

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 492 OF 2012

MULTI CHOICE KENYA LIMITED.....PLAINTIFF

VERSUS

MAINKAM LIMITED.....1ST DEFENDANT

JAMES MAINA KAMAU2ND DEFENDANT

JUDGMENT

1. Digital Satellite Television Service (DSTV) is a direct broadcast satellite service and is fairly popular in Kenya. Multichoice Kenya Limited (The Plaintiff or Multichoice) is a support service provider in Kenya to the operator of DSTV and from time to time imports goods related to DSTV service. This suit is a claim based on alleged unpaid customs duty, valued added tax(VAT) and the import clearance expenses.

2. It is the case of Multichoice that in the year 2009 it engaged Mainkam Limited (Mainkam or the 1st Defendant) as a clearing and forwarding agent to assist it in clearing various goods, in particular satellite dishes and decoders. The arrangement, it is averred by the Multichoice, was that Mainkam would advise it of the sums due to Kenya Revenue Authority (KRA) in respect to customs duty and VAT, and expenses to other third parties related to clearance. Mainkam would raise invoices which would include these taxes and charges whereupon Multichoice would make payment on each invoice.

3. It is asserted by Multichoice that sometime in the year 2012, and arising from routine investigations conducted by KRA, it came to light that Multichoice owed KRA substantial sums of money on account of unpaid taxes. That it was revealed that various consignments of goods (hereinafter imputed consignments) were cleared without payment of due taxes or by use of falsified or forged documents. The particulars of those consignments are set out in the plaint.

4. The case by Multichoice is that by reason of this state of affairs KRA demanded a sum of Kshs.154,077,023.00 from it, with the sum of Kshs.153,454,809.00 attributed to default on the part of Mainkam and this sum had to be paid by Multichoice. Multichoice alleges breach of contract and fraud on the part of the 1st Defendant.

5. It is contended that Mainkam was in breach of the clearing agreement by failing to take reasonable and proper steps to render to Multichoice a true and full account of monies remitted to it in respect of the imputed consignments. It is asserted that Mainkam obtained money under false pretenses from Multichoice by uttering falsified documents relating to the said consignments. Mainkam is also assailed for failing to remit, in full, money indicated by it to be due to KRA in respect of the imputed consignments. The other particulars of breach include an allegation that Mainkam misrepresented to Multichoice that the documents presented to it were genuine and truly reflected the tax assessments relating to the consignments in question.

6. That really is the gist of the allegations made against Mainkam in a somewhat repetitive pleading.

7. The claim is also against James Maina Kamau (Kamau or the 2nd Defendant) who is said to have been a director and shareholder of Mainkam responsible for management and operations of the clearing firm at the time of importation of the controversial consignments. It is said that Mainkam is a shell Company used by Kamau as a façade and as a vehicle to defraud Multichoice. Multichoice contends that Kamau knowingly or recklessly caused the uttering of false documents to it; operated Mainkam so as to allow fraud; allegedly changed the directorship and shareholding of the company after discovery of the fraudulent scheme and failing to account for the funds in respect to the imputed consignments.

8. In paragraph 30 of the plaint, Multichoice avers:-

“The conduct of the 2nd Defendant in specifically inducing the Plaintiff to deal with the 1st Defendant Company as its clearing agent, maintaining contact with the Plaintiff’s employees and holding himself out to them as a principal director of the 1st Defendant Company, receiving monies on behalf of the 1st Defendant in respect of the Imputed consignments and even attending the offices of Kenya Revenue Authority as a director of the 1st Defendant demonstrates knowing and calculated actions by the 2nd Defendant as an individual to receive monies from the Plaintiff in respect of the customs duty and other taxes with no intention to pay on the same to the Kenya Revenue Authority”.

9. It is the assertion of Multichoice that Kamau is personally guilty of fraud committed against it. In the end the Plaintiff seeks judgment against Mainkam and Kamau jointly and severally for:-

a) General damages for breach of contract and fraud.

b) Kshs.153,457,809.00 being the amount demanded and payable to the Kenya Revenue Authority in respect of the Imputed Consignments.

c) Interest on the amount found to be due to the Plaintiff at court rate from the date of the payments made to the Defendant or alternatively from such time as the Court may determine till payment in full.

d) Costs of this suit.

e) Any other relief this Honourable Court may deem fit to grant.

