



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO.54 OF 2002

ANTILAL D. KUKADA

T/A RAIYA CONSTRUCTIONS.....PLAINTIFF

=V E R S U S=

1. MALINDI HOLIDAY RESORT LTD.....1ST DEFENDANT

2. EMIEL VAN DE WERF.....2ND DEFENDANT

3. PAUL PETERS.....3RD DEFENDANT

R U L I N G

The second defendant was arrested and brought before this court on 26.8.2002 under a Warrant of Arrest issued by my brother Hon. Omwitsa, Commissioner of Assize. He is supposed to show cause why he should not furnish security for his appearance until this suit is disposed of. The main suit was filed on 13.8.2002. The claim is for a liquidated sum of Kshs.2,032,065/- plus interest being the amount due and owing from the defendants jointly and severally to the Plaintiff as on 31.5.2002. It is said to be in respect of retention moneys held by the defendants for building construction works and materials undertaken and/or supplied by the plaintiff for and to the defendants at Vera Cruz in Malindi in 1999.

The first Defendant is described as a limited liability company incorporated in Kenya and having its registered office at Malindi. The 2nd and 3rd Defendants are described as directors of the first Plaintiff. The liability or cause of action clause against the 2nd Defendant is found in clause number five of the Plaint.

It states:-

“The 2 nd and 3 rd Defendants are the Directors of the 1 st Defendant and upon whose personal requests, directions and warranties, the plaintiff undertook all relevant building construction works and supplied material at the 1st Plaintiff’s (sic) business premises known as ‘The Vera Cruz’ at Malindi and

hence they are sued in their personal capacities and as directors jointly and severally with the 1st Defendant herein."

I have perused the contractual documents upon which the claim is based.

They include:-

1. A Certificate of Completion – marked KDK.1
2. A Certificate of completion – marked KDK.2.
3. Correspondence – letters marked 'KDK.3', 'KDK.4', KDK.5' & 'KDK.6'

Annexure 'KDK.1 & 2' are the original contractual documents. They effectively state that the Plaintiff had on 23.12.1999 completed the works shown thereon and was entitled to payment of the sums shown thereon amounting to Kshs.528,000/-. Annexure KDK.2 is shown on it as connected to KDK.1, thus forming the full contract between the parties herein. It revises the outstanding amount to Kshs.1,200,000/-. The 2nd and 3rd Defendant have signed the contract document 'KDK.1' as directors. They also have signed 'KDK.2', which I have already shown is part and parcel of 'KDK.1' without indicating that they did so as directors.. Letters from the 2nd Defendant to the Plaintiff marked 'KDK.3', 'KDK.4' and 'KDK.6' have also been so signed in his capacity as director. The substance of the three letters is the promise to pay the sums due to the Plaintiff.

The Plaintiff's argument and basis in trying to make the 2nd and 3rd Defendants personally liable although they are directors of the 1st Defendant is that the two gave personal warranty to pay the money due from the company. The Plaintiff first pointed out to annexure 'KDK.2' which is a contractual document forming part of 'KDK.1' and argued that 'KDK.2' was signed by the 2nd & 3rd Defendants as individuals and that no company seal was used. I have considered that argument but find it too extended. It does not represent what the court sees in those two documents. The two documents cannot be separated as the 2nd is only an extension of the first and in my view and logically, must have been signed exactly in the manner and capacity that the first one was executed. Otherwise it makes no sense and cannot be part or extension of 'KDK.1'. I do not therefore find in the material before me anything that would prima facie suggest that the Second and/or 3rd Defendant, at any stage, as related to the contract in reference, acted in any other capacity other than that of company director. May be the Plaintiff will have adequate evidence to prove the liability averred during the full hearing but on the face of things at this moment, that is not shown and cannot be assumed.

The 2nd Defendant was arrested before judgment and was required to show cause why he cannot furnish security for his appearance. When he appeared before this court, it was submitted on his behalf that the arrest was not justified because there is no cause of action shown in the plaint and from the evidential material placed before the court by the Plaintiff. He argued that he is and always acted as a director of a limited company, the First Defendant. He argued that the contract upon which the cause of action is alleged and averred in this case was only between the 1st Defendant and the Plaintiff. As I have already made a finding hereinabove, the 2nd Defendant's allegation on the basis of the affidavit material before the court, is correct and acceptable. There is no doubt however, that the 2nd Defendant was about to leave the jurisdiction of this court when he was arrested. There is adequate and undeniable evidence that the 1st Defendant through the 2nd and 3rd Defendant, is in negotiations to sell the only property the 1st Defendant may have in this jurisdiction although with a promise to also clear the debt

claimed herein. This means that at the end of the day if the Plaintiff obtains a judgment, even against the 1st Defendant only, it will have no property to fall on to recover the proceeds of the judgment unless the 2nd and 3rd Defendants as directors make good their promise. This is a very unfortunate situation and the court feels sympathy. However, the courts are not merely sympathy-driven. They are courts of law as laid down by legislation and precedents.

In this kind of case however the court must be satisfied on two points. The first is that the Plaintiff has a cause of action which is prima facie unimpeachable, subject to his proving the allegations in his plaint and secondly, that the court has reason to believe on adequate material that unless jurisdiction is exercised to arrest the defendant, there is real danger that the defendant will remove himself from the ambit of the powers of the court. As shown already the second condition was satisfied. However, not the first, since I am of the view, which is also my finding, that the Plaintiff has no prima facie cause of action against the 2nd Defendant. He accordingly had no right to seek the remedy he sought against him in the first place. Put it another way, the 2nd Defendant has succeeded in showing good cause why he should not furnish security for his appearance. I order him released from the obligation of the said Warrant forthwith.

It is so ordered.

Dated and delivered at Malindi on the 23rd day of September, 2002.

D. A. ONYANCHA

J U D G E

Delivered in the presence of:-

Mr. Ochieng - for Plaintiff

Mr. Mouko - for Defendants



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