



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 255 OF 2010
TROPICAL FARM MANAGEMENT (KENYA) LIMITED...PLAINTIFF
VERSUS
SOCFINAF COMPANY LIMITED.....1ST DEFENDANT
SASINI LIMITED.....2ND DEFENDANT
KYANZAVI FARMERS COMPANY LIMITED.....INTERESTED PARTY

RULING

INTRODUCTION

1. The Application before the Court is the Plaintiff's Notice of Motion dated **17th July 2012** and filed on **18th September 2012**. It is expressed to be brought under the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act**. The Application sought for the following orders:-

- 1. That the second Defendant do furnish the Plaintiff within 30 days with full particulars with all supporting documents of the sale of the interested Party's 2010/11 season coffee crop by the Second Defendant through its subsidiary company.***
- 2. That the second Defendant do deposit within 30 days a sum of Kshs. 17,142,242.15 in an interest earning bank account in the joint names of the advocates of the Plaintiff, the second Defendant and the Interested Party.***
- 3. That the Second Defendant do pay the Plaintiff the costs of this application.***

THE PLAINTIFF'S CASE

2. The application is based on the grounds set out therein and is supported by the Affidavit of MAINA RUO, the Agronomy Manager of the Plaintiff and sworn on **17th July 2012**.

3. It is averred by the Plaintiff that in April 2010, the interested party owed them Kshs. 61,346,876/= which prompted the Plaintiff to file the current suit as they were apprehensive that they would face difficulties in recovering the amount. Subsequently, the Parties entered into a Consent Order which was recorded on 7th May 2010 and issued by the Court on 19th May 2010. The essence of the consent order was that the interested party was to be sold by the Second Defendant through its subsidiary and the sale proceeds were to be paid to the Plaintiff and to the Interested Party according to the formula agreed and stipulated in the Consent Order.

4. Pursuant to the Consent Order, the second Defendant sold the Coffee in two lots and the sale proceeds were shared between the Plaintiff and the interested party as set out in Clause 6. The end result was that the Plaintiff had been paid a sum of Kshs. 44,203,633.85 leaving a balance of Kshs. 17,142,242.15/. The parties had agreed, as set out in clause 7, that in the event that there was still a balance due to the Plaintiff after the payment of the sale proceeds, then the balance was to be paid through the sale of the interested Party's 2010/11 season coffee crop.

5. The Parties had further agreed that the Plaintiff was to provide the interested party with full particulars of its claim, which the Plaintiff did but the Interested Party neither admitted nor denied the claim. In the event that the claim was admitted the Second Defendant was required to pay the Plaintiff the balance of its claim and if the claim was denied the second Defendant was to deposit the said amount in an interest earning account in the joint names of the Plaintiff's advocates, the second Defendant and the interested party pending the adjudication of the claim in Court.

6. The Plaintiff's case is that despite repeated requests made to the second Defendant to supply them with full particulars of the sale of the said coffee, the second Defendant continues to refuse to supply the same. It is further the Plaintiff's case that as a result of this breach on the part of the Second Defendant, they have suffered and continue to suffer loss and damages.

THE 2ND DEFENDANT AND THE INTERESTED PARTY'S CASE

7. The 2nd Defendant opposed the application vide the Grounds of Opposition dated 23rd October 2012 and filed on even date.

8. The 2nd Defendant avers that the Plaintiff has come to Court with unclean hands having failed to provide the interested party with the full particulars of its claim which was a condition precedent to payment of the balance as set out under clause 7 of the Consent order. It is therefore the 2nd Defendant's case that the Plaintiff's application is premature and untenable.

9. On 19th October 2012, the interested party filed a Replying affidavit sworn by JAMES MUIYA MUEMA on 16th October 2012 in opposition to the application.

10. It is the interested Party's position that the Plaintiff has never furnished them with an account of all the money it received during the management period. It is therefore their case that the Plaintiff's application is premature in view of the fact that it has not yet supplied all particulars required by the interested Party.

ANALYSIS

11. The application was orally canvassed before me. I have considered the application, the affidavits in support and opposition to the application as well as the oral submissions by Counsel. Having done so, I take the following view of the matter.

12. The Plaintiff in its submissions maintains that they furnished the requisite particulars to the interested party who neither denied nor admitted the claim therein. The Plaintiff further submitted that the 2nd Defendant has refused to provide them with particulars of the coffee that was sold and the ensuing proceeds.

