



**Niti Distributors Limited & another v Smollan Kenya Limited & another (Civil Appeal E059 of 2018) [2024] KEHC 11039 (KLR) (Commercial and Tax) (16 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11039 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E059 OF 2018  
JWW MONG'ARE, J  
SEPTEMBER 16, 2024**

**BETWEEN**

**NITI DISTRIBUTORS LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**SQUAD SOLUTIONS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SMOLLAN KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ALVIN OKULO OWINO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction And Background**

1. By a plaint dated 7<sup>th</sup> September 2018, the Plaintiffs filed the present suit against the Defendants claiming a sum of Kshs. 23,852,400.01/= being the cost of goods and services supplied to the Defendants between 16<sup>th</sup> March 2018 and 27<sup>th</sup> April 2018.
2. The Plaintiff claimed that the 2<sup>nd</sup> Defendant used to be an employee of the 1<sup>st</sup> Defendant but was dismissed from employment and that the Defendants had taken different positions in respect of liability with each attributing liability to the other. The Plaintiffs thus aver that in the circumstances of this matter, the Defendants are jointly and severally liable for the cost of the goods claimed.
3. In response, the 1<sup>st</sup> Defendant, in a statement of defence, dated 12<sup>th</sup> October 2018 and amended on 8<sup>th</sup> February 2021, admitted that indeed, the 2<sup>nd</sup> Defendant was its employee but was dismissed from employment. It was the defence of the 1<sup>st</sup> Defendant that the 2<sup>nd</sup> Defendant was employed as an IT Assistant and that he had no authority, whether express or implied, to procure any goods or services from the Plaintiffs on the 1<sup>st</sup> Defendant's behalf.



4. The 1<sup>st</sup> Defendant further admitted that it has taken a different position from that of the 2<sup>nd</sup> Defendant as far as the issue of liability was concerned and denied liability whether jointly or severally with the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant stated that it has never had any prior business dealings with the Plaintiffs and that between the stated subject dates and that it never received the alleged supply of goods and services from the Plaintiffs as particularized in the Plaint.
5. In addition, the 1<sup>st</sup> Defendant averred that if the alleged transaction between the Plaintiff and the 2<sup>nd</sup> Defendant for the supply of the said goods indeed took place, the 1<sup>st</sup> Defendant was not a party to it and regretted that the Plaintiffs neglected and or failed to conduct due diligence before losing their goods in what appeared to have been an elaborate scheme by the 2<sup>nd</sup> Defendant to defraud them.
6. As such, the 1<sup>st</sup> Defendant states that it did not owe the Plaintiffs the sum claimed and denied having entered into any agreement with the Plaintiffs and denied the existence of any contract whatsoever between them. The 1<sup>st</sup> Defendant stated that it was a stranger to the alleged contract and that it is not in the business of buying and re-selling laptop computers and related goods but instead, it was a services-provider which fact would have been revealed to the Plaintiffs had they conducted any due diligence before dealing with the 2<sup>nd</sup> Defendant, who was nothing more than an impostor when he presented himself as the 1<sup>st</sup> Defendant's Sales Manager. That the 2<sup>nd</sup> Defendant was charged with forgery and obtaining money by false pretences in an ongoing criminal case.
7. The 1<sup>st</sup> Defendant averred that it had never, either in the past or present, been indebted to the Plaintiffs and had never refused and/or neglected to make good any legitimate claim by the Plaintiffs. For these reasons, it urged the court to dismiss the suit against it.
8. The 2<sup>nd</sup> Defendant neither entered appearance nor filed any pleadings despite being served with the pleadings in the suit and as such, interlocutory judgment was entered against him on 8<sup>th</sup> April 2019. The matter was set down for hearing where the Plaintiffs called one witness, Manish Shah, their Operations Manager, who relied on his witness statement dated 7<sup>th</sup> September 2018 (PW 1) and produced the Plaintiffs' List of Documents dated 7<sup>th</sup> September 2018 (PEXhibits 1-39) and a Certificate of Electronic Evidence dated 2<sup>nd</sup> March 2022 (PEXhibit 40). The 1<sup>st</sup> Defendant called three witnesses; Soughata Chatterjee, its Country Manager who adopted his witness statement dated 5<sup>th</sup> October 2021 (DW 1) and produced the 1<sup>st</sup> Defendant's Bundles of Documents dated 28<sup>th</sup> January 2022 and 25<sup>th</sup> February 2022 respectively (DEXhibit 1-22 and DEXhibit 23-25); Paul Maghanga Ngume, its Finance Manager who adopted his witness statement dated 5<sup>th</sup> October 2021 (DW 2) and; Caroline Musuli, its Human Resource Manager who adopted her witness statement dated 5<sup>th</sup> October 2021.
9. After the hearing, the parties were directed to file written submissions although the record only has those of the Plaintiffs. Since the parties gave evidence along the lines highlighted above, I do not wish to rehash the same but I will make relevant references to them in my analysis and determination below.

