



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 90 of 2003

GREEN PALMS INVESTMENT LTD.....PLAINTIFF

VERSUS

KENYA PIPELINE CO. LTD.DEFENDANT

J U D G M E N T

By a plaint dated 5th May 2003, Green Palms Investments Ltd the Plaintiff herein, sued Kenya Pipeline Company Ltd. the defendant herein, for payment of Kshs.26,384,800/- on account of fees for services rendered. The plaintiff also claimed costs of the suit plus interest.

When the defendant was served with the summons and pleadings it filed a defence dated 21.5.2003 denying the plaintiff's claim. The defendant upon obtaining leave, issued a third party notice upon its former Managing Director Dr. Linus Cheruiyot the third party herein. In that notice the defendant sought to be indemnified by Dr. Linus Cheruiyot in case judgment is given against it and in favour of the plaintiff.

The plaintiff lined up the evidence of three witnesses in support of its case. The plaintiff's Managing Director, Daniel Njoroge Kihiko (P.W.1), testified as the plaintiff's first witness. He told this court that he is an accountant and a banker by profession. He said he is however currently a property developer based in Mombasa through Green Palms Investments Ltd. P.w.1 said that sometimes in the year 2002, he attended a cocktail party held at Mombasa by Kenya Pipeline Company Ltd. pursuant to an invitation of the defendant's Kipevu Depot Manager. In that cocktail party P.W. 1 said, he met Luke Obok and Dr. Linus Cheruiyot the then Chairman and Managing Director of the Kenya Pipeline Company Ltd. P.W.1 states that the duo disclosed to him that Kenya Pipeline Company Ltd. had a problem in obtaining title to its Kipevu Oil Storage facility when they discovered that he was a property developer. P.W.1 further told this court that Dr. Linus Cheruiyot instructed Mr. George Okungu, the then Deputy Managing Director who was also in attendance of the cocktail party to deal with P.W. 1 to process title to the Oil Storage

facility. P.W.1 said he was instructed to visit the Defendant's head office in Nairobi. His visit gave rise to a letter dated 15th October 2002 giving Green Palms Investments Ltd. firm instructions to process title to the facility. P.W.1 produced the letter duly signed by the 3rd party on behalf of the defendant as an exhibit in evidence. P.W. 1 said he visited the offices of the Commissioner of Lands to commence the implementation of the defendant's instructions. He said he did a search and found out that the Ministry of Energy by virtue of a letter of allotment owned the land. P.W.1, produced in evidence a letter dated 6th November 2002 which was given to him by the 3rd party on behalf of the defendant to present to the Commissioner of Lands in which the defendant sought for the letter of allotment issued to the defendant's Ministry to be cancelled and for the same to be allocated to it. P.W. 1 said the Commissioner of Lands acted as per that request thus opening the way for him to start processing the title. P.W.1 said he instructed one Edward Kiguru (P.W.2) a Land Surveyor practicing in the name and Style of Edward Kiguru Land Surveyors to survey the land. Edward Kiguru (P.W.2) confirmed in his testimony that he carried out the instructions after which he presented a deed plan and a fee note for his fees as a surveyor. P.W.2 said he carried the survey of the land after he was let into the land by the defendant's depot Manager. He found the land to be measuring 18.11 hectares. P.W.2 said he sought for the opinion of Mr. Maina Chege (P.W.3), a Valuer to give him an open market value of the property. P.W.3, Maina Chege confirmed in his evidence that he did not actually value the property but gave an open market value of an acre of land within the vicinity of the property at Kshs.10,000,000/-. P.W.3 said he based his estimate on the sales and offers for sale of land adjacent to Kipevu Oil Storage Depot. P.w.2 said that he calculated his fees on the basis of Kshs. 10,000,000/- per acre for 44.7 acres as per the Survey Act (Cap 299 Laws of Kenya). P.W.2 gave his fee note of Kshs.16,202,615/-. A copy of the fee note was produced in evidence as an exhibit.

P.W.1, said that upon obtaining the deed plan from P.W.2, he successfully processed and obtained title to the Kipevu Oil Storage facility now known as Plot No. MN/VI/4182 in the name of Kenya Pipeline Co. Ltd. A copy of the title was submitted in evidence as an exhibit.

