REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 713 of 1998

PANTHEON LIMITED……..……..……PLAINTIFF

VERSUS

INDUSTRIAL & COMMERCIAL DEVELOPMENT

CORPORATION (ICDC)……...……..……DEFENDANT

JUDGEMENT

The Plaintiff's suit was filed on 12th November 1998 seeking a sum of Kshs.10,698,844/= with an alternative prayer for Kshs.18,326,681/= with interest plus costs. The defendant by statement of defence filed herein on 22nd December 1998 denies the claim and pleaded *inter alia*;

(a) That the suit is *res judicata.*

(b) That any claim for money should have been lodged against the receiver/manager of PAN Vegetable Processors Limited.

(c) That the claim was *sub judice.*

(d) No accounts were taken or that the letter of 4th September, 1997 was issued on condition of approval of the defendant's board which was rejected and the same was without prejudice basis.

The facts in this case are that sometimes in 1992, the plaintiff negotiated for the lease of a premises owned by Pan Vegetables Processors Limited under receivership. As a result a parcel of land known as LR NO.1144/681 situate in Naivasha and owned by Pan Vegetables Process Limited was leased to the plaintiff. The parties signed a lease agreement dated 31st December, 1992. At the time Mr. Ephrahim Majani was the receiver/manager appointed by the defendant who was the sole 100% shareholder and also the debenture holder in terms of a debenture agreement dated 23rd July, 1992.

In July 1994 the receiver manager of Pan Vegetable Processors Limited sold the leased property to a third party while the plaintiff was still in possession. The receiver manager then issued a tenancy termination notice to the plaintiff to vacate the premises wherein the plaintiff filed PM CC. 1376 of 1994 at Nakuru Law Courts. In the suit, the plaintiff sought stay of the notice of termination and the plaintiff obtained temporary orders restraining the receiver manager from proceeding with the termination and eviction of the plaintiff from the suit premises. It is alleged that the suit filed by the plaintiff threatened to slow down

or frustrate the completion of the sale of the suit property to a third party to the detriment of the defendant. To counter the temporary orders issued in the Nakuru court, the receiver manager and the defendant herein moved to High court in Nairobi and filed Misc. High court Case No.1179 of 1994 seeking orders of certiorari and prohibition against the orders obtained before the Nakuru court. The plaintiff was also made a party to that suit together with the Attorney General on behalf of the State.

The plaintiff, defendant and the receiver/manager of Pan Vegetable Processors Limited entered into a negotiation in order to compromise the two suits and so that the plaintiff could give up possession of the premises to enable the receiver manager to complete the sale transaction. On 11th October 1994 the parties entered into compromise which was recorded in Misc. HCCC No.1179 of 1994 thereby making the parties to sign a consent order which provided;

(1) That the plaintiff to give vacant possession of the suit premises by 11th November 1994.

(2) That the defendant, Pan Vegetable Processors Limited and the receiver manager to take accounts on any sums that may be expended by the plaintiff on the suit premises during the subsistence of the tenancy agreement and whether the plaintiff owed any money to the receiver manager.

(3) That Nakuru PMCC No.1376 of 1994 be and is hereby stayed forthwith.

As a result of that consent, the plaintiff gave up possession of the suit premises and the parties were thereafter required to take accounts. At the time, the plaintiff was alleging that it had expended monies over the suit premises and was claiming a refund or compensation in the sum of Kshs.18,326,681/=. It is the case of the plaintiff that as a consequence of the consent order, it was manifestly understood and agreed that the defendant would settle any sums that was found to be due to the plaintiff after taking of accounts and that the parties would extinguish any claim against each other after completion of the accounts taken.

After various meetings between the plaintiff, the defendant and the receiver manager and after the examination and taking of accounts, the defendant admitted that it was liable to pay the plaintiff the sum of Kshs.10,698,844/=. This was confirmed by the defendant's letter dated 4th September 1997 which states as follows:

RE: YOUR CLAIM AGAINST PVP LTD FOR KSHS.18,326,681.00

Following our meeting held on 19th August, 1997 to review your claim and after perusing through the documents produced by yourselves, we are pleased to inform you that the amount payable to you is Kshs.10,698,844.00. This amount was arrived at after disallowing all repairs (as agreed in our meeting) post – 1993 operations because the receivership could not have been responsible for consumables like operating apparatus, oil etc for the period 1994. This included items like machine bearings which are replaced periodically. We also disallowed claims on water bills as they were not backed by any documentary evidence as proof of the claim. However, please note that the settlement proposals are subject to the approval of the Board which will be sought after your comments or concurrence.