10. In support of its case, Multichoice called four witnesses namely Janet Oyugi (PW1, its finance manager), Laura Onyambu (PW2, a KRA official), Alex Odhiambo (PW3, an employee of National Bank of Kenya Limited) and Timothy Siloma (PW4, a senior tax manager at Price Water House Coopers Limited). Their evidence in so far as is relevant in unraveling the controversy herein is discussed in the later part of this decision.

11. In resisting the claim, the Defendants filed separate statements of Defence. The true purport of the Defence of Mainkam filed on 28th August 2018 is that it denies any wrong doing or liability. It makes the point that KRA would not have released the goods if the duty and taxes had not been paid. It asserts that it advised Multichoice of the proper and correct amount of taxes due to KRA. It states that all monies obtained from Multichoice were applied for the intended purposes. It contends that it made full payment of dues demanded by KRA for the imputed consignments.

12. In further defence of its position Mainkam avers that it reasonably believed that the documents it received from KRA and other third parties were genuine. That in any event Multichoice has no right in law to bring a claim on behalf of KRA.

13. As to whether it is a façade as alleged in the plaint, Mainkam avers that it is a genuine going concern that has been in operation for 22 years and was not formed for fraudulent, illegal or improper purpose.

14. On his part Kamau takes issue with being sued in his personal capacity for alleged wrongs of Mainkam. Kamau states that he resigned as a director of Mainkam in 2008, well before the cause of action arose. And that at any rate he did not directly or indirectly assume personal responsibility for the acts or omissions of Mainkam. Kamau further denied that he was ever the principal director or managing director of the Company and that he did hold himself out as such.

15. Kamau denied the allegations of fraud or that he induced Multichoice into dealing with Mainkam as its clearing agent or that he received money from Multichoice as alleged or at all.

16. At the hearing, Kamau gave evidence for the Defence. His testimony will be evaluated in so far as is relevant to the issues that call for the Court's determination.

17. In that regard, the rival sides proposed separate sets of issues. Giving due consideration to those, in the context of the pleadings herein, I see the following as matters for resolution.

a) Has Multichoice proved that Mainkam failed to pay due taxes to KRA on its behalf?

b) If the answer to (a) above is in the affirmative, then what loss, if any, has the Multichoice suffered?

c) If the answer to (a) is in the affirmative is Kamau personally liable as well?

d) What is the appropriate orders as to costs?

18. Janet Oyugi (PW1) was at the time of testifying the Finance Manager of Multichoice. Her testimony was that Mainkam acted as a clearing agent for Multichoice since the year 2009 although a formal agreement between the two was made later on 1st March 2012 (P. Exhibit pages 131). That the relationship began in 2009 is indeed expressly admitted by Mainkam in paragraph 4 of its statement of Defence of 28th August 2012.

19. Also admitted in that same paragraph of the Defence are the following averments by Multichoice;

5. The 1st Defendant in the course of its engagement did clear various consignments of goods with the arrangement being that it would advise the Plaintiff of the sum assessed as due to the Kenya Revenue Authority in respect of Customs Duty, Value Added Tax and any other costs payable to the third parties incurred in the clearance process for the goods. The 1st Defendant would raise an invoice for the total amount encompassing these taxes and charges.

6. The Plaintiff made payment on each of the invoices raised, in reliance upon on the strength of the documents provided to it by the 1st Defendant. Thereafter, the 1st Defendant would procure the delivery of the cleared goods to the Plaintiff's premises and warehouse.

20. It is therefore a fact that the arrangement between Multichoice and Mainkam was that Mainkam would advise Multichoice of the duty and taxes due for the imports and would raise invoices reflecting this advice. Multichoice would then pay the invoiced amounts to Mainkam to enable Mainkam pay duty and taxes to KRA.

21. Further testimony by Oyugi (PW1) is that on the strength of this arrangement Multichoice paid Mainkam a sum of Kshs.287,598,131.00 in respect to the controversial consignments of which Kshs.283,861,217.00 was said to be for duty and taxes. Yet KRA contends to have received only Kshs.47,095,977.00 from Mainkam. The evidence of the invoices raised by Mainkam and proof of payment by Multichoice were produced in evidence (P. Exhibit pages 62-124). These were not challenged by Mainkam nor evidence to the contrary tendered. This court holds that on the advice of Mainkam, Multichoice paid to it Kshs.283,861,217.00 on account of duty and taxes.

22. Is there veracity in the allegation that of this sum only Kshs.47,095,977.00 was paid to KRA? Produced to court as P. Exhibit Pages 31-61 are documents sent by KRA through a letter dated 10th May 2012 to Manager Tax Services PWC (representing Multichoice) in support of what KRA alleges was paid for and received by it.

23. Laura Onyambu (PW2), an officer at the investigation and enforcement department of KRA, explained how Mainkam allegedly carried out the fraud. She explained that KRA operates a system christened the Simba System which is a customs goods clearance system. It is a self-assessment process where the importer, through the clearing agent, makes a self-assessment of the taxes payable and pays the taxes on that basis. The witness further explained that customs officers would rely on the declaration and payment to release the goods unless there was valid reasons to reconfirm or relook at the values.

24. In respect to the scheme carried out by Mainkam she explained;

“Investigations revealed that Multichoice Kenya Ltd clearing agent, Mainkam Ltd, would obtain invoices from Multichoice for purposes of making custom declarations. In order to pay less tax, Mainkam would then prepare fresh invoices with lower customs value and use the same to prepare custom entries. KRA officers had no reason to reconfirm the values because of the nature of the goods imported and the standing of the Plaintiff as a respectable company. They thus acted in good faith and released the goods based on the declaration by the agents. This was a normal practice done to fast track clearance of goods through customs to avoid unnecessary congestion at the port and airports”.

25. The witness then provided documents which she alleges would support her thesis. This court takes a document from each year as a sample;

Declaration number	Document provided by Mainkam	Document provided by KRA
2009MSA1682281	Declarant Mainkam P. Exhibit Page 1.	Declarant Skywards Agencies. P. Exhibit Page 3
2010 JKA961024	Declarant Mainkam P. Exhibit Page 7	Declarant Airflo Limited P. Exhibit 37
2911 JKA 1387659	Mainkam Duly payable taxes 12,376,969. Page 26	Mainkam Duly payable taxes 3,635,642. Page 38
2012 JKA1447012	Mainkam Duly payable. Page 28	Mainkam 4,849,116 Page 61

26. To fortify the allegations of cheating and falsehood, the plaintiff also called into aid the evidence of a bank official at National Bank. Alex Odhiambo, was at the time of testifying, a manager, Swift in Cash Operations Department at National Bank. Although he did not have first-hand evidence of the matters in dispute he gave evidence in his capacity as the custodian of the records prepared by his predecessor A. M. Mbinda who had left the Bank.

27. KRA was an account holder at National Bank. That through a letter of 21st September 2012, KRA asked the Bank to verify whether funds were deposited in its account as per transactions voucher for Kshs.6,750,316.00 and RTGS text for Kshs.15,390,481.00. Both

transactions related to payments allegedly paid by Mainkam into the account of KRA for Multichoice duties and taxes. That upon verification the funds could not be traced and the documents did not appear genuine.

28. The witness explained the following of the anomalies;

Paragraph 4: We could not trace the sums of money that were allegedly paid through the aforementioned document. Moreover, an examination of the documents showed that they were not genuine. For example the bank reference number EEU8298502 on the transaction voucher was posted to KRA's account on 28th September 2009 under entry ref No. JK79066350600 for Kshs.476,995. However, the entry reference number on the copy that was sent to us was JK7922115.

Paragraph 5: On the other hand the RTGS text for Kshs.15,390,481 had the following anomalies:

- a) The name of the remitting bank was not shown.
- b) Swift code F01 BBKKNXAXXX561215894 under field 1 did not exist. The correct code for Barclays of Kenya is BARC KENX.
- c) Message type 106 did not exist under the swift standards.
- d) Central Bank of Kenya code shown as CBKKNX under filed 52A was incorrect. The correct code for Central Bank of Kenya was CBKEKENX.
- e) The field for the authentication code was missing.

29. Confronted by that evidence, what answer did Mainkam proffer? In its Defence Mainkam took the position that any falsity on the documents needed to be explained by KRA and that in event KRA needed to explain why it released the goods when the due duties and taxes had not been paid.

30. In his testimony, however, Kamau made the following concession in regard to payments made on behalf of Multichoice to KRA:-

“The payments were made by bankers cheque to KRA. We would have a copy of the Bankers cheque and deposit slip” (sic).

To be noted, however, is that Mainkam choose not to produce a single bankers cheque or deposit slip to support the payments it says to have faithfully made to KRA.

31. It has been explained, and not debunked, that the impugned declaration forms were prepared by Mainkam on behalf of the agent. Those declarations have been found to have discrepancies. Regarding payment to the bank, there has been demonstration that some deposits are questionable. As to why KRA released the goods on documents that have turned out to be falsified, it has been explained by KRA that under the self-assessment system some latitude was extended to the taxpayer as to the veracity of the self-assessment and taxes paid. It is in these circumstances that the Court holds that Mainkam, who claim to have made payment of the duties and taxes by way of bankers cheque, needed to disprove the fairly strong evidence against it. Mainkam conceded to having the bankers cheque and deposit slips that would have propped up its defence but choose not to produce them. No explanation was given as to why it did not do so and the only inference this court can draw is that they do not exist.

32. I have to come to the conclusion that Multichoice has proved its case that a substantial amount of what it paid to Mainkam did not get to KRA and was fraudulently diverted by Mainkam. In reaching this finding the Court is acutely aware that the allegation made against Mainkam is that of fraudulent conduct and the standard of proof is higher than that of a balance of probability but not as high as beyond reasonable doubt. The plaintiff has adduced evidence that easily achieves that threshold.

33. There is further evidence, and that is not disputed, that because of the breach of Mainkam, Multichoice was again required to pay duty and taxes to KRA. In this regard it made payments as follows:-

<i>Date</i>	<i>Amount (Kshs.)</i>
<i>29th June 2012</i>	<i>60,000,000</i>
<i>31st July 2012</i>	<i>33,968,113</i>
<i>31st August 2012</i>	<i>35,968,113</i>
<i>18th October 2012</i>	<i>22,140,797</i>
<i>Total</i>	<i>154,077,023</i>

(Copies of the letters forwarding the RTGS slips and receipts are at pages 9 to 19 of the supplementary bundle of documents)

34. This court must now turn to the more confounding question which is whether Kamau must shoulder the liability either severally or jointly with Mainkam. Counsel for Multichoice has urged Court to find that Mainkam is a shell company used by the Kamau as a vehicle to defraud Multichoice. As a prelude to considering this aspect of the claim, the Court notes the observations made in a Ruling herein of 12th April 2013. That was a Ruling by Mabeya J that determined a Notice of Motion dated 25th September 2013 in which Kamau was seeking that he be struck out as a party herein. The Judge remarked:-

“In the present case, I associate myself fully with the above finding. The applicant has denied inducing the Plaintiff to deal with the Company. He has also refuted the claim that the Company is a shell corporation used as a front and a vehicle to defraud the Plaintiff. My view is that liability, if any, with respect to the matter under inquiry will flow from the determination of the issues by the trial court. For the moment, I do not see any prejudice to the Applicant being enjoined in the suit which cannot be adequately compensated by way of costs if he is finally exonerated. In my view, the Applicant will have the opportunity to demonstrate at the trial that as a director he was not personally liable for the acts and omissions of the Company”

35. This Court is asked by Multichoice to follow the decision in *National Social Security Fund Board of Trustee –vs- Ankhan holding limited & 2 others (2006) eKLR* in which the Court held:-

“This reasoning cannot in any opinion apply to liability for fraud. No one can escape liability for his fraud by saying I wish to make it clear that I am committing this fraud on behalf of someone else, and I am not to be personally liable. Sir Anthony Evans framed the question ([2000]) 1 Lloyds Rep. 218, 230) as being whether the Director may be held liable for the company’s tort. But Mr. Mehta was not being sued for the Company’s tort. He was being sued for his own tort and all the elements of that tort were proved against him. Having put the question in the same way he did, Sir Anthony answered it by saying that the fact that Mr. Mehta was a director did not in itself make him liable. That of course is true. He is liable not because he was a director but because he committed a fraud”

36. For Kamau it was submitted that he is neither a director nor a shareholder of Mainkam and no actions of the 1st Defendant can be attributed to him. It had also been pleaded that he was not guilty of any fraud at all.

37. The Court has found that Mainkam is guilty of converting a substantial amount of money being Kshs. 153,457,809.00 which was placed in its hands by Multichoice for onward payment to KRA. The evidence of Oyugi (PW1) is that Kamau was a director and shareholder of Mainkam responsible for the management and operations of the company at the time of the imported consignments. Further that he was the principal point of contact between Multichoice and Mainkam and on occasion actually attended the offices of Multichoice to collect or drop off specific documentation dealing with the business engagement between the two.

