



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 48 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**

**INSTEEL LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. There are 2 applications before me. The first application was brought by the plaintiff, seeking Judgement on Admission.
2. It is the plaintiff's contention that it invested the sum of Kshs. 10,000,000/- through the 2<sup>nd</sup> defendant, **DRY ASSOCIATES LIMITED**. And the plaintiff asserts that that fact was admitted by the 2<sup>nd</sup> defendant.
3. At the time when the plaintiff was making the investment, the 1<sup>st</sup> defendant, **TIMOTHY KARUNGU KARANJA**, was an employee of the 2<sup>nd</sup> defendant. That fact was admitted by both the 1<sup>st</sup> and the 2<sup>nd</sup> defendant.
4. The plaintiff's funds were said to have been invested in Commercial Papers and Short Term Notes which were issued by the 3<sup>rd</sup> defendant, **INSTEEL LIMITED**.
5. According to the plaintiff, there was an admission by the 3<sup>rd</sup> defendant that the plaintiff's funds, amounting to Kshs. 10,000,000/- were invested with the 3<sup>rd</sup> defendant.
6. When the investment matured, the plaintiff called for the funds it had invested, together with the returns on the said investment. However, the 3<sup>rd</sup> defendant failed to remit payment to the plaintiff.
7. In those circumstances, the plaintiff asked the court to grant judgement against the 3 defendants, on the basis of their respective admissions.
8. The plaintiff submitted that the 1<sup>st</sup> defendant had ostensible authority to act for and on behalf of the 2<sup>nd</sup> defendant. Such authority was said to have been derived from the fact that the 1<sup>st</sup> defendant was an employee of the 2<sup>nd</sup> defendant, at the material time.
9. The plaintiff relied on the following words of Lord Sumption in **JACINTA KELLY & 4**

*“An agent cannot be said to have authority solely on the basis that he has held himself out as having it. It is, however, perfectly possible for the proper authorities of the company (or, for that matter, any other principal) to organize its affairs in such a way that subordinates who would not have authority to approve a transaction are nevertheless held out by those authorities as persons who are to communicate to outsiders the fact that it has been approved by those who are authorized to approve it or that some particular agent has been duly authorized to approve it. These are representations which, if made by one held out by the company to make representations of that kind, may give rise to an estoppel”.*

10. I have no doubt that that pronouncement by the Court of Appeal of Jamaica is accurate.

11. The plaintiff also sought to rely on the following words of **DIPLOCK L J in FREEMAN AND LOCKYER (A FIRM) Vs BUCKHURST PARK PROPERTIES (MANGAL) & ANOTHER [1964] 1 ALL E.R 630**, at page 645;

*“As ‘apparent’ or ‘ostensible’ authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the ‘apparent’ authority, so as to render the principle liable to perform any obligations imposed on him by such contract.*

...

*The representation, when acted on by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether or not the agent had actual authority to enter into the contract”.*

12. The plaintiff’s position, as I understand it, is that because the 2<sup>nd</sup> defendant employed the 1<sup>st</sup> defendant in a capacity which placed him in direct contact with third parties who went to seek the services of the 2<sup>nd</sup> defendant, that constituted a representation to third parties. The plaintiff was such a third party, and it took action believing that it was contracting with the 2<sup>nd</sup> defendant.

13. The plaintiff had no intention of dealing with the 1<sup>st</sup> defendant, save in his capacity as an employee of the 2<sup>nd</sup> defendant.

14. But, on its part, the 2<sup>nd</sup> defendant asserts that there was no privity of contract between it and the plaintiff.

15. If the plaintiff transferred its money directly to the 3<sup>rd</sup> defendant, **INSTEEL LIMITED**, without involving the 2<sup>nd</sup> defendant; and because the 2<sup>nd</sup> defendant earned no commission out the transaction, the 2<sup>nd</sup> defendant states that it cannot be held accountable to the plaintiff.

16. Whilst the 2<sup>nd</sup> defendant denies any involvement in the process through which the plaintiff invested funds with the 3<sup>rd</sup> defendant, the plaintiff insists that the 2<sup>nd</sup> defendant was directly and actively involved in the whole process. The said involvement was through the 2<sup>nd</sup> defendant’s employee, **TIMOTHY KARUNGU KARANJA**.

