



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

CAUSE 811 OF 2018

PETER GORDON HORSEY.....CLAIMANT

VERSUS

CIVICON LIMITED.....RESPONDENT

CONSOLIDATED WITH

CAUSE 785 OF 2018

JASON HORSEY.....CLAIMANT

VERSUS

CIVICON LIMITED.....RESPONDENT

RULING

The applicant herein filed two applications in Cause 785 of 2018 and 811 of 2018 against Jason Horsey and Peter Horsey, seeking the following Orders:

1. That the Statement of Claim dated 18th May 2018 be dismissed and/or struck out in its entirety.
2. That the costs of the Application and of this suit be in the cause.

The applications are premised on grounds that the claim does not disclose a reasonable cause of action against the Respondent and that the Respondent is not the Claimant's employer. In Cause 785 of 2018, it states that the employment contract tendered as evidence by the Claimant in this matter identifies the employer as Civicon Kenya Limited and not Civicon Limited. In Cause 811 of 2018 it avers that the employment contract tendered as evidence identifies the employer as Civicon Africa Group Limited and not the Respondent, Civicon Limited. That the claim is prejudicial and embarrassing to the Respondent considering it had no contract with the claimant. The applications are supported by the affidavit of Ben Kiilu, the Respondent's Acting Chief Executive Officer sworn on 10th May 2019 in which he reiterates the averments on the face of the application.

In response to the application, each claimant filed a Replying Affidavit sworn on 10th July 2018. They depose that Civicon Limited and Civicon Kenya Limited are one and the same thing and that the name Kenya is often appended to the name Civicon Limited to differentiate it from other Civicon Limited companies, all subsidiaries of Civicon Africa Group Limited.

The claimants aver that at all times the Respondent was their employer as evidenced in their P9 forms, which were used to make their statutory tax deductions for the year 2017. Further, one of the claimants, Jason Horsey, avers he tendered his resignation as the Respondent's Chief Executive Officer on 26th July 2017 and 2nd August 2017 and that the Respondent responded to the resignation letters. In addition, the Respondent informed Jason by letter dated 17th October 2017 of his last working day and its intention to settle his salary arrears. Peter Horsey on his part avers that he tendered his resignation to the Respondent in his letter dated 18th September 2017.

The application was canvassed by way of oral submissions by Counsel Omulo for the Respondent and Counsel Odongo for the Claimant.

Both Counsel mainly addressed the Court in respect of the documents produced by the parties in both the Applications and the Statements of Claim.

Determination

The Respondent/Applicant in the instant application avers that it was not the claimants' employer. In Cause 811 of 2018, the applicant avers that the evidence tendered by the Claimant identifies his employer as Civicon Africa Group Limited. In Cause 785 of 2018, it avers that the evidence by the claimant identifies his employer as Civicon Kenya Limited and not Civicon Limited.

From the documents annexed by the Respondent in Cause 811 of 2018, the Employment Contract dated 19th March 2012 provides that the Respondent was employed by Civicon Africa Group Limited. In his Replying Affidavit he avers that the respondent, which was his employer is a subsidiary of Civicon Africa Group Limited.

In Cause 785 of 2018, the Employment Contract annexed to the claim states that the Claimant was employed by Civicon Kenya Limited. The Respondent contests this and avers that the name "Kenya" is often appended to the name Civicon Kenya to differentiate it from other Civicon Limited Companies.

Save for the Certificate of Incorporation for Civicon Limited issued on 17th October 1975, the Applicant herein did not provide any document to prove that it did not engage the Respondents as its employees. The Court appreciates that in the documents produced in Cause 785, the Claimant in his resignation letter dated 26th July 2017 addressed to the applicant stated that he was resigning as the Chief Executive Officer of Civicon Africa Group Limited. In acceptance of this resignation letter and that dated 15th August 2017 the Board Chairman of the Respondent accepted the resignation and stated that the Claimant was to hand over to Ben Kiilu, who swore both Supporting Affidavits.

The law on striking out pleadings was summarised by the Court of Appeal in its ruling in ***Kiranga Estates Limited –V- National Bank of Kenya Limited (2017) eKLR*** –

"It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations.

Although the court exercises discretionary powers in striking out pleadings, because of its far reaching consequences, **Order 2 Rule 15** of the Civil Procedure Rules, has established clear principles which guide the court in the exercise of that power in the following terms;

"15.(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

a. it discloses no reasonable cause of action or defence in law; or

b. it is scandalous, frivolous or vexatious; or

c. it may prejudice, embarrass or delay the fair trial of the action; or

d. it is otherwise an abuse of the process of the court....and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be." (Our emphasis).

The language as highlighted demonstrates that, as a drastic measure in litigation, the remedy must be resorted to sparingly. It is only where a pleading cannot be salvaged by an amendment that the court will utilise this procedure, hence the use of the word "may". **Order 2 rule 15** which retains word for word

Order VI rule 13 of the repealed Civil Procedure Rules has been construed over the years in a long line of cases, both by this Court and the courts below. For instance in **Co-Operative Merchant Bank Ltd. vs George Fredrick Wekesa** Civil Appeal No. 54 of 1999 the Court summarized the principles as follows::

"The power of the Court to strike out a pleading under Order 6 rule 13(1)(b), (c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact....A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment."

The principles set out in this case are what guide courts in deciding an application for striking out pleadings.

In the instant case, there are two applications for striking out on the basis that the person sued being Civicon Limited is different from the person who entered into the employment contracts with the claimants being Civicon Kenya Limited. The applicant who is the respondent in the claim has produced the Certificate of Incorporation of Civicon Limited. The claimants (respondents in the application) state that the two

companies are one and the same and trade in various names being Civicon Limited, Civicon Kenya Limited and Civicon Africa Group Limited. The correspondences in the file reveal yet another entity Civicon Engineering Africa, which accepted the resignation of Jason Horsey for and on behalf of Civicon Limited. The Constitution of Civicon Africa Group Limited states in the objects clause that –

“5. OBJECTS

To acquire the entire issued share capital or no less than ninety per centum (90%) of the Issued share capital In, but not limited to, Civicon Limited (Incorporated in Kenya), Civicon Limited (incorporated in Mauritius), Civicon United (incorporated in South Sudan), Civicon Limited (incorporated in Uganda), Civicon Limited (incorporated in Rwanda) and Truckoll Limited (incorporated in South Sudan) (the "Target Companies") through the issue of shares In the Company to the holders of shares In the Target Companies b exchange for the shares held by them In the Target Company or alternatively through the issue of shares of the Target Companies directly to the Company.

To hold the above Investment and any other Investment that the board may decide from time to time.

To do at such other things as are incidental or conducive to the attainment of the above objects.”

Although claimants’ employment contracts refer to the employer as Civicon Africa Group Limited and Civicon Kenya Limited respectively, the Income Tax Deduction cards were by Civicon Limited. The letters of resignation were also to Civicon Limited. The said resignations were acknowledged, accepted and responded to by Ndungu Gathinji, Board Chairman for Civicon Limited and Ben Kiilu, Acting Chief Executive Officer – Civicon Limited who is also the deponent of the affidavits in support of the two applications where he describes himself as Acting Chief Executive Officer of Civicon Limited. Were Ben Kiilu and Ndungu Gathinji responding to resignations from strangers?

From the foregoing and going by the guidelines of the Court of Appeal in **Kivanga Estates Limited**, I find that the applications for striking out are not merited. They in fact border on abuse of court process.

I thus dismiss both applications with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE