



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 47 OF 2014**

**DIOCESE OF KITUI REGISTERED TRUSTEES.....PLAINTIFF**

**• VERSUS –**

**TIMOTHY KARUNGU KARANJA.....1<sup>ST</sup> DEFENDANT**

**DRY ASSOCIATES LIMITED.....2<sup>ND</sup> DEFENDANT**

**CAR AND GENERAL (K) LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. By an application dated 8<sup>th</sup> July 2014, the plaintiff, the **DIOCESE OF KITUI REGISTERED TRUSTEES**, asked the Court to grant judgement on admission. The said relief was sought against all the 3 defendants, namely **TIMOTHY KARUNGU KARANJA**, **DRY ASSOCIATES LIMITED** and **CAR & GENERAL LIMITED**.
2. As far as the plaintiff was concerned, it had invested in Commercial Papers and Short Term Notes which had been issued by **CAR & GENERAL LIMITED**.
3. The plaintiff's case was that **DRY ASSOCIATES LIMITED** were the Placement Agent for **CAR & GENERAL LIMITED**, whilst **TIMOTHY KARUNGU KARANJA** was the Senior Investment Analyst at **DRY ASSOCIATES LIMITED**.
4. The plaintiff's assertion was that the 1<sup>st</sup> and the 2<sup>nd</sup> defendants advised it to invest Kshs. 5,000,000/- in a Commercial Paper, with the 3<sup>rd</sup> defendant. Acting on that advice, the plaintiff placed the sum of Kshs. 5,000,000/- with the 3<sup>rd</sup> defendant, for an initial investment period of 91 days.
5. The plaintiff says that when the first investment matured, the plaintiff instructed the 1<sup>st</sup> and 2<sup>nd</sup> defendants to roll over the principal sum together with the interest for a further period of one (1) year.
6. The investment was thus scheduled to mature on 5<sup>th</sup> August 2011.
7. However, the plaintiff had not received the maturity proceeds. It was for that reason that the plaintiff filed suit against the 3 defendants.
8. The defendants filed their respective defences. But the plaintiff holds the view that the said defences constitute admissions of liability. It was for that reason that the plaintiff brought the application seeking judgement on admission.
9. Meanwhile, the 2<sup>nd</sup> defendant, **DRY ASSOCIATES LIMITED**, holds the view that the plaintiff did not disclose any cause of action against it. Therefore, the 2<sup>nd</sup> defendant filed an application dated 27<sup>th</sup> August 2014, asking the court to strike out the plaintiff.

10. Those 2 applications were heard together, and this Ruling is in relation to both of them.
11. In its submissions, the plaintiff contended that paragraph 2 of the 2<sup>nd</sup> defendant's Defence contained an admission;

*“that the 1<sup>st</sup> Defendant was its former employee during the material time hence, the 1<sup>st</sup> Defendant had ostensible authority to represent the 2<sup>nd</sup> Defendant in their capacity as placement agent/broker”.*

