



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 464 OF 2016

SAHKAR LIMITED.....1ST PLAINTIFF/APPLICANT

DAVID LIVINGSTONE LIMITED.....2ND PLAINTIFF/APPLICANT

VERSUS

AFRICAN HOTELS & ADVENTURES

(EAST AFRICA) LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The success of the Preliminary objection dated 14.12.2016 will turn on the following principle of law set out in Halsbury's Law of England 4th Edition, Vol 7 para 728,

“In order that the Company may be bound by agreements entered into before its incorporation, there must be a new Contract to the effect of the previous agreement, although this new contact may be inferred from the company's acts when incorporated, except when such acts are done in the mistaken belief that the agreement is binding”.

That principle has been accepted by our Courts as correct (see for instance The Court of Appeal decision in **Consolidated Chemicals Ltd vs. KEL Chemicals Ltd [1981] eKLR**).

2. The Preliminary objection by the Defendants is taken out through a Notice of Motion dated 14th December 2016 on the following 4 grounds:-

1. The Plaintiffs' entire suit and all proceedings taken out against the Defendant based on the Joint Venture Agreement dated 24th July, 2013 are an illegality and a nullity in law and therefore void *ab initio*.

2. As at 24th July, 2013, the Defendant was not a corporate body with corporate personality and existence. Accordingly, there is no cause of action capable of being maintained against the Defendant based on the Joint Venture Agreement dated 24th July, 2013.

3. It is plainly admitted from the Plaintiff's pleadings and documentary material that the Defendant did not exist as at 24th July, 2013. A body that does not exist cannot be bound under a document entered into prior to its existence.

4. The Defendant was incorporated on 22nd October, 2013 and therefore was not legally and factually capable of contracting under the Joint Venture Agreement dated 24th July 2013.

3. The gravamen of the Plaintiffs Claim against the Defendant is that the Defendant is in breach of a Joint Venture Agreement dated 24th July 2013. For that breach the Plaintiffs claim a sum of USD. 1,928,900, aggravated damages for loss of business and profits, dishonest business practices and breach of Contract.

4. In the Plaintiff presented to Court on 18th November, 2016, the Plaintiffs aver that at all material times relevant to the suit, the 1st Plaintiff was Lessee of all that property known as **Narok/Cis-Mara/Lemek 189 and 190** and had granted to the 2nd Plaintiff the exclusive right of use and license to undertake business in the name and style of '*David Livingstone Safari Resort*'. The Defendant was part of a group in a tours operator and lodge management business which owned and operated several lodges in Tanzania.

5. The Joint Venture Agreement arranged a limited Joint Venture for purposes of conducting the Resort business through the auspices of a new incorporated company '**Herne Limited**'.

6. The Defendant was duly incorporated on 22nd October 2013. This would be three months after the Joint Venture Agreement was executed. The Defendant submits that it is a well-established rule of law that a pre-incorporated Contract cannot be ratified by a Company after its incorporation as that would amount to a retrospect act.

7. The Defendants cite the case of **Beach Bay Holdings Ltd vs. Ratim Relations Ltd & 2 others** [2014]eKLR where the Court made reference to this passage from **Newborn vs. Sensolid (Great Britain) Ltd** [1953] ALL ER 708

“The Contract was made, not with the Plaintiff, whether as agent or as principle, but with a limited company which at the date of the making of the contract was non-existent and therefore, it was a nullity and the Plaintiff could not adopt it or sue on it as his contract”

8. The Plaintiffs on the other hand do not think the position to be that simple. Although they accept that a company cannot ratify a Contract made before its incorporation they argue that there may be circumstances from which it can be inferred that a Company, after incorporation, has made a new Contract to the effect of the previous Contract. The proposition of the law taken up by the Plaintiff is discussed in the decision of **Trevor Price & Another vs. Raymond Kesall** [1987] EA 152 which sets out the position more fully. Although there may be circumstances from which it may be inferred that the Company, after its incorporation, has made a new Contract to the effect of the previous agreement,,,,,

“The mere adoption and confirmation by Directors of a Contract made before the formation of a Company by persons purporting to act on behalf of the Company creates no contractual relation whatever between the Company and the other party to the Contract’.

9. So, a new Contract may be inferred from the Company’s acts after incorporation however no new contract will be inferred when such acts are done in the mistaken belief that the agreement is binding. Of this, Sir Kenneth O’connor in Trevor Price *Supra* said,

“I think it would be more exact to say that no new Contract can be inferred where all the subsequent acts of the Company are referable to the previous agreement which the Directors erroneous suppose to be binding”

10. The Plaintiffs have asked this Court to find that there was a new Contract after incorporation and to therefore find the Preliminary Objection as unmerited. It seems clear to me that whether or not a new Contract can be inferred will have to depend on facts of each case. What are the facts here?

