



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 378 OF 1988

CONSOLIDATED MARINE CONTRACTORS LTDAPPLICANT

VERSUS

SAMHERE T/A SAMHERE CONSTRUCTION COMPANY.....RESPONDENT

RULING

This is an application by the plaintiff under order VI rule 13(1) Civil Procedure Rules that the defendant's defence be struck off and judgment be entered for the plaintiff for shs 439,763/45 being the hiring charges of the plaintiff's bulldozer by the defendant.

The defendant is sued in his individual capacity but he is shown in the plaint as trading as "Samhar Construction Company" which in turn is described as "a firm of contractors".

The statement of defence raises two defences – one that the wrong party has been sued because the plaintiff dealt with a limited liability company namely Semhar Construction Company Limited and not with the defendant individually. The second defence is that the said limited liability company was subcontracted by Ramco Construction Company Limited who had been employed by Taita – Taveta Teachers Development Company Ltd and the plaintiff was aware of the payment arrangements between the employer, main contractor and sub-contractor and is aware that Samhar Construction Company Limited has not been paid by the main contractor. The defendant does not dispute the plaintiff's claim that it is owed the sum claimed. Indeed, in paragraph 11 of the defendant's replying affidavit, he admits that the plaintiff performed its work and that the plaintiff's claim is not in dispute.

The plaintiff has annexed the contract between it and the defendant which defendant admits to have signed. The contract is in form of a letter addressed to the defendant in his own name and is asked by the plaintiff to sign if he agrees to all the conditions. The defendant then signed in the space provided for "Semhar Construction Company". In that contract the defendant agreed to pay the plaintiff's weekly certificates within 5 weeks. Mr Atoni the Director of the plaintiff company depones that the defendant kept silent in his defence about his connection with Semhar Construction Co Ltd; that he did not enter into a contract with that company and that plaintiff has always known the defendant as described in the plaint. The defendant in his replying affidavit now discloses that he is a director and shareholder of Semhar Construction Co Ltd.

The defendant's appearance in his individual name was filed by a firm of advocates. That appearance

was not conditional – that is it was not “under protest”. There was no application by defendant prior to the plaintiff’s present application for the striking out of the service and the summons to enter appearance. The contract does not show that it was entered into between the plaintiff and a limited liability company as there is no company seal nor any indication that the defendant signed as an official / director of a limited liability company. The contract document was in fact addressed to the defendant as an individual.

The plaintiff disputes that a limited liability company described by the defendant exists. Although the defendant states that such a company exists, he did not give details of the limited liability company such as when it was incorporated, its directors nor exhibit the certificate of incorporation. He did not also exhibit any letter-head bearing the name of the company or give its address of service.

Even if such a company exists, the defendant does not say that he was acting with authority of the company and within the scope of his employment.

In law, if the defendant makes contracts in his own name without disclosing the name of the principal or the existence of the principal, he is personally liable on the contract though he may in fact be acting on behalf of a principal.

He would continue to be liable even after discovery of the agency by the plaintiff unless and until there has been unequivocal election by the plaintiff to look to the principal along – *Halsbury’s Laws of England*, 4th Ed Vol I, para 853.

The defendant states in paragraph 10 of his replying affidavit that payment to the plaintiff was conditional on his being paid by the main contractors. He does not state so in his defence. The contract between the plaintiff and the defendant is not related to the building contract. The contract does not contain such a term and the correspondence exhibited by the defendant does not show that such a term was subsequently incorporated into the contract.

The conduct of the plaintiff of waiting until the defendant is paid and his conduct in pleading with the owners of the project to pay the defendant so that the defendant could pay the plaintiff merely shows that the plaintiff was being realistic. The conduct does not amount to an unequivocal election to look for the owners of the project for payment.

For reasons stated above, the defendant’s defence does not disclose a reasonable defence. The defence is also frivolous.

I allow the application with costs to the plaintiff, strike out the defence and enter the judgment for the plaintiff against the defendant for shs 439,763/45 with costs and interest.

Dated and Delivered at Mombasa this 19th December, 1990

E.M. GITHINJI

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JUDGE



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