### **Analysis and Determination**

10. In making this determination, I am guided by the fact that the standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107 (1) and (2) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provides that "whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist" and that "When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person".



11. In *Miller. V. Minister Of Pensions* 1947 ALL E.R 372, Lord Denning aptly summarised the application of the standard in the following terms:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

12. The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Ltd* CA Civil Appeal No 365 of 2017 [2019] eKLR simply put it that ‘Courts will make a finding based on which party’s version of the story is more believable.’

13. This court is being called upon to determine whether the 1<sup>st</sup> Defendant is liable to pay the Plaintiffs the sum of Kshs. 23,852,400.01/= arising from a supply of goods which the latter claimed was done on instructions from the 2<sup>nd</sup> Defendant and on the 1<sup>st</sup> Defendant’s behalf. As stated earlier, the 1<sup>st</sup> Defendant did not dispute that the 2<sup>nd</sup> Defendant was its employee at the time the impugned goods were ordered and delivered. However, it denied receiving the said goods and argued that the 2<sup>nd</sup> Defendant did not have authority to enter into such a transaction on behalf of the 1<sup>st</sup> Defendant and that the 2<sup>nd</sup> Defendant defrauded the Plaintiffs in his personal capacity and not on behalf of the 1<sup>st</sup> Defendant.

14. During cross examination by the Plaintiff, the 1<sup>st</sup> Defendant agreed that a third party dealing with the company is not supposed to find out the internal working or procedures of the company before dealing with it as was stated in *Royal British Bank v Turquand* 1856 A 11 ER. 886 (the Rule in *Turquand* Case). The Court of Appeal in *Samuel Mureithi Murioki & Another v Kamahuha Limited* NRB CA Civil Appeal No. 49 of 2012 [2018] eKLR further expounded on this principle by stating that whether a company has or has not complied with its internal procedures as to execution of contracts is an internal management issue and cannot afford a defence to a third party dealing with the company. A person dealing with a company is entitled to assume, in the absence of circumstances putting him on inquiry, that there has been due compliance with all matters of internal management of the company. The third party is entitled to assume that the person it is dealing with in the company has authority unless it has notice or has been put on inquiry as to the irregularity or lack of authority. This position now has statutory backing in the *Companies Act* (Chapter 486 of the Laws of Kenya) under section 34(2)(b) which provides as follows:-

(b) a person dealing with a company -

- (i) is not bound to enquire as to any limitation on the powers of the directors to bind the company or to authorize others to do so;
- (ii) is presumed to have acted in good faith unless the contrary is proved.
- (iii) is not to be regarded as having acted in bad faith only because the person knew that a particular act is beyond the powers of the directors under *the constitution* of the company.