P.W.1 said upon obtaining title he presented a fee note of Kshs.26,384,800/- which covered both the surveyors and his fees to the defendant's Managing Director (3rd party) who then instructed Mrs. Kiptui, the company Secretary and Mr. George Okungu, the then Deputy Managing Director who is currently the Defendant's Managing Director to settle the fee note. P.W. 1 said that Mrs. Kiptui, the Company Secretary demanded a detailed fee note. P.W.1 produced a copy of the one he presented to her. It is said Mrs. Kiptui rejected the bill and made a counter offer to settle the bill at Kshs.7,000,000/-. P.W. 1 said he flatly rejected the counter offer hence this suit.

On its part, the defendant summoned the evidence of its Senior Legal Officer, Mr. John Muindi (D.W.1) in support of its defence. D.W.1 said that Kenya Pipeline Company Ltd. could not have applied for the allotment of Plot. No. MN/VI/4/82 yet it knew that the same was owned by the Ministry of Energy. D.W.1 produced a copy of the letter of allotment in evidence to establish that fact. D.W.1 stated that the defendant managed Kipevu Oil Storage facility on behalf of the Ministry pursuant to a written agreement between it and the parent Ministry. D.W.1 claimed that the plaintiff was given the job of processing title without following the procedures required by the public procurement regulations of 2001. He denied the fact that the defendant gave instructions to the plaintiff to obtain title on its behalf because the transaction was not approved by the defendant's tender board. He said he was not aware of the deal yet he was by then in charge of contracts. D.W.1 also accused the plaintiff of colluding with Dr. Linus Cheruiyot (3rd party) to commit fraud. D.W.1 was of the view that the plaintiff should not be allowed to benefit from an illegality it hatched.

Upon receiving the evidence for and against this suit, learned advocates on both sides were granted leave to file written submissions and later invited to make oral submissions. The parties did not file the agreed issues for the determination of this court. I have carefully considered the evidence tendered by the protagonists in support of their positions. I have also taken into account the able submissions made by learned counsels on both sides. I think the following issues arose for my determination:

(i) Whether or not the defendant contracted the plaintiff to survey and procure a title deed to plot no.

- (ii) Whether or not Dr. Linus Cheruiyot (3rd party) acted on behalf of the defendant.
- (iii) If the answer to (ii) above is yes then is the defendant bound by the 3rd party's actions.
- (iv) Whether or not the plaintiff performed his part of the bargain? If so what is the plaintiff entitled to receive.
- (v) Whether or not the defendant is entitled to indemnity from the 3rd party.

I will begin by dealing with the first three issues together. The evidence of Daniel Njoroge Kihiko, (P.W.1), a Managing Director to the defendant appears to be consistent and largely uncontested. I observed his demeanor as he testified and he appeared to me to be a straightforward and a trustworthy witness. It is not controverted that his company, Green Palms Investments Ltd, the plaintiff herein, is a company involved in property development and as a result the company was approached by Luke Obok, Dr. Linus Cheruiyot and George Okungu being the defendant's Chairman, Managing Director and Deputy Managing Director respectively to survey and procure title to plot no. MN/VI/4182. The defendant did not deem it fit to summon the evidence of Luke Obok, the former defendant's Chairman and Mr. George Okungu, the current Managing Director of the Defendant to deny or confirm the fact that the trio met with the plaintiff's Managing Director (P.W.1) at the defendant's cocktail party where P.W.1 was given an appointment to see the Defendant's Managing Director over the deal at the defendant's headquarters, Nairobi. The evidence of P.W.1 has clearly stated that he dealt with Mrs. Kiptui, the defendant's Company Secretary over the settlement of the fee note. It has even been alleged by P.W.1 that Mrs. Kiptui rejected his fee note and offered to settle the dispute by paying the plaintiff a sum of Kshs.7,000,000/-. Again the defendant did not deem it fit to call for the evidence of Mrs. Kiptui to deny this crucial and damaging evidence against the defendant despite the fact that Mrs. Kiptui is still the company secretary. The question which is lingering in my mind is why didn't the defendant give the evidence of these crucial witnesses? I will attempt to settle this issue by adopting the position taken by Justice Mbaluto in the case of Kimotho vs Kenya Commercial Bank [2003] 1 E.A. 105 [C.A.K]