13. On the other hand, the 2nd Defendant submitted that the current application was premature. It was the 2nd Defendant's submission that the Plaintiff had not met the condition precedent in the Consent order which was to furnish the interested party with particulars of its claim.

14. On its part, the Interested Party submitted that the Consent was not enforceable yet as the Plaintiff's claim had not been proved. It was further submitted that the Plaintiff had failed to satisfy clause 7 of the Consent Order by not providing full particulars of its claim to the Interested party.

15. From the foregoing, the main contention between the parties arises from **clause 7** of the Consent order dated **7th May 2010** and issued in Court on **19th May 2010**. For the benefit of this ruling, I find it necessary to reproduce the contents of the said clause which states as follows:-

“That if after tropical receives payment from Sasini as stated above there is still a balance due to it from Kyanzavi towards the said claim then the same shall be paid to Tropical after the sale by Sasini of Kyanzavi's 2010/2011 Season Coffee crop which will be harvested around June/July, 2010. However before this amount is paid, Tropical shall provide Kyanzavi full particulars of the said claim and require Kyanzavi to admit the same. Such portion of the said claim as Kyanzavi shall admit shall be paid by Sasini immediately. However if there is any portion of the said claim as Kyanzavi shall not admit then if Tropical does not give up its claim to that portion it shall become a disputed amount (“the disputed amount”) and in that case an amount equal to the disputed amount shall be deposited by Sasini in an interest earning account in the joint names of the advocates of tropical, Sasini and Kyanzavi and Tropical and Kyanzavi shall thereafter file appropriate pleadings in this suit with a view to requiring the court to adjudicate upon the disputed amount.”

16. From the Consent order and in particular clause 6, it seems that the parties were in agreement that the Plaintiff (Tropical) was owed Kshs. 61, 346, 876/= by the Interested Party (Kyanzavi). The said Consent Order provided for the formula in which the said amount was to be paid. The Plaintiff's position is that so far it has been paid a sum of Kshs. 44,203,633.85 leaving a balance of Kshs. 17,142,242.15/=. This fact has not been controverted by the 2nd Defendant (Sasini) or Interested Party. Therefore this Court takes it that the balance of Kshs. 17,142,242.15/= is indeed outstanding.

17. The parties had agreed, as set out in clause 7 above, that in the event that there was still a balance due to the Plaintiff after the payment of the sale proceeds, then the balance was to be paid through the sale of the interested Party's 2010/11 season coffee crop. However, there was a condition precedent to the payment of the balance, which the interested party claims the Plaintiff has not fulfilled. The Plaintiff was to provide the Interested Party with full particulars of its claim. The nature and extent of such particulars were not explained in the Consent order. I believe the requisite particulars are best known to the parties.

Though the Plaintiff maintains that it provided the Interested Party with the Particulars required, it is unfortunate that it did not find it necessary to provide evidence of the same by either attaching them to its application or filing them in Court. In that case, this Court has no way to ascertain that the Plaintiff has met the condition precedent in clause 7.

18. The Interested Party can only admit or deny the Plaintiff's claim, once the Plaintiff has provided them with the particulars. In the event that there will be a disputed amount, then as is provided for under clause 7 of the Consent Order, the 2nd Defendant shall deposit the disputed amount in an interest earning account in the joint names of the advocates of the parties herein.

19. In a synopsis, it is not clear on what basis the Plaintiff brought the current application. The Plaintiff has failed to show this Court that it has met part of its bargain as envisaged under the Consent Order and it therefore appears that the application in itself is premature. The Consent order is binding on the parties and cannot be varied or discharged unless obtained by fraud or collusion. See *Hirani vs Kassam (1952)*, 19EACA 131. No such circumstances have been shown to exist in this case, therefore the Plaintiff must abide by the Consent Order in order to enforce his rights therein.

DISPOSITION

20. In the circumstances foregoing, the upshot of this court's ruling is that the Plaintiff's Notice of Motion dated **17th July 2012** and filed on **18th September 2012** is hereby dismissed with costs.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 15TH DAY OF MAY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Ms Miringu holding brief for Kapila for Plaintiff

Mr. Musyoka holding brief for M/s Mutua for 1st Defendant

Mr. Sifuna holding brief for Ashitiwe for 2nd Defendant

Teresia – Court Clerk