



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT 142 OF 2004

PYRETHRUM PROCESSING CO. LTD.....PLAINTIFF

VERSUS

KITCH AGRICULTURAL CO. LTD.....1ST DEFENDANT

ROGER SHAKO NGOO.....2ND DEFENDANT

RULING

This is an application by the 2nd Defendant made under the provisions of Order VI Rule 13 1(a) and 16 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The 2nd Defendant is seeking the orders of this Court to have the suit against him struck out. The grounds in support of the application are that the suit as framed disclosed no reasonable cause of action against the Defendant. The 2nd Defendant further states that he was a disclosed agent of the 1st Defendant and therefore he could not be held liable for any breach of the agreement between the Plaintiff and the 1st Defendant on the subject matter of the suit. The Application is opposed. The Plaintiff has filed grounds of opposition and a lengthy replying affidavit sworn by Ms Kevin Mpaka in opposition to the 2nd Defendants application. In the grounds of opposition, the Plaintiff has stated that the Application filed by the 2nd Defendant was bad in law, incompetent, misconceived and amounted to an abuse of the due process of the Court. The Plaintiff further stated that the 2nd Defendant executed the transfer in favour of the 1st Defendant in spite of the fact that the sale of the subject matter had been revoked.

At the hearing of the Application, Mr Mburugu Learned Counsel for the 2nd Defendant submitted that the subject matter of the suit was a sale agreement between the Plaintiff and the 1st Defendant. It was his further submission that the 2nd Defendant was not a party to the said agreement but acted as an Advocate on behalf of the 1st Defendant. Mr Mburugu submitted that no suit could lie against the 2nd Defendant as the 2nd Defendant was a disclosed agent of the 1st Defendant. It was the 2nd Defendant's submission that the prayers sought in the suit were directed against the 1st Defendant and not the 2nd Defendant. The 2nd Defendant further submitted that he had improperly been joined as a party to the suit. The 2nd Defendant argued that the grounds of opposition filed by the Plaintiff against the Application had no relevance as the 2nd Defendant did not have any capacity to execute any transfer involved in the subject matter of the suit. The 2nd Defendant urged this Court to allow the Application and order that the suit do proceed to hearing against the 1st Defendant only. Mrs Njoroge for the Plaintiff opposed the application. She submitted that the 2nd Defendant had given a Professional undertaking that the suit land would not be transferred before the completion of purchase consideration. Learned Counsel for the Plaintiff submitted that once the 1st Defendant failed to pay the purchase consideration as agreed, the 2nd Defendant was asked to return the conveyancing documents but the 2nd Defendant failed to return the documents. The Plaintiff submitted that striking out of suits was a drastic remedy. The Plaintiff further submitted that the matters in issue

between the two Defendants were intertwined and could not be separated. It was the Plaintiffs' submission that the case against both defendants should be allowed to go to full hearing to enable the evidence against both Defendants to be adduced and a determination made. The Plaintiff further submitted that a breach of Professional undertaking can result in a suit being filed against an Advocate giving such an undertaking. The Plaintiff prayed that the Application be dismissed and the suit be ordered to proceed to hearing.

In reply, Mr Mburugu, Learned Counsel for the 2nd Defendant submitted that the enforcement of a professional undertakings is provided for under a specific procedure of the Civil Procedure Act. The 2nd Defendant submitted that the Plaintiff could not seek to enforce a professional undertaking by filing a Plaint. The 2nd Defendant insisted that the plaint did not seek any specific orders against him and therefore the suit filed against him should be struck out.

I have considered the rival arguments made by Counsel for the Plaintiff and Counsel for the 2nd Defendant. I have also read the entire pleadings filed by the parties to this suit. The issue for determination by this Court is whether the 2nd Plaintiff has proved that, he, as a disclosed agent, should not have been made a party to this suit. By its Plaint filed on the 14th of May 2004, the Plaintiff averred in paragraph 8 thereof as follows:-

“The Plaintiff upon re voking the sale agreement with the Defendant (1st Defendant?) requested the 2 nd Defendant to return the title document, deed plan and the Land Control Board Consent but the 2 nd Defendant proceeded to effect transfer of the L.R. 11322/3 OL JOROROK to the 1 st Defendant and thereafter purported to finalise the purchase.”

