



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: T.W. CHERERE-J)**

**COMMERCIAL CASE NO. 22 OF 2018**

**(FORMERLY KISUMU ELC 156 OF 2017)**

**BETWEEN**

**DOMINION FARMS.....PLAINTIFF**

**AND**

**LAKE BASIN DEVELOPMENT AUTHORITY.....1<sup>ST</sup> DEFENDANT**

**VICTORIA BLUE AUCTIONEERING SERVICES.....2<sup>ND</sup> DEFENDANT**

**AND**

**IN THE MATTER OF COUNTERCLAIM**

**BETWEEN**

**LAKE BASIN DEVELOPMENT AUTHORITY.....1<sup>ST</sup> DEFENDANT**

**AND**

**DOMINION FARMS.....PLAINTIFF**

**JUDGMENT**

**Background facts**

1. By a Memorandum of Understanding (MOU) dated 19<sup>th</sup> May, 2003 between the Plaintiff and the 1<sup>st</sup> Defendant, agreed to jointly take a lease of a farm at Yala Swamp from the County Council of Siaya and the County Council of Bondo (as they were known then).

2. It was a term of the agreement that the 1<sup>st</sup> Defendant was to provide the Plaintiff with technical assistance and expertise and any other assistance that the Plaintiff was to require from time to time for which the Plaintiff was to pay the following amounts commencing in 2003:

- i. 0-5 years (Three million shillings (Kshs. 3,000,000/-) per year)
- ii. 5-10 years (Three million shillings (Kshs. 3,000,000/-) per year)
- iii. 10-15 years (Five million shillings (Kshs. 5,000,000/-) per year)
- iv. 15-20 years (Six million shillings (Kshs. 6,000,000/-) per year)
- v. 20-25 years (Seven million shillings (Kshs. 7,000,000/-) per year)

**3. The parties also agreed to enter into a tenancy agreement for the purpose of the Plaintiff renting houses and offices constructed by the Plaintiff.**

4. The parties appear to have disagreed as a result of which the 1<sup>st</sup> Defendant instructed the 2<sup>nd</sup> Defendant to levy distress on Plaintiff's properties in January, 2017 for alleged non-payment of rent prompting the Plaintiff to file this suit on 04<sup>th</sup> May, 2017 by a plaint dated 04<sup>th</sup> May, 2017 to stop the distress.

5. In response to the plaint, the 1<sup>st</sup> Defendant in its defence and counterclaim filed on 04<sup>th</sup> December, 2017 denied the Plaintiff's claim and pleaded that by a tenancy agreement dated 01<sup>st</sup> July, 2013, the Plaintiff paid an initial payment of Kshs. 21,620,000/- and owes Kshs. 34,130,000/- which sum the 1<sup>st</sup> Defendant has counterclaimed for.

6. On 31<sup>st</sup> July, 2019, the Plaintiff's claim was dismissed for want of prosecution.

### **Counterclaim**

7. Clifford Obiero, the 1<sup>st</sup> Defendant's witness reiterated the terms of the MOU and acknowledged that 1<sup>st</sup> Defendant had received Kshs. 21,620,000/- and in support thereof tendered a statement of account dated 25<sup>th</sup> April, 2015 and a bundle of receipts in respect thereof. It was also his evidence that the Plaintiff subsequently defaulted and owed the 1<sup>st</sup> Defendant Kshs. 34,130,000/- as at 01<sup>st</sup> March, 2017.

### **Issues for determination**

8. I have considered the 1<sup>st</sup> Defendant's case together with its submissions and I have summarized issues for determination as follows:

**a) Whether the counterclaim is merited**

**b) Who is to bear the costs of the suit**

### **Whether the counterclaim is merited**

9. The relationship between the parties herein arises from a **MOU dated 19<sup>th</sup> May, 2003. Clause EE of the MOU contains a term that the parties agreed to enter into a tenancy agreement for the purpose of the Plaintiff renting houses and offices constructed by the 1<sup>st</sup> Defendant.**

**10. Although the 1<sup>st</sup> Defendant pleads the existence of a tenancy agreement dated 01<sup>st</sup> July, 2013 between the parties, none was tendered. The Plaintiff in its plaint denied the existence of such a tenancy agreement.**

11. It is trite law that "whoever alleges must prove. **Section 107 of the Evidence Act, Chapter 80 Laws of Kenya** stipulates this in the following terms:

**1) 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.**

**2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person**

12. Further **Section 109** in narrowing down to proof of particular facts stipulates:

**The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**

13. Further, **Section 110** further provides that:

**The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.**

14. Regarding the incidence of burden, **Section 108** provides that: -

**The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**

15. It is therefore clear that the burden to prove that there existed a tenancy agreement between the Plaintiff and the 1<sup>st</sup> Defendant against the Plaintiff lies with 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant's counterclaim for Kshs. 34,130,000/-, in the absence of prove of existence of a tenancy agreement between the parties is founded on shaky ground and cannot therefore stand.

### **DISPOSITION**

12. In view of the foregoing analysis, this court makes the following orders:

**i. The counterclaim has no merit and it is dismissed**

**ii. Each party shall bear its own costs**

**DELIVERED AND SIGNED IN KISUMU THIS 06<sup>th</sup> DAY OF February 2020**

**T.W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - Amondi/Okodoi**

**For the Plaintiff - N/A**

**For the 1<sup>st</sup> Defendant - N/A**

**For the 2<sup>nd</sup> Defendant - N/A**