Kindly let us have your comments/reaction to the above before we finalize this long outstanding matter".

The above letter was preceded by a meeting held on 8th August, 1997 between the plaintiff's representative and those of the defendant appointed by the Executive Director of the defendant herein. The representatives of the defendants were Mr. Ndombi an Assistant Corporation Secretary , Mr. Magaiwa the Deputy Internal auditor and Mr. Mukamba, Finance controller of the defendant. The meeting was held in the offices of the defendant. It is the case of the plaintiff that during the said meeting, proper and all accounts were taken between the parties in so far as the plaintiff's claim for Kshs.18,326,681.55 was concerned. And through a letter dated 4th September, 1997 the plaintiff confirmed the offer contained in the letter dated 4th September, 1997 from the defendant by stating;

"*We acknowledge receipt of your letter Ref:ED/IDC/128/001/97 dated 4th September 1997 on the subject of settlement of the above claim.*

We are totally in agreement with payment of the sum of Kshs.10,698,844.00 (Ten Million six hundred ninety eight thousand eight hundred forty four only) as per our meeting of 19th August 1997 without prejudice. We also re-affirm that we will abide by our board Resolution already submitted to yourselves.

The Directors of Pantheon take this opportunity to thank you for bringing the issue to a satisfactory conclusion".

The case of the defendant is that its letter dated 4th September, 1997 was subject to approval by its board but that the board of directors rejected the plaintiff's claim upon evaluation of the relevant documents and evidence presented before the board. Secondly the defendant averred that it was not liable to pay the debts of Pan Vegetable Processors Limited since Pan Vegetable Processors Limited was a separate entity. And that the plaintiff's claim ought to be pursued in accordance with the receivership laws. The basis of such contention is that the tenancy agreement was between the receiver manager of Pan Vegetable Processors Limited and the plaintiff. And that the plaintiff's claim arose during the tenure of the receiver of Pan Vegetable Processors Limited. Therefore, any claim by the plaintiff should be directed towards the receiver manager and not the defendant.

The other defence by the defendant is that this suit is res judicata as the issues raised herein have been previously determined in Nakuru PMCC No.1376 of 1994 and Nairobi High court Misc. application No.1179 of 1994. It is alleged that the plaintiff's only recourse could be to refer to the aforesaid suits. No doubt that PMCC 1376 of 1994 was between the plaintiff and Pan Vegetable Processors Limited (in receivership) and the issue was whether the receiver manager was entitled to terminate the tenancy of the plaintiff. The plaintiff in that suit sought a declaration that the notice dated 26th July 1994 is null and void and of no effect. And as a result the plaintiff sought a permanent order restraining the receiver manager from terminating the tenancy and/or evicting the plaintiff from the suit premises. Having looked at the pleadings in that case, it is my determination that the issues in that case are completely different from the issues in this case. In any case the plaintiff in SPM CC NO.1376/1994 (Nakuru) filed a notice of withdrawal and discontinuance of that suit on 16th May 2000. Therefore, it can be safely concluded that there is no suit that involves the same issues which has been determined on merit by another court.

The other issue is whether Nairobi High court Misc. Civil application 1179 of 1994 also raised similar questions or issues that are closely related and/or in dispute as in the present case. First and foremost that case was a judicial review application which sought orders of prohibition and certiorari to stop the Nakuru SPM CC 1376 of 1994 from proceeding further. It is therefore wrong to say that the issues in that case finally and completely determined the issues in dispute between the parties in this case. It is my decision that this suit is not res judicata and the plea of res judicata by the plaintiff is misplaced.

I agree that no court shall try any suit or issues in which the matter directly and substantially in issue, has been directly and substantially in issue in a former suit between the same parties or between parties under whom they are or any of them claim or litigating under the same title, in a court competent to try such subsequent suit in which such issue has been subsequently raised and has been heard and finally decided by that court. It is my decision that the issue of accounts being taken between the parties was not an issue that was dealt with in the two earlier suits. The appropriate avenue for the plaintiff is this suit. And I do not think the plaintiff in this suit is trying to re-litigate an issue that has already been determined or dealt with in the earlier suit. The consequence is that the plea for res judicata raised by the plaintiff is unmeritorious and misconceived.

