



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, KIAGE & MURGOR, JJA)

CIVIL APPEAL NO. 71 OF 2013

BETWEEN

DEWDROP ENTERPRISES LIMITED.....APPELLANT

AND

CITY COUNCIL OF NAIROBI.....1ST RESPONDENT

BOMCO BUILDING AND

CONTRACTORS LIMITED.....2ND RESPONDENT

(Appeal from the ruling and orders of the High Court of Kenya at Milimani of Njagi,

J.) dated 31st July 2012 in

Civil Cause No. 892 of 2009)

JUDGMENT OF THE COURT

The appeal is from the decision of the High Court in respect of two applications brought by the appellant against the 2nd and 3rd respondents by way of Chamber Summons dated 27th April 2010 and 13th July 2010 under **order VI rule 13 (1) (b)** of the retired **Civil Procedure Rules** (now **order 2 rule 15** of the **Civil Procedure Rules 2010**) and **section 3A** of the **Civil Procedure Act**. The brief background to the applications is that the appellant filed a plaint on 9th December 2009 where it claimed that, on or about 22nd December 2005, the 1st respondent contracted it to carry out structured cabling installation of the 1st respondent's City Hall Building which had been gutted by fire. The contract sum was stated to be Kshs 7,499,999.55. The appellant contended that it carried out and delivered a portion of the cable installations and was issued with a certificate of payment for Kshs.996,251.40. On 9th May 2006, the appellant was paid a sum of Kshs.711,360.87 by the 2nd respondent, the main contractor of the 1st respondent, which sum it stated, was exclusive of Value Added Tax (VAT) of Kshs.133,276.04, Retention fee of Kshs.96,625.13 and Withholding Income Tax of Kshs.24,989.26.

As a consequence the appellant filed a claim against the 1st respondent and the 2nd respondent, the for the sums allegedly withheld, together with a sum of Kshs.885,253.75 for installation items delivered on site

before 19th April 2006; Kshs.1,413,191.37 for installation items delivered on site before 24th August 2006 and a further Kshs.2,155,482.19 for loss of income for installation items not supplied on account of the 1st respondent's breach of contract.

Prior to hearing of the substantive suit the appellant sought various orders in the two applications, both of which were heard together and determined by the learned judge, Njagi, J, in a ruling dated 31st July 2012. In the first Chamber Summons dated 27th April 2010 orders sought were that;

1. *The 2nd Defendant's defence be struck off (sic) for being frivolous, vexatious, and an abuse of the court process;*
2. *The 2nd Defendant do pay the plaintiff Value Added Tax of Kshs 133,276.04*
3. *The 2nd Defendant do issue the plaintiff with a Withholding Income Tax certificate for Kshs 24,989.26;*
4. *Costs of the application be in the cause.*

The application was premised on the grounds that the 2nd respondent had illegally refused to pay VAT and issue a Withholding Tax certificate to the appellant in respect of the paid sum of Kshs. 996,251.40.

The application was supported by an affidavit of the appellant's Managing Director, **Edward Thiong'o Wachira** sworn on 27th April 2010 and a supplementary affidavit sworn on 3rd June 2010 where it was deponed, without prejudice that, on 9th May 2006, the 2nd respondent had paid the appellant a sum of Kshs.711,360.87, following which the 2nd respondent advised the appellant that the aforementioned payment comprised the value of the appellant's deliveries of Kshs.966,251.30 less VAT of Kshs.133,276.04, retention fee of Kshs.96,625.13 and Withholding Income Tax of Kshs. 24,989.26. It was further deponed that on 2nd August 2006, the 2nd respondent requested the appellant for a VAT invoice for the value of the deliveries, and on 9th August the appellant provided Invoice Number BBCC01 for Kshs.966,251.40 and which was accepted by the 2nd respondent; that despite demand and notice of intention to sue, the 2nd respondent had neglected to pay VAT as demanded, or to issue the Withholding Tax certificate for Kshs.24,989.26.

In a replying affidavit sworn on 11th May 2010 by **Tarsem S. Devgun**, a director of the 2nd respondent, it was concluded that the appellant was awarded a sub contract for the delivery of structured cabling by the Nairobi City Council, the 1st respondent, and that though the averments in Mr. Wachira's affidavits were true, the sums of Kshs.96,625.13 and Kshs 24,989.26 were retained by the 1st respondent and not by the 2nd respondent, and that the appellant should therefore direct its demands to the 1st respondent, who was responsible for the deductions and remittances to the Kenya Revenue Authority.