12. The plaintiff further submitted that the 1<sup>st</sup> defendant had admitted, in paragraph 3 of his Defence, that he was an employee of the 2<sup>nd</sup> Defendant and had ostensible authority to represent the 2<sup>nd</sup> Defendant.
13. A reading of the Defences reveals that the 2<sup>nd</sup> Defendant had expressly denied the contention that the 1<sup>st</sup> defendant had ostensible authority to represent the 2<sup>nd</sup> Defendant in the matters pertaining to the present suit.
14. At the same time, the 1<sup>st</sup> defendant had, in his Defence, admitted that he had been an employee of the 2<sup>nd</sup> defendant.
15. That admission does not, of itself, bear the necessary implication that the employee had ostensible authority of the employer to do that which the employee is alleged to have done in this case.
16. Having admitted that the 1<sup>st</sup> defendant was its employee, the burden of proof shifted to the employer to demonstrate that the third parties who dealt with the employee knew or ought to have known that the actions of the employee were not authorized by the employer.
17. In this instance, the 2<sup>nd</sup> defendant has admitted that its letter-heads were used to impress upon the plaintiff that there was a transaction that connected the plaintiff to the 3<sup>rd</sup> defendant, through the help of the 2<sup>nd</sup> defendant. However, the 2<sup>nd</sup> defendant insists that the use of its letter-heads was un-authorized by the 2<sup>nd</sup> defendant. It is the 2<sup>nd</sup> defendant's case that the said documents were forged by the 1<sup>st</sup> defendant.
18. Until and unless there is a determination by a court of competent jurisdiction, on the question as to whether or not the documents were forged, I hold the considered view that it would be premature to exonerate the 2<sup>nd</sup> defendant from liability. Therefore, the fact that the 1<sup>st</sup> defendant has been charged with criminal offences, emanating from his actions whilst he was an employee of the 2<sup>nd</sup> defendant, is not sufficient ground to conclude that the 2<sup>nd</sup> defendant did not know, or did not condone the actions of the 1<sup>st</sup> defendant.
19. It must be borne in mind that there is a legal presumption of innocence. Therefore, until the trial of the 1<sup>st</sup> defendant was finalized, and the said defendant was convicted, nobody can conclude that the 1<sup>st</sup> defendant was guilty of the offences he has been accused of committing.
20. In the circumstances, even after the 2<sup>nd</sup> defendant had intimated to the plaintiff that the 1<sup>st</sup> defendant had acted without the authority of the 2<sup>nd</sup> defendant, and that the use of the 2<sup>nd</sup> defendant's letterheads were a forgery calculated to defraud the plaintiff, that would not render the 1<sup>st</sup> defendant guilty.
21. It is noteworthy that the 2<sup>nd</sup> defendant completely denies any role in the issuance of the Commercial Paper which was issued by the 3<sup>rd</sup> Defendant.
22. On its part, the 3<sup>rd</sup> Defendant also denies any dealings with the plaintiff, in which the 2<sup>nd</sup> Defendant was the placement agent.
23. But the plaintiff firmly believes that the 1<sup>st</sup> defendant, in his capacity as an employee of the 2<sup>nd</sup> defendant, provided advice to the plaintiff and also handled the plaintiff's investment in the Commercial Paper issued by the 3<sup>rd</sup> Defendant.
24. The plaintiff's said contention was founded upon the fact that the plaintiff went to the offices of the 2<sup>nd</sup> defendant. The plaintiff was advised by an employee of the 2<sup>nd</sup> defendant.
25. Thereafter, the plaintiff gave written instructions to the 2<sup>nd</sup> defendant. And the plaintiff got a response, indicating that the 2<sup>nd</sup> defendant was carrying out the plaintiff's instructions.
26. The plaintiff thus relied on the following decision, to back its contention that the 2<sup>nd</sup> defendant

ought to be held liable for the actions of its employee;

***“A company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority; and strangers dealing bona fide with such persons have a right to assume that they have been duly appointed”.***

- per Pearson L J in ***FREEMAN AND LOCKYER (A FIRM) Vs BUCKHURST PARK PROPERTIES (MANGAL) & ANOTHER [1964] 1 ALL E R 630***, at page 641.

27. The learned Judge had quoted, with approval, those words from the trial Judge. Pearson L J went further to state as follows;

***“In my view the decision of the Judge was correct. On the facts as found, the plaintiffs were entitled to rely on the second defendant’s ostensible authority to give them instructions on behalf of the defendant company, because there was a holding out of the second defendant by the defendant company as its agent to conduct its business within the ordinary scope of that business”.***

28. I hold that there is a possibility that the plaintiff could lead evidence to prove that the 2<sup>nd</sup> defendant had held out the 1<sup>st</sup> defendant as its agent, to conduct the business of the 2<sup>nd</sup> defendant within the ordinary scope of the 2<sup>nd</sup> defendant’s business.