In my opinion it is not true that the issue of accounts being taken between the parties is an issue that was dealt with in the earlier two suits. It is also not true that the plaintiff in this suit is trying to re-litigate an issue that has already been determined or dealt with in the earlier suits. I fail to understand how the plea of res judicata applies in this case while the issue central to this dispute has not been heard and

determined conclusively by another court. I refuse to be persuaded by the submission of Mr. Nderitu for the defendant.

It is also the case of the defendant that there is no nexus or privity of contract between the plaintiff and the defendant. No doubt this suit arises out of a lease or tenancy agreement between the plaintiff and the receiver manager of Pan Vegetable Processors Limited. The defendant says that any dispute arising therefore, is a dispute strictly between the plaintiff and the receiver manager. It is not in dispute that the plaintiff is claiming for reimbursement of expenses allegedly incurred in the repair of the leased premises. And it is for that reason that the defendant thinks that the plaintiff is attempting to drag the defendant into the dispute on the basis that the defendant was the debenture holder and the shareholder of Pan Vegetable Processors Limited.

It is also the case of the defendant that the plaintiff was in any case responsible for the repair and maintenance of the leased premises. The defendant relied on clause 2(5) and (6) of the lease agreement dated 31st December, 1992 between the plaintiff and the receiver manager. Clause 2(5) and (6) provides;

"*(5) Not to make alterations or additions to the demised premises or assets without the written consent of the landlord.*

(6) To keep the assets used for the purpose of or in connection with the business of the tenant and every part thereon in a good state of repair and in proper working order an condition and to permit the landlord or such person or persons as the landlord may appoint at all times during normal working hours to enter the demised premises and view the state of the assets and forthwith to repair we and make good to the satisfaction of the landlord on default of which the landlord to repair to and make good and recover the expenses from the tenant".

It is for that reason that the defendant contended that the issue of repairs was the plaintiff's responsibility to keep the premises in the good state of repair. And that the plaintiff cannot make a claim for repair costs. The plaintiff on the other hand has relied on the letter dated 3rd December 1992 produced as exhibit P2 to support the claim for repairs. The plaintiff alleges the receiver manager agreed to the plaintiff incurring repair costs and thereafter to inform the defendant so that a refund would be effected. The defendant refuted the contents of the said letter by stating the letter is dated 3rd December 1992. While the lease agreement between the plaintiff and receiver/manager is dated 31st December 1992. In essence anything that preceded the lease agreement cannot be considered. The said lease agreement specifically provided for the plaintiff to be responsible for all repair costs. The contents of the said letter was therefore overtaken by the lease agreement.

The receiver/manager who testified on behalf of the defendant stated that he had no authority to bind the defendant to repair charges and therefore the defendant cannot be held liable to pay the same. He also contended that the plaintiff never got him receipts that it actually carried out repairs.

On the other hand the plaintiff relied heavily on the evidence of Gilbert Kahuria (PW1) who is a director of the plaintiff who stated that prior to the execution of the lease agreement, he commenced negotiations to lease the factory premises from the receiver/manager. And it is during that negotiations that he brought to the attention of the receiver manager that the factory was run down and needed substantial repairs before the plaintiff could seek and obtain certificate of compliance with the relevant industrial laws for operating such premises. He stated that after having a discussion with the receiver/manager Mr. Majani, he wrote the letter dated 3rd December, 1992. And in that letter he alerted the receiver/manager that the premises under negotiations for lease had not been refurbished and repaired for sometime. He stated that he sought permission to spend funds on such works which would be noted for future refunds. The receiver/manager acknowledged receipt of the letter dated 3rd December, 1992 and wrote the remarks '*it is in order'* and signed. The receiver manager in his evidence did not contest that he wrote said words and signed the said letter.

It is the case of the plaintiff that based on the approval given by the receiver/manager that, it obtained

spares for replacement and refurbishment of the factory. It is also the case for the plaintiff that the issue of the repairs was done before the execution of the lease agreement and as such was outside the lease agreement as they could not operate the factory without undertaking the necessary repairs. And that since it was within the knowledge of the receiver/manager and by extension the defendant, then they are liable for any costs incurred. And it is for that reason that when the lease was terminated, the parties agreed that the accounts be taken and the plaintiff vacates the premises.