In a replying affidavit sworn on 25th June 2010, **Engineer S.K. Mburu**, the City Engineer for the 1st respondent deponed that the 1st respondent had not entered into any contract with the appellant on 22nd December 2006 and therefore, the 1st respondent was not in breach of any contract with the appellant. Furthermore, that it had not received any letter from the 2nd respondent concerning VAT and Withholding Tax and that it had not withheld any tax as alleged by the 2nd respondent; and finally, that the 1st respondent had not contracted the 2nd respondent to act as its agent with regard to the alleged contract with the appellant.

By way of a second Chamber Summons dated 13th July 2010 the appellant sought orders that;

- “ 1. *The 1st Defendant's written statement of Defence dated 28th January 2010 be struck off for being frivolous, vexatious and an abuse of the court process;*

2. *The Honourable Court be pleaded to enter judgment in favour of the plaintiff against the 1st Defendant as prayed in the plaint for Kshs 4,708,817.74 together with compound interest thereon at the rate of 3% per month from 28th June 2006 until payment in full;*

3. *That the costs of this application be in the cause.*”

The application was grounded on the premises that the 1st respondent's defence dated 28th January was a nullity and could delay a fair trial as it was illegally drawn by an unqualified person.

The application was supported by the affidavit of Mr. Wachira dated 9th June 2010 where it was deponed that by 29th March 2010 Abwao Eric Odhiambo, Advocate for the 1st respondent had not paid for his 2010 practicing certificate and was therefore unqualified to act as an advocate for the appellant; that the written statement of defence offended the provisions of **sections 9, 31, 33, and 34** of the Advocates Act and **order III rule 1** of the retired **Civil Procedure Rules**. It was further averred that following its successful prequalification of a contract for structured cabling installations, on 22nd December 2005, the 1st respondent awarded the appellant the contract; and that despite fulfilling the terms of the contract the 1st respondent had neglected to pay the sums particularized in the plaint.

In a replying affidavit sworn 21st November 2010, Abwao Eric Odhiambo swore a replying affidavit on behalf of the 1st respondent where it was deponed that, he was a qualified advocate employed by the 1st respondent as legal Counsel and Assistant Director, Legal Affairs, and therefore the 1st respondent's statement of defence did not offend against the provisions of the Advocates Act; that the application dated 13th July 2010, did not disclose any cause of action.

In response, the 2nd respondent filed Grounds of Objection dated 21st July 2010, on the basis that the suit and the application were an abuse of the court process, that the application was defective in law and that no proper cause had been disclosed against it. In a replying affidavit sworn on 11th August 2010, Mr. Devgun averred that the appellant's applications were res-judicata as the appellant had filed similar applications in the magistrate's court being *SRMCC NO. 13180 of 2006*; that though the 2nd respondent was the main contractor of the 1st respondent, the appellant was specifically subcontracted by the 1st respondent, and was paid its dues. It was averred that the defence raised triable issues which should be determined by way of a trial.

The learned judge delivered a ruling dated 31st July 2012, in respect of both applications, and in dismissing the first application the learned judge found that the 2nd respondent's Statement of Defence raised triable issues one of which touched on the relationship between the parties.

On the second application, the learned judge was satisfied that since Abwa Erick Odhiambo was an assistant Director Legal Affairs of the 1st respondent, and was admitted to the roll of Advocates Advocate, he met the requisite conditions of **section 10 (a), (b), (c) and (d)** of the Advocates Act, and was eligible to file the statement of defence on behalf of the 1st respondent. Furthermore, that the contention that the statement of defence lacked merit had no legal basis. The court also found that the appellant's case was not plain and straightforward so as to warrant the striking out of the 1st respondent's defence.

The appellant was aggrieved by the court's decision and has appealed to this court on grounds that the learned judge erred in law and in fact in failing to order the 2nd respondent to pay the admitted sum of Kshs.158,265.30; in failing to find that the 2nd respondent did not file its Statement of Defence in the proper court; in failing to find that the 1st respondent was vicariously liable for the 2nd respondent; in holding that there were triable issues; in failing to find that the 1st respondent's advocate was an unqualified person within the meaning of the Advocates Act, in finding that the 1st respondent's Statement of Defence did not offend sections 31 and 33 of the Advocates Act; and in failing to allow the appellant's applications.