38. On his part Kamau sought to distance himself from the said transactions and stated that he ceased being a director of the company in 2008, a period before the liability that is the subject matter herein accrued. As to any role he played he stated as follows in his written statement:-

“I have remained supporting of the 1st Defendant’s new directions, who, from time to time, seek my advice in the day-to-day running of the 1st Defendant. However, it is not true that I have been presenting myself as its “principal director”. I deny inducing the Plaintiff to deal with the Mainkam Ltd as its clearing agent or receiving monies from the Plaintiff as alleged or at all. I am also not guilty of the fraud the Plaintiff complains of or at all. I therefore pray that the Plaintiff’s case against me be dismissed with costs”.

39. During cross-examination, Kamau was confronted with the agreement for engagement of 1st March 2012 and over a signature appearing on the execution page of the agreement (P. Exhibit 1 Page 731). This was his reaction:-

“This looks like my signature. Salome Nduta was my secretary. She is alive. I may have signed”.

Salome Nduta appears on that page as witnessing his signature.

40. This document is critical because in it Kamau is named as signing it in his capacity as a company Director of Mainkam. Its significance is that it directly contradicts the assertion of Kamau that he had resigned as a shareholder and Director. Why would he be signing this important agreement as a Director in the year 2012 when he had long resigned? It must therefore be asked why Kamau would give a lukewarm answer to an allegation that he signed the document. Would he not remember signing this document? If he did not sign it, then why would he not summon Salome Nduta to support him? I have to find that Kamau was not forthright in stating that he had resigned as a director in 2008 and that he only played a peripheral role as an advisor to Mainkam. This Court chooses to believe Multichoice in its contention that Kamau played a leading role as a principal director for Mainkam at the material time.

41. In leaning in favour of Multichoice on this issue, this Court finds it curious that although Kamau is said to have executed transfer of share forms on 26th August 2008 in favour of one Joel Kamau Kiragu, it was only until about 5th June 2012 that the transfer forms were duly stamped. The curiosity is piqued by the timing of the stamping and filing of the transfer forms *vis a vis* a meeting convened on 8th April 2012 between KRA, Multichoice, PWHC and Mainkam to discuss a demand dated 23rd April 2012 by KRA to Multichoice for duty and tax of Kshs.196,475,188 in respect to the alleged falsified documents (*see minutes in P. Exhibit Page 132-135*). After initially denying attending this meeting, Kamau yielded on further questions. He stated:-

“I attended the meeting referred to on page 132”

42. It would be curious that he was attending such a critical meeting on 8th April 2012 as proprietor/managing director of Mainkam when he had in fact resigned as a shareholder and director four years earlier! The theory put forward by Multichoice that Kamau sought to effect changes in ownership and directorship so as to avoid liability arising out of the tax issue as therefore not without merit.

43. It is the Court's finding that Kamau's spirited, but failed, attempts to distance himself from Mainkam and the transactions giving rise to Mainkam's culpability herein does not speak kindly as to his credibility. The Court comes to a conclusion that Kamau knew or participated in the fraud perpetrated by Mainkam and must take personal responsibility for his role. It is of course true that a limited liability company is a body corporate that is separate and distinct from its members. Yet it is also a truism that where a director uses the cloak of corporate personality to perpetrate fraud and deceit, then the director stands on the same footing as the company itself (*see National Social Security Fund Board of Trustee (Supra)*). It matters not that Mainkam is a going concern and a vibrant business as it alleges, its corporate cloak cannot be used to shield the wrong doing of Kamau. Neither the law nor equity will permit the rationale of the principle of corporate personality to shield fraud. Kamau should, and must, take personal responsibility for the wrong occasioned to Multichoice.

44. And the Court must add the following. Mainkam would have special knowledge as to its vibrancy and robustness. Once challenged, as here, that it is a shell then it bears the onus of disproving the allegation. This duty is placed on it by the provisions of section 112 of the Evidence Act which reads;

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.

Having failed to marshal such evidence then the Court must believe the Plaintiff's contention that Mainkam is a shell company.

45. So what damages are due to Multichoice? The loss proved by Multichoice is the sum of Kshs.154,077,023 demanded and paid by it to KRA. However as it prayed for a slightly smaller sum of Kshs.153,457,809 then judgment is entered for the Plaintiff against the 1st and 2nd Defendants jointly and severally for Kshs.153,457,809.00 with interest thereon at court rates from the date of filing suit until payment in full. The Plaintiff shall also have costs of the suit.

Dated, delivered and signed in open Court at Nairobi this 24th

day of September 2019.

F. TUIYOTT

JUDGE

PRESENT:-

Impano Holding brief Omwenga for Plaintiff

Mukuria for Defendant

Court Assistant: Nixon