REPUBLIC OF KENYA
HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT NO. 316 OF 2010

KENYA ANTI CORRUPTION COMMISSION ………………………PLAINTIFF/APPLICANT

VERSUS

DR. DAVY KIPROTICH KOECH ………………..…………………DEFENDANT/RESPONDENT

RULING

The Plaintiff has filed this Plaint under the powers conferred on the Kenya Anti Corruption Commission under Sec. 7 (1) (h) of The Anti Corruption and Economic Crime Act (Act No. 3 of 2003)

The cause of action of this suit arose from the averred transfer by the Defendant of Kshs.800,000/=, Kshs.6,000,000/= and Kshs.12,500,000/= from the Account of Kenya Medical Research Institute (referred to as "KEMRI") into the Account of Africa Medical Services Trust (referred to as "AMSET"). The transactions of the said transfers occurred on diverse dates between the months of August and December, 2006. The authority of such transfer and signature on the cheques were from and by the Defendant. The said sum was purported to be refunded by signing of cheques from AMSET at the behest of the Defendant. Except for that for the sum of Kshs.800,000/= the other two cheques were returned unpaid.

Hence this suit against the Defendant. The claim of the Plaintiff is for the judgment against the Defendant in the sum of Kshs.18,500,000/- with costs and interest.

The Plaint further avers that the transfer of the claimed sum into the accounts of AMSET was converted to the use of the Defendant and has particularized the grounds of irregularity.

It is averred and not disputed by the Defendant that he is a founder and trustee of AMSET. The Plaint also avers that transfer and conversion of the said sum was done fraudulently and particulars of fraud are stipulated in the Plaint.

The Defendant in his statement of Defence has denied the averments and specifically contended that the account in question of KEMRI was to be operated by the authorization of any of the two members of the Board of KEMRI and averred that all the transfers were regular and properly authorized. The Defendant also refutes the allegation of conversion and fraud. It is further claimed that KEMRI had a collaborative agreement with AMSET and it had assisted in various research projects. The Defence specifically averred that "*once in a while it was expected that KEMRI was to reciprocate the good gesture from the said AMSET*". It is also averred that if any fund was transferred to AMSET Bank Account it should be claimed from AMSET and not from the Defendant.

The Defence further averred that issues in Criminal Case No. 22 of 2009 filed against the Defendant, are

the same as raised in this case and thus the same should be struck out being malicious. In Reply to Defence, the Plaintiff has joined issues with defence.

Thereafter, the present Notice of Motion was filed under Order XXXV Rule 1 if Civil Procedure Rules (now repeated) which is equivalent to order 36 of the present Civil Procedure Rules.

It seeks summary Judgment against the Defendant in the sum of Kshs.18,500,000/=. The motion is supported by grounds set forth on the face thereof and detailed supporting affidavit of Mr. Ignatius Wekesa, an Investigator with the Plaintiff commission.

It avers in short as under:

1. That the Defendant was at all material time the Director and Chief Executive Officer of KEMRI and was signatory to various Bank Accounts of KEMRI as well as dedicated accounts for funds provided by the donors. One of such account was Account No.01020 – 985 421 – 00 KEMRI/CBCR (referred to as K Account). It was the Account at Kisumu Branch of Standard Chartered Bank Ltd.

2. On diverse dates in months of August and December, 2006 the Defendant unilaterally transferred Kshs.19,300,000/= from the K Account into an Account No. 1020 – 690 826 – 00 held at Yaya Centre Brach of the said Bank, in the name of AMSET. AMSET is a private trust, the Defendant being its trustee and signatory. The relevant documents for transfer and Trust Deed is produced as Annexure IW 1 and IW5. I shall specifically refer to the Defendant's letters of 16th August, 2006, 13th December, 2006, the documents confirming the authority to transact the accounts by two signatories, correspondence between the Department of Health and Human Services and the Defendant between January, 2007 and July 2007.

3. The Defendant in response to the queries from the Donor and the Ministry of Health has stated that there was a mix-up of Accounts due to an error and that <u>the reversals would be affected.</u>

4. The Defendants did issue three cheques in the sum of Kshs.12,500,000, Kshs.6,000,000/= and Kshs.800,000/= from the Account of AMSET. Out of the three, only the cheque of Kshs.800,000/= was paid. The other two were returned unpaid.

5. Due to the said dishonor of the cheques, vide letter of 16th August, 2007, the Defendant was suspended as a Director of KEMRI. the Defendant in response to the said letter wrote a letter of 20th August, 2007 stating inter alia that <u>"I shall provide proof of restoration of the funds in the course of the day"</u> (Annexure IW8)

6. During suspension, investigation was directed and Inspector General of State Corporation carried out a special report. It unearthed some other mismanagement but I shall only consider the relevant part in respect of this case.

Vide a letter dated 1st September, 2008 from the Minister of Public Health and Sanitation the Defendant was relieved from his duty as a Director of KEMRI and I shall quote the following observation made by the Boards of Management KEMRI against the Defendant, namely, "Make arrangement to refund Kshs.19,300,000/= which you irregularly transferred from Co-op Agreement Account to an account of an organisation where neither CDC or KEMRI has interest".

