



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 6 OF 2018 (OS)

SHABAN OPIYO KASSIM PLAINTIFF

VERSUS

BLUE SANDS HOTEL LTD 1ST DEFENDANT

JOEL MOLA ASEDA.....2ND DEFENDANT

EDRIS & COMPANY ADVOCATES.....INTERESTED PARTY

RULING

The Plaintiff filed an Originating Summons on 10th May 2017 seeking a declaration that the Defendants are under a contractual obligation to meet the legal costs arising from **Kisumu HCCC No. 48 of 2007** and **Kisumu ELC Misc. No. 65 of 2014**. That this Honourable Court be pleased to order that the sum of Kshs. 2,000,000.00 payable to the Defendants from Ecobank Kenya Limited on account number 0140025009371901, Mall Branch, Kisumu to be released to the Plaintiff. That costs of this application be granted to the Plaintiff.

The application is based on the grounds that on 20th October 2014, the parties entered into an agreement in which the Defendants undertook to meet the legal costs arising from Kisumu HCCC No. 48 of 2007 and Kisumu ELC Misc. No. 65 of 2014. That on 19th July 2016, the legal costs arising from Kisumu ELC Misc. No. 65 of 2014 were taxed at Kshs. 1,150,801.00 in Kisumu HC Misc. Civil Cause No. 104 of 2016; and that on 21st September 2016, the legal costs arising from Kisumu HCCC No. 48 of 2007 were taxed at Kshs. 2,912,334.00 in Kisumu HC Misc. Civil Cause No. 34 of 2016.

That on 28th April 2017, the court made an order in Kisumu CMCC No. 320 of 2016 through which Ecobank Kenya Limited was directed to pay of Kshs. 2,000,000.00 to the Defendants from account number [...], Mall Branch, Kisumu. That the said amount has not been released to the Defendants but may be released soon if the order for attachment sought is not granted, prejudicing the Plaintiff's interest and causing irreparable loss.

That the Defendants have refused to pay legal costs as agreed and are intent on receiving and appropriating the Kshs. 2,000,000.00 held by Ecobank Kenya Limited to defeat the interest of the Plaintiff yet the Defendants have no other known means to satisfy the decree that would eventually issue against them.

That the Plaintiff and his family have since paid Kshs. 2,912,334 to the Interested Party as legal fees despite the fact the pursuant to the agreement the Defendants undertook to settle legal costs accruing from the aforementioned suits. That the sum of Kshs. 1,150,801.00 has already been taxed pending payment and the Judgment Debtor is in the process of execution of the same. That granting the orders sought would serve the wider interests of justice and not party would be prejudiced in the event.

In his supporting affidavit, the Plaintiff attached the land sale agreement and referred to Clause 5.2 of the Agreement.

Defendants' Response

Derrick Otieno Mola, one of the Directors of the 1st Defendant, filed a replying affidavit in which he stated that the 1st Defendant had two Directors being himself as the majority shareholder and the 2nd Defendant. That the Board of Directors passed a resolution to adopt and implement an agreement made on 6th February 2004 between the 2nd Defendant and Kassim Were Abdala and his family regarding the sale of the property known as Kisumu/Kogony/4454 and 4455. That the Board also resolved to implement an agreement made on 5th February 2014 between the 1st Defendant and Kassim Were Abdala and his family regarding the sale of the same properties.

That the sale of the properties proceeded on the basis of the terms of the sale agreement of 5th February 2014 which was preceded by the

agreement of 6th February 2004. That as per the agreement of 2014, the 1st Defendant did not undertake to meet the legal costs arising from Kisumu HCCC No. 48 of 2007 and Kisumu ELC Misc. No. 65 of 2014. That the 1st Defendant was not privy to the sale agreement dated 20th October 2014 and the 2nd Defendant acted unilaterally in executing the same. That the 2nd and 1st Defendant were two distinct legal persons and the actions of the 2nd Defendant cannot bind the 1st Defendant. That the agreement of 20th October 2014 is null and void for want of resolution of the Board of Directors.

