



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 1 OF 2004

CLEARSPAN CONSTRUCTION CO. LTD PLAINTIFF

V E R S U S

EAST AFRICAN GAS LIMITED 1ST DEFENDANT

AND

VIKING WORLD INVESTMENT SA 2ND DEFENDANT

RULING

BACKGROUND

1. Judgment was entered for the Plaintiff against the Defendant on 3rd November 2009 for Kshs. 49,914,562/- with interest. Plaintiff on 12th March 2013 obtained attachments of Defendant's movable goods when the auctioneer Makini Auctioneer Agencies issued a proclamation. The Auctioneer proclaimed four (4) large LPG storage tanks. It is that proclamation that provoked the objection raised by Viking World Investment SA (hereinafter referred to as the '**Objector**') by their Notice of Motion dated 20th March 2013, (hereinafter referred to as the application).

THE APPLICATION

2. The Objector by the application seek a finding that the attached tanks belong to it in equity and law. The application is brought under Order 22 rule 51(1) and (2) of the Civil Procedure Rules. Rule 51(1) provides-

“Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the Court and to all the parties and to the decree-holder of his objection to the attachment of such property.”

OBJECTOR'S AFFIDAVIT EVIDENCE

3. In support of that application Objector relied on the affidavit sworn by Sarah Yar Khan dated 20th March 2013 and her Supplementary Affidavit dated 27th November 2014.

4. The affidavit dated 20th March 2013 was the one that accompanied the application. In that affidavit Sarah Yar Khan stated-

1. She is a Director of the Objector Company.

11. The Plaintiff entered into an agreement with Pacific Corporation Group SA (Pacific) whereby Pacific would finance the purchase of four LPG tanks for the Defendant.

5. That agreement annexed to the affidavit on the issue of payment for those tanks states as follows-

This equipment would be paid for and delivered to a site in Mombasa, by Pacific and once testing had been complete and full and final payment made to Pacific, title and ownership of the said tanks and equipment would pass to EAGL.

Pacific warrants that the cost of such equipment as US\$4,033,004.19 and DM 1,371,190.00, which included cost and transportation to site. Invoices are attached in Appendix 2 showing amount fully paid by.

EAGL warrants that it will fully reimburse Pacific for the costs accumulated as per Clause 94) above.

6. Ms Khan in the affidavit of 20th March 2013 further deponed that, over time Pacific being 100% subsidiary of the Objector transferred all its rights to the Objector over the tanks making the Objector the legal owner of those tanks.

7. In what seems to be apparent contradiction of the above depositions Ms Khan then deponed-

That it (Viking World Investment SA) financed the tanks and placed a caveat on the said tanks to retain title to the tanks until and unless the East Africa Gas Company Ltd paid for them.

That the request to finance the tanks was made to it (Viking World Investment SA) by Gas Company Ltd, a shareholder in East Africa Gas Company Ltd.

8. Ms Khan then deponed that the Defendant had not paid the cost of the tanks being US Dollars 4,033,004.19 and DM 1,371,190.00.

9. By her Supplementary Affidavit dated 17th November 2014 Ms Khan describes herself as the Vice President of the Objector Company even though she annexed to her said affidavit a Certificate by the General Directorate of the Public Registrar office of Panama which shows that the Vice President of the Objector Company is someone else by the name Gi Selle Arango De Rodriguez and not Ms. Khan.

10. In that affidavit Ms Khan denied that the Objector was privy to the previous applications made in this matter by the Defendants whereby Defendant unsuccessfully sought stay of execution of attachment of its immovable and moveable assets which obviously included the four tanks.

11. Further on the issue of financing the purchase of the tanks she deponed in the Supplementary Affidavit that-

The Objector provided funds for the acquisition of the tanks and transportation to Mombasa.

The sale price was to be paid to Pacific, on behalf of the Objector, but subject to

inspection and valuation by the Defendant.