7. The Plaintiff thereafter served a demand notice vide its letter of 18th January, 2010 which was responded vide letter of 23rd February, 2010. The said letter inter alia stated that the <u>Defendant is absolutely unaware of the allegations made in the letter of demand and does not admit the same.</u>

8. The Defendant on 12th March, 2007 along with the signature of Dennis Chivatsi Ali wrote a letter to the bank that the transfer of Kshs.18,500,000/=, (Kshs.600,000,000/= and Kshs.12,500,000) were bona fide and proper (Annexure IW3). This letter is written after his letter of 6th February, 2007

to the Grants Manager Officer CDC, Atlanta, USA. The sum of Kshs.12,500,000/=indicating inter alia that the Account "was inadvertently debited and process of reversal of the funds to its correct account started."

Letter of 14th February, 2007 to the same addressee confirms that KEMRI has completed the reversal of Kshs.12.5 million.
The Defendant had reiterated the defence of mix-up or error as stated in the letter from dated July 2007 from Department of Health and Human Services addressed to him despite what was stated in his letter of 12th March, 2007 stating that the transfer was bona fide.

The Plaintiff has also shown sufficiently that the Defendant could transact AMSET Bank Account solely and that he has actually done so in an effort to refund the sum by issuing the aforesaid three cheques. The Plaintiff has clearly refuted the averment by the Defendant that there has been collaborative agreements between KEMRI and AMSET. The Defendant has not shown any such agreement or any services rendered which have been averred by him. In any event, in his departmental correspondence, he has not raised this issue and which is only now raised in the Defence.

In the further affidavit sworn on 9th January, 2011, the Plaintiff has annexed an affidavit sworn by the Defendant on 16th November, 2010 in a Constitution Petition No. 648/10 filed by the Defendant which challenges his termination.

I shall quote from Paragraph 34, 35, 36 and 37:-

"34. …On occasions, the funds being required in Nairobi which at times could run to more than KES three (3) million at a time could not be supported by the balance in the account in Kisumu at the time of drawings. I could then borrow from the African Medical Services Trust (AMSET) account to which I had access in order enable the accountant collect the cash required for the operations at KEMRI/CDC Nairobi. This was on the understanding that reconciliations of the accounts could be done later.

35. That it was during these occasions that some funds were borrowed and in good faith from the KEMRI/CDC Account to AMSET account. In a matter of routine reporting, I informed my DCD colleagues and assured them that reconciliations and reversals could be made as soon as practicable. There was no evidence that the funds were deliberately diverted because if it were, I could not have made the effort myself to report on the same. But before reversals could be done, and for bank purposes, we had to regularize the transfers with the bank as bonafide.

36. That the sums transferred were KES 800,000; KES 6,000,000 and KES 12,500,000/=. Initially, these figures could not be fully supported by documents and were simply treated as accounts receivable in our KEMRI books.

37. That it is important to note that CDC does not have direct access to the account details being held at MEMRI. The CDC relies on the information received from the KEMRI authorities, or by their independent auditors. In this particular case, the report was made by me as a matter of course."

It is important to note that the Defendant has for the 3rd time changed his version to explain the transfer. Moreover, from the above paragraphs, it becomes clear that he was able to handle the AMSET Account at his discretion and on his own.

The Defendant has opposed the application on the grounds that the triable issues are raised and has averred that KEMRI and AMSET had collaborative arrangements whereby AMSET had funded various research projects on behalf of KEMRI and that AMSET had to be refunded some of its monies spent in such projects. Furthermore, the funds which are alleged to have been transferred in AMSET is a separate entity which is a trust wherein there are many other trustees. These submissions and averrements are made defiantly against the Trust Deed annexed as IW6 wherein there are only two trustees, one is

Defendant and another is Ronny Lusk. Moreover, the three cheques of AMSET which were purported to be issued in reimbursement of the sums transferred from KEMRI Account to AMSET Account were signed by the Defendant solely although there were two signatories. It is also to be noted that one of the said cheques was cleared by a cheque from AMSET signed solely by the Defendant. On page 35 of the application dated 25th January, 2000 to the Bank by AMSET which was the instructions to the Bank as to who are the signatories, it is shown that either of the two aforesaid signatories of AMSET was mandated to sign and transact its Bank Account. Thus as from the year 2000, the Defendant was empowered to sign on his own any of the cheques and he has done so as specified hereinbefore.

The Defendant in his two affidavits filed in response to the application and three affidavits filed by the Plaintiff, has not refuted veracity of any of the documents annexed and averments made therein. Moreover, the Defendant has failed to show any proof or documents in support of his averments as regards corrobative agreements between KEMRI and AMSET. The amounts transferred into AMSET Account under the Defendant's written instructions initially given unilaterally are to any standard not small amounts and cannot be expected to be transferred from a Government Institution Funds without any documents in support thereof.

What is more striking is the three different versions from the Defendant to explain the transfers. When the donor inquiry started the Defendant raised an issue of mix-up with a promise of reimbursement.