It is important to appreciate that the receiver manager Ephrahim Majani was appointed by the defendant who was 100% shareholder in terms of debenture dated 23rd July 1992. It is also clear that the receiver/manager of Pan Vegetable Processors Limited was an employee of the defendant. Further the defendant was the debenture holder of the suit premises that brought about the dispute before court. And the monies alleged expended on repairs arose during the time when the receiver manager was in charge of the affairs of Pan Vegetable Processors Limited. The defendant being the debenture holder was in law required to receive the proceeds that may have been generated during the subsistence of the receivership. Equally after the receiver/manager sold Pan Vegetable Processors Limited together with all assets, the defendant received the proceeds of the sale of the premises, therefore it can be safely concluded that the receiver manager was an agent of the defendant.

The receiver manager gave evidence in this case and stated that as an employee of the defendant and as a liquidator of Pan Vegetable Processors Limited that all repairs and costs of running the factory before the lease agreement, and thereafter were the responsibilities of the plaintiff and could not claim any sums from either the receiver/manager or the defendant. However, he acknowledged having endorsed 'it is in order' on the letter dated 3rd December, 1992. He asserted that there is nothing to show that any repairs were undertaken by the plaintiff since no receipts were supplied to him. He also stated that as a receiver/manager he had a claim against the plaintiff which claim is not subject to this determination. In other words there is no counterclaim for the alleged sums owed to the plaintiff. As was rightly pointed out by the advocate for the plaintiff the issue is whether or not the plaintiff can look up to the defendant for payment of the sum of Kshs.10,698,844/=. The foundation of the plaintiff's claim is exhibit No.2 which was heavily contested by the defendant.

The starting point is whether the plaintiff was given permission to undertake repairs before he could start operation of the factory. From the nature of the work carried out by the plaintiff it was incumbent upon the receiver/manager to lease out a proper functioning factory that could meet the standards of the relevant laws. The plaintiff rightly stated that he could not obtain the relevant certificates before it could ensure that the factory was in good working condition. It is for that reason that the receiver/manager was expected to undertake repairs but in his evidence he stated that he had no funds therefore the evidence by PW1 that they were authorized to do the necessary repairs remains uncontroverted. The receiver manager on the other hand does not deny the contents of the letter dated 3rd December, 1992. In fact he admits that he endorsed in the said letter the words 'it is in order'.

In my humble view by endorsing the said words in the said letter he was aware of the intention of the plaintiff and his obligations to shoulder any costs that may accrue from such venture. He cannot now be allowed to turn round and say that the said remarks did not mean anything and cannot bind the defendants. The receiver/manager had a cardinal obligation to inform the defendant of all actions and omissions since he had a peculiar role of being a receiver/manager and employee of the defendant. He was therefore expected to ensure that he acts in the best interest of the defendant since he was representing the interests of the defendant in Pan Vegetable Processors Limited.

On the same breath I make a finding that the assertion by the defendant that it could not be responsible for the claim by the plaintiff and that the same should be directed to the receiver/manager is misconceived. It is important to appreciate that the defendant was the sole owner of Pan Vegetable Processors Limited and that the receiver manager was also its employee. As was rightly pointed out by Mr. Majani he reported all his activities to the defendant and that all the proceeds from the sale of Pan Vegetable Processors Limited went to the defendant.

Further the consent recorded in HCCC Misc. 1179 of 1994 was that accounts to be taken between the

defendant, receiver manager and the plaintiff. Also the plaintiff agreed to vacate the suit premises within a short time on consideration that accounts would be taken. And whoever was found to be owing ought to have paid the other upon such accounts being taken. And in view of the peculiar relationship between the receiver/manager and the defendant, I make a finding that the receiver/manager was an agent of the defendant. It is the defendant who is liable for the acts and omissions of the receiver/manager. The purpose of the account taking was to establish which party owes the other. And after several meetings and negotiations the defendant's Executive Director gave an offer to the plaintiff to settle the claim at Kshs. 10,698,844/= in a letter dated 4th September, 1997. The said letter was subject to the approval of the board of the defendant. The plaintiff accepted the offer through a letter of the same date. However, through a letter dated 12th December, 1997, the defendant stated that the board directed that the matter could not be settled since the receiver/manager is also claiming Kshs.6 million from the plaintiff. The plaintiff was thereafter referred to court to determine the issue of liabilities between the parties. It is important to quote the reasons advanced by the defendant;

"*Consequently, when the matter was presented to our Board of Directors on 11th November, 1997, the Board directed that;*

(i) since the debt (if any) occurred during the duration of the Receivership under Ephraim K. Majani who is also claiming Kshs.6 million from yourselves and;

(ii) Since there are other pending claims on unsecured creditors including yourself, your matter can best be determined by referring it back to the court of law. This therefore, means that we cannot entertain your claim until Industrial & commercial Development Corporation, Pan Vegetable Processors Limited, Receiver manager take accounts as indeed ordered by the court.

