



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 15 OF 2011

KWA MATINGI FARMERS CO-OPERATIVE SOCIETY LTD.....PLAINTIFF

VERSUS

TROPICAL MANAGEMENT KENYA LIMITED.....DEFENDANT

R U L I N G

1. The Application herein is a Notice of Motion dated 8th June 2016. It is brought under Order 45, Order 13 Rule 2 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. It is based on the grounds on the face thereof and the affidavit sworn by Anthony MwanzaWambua in support dated 8th June 2016.

2. It is seeking for Orders:

- *That, the application be certified as urgent.*
- *That this Honorable Court be pleased to order the release of USD 36156.99 (3,379,517.47) as at end of May 2011 which the defendant holds to the plaintiff which amount the defendant has been unlawfully holding.*
- *That the court be pleased to review the orders of the Hon. Justice J.B Havelock made on 2nd day of March 2014.*
- *That the defendant be ordered to submit to the auditor all books, documents and statements requested by the auditor by their letter dated 3rd July 2015.*
- *Those costs of this application be provided for.*

3. The Applicant's case is that, it filed an application dated 6th day of February 2013, seeking to have all the money claimed in the suit deposited in court. The Honorable Court dismissed the Application on the 2nd day of May 2014 and ordered that the parties jointly appoint a member of the Institute of Certified Public Accountants for the auditing of statement of accounts submitted by the defendant to the Plaintiff within 30 days of delivery of the ruling.

4. The Court further ordered that in the event that the parties cannot agree upon a mutually acceptable auditor after 30 days then the Chairman for the time being of the Institute of Certified Public Accountants be called upon, at the instance of either party to make such appointment.

5. Both parties failed to agree on the appointment of an auditor and a request was made vide a letter dated 10th March 2015 addressed to the Chairman of the Institute of Certified Public Accountants for appointment of an auditor. The Institute of appointed the firm of M/s James Aggrey & Associates to

conduct the audit and none of the parties had an objection to the appointment.

6. A preliminary meeting was convened on 17th day of June 2015. The firm of auditors listed down the list of documents to be availed by the defendants and the same was dispatched to all parties on the 3rd day of July 2015. The said firm set their fees at Kenya shillings two Million five hundred thousand only (Kshs. 2,500,000).

7. The Applicants sent a letter to the Respondent to that effect and the Respondent acknowledged the letter on the 2nd day of May 2014 and indicated they were seeking instructions. Subsequently the respondent wrote to the Applicants stating that the said fees was too high. Both parties then agreed to have a meeting between themselves and their financial advisors to narrow down the issues before involving the auditor in a bid to reduce the audit fees.

8. However, according to the Applicant, attempts to move forward have been hampered by the defendant's failure to co-operate and or avail the books to the auditors and that a series of dates proposed for the meetings by the Applicant to the Defendants have received no positive response.

9. That, in view of the foregoing and in view of the fact that the sum of Kshs. 3,397,517.47 is admitted as being credit balance in favour of the Applicant as at the end of May 2011, it is fair and just that this Application is allowed. In any event the claim that remains outstanding will still be higher than the counter-claim. They argued that the Plaintiff/Applicant has been eager to conclude this matter and the Defendant has delayed the conclusion, as the Defendant is enjoying the amount admitted as due to the Plaintiff above. There will be no prejudice to the defendant if the money admitted is paid over to the Plaintiff.

10. The Application was opposed by the Defendant/ Respondents vide a Replying Affidavit sworn by Stephen Karanja on 20th June 2016. He averred that, after an auditor was appointed to undertake the exercise of auditing the relevant accounts, and after a preliminary meeting held with the auditor, the Defendants received a letter from the auditor dated 3rd July 2015 informing them that the auditor will charge a fee of Kshs. 2,500,000 plus Value Added Tax. However, they were of the view that the fee quoted was extremely high.

11. On 9th July 2015 their advocates wrote to the advocates of the Plaintiff accordingly and sought their opinion. Nearly two months later their advocates received a reply from the advocates of the Plaintiff by a letter dated 31st August 2015 agreeing that the fees quoted was extremely high and suggesting a meeting to work out a way forward. Their advocates responded by their letter dated 28th September 2015 suggesting that both sides needed to re-look at the accounts to see if the alleged dispute can be resolved amicably.