17. Logically, the reasoning by the plaintiff appears plausible. However, the 2<sup>nd</sup> defendant did not admit the facts upon which the plaintiff relied as a foundation for the said reasoning.

18. The 1<sup>st</sup> and the 2<sup>nd</sup> defendants admitted that the 1<sup>st</sup> defendant was an employee of the 2<sup>nd</sup> defendant at all material times.

19. However, that fact alone was insufficient to render the 2<sup>nd</sup> defendant liable to the plaintiff, in respect to funds which the plaintiff invested with the 3<sup>rd</sup> defendant.

20. Another twist to this whole saga was the fact that although the plaintiff insisted that it directly

- handed over funds directly to the 3<sup>rd</sup> defendant, that defendant categorically denied receiving any funds from the plaintiff.
21. It would therefore be necessary for the plaintiff to lead evidence to prove that it invested funds with the 3<sup>rd</sup> defendant; and that the plaintiff did so on the advice of the 2<sup>nd</sup> defendant, who also facilitated the process of the said investment.
22. Whereas, it is possible that the plaintiff could produce evidence to prove the investment in question, the 2<sup>nd</sup> defendant nonetheless insists, that it cannot be vicariously liable for the criminal actions of its employee.
23. In **“SALMOND’ LAW of TORTS”**, 1945 Edition, the learned author, Stallybrass said;

***“The authority of the agents and representatives of a corporation is therefore conferred, limited and determined, not by the consent of the principal, but by the law itself. It is the law that determines who shall act for a corporation and within what limits his activity must be confined. Any act which lies beyond these legally appointed limits will not be imputed to the corporation, even though done in its name and on its behalf”.***

24. Therefore, the 2<sup>nd</sup> defendant intends to exonerate itself from blame for the actions of its employee, because the said employee acted beyond the legally appointed limits.
25. The plaintiff appears to appreciate the fact that there was fraud which was perpetuated by the 1<sup>st</sup> defendant.
26. Claims of fraud must be proved by the party alleging them. In the case of **HARIT SHETH T/A HARIT SHETH ADVOCATES Vs SHAMAS CHARANIA, CIVIL APPEAL No. 252 of 2008**, the Court of Appeal quoted with approval the following words from the decision of the Court of Appeal for Eastern Africa in the case **R.G. PATEL Vs LALJI MAKANJI [1957] E.A 314**;

***“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.***

27. In this case, the defendants had denied the allegations of fraud which were levied against them. Therefore, the plaintiff will have to discharge the onus of proving the fraud.
28. And, assuming that the plaintiff did succeed in proving that one or another of the defendants acted fraudulently, the question would be whether such proof rendered any of the other defendants liable.
29. In the circumstances, I find that the plaintiff has not demonstrated admissions that were plain and obvious, upon which judgement could be summarily founded.
30. However, the 2<sup>nd</sup> defendant cannot be permitted, at this stage, to exit the trial. On a *prima facie* basis, the 2<sup>nd</sup> defendant is deemed to be a necessary party in the proceedings. My said finding is based upon the admission by the 2<sup>nd</sup> defendant that it was the employer of the 1<sup>st</sup> defendant, who is alleged to have advised the plaintiff on the process of the investment in question, and who is also said to have facilitated the investment by the plaintiff.
31. If, as the plaintiff asserts, there was a representation by the 2<sup>nd</sup> defendant that the 1<sup>st</sup> defendant was duly authorized to help third parties who were dealing with the 2<sup>nd</sup> defendant, it may well be held, after a full trial, that the 2<sup>nd</sup> defendant was estopped from denying the contract signed on its behalf, by the 1<sup>st</sup> defendant.
32. Effectively, therefore, there is a possibility that the court could, ultimately hold that there was a privity of contract between the plaintiff and the 2<sup>nd</sup> defendant. Accordingly, on a *prima facie* basis, there is a cause of action against the 2<sup>nd</sup> defendant. In the circumstances, the 2<sup>nd</sup> defendant’s application to strike out the plaintiff’s claim fails.
33. Finally, as each of the applicants has been unsuccessful, I order that each party should pay his own costs, in both applications.

**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.