11. But I must first observe that this matter has not been to trial and the Court can only limit itself to undisputed facts that emerge from the pleadings and affidavits so far filed.

12. The Joint Venture Agreement was entered on 24th July, 2013. The Defendant was not in existence then but was purportedly made a party to the Agreement as a ‘*to be incorporated Company*’. It only came into being on 22nd October, 2013 when it was duly incorporated.

13. On 3rd March 2015 and 4th April 2015, the Defendant wrote two similar letters to the Plaintiffs. These were Notices of intended termination of the Joint Venture agreement. The Defendant starts by saying,

“We hereby notify you of the intended termination of the Joint Venture agreement on the grounds set out in this letter”.

The grounds listed are six. I need not set them out here.

14. Ultimately the Defendant close by saying:-

“We therefore require DLL and SL to remedy all the breaches listed above within fourteen days from the date of this letter. If DLL and SL fail to do so, the JV Agreement will stand terminated without need for any further notice from us to you. We also reserve the right to all other remedies available to us, including instituting proceedings against you. In the meantime, we are notifying the staff that the lodge will be closed temporarily. If we do not hear from you positively Herne Limited will have to initiate a redundancy process which will require the shareholders to fund Herne Limited with the amount of the termination dues pro rata to our shareholdings”.*(my emphasis)*

15. There is this averment contained in paragraph 12 of the Replying affidavit of Moses Masinde sworn on 14th December 2016 on behalf of the Defendant,

“12. Despite the difficult circumstances posed by the Plaintiffs’ own non-compliance with the express terms of the Agreement, the Company and the Defendant took over the management of the Lodge and the Defendant did its best, under limiting circumstances to comply with its obligations under the Agreement. The following is a non-exhaustive list of the compliance measures taken by the Defendant:-

(a) Injection of funds into the Company. Considering the Plaintiffs refused and failed to transfer the deposits and sums of monies under Clause 2.3.4 and to effect payment of the capex and operating expenses contribution of USD 400,000 under clause 2.3.2 and clause 2.3.6 of the Agreement, the Defendant was left with singlehandedly running the lodge from scratch with a Zero balance. The Defendant and the Company honoured all the bookings done prior to the Agreement being implemented.

(b) From the time the Defendant took over management of the Lodge, through one of its shareholders- Vintage Africa – it has invested approx. USD 399,204.03 through direct deposits into the Company’s accounts (USD 218,183.90) and by directly paying suppliers of goods and services (USD 181,020.12) for expenses and refurbishments incurred by the Lodge.

(c) Contrary to the unsubstantiated, baseless and false allegation by the Plaintiffs that the Defendant did not comply with its marketing requirements under the Agreement, the Defendant falls under an umbrella of companies owned and managed by the Tourvest Group which has significant investments within the tourism industry in Africa. A dedicated marketing team within the Tourvest Group was responsible for marketing the Lodge under the stewardship of James Haigh who was appointed as sales and marketing Director. Subsequently, Veronica Otter was appointed as Regional Sales and Marketing Manager within the regional agents and destination management companies. As a result of the Defendant’s successful marketing strategies and efforts,

the Lodge's reputation grew leading to an increase in occupancy and tourist numbers. Furthermore, it is important to note that the Lodge made significant profits in the first year of operation but as a result of the Defendant's failure to attend meetings and approve accounts it became impossible to account for the actual profits. The draft accounts prepared are indicative of a profitable venture. The Company paid exactly 1,888,139 to the Kenya Revenue Authority as tax for the financial year it was in charge of operating the Lodge.

16. What is clear from the letter and the contents of the affidavit is that the Defendant was under the belief that the agreement was binding on it. What is less clear is whether there were other acts done by the Defendant which were not referable to the previous agreement. Obviously if all subsequent acts are referable to the previous Agreement, then on the authority of Trevor Price (*supra*), no new Contract can be inferred. The converse is true, if some subsequent acts are not referable to the previous agreement then a new Contract can be inferred.

17. For the Defendant to benefit from its Preliminary Objection it needed to unequivocally state, and then demonstrate that :-

(i) It was under the mistaken belief that the Joint Venture Agreement was binding and,

(ii) All its subsequent acts are referable to the Joint Venture Agreement.

While the Defendant made out a good case of the former, it failed to provide clear and plain evidence on the latter.

18. The dismissal of a suit before a full hearing is a draconian measure which should be taken only in clearest of cases. This Court is not prepared to make such a far reaching order before it is plain and explicit that no new Contract can be inferred. The Defendant may still be able to demonstrate this but let it be done when the evidence herein has been heard and tested through cross-examination.

19. The Preliminary Objection of 14th December 2016 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 22nd day of September, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Wachira h/b Rutto for Plaintiff

Mailu h/b Esmail for Defendant

Alex- Court Clerk