



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 822 of 1996**

**DANIEL GATHAIYA NJAGI &**

**ANOTHER.....PLAINTIFF**

**VERSUS**

**K P & T**

**C.....DEFENDANT**

**RULING**

This is an application by Postal Corporation of Kenya (PCK) for Review of the decree dated 2.11.2000 on the ground of discovery of new and important facts.

On 21.1.2000, the Court struck out the Defence and entered Judgment for plaintiff on an application by the plaintiff.

Consequently, Judgment was entered against the defendant Kenya Post and Telecommunications Corporation (KP&TC) for shs 37,979,903/75 plus interest at the rate of 30% p.a from 12.12.95.

The Decree issued on 3.2.2000 shows that the decretal sum at that date is a staggering shs 84,835,654.75

The defendant has been split up into three entities - Postal Corporation of Kenya Communications Commission of Kenya and Telkom Kenya ltd - a Private Company. By legal Notice 156 contained in the Kenya Gazette supplement No. 59 dated 5.11.99 Liability in this suit was vested to PCK. It is the PCK and not the defendant which is therefore required to pay the decretal sum in this suit. It is not argued that PCK has no Locus Standi to make the present application. As the body liable to satisfy the decree in this suit, it has a right to apply for the review of the decree. The words "Any person considering himself aggrieved" in Order XLIV Rule 1(1) CP Rules are wide enough to include PCK.

Plaintiff averred in the plaint inter alia;

- (i) That by a letter dated 22.8.90 defendant (KP&TC) commissioned plaintiffs firm as their Civil and Structural engineers in respect of defendants Malindi Post Office and Offices.
- (ii) Terms of Commissioning were to comply with current edition of the "conditions of engagement and scales off fees for professional services for Building and Civil engineering works" issued in 1974 by Building Department of the Ministry of Public Works.

(iii) Plaintiff started work on the defendants Malindi Post office and continued with construction work until 9.5.94 when defendant informed plaintiff to stop any further professional work on the project and to submit their drawings and their fees for settlement. (para 6 of the plaint)

(v) Defendant failed to pay various fee notes amounting to shs 37,979,901/75.

The court found that the defence on record was flimsy and frivolous and intended to delay the settlement of plaintiffs claim. Applicant concedes that on the basis of the material before the court then, the courts decision was fair.

Mr. JFK Omanga, the Corporation Secretary of PCK, deposes that the file on this court case remained at the Legal Department of Telkom Kenya ltd and was not aware of the suit until he was informed by Telkom Kenya ltd vide a letter dated 24.1.2000 that Judgment had been entered against KP&TC. He states that, it is after studying the pleadings filed in court and after studying the project file that he discovered the new and important facts which are the basis of this application. The new and important facts discovered by Mr. Omanga are set out in para 9 of his affidavit thus:

(a) That the alleged contract that forms the basis of this suit is not a contract in the true sense of the word

(b) That the alleged contract is vague in that no price or consideration is set out nor is the nature of the work to be undertaken specified, i.e whether it was for the construction of a 100 storey building or a two bedroom flat.

(c) The contract was open ended, vague and purely calculated to lend itself to fraud.

(d) That *stricto sensu*, there was no legal contract between the parties.

(e) That no construction was ever undertaken by plaintiff on defendant behalf

(f) That designs drawings, plans, allegedly undertaken by plaintiff on defendants behalf are truly not based on any known property or property that can be specified with any clarity and certainty for they do not state the specific land reference number or title number.

(g) That the designs, drawings and plans are not based on any pieces of real property belonging to defendant

(h) That Mr. Ndarua an ex -employee of defendant connived and conspired with plaintiff and is the architect of the whole scheme

(i) That no construction ever took place as alleged for the simple reason that was no plot to erect the building on.

