



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT NO. 18 OF 2002

DINO TOFALINIPLAINTIFF

VERSUS

NAYWA INVESTMENTDEFENDANT

JUDGMENT

1. The undisputed background to this case is that in the nineties the defendant company developed apartments known as Oasis village on plot no. LR 1862 over which they held a 99 year lease. Over 210 apartments and shop units were constructed and sublet to interested tenants such as the plaintiff. The directors of the defendant included Giovanni Decaro, Renato Neroni (DW2), Pepe Teresa and Carlo Barlini (now deceased).
2. The directors also took up several apartments. Before 1997, the common services to the apartments including maintenance and cleaning were provided to the tenants by the defendant. For this, the tenants paid a service charge of shs. 40,000 p.a. to the defendant. It would appear that the tenants were unhappy with the services provided by the defendant and decided to appoint an administrator, the first one being Decaro. In 1996 he resigned and in his place the plaintiff was appointed as administrator, a position he occupied between January, 1997 and December 1997. He was entitled to receive Kshs. 30,000/- per month as emoluments. At the end of 1997 DW1 took over.
3. It is the plaintiff's contention, denied by the defendant, that he was an agent of the defendant and that accounts taken at the end of his tenure showed that he was owed a sum of shs. 150,000 as outstanding salary and shs. 1,000,713. That of this amount only a sum of shs. 439,773 was paid leaving a balance of shs. 710,640/-. This is the sum total of the pleadings and evidence of the plaintiff.
4. Through DW1 the defendant denies having appointed the plaintiff as an administrator and states that the plaintiff was appointed by the subtenants of the apartments and that therefore the defendant is not liable to compensation. Regarding the defendant's alleged admission of the debt contained in P.Exh.4, DW1 said he signed it because the plaintiff persuaded him to do so, so that if more money was collected from apartment owners he could be paid therefrom too while giving some to the plaintiff.
5. He said he did not know how the debt arose. He claimed that during his tenure he collected arrears of service charges from the tenants and paid shs. 400,000/- odd to the plaintiff and that even after filing the case, the plaintiff continued to collect arrears from tenants. He claimed that

the plaintiff did not bank any of the monies he collected into the defendant's account.

6. Having considered the evidence on record, and especially the documentary exhibits, I take the following view of the matter. This claim stands or falls on two questions, namely whether the plaintiff was an agent of the defendant and ultimately whether the plaintiff's claim has been proved. It may or may not be a coincidence but the minutes of the appointment of the plaintiff as administrator (P.exh.3) does not bear any reference to Naywa Investments Ltd. as the appointing authority.
7. Like the minutes accepting the resignation of the previous administrator De Caro (P.exh. 2), the minutes are headed "JOINT – OWNERS MEETING" followed by the meeting date. But with one key difference – the minutes of 9-1-97 when the plaintiff was appointed do not show Naywa Investments in attendance as the minutes of 7th January, 1997 show. In both instances however both Tofalini Dino, the Plaintiff and Neroni Renato (DW1) are shown in attendance. The minutes were supposed to be approved by the secretary and president.
8. In Exh. 3 the president of the meeting is described as Arignoni Giovanni and the secretary Pigliafreddo Angelo who were also in attendance in the first meeting. According to P.exh. 3 a board of advisors were appointed alongside the plaintiff, on 9th January 1997. These were Merli Guancarlo, Volpi Allesandro, Devita Lucia, and others described as "referents from Italy" namely, Pigliafreddo Angelo, Colombi Guido, Rocca Constante and De Marchi Bruno.
9. These matters as well as items 3 and 4 of the minutes appear to support the evidence of DW1 that the tenants took the matter in their own hands and appointed the plaintiff and his board to manage the apartments. His emoluments and duties are clearly indicated in items 1 and 2. In light of this exhibit, it is absurd for the plaintiff to claim that he was the agent of the defendant.
10. More significantly, no contract was signed between the plaintiff and the defendant. The plaintiff has further placed reliance on the alleged admission – P.exh.4a to buttress his claim. His claims that accounts were taken before the execution of this document appear doubtful as DW1 signed "in faith", according to the exhibit.

The document was executed on 18th January, 1998 barely one month since DW1 took over. It reads:

"NAIWA INVESTMENT L.T.D. With headquarter in Malindi (KENYA) recognizes that Mr DINO TOFFALINI HAS ADVANCED ON HIS BEHALF the condominium "IASIS" of Malindi. Undertakes therefore to pay to Mr. DINO TOFFALINI the amount of shillings (kshs) 1.00.713 (one million seven hundred thirteen) within the month ofwith monthly payment equal to (Kshs.) 1.000.713.....within the day of every month starting from the current month of within 4 months 1998.."

IN FAITH

RENATO NERONI"

11. It is difficult to understand the true purport of this document, at least the English translations. Were the alleged sums expended on PW1's apartments/shops; what were the expenses; was the defendant to pay a monthly sum of shs. 100,713/- for four months in 1998 or a lumpsum? What is presented as accounts for the year ended on 31st December, 1997, (P. exh. 5) contains a different figure – shs. 1054, 354.30 and certainly does not include the alleged outstanding wages of shs. 150,000/- now claimed by the plaintiff.
12. In lieu of primary evidence of expenditure, it appears that the plaintiff relied on the Defendant's alleged admission and the alleged accountant's statement. In the defence, the defendant had challenged the plaintiff's claim and he had the onus to prove the claim, which in my view is also pleaded in a most obscure manner in the plaint. The plaint does not state what the claim was in respect of.

13. Besides, under item 2 of the minutes of the meeting of his appointment, the plaintiff was required to issue receipts and deposit moneys received into an account no. 11436-30- at the Trust Bank Ltd, Malindi. It is not clear how much he received from the tenants during the one year of his tenure. The account in question, expenses any payments were on the face of these minutes the mandate of the joint owners. They approved the yearly budget estimate, the installments and action against defaulters.

14. In these circumstances, it is unbelievable that the defendant was to be held responsible for the actions of an administrator whose work was clearly supervised by others – the tenants. And for this reason the alleged admission is even more doubtful – that a company would take responsibility for funds it did not control in the first place. In all likelihood, the explanation by DW1 is true. DW1 was giving covert authority to a retired administrator to continue collecting arrears from tenants in hopes of sharing the same. Hence P.exh. 4(a) represents a crooked collusion. My view is buttressed by the supposed payment of over shs. 400,000/= to the plaintiff by defendant. Why was that evidence of payment not tendered when it would have been useful in showing that the defendant indeed undertook liability?

15. The plaintiff's claim has no merit and is dismissed with costs. I do apologize to the parties that this judgment has delayed since 26th October, 2009 when my predecessor concluded trial. It seems the file somehow fell through the cracks and was only brought to my attention in March, 2013.

Delivered and signed at Malindi this **20th** day of **May, 2013** in the absence of parties, with notice via Kenya Law Reports' Website.

C. W. Meoli

JUDGE