



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 2560 OF 1988
(CONSOLIDATED with HCCC NO 2559 AND 2561 OF 1988)
KENYA POLICE STAFF SACCO.....PLAINTIFF
VERSUS
KENSING & PARTNERS
CONSULTING ENGINEERS LTDDEFENDANT
RULING

This is an application by decree holder for orders that: (1A) Legal representatives of the defendants herein be joined as parties to the suit.

- (1) Court be pleased to allow the execution of the decree against the legal representative of the defendants herein.
- (2) The decree dated 28.11.97 be amended appropriately to reflect the legal representatives as the defendants.
- (3) That a notice to show cause do issue against the legal representatives to show why the decree should not be executed against them.

The application supported by the affidavit of John Mwaura Muthabuki – manager of the decree holder. It shows that Mr & Mrs Ndubai (2nd defendant died in 1999 and were shareholders of the first defendant . It also shows that a Grant of letters of Administration to the estate of Benjamin Rewel Ndubai who died on 6.1.99 was given to Richard Mwongela Ndubai, Leon Miriti Ndubai and Lena Margaret Ndubai on 15.4.99.

The application to support the petition for Grant of letter of administration which lists the assets of Benjamin Jewel Ndubai in the supporting affidavit is annexed.

The application is opposed on the main grounds that:

1. The legal representatives referred to are only legal representatives of Benjamin Rewel Ndubai and not legal representatives of his wife the late Chloris Ndubai who had no estate.
2. Kensing and Partners Consulting Engineers Ltd was a limited liability company which has since been struck off the Companies Register.

3. Kensing and Partners does not exist in law and owns no property.

The decree arose from three consolidated suits namely:

(a) HCCC No 2559/88 where Applicant had sued Kensing International Ltd (1st defendant) and Kensing Consulting Engineers Company Ltd (2nd defendant) recover shs 7,912,019 and a further shs 310,250

(b) HCCC No 2560/88 where applicant had sued Kensing & Partners Consulting Engineers Ltd (1st defendant) and Benjamin Ndubai & Chloris Ndubai trading as Kensing and Partners (2nd defendant) to recover shs 8,140,000 and general damages. That suit was based on a construction agreement dated 25.11.82 made between applicant and Kensing & Partners Company limited. Para 4 of the plaint averred that the 2nd defendant was acting as agent of first defendant in the contract

(c) HCCC No 2561/88 where applicant has sued Kensing and Partners Consulting Engineers limited to recover shs 6,150,000 and general damages.

The three suits were heard *ex parte* and judgment was entered for shs 16 million against defendants jointly and severally on 11.11.97. The court made a global award in the three suits without specifying the award in each of the three suits.

By section 37(1) of the Civil Procedure Act, a decree holder can apply to court to execute a decree against legal representatives of a judgment debtor who has died without satisfying the decree fully.

But by section 37(2) of the Civil Procedure Act, where the decree is executed against such legal representative he shall be liable only to the extent of the property of the deceased which has come to his hands and which has not been disposed. By order XXI rule 18(1)(b) Civil Procedure Rules, the court is required to issue a notice to show cause against the legal representative where the decree holder has made an application to execute against the legal representative.

In my view, it is not necessary to join the legal representative in the suit or to amend the decree where execution is sought against the legal representative of a deceased judgment debtor. If an application is made to court for permission to execute against the legal representatives and such permission is granted, the decree holder can file an application for execution against the legal representatives being made parties to the suit and without the decree being amended. Moreover it is not necessary to issue a notice to show cause against the legal representatives at this stage.

It is after the court allows the decree to be executed against the legal representatives that the decree holder can apply for a notice to show cause.

Should the court allow the execution of the decree against the legal representative of Benjamin Rewel Ndubai?

Firstly, the decree holder has not explained why it has become necessary to seek execution against the legal representatives. Mr John Mwaura Muthabuku has not, in the supporting affidavit, said that the decree is incapable of being enforced against the judgment debtor companies.

Secondly, although a global award of shs 17 million was given in the three suits Benjamin Ndubai was only a defendant in one suit – HCCC No 2560/88.

The decree does not specify the award made in HCCC No 2560 of 1988 for which Benjamin Rewel Ndubai as a second defendant would be liable.

Even in HCCC No 2560/88, the agreement which gave rise to liability was between the decree holder and Kensing & Partners Company Ltd.

The plaint in HCCC No 2560/88 name Benjamin Ndubai and his wife as trading as Kensing & Partners. Is that a distinct entity from Kensing & Partners Company ltd which entered into the agreement?

Further, paragraph 4 of the plaint in HCCC No 2560/88 show that Benjamin Ndubai and his wife were acting as agents of Kensing & Partners Consulting Engineers Ltd. A director of a limited liability company acts as agent of the company. A director of a limited liability company would only be personally liable for acts of the company in the well known restricted circumstances. Thus there are several unanswered questions concerning the personal liability of Mr Benjamin Ndubai for the whole of the decretal sum of shs 17 million.

Thirdly, there is no evidence that all the properties listed still exist and have gone into the hands of the three legal representatives. The investigation report show that most of the properties were mortgaged.

For those reasons I dismiss the application with costs.

Dated and delivered at Nairobi this 28th day of November, 2002

E.M GITHINJI

JUDGE

Mrs. Nyakundi present

Dr. Khaminwa present

Mrs Nvakundi

I apply for leave to appeal

Dr. Khaminwa

I also apply for leave to appeal

E. M. Githinji Judge

Order:

Leave to appeal given

E. M. Githinji Judge