Mr. Omanga states in para 19 that he has discovered a new important fact that Mr. P.G. Ndarua, the then Chief Architect of KP&TC and who signed the commissioning letter was an interested party in the project and that he was eventually paid shs 23,280,50 as consultancy fees on the project although he was an employee of KP&TC. In Para 21 Mr. Omanga deposes that, after comparing the alleged contract and the new and important facts, he verily believes that the entire project was a fraudulent gimmick aimed at generating colossal sums in consultancy fees without any intention or aim of ever undertaking real work on the basis of the consultancy work.

The application is also supported by the affidavit of Mr. E. K. Buttuk - an architect by profession and the Manager of Buildings and maintenance Department of PCK He has summarized his findings after perusing the project file and relying on his knowledge in Para 25 of the affidavit thus...

(a) The entire project was a mere fraud simply so calculated and executed

(b) That no land belonging to defendant and upon which to base the drawings existed at any one point in time

(c) Plaintiff seem to have drawn the designs and plans on thin air.

(d) Plaintiff does not state the basis of his fees

(e) No construction was ever undertaken contrary to assertions by plaintiff

(f) The alleged land which plaintiffs have based their drawings on does not belong to either the defendant or to any other known human being.

Mr. Daniel Gathaiya Njagi of the plaintiff has filed a replying affidavit. Plaintiffs have also filed grounds of opposition.

Mr. Buttuk avers that the consultants involved in the project including the plaintiffs were paid shs 99,873,604/90 by KP&TC. Mr. Ahmed Nassir for applicants informed the court that the applicant has filed High Court Civil Case No. 1055/2000 against all the consults in project including the applicant to recover about shs 450 million paid to the consultants in respect of the project and that plaintiff in this suit has filed a 54 paragraphs Defence. This fact is conceded by Mr. Kirundi for the plaintiff.

Applicants has to satisfy the court that it has discovered new and important matter or evidence which after the exercise of due diligence was not within its knowledge or could not have been produced by it at the time the decree was passed.

Plaintiffs contends that there are no new facts discovered and the alleged new facts were within the knowledge of the applicant at the time the decree was passed.

I have studied the respective affidavits and numerous documents exhibited by the parties. It is apparent that one of the most important new fact relied on by the applicant is the fact that no land existed on which the project could be constructed. Mr. Buttuk, an architect by profession, stated in para 5(f) of his affidavit that Civil Works allegedly done by plaintiff must be based on real and actual known property. It is clear from the affidavit and documents annexed to Mr. Buttuk's affidavit that by a letter of allotment dated 15.9.88, the Commissioner of Lands allotted unsurveyed plot to the defendant for construction of Mast Bast and Head Post Office at Malindi. But the documents show that the plot was later found to have been allotted to Malindi Gineries. This was discovered as early as July 1990. The letter dated 26.7.90 from a Buildings Officer of Defendant at Mombasa to Head Post Master Malindi, (Buttuk's exhibit EKB2), shows that on inspection of the plot by the defendants Officer he found that the plot was fenced off using concrete posts and chain link wire.

The letter dated 21.5.91 (EKB3) the defendant applied to the Commissioner of Lands for allocation of an alternative plot. The letter dated 22.11.91 (EKB4) from Post Master Malindi to Regional Manager Coast reports, inter alia, that "work for the proposed Malindi Post office and Office Block could not proceed as the plot allocated was found to be owned by Malindi Gineries".

The writer also reports that meeting with consultants including the plaintiff and attended by plaintiff among others on 5.7.91 on the proposed new Malindi Post Office and Office block was arranged but was postponed because the Chief Architect did not attend. Mr. Buttuk deposes that Commissioner of Lands allotted alternative plot to the defendant on 15.10.97.

Mr. Daniel Gathaiya Njagi, one of the plaintiffs deposes that his firm was taken to the site where the project was to be undertaken by Officials of defendant and that it is the same land contained in the letter of allotment dated 15.9.88. Mr Gathaiya states that the civil work on the project was based on the deed plan and copies of the topographic survey and that the drawings were to conform to architects drawings. He annexed a copy of Deed Plan which allegedly defendant issued.

That Deed Plan does not have the land reference number as it should have provided. It is dated 31.1.90

The consultants were Commissioned on 22.8.90. The letter dated 6.11.90 annexed to Mr. Gathaiya's affidavit shows that by 6.11.90, the plot had not been surveyed and that a topographical survey was required by the Architects to enable them to do proper planning of the project. The letter dated 3.12.90, again annexed to Mr. Gathaiya's affidavit, shows that by that date, the architect had not completed preliminary sketch designs and the cost plan of the project had not been prepared. It is by a letter dated 14.11.91 that M/S Nyambene & Magare Associates informed the defendants that the total estimated cost of the construction was shs 591,577,600

A letter dated 20.5.93 (page 36 of Omanga Exhibit from defendant to M/S Nyambene & Magare Associates - the projects quantity Surveyors, shows that defendant intended to implement the project in two phase - first phase to be constructed up to first floor and second face the construction of the offices. Exhibit "EKB5" of Mr. Buttuk's affidavit is a schedule of drawings made by plaintiff and which are the basis of his claim. The consultants were informed by defendant of the abandonment of the project by a letter dated 9..7.94. The drawing forming the basis of plaintiffs claim were made in 1991, 1992, 1993 and in 1994 and cover drawings from the basements to fourth floor.

M/S Nyambene & Magare Associates show in the second fee note dated 1519/93 (page 19 of Mr. Omanga's affidavit) that the estimated costs of works for phase 1 & 11 was shs 1,130,850.200/=

The real dispute raised in the application is whether or not plaintiff legally earned the remuneration for which judgment was entered. There is difference of opinion on some technical matters regarding requisite terms of a valid building contract between Mr. Gathaiya and Mr. Buttuk both of them experts. For instance Mr. Buttuk says that drawings must be based on an existing piece of land and that the cost plan must be an ingredient of the contract. Mr. Gathaiya is of a different opinion. According to him, a structural engineer is not concerned with the issue of ownership of the land and his drawings are supplemental to those of the Architect. He further says that the project was a contingent project whose cost would not be immediately estimated at the time of commissioning and therefore issue of costs plan was irrelevant. The court is dealing with a technical area. The issues raised cannot be resolved on the affidavits and it is not the duty of the court, at this stage, to resolve those disputes. The court can only at this stage decide the application on prima facie basis. This is a project in which over shs 400 million was spent. The project did not even start.

From the analysis of the affidavit evidence and documents it is apparent that:

1. Defendant knew as early as 26.7.90 that plot on which the proposed Post Office and offices were to be constructed had been fenced off by another person.

So when the defendants officers commissioned the project and appointed consultants on 22.8.90, there was no certainty of the existence of the plot on which the project could be started.

2. At the time consultants were commissioned, the plot had not been surveyed and the cost plan had not been prepared. Whether a project of this size could be started on the basis of a letter of allotment and before survey and before a Grant has been issued by the Commissioner of Lands is matter than can only be decided at the hearing.

3. At the date of Commissioning of the plaintiffs the Architect had not completed preliminary sketch designs

4. By 21.5.91 defendant was certain that the plot did not exist as it had been allocated to Malindi Gineries

5. Post Master Malindi informed the Regional Manager Coast by a letter dated 22.11.91 that the work could not proceed and that indeed a meeting with consultants had had been held on 5.7.91

6. Despite those facts costs plan was provided on 14.11.91 to defendant and on 20.5.93 defendant intimated that the project would be implemented in two phases - first floor and then offices

7. Although project had to be implemented up to first floor, plaintiffs drawings for which he claimed payment included drawings for 2nd 3rd and 4th floors.

