



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE No. 345 OF 2004

EAST AFRICAN SAFARI AIR LIMITED Plaintiff

Versus

ANTHONY AMBAKA KEGODE First Defendant

ELIZABETH ANN KEGODE Second Defendant

R U L I N G

1. The Matter now before the Court is slightly out of the ordinary as the Parties are seeking only directions from the Court on how this suit and the various applications made within the suit should proceed. The Matter has a long and convoluted history and raises interesting issues of law.

2. The Suit was begun by a Plaint dated and filed on 28th June 2104. It seeks the following prayers:

(a) A declaration that the Defendants and each of them hold on constructive trust for the Plaintiff or are liable to account for all the sums of monies as set out in paragraph 6 above now in their possession to the extent of the monies having been paid into their respective personal accounts and having been acquired directly or indirectly from the Plaintiff's assets.

(b) A permanent injunction restraining the Defendants and each of them whether by themselves or by their servants, agents or otherwise howsoever, from withdrawing or disposing of any of the sums of monies deposited in their accounts at Charterhouse Bank Limited (Longonot Branch), Standard Chartered Bank Limited (Langata and Karen Branches) and any other accounts that may later be discovered.

(c) A permanent injunction restraining the 1st Defendant, and whether by himself his agents or servants or otherwise howsoever from interfering with the operations of the Plaintiff by writing any letters or holding themselves out to be in a position of authority or from otherwise intermeddling in the Plaintiff's business or the management of its affairs.

(d) An Order that the sum of US\$165,156.30 in the 1st Defendant account at Charterhouse Bank Limited (Longonot Branch) be immediately transferred back to the Plaintiff's account no FX 400119 which account is in the same bank from which account the money was withdrawn.

(e) All necessary accounts and inquiries to enable the Plaintiff to trace and recover the monies paid out of the Plaintiff's accounts into the 1st Defendant's personal accounts (as set out in I to ii below)

and the joint account of both Defendants as set out in iv below) and an Order for the delivery up or transfer to the Plaintiff the following sums together with interest at court rates from 4th June 2004 until payment in full:

i. US\$860,734.00

ii. Euros 407,386.29

iii. Kshs,21,559,551 (inclusive of the sum of Kshs13,060,000/- set out below in iv)

iv. Kshs.13,060,000 paid into the joint account of the Defendants provided that credit is given for this sum in (iii) once payment is made.

(f) Costs on an advocate client basis together with interest thereon at court rates.

(g) Any further relief that this court may deem fit.

3. In addition, the Plaintiff filed an application by Chamber Summons under **Section 3A of the Civil Procedure Act** and **Order 38 Rule 5 and 12** and **Order 39 Rules 1 and 9 of the Civil Procedure Rules** and all other enabling provisions of the law. The Application was made under a Certificate of Urgency seeking ex parte orders in the first instance. The remaining prayers were for orders that:

“2. The Defendants do furnish security for the sums of US\$860,734.00, Eur 407,386.29 and Kshs21,559,551.00 or produce the said sums of money and place at the disposal of the court the said sums of money as may be sufficient to satisfy the decree within 7 days of the Order of this court.

3. A temporary injunction restraining the Defendants and each of them whether by themselves or by their servants, agents or otherwise howsoever, from withdrawing or disposing of any of the sums of monies deposited in their accounts at Charterhouse Bank Limited (Longonot Branch), Standard Chartered Bank Limited (Langata and Karen Branches) and any other accounts that may later be discovered.

4. An Order that the sum of US\$165,156.30 in the 1st Defendant’s account at the Charterhouse Bank Limited (Longonot Branch) be immediately transferred back to the Plaintiff’s account No. FS 400119 which account is in the same bank and from which account the money was withdrawn

The costs of the application be the Plaintiff’s in any event”

4. The basis of the suit and application is that the 2 Defendants through the mechanism of a holding company sold their shares in the Plaintiff. The share sale agreement is dated 4th June 2004. On June 2004, the Plaintiff through its putative directors and/or shareholders filed a CR 12 at the Registrar of Companies showing the changes allegedly brought about by the sale of shares. The withdrawals from the Plaintiff’s bank accounts alleged to have been transferred to the Defendants was done short before the Agreement was signed. It is therefore, for the purposes of these directions fair to assume it was done during or after negotiations for the sale of the shares. The agreement includes a duty of good faith. The First Defendant appears to have admitted the payments. He states in his Affidavit dated 25th October 2004 that *“I wish to reiterate that I did not breach any fiduciary duties at all and all payments were made for valid reasons and were properly authorized by the duly constituted organs of the company”*.

5. The Summons were signed on 29th June 2004 and duly served. The Defendants failed to enter a Defence on the due date and the Plaintiff sought judgment in default. There was no application to strike out the Plaintiff. In addition there was no Preliminary Objection filed. The First Defendant and a Company called Uhai Ltd (which was not named in the Plaintiff) then on 12th July 2004 filed a new suit bearing the

name/title ***High Court Civil Suit No 379 of 2004*** that sought to sue the Plaintiff herein and Adam Craig Ogden, Esta African Safari Air Ltd and East African Air Express Ltd. That suit creates a nexus between the share sale and the Plaintiffs directors and/or shareholders which is denied in the subsequent defence and application to strike out in this suit. The Defendants also seem to have changed representation to being separately represented. Prior to filing that suit the First Defendant took from the Company Secretary all the documents relating to the Plaintiff.

6. An additional factor in the scenario was that the Plaintiff went into receivership. There were two receivers appointed pursuant to a Debenture dated 5th December 2003. From the evidence before the Court they appear to be Harveen Gadokhe and Daniel Mutisya Ndonye. They were appointed on 8th September 2004. In the circumstances, the Receivers then took over the running of the Plaintiff Company with all the powers and functions that directors would ordinarily have (See Affidavit of Harveen Gadokhe filed on 14 October 2004). On 21st September 2004 Messrs Walker Kontos, Advocates for the Plaintiff wrote to opposing Advocates and confirmed that they had the necessary authority and ratification to continue acting and proceed with the suit. A copy of the Notice of Appointment of the Receivers was filed under cover of that letter.

7. The Defendants filed an application (a copy of which is not on the file) seeking orders to strike out the Plaintiff and Chamber Summons in effect for want of authority. The Matter was heard by Hon Emakule J (as he then was) who delivered his Ruling on 2nd March 2006. From the Proceedings it seems that the Learned Judge decided the matter purely from the evidence filed in the form of Affidavits. They present a conflicting picture. No application was made to cross-examine any of the deponents. In the event the Learned Judge made the Order striking out the Plaintiff's Application, striking out the Plaintiff's suit and ordering that the Plaintiff's Advocates pay the costs of the suit and the Directors of the Plaintiff to indemnify their own Advocates. The Parties were given leave to Appeal. The Order in effect allowed the Defendants' Application in its entirety. The Decree was issued on 15 March 2006 and the Plaintiffs sought a stay and proceeded with the Appeal (Civil Appeal No 42 of 2007).

8. The Appeal was allowed and the Court of Appeal Delivered its Judgment on 27th July 2011. The Court of Appeal allowed the Appeal with costs to the Appellants. It set aside the Orders of the High Court and ordered that the Chamber Summons application dated 28th June 2004 be heard on its merit before any Judge other than Emukule J.

9. The record shows that shortly after that the File could not be traced. This culminated in a complaint to the Ombudsman in 2012. The file was eventually traced by the Commercial and Admiralty Registry on 7th October 2014. That was not the first time it had been misplaced.