OBJECTOR'S SUBMISSIONS

12. Objector's Learned Counsel submitted that Objector recognized that it was obligated to prove its legal or equitable interest in the tanks but then added that the standard of proof remained the civil standard of proof, that is on a balance of probability. In that regard learned Counsel referred to the case **PATRICK KINGORI WARUGONGO -Vs- JAMES NDERITU & ANOTHER (2014)eKLR** as follows-

“Although the law is that in the objection proceedings the Court does not and cannot make a finding as to the ownership of the property the subject of the objection proceedings but simply decide whether or not the Objector has interest legal or equitable in the attached property it is equally true that the onus of proof in objection proceedings is on the Objector to establish ownership.”

13. Objector also relied on the opening statement in the case **AKIBA BANK LIMITED -Vs- JETHA & SONS LIMITED** as follows-

“An Objector coming to Court under Rule 57 of Order 21 of the Civil Procedure Rules (the Rules) so as to establish his claim to attached goods as required by Rule 56 of the same Order must exhibit evidence of his legal or equitable interest in the whole or part of any property attached in execution of a decree.”

14. The Objector relied on the depositions of Ms Khan which it was submitted well met the standard of proof which proved the Objector's right to the tanks.

PLAINTIFF'S REPLYING AFFIDAVIT

15. Plaintiff's Director Anthony Dickinson swore an affidavit in reply dated 26th March 2013. The deponent stated that the Defendant by its earlier application, a Notice of Motion dated 13th August 2011 had sought stay of execution by setting out the following prayer-

“2. That there be a temporary stay of execution, and or further execution, ... and or alienation and or trespass or transfer of any of the Applicant's parcels of land situated in Mombasa (numbers given) ... and the movable property comprising four large L.P.G storage tanks.”

16. Plaintiff emphasized that that prayer showed that the Defendant at that time recognized that the four LPG storage tanks belonged to it, the very tanks the Objector now claims ownership over.

17. Plaintiff referred to subsequent application by the Defendant dated 28th and 31st August 2012 by which the Defendant did not indicate the ownership of the tanks.

18. Plaintiff saw mischief in the present application by the Objector which was filed after the Defendant failed twice to obtain stay of execution of the Decree.

19. Plaintiff faulted Objector's reliance on agreements which were not under seal and it was deponed that the same were contrary to the provision of the Companies Act Cap 486. Plaintiff concluded that Objector had failed to demonstrate any right over the tanks.

PLAINTIFF'S SUBMISSIONS

20. In its written submissions the Plaintiff elaborated the points raised in its Replying Affidavit. Plaintiff drew Court's attention to the Objector's failure to controvert the Defendant's prayer in its previous application, where the intimation was that the tanks belonged to the Defendant. In that

regard Plaintiff relied on the case KAGENYI –Vs- MUSAIRAMO [1968]E.A. 43 as follows-

“The application is opposed by the Defendants, Neither the Respondents nor their Counsel has filed a counter-affidavit to the affidavit sworn by the Counsel for the Applicant. The allegations of fact contained in the Applicant’s affidavit are therefore uncontradicted and unchallenged on oath and must be accepted by this Court as the truth of the averments therein contained.” (emphasis given)

21.Plaintiff submitted that the Objector, contrary to it stated, could not in law be the holder of 100% shares of Pacific. Plaintiff relied on Section 154 of Cap 486 which is *pari material* to the provisions in United Kingdom where both the Objector and Pacific are registered as Companies. Section 154 sets out how one Company is deemed to be a holding Company, or subsidiary Company of another. Plaintiff further relied on Halbury’s Laws of England, Vol 7, 4th Edition where the Learned author wrote-

“A Company may be wound up by the Court if:

(4) the number of members is reduced, in the case of a private Company, below two, in the case of any other Company below seven.”

This the Plaintiff used to argue that it was not legally tenable for the Objector to singly be the only member of Pacific. That if so Pacific was likely to be wound up.

ANALYSIS

22.This Court by its Ruling dated 31st July 2014 while Ruling on Plaintiff’s application for security of costs considered the merits or otherwise of the Objector’s claim of ownership of the four tanks. That Ruling, in part, was in following terms-

“The Objector on a prima facie basis did not produce any evidence to prove its allegations that it had taken over the contract for the supply of the tanks. There is no evidence that PACIFIC CORPORATION GROUP SA transferred all its rights to the Objector and therefore clothing the Objector with legal and/or equitable rights and interests in the subject tanks. In my view, since the contract for the supply of the tanks was between the Defendant and another company (Pacific Corporation Group SA), it was very material for the objector to create a clear nexus between itself and that other company. That required documentary backing rather than mere averment because, I believe, an issue as important as transfer of rights from one company to another ordinarily is done in writing and sometimes requires resolution of shareholders or directors, notification to the relevant regulatory authority and execution of relevant documentation to effect the transfer. The Objector did not exhibit any such documents. The conclusion I arrive at is that since the Objector did not exhibited any evidence to support its allegations as to transfer of rights over the tanks, the Plaintiff’s defence that the Objector lacks *locus standi*, is a *bona fide* defence.”

That finding was not appealed by the Objector but the Objector did file Supplementary Affidavit, referred to above.

23.As can be seen above in this Ruling the Objector filed an agreement between it and Pacific whereby Pacific allegedly assigned over to the Objector its alleged rights over the tank. That agreement was dated 11th April 2004. Surprisingly on that very day, 11th April 2004, the Defendant, a Company registered and trading in Kenya confirmed that it did not object to the assignment of right over the tanks to the Objector. The Plaintiff, quite rightly, was suspicious whether the Defendant based in Kenya could give its written authority on 11th April 2004 and Pacific and the Objector being foreign Companies could then sign an assignment agreement on the

same day. Even though the Plaintiff raised that suspicion in its submissions, the Objector did not respond to it, even through oral submissions.

24. But perhaps much more telling is the Objector's failure to deny the Defendants previous allegations that the tanks belonged to it. The Defendant by its Notice of Motion dated 13th August 2011 sought stay of execution on one ground, amongst others, that the four LPG tanks belonged to it. That application was fixed for hearing on 29th August 2011. Because the Plaintiff conceded that the warrants of attachment had been issued prematurely the Court granted stay as sought by Defendant by that Notice of Motion dated 13th August 2011. The stay therefore was granted partly on the ground that the tanks belonged to Defendant. It therefore follows that it was an obvious failure on Objector's part to respond to that allegation of ownership of the tanks by Defendant by saying it was a stranger to Defendant's allegations of being owner of the tanks. The Plaintiff was not misplaced to have suspected mischief in that failure by Objector. It is not misplaced to state that the Objector's failure to rebut that statement of fact would lead to a finding that the Defendant's version was correct, that it is the owner of the tanks. The Objector ought to have explained why it relied on Defendant's alleged letter dated 11th April 2004 giving authority to assignment of right over the tanks by Pacific to Objector yet in the 2011 Defendant by its Notice of Motion sought stay of execution on the ground that the very same tanks belonged to it.
25. As it will be seen from the extract of the Ruling of 31st July 2014 reproduced above, that the Court found that the Objector's claim was weakened by lack of documents to support its claim, I am of the view, that even though the Objector obtained leave to file a further affidavit and did infact file that affidavit its claim is still hampered by lack of documentation to prove its claim of ownership of those tanks on a balance of probability.
26. As far as who financed the purchase of the tanks is concerned I best describe what the Objector presented to this Court as gibberish. Why so? Because the Objector presents an agreement between Pacific and the Defendant dated 25th February 2000 which agreement at one point suggests the financier for the tanks would be Pacific and in another paragraph the identity of the one paying was left as a mystery when it stated "**... showing amount fully paid by ...**". The one who was to fully pay was not stated in that agreement. Further the Objector time and time again stated that it was it that provided the finance. The issue of the financier remains clouded in that mystery. It may have assisted if the Objector had provided shipping documents of those tanks.
27. The other failure of provision of documents is that the Objector stated that Pacific could not bring objection before this Court because it was dissolved prior to it assigning its alleged rights to the tanks to the Objector. The Objector ought to have provided evidence of that dissolution of Pacific.
28. The Objector in its affidavit stated that it paid for the tanks and placed a caveat on them. There was no document presented by the Objector to support its allegation about that caveat. The Oxford Reference Dictionary of Law New Edition defines caveat as-
- "A notice, usually in the form of an entry in a register, to the effect that no action of a certain kind may be taken without first informing the person who gave the notice."**
29. From that definition it becomes clear that what the Objector referred to as a caveat was not a caveat and if it was then the Objector ought to have provided copy of the notice of it.
30. There is also the niggling issue of dates, which the Plaintiff captured in its submissions.
31. As noted by the Plaintiff the Defendant wrote a letter dated 11th April 2004 giving its confirmation that it did not object to Pacific assigning its right over the tanks to the Objector. On that very day Pacific and the Objector signed that assignment. No explanation was forthcoming from the Objector how that could have been when the letter was done in Kenya and the assignment was done abroad.