In the above case, the plaintiff brought an action against the defendant claiming that he was wrongly terminated. At the trial of the suit, the defendant's witness sought to rely on an incident that allegedly happened at the Senior Management meeting where the plaintiff allegedly engaged in an altercation with a colleague. The alleged colleague was however not called to testify. In the end Justice Mbaluto held that the failure by a party to call as a witness any person whom he might reasonably be expected to give evidence be favourable to him may prompt a court to infer that the person's evidence would not have helped the party's case. It is obvious that the evidence of Mrs. Kiptui & Luke Obok were useful to the defendant's case. I am prepared to infer that the defendant intentionally failed to summon them because their evidence would have been prejudicial to its case and that the witnesses may have technically avoided to testify to escape being embarrassed on cross-examination. In view of this inference I am satisfied that the plaintiff has properly established that it was indeed contracted to do some job. The letters written by Dr. Linus Cheruiyot (3rd party) clearly shows that the defendant knew that the parent Ministry of Energy had a letter of allotment. The defendant also knew that the commissioner of Lands had the discretion to cancel a letter of allotment and that is why its Managing Director applied for the letter in possession of the Ministry of Energy to be cancelled.

It has also been argued by the defendant's counsel that the Defendant's former Managing Director Dr. Linus Cheruiyot (3rd party) had no authority to authorize the transaction without the approval of the Defendant's board. I think this issue can easily be dealt with under Section 120 of the Evidence Act. That Section is quite clear as to the effect that a person who has by his declarations, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and such person or his representative to deny the truth of that thing. There is ample evidence that the defendant through its former Managing Director (3rd party) caused the plaintiff to undertake the tasks complained of

on behalf of the defendant company. It was not possible for the plaintiff to know what was going on internally within the Kenya Pipeline Company Ltd. boardroom. To buttress this point, I wish to refer to the English case of Freeman and Lockyer =vs= Buckhurst Park Properties (Mangal) Ltd & another [1964] ALL E.R. 630 in which one of the directors acted as Managing Directors with the knowledge of the board yet they knew that no Managing Director had been appointed. The 'Managing Director' sourced for a purchaser of the company's estate, again without the express authority of the board. He also employed on behalf of the company a firm of architects and surveyors for the submissions of an application for planning permission. At the end of the work the firm of architects claimed from the company their fees for work done. It was held that the board member throughout acted as the Managing Director to the knowledge of the company and thus held out by the company as being the Managing Director and ostensible authority, thus rights conferred could bind the company since its articles of association in fact provided for there being a Managing Director of the company.

The above issue is further expounded in the Treatise of Palmer's company Law at page 627 which quoted Cairns L.J. in the case of Ferguson =vs= Wilson [1866] L.R. 2 CH 77:

"What is the position of directors of a public company? They are merely agents of a company. The company itself cannot in its own person, for it has no person. It can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent. Whenever an agent is liable, those directors would be liable, where the liability would attach to the principal, and the principal only, their liability is the liability of the company."

In this case now before this court, it is not denied that Dr. Linus Cheruiyot was the Managing Director of the Defendant at the time of contracting with the plaintiff's Managing Director. There is an allegation that there was a collusion between Dr. Linus Cheruiyot and the plaintiff to commit fraud. Particulars of fraud were pleaded in the defence. It is unfortunate because no evidence were led to establish that there was fraud committed by the third party.

Having disposed of the first three issues let me now embark on the 4th issue as to whether or not the plaintiff performed his part of the bargain. The plaintiff has tendered the evidence of Daniel Kihiko (P.W.1) who gave the details of the steps he took until he obtained title to plot no. MN/VI/4182. There is no denial that P.W.1 visited the offices of the Commissioner of Lands at the prompting of the defendant. It is not also denied that P.W.1 obtained title over MN/VI/4182 in the name of the defendant. The defendant has alleged that there was fraud committed in obtaining the aforesaid title. There was no counter-claim to seek for the cancellation of the title deed. Even if there was such a pleading, the allegations must be proved by credible and cogent evidence. There was no evidence from the Commissioner of Lands office to prove that the title deed was fake. There was no evidence from the Ministry of Energy to establish fraud committed against it by the plaintiff. In the absence of evidence challenging the validity of the aforesaid title, the document must stand as a valid document and hence admissible in evidence under Section 38 of the Evidence (Act, Cap 80 Laws of Kenya). What is obvious is that the plaintiff is in possession of a title deed to the land known as Kipevu Oil Storage Facility now known as Plot No. MN/VI/4182. The title was issued pursuant to the provisions of the Registration of Titles Act Cap.281 Laws of Kenya. By virtue of Section 23(1) of the Registration of Titles Act Cap.281 Laws of Kenya, I hold the certificate of title held by the plaintiff to be conclusive evidence of the defendant's proprietorship over Plot No. MN/VI/4182. Attached to the aforesaid title is the deed plan prepared by P.W.2 and duly approved by the Director of Surveys.