In failure to reimburse, the Plaintiff filed this suit and the Defendant raised issues of corroborative agreement between KEMRI and AMSET which again till to date the Defendant has failed to show the existence of such agreements.

In the Constitutional Petition filed by the Defendant, the third issue of borrowing the money from one Account to another was raised. When the special auditing was undertaken after his suspension the Defendant did not give any hint of either of the aforesaid two explanations. The Defendant thus, in my humble view is changing goal posts at each step and that too without any substantiation.

I would stress one point specifically which is: the Defendant had access to both the accounts as a signatory. He could even persuade the Bank in respect of KEMRI Account to comply to his instructions given unprocedurally. The attempt to regularize his actions, by sending a letter signed by another signatory after almost three months, cannot justify his earlier actions in view of what transpired later in departmental inquiry. I would further state that his attempt to regularize the actions, with a stamp of *bona fide* vide the letter of 12th March, 2007, contradicts his stand of error and mix up and thus neither of them can stand the test of justification. The money deposited in AMSET Account were shown to have been removed from that account which Account the Defendant could handle as a sole signatory. The Defendant has not tried to explain the withdrawal of the money from AMSET Account. It is thus not in doubt that the money in question was transferred by the Defendant in an account which is under his control and the money were withdrawn which under the circumstance could be taken as misappropriation or conversion by the Defendant. The Defendant in any way was instrumental to the transactions of transfer as hereinbefore detailed without authority and without following the procedure. He is thus liable to refund the same.

The silence or lack of justifiable explanation for the withdrawal of money from AMSET and also for the transfer of KEMRI FUND into AMSET Account cannot persuade the court that the Defence has raised any triable issue as regards transactions in respect of the sum under claim.

The case before me is not a criminal case, where the Accused person is entitled to keep silence. This is a civil matter and the Court expects the explanations and justifiable defence from the Defendant. The standard of proof even in the application for Summary Judgment remains the same. The court has only to be satisfied that there is no triable issue and that the claim of the Plaintiff is clear and does not face any triable issue.

I have observed all the above, having been absolutely aware of the tenets of law in respect of summary judgment. I have also given due consideration to all the three authorities cited by the learned counsel of

the Defendant, namely

1) ***Civil Appeal No. 296 of 2004 between Moi University and Vishva Builders Ltd. (2010) eKLR***

2) ***CA No. 231 of 2006 Zacharia Mweri Boya and Mohamed Sheikh Abubakari (2010) eKLR.***

3) ***HC 25 of 2010 Muskie Ltd. –vs- Raphael Kipsoi A. Korir (2010) eKLR.***

I would state that as per facts of those cases, the decisions taken were absolutely appropriate.

But it is trite that the law can only be applied as per facts and circumstances to be considered in each case. The court can and must take all the relevant facts produced and materials exhibited from both sides and arrive at a carefully balanced determination.

I shall cite a passage from the court of case of G***upta –vs- Continental Builders Ltd. (1976 – 80) 1 KLR 809 at 814-8115.***

"In any given case it is the duty of the court to examine with minute care the documents and facts laid before it. In this case, there is a complaint made that this was done instead of paying a compliment to the Court's assiduity for doing so. If it had not been done, there would be some cause for making a complaint that the court failed in its task to do so, thereby possibly causing a failure of justice. A minute and careful examination of documents and facts laid before the Court is carried out by the Court as a part of the daily task in the performance of its judicial duty and, understandably (even inevitably), it may lead to both the acceptance or rejection of some documents and some facts which some people, in the case of an application for summary judgment, may construe, albeit incorrectly, as an actual trial. There is no more in it except the process of determining the judicial verdict to be delivered. The merits of the issues are investigated to decide whether leave to defend should be granted; but the case is not tried upon affidavits, it is that this is the procedure in the main provided for this purpose. Sometimes the prima facie issues which are proffered are rejected as unfit to go to trial being, by their very nature as disclosed to the Court, incapable of effectively resisting the claim. The court does not thereby shut out any genuine defences of a Defendant, as it is the only proper order to make if no reasonable grounds of defence are disclosed, even as only prima facie triable issues, at this stage. What happens is that the Court merely does not accept the prima facie issues offered as genuine. This is exactly the task which the Court is required to perform on an application for summary judgment. In the instant case, Miller J. performed his task with more than due zeal for he said during the course of his ruling;

the essential consideration is to seek for a bona fide defence on the part of the Defendant and in doing so to lean almost entirely on the side of the Defendant I order to grant him leave to defend, this the court continues to do."

I do want to believe that I have made an honest effort to do the same and find that unfortunately, I do not find any *bona fide* defence on the part of the Defendant and thus am bound to allow the application dated 16th August, 2010, which I hereby do.

In the premises, I enter judgment for the Plaintiff in the sum of Kshs.18,500,000/= against the Defendant with cots and interest.
Orders accordingly.
Dated, signed and **delivered** at Nairobi this 13th day of **April, 2011**

K. H. RAWAL

JUDGE

13.04.2011