



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

Civil Case 268 of 2004

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEE.....PLAINTIFF
VERSUS

ANKHAN HOLDING LIMITED.....1ST DEFENDANT

SAMMY BOIT ARAP KOGO.....2ND DEFENDANT

HUBERT NYAMBU MWAKIBWA.....3RD DEFENDANT

R U L I N G

There are three defendants in this suit, and all of them have asked this court to strike out the Plaintiff, on the grounds that it is frivolous, vexatious and an abuse of the process of the court.

If I understood the defendant's application properly, it has its foundation on two grounds, namely:

- (i) The 2nd and 3rd defendants were agents of a disclosed principal, namely the 1st defendant, and
- (ii) All the three defendants were agents or nominees of a disclosed principal, namely Jonathan K. Toroitich Arap Moi.

For those reasons, the defendants believe that the claims against them cannot be sustained at all, and that therefore, the Plaintiff should be struck out.

It is submitted that no personal liability could possibly attach to the defendants, or any of them.

The defendants pointed out that the main claim against them was on the basis of an alleged fraud, which was perpetrated against the Plaintiff. The said act of defrauding the plaintiff was alleged to have been carried out by the defendants, when they sold some land which was a part of the Ngong Forest.

In the defendants' understanding of the case, they have been accused of selling, to the plaintiff, a piece of land in respect to which they had no legal capacity to contract. In effect, the plaintiff was saying that the contract pursuant to which the defendants sold the property in issue, was illegal.

The plaintiff has sued the defendants on the basis of alleged fraudulent misrepresentation and fraud. The fraudulent misrepresentation is said to arise from the fact that in the Grant which the 1st defendant transferred to the plaintiff, it was specifically stated that the property could only be used for residential purposes. However, it later turned out that the said piece of land was an integral part of the NGONG Road Forest Reserve, upon which no residential or other development could be undertaken or entertained.

The defendants' position is that they cannot be personally liable to the plaintiff, because they were all agents of a disclosed principal, one Jonathan K. Toroitich Arap Moi. That position was clearly spelt out in paragraphs 7 and 8 of the Defence.

The 2nd Defendant has sworn an affidavit in support of the application. In the said affidavit, Mr. Sammy Boit Arap Kogo, who is the 2nd defendant confirms that both he and the 3rd defendant were

directors of the 1st defendant. He says that the 1st defendant, Ankhan Holdings Limited was “**a company that was substantially**

owned by Jonathan Toroitich Arap Moi, a fact which was well known to the plaintiff.”

He also deposed that he only became a director of the 1st defendant, as a nominee for Jonathan Moi. He therefore holds the view that he was an agent of a disclosed principal, and should not be made personally liable, in relation to contracts which he executed on behalf of the disclosed principal.

In an endeavour to demonstrate their positions, as agents, the defendants drew the court’s attention to a letter from Mr. Jonathan K. Toroitich, dated 6th March 1994. The subject matter of that letter was:

“Re, Appointment as my nominee.”

The letter is addressed to a Mr. Kogo and requests him to handle the sale transaction of L.R. No. 18486, at a commission.

By that letter, Mr. Jonathan Moi also states that it had already negotiated with the plaintiff herein about the sale of the property in issue.

For those reasons, the defendants say that it is obvious that they were agents of a disclosed principal, and that the plaintiff knew about the agency relationship.

The plaintiff’s knowledge of the said agency relationship is said to stem from the fact that on 27th April 2004, the plaintiff’s advocates wrote to Mr. Jonathan K. Toroitich Arap Moi seeking relief in relation to the sale of L.R. No. 18486. For those reasons, the defendants submit that the plaintiff ought to be struck out.

In response to the application, the plaintiff put forward a strong opposition. It submitted that the defendants cannot hide behind Mr. Jonathan K. Toroitich Arap Moi for their own fraudulent and deceitful actions. For instance, it is pointed out that in paragraph 16 of Mr. Kogo’s affidavit his only defence was that he had at all material times acted “**in good faith and without the knowledge that the sale of the Subject land might have entailed any underhand deals.**”

He was only an agent, he emphasized. But, the plaintiff is far from impressed. First, it is submitted, by the plaintiff that there is nothing in our laws as “**nominee director**”

To my mind, whether or not the notion of a “**nominee director**” is acceptable within Kenya that by itself would not have any bearing on the application before me. I say so because once a person was named as a director of a company; his rights and obligations are as defined by the Memorandum and Articles of Association; and the Kenyan law. A director cannot purport to diminish his legal responsibilities by a “**side-contract**” between himself and the company, especially when the said director is dealing with third parties. Such third parties would be entitled to assume that the director had ostensible authority, such as other directors would normally have.

