



EUROCRAFT AGENCIES LIMITED.....PLAINTIFF

VERSUS

TRADEWINDS EXPRESS LIMITED1ST DEFENDANT

BARRY MICHAEL TOMLINSON 2ND

DEFENDANT

RULING

Chamber Summons dated 9/3/09 filed by the plaintiff is brought under **Order 19 Rule 1 and 2 of Civil Procedure Code** seeking orders to appoint independent firm of auditors to examine, assess, verify and report on the true accounting position between the plaintiff and the first defendant arising out of transactions and payments made by virtue of an arrangement to implement a concession agreement made between the plaintiff and a third party dated 1st March 1995.

And the independent accounting firm be authorized to make all necessary inquiries and examine all such books of accounts and other documents as it shall consider necessary in the discharge of its mandate. And further that the said firm of auditors do prepare a report within such period as shall be stipulated by court and which report shall be conclusive as to the accounting position between the plaintiff and the first defendant. Furthermore, further or other direction as may be expedient. The costs of the firm of auditors shall be born initially by the parties jointly.

The costs of this application do abide the outcome of the auditors' report.

The grounds are set out in the application. **Order 19 Civil Procedure Code** provides for the applications for an account. **Rule (1)** states:-

“Where a plaintiff prays for an account, or where relief sought or the plaintiff involves the taking of an account, if the defendant either fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is some preliminary question to be tried an order for the proper accounts, with all necessary inquiries and directions usual in similar cases shall forthwith be made.”

Rule 2 provides for the procedure to be followed. In the plaintiff filed by the applicant the first prayer is for the sum of Kshs.76,509,743/55 against the 1st and 2nd defendants jointly and severally. In the alternative the plaintiff prays for an account of all transactions between the plaintiff and first defendant in terms of paragraph 23 of the plaintiff which states:-

“In the alternative, the plaintiff seeks a true account of transactions between the plaintiff and the first defendant and the payment over to the plaintiff of any monies found to have been paid to the first defendant improperly without justification or without the authority of the plaintiff.”

Upon perusal of the plaintiff and the defence matters pleaded under paragraph 9 of the plaintiff are admitted by the first defendant. A counterclaim is filed by first defendant in which it is claimed Kshs.13,512,728/78. Two agreements entered by the parties are pleaded out of which these claims arise.

The parties have filed written submissions. For the plaintiff it is sought to obtain appointment of independent auditors with the specific task of verifying accounts between the parties. There is evidence that KPMG were the auditors of both parties and it appears some auditing has been carried out by the said auditors but the plaintiff does not regard them as independent auditors as they receive instructions from the Managing Directors of both plaintiff and defendant who is 2nd defendant.

The plaintiff relies on the case of **National Bank of Kenya Ltd. vs. Pipeplastic Samkolit (K) & another [2002] 2 EA 503** where the Court of Appeal said:-

“Order 19 Rule 1 of Civil Procedure Code provides that is a plaintiff prays for an account or where relief sought or the plaintiff involves taking of an account an order for proper accounts with all necessary inquiries and directions usual in similar cases shall be made.”

The plaintiff filed by the plaintiff does fulfill such requirements. The plaintiff now requires independent auditing. The plaintiff is also relying on the decision in **Re City Equitable Fire Assurance Co. Ltd. [1924] All ER Rep. 485** where the court said:-

“The duty of the auditor is verification not detection. He is the watchdog not a bloodhound. He need not be suspicious as distinct from reasonably careful.”

Further authority is **Re National Electrical Industries – Winding Up Cause No.41A of 2000** where Mutungi, J. held:-

“A transparently managed and operated company has no cause to fear or worry over investigations.”

The plaintiff submits that the purpose of this exercise is to record the financial transactions between the parties for relevant period.

Regarding authority in the case of **Re Gyhon (1885) Zach C. 834** cited by defendants. There was a preliminary question to be tried. In this case there is no question to be tried. The verification of accounts sought are necessary to bring out facts and do not settle liability.

Defendants authority **Sharer vs. Wallace** – in that case the court found that the plaintiff’s claim was for an account not for a specific sum. The purpose for which the sums were alleged to have been paid did not become relevant until it had been established that defendant was an accounting party.

In opposing this application the defendants have also filed submissions saying that the accounts are approved by the Board each year and auditors of both companies Peat Marwick KPMG have found no fault on the part of both defendants. Defendant’s main objection is no accounts may be ordered if there are preliminary issues to be tried by court. The defendants have listed a list of 6 questions to be decided:-

- (i) nature of agreements between the parties. This is not an issue as the main agreement is in writing;***
- (ii) Whether defendants were entitled to charge the plaintiff for services rendered. This is not an issue since it is in the agreements made;***
- (iii) Whether plaintiff paid money to defendant it was entitled to;***
- (iv) Defendant raised overstated invoices. This can only be disclosed by the auditors;***
- (v) Not a preliminary issue to be tried;***
- (vi) Issue of breach of fiduciary duties to the plaintiff.***

All these matters are not preliminary points to be tried first. The verification of accounts shall answer

all these questions. The defendants rely on the case of **National Bank of Kenya Ltd. vs. Pipeplastic** where the Court of Appeal said that order for proper accounts under **Order 19 Rule 1** is made in the proceedings where the taking of account is necessary. They also rely on the **Re City Equitable Fire Assurance Co. Ltd.** And **Abdulla Jaffer Devji vs. Devji [1958] EA 558** in this case it was said that **Order 19 Civil Procedure Code** is not applicable where there is willful default to obtain decree. In this case the plaintiff is not in willful default.

In the case of **National Electrical Industries** this was a winding up petition and the applicant was seeking to inspect the company books. This is not relevant.

Upon considering the submissions by both sides and the plaint and defence, I note that defendant has counter-claimed against the plaintiff on the basis of the same agreement and that the defendants were running the affairs of the plaintiff with 2nd defendant as Managing Director of both plaintiff and the defendant. Furthermore, the auditors of the defendants were also the auditors of the plaintiff. It is important that the plaintiff be given the right to have independent auditors to examine, assess, verify and report on the true accounting position as between the plaintiff and 1st defendant concerning the implementing of concession agreement made with third party dated 1/3/1995.

This court is satisfied that the provisions of **Order 19 Rules 1 and 2** are satisfied by the plaintiff.

I allow the application and grant orders as prayed with costs to the applicant/plaintiff.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 16th day of October 2009.

JOYCE N. KHAMINWA

JUDGE