



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT 131 OF 2002

MOHIDEEN GILANI.....1ST PLAINTIFF

YESMIN GILANI.....2ND PLAINTIFF

VERSUS

VIJAY V. SINGH.....1ST DEFENDANT

RITA WALIA.....2ND DEFENDANT

RULING

The plaintiffs and the defendants are the sole shareholders of **Pine Breeze Hospital Limited** (hereinafter referred to as "**the Hospital**"). Subsequent to the filing of the suit herein, on 11th March, 2003 the parties and their respective advocates appeared before Justice Visram and recorded the following consent orders:-

- 1. THAT the Defendant do hereby agree to purchase the plaintiffs' 50% share in Pine Breeze Hospital.**
- 2. THAT the gross value of Pine Breeze Hospital is hereby agreed to be Kshs.55 million.**
- 3. THAT the sale be subject to the taking of full accounts upto date of Pine Breeze Hospital which accounts shall be taken by a firm of a Certified Public Accountants to be mutually agreed on by the parties within the next two (2) weeks failing which the parties shall submit the said accounts to a firm of accountants to be appointed by the court.**
- 4. THAT upon taking of the said accounts the firm of the Accountants shall determine the net sum payable by the Defendant to the Plaintiff as the consideration of the sale of the Plaintiff's 50% share.**
- 5. THAT the suit be mentioned on 1st April 2003 for further orders."**

The parties were unable to agree on a firm of Accountants until 9/4/2003 when they recorded a further consent as follows:-

"Mr. J. D. Nanji of Nakuru is hereby appointed by this court to take the accounts and determine the net amount payable to the plaintiff for its 50% share in Pine Breeze Hospital in accordance with the consent order entered in by the parties on the 11th day of March, 2003. This matter to be determined within the next 30 days."

The advocates for the respective parties in this matter appended their signatures to the two separate

consent orders.

On 28th May, 2003 the appointed Accountant Mr. J. D. Nanji of Jaidev Nanji & Company, Certified Public Accountants filed his determination in court and stated therein as follows:-

“I have examined the Audited Accounts of Pine Breeze Hospital Ltd for the financial year ended 30th June 1999, 30th June 2000, 30th June 2001 and 30th June 2002 as prepared by the Company’s Accountant and duly audited by the Company’s appointed Auditors Messrs KLSA Pannel Kerr Forster.

I have also examined the accounts of the said company as prepared by the Hospital Accountant with the assistance of the Company’s said Auditors for the Nine month period to 31st March, 2003.

I have also examined the Sale Agreement dated 20th March, 2002 between the shareholders of Pine Breeze Hospital Ltd and D. Nikala and others which was not executed. Having taken all the above mentioned into consideration and having been informed that there have been no significant or material changes since 31st March, 2003 to date, I determine the net sum payable by the defendants to each of the plaintiffs as consideration of the sale of their share in Pine Breeze Hospital Ltd to be as follows:

“Due to Mr. M. A. Gilani Kshs.22,500,364 (Twenty Two Million Five Hundred Thousand Three Hundred Sixty Four only). Due to Mrs Yasmin M. Gilani Kshs.13,574,952 (Thirteen million five hundred seventy four thousand nine hundred fifty two only). My professional fees for the above exercise are Kshs. Sixty Thousand only and would request the court to order accordingly.

Yours faithfully

(signed)

J. D. NANJI”

On 29/5/2003 the matter was mentioned and each party was given a copy of the report and due to some queries that were raised by the defendants, a meeting was arranged on 5/6/2003 with all the parties present together with their respective advocates and the accountant explained everything regarding his report.

Shortly thereafter, on 20th June, 2003 the defendants filed an application seeking two orders.

- 1. “That this Honourable court be pleased to declare that J. D. Nanji and/or the firm of JAIDEV NANJI & CO. Certified Accountants have not complied with this Honourable Court’s order of 9th April and in particular as read together with the consent order recorded on 11th March, 2003.***
- 2. That this Honourable court do order that the Plaintiff and the defendant appoint a firm of Public Certified Accountant each of their choice, who shall independently take accounts of the Pine Breeze Hospital in terms of clause 3 & 4 of the Consent Order of 11th March, 2003 and file their respective accounts reports with the court upon which the court shall make judgment.”***

The said application was made on the grounds that the accountant did not take accounts as ordered by the court and that no accounts had been filed and/or supplied to the parties by the accountant. The Defendant also said that the letter by J. D. Nanji of 26th May, 2003 addressed to the Deputy Registrar did not constitute a state of accounts of the hospital. They also said that J. D. Nanji relied on the accounts taken by other parties instead of preparing out his independent accounts. The application was supported by an affidavit sworn by the first Defendant on 20th June, 2003 and a further affidavit sworn on 23rd July, 2003.