You may wish to move to court, so that this matter is settled once and or all".

The Executive Director of the defendant Mr. Edgar Manasseh testified on behalf of the defendant and stated that he wrote the said letter pursuant to a request by the plaintiff. In his evidence he stated the plaintiff wanted certain facilities from its bank and wanted a letter from the defendant to show that there was some money owed to it. He averred that, he wrote the letter simply as a letter of comfort to the defendant and it was not intended to bind the defendant. With respect such flimsy and flippant attitude is not a proper way to manage the affairs of a public body. It is not the business of the defendant to give letters of comfort to anybody who alleges to have a claim against it. I think ,it was inappropriate and utterly wrong for the Executive director of the defendant to write a letter which is in his mind was a letter of comfort. He says that he knew that the letter would be needed by the plaintiff to enable it to obtain certain facilities from a bank. The Executive director knew that the value of the letter was for purpose of comfort to the plaintiff and by writing such a letter which could have had far reaching effects of enabling the plaintiff obtaining credit facilities from a bank, the Executive Director was committing a criminal offence of fraud and perjury. In his estimation, the letter was meant for the defendant to show that there was some money owed to it. The person owing the money must be the defendant. And if a bank relied on the contents of such letter by extending credit facilities to the plaintiff, the Executive Director was committing the bank to a transaction where it had no proper fall back.

It is also the case of the defendant that the letter does not state who was to pay the plaintiff this money. And that whether it was the defendant or the receiver manager. In my humble view the letter says that the matter was presented to the board of directors of the defendant company. And it is not the business of the board to refuse monies which it is not liable to pay. It can simply say that there is no basis for the defendant to pay because we are the wrong party. With profound respect the board rejected the plaintiff's claim because there were other claims by other creditors. And that the receiver/manager has claims against the plaintiff and therefore, the plaintiff should go to court for further orders. In my understanding the defence of the defendant is disjointed and directionless. It amounts to a party blowing both hot and cold. And I do not think a party can be allowed to benefit from his own wrong doing.

Mr. Nderitu learned counsel for the defendant submitted that once the board of directors rejected the plaintiff's claim, the defendant cannot be said to have admitted liability therefore, the plaintiff has not

proved its case. My answer is that from the evidence on record before this court and from the documents produced by the parties, it is clear in my mind that there is a clear and uncontroverted evidence against the defendant, that it is liable for the sums admitted in the letter dated 4th September, 1999. The said sum was arrived at, after disallowing all repairs as agreed in a meeting held on 19th August, 1997 between the representatives of the plaintiff and the defendant. It is not the business of the plaintiff to concern itself with the internal mechanism of the defendant. In my opinion it was the duty of the Executive Director of the defendant to obtain permission and/or consent from the board before he undertook to settle the claim of the plaintiff . The first event was to seek and obtain approval from the alleged board of directors. The defendant cannot be allowed to hide behind its internal mechanism which was not disclosed to the plaintiff at the time when they agreed to the offer contained in the letter dated 4th September, 1997. In my humble view the contents of that letter amounts to a clear admission which is unequivocal and binding on the defendant.

It is therefore my decision, that the plaintiff has established that the entity liable to settle its claim is the defendant. The plaintiff has indeed shown that the defendant was all along involved in the issues subject and forming its claim. The plaintiff supplied consideration by vacating the premises after the consent order of 10th November, 1994.

It is clear that after a protracted negotiation, the parties agreed to compromise the dispute for the sum of Kshs.10698844/= which was made by the defendant and accepted by the plaintiff. I make a finding that the approval by the board of directors was an internal requirement which could not affect the right of the plaintiff. It was not a condition which was contained in the consent order recorded by the parties and in any case it is not the business of the plaintiff to be concerned with the internal mechanism of the defendant. It is therefore my decision that the claim of the plaintiff has been proved based on the accounts carried out by the parties and the evidence tendered by the parties to the satisfaction of this court.

In the premises I enter judgement for the plaintiff against the defendant in the sum of Kshs.10,698,844/= plus costs and interests at court rate from the date of this judgement until payment in full.

Dated, signed and delivered at Nairobi this 13th day of June, 2008.

M. A. WARSAME

JUDGE