The appellant filed written submissions on 10th April 2013, while the 1st respondent filed theirs on 10th May 2017, and the 2nd respondent filed theirs on 9th December 2016. When the appeal came before us **Mr. Edwin Wachira**, the appellant's director, **Ms. Omesa** learned counsel for the 1st respondent and **Ms. Judith Guserwa** learned counsel for the 2nd respondent stated that they would rely entirely on their written submissions.

We have considered the pleadings and submissions and are of the view that there are two issues for determination in the first application, which are, whether the 2nd respondent admitted owing the sum of Kshs. 158,265.30 in its defence, and whether the 2nd respondent failed to file its Statement of Defence in the proper court.

And in respect of the second application, we consider that there are three issues for determination, which are whether the defence should have been struck out for failing to disclose any triable issues; whether the 1st respondent was vicariously liable for the acts of the 2nd respondent, and finally, whether the 1st respondent's Advocate was an unqualified person within the meaning of the Advocates Act as at 29th March 2010, such that the Statement of Defence filed by its Advocate, was rendered null and void.

Beginning with whether the 2nd respondent admitted owing the sum of Kshs.158,265.30, comprising VAT of Kshs.133,276 and Withholding Tax of Kshs. 24,989.26, the appellant has argued that the 2nd respondent's defence is a mere denial, which does not raise any triable issues. In addition, that the 2nd respondent's replying affidavit of 11th May 2010 admits to illegally withholding the sums due.

The appellant singled out paragraph 5 of the 2nd respondent's replying affidavit as resulting in an admission of the averments set out in its affidavit in support of the application, which averments generally outlined the chronology of events surrounding the alleged withheld sums. The appellant therefore sought that judgment be entered against the 2nd respondent in respect of these sums.

Order 2 rule 11 of the Civil Procedure Rules deals with admissions and denials. **Subrule (11) (1)** is concerned with allegations of fact made by a party in their pleading. It specifies that they are deemed to be admitted by the other party unless traversed by that party in their pleading or by a joinder of issue under **rule 10** which operates as a denial. A traverse is express and is made either by denial or by a statement of non-admission.

In the case of **Crescent Construction Company Limited vs Caltex Oil Kenya Limited [2016] eKLR**, this Court cited the position enumerated in **Tea Board of Kenya vs Gideon Asirigwa Mbagaya [2015] eKLR** and **Herta Elizabeth Charlotte Nazari vs Herta Elizabeth Charlotte Nazari [1984] eKLR** and observed that;

“An admission ought to be determined from the analysis of entire pleadings and not just portions of any one of them.”

In the instant case the appellant relied on the averments in the 2nd respondent's replying affidavit yet, in its defence the 2nd respondent stated that;

“The 2nd Defendant further denies the Plaintiff's claim as stated in paragraph 6 of the Plaintiff and further denies that the sum of Kshs.711,360.87 alleged to have been paid to the Plaintiff was exclusive of Value Added Tax of Kshs.133,276.04 retention fee of Kshs.96,625.13 and withholding tax of Kshs.24,989.26 was withheld by them and not the 1st respondent (Nairobi City Council) and puts the Plaintiff to strict proof.”

Relying solely upon the 2nd respondent's replying affidavit, without due regard to its defence wherein it had clearly, unambiguously and specifically traversed and denied owing the appellant the sums withheld, amounted to a selective construal of the pleadings by the appellant. Needless to say, the learned Judge

properly considered the pleadings in their entirety, including the 2nd respondent defence, and in our view, correctly declined to enter summary judgment merely on the basis of the averments in the 2nd respondent's replying affidavit.

This brings us to the issue of whether or not the 2nd respondent filed its statement of defence without leave of the court. Having considered the first application and the submissions that were before the learned judge it is apparent that the issue was not pleaded, canvassed or indeed determined by the High Court. Since a party is bound by its pleadings, we are of the view that the issue is not within our remit for determination.

The next issue in respect of the second application is whether there were triable issues, and whether the 1st respondent was vicariously liable for the acts of the 2nd respondent.

As did the learned Judge, we refer to the leading authority on the issue which is the case of **D.T. Dobie & Company (Kenya) Ltd vs. Muchina, (1982) KLR 1** in which Madan, JA (as he then was) stated inter alia;

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way,” Sellers LJ. (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.

