Case Number:	Civil Case 720 of 2006
Date Delivered:	18 Dec 2007
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Ruling
Judge:	
Citation:	SEGWICK KENYA INSURANCE BROKERS v PRICE WATER HOUSE COOPERS KENYA [2007] eKLR
Advocates:	-
Case Summary:	..
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 720 of 2006

SEGWICK KENYA INSURANCE BROKERS……..PLAINTIFF

VERSUS

PRICE WATER HOUSE COOPERS KENYA…….DEFENDANT

RULING

The Defendant, **PRICE WATER HOUSE COOPERS, KENYA** (sued as a firm) has by a chamber summons dated 23rd April, 2007 sought to have the plaint struck out and the suit dismissed. The application is expressed to be brought under Order VI rule 13(1)(a) and 16 of the Civil Procedure Rules. There are two grounds for the application namely.

1) The Plaintiff has no *locus standi* and is therefore not entitled to sue in these proceedings and;

2) The plaint discloses no reasonable cause of action.

The application is opposed. The Plaintiff, Sedgwick

Kenya Insurance Brokers Limited, has filed five grounds of opposition dated 3rd May, 2007. The grounds are:

1. The Plaintiff has *locus standi* and has a cause of action apparent on the face of the pleadings.

2. The application as drawn and filed lacks merit and it is stratagem contrived to delay the trial of the matter.

3. Striking out is a draconian measure that should be exercised with caution. This is not a proper case of striking out and the suit should proceed to full hearing on its merit.

4. No prejudice would be suffered by the Defendant if the matter proceeds to hearing.

5. It is in the interest of justice that the matter be heard on evidence for effectual and final determination of the suit.

The Plaint in this case was filed on 28th December, 2006. In it the Plaintiff avers that it contracted the services of the Defendant to carry out an annual audit for the financial year commencing 1st January, 2002 to 31st December, 2002 and that the Plaintiff was relying on the Defendant to exercise all due skill, care and judgment and to carry out the audit to national and international standards. The Plaintiff avers that the Defendant was negligent in the manner in which it carried out the audit. The Plaintiff pleads in

the alternative that the Defendant was fraudulent. The particulars of negligence and of fraud are also pleaded. The Plaintiff seeks damages, special damages to the tune of Kshs.21,000,000/= for damage occasioned by the Defendant's negligence and breach of Contract.

In the Defendant's statement of defence filed on 7th March, 2007 the defendant denies that it owed any duty of care to the Plaintiff, or that it acted in breach of duty or of contract. The Defendant avers further that if the Plaintiff suffered any damages, it was not caused by the alleged breaches by the Defendant. The Defendant went ahead to plead the particulars of the reasons why the Defendant could not have caused any breaches as alleged. The Defendant denied the particulars of negligence, fraudulent, misrepresentation and fraud. The Defendant further averred that it's statutory and contractual duty to the Plaintiff for the audit did not extent to giving absolute assurances or detecting all material misstatements in financial statements or accounting records and further that being post-event analysis, the audit could not lead to the alleged losses claimed by the Plaintiff.

The Plaintiff did file a reply to the defence on 1st March, 2007 in which it joined issues with the Defendants statement of defence.

The Applicant was represented in this application by Mr. Gachuhi while Mr. Kimondo opposed the application on behalf of the Plaintiff/Respondent.

Mr. Gachuhi argued only one ground, that the Plaintiff had no locus to file the suit. Mr. Gachuhi submitted that only members of the Plaintiff Company could sue the Defendant because it was those members who appointed the Defendant Auditors during the AGM. Counsel submitted that any duty of care owed by the Defendant, was owed to the members of the Plaintiff Company and not the Company. Mr. Gachuhi submitted further that likewise, any breach of duty on any of the statements made in the audit report could only be taken up by the members. Mr. Gachuhi relied on Section 159(1) and Section 162(1) and (2) of the Companies Act. The two sections provide:

"Section 159(1)

Every Company shall at each annual general meeting appoint an auditor to hold office from the conclusion of that, until the conclusion of the next, annual general meeting

Section 162(1)

The auditors shall make a report to the members on the accounts examined by them, and on every balance sheet, every profit and loss account and all group accounts laid before the company in general meeting during their tenure of office, and the report shall contain statements as to the matters mentioned in the Seventh Schedule.