On the other hand, the plaintiffs filed an application dated 3rd July, 2003 seeking the following orders:-

1. ***“THAT this Honourable court be pleased to approve the determination by Jaidev D. Nanji on accounts herein lodged in court on 28th May, 2003.***
2. ***THAT the determination/assessment by Jaidev D. Nanji herein of the net sums payable to the plaintiffs herein for the purchase of their shares in Pine Breeze Hospital Ltd be adopted by the Honourable Court in entering judgment in favour of the Plaintiffs herein as per prayers 3 and 4 of the amended plaint.***
3. ***THAT IN THE ALTERNATIVE the court be pleased to enter summary judgment for the plaintiffs for the unquestioned sum of Kshs.33,017,448.00 and make further orders on the queried sum thereafter pending clarification thereof.***
4. ***THAT the costs of the instant application and the substantive suit be provided for.”***

The plaintiffs argued that the assessment by Jaidev D. Nanji was done independently of any influence by any party to this suit and also by consent of all parties and the defendants having agreed to submit accounts to the accountant for assessment by consent could not seek to extract themselves from the binding nature of the consent through the back door by seeking fresh accounts.

The plaintiffs also stated that the defendants were raising accounting queries over a sum of Kshs.3,057,868 which sum accounted for less than 10% of the total sum payable and it was inequitable for that sum to prejudice and delay the finalisation of the consent sale as it could be placed in an escrow interest earning account while the defendants settled the unquestioned figure. The plaintiffs further stated that the defendants' challenge to accounts prior to 30th June, 1999 ought not to be entertained by the court as all accounts up to and prior to that date had been audited and subsequently certified by the Directors of the Company who were the parties to this suit.

The advocates for the respective parties examined the Accountant on his report on record and thereafter the two aforesaid applications were heard.

Mr. Nanji, in his sworn testimony explained how he arrived at sums which he stated as payable to the plaintiffs and said that the basis of his report was the Company's audited accounts prepared by KLSA Pannel Kerr Foster Auditors for the hospital for the period 1992 to 30/6/2002 and also draft accounts for the period ending 31/3/2003. He confirmed that he did not consult any of the Directors of the Company as he prepared the accounts.

Mr. Nanji further stated that he had explained the first Defendant that he could not revise the audited accounts for the years 1991 to 1999 as per his request since the said accounts had been approved, signed and certified by the Directors of the Company. The Directors had also signed the Directors Balances which showed the various directors' capital injections into the Company. He explained that in computing what was due to the plaintiffs he did not factor in what the defendants had put into the Company because the defendants' contributions were going to remain in the assets of the company. He further deposed that the Directors' balances did not show anywhere that the first defendant was owed Kshs.17 million and said that the sum owed to him by the company as at 30/6/99 was Kshs.4,299,094.

With regard to the issue of the time he took to file his report, he stated that he was served with the court order on 23/4/2003 and he was supposed to file the report within 30 days from the aforesaid date but he filed the same on 26/5/2003, about 3 days out of the required time.

I have considered all the affidavits filed by the parties herein as well as the submissions advanced by counsel in this matter. The determination of the two applications calls for close examination of the consent orders recorded on 11th march, 2003 and in particular Clauses Nos. 3 and 4 thereof. According to Clause No.3, a firm of Certified Public Accountants which was to be mutually agreed upon by the parties

was to take the hospital accounts and if the parties did not agree on the firm within two weeks they were to submit **the accounts** to a firm of accountants which was to be appointed by court. My understanding of that clause so far as regards the accounts is that they were already prepared and that is why it provided that in the event that the parties did not agree on the firm, the parties were to submit **the accounts** to another firm which was to be appointed by the court. The parties were directors of the said company and they knew that audited accounts of the hospital were in existence. These accounts must have been the ones prepared by KLSA Pannel Kerr Forster Certified Public Accountants for Pine Breeze Hospital Ltd over the years as the Company's external Auditors.