8. Although defendant officer reported by a letter dated 22.11.91 that work on the proposed Malindis Post Office could not be done due to non existence of the plot, most of the drawings for which plaintiff claimed payment were made after date of that letter between 1992 and 1994

9. Although no plot existed and work could not be done and although defendant Officers knew of these facts as early as 26.7.90, defendant officers did not defer the project until 9.5.94

Applicant further states that another knew and important facts is that Mr. Ndarua the Chief Architect of the defendant and the Officer who commissioned the consultants was an interested party and was infact paid shs 23,280,501

If the defendants officers knew even before the date of commissioning of the consultants that the plot had been taken by another person, why did Mr. Ndarua commission the consultants on 22.8.90? Further, as defendant had ascertained by May 1991 that the plot did not exist and had by a letter dated 21.5.91 (page 57 of Omanga's affidavit ) applied to the Commissioner of Lands for allocation of an alternative plot, why did the defendants officer allow the consultants to continue with work thereafter until 9.5.94? Court has not been shown any documents from the Defendants Board of Directors approving the project.

In the light of the above circumstances the applicants assertion that the entire project was a fraud intended to generate colossal consultancy fees is prima facie established. Applicant believes that the project was a fraudulent scheme as it has gone a head to file a suit against all the consultants to recover monies paid under the project.

The applicant got access to the project file after the decree was passed. The facts relied on were extracted from the project file. There is no evidence that any of the current officers of applicant were involved in the project. As have said above, the minutes of the Board of Directors of the defendant approving the project have not been shown to court. It is probable that the project was started by officers of the defendant without the knowledge of the Board of Directors and therefore without the knowledge of the defendant. Even if the officer of defendants had the true facts at the time of the passing of the decree, they would not have brought them before the court if they were themselves involved in a fraud. In the circumstances, no amount of diligence could have led to the discovery of the new facts now relied on by the applicant.

An agreement is illegal and void if its object is to commit a crime. If a contract is designed to obtain money by false pretences or amounts to a criminal conspiracy to defraud by the false pretences, it is illegal. If a contract is ex facie lawful but both parties intend to exploit it for illegal purpose, it is considered as illegal from inception. If the contract is lawful at the time of formation but one party alone intends to exploit it for an illegal purpose, the innocent party can recover his entitlement under the contract. The letter commissioning the consultants is ex facie lawful but facts brought to light by applicant show prima facie that the project was designed to defraud the defendant.

Plaintiff claims innocence. Plaintiff cannot recover under an alleged contract unless he shows that he was an innocent party. Whether the project from inception was infact a fraudulent scheme to defraud the defendant and whether or not the scheme was designed by defendants employees alone or together with the consultants and whether plaintiff is an innocent party or not can only be known at the trial of the suit.

Suffice to say at this stage that, the applicant has established on prima facie basis that the project was a fraudulent scheme and that applicant may not be entitled to recover any money under the project.

However I note that applicant has not included a prayer for leave to amend the defence to plead to the

new facts if the application is allowed. By Order VI Rule 4(1) CP Rules, facts showing fraud or illegality must be pleaded in the Defence. Applicant has nevertheless invoked S. 3 A of CP Act which gives court inherent jurisdiction to make necessary orders for ends of justice. As a consequence of this Ruling the Defence will have to be amend. As there are facts before the court which prima show fraud; the court should give automatic leave to amend to plead to the new facts. This will also save parties time and costs. I think that this is a proper case for invoking the inherent jurisdiction of the court.

For the foregoing reasons, I allow the application dated 9.2.2000 with costs in the cause. I review the Ruling and orders given on 21.1.2000 and set aside the judgment given in favour of the plaintiffs with costs in the cause.

I give leave to the defendant (applicant ) to amend and file amended Defence within 15 days from today. I also give leave to plaintiff to file a reply to the Defence to be amended within 15 days from date of service.

**E. M. GITHINJI**

**JUDGE**

16.3.2000

Mr. Ahmed Nassir present

Mr. Owang for Mr. Kirundi present

Mr. Owang

I apply for leave to appeal

Court : Order XLII Rule 1(99) CP Rules gives right of appeal as of right

Order: In case of doubt leave to appeal is granted

E. M. Githinji

Judge