



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCC NO.319 OF 2015**

**JOHN NJUGUNA NDUATI.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**MONICAH W. KARANJA.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VS.**

**MULTICON ENTERPRISES LIMITED..1<sup>ST</sup> DEFENDANT/RESPONDENT**

**WALTER NGARUIYA MUKURIA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**LILIAN WAIRIMU WAIGANJO .....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**DAVID NJOROGE KIARIE.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**VICTOR NJUGUNA KIHARA.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**MINISTRY OF LANDS, HOUSING AND URBAN**

**DEVELOPMENT.....INTERPLEADER**

**RULING**

1. There is a Dispute as to who are the true Shareholders of Multicon Enterprises Limited (the 1<sup>st</sup> Defendant or Multicon), and John Njuguna Nduati and Monicah W. Karanja (the Plaintiffs herein) have asked the Court to resolve the issue.

2. In the Plaint dated 3<sup>rd</sup> July 2015 and filed on the same day, the Plaintiffs seek the following prayers:-

a. An Order cancelling the change of Directors and shareholding of the 1<sup>st</sup> Defendant company, MULTICON ENTERPRISES LIMITED, NO.CPR/2010/26749, registered pursuant to the alleged meeting of 1<sup>st</sup> October 2014 and reverting to the earlier records reinstating the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs as Directors and shareholders each owning 250 shares.

b. An Order prohibiting and restraining the interpleader from releasing to the 1<sup>st</sup> Defendant company, MULTICOAN ENTERPRISES LIMITED, any and all further monies, proceeds or payments regarding the Rehabilitation and Reconstruction of Narok Storm Water Drainage Systems and Associated Works being undertaken and or that has been undertaken by the 1<sup>st</sup> Defendant.

c. Permanent injunction restraining the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants from acting or purporting to act as lawful Directors and Shareholders of the 1<sup>st</sup> Defendant Company, MULTICON ENTERPRISES LIMITED.

d. Costs on a higher scale and interest to be borne by the Defendants.

3. Prior to the presentation of this suit, the Government of Kenya, through the Ministry of Lands, Housing and Urban Development had contracted Multicon in respect to a Storm Water Drainage System and Associated Works at Narok (hereafter the Narok Water Project) and monies would be due from time to time from the said Ministry to Multicon. For this reason the Ministry was enjoined to these proceedings as

an Interpleader.

4. At the time of presenting the suit, the Plaintiffs filed a Notice of Motion in which one of the Prayers was to injunct the Interpleader from releasing any payments to Multicon pending the hearing and determination of the suit. Before the application could be heard the Plaintiffs filed an application dated 26<sup>th</sup> October 2016 for the following Orders:-

1. Spent

2. THAT pending the hearing and determination of this application inter partes, and pursuant to the Order dated 31<sup>st</sup> July 2015 the Interpleader shall withhold the final proceeds and emoluments of the 1<sup>st</sup> defendant Company respecting the contract for the Rehabilitation of Narok Storm Water Drainage Systems and Associated Works.

3. THAT accounts be taken and the Plaintiffs be and are awarded a sum equal to their investment from the proceeds held by the interpleader respecting the contract for the Rehabilitation and Reconstruction of Narok Storm Water Drainage Systems and Associated Works.

4. THAT costs of the application be provided for.

5. The Application was compromised by a Consent entered on 11<sup>th</sup> November 2016 in the following terms:-

“By consent the Plaintiff’s application of 26<sup>th</sup> October 2016 be allowed in the following terms:-

1. All the funds pertaining to Certificate No.6 be released by the Interpleader to the 1<sup>st</sup> Defendant Company immediately.

2. Khs.10,000,000 being part of the Retention fees held by the Interpleader on account of the project to be deposited in Court as and when it matures as part of the Plaintiffs claim pending further orders of the Court and/or further agreement by the parties.

3. Costs in the cause”.

6. It is common ground that a sum of Kshs.10,000,000 was deposited in Court by the Interpleader and through a Notice of Motion dated 24<sup>th</sup> October 2017 the Plaintiffs seek the release of that money to themselves through their Lawyers on record Messrs Andrew Obwayo & Co. Advocates. That motion is opposed and is the subject matter of this Decision.

7. The singular issue for determination is whether, in terms of the Consent of 11<sup>th</sup> November 2016, the money deposited was earmarked as what is justly due to the Plaintiffs and should therefore be released to them without further ado.

8. The Consent was entered by the parties and had the following two limbs:-

1. All the funds pertaining to Certificate No.6 be released by the Interpleader to the 1<sup>st</sup> Defendant Company immediately.

2. Khs.10,000,000 being part of the Retention fees held by the Interpleader on account of the project to be deposited in Court as and when it matures as part of the Plaintiff’s claim pending further orders of the Court and/or further agreement by the parties.

9. Although it could have been worded more elegantly, I understand the second limb to be that Khs.10,000,000 would be deposited so that it would be available for the Plaintiffs in the event that the Plaintiffs prove their Claim or the parties agree. I say so because although, the consent talks of the money to be deposited “as part of the Plaintiffs’ Claims”, it would be nonsensical to have it deposited pending further orders of the Court and/or agreement by the parties if indeed the parties had agreed that it was justly due to the Plaintiffs. If the agreement was that the money was set apart as due to the Plaintiffs then why did the parties not consent to it being released directly to the Plaintiffs instead? It is not lost on the Court that unlike the amount to be deposited in Court, the consent directed that some funds (those pertaining to Certificate No.6) be released directly to Multicon, perhaps an indication that there was no dispute that these were due to the Company.

10. I cannot grant the Order sought because the Plaintiffs Claim has not been determined nor have the parties compromised it by agreement. The Notice of Motion dated 24<sup>th</sup> October 2017 is hereby dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 18<sup>th</sup> day of May,2018.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Twahir hb for Obwayo for Plaintiffs

Nyakundi for 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents

Sitienei h/b for Mbaluka for 2<sup>nd</sup> Respondent

Nixon - Court Assistant