15. At the material time, the 2<sup>nd</sup> Defendant presented himself to the Plaintiffs as an employee of the 1<sup>st</sup> Defendant and it is not disputed that indeed, he was an employee of the 1<sup>st</sup> Defendant. As an employee of the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant was an “apparent agent” which Black’s Law Dictionary (9<sup>th</sup> Ed.), at page 72 defines as “A person who reasonably appears to have authority to act for another, regardless of whether actual authority has been conferred – also termed ostensible agent.” Regardless of whether or not he had the authority to enter into a contract with the Plaintiffs, the Plaintiffs believed he had the authority to enter into such a contract. (See *Total Kenya Limited v D Pasacon General Construction & Electrical Services (Civil Appeal 119 of 2019)* [2022] KECA 593 (KLR) (8 July 2022) (Judgment)] and *Straight Media Limited v Trustees JKUAT Retirement Benefit Scheme (Commercial Appeal E120 of 2022)* [2023] KEHC 21753 (KLR) (Commercial and Tax) (29 August 2023) (Judgment)] The Plaintiffs believed that 2<sup>nd</sup> Defendant had this authority as he was the one who issued the LPOs to them (PEXhibit 1,7 & 13 ), he received the goods as per the delivery notes produced (PEXhibits 2,3,6,9and 12) and further received the invoices issued (PEXhibit 5,8,10,11 & 14). All these documents were in the letterhead of the 1<sup>st</sup> Defendant and/or bore its stamp. In the Acknowledgement and Agreement document dated 21<sup>st</sup> June 2018(PEXhibit 15), the 2<sup>nd</sup> Defendant stated that he issued the LPOs “.....on behalf of the Company in favour of M/s Niti Distributors Limited and M/s Squad Solutions for various laptops, computers and IT equipment’s. I personally received the following laptops and computers.....”
16. As stated, the only way the 1<sup>st</sup> Defendant can be absolved from being bound the aforementioned contract(s) by the 2<sup>nd</sup> Defendant is if the Plaintiffs had knowledge of the limits of the 2<sup>nd</sup> Defendant’s authority. The 1<sup>st</sup> Defendant did not produce any evidence that the Plaintiffs were aware of the 2<sup>nd</sup> Defendant’s limitation of authority when they were engaging him. The stated limitation in the 1<sup>st</sup> Defendant’s Preferential Procurement Policy (DEXhibit 4), the 2<sup>nd</sup> Defendant’s terms of employment and job profile (DEXhibits 7&8) and the list of approved suppliers in 2018 (DEXhibit 6) appear only to have been known by the 1<sup>st</sup> Defendant itself.
17. Up to this point, I find that the 1<sup>st</sup> Defendant cannot wriggle away from its obligations after being bound by the 2<sup>nd</sup> Defendant, who had apparent agency and authority to enter into contracts with third parties such as the Plaintiffs on behalf of the 1<sup>st</sup> Defendant. Even though the 1<sup>st</sup> Defendant contended that the 2<sup>nd</sup> Defendant acted fraudulently, it should not be lost that an act of an agent within the scope of his actual or apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests (See Article 84 of Bowstead & Reynolds on Agency and Tunoi J., (as he was then) in *Karanja v Phoenix of EA Assurance Co. Ltd KSM HCCC No. 56 of 1987 [1991] eKLR*)]
18. It is therefore my finding that the 1<sup>st</sup> Defendant is liable to pay for the goods that were supplied by the Plaintiffs and received by the 2<sup>nd</sup> Defendant on behalf of the 1<sup>st</sup> Defendant.

### **Conclusion and Disposition**

19. For these reasons, I find that the Plaintiffs’ suit succeeds and hereby enter judgment for the Plaintiff against Defendants, jointly and severally for the sum of Kshs. 23,852,400.01/= together with costs. Interest shall be calculated at court rates from the date of this judgment.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

.....



**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Mr. Kali for the Plaintiff.

N/A for the 1<sup>st</sup> Defendant.

N/A for the 2<sup>nd</sup> Defendant.

Amos - Court Assistant