Section 162(2)

The auditors' report shall be read before the company in general meeting and shall be open to inspection by any member."

Mr. Gachuhi also relied on two authorities **CAPARO INDUSTRIES PLC VS DICKMAN & OTHERS [1990] 1 ALLER** 568 at page 569 where it was observed:

"Auditor's statutory duty to prepare accounts was owed to the body of shareholders as a whole, the purpose for which accounts were prepared and audited being to enable the

shareholders as a body to exercise informed control of the company and not to enable individual shareholders to buy shares with a view to profit. It followed that the auditors did not owe a duty of care to the Respondents either as shareholders or as potential investors in the Company. The appeal would therefore be allowed and the cross-appeal dismissed."

Counsel also relied on **COAST PROJECTS LIMITED VS M. R. SHAH CONSTRUCTION (K) LTD (2004)** 2 KLR 119 where **Omolo, O'Kubasu JJA** and **A. O. Otieno Ag. JA** held:

"In an application to strike out a defence 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 and without oral evidence tested by cross-examination in the ordinary way."

Mr. Kimondo in response submitted that even though auditors were appointed by members of a Company, they work for and on behalf of the Company and the Members. He submitted further that the work done by the auditors relates to the management of the Company which is vested in the Board of Directors who are the mind and will of the Company. Counsel submitted that in the circumstances the action challenging the auditors could only be brought by the Company. Mr. Kimondo submitted that as wrongs done by the auditors affects the Company, the members by themselves could not bring an action against them except in few exceptional circumstances not captured by the circumstances of this case. Mr. Kimondo said that there was a second aspect of the application which was the fact the Court was being asked to look at the pleadings and form an opinion that the Plaintiff had no cause of action. Counsel relied on the case of **D. T. DOBIE & COMPANY (K) LIMITED VS MUCHINA [1982] KLR 1** where the Justices of Appeal **Madan, Miller** and **Potter JJA** described "reasonable cause of action" as follows:

"1. The words "reasonable cause of action" in Order VI rule 13(1) means an action with some chance of success, when the allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim and prayer.

2. The words "cause of action" means an act on the part of the Defendant which gives the Plaintiff his cause of complaint.

Counsel also relied on the case of **COAST PROJECTS LIMITED VS MR. SHAH CONSTRUCTION (K) LIMITED**, Supra, as did Mr. Gachuhi.

Mr. Kimondo opposed Mr. Gachuhi's contention that the suit was based entirely on the audit report. Counsel drew the Court's attention to paragraph 5 of the Plaint where allegation of fraud and collusion are pleaded and paragraph 4 where allegations of negligence are pleaded.

Mr. Kimondo submitted that a Court should aim at sustaining rather than terminating a suit at an interlocutory stage. He relied on **COAST PROJECTS LIMITED,** Supra. Counsel also relied on **HEDLEY BYRNE COMPANY LIMITED VS HELLER & PARTNERS LIMITED [1963] 2 ALLER 575** where it was held:

"Although in the present case, but for the Respondent's disclaimer, the circumstances might have given rise to a duty of care on their part, yet their disclaimer of responsibility for their replies on the occasion of the first inquiry was adequate to exclude the assumption by them of a

legal duty of care, with the consequence that they were not liable in negligence."

Mr. Kimondo also relied on the case of **K.C.B VS KABITA T/A ODONGO KABITA VALUERS [2002]2 KLR 419** where **Ringera J**, as he then was, held:

"1. The Defendant as a professional duly instructed by the Plaintiff owed a duty of care to the Plaintiff since he knew that a professional opinion which the plaintiff would rely on was required.

2. The Defendant was also in breach of that duty in that he did not proceed to value the property in accordance with the ordinary standard of care, skill and diligence expected of a professional valuer.

3. Although to err may be human, for a professional to err as a result of not applying professional skills and tools is negligence. The Defendant had been negligent and he had caused loss to the Plaintiff."