Having come to the conclusion that the plaintiff performed its part of the bargain, it is important now to look at what it is entitled to get. It is the submission of the defendant's advocate that the plaintiff is not entitled to the amount claimed in the plaint because the same was not strictly proved by the evidence tendered by the plaintiff. I have examined the evidence tendered by P.W.1, P.W.2 and P.W.3. P.W.1 Daniel Kihiko produced before this court in evidence as an exhibit, a fee note attached to a letter dated 9th December 2002 giving the details of how the figure of Kshs.26,384,800/- was arrived at. The defendant does not deny that it received the fee note from the plaintiff. According to P.W. 1, the amount covered the surveyor's fees, the plaintiff's consultancy fees as a property developer and the value added tax of 18% p.a. P.W.2 gave the details as to how he arrived at the Surveyor's fees pursuant to the surveys Act

(Cap 499 Laws of Kenya). P.W.2 pegged his fees per acre on the estimated value of Kshs.10m per acre he was given by P.W.3 a valuer of long standing. It is the submission of the defendant that the plaintiff is not entitled to the survey fees because it was not a surveyor. I am of the view that such a submission should not be allowed to stand because there was credible evidence of P.w.2 that he was a surveyor of more 30 years experience. P.w.2 was contracted by the plaintiff to carry out the survey works on its behalf and he can only claim his fees through the plaintiff being the person he dealt with. P.W. 2 has confirmed that he charged his fees as per schedule 8 of the survey (Amendments) Regulations of 1999. P.W.2 said he computed his fees at a rate of 3% of the total value of the property P.W3 gave the estimate value of the property at Kshs.10m per acre. The defendant did not attempt to give a contrary figure to dispute the estimates. The plaintiff said it charged 2% of the value of the property as consultancy fee. Again the defendant did not contradict by cogent evidence the amount sought by plaintiff. I am satisfied that the estimate of Kshs.10m per acre given by Maina Chege, a valuer of long standing is a reasonable estimate of the value of the property in the absence of contrary evidence. In brief, the plaintiff's evidence regarding sum of Kshs.26,384,800/- may be particularized as follows:

- (i) Value of Plot No. MN/VI/4182 is estimated at Kshs.447,200,000/-
- (ii) Surveyors and consultancy fees is 5% of 447,200,000/- = 22,360,000/-
- (iii) V.A.T. 18% of (ii) above = 4,024,800.

I am satisfied that the plaintiff has established that it is Entitled to the amount claimed in the plaint. The final issue is whether or not the defendant is entitled to be indemnified by Dr, Linus Cheruiyot, the 3rd Party. I think I have already said enough over this matter. Let me sound repetitive by saying that the defendant failed to call for the evidence of the key players in this saga. The current Managing Director and the then Company Secretary who is also the current Company Secretary were not called to shed light whether or not the former Managing Director Dr. Linus Cheruiyot acted against the defendant's interest. No company Minutes were availed to prove that such transactions never took place. It is clear from the testimony of D.W.1, John Muindi, that he was a junior officer at the time of the transaction now in dispute hence it is possible that the details regarding the matter was hidden from him. The defendant has miserably failed to establish that it is entitled to the claim pleaded in the third party Notice against Dr. Linus Cheruiyot. The same is ordered dismissed with no order as to cost.

In the final analysis I am satisfied that the plaintiff has established its case against the defendant on a balance of probabilities. Consequently, judgment is entered against the defendant and in favour of the plaintiff as follows:

- (i) a sum of Kshs.26,384,800/-.
- (ii) Costs of the suit
- (iii) Interest of (i) and (ii) at court rates from the date of judgment until the date of full payment.

Dated and delivered at Mombasa this 23rd day of June 2006.

J.K. SERGON

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