Interested Party's Response

Nicholas Edris Omondi Advocate filed a replying affidavit on behalf of the Interested Party. He stated that the Interested Party acted for the Plaintiff and his family in Kisumu HCCC No. 48 of 2007 and Kisumu ELC Misc. No. 65 of 2014, and that it has been waiting for its former clients to make payment of the costs as taxed but in vain. That it has never received the Kshs. 2,912,334.00 as claimed by the Plaintiff. That the purported balance of Kshs. 1,150,801 is due and owed to it and not Kojo and Munje Advocates or Owino Kojo and Company Advocates. That it supports the OS with the rider that the entire taxed costs due of Kshs. 4,065,135 be released to it. The 2nd Defendant did not file any reply to the Originating Summons.

Plaintiff's Submissions

Counsel for the Plaintiff filed written submissions on 26th June 2019. Counsel submitted that Clause 5.2 of the agreement of 20th October 2010 imposed on the Defendant a contractual obligation to pay the costs arising from the two mentioned suits. That despite several calls by the Plaintiff and court for an out of court settlement, the Defendants have remained adamant and have refused to engage in negotiations.

That replying affidavit of one Derrick Otieno Mola who is the 2nd Defendant's son attempts to absolve the 1st Defendant from Respondent while implicating the 2nd Defendant who did not even bother to oppose the Plaintiff's application. That the agreement of 6th April 2004 was an addendum to the original agreement dated 5th February 2014. That the Plaintiff is not privy to the agreement dated 5th February 2014 and the alleged Board Resolutions which refer to the internal affairs of the company.

Counsel submitted that it was not for the Board to pick and choose which agreement to honour, as it is obligated to honour all agreements entered into with third parties. That the addendum dated 20th October 2014 was executed on his own behalf and on behalf of the 1st Defendant as a Director. That the Plaintiff was entitled to indemnification under Clause 1.2 (g) of the agreement. That the 1st Defendant cannot get away with the allegation that the 2nd Defendant acted unilaterally in executing the agreement of 20th October 2014 since third parties entering into contracts with a company are not reasonably expected to be privy to the internal affairs of the company. That third parties are not expected to be privy to the resolutions of the Board especially those that are not registered but should only ensure that they are dealing with an authorised employee and/or director of the company

Interested Party's Submissions

Counsel for the Interested Party filed submissions on 29th October 2019. Counsel submitted that in 2014 at the point of consultancy of the Plaintiff, the Interested Party has two associates Victor Kojo (now of Kojo & Munje Advocates) and Joseph Makoha. That every negotiation in the consultancy to the Plaintiff was done on behalf of and under the guidance of its senior partner, Edris Omondi. That Victor Kojo had been entrusted with being a signatory of the Interested Party's NIC bank account among other privileges. That a consent was entered at the settlement of Kisumu ELC Misc 65 of 2014 but no monies were deposited in the firm's bank accounts.

Counsel submitted that the services offered to the Plaintiff were under the auspices of the Interested Party hence it was only proper that the payment emanating from them were sent to its bank accounts. That effectively the Plaintiff had entered into a contract with the Interested Party and not any individual associate of the firm, hence any agreement on fees and costs were binding on the firm.

Counsel submitted that the Plaintiff was furthermore barred from benefitting from the said monies because the consent was in respect of costs due to their advocates in the two suits and not themselves. That the Plaintiff acted in bad faith and was attempting to take advantage of the dormancy of the firm and it was only through a stroke of luck that the Interested Party came to know of the present suit as its advocate was perusing the court cause list. Counsel cited the case of *Namachanja & Mbugua Advocates v Igainya Limited [2015] eKLR*.