10. The matter then came before this Court for Hearing of the Chambers Summons dated 28th June 2004. When the Parties respective Advocates attended for the hearing it was readily apparent that the passage of time meant that some parts of the Application (if not all) and the suit had been superseded by events. Therefore, even though the Court of Appeal ordered that the Application and Suit be heard, there may be no purpose and indeed insufficient grounds for seeking the freezing orders originally prayed for. One glaring example is that one of the Banks holding the account no longer exists. Rather than filing Submissions on the best way forward the Parties have filed (on 17th March 2015) an agreed List of Directions. The agreed List states:

"We the undersigned counsels agree to have both the application and the main suit dealt with as follows in the interests of justice:

EITHER;

1. That both the Chamber Summons application dated 28th June 2004 and the main suit be heard together
2. Parties to proceed and emark on the process of pre-trial proceedings, within an agreed period of

time and have the main suit fixed for hearing at the earliest.

OR

Parties dispense with the Chamber Summons application dated 28th June 2004 and have the main suit fixed for hearing at the earliest upon conclusion of pre-trial direction.

The Agreement is signed by Counsel for the Defendants. The kindest thing that can be said about that agreement is that it is clear that Counsel have put very little, if any, thought in the issues arising. It is therefore left to the Court to give directions.

11. It should be borne in mind that between the Appeal and the second Hearing of the Application was due, the procedural landscape had changed and for the Commercial and Admiralty Division **Order 11 of the Civil Procedure Rules** was replaced with the Practice Direction on Case Management.

12. The issues for determination that appear from those of the Pleadings that are still on the File and the Decision of the Court of Appeal are:

(1) The issue of actual and ostensible authority both in relation to the suit (Turqand's case) and the withdrawals/transfers from the Bank Accounts

(2) Who are the proper parties to the Proceedings?

(3) Whether the actions taken and decisions made by or on behalf of the Plaintiff Company were valid and enforceable or something else ranging from unenforceable to outright fraud

(4) Whether the interests of justice are served by converting the suit into a derivative action?

(5) What is the effect of the appointment of the Receivers and where have they reached in their deliberations?

(6) Are there any related proceedings whether in the Commercial Courts relating to the shares and/or property of the Plaintiff to Criminal proceedings?

13. Given the complexity of those issues and the passage of time, it is essential that the Parties take stock of how best they wish to proceed against the imperative that the suit must be heard sooner rather than later, with or without any applications. The Advocates also need to evaluate whether the best interests of their clients are served by amending any of the pleadings and thereafter making the appropriate applications.

14. The approach taken here is informed by **Article 159(2)** of the Constitution *of Kenya 2010*, the overriding objective contained **in Section 1A, 1B and 3A of the Civil Procedure Act** as well as the **Case Management Practice Direction** as well as an eye on each Party's right to be heard either in terms of a claim or the defence they seeks to raise.

15. This Ruling has been delayed and that it regretted. The File was only made available by the Registry to the Judge as a consequence of the Plaintiff's Letter of 17th October 2016 to the Deputy Registrar. The Court is takes the view that in light of its repeated disappearance, this File must henceforth be placed in safe keeping.

16. In the circumstances, it is therefore ordered that:

(1) Each Party to ensure that all the Pleadings and Affidavits it filed are properly on the file and if not to make copies available;

(2) The Parties to file and exchange their respective case management questionnaire and checklist

including all applications the Parties intend to bring within 28 days

(3) Parties to take a date for Case Management before Hon Mr Justice Onguto who now occupies Court 38

(4) The aforesaid checklists/questionnaires must be accompanied by any applications that any party wishes to bring in draft for the purposes of seeking leave. To be served at least 14 days before the Case Management Conference.

(5) File to be placed in safekeeping until the next hearing.

Order accordingly,

FARAH S. M. AMIN

JUDGE

Delivered Dated and Signed at NAIROBI this 16th day of May 2017.

In The Presence of :

Court Clerk: Patrick Mwangi

Plaintiff: Mr Wafula Holding Brief for Mr Kahugo

First Defendant: Mr Oboga Holding Brief for Prof AlberMuma

Second Defendant: N/A