12. On the 5th January 2016 their advocates again wrote to the Advocates of the Plaintiff. In the said letter they pointed out that they had managed the Plaintiff's coffee farm pursuant to a Management Agreement for a considerably long period of time, nearly four years, during which time accounts rendered to the Defendant from time to time were being paid without any difficulty. That only after termination of the Management Agreement, did the Plaintiff raised some issues, pertaining to a short period almost immediately preceding the termination of the Agreement. That, the issues raised were comprehensively responded to by them.

13. Their suggestion was to allow the accountants of both the sides to re-visit the issues raised by the parties to see if these can be re-looked at afresh and if after a comprehensive examination there is still some area on which there is no agreement then only part could be referred to an independent auditor for his opinion. Two months later the Plaintiff's advocates by a letter dated 2nd March 2016 replied suggesting dates for the accountants of the two sides to meet. However, these dates were not convenient to Defendants. By a letter dated 14th April 2016 the Defendant asked for some other dates to be suggested. The Plaintiff replied saying they should suggest dates and then they will find out if any of

those dates were convenient to their accountants but nothing followed.

14. The Defendants stated that they are ready and willing to meet the accountants of the plaintiff on any mutually convenient date to carry out the exercise of re-visiting the accounts with a view to narrowing down the area of dispute. They denied the allegation that, they are dragging the matter and blamed the Plaintiff for more than often taking months to respond to them and therefore should be the last party to complain about delay.

15. They argued that, there is no evidence whatsoever laid before the Honorable Court in support of this allegation in that **“the execution of the orders given proves difficult and the matter is likely to drag and such dragging is likely to cause irreparable damage and financial loss to the Applicant.”**

16. The Defendant further stated that under prayer 2 of the Application, the Plaintiff is seeking for an order of **“release”** of USD (36,156.99) (Kshs. 3,379,517.47), for conveniently forgetting the Defendants Defence and Counterclaim. That the Defendant has set off this amount against its claim of Kshs. 18,873,269.38 and raised a counterclaim for the balance of Kshs. 15,475,751.91. Thus, there is no amount due from and owing by the Defendant to the plaintiff but it is the plaintiff who owes a substantial amount to the Defendant and therefore there is no amount lying with the defendant which can be **“released.”**

17. That, further under prayer 3 of the Application, the plaintiff is seeking for review of the orders of Hon. Justice J.B Havelock. Yet in its affidavit no case has been made out for this prayer. However if at all any review is required to be made then it should be that, the parties should ask their accountants to re-visit the accounts and consider any objections and resolve such matters that can be resolved and refer the remainder if any to Arbitration as Arbitration may be a more convenient forum for a dispute such as this where accounts are involved and a lot of paperwork will need to be looked at.

18. The Parties filed submissions to dispose off the Application. The Plaintiff submitted that, the compliance with the orders issued herein has been rendered impossible due to the timelines that the learned Judge imposed, and the parties have therefore been constrained as to how to proceed without breaching the orders. They further submitted that, it is noteworthy that the Defendant/Respondent is not opposed to the application for review as detailed in paragraph 8 of its replying Affidavit.

19. That it is a principle in law that the Court does not issue orders in vain as such, the prevailing situation is curable through review of the said orders. The amount claimed is a credit balance owed to the Plaintiff/Applicant and which ought to have been released to the Applicant after the sale and is not part of the money the Plaintiff/Applicant claims from the Defendant/Respondent in its plaint. That, it is a fact that the difference in the amount claimed by the plaintiff/Applicant and that claimed in the counter claim is Kshs. 3,397,157.47.

20. The Applicant also submitted that, there is no prejudice to the Defendant/Respondent if the court orders a release of the amount owing to the Plaintiff/Applicant. Further the Defendant/Respondent has not demonstrated any prejudice that it would suffer in release the credit balance owed to the plaintiff.

21. They humbly pray that this honorable court be pleased to make orders for the defendant/respondent to submit all the relevant documentation for the expeditious disposal of this matter and relied on the overriding Objective anchored in **Sections 1A and 1B of the Civil Procedure Act**, supported by **Section 3A** of the Act.

22. Defendant's Submissions, reiterated the contents of the replying affidavit. In response to prayer 3 of the application, they submitted that, the plaintiff is seeking a review of the order of Mr. Justice Havelock, but in its affidavit the plaintiff has not made up a case for this prayer.

23. However if at all any review is required then it should be that the parties should themselves scrutinize the accounts in question and consider any issues that may arise and resolve such matters that can be solved and refer the area of disagreement to arbitration as aforesaid.

