



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MAKHANDIA & MUSINGA, J.J.A.)

CIVIL APPEAL NO. 118 OF 2012

BETWEEN

TRIPLE I & K LIMITED.....APPELLANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

MILICONS LIMITED..... 2ND RESPONDENT

NATIONAL COUNCIL FOR SCIENCE AND TECHNOLOGY ...3RD RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (J.B. Havelock, J.) dated 19th December, 2011

in

H.C.C.C. No. 428 of 2011)

JUDGMENT OF THE COURT

1. On 29th September 2011 the appellant filed a suit against the respondents, jointly and severally, seeking judgment for Kshs.12,312,860 plus interest and general damages for breach of contract. The genesis of the suit was an invitation to tender for building of a perimeter wall around the premises known as L.R. No. 22395 owned by the 3rd respondent. The invitation to tender was done through the Ministry of Public Works.
2. The appellant successfully tendered for the said project and commenced work as per the signed contract. However, on 19th October, 2010 the 3rd respondent wrote to the appellant halting the building work, when the appellant had done more than 25% of the work. The 3rd respondent re-advertised the tender and the same was eventually awarded to the 2nd respondent. Being aggrieved by the 3rd respondent's termination of the contract, the appellant filed the aforesaid claim.
3. Together with the plaint, the appellant also filed an application seeking a temporary injunction to restrain the 2nd respondent from commencing or continuing with the work, pending hearing and determination of the suit.
4. The 1st respondent also filed an application seeking to have his name struck out of the proceedings, arguing that he had been wrongfully sued on behalf of the 3rd respondent, which is a statutory body established under **section 3 of the Science and Technology Act, Cap 250 Laws of Kenya**, with power to sue and be sued, and which had already engaged its own advocate in the matter.
5. The two applications were heard by Havelock, J. Dismissing the appellant's application, the learned judge held that it was improper for the appellant to seek damages in its plaint, specific or general damages, and at the same time seek injunctive orders. The trial court concluded that the appellant had not made out a prima facie case with a probability of success against the 2nd respondent.
6. Regarding the 1st respondent's application, the learned judge rejected the appellant's contention that the Attorney-General had been sued as representing the Ministry of Public Works, since it was the one that had sought invitations for the tender. The Court agreed that the 3rd

respondent was a statutory body with capacity to sue and be sued; and had even engaged its own advocate. Consequently, the 1st respondent's application was allowed, with the result that the Attorney General's name was struck out of the proceedings under **Order 1 rule 14** of the **Civil Procedure Rules, 2010**.

7. The appellant, being aggrieved by the said ruling, preferred an appeal to this Court. The appellant faulted the learned judge for making final determination on issues at an interlocutory stage; for holding that there was no cause of action disclosed against the Attorney General; and for failing to appreciate or apply the principles that guide trial courts in applications for temporary injunctions.

8. When the appeal came up for hearing, **Mr. Njengo**, learned counsel for the appellant, told the Court that the appellant was no longer pursuing the grounds of the appeal challenging dismissal of its application. The appellant's appeal was therefore limited to the striking out of the Attorney General as a party to the suit.

9. Relying on his written submissions, counsel cited **Order 1 rule 3** of the **Civil Procedure Rules, 2010**, which states as follows:

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, if separate suits were brought against such persons any common question of law or fact would arise.”

10. Counsel further submitted that it was the Ministry of Public Works that had advertised the tender and since ministries are ordinarily represented by the Attorney General, the latter was rightfully joined as a defendant.

11. **Ms. Munyi**, learned counsel for the 1st respondent, submitted that there was no act or transaction or series of acts or transactions between the appellant and the 1st respondent to warrant joinder of the latter as a defendant to the suit.

12. Counsel further argued that there was no specific claim, cause of action or remedy sought by the appellant from the 1st respondent or any of the ministries on behalf of which the 1st respondent had been sued; that the 3rd respondent is a statutory body, with capacity to sue and be sued and had retained its own advocate in the matter.

13. Regarding the appellant's argument that the tender advertisement was issued by the Provincial Works Officer under the Ministry of Public Works, Ms. Munyi submitted that this was a standard procedure; it is however the letter of acceptance that originates from the 3rd respondent as well as the signing of the contract that binds the 3rd respondent and not the 1st respondent. For those reasons, counsel urged the Court to dismiss the appeal.

14. **Mr. Odoyo**, learned counsel for the 2nd respondent, who also held brief for **Mr. Cheboiwo** for the 3rd respondent, adopted Ms. Munyi's submission that the 3rd respondent has capacity to be sued.

15. The issue for determination in this appeal is just one: whether the Attorney General, the 1st respondent, was rightfully struck out as a defendant to the appellant's suit. A perusal of the plaint reveals that the 1st respondent was joined as a defendant to the appellant's suit because, as pleaded in paragraph 6 of the plaint, **“The, invitation to tender was done through the Ministry of Public Works.”**

16. In his application seeking to be struck from the proceedings, the 1st respondent advanced four main arguments:

“(i) THAT the 1st Defendant has been sued on behalf of the 3rd Defendant i.e. The National Council for Science and Technology, which is a statutory body established under section 3 of the Science and Technology Act, Cap 250 of the Laws of Kenya.

(ii) THAT there are no allegations or claims against the 1st Defendant i.e. the ATTORNEY General of Kenya.

(iii) THAT the 3rd Defendant herein has already engaged the services of an independent advocate who has since come on record and filed the relevant pleadings on behalf of the 3rd Defendant.

(iv) THAT no party will be prejudiced by the 1st Defendant being struck out of the present proceedings.”

17. In considering whether the 1st respondent was rightly joined as a defendant to the suit, we have to determine whether, in terms of the provisions of **Order 1 rule 3** of the **Civil Procedure Rules, 2010** (which we have already cited) if a separate suit were brought against the 1st respondent any common question of law or fact would arise as against the three respondents.

18. We do not think so. The mere fact that the invitation to tender was advertised by the Ministry of Public Works, per se, cannot found a cause of action as against the 1st respondent and therefore no common question of law relating to the cancellation of the tender by the 3rd respondent and the subsequent award of the same to the 2nd respondent can arise if the appellant had chosen to file separate suits against the three respondents.

19. The appellant does not dispute that: the 3rd respondent is a statutory body established under **section 3** of the **Science and Technology Act**; that it has not made any specific allegation against the 1st respondent; that no relief has been sought against the 1st respondent; and that

the 3rd respondent is represented by its own counsel and not the Attorney General. In those circumstances, we cannot see any basis for faulting the learned judge for granting the 1st respondent's application to strike out the Attorney General from the proceedings. It is clear that the Attorney General ought not to have been joined as a defendant.

20. Consequently, this appeal is bereft of merit and is dismissed with costs to the respondents. It is so ordered.

Dated and delivered at Nairobi this 9th Day of November, 2018.

W. OUKO, (P)

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR