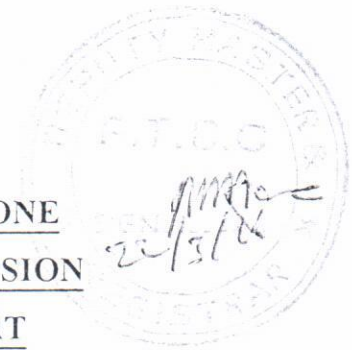




IN THE HIGH COURT OF SIERRA LEONE
COMMERCIAL AND ADMIRALTY DIVISION
FAST TRACK COMMERCIAL COURT



Case No: FTCC 076/15

BETWEEN:

XINGWANG BUSINESS LTD - PLAINTIFF

AND

KINGHO INVESTMENT COMPANY - DEFENDANT

REPRESENTATION

C. F. MARGAI & ASSOC.

TANNER LEGAL ADVISORY

- Counsel for the Plaintiff

- Counsel for Defendant

BEFORE THE HON. MR. JUSTICE SENGU M. KOROMA J.
RULING DELIVERED ON THE 22nd MARCH, 2016.

1. This is an application by way of Notice of Motion dated the 17th day of December, 2015 praying for the following orders:-

1. That the matter herein be disposed of on a point of law to wit:

A Whether or not the Plaintiff fraudulently misrepresented itself as a registered Company to the Defendant?

2. That if the answer to 1 (a) above is in the affirmative that the action against the Defendant be struck out.

3. Whether or not the Plaintiff can assign the contract without the consent of the Defendant.

4. That if the answers to 1 (a) and 3 above are in the affirmative and negative respectively, that damages be assessed by the Honourable Court and awarded to the Defendant.

5. That this Honourable Court orders a stay of all further or other proceedings to this action pending the hearing and determination of this application.

6. Any further orders or reliefs as this Honourable Court may deem just.

7. That the costs of this application be costs in favour of the Defendant/Applicant.

2. This application is supported by the affidavit of Zhao Tuig sworn to on the 17th December, 2015 together with the exhibits attached thereto. There is a supplemental Affidavit sworn to by the Zhao Tuig on the 4th day of January, 2016.

3. Mr. Zhao Tuig deposes as follows:

a. That the Applicant herein is a registered Mining Company with operations in the Tonkolili District. Copies of the Certificate of Incorporation, Business Registration, Change of name and Tin Registration marked ZT5 a-d"

b. That the Applicant entered into a contract in December, 2013 with the Respondent for the construction of a Road from Mabonto to Masobin including concrete culverts and bridges and the Mabonto Village Square pavement for the total sum of **\$3,460,930.00 (Three Million Four Hundred and Sixty Thousand Nine Hundred and Thirty United States Dollars)**

c. That a search in the Registry revealed that the Respondent incorporated as a Company in August, 2015 as evidenced by Exhibits "ZT6 "ZT7"and "ZT8" respectively.

- d. That due to the fact that the Respondent registered as a Company in August, 2015 it had clearly misrepresented itself to the Applicant at the time of entering into the contract in December, 2013.
- e. That the Applicant was induced to enter into the contract as a result of the Respondent's misrepresentation.
- f. That the Respondent violated several clauses of the contract particularly clauses 3 and 8
- g. That the Respondent hired a sub contractor without the consent of the Applicant.
- h. Mr. Zhao Tuig finally deposes that despite the Respondent breaching the contract in hiring a sub -contractor, the Respondent in a technical assessment and evaluation Right carried out by Techsult and company Limited, were adjudged to have failed to carry out the job contained in it. The Plaintiff did not file an affidavit in opposition but was in court and opposed the application.

ISSUES FOR DETERMINATION

- 4. The Applicant has applied to this Court for the matter herein to be disposed of on a point of law namely; whether or not the Plaintiff fraudulently misrepresented itself as a registered company and that if the answer to the question is in the affirmative, that the action be struck out.
- 5. The Respondent adds another issue: whether the Applicant can move his application without leave of the court.
- 6. For convenience, I shall deal with the last issue first because if the Respondents' argument is upheld, it will not serve any useful purpose to determine the other two issues.
- 7. Whether the Applicant can move this application without leave of the court.
- 8. Counsel for the Respondent submits that technically, leave ought to be granted to the Applicant to argue for this matter to be disposed of on a point of law. He refers this Court to the provisions of Order 17 of the High Court Rules, 2007. Counsel for the Applicant on the other hand argues that there is nothing in Order 17 that makes it mandatory for leave to be obtained. Counsel for the Respondent in support of his submission also cites the case of **Abdul Karim Seray Wurie V. The Attorney-General and Minister of Justice and Charles F. Margai CC 164/13 (2013) w No. 3 (unreported)**

9. I have carefully perused at Order 17 of the High Court Rules, 2007 and hold the view that an application can be made under this provision without leave of the court.
10. This view finds support in the English Supreme Court Practice, 1999 paragraph 14^A/2/12 in these words:-“an application for determination of a question or construction may be made by the party or the Court may make such determination on its own motion. The Court may proceed to make such determination at any stage of the proceedings.”What the learned judge in the **Abdul Karim Seray Wurie** case is saying is that the suitability of the application under Order 17 must first be established (Order 17) (1) (a) and that this issue ought to be addressed by an Applicant in his submission. There is no mention of the need to seek to leave of the Court; the requirement of the Rule could be properly fulfilled in the course of submission by Counsel.
11. Having held that the Applicant can make this application without leave, I shall now proceed to determine the first issue which is whether the matter could be disposed of on point of Law, namely whether or not the Plaintiff misrepresented itself as a registered Company and if the answer to the question is in the affirmative, that the action be struck out.
12. On this point, Counsel for the Applicant, Brima Koroma Esq. submits as follows:
 - a) That the Respondent was not a registered company at the time it entered into the contract and therefore violated clause 3 of the contract.
 - b) That the Respondent made the representation in order to secure the contract and refers this Court to CHITTY on Contracts-General/ Principles, paragraph 273 at page 131 and paragraph 276 at page 133 in a bid to establish that the Respondent made a misrepresentation to the Applicant and the Applicant acted on that misrepresentation by signing the contract. Counsel for the Applicant further submits that the misrepresentation made was is fraudulent and refers the Court to CHITTY on Contracts, General-Principles, paragraph 278/279 under the rubric “Fraudulent Misrepresentation: Claims for Damages or Fraud” Counsel for the Applicant argues that the contract between the Applicant and the Respondent amounts to a pre incorporation contract. Counsel for the Applicant finally cites provisions of the companies Act, 2009 and Boyle and Birds, Company Law

4th Edition chapter 5 on capacity to bind a company. He concluded that on the basis of the foregoing submissions, the action, herein be struck out.

13. R. B. Kowa Esq., Counsel for the Respondent in reply submits as follows:

- a) That the Applicant has not clarified the provision under which he is making his application.
- b) That there is no provision in the Laws of Sierra Leone for an action to be struck out on the basis of such an application. He refers to Order 17 Rule (2) which provides that "upon the determination the court may dismiss the cause or matter or make such order or Judgement as it thinks first."
- c) That an allegation of fraud must be strictly proved and as such can only be determined at a trial
- d) There is a need for witnesses to prove or disprove of the allegations made by Counsel.

14. The procedure under Order 17 of the High Court Rules, 2007.

- a) The Defendant must have filed a defence
- b) The question of law or construction is suitable for determination without a full trial of the action (Rule 1 (a) and (b))
- c) Such determination will be final as to the entire cause or matter or any claim or issue.
- d) The parties had an opportunity of being heard on the question of law or have consented to an Order or Judgement made on such determination.

15. Among these requirements, the most important for our present purpose is whether the question of law or construction is suitable for determination without a full trial. The case of the **KORSO FINANCE ESTABLISHMENT ANSTALT -V- JOHN WEDGE** (unreported, February 15, 1994, see **English Supreme Court Practice, 1999**) paragraph 14^A/2/5 laid down the principle that "if a question of construction will determine whether an important issue finally is suitable for determination under Order 14A (Order 17 of our Rules) and where it is a dominant feature of the case, a Court ought to proceed to so determine such issue."

16. My understanding of this principle is that the Applicant must first establish whether an issue will finally determine the matter. Until and unless that is established, the court cannot properly move to dispose of the matter on a point of law.

17. I will at this junction dispose of the submissions made by Counsel for the Respondent that the Court cannot strike out a matter during an application under Order 17 of the High Court Rules, 2007. I disagree with him: both applications can be combined. The Court has the case management power to strike out pleadings or an action under Order 21 of the High Court Rules, 2007 and may also strike out under its inherent power. It is established practice that an Applicant can combine a strike out application with an application for Summary Judgment. If an application for strike out is unsuccessful, the Applicant may have a second bite at the Cherry if he can show that the other party's case has no real prospect of success. It should however be noted that an application to strike out under the Courts inherent jurisdiction is a grave powerful tool to head of litigation and save costs, but litigators should be cautious about strike out applications. The Courts use the power sparingly. Furthermore, the Court's application of the overriding objective means that they will not interfere with the administration of the Justice unless there is a very good reason. Strike out is very much an order of last resort. Where a party's case is defective or have not complied with court rules, there are other mechanisms within the High Court Rules to deal with it other than strike out e.g. amendment, request for further information, disclosure and witness statements. Striking out can only be made for plain and obvious cases. **Sir Thomas Bingham MR in E (A MINOR) -V- DORSET CC (1995) 2 AC 633** considering the interrelationship between strike out and Order 14A (Order 17 of our Rules) expressed unease at deciding legal principles without knowing the full facts.

CONCLUSION

I am satisfied that the Applicant has raised serious legal issues to be determined in this matter but however these do not amount to issues that will finally determine this matter without a full trial. In my view the issues such as; was the entering into the contract predicated on whether the Respondent was not a Company at the material time, and has the contract being ratified, following on this, has fraud being strictly proved? - All of these questions cannot be properly answered at this point. What is needed to resolve these issues is a trial where each party will have an opportunity to call witnesses.

DECISION

In the circumstances, I order as follows:

1. Application for disposal of the matter herein on a point of law is hereby refused.
2. Application to strike out the matter herein is dismissed.
3. The matter is set down for trial within (7) seven days of the date of this Order.
4. Costs in the cause.
5. Matter adjourned to Wednesday, 20th April, 2016.



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Hon. Mr. Justice Sengu Koroma (J.)