24. In response to paragraph 2 of its application they submitted that, it is a very strange application because the defendant knows that there is no such amount lying with the Defendant which can be “released” to the Plaintiff as stated in the Replying Affidavit.

25. The Law on Review of a Decree or an Order of the Court is founded on Section 80 of the Civil Procedure Act makes provision for review of a decree or an order and supported by Order 45 Rule 1 Sub rule 1 of the Civil Procedure Rules which states as follows:

“Any person considering himself aggrieved:

1. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

2. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”

26. At the conclusion of the Application I find the issues for determination

- Whether the applicant has met conditions for review
- Whether the granting of orders sought for herein will be in the interest of justice.

27. I shall now address the Prayers in the Application. In regard to prayer 2 relating to the release of USD 36156.99 (3,379,517.47). I refer the applicant to paragraph 7 of the ruling delivered by Hon. Justice Havelock, which I reproduce herewith:

“The Applicant has not shown what risk or loss or damages it stands to suffer or incur should the said amount of Kshs. 23,703,953 not be deposited into the Court as per its application. In any event, it has not demonstrated that the defendant company would be unable to repay that or any amount certified after the taking of accounts or any decretal sum as may be ordered by the Court after the hearing of the matter. In my view, the Applicant has not given any compelling or cogent reasons as to why the Court’s discretion to issue Orders as prayed for under Order 20 Rule 4 should be exercised in this matter.”

28. The amount herein sought to be released is part of the amount dispute and it can only be certified as due once accounts are taken. I find in that regard, the Applicant is on a fishing expedition.

29. As regards Prayer 3: Review of orders, none of the grounds required for review have been satisfied by the Applicant. Applicant only alleges impossibility to comply with the court order due to timelines that the learned judge imposed. The parties have therefore been constrained as to how to proceed without breaching the orders. That reason is not part of the requirements of Order 45 Rule 1 Sub rule 1 of the Civil Procedure Rules

30. However, both parties have agreed to the review of the Orders herein, although it is not clear in what terms the review the Applicant wants the ordered. The respondent seem to be clear that, if at all any review is required then it should be that the parties should themselves scrutinize the accounts in question and consider any issues that may arise and resolve such matters that can be solved and refer the area of disagreement to arbitration.

31. In relation to Prayer 4, seeking for submission of documents to the auditor, the correspondence annexed to the affidavits sworn by the respective parties clearly reveals that the parties have been in communication with the view complying with Court order.

32. This is evidenced from the letters from their respective counsels. The first letter is dated 31st May 2015 from the firm of Muriungi & Company Advocates with a response thereto from the firm of D.V. Kapila dated 9th July 2015. Both parties agreed that the audit fee was on the higher side. They agreed to work a way out, with the firm of D.V. Kapila suggesting the way forward vide his letter dated 28th September 2015.

33. By a further letter 5th January 2016, D.V Kapila, was still of the view that the parties should find a way forward amicably, that the parties should try to narrow down the issues in dispute prior to presenting the accounts required to the independent auditor.

34. On 2nd March 2016, the firm of Muriungi & Company Advocates suggested dates of the meeting of their clients' auditors. On 14th April 2016 the firm of D.V. Kapila responded saying that the dates proposed were not convenient for their accountants and auditors. On 18th April 2016 the firm of Muriungi & Company Advocates sought for a convenient date from the firm of D.V. Kapila. Nothing seems to have happened thereafter until this application was filed on 8th June 2016.

35. It is there clear in my mind that both parties have been in active communication to resolve this matter. The Applicant simply became impatient. In that regard and to assist the parties I think timelines need to be fixed for compliance.

36. In conclusion, **the Notice of dated 8th June 2016 is dismissed save for the following orders**

- *The Parties herein shall forthwith commence with the ongoing negotiation and or communication with a view to narrow down issues in dispute*
- *They shall proceed and facilitate the meeting of their respective Auditors or Accountants, whatever the case may be and the first such meeting shall take place within 14 days of this Order*
- *The parties shall report to Court the progress of the matter within 30 days of this Order*
- *Each party is at liberty to apply*
- *Each party shall meet its own costs in relation to this Application*

It is so ordered.

DATED AND DELIVERED ON THIS 18TH DAY OF AUGUST 2016

G.L NZIOKA

JUDGE

In the presence of:

For the Applicant

For the Respondent

Teresia

Court- Clerk