In this case, the contract for the sale of L.R. No. 18486 NGONG ROAD, NAIROBI is contained in an Agreement for Sale dated 16th May 1994. It is as between **ANKHAN HOLDINGS LIMITED** as the vendor, and the **BOARD OF TRUSTEES, NATIONAL SOCIAL SECURITY FUND**. In the light of that written contract, I hold the view that on a prima facie basis, the 1st defendant was a principal player. It cannot be deemed to have been an agent for any other person, as at the moment. If it wishes to establish the existence of any agency relationship between it and Mr. Jonathan K. Arap Moi, or any other person, the 1st defendant would have to lead evidence, at the trial of this suit.

Secondly, the 3rd Defendant did not lead any evidence on the matter. He did not swear any affidavit at all, to try and explain how he claims to have become the agent of Mr. Jonathan Arap Moi. Therefore, to

the extent that this application is predicated on the argument that he was the agent of Mr. Moi, the 3rd defendant's application must fail.

But, there is no dispute about the fact that both the 2nd and 3rd defendants were directors of the 1st defendant. Indeed the 2nd and 3rd defendants did expressly admit that they were directors of the 1st defendant. That fact gives rise to a very fundamental question; can the directors of the company which sold the land which is the subject matter of this suit, be liable alongside the company itself?

The 2nd and 3rd defendants say that they cannot be personally liable for the actions of the company, to which they are directors. But the plaintiff submits that when there is deceit and fraud, which is perpetuated by directors of a limited liability company, the directors stand on the same footing as the company itself.

In **ANTHONY FRANCIS WAREHEIM t/a WAREHAM & 2 OTHERS v KENYA POST OFFICE SAVINGS BANK, CIVIL APPLICATION Nos. NAI 5 & 48 of 2002**, at page 10, the Court of Appeal unanimously held as follows:

“It was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued. Furthermore, the court having found on the evidence that the second and third appellants were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the first appellant who had been sued as the principal.”

Relying on that legal pronouncement, the 2nd and 3rd defendants submitted that as they have been sued in their capacity as directors of the 1st defendant, the suit against them should be dismissed.

The 2nd and 3rd defendants also cited the following authority, in which the 2nd defendant was sued on the basis of the contract; **FURSYS (K) LTD V. THE DE GAMA ROSE GROUP of COMPANIES & ANOTHER, HCCC NO. 2005 of 2001** (At Milimani Commercial Courts). In that case, the Hon. Mwera J. held as follows:

“The well known principle of separate legal personalities in company law as set out in SALMON V. SALMON (1897) A.C. 22 (H.L.) still holds good. Accordingly suing the two defendants in such circumstances is simply groundless and fanciful (i.e. frivolous) and/or lacking in bona fides, hopeless and oppressive. It will only cause the defendants unnecessary anxiety, trouble and expenses (vexatious). All that the court has a duty to end, as it does now.”

The learned judge went ahead to strike out the defendants from the suit, and consequently the suit stood dismissed.

Another case which was cited by the defendants was FRIENDSHIP CONTAINER MANUFACTURERS LTD V. MITCHELL COTTS (K) LTD, [2001] 2 EA 338, wherein the Hon. Mbaluto J. held that a person who acts as a disclosed agent is not liable to the plaintiff in respect to that particular transaction.

And, in **MISCELLANEOUS CIVIL APPLICATION NO. 114 of 1997; IN THE MATTER OF FLORICULTURE INTERNNATIONAL LTD, SATISH NAKER & JULIUS MAINA (Consolidated with two other matters)**, the Hon. Kuloba J. expressed himself thus, at page 45:

“It is clear that the said company is a limited liability company, a body corporate, a *persona juridica*, with a separate independent identity in law, distinct from its shareholders and directors.”

In view of the very clear legal position, should not the plaint against the 2nd and 3rd defendants be

struck out?

The plaintiff says that even though the general rule is that an agent of a disclosed principal cannot be held personally liable, there are exceptions to the said general rule. One such exception is said to arise when fraud and deceit are alleged. Another example that was given was in relation to murder, for which a person cannot escape liability because he had committed the act on behalf of another.