Mr. Kimondo sought to distinguish the instant case from the case of **CAPARO INDUSTRIES,** Supra, cited by Mr. Gachuhi. Mr. Kimondo submitted that auditors owe no duty of care to share holders or existing members of a Company who may rely on their report on present or future investment. Mr. Kimondo contended that in the instant suit it was the competence of the Defendant and the quality of its staff who prepared the audit report which was being questioned and not the entire opinion given in the audit report. Counsel urged the Court to find that such matters could only be convassed at a full trial.

I have carefully considered the divergent views expressed by both Counsels in their submissions, the cases relied upon, the pleadings and the application. There are only two issues in this application.

1) Whether the Plaintiff has *locus standi* to sue the Defendant, and;

2) Whether the Plaintiff has a reasonable cause of action

In paragraph 2 of the defence, the Defendant avers

2. The Defendant admits it signed an engagement letter with the Plaintiff's Board of Directors but denies that the audit services were contracted for the Plaintiff as alleged in paragraph 3 of the plaint.

In the submissions made by Mr. Gichuhi for the Defendant, the Defendant/Applicant was saying that the Defendant firm was appointed by the members of the company during the AGM. This submission is a departure from paragraph 2 of the defence in which the Defendant avers that its services were engaged through a letter by the Plaintiff's Board of Directors. As noted, the Court has no benefit of seeing the said letter since the application is expressed to be brought under Order VI rule 13(1)(a) of Civil Procedure Rules. In **CAPARO INDUSTRIES LIMITED,** Supra, the House of Lords held:

"1) The three criteria for the imposition of a duty of care were foreseeability of damage, proximity of relationship and the reasonableness or otherwise of imposing a duty. In determining whether there was a relationship of proximity between the parties the court, guided by situations in which the existence, scope and limits of a duty of care had previously been held to exist rather than by a single general principle, would determine whether the particular damage suffered as the kind of damage which the Defendant was under a duty to prevent and whether there were circumstances from which the court could pragmatically conclude that a duty of care

existed."

The issue of proximity of relationship is a live issue in the instant case. On the one hand the Defendant contends that if any duty was owed by it, it could only have been owed to the members of the Company who appointed them. That position, that the members of the Company appointed the Defendant firm, was a shift from the Defendant's pleadings especially in paragraph 2 of the defence. The Defendant is not clear who appointed him, whether shareholders or the Board of Directors.

The Plaintiff's position is somewhat different; that the Plaintiff Company appointed the Defendant and that it did so through it's officials, not shareholders and therefore the Plaintiff Company had capacity and *locus standi* to sue. On the point of proximity of relationship, in view of the contentious nature of the submissions by both counsel, which submissions are divergent, I do find that this issue cannot be resolved without a detailed analysis of the evidence and documents in the case. It is not a matter that can be determined before the Court is fully informed though discovery and oral evidence. I do find that the issue whether or not there was proximity of relationship and/or privity of contract, is a triable issue that should be determined during the trial.

On the second issue whether the Plaintiff has a 'reasonable cause of action' again the House of Lords decision in **CAPARO INDUSTRIES PLC**, supra, is quite illuminating. The Court has to determine whether the Defendant owed any duty of care to the Plaintiff and whether there was negligence. The Court has to determine whether the damages suffered, if at all, was foreseeable and whether imposing a duty of care on the Defendant was reasonable. Quite apart from the issues revolving around the issue of negligence, the Court will have to determine other issues, whether there was a breach of Contract, whether there was fraud or collusion involved and whether the Defendant applied professional skills and tools to the required standard.

All these issues are highly contentious. They are not issues that could be determined at an interlocutory stage as each party will need to adduce evidence and produce documents in support of their case. In the result, I do find that this is not a plain and obvious case, which can be proceeded on and concluded on an interlocutory application.

Having come to that conclusion I do find that the best order to make is to dismiss the application with costs to the Respondent.

Dated at Nairobi this 18th day of December, 2007

LESIIT, J

JUDGE

Read, signed and delivered in the presence of:

Mr. Kimondo for the Plaintiff/Respondent

Mr. Mahat for the Defendant in open Court.

WARSAME, J

JUDGE