Paragraph 9 states as hereunder: “The Plaintiff avers that the transfer of LR No. 11322/3 OL JOROROK to the 1 st Defendant by the 2nd Defendant was illegal, irregular, and fraudulent. PARTICULARS OF FRAUD BY THE 2 ND DEFENDANT

- (a) Causing L. R. 11322/3 OL JOROROK to be transferred to the 1 st Defendant after the sale agreement was revoked by the Plaintiff.
- (b) Releasing the conveyance documents to the 1 st Defendant and causing the transfer of L.R. 11322/3 OL JOROROK notwithstanding the knowledge that the Plaintiff had revoked the agreement .
- (c) Going against the Professional undertaking not to transfer L.R. 11322/3 OL JOROROK until the final payment was made by the 1 st Defendant within 90 days from the date of the agreement.
- (d) Attempting to forward the payment of the purchase price i.e. Kshs. 10,650,000/= despite knowing that the said agreement had been revoked.”

In his defence, the 2nd Defendant admitted that at all the material times referred to in the said averments filed by the Plaintiff he was acting as an Advocate and a disclosed agent of the 1st Defendant and therefore there was no cause of action against him. The 2nd Defendant denied that the agreement between the Plaintiff and the 1st Defendant was ever revoked.

While the Plaintiff was stating that the 2nd Defendant had, in effect, colluded with the 1st Defendant to have the said suit transferred from the Plaintiff to the 1st Defendant to the Plaintiff's detriment, the 2nd Defendant on the other hand was stating that whatever action that he took was under the instructions of the 1st Defendant. The 2nd Defendant is stating that he cannot be liable for the acts of the 1st Defendant moreso where the parties to the agreement knew that he was an advocate and therefore an disclosed agent of the 1st Defendant.

I have considered the opposing interpretation of the facts of this case that has been taken by the Plaintiff and the 2nd Defendant. It is not disputed that the Defendant gave a professional undertaking to the Plaintiff whereby the 2nd Defendant undertook not to transfer the suit land until the full purchase consideration had been paid. From the pleadings filed by the Plaintiff, the Plaintiff states that it was not

paid the balance of the purchase consideration in time and therefore wrote to the 1st Defendant revoking the agreement. The 2nd Defendant on the other hand states that he did not breach the Professional undertaking given. The 2nd Defendant denies that the balance of the purchase consideration was paid after the expiry of the requisite period.

From my evaluation of the facts of this case, it is clear that the issues involving the 1st and 2nd Defendant as stated by the Plaintiff in his Complaint are so intertwined that they cannot possibly be separated. While it is not disputed that the 2nd Defendant was a disclosed agent of the 1st Defendant, when the 2nd Defendant gave the Professional undertaking to the Plaintiff, he became a trustee for the Plaintiff for the Professional undertaking that he had given. The 2nd Defendant was therefore liable to the Plaintiff for the Professional undertaking given. The Plaintiff has alleged that the Professional undertaking given by the 2nd Defendant was breached. The 2nd Defendant denies that he breached the Professional undertaking. That is an issue which can only be determined after the evidence has been adduced in Court. After evaluating the arguments made by the parties to this application, I do find that the 2nd Defendant has not established that his actions in the transaction removed him from being liable to the Plaintiff. On the contrary, once the 2nd Defendant gave the Professional undertaking to the Plaintiff, he became liable to the Plaintiff for an alleged breach of the said Professional undertaking given. And if the said alleged breach resulted in a party benefiting (in this instance the 1st Defendant) then an aggrieved party can sue both the beneficiary and the person who gave the undertaking. The Plaintiff has therefore established that it has a reasonable cause of action against the 2nd Defendant. The fact that there is another procedure given by the law to enforce a Professional undertaking does not preclude an aggrieved litigant from filing suit against an Advocate giving such a Professional undertaking more so if such an Advocate is sued together with a beneficiary of the breach of the professional undertaking. In the premises therefore, I do not find any merit in the Application filed by the 2nd Defendant. The Application is therefore ordered dismissed with costs to the Plaintiff. The suit against the 2nd Defendant shall proceed to full hearing.

DATED at NAKURU this 2nd day of November 2004.

L. KIMARU

AG. JUDGE