32. On perusal of the applications before me I was intrigued by noting that the affidavit of Ms Khan signed before a Notary Public in United Kingdom on 20th March 2013, was filed in Mombasa High Court, in this matter, on 21st March 2013. I have checked all the copies of the Objector's application filed on 21st March 2013 and I have seen that the affidavit sworn before that Notary Public is the original copy. So when was it signed in United Kingdom, for it to be sent to Mombasa and to then be filed? It is intriguing.

33. I do agree with the submissions made by the Objector to the effect that the agreement dated 25th February 2000 between Defendant and Pacific is not invalidated by the fact it was not under seal. Under Section 37(1) the official seal is mandatory for use in documentation done outside Kenya. This is supported by the authority relied upon by the Objector namely **LWAJAGALI COFFEE GROWERS LTD –Vs- LESLIE AND ANDERSON (E.A) LTD & OTHERS [1967]IALR COMM 323** where Newbold P stated-

“The stern rule of law that generally contracts should be by deed under seal was gradually eroded especially in relation to what we call Commercial Corporation. For over 100 years it has been accepted that commercial companies do not usually need to act under or by virtue of a deed. No distinction in common law has been made between an instrument writing not under seal and any other form of authority. In other words a commercial company can unless there is a statutory provision to the contrary, contract validly, whether the contract is created by word of mouth or by writing.”

34. I am in agreement with the Plaintiff's submission that it is legally unattainable for the Objector to hold 100% shares of Pacific. To accept that the Objector Company could hold 100% shares of Pacific would be to say that a Limited Liability Company could be owned by one person. Although Section 154 of Cap 486 recognizes that a Company could be a holding Company of another if it holds more than half of the nominal value of its equity share capital, that Section importantly does not state that such holding can be 100% as suggested by the Objector. The Objector's contention therefore that it held 100% shares of Pacific is rejected.

CONCLUSION

35. In the end I find the Objector failed to meet the evidential burden of proof on a balance of probability. The Objector's Learned Counsel submitted that the Objector had met the Civil burden of proof. The Civil burden of proof was discussed by Denning J in **MILLER –Vs- MINISTER OF PENSION [1947]** when he stated-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable that not’, the burden is discharged, but, if the probabilities are equal, it is not.”

36. The Objector failed to meet that burden. After reviewing the evidence presented before Court one is left with an impression that it is more probable that the tanks belong to the Defendant.

37. Accordingly the Notice of Motion dated 21st March 2013 is dismissed with costs to Plaintiff.

DATED and DELIVERED at MOMBASA this 19TH day of MARCH, 2015.

MARY KASANGO

JUDGE