So, in this case, even though the contract was signed in the name of the 1st defendant, the plaintiff believes that the 2nd and 3rd defendants cannot escape personal liability, simply because directors were distinct from their company. The plaintiff's belief is said to arise from the fact that the 2nd and 3rd defendants were actively involved in the transaction. An example of the said involvement is the letter which was written by the 2nd Defendant to the plaintiff, on 24th March 1994. The said letter was written on the letter-head of KOG HOLDING LIMITED, and appears to constitute the 1st defendant's acceptance of the offer from the plaintiff, to buy the suit property for KShs. 70 million.

In *JONES & ANOTHER V. LIPMAN & ANOTHER* [1962] 1 W.L.R 833, Russel J. held that if a company was thought to be a mere cloak or sham, a device or a mask which the defendant held to his face, in an attempt to avoid recognition by the eye of equity, the court could grant summary judgement even against the person behind the said company.

In this case, at paragraph 21 of the Plaintiff, the plaintiff asserts that the 2nd and 3rd defendants have used the corporate face of the 1st defendant to shield their identity in the fraud they committed against the plaintiff. In effect, the plaintiff does not deny that in principle, the company is a distinct person who was independent of its directors. But it believes that the said two directors merely used the company as a shield behind which to hide, whilst committing fraud and deceit on the plaintiff.

As to whether or not the plaintiff will be able to prove its assertion against the 2nd and 3rd defendants is a matter that I cannot comment on for now. However, in the light of the decision in **JONES & Anor V. LIPMAN & Anor** (above), there is a possibility that the court could lift the veil off the face of the company. If that were to happen, the 2nd and 3rd defendants may yet be held liable. Therefore, this appears not to be such a clear-cut case that calls for itself to be struck out.

In so saying, I am fully conscious of the decision by the House of Lords in **WILLIAMS & Another V. NATURAL LIFE HEALTH FOODS LTD & Another** [1998] 2 All. E.R. 577 at 581 – 582, wherein LORD STEYN held as follows:

“It will be recalled that Waite LJ took the view that in the content of directors of companies the general principle must not set at naught the protection of limited liability. In *Frevor Ivory Ltd v. Andersen* [1992] 2 NZLR 517 at 524 Cooke P. (now Lord Cook of Thorndon) expressed a very similar view. It is clear what they meant. What matters is not that the liability of shareholders of a company is limited but that a company is a separate entity, distinct from its directors, servants or other agents. The trader who incorporates a company to which he transfers his business creates a legal person on whose behalf he may afterwards act as director. For present purposes, his position is the same as if he had sold his business to another individual and agreed to act on his behalf. Thus the issue is not peculiar to companies. Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal.”

Having recognised the possibility that in law, an agent may incur personal liability Lord Steyn analysed the evidence, and came to the conclusion that:

“Mr. Mistlin was a stranger to that particular relationship. He cannot therefore be liable as a joint tortfeasor with the company. If he is to be held liable to the plaintiffs, it could only be on the basis of a special relationship between himself and the plaintiffs. There was none.”

While liability in tort may not necessarily be equated to liability arising from contract, I nonetheless hold the view that there is room for the applicable principles being applied to both categories of claim. In the case of **STANDARD CARTERED BANK V. PAKISTAN NATIONAL SHIPPING CORPORATION [2002] UKHL 43**, Lord Hoffman said:

“And just as an agent can contract on behalf of another without incurring personal liability, so an agent can assume responsibility on behalf of another for the purposes of the *Hedley Byrne* rule without assuming personal responsibility. Their Lordships decided that on the facts of the case, the agent had not assumed any personal responsibility.

This reasoning cannot in my opinion apply to liability for fraud. No one can escape liability for his fraud by saying “I wish to make it clear that I am committing this fraud on behalf of someone else, and I am not to be personally liable” Sir Anthony Evans framed the question ([2000] 1 Lloyd’s Rep. 218, 230) as being “whether the Director may be held liable for the company’s tort.” But Mr. Mehta was not being sued for the company’s tort. He was being sued for his own tort and all the elements of that tort were proved against him. Having put the question in the same way he did, Sir Anthony answered it by saying that the fact that Mr. Mehra was a director did not in itself make him liable. That of course is true. He is liable not because he was a director but because he committed a fraud.”

I am convinced that there is a cause of action against the 2nd and 3rd defendants, not because they were directors of the 1st defendant, but because they may be committed acts of false misrepresentation or of fraud, on the plaintiff. If the plaintiff may prove its claims against the said two defendants, they may well be found liable personally.

For all those reasons, there is no merit in the defendants’ application. It is therefore dismissed, with costs to the Plaintiff.

Dated and Delivered at Nairobi this 26th day of April 2006.

FRED A. OCHIENG

JUDGE