It was Madan JA's further view that;

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

In the case of **Crescent Construction Co. Ltd. vs Delphis Bank Ltd Civil Appeal No. 146 of 2001** this Court stated;

“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the Court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”

In its plaint, the appellant alleged that the 2nd respondent had illegally retained sums in respect of VAT and withholding tax. In its defence, the 2nd respondent denied withholding the disputed sums, and instead claimed that it was the 1st respondent that owed the appellant the various sums. On its part the 1st respondent denied owing the appellant any sums whether through the 2nd respondent or at all.

The question that becomes apparent from the respondents' pleadings is whether or not the appellant is entitled to the sums claimed, and if so, who between the 1st and 2nd respondent was responsible for the payment of VAT of Kshs.133,276 and Withholding Tax of Kshs.24,989.26. These are matters that will require to be discerned from the evidence of the parties both viva voce and documentary. We agree with the learned judge that, there is an issue touching on the relationship between the parties, and the manner of payment of the various sums, which the court should have an opportunity to interrogate, based on all the material placed before it. And only once the relationship between the parties is ascertained can the

court be in any position to determine whether the 1st respondent was vicariously liable to the 2nd respondent. As a consequence, we are satisfied that the learned judge rightly declined to dismiss the 2nd respondent's defence upon finding that there were triable issues for determination by the court.

The next issue is whether Abwao Eric Odhiambo, Advocate who filed the statement of defence was an unqualified person. The appellant's complaint is that Abwao Eric Odhiambo, Advocate had not paid for a practicing certificate for the year 2010 in accordance with **section 22 (1) (b)** of *the Advocates Act*, which offended the provisions **of section 31 and 33** of the *Advocates Act*. At the time of filing the statement of defence, therefore, he was an unqualified person thereby rendering all the 1st respondent's pleadings null and void- See ***R.N. Mucira & Co Advocates vs Mbo-I-Kamiti Co Ltd [2010] eKLR***.

Section 10 of the *Advocates Act* specifies when a person is deemed to be qualified to act as an advocate. The section provides;

“Each of the following persons shall, if he holds one of the qualifications specified in subsections (a), (b) and (c) of section 13 (1) at the time of his appointment to his office, be entitled in connection with the duties of his office to act as an advocate, and shall not to that extent be deemed to be an unqualified person, that is to say-

(a) an officer in the Attorney General's Office;

(b) the Principal registrar of Titles and any Registrar of Titles; or

(c) any person holding office in a local authority established under the Local Government Act.”

In the affidavit sworn by the Mr. Odhiambo it was averred that he was the 1st respondent's Legal Counsel and Assistant Director, Legal Affairs; that he was qualified to act as an Advocate in connection with the duties of his office in accordance with **section 10** of the *Advocates Act*. In support of this averment, a copy of a Certificate of Admission dated 13th September 2001 was attached.

As such, at the time Mr. Odhiambo prepared and filed the defence, he was already an advocate. But more specifically, the appellant's complaint was that he was an unqualified person within the meaning of the Act as he had not paid for his practicing certificate for the year 2001 in accordance with **section 22 (1) (b)** of the *Advocates Act*. Yet, **section 13 (c)** makes it clear that he was entitled to act as an advocate in connection with the duties in the Nairobi City Council, which is a local authority, and to that extent was deemed to be a qualified person.

The circumstances of this case can be distinguished from the case of ***R.N. Mucira & Co Advocates vs Mbo-I-Kamiti Co Ltd (supra)***. There, Mr. Mucira was an advocate who carried on his private practice despite being incompetent and unqualified to act as an advocate having been suspended from practice by the Disciplinary Committee of the Law Society of Kenya, and who since 2001 had not been in possession of a valid practicing certificate.

Recently, in the case of ***National Bank of Kenya vs Anaj Warehousing Limited [2015] eKLR***, the Supreme Court finally clarified the meaning of an 'unqualified persons' under the *Advocates Act*, and the resultant effect on any document that was drawn by such persons, when it stated that ***“... documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes”***.

Needles to say, in the instant case, we consider that **section 31 and 33** of the *Advocates Act* which prohibits an unqualified person to act as an advocate or to cause any summons or other process to issue or to institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction, was inapplicable to the circumstances of this case, and we so find.

Accordingly, there is no reason to interfere with the exercise of judicial discretion by the learned Judge in his determination of 31st July 2012. We find that the appeal is without merit, and is dismissed with costs to the 1st and 2nd respondents.

It is so ordered.

Dated and delivered at Nairobi this 6th day of October, 2017.

W. OUKO

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JUDGE OF APPEAL

P.O.KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Deputy Registrar.