29. I say that such a possibility exists because the 1<sup>st</sup> defendant was definitely an employee of the 2<sup>nd</sup> defendant. That is common ground between the plaintiff, the 1<sup>st</sup> and the 2<sup>nd</sup> defendants.

30. If, as the plaintiff asserts, it dealt with the 1<sup>st</sup> defendant in the ordinary course of the 2<sup>nd</sup> defendant’s business, it may well be held that the 1<sup>st</sup> defendant had ostensible authority from the 2<sup>nd</sup> defendant.

31. The point I am making is that the plaintiff’s claim against the 2<sup>nd</sup> defendant is not so hopeless, that it was doomed to fail. It ought not to be stuck out summarily.

32. But, at the same time, the admissions made by the 1<sup>st</sup> and the 2<sup>nd</sup> defendants are not adequate to found liability against those defendants.

33. In ***MOUSEL BROTHERS LIMITED Vs LONDON AND NORTH WESTERN RAILWAY CO. [1917] 2 K B 836 at page 845***, the court made it clear that, *prima facie*, a principal is not to be made criminally responsible for the acts of its servants. Even if that be the case, I find that the attempt by the plaintiff, to prosecute its civil claim against the 2<sup>nd</sup> defendant is not intended to render the 2<sup>nd</sup> defendant criminally responsible.

34. To the extent that the 1<sup>st</sup> defendant may be found to be criminally culpable, he alone would be duly punished.

35. But the 2<sup>nd</sup> defendant has, in its own pleadings made the following point;

***“15. The case of Tabitha Nduhi Kinyua Vs Francis Mutua Mbuvi & Another Civil Appeal No. 186 of 2009 [2014] e KLR provided the ingredients for vicarious liability, stating;***

***“The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held vicariously liable if its employee was acting within the course and scope of employment at the time the delict was committed”.***

36. To my mind, that submission by the 2<sup>nd</sup> defendant clearly reinforces my finding that there was a possibility that the 2<sup>nd</sup> defendant could end up being found liable for the actions which the 1<sup>st</sup> defendant took whilst he was an employee of the 2<sup>nd</sup> defendant.

37. As for the 3<sup>rd</sup> defendant, there is an assertion that the plaintiff’s money was received by that

- company. Therefore, if the plaintiff proves that assertion, the question which the 3<sup>rd</sup> defendant would be obliged to respond to is why it has not paid the proceeds of the investment, back to the plaintiff.
38. But the 3<sup>rd</sup> defendant says that it received no money from the plaintiff, or on behalf of the plaintiff.
39. In the light of that denial, the plaintiff would have to discharge its burden of proof, by leading evidence to connect its investment with the 3<sup>rd</sup> defendant.
40. The fact that there was no document signed by the 3<sup>rd</sup> defendant, to show that it received some funds from or on behalf of the plaintiff, may make it difficult for the plaintiff to prove its assertions against the 3<sup>rd</sup> defendant.
41. But simply because the onus on a party was difficult to discharge, does not mean that the party would fail to discharge it.
42. To my mind, following the joinder of **MERIDAS CAPITAL LIMITED** and **INVESTMENT HOUSE LIMITED**, it should now be possible for the trial court to make a substantive determination of the issues arising in this case.
43. For now, however, the court rejects the plaintiff's application for judgement on admission. The court also rejects the application of the 2<sup>nd</sup> defendant, for the striking out of the plaint.
44. Each of the applicants will bear their own costs, as neither of them was successful.

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>th</sup> day of September 2015.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Mrs. Koech for the Plaintiff

No appearance for the 1<sup>st</sup> Defendant

Wawire for Gichuhi for the 2<sup>nd</sup> Defendant

Wawire for Gichuhi for the 3<sup>rd</sup> Defendant.

Collins Odhiambo – Court clerk.