It would be unreasonable to interpret the said provision or clause of the consent to imply that the firm of Jaidev Nanji & Company, Certified Public Accountants was to begin auditing and preparing the said company's accounts for a number of years within the stipulated period of thirty (30) days. Besides, the said accounts had been approved and certified by the company directors as correct and it is therefore preposterous for the first Defendant to aver that he had been signing the said accounts over the years merely in trust and without verifying whether they were correct or not. The defendants are estopped from denying the authenticity of the said accounts. The Companies Act requires every company to keep and maintain true and fair records of its accounts and therefore the company's audited accounts which had been certified as true and correct by the directors must be taken to be genuine and true.

The appointed accountant, Mr. J. D. Nanji was further required to determine the net amount payable to the Plaintiff and this was after taking the said accounts. The parties in their own wisdom chose to leave the issue of determination of the amount payable to the Plaintiff in the hands of the said firm of the accountants because they knew that the said determination required technical evaluation by an expert in that field. The parties, by their own consent, did not leave any room for the court to determine the amount payable to the plaintiff. The said accountant explained to the parties in his meeting with them on 5/6/2003 how he arrived at the sums payable to the plaintiffs.

The consent orders of 11/3/2003 and 9/4/2003 did not require Mr. J. D. Nanji to file the Company's accounts prepared by himself but was specifically required to determine the amounts payable to the plaintiffs after taking the company accounts. The consent of 9/4/2003 required him to do the determination within 30 days from the aforesaid date. He, however, filed his determination in court about four days outside the required period from the date when he was served with the court order, that is on 23/4/2003. That short delay was not caused by the plaintiffs and neither was it prejudicial to either of the parties and in the absence of any other short coming to the said determination, the delay cannot vitiate the same.

In my view, J. D. Nanji and the firm of Jaidev Nanji & Co. sufficiently complied with this court's order of 9th April, 2003 as read together with the consent recorded on 11th March, 2003. I therefore reject the defendants' application dated 20th June, 2003 and dismiss the same with costs to the Plaintiff.

With regard to the plaintiffs' application dated 3rd July, 2003, I have already expressed my views regarding my interpretation of the aforesaid consent orders and also the determination by Jaidev D. Nanji lodged in court on 28th March, 2003. It is trite law that a court should give effect to the expressed intentions of parties in its interpretation of consent orders and a court will only interfere with a consent order in such circumstances as would afford a good ground for varying or rescinding a contract between parties. The Court of Appeal has stated that position in several matters for example in **MUNYIRI VS NDUNGUYA [1985] KLR 370** and in **FLORA WASIKE VS DESTIMO WAMBOKO [1982-88] 1KAR 625**.

The defendants agreed by consent to purchase the plaintiff's shares in Pine Breeze Hospital Ltd at a specified base value of Kshs.55 million and by further consent left the question of determination of the exact amounts to be paid to the plaintiffs in the hands of an agreed accountant, Jaidev D. Nanji upon taking accounts of the said company. The said accountant explained that in arriving at the sums payable to the plaintiffs he examined the audited accounts of the company for the years 1999, 2000, 2001 and 2002 as prepared by the company's auditors and certified by the Directors of the Company. He also examined the accounts of the company prepared by the Hospital Accountant with the assistance of the

Company's Auditors for nine months period upto 31/3/2003. The plaintiffs did not establish any valid grounds as would entitle the court to conclude that the process through which Mr. Nanji the Accountant arrived at his determination was flawed. All the financial queries raised by the first Defendant in his affidavit were contained both in the company's audited accounts and the Directors Balances which the said accountant took into consideration before arriving at his said determination.

In my view, therefore, the determination by Jaidev D. Nanji of the net sums payable to the plaintiffs should be adopted by this court as I hereby do. I therefore enter summary judgment for the plaintiffs against the defendants jointly and severally in terms of prayer No.(iii) of the amended plaint and in particular do order the defendants to pay to the first plaintiff Kshs.22,500,364/- and to the second Plaintiff Kshs.13,574,952/- as consideration for their shares in Pine Breeze Hospital Limited and upon payment of the said sums, the plaintiffs should transfer their shares in the said Company to the defendants.

The defendants shall pay the costs of this application as well as costs of the suit to the Plaintiffs.

DATED, SIGNED & DELIVERED at Nakuru this 26th day of November, 2004.

DANIEL MUSINGA

AG. JUDGE

26/11/2004