:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall be on any particular person."

At this stage, based on the evidence placed before the court so far, there can be no conclusive holding on whether the alleged wrongful acts alleged by the Plaintiffs are attributable to the 1st Defendant or a different agent of the 2nd Defendant.

3. *Whether the 1st Defendant is a necessary party*

Delvin J in *Pizza Harvest Limited v Felix Midigo* [2013] eKLR cited with approval the case of *Amon v Raphael Tuck & Sons Ltd?*(1956) 1 All ER 273:

"What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party."

This suit is predominantly about the legality of the acquisition of the property on which pipes were laid and the manner in which entry was conducted and the Plaintiffs' property was treated. The Plaintiffs seek relief in the form of a proper way leave agreement, restoration of the premises, compensation for loss of value for the property and general damages for trespass nuisance and breach of the rights to property.

As the role of the 1st Defendant as agent of the 2nd Defendant in the project has not been clarified, the 1st Defendant could be bound by the result of this action in so far as the alleged tortious acts are concerned. The questions regarding the alleged tortious acts are not likely to be effectually and completely settled unless the 2nd Defendant remains enjoined in this suit. The upshot of the foregoing is that the application ought to be, and is hereby dismissed with costs.

DATED AT KISUMU THIS 10TH DAY OF DECEMBER 2020.

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE