



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Misc. Civ. Appli. 502 of 2007

RESTORES CONSULT.....APPLICANT

VERSUS

SEDCO CONSULTANTS LIMITED..... 1ST RESPONDENT

ARSHAD-UL-HAQ..... 2ND RESPONDENT

AL HAQ HOLDINGS LIMITED.....3RD RESPONDENT

R U L I N G

The application is a Chamber Summons dated 25th March, 2008. It has been brought under Order 1 rule 10(2) and 13 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks the following orders.

1. THAT the 2nd and 3rd Respondents are non-suited in this matter.
2. THAT this Honourable Court be pleased to strike out the 2nd and 3rd Respondents from this suit.
3. THAT costs of this application be provided for.

The grounds for the application are namely:

- (a) The 1st Respondent (the Managing agent of the 3rd Respondent) instructed the Plaintiff to levy distress for rent arrears upon tenants in the 3rd Respondent premises.
- (b) The Plaintiff acted upon these instructions and is now seeking to tax its bill on work done.
- (c) The 2nd and 3rd Respondents were in no way involved in the above and are this strangers to this suit.
- (d) The 2nd and 3rd Respondents never entered into any contract within the Plaintiff.

The application is supported by an affidavit sworn by ARSHAD UL HAQ dated 25th March, 2008. The gist of the affidavit is that the 3rd Respondent Company, which owns the suit premises, instructed the 1st Respondent to manage and collect rent over the premises. The Deponent avers that he is a director of the 3rd Respondent. He deposes that neither he nor the 3rd Respondent gave any instructions to the

Applicant to levy distress over the suit premises.

The application is opposed.

The Applicant with the Bill, Simon Kanure Kibue trading as Restores Consult, a firm of auctioneers, swore the replying affidavit dated 7th May, 2008. The gist of the affidavit is that the 1st Respondent instructed the Applicant with the Bill and was an agent of the 2nd and 3rd Respondents who owned the suit premises. Mr. Kibue deposes further that the authority of the 1st Respondent was not restricted and that therefore the application should be dismissed.

I have considered the submissions by Mr. Wambugu for the 2nd and 3rd Respondents with the application, and Mr. Kimani for the auctioneer. Mr. Wambugu's submissions were wanting as he made inconclusive submissions. Mr. Wambugu's clients case is however the stronger one.

It has been admitted by the auctioneer that he received instructions from the 1st Respondent, to levy distress for rent. The instructions are not exhibited. It is not clear how the auctioneer brought in the 2nd and 3rd Respondents to this miscellaneous application. The 2nd Respondent is a director of 3rd Respondent which owns the suit premises. That cannot be a reasonable ground to bring him into the suit. As director of the 3rd Respondent, bringing him into the suit at this stage amounts to lifting the corporate veil. The lifting of the corporate veil is premature. It can only be lifted on application. The procedure adopted by the Applicant was irregular.

Regarding the 3rd Respondent, the auctioneer is clear that he dealt with, the 1st Respondent, an Agent of an undisclosed principle. As long as the principle the 3rd Respondent is not shown to have been disclosed, then the auctioneer cannot go after the 3rd Respondent.

The 2nd and 3rd Respondent did not instruct the auctioneer. The auctioneer should file his bill of costs only against his instructing client. That being the case I allow the application dated 25th March, 2008 and strike out the 2nd and 3rd Respondents from the Bill of Costs filed herein.

Due to circumstances of the case, each party should bear its own costs.

Dated at Nairobi, this 5th day of December, 2008.

LESIT, J.
JUDGE

Read, signed and delivered, in the presence of:

Wambugu for the 2nd and 3rd Respondents

Mr. Kimani for the auctioneer

LESIT, J.
JUDGE