That there was misrepresentation of facts by the Plaintiff. Counsel submitted that the Plaintiff did not annex any evidence backing up his claim that he had made the payment as alleged. Counsel urged the court to make an order for the costs to be awarded to the Interested Party and not the Plaintiff.

Issues for Determination

1. *Whether the agreement of 20th October 2014 is valid*

Section 34 of the repealed Companies Act, Cap 486 provides:

“(1) Contracts on behalf of a company may be made as follows–

- a) a contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied;**

b) ...

2) A contract made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto.”

Section 34 of the Companies Act 2015 provides:

(1) In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is free of any limitation contained in the company's constitution.

(2) For purposes of subsection (1) —

(a) a person deals with a company if the person is a party to a transaction or other act to which the company is a party; and

(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 authorise others to do so;

(ii) is presumed to have acted in good faith unless the contrary is proved; and

(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.”

The Court of Appeal in *Emco Plastic International Ltd v Freeberne* [1971] EA 42 held that a contract made between an third party and a managing director acting under the implied or ostensible authority of the company was binding on the company and the third party was not obliged to enquire whether the Articles of Associations were complied with or whether resolutions of the board were made to that effect:

“...someone had to represent the appellant company in the conduct of its business, particularly at the initial period, and such person must surely have authority to bind the appellant company. Thus a third party dealing with the appellant company was entitled to assume that there was authority on the part of that person to bind the appellant company. The question as to whether or not the Articles of Association or a resolution of the board empowered the Chairman or any other director to enter into a contract binding the appellant company was not a matter into which a third party should have inquired as long as he acted on a representation that the Chairman or director had authority to bind the appellant company.

In my view, it is immaterial whether [the director] had authority to enter into the contract. The appellant company cannot repudiate the actions of the Chairman/director done within the scope of this ostensible authority.”

In *Akusi Farmers Company Limited v Robert Ndiritu Gitonga* [2019] eKLR, Mulwa J. held:

“Thus a corporation may be represented by its authorized officers which authority may be express or implied. Directors of a company are such officers. My understanding of Section 35 above is that such authority need not be in writing or even filed. It could be implied, by conduct of the parties. If that was not so, the drafters would have expressly stated so.”

The 2nd Defendant having been the signatory for the 1st Defendant in the initial sale agreement dated 6th April 2004 and in the contested sale agreement of 5th February 2014, the Plaintiff and his family was entitled to assume that the 2nd Defendant was executing the agreement of 20th October 2010 on behalf of the 1st Defendant. The contention that there was no resolution of the board does not hold water. In fact, based on the board resolutions filed by the 1st Defendants it appears that the practice of the Board of Directors were to make resolutions approving implementing agreements after entering into those agreements, despite the fact that 1st would be automatically bound by the terms of any contracts entered into on its behalf through its Directors. Therefore, no resolution of the Board of Directors was necessary to approve or implement the agreement dated 20th October 2014. Further, the 2nd Defendant did not raise any opposition to the Plaintiff's assertion that he signed the agreement on behalf of the 1st Defendant.

The only conclusion that can be drawn from the foregoing is that the agreement dated 20th October 2016 between the parties was valid and enforceable, and its purpose was to remedy the breach by the Defendants “of the earlier agreements made.” That the Defendants are bound by the terms of the agreement to meet the legal costs arising from Kisumu HCCC No. 48 of 2007 and Kisumu ELC Misc. No. 65 of 2014.

2. Whether the question of the party entitled to the monies in Ecobank Kenya Limited can be determined in this originating summons

The issue of the proper party to release to the monies in Ecobank Kenya Limited account number [...], Mall Branch, Kisumu has raised contentious questions of fact such as the veracity of the allegations of partial payment of costs to the Interested Party by the Plaintiff, and the nature and extent of the Advocate-Client relationship between the Interested Party and the Advocate vis a vis the Advocates on record for the Plaintiff in this summons. These questions go beyond the scope of the affidavit evidence filed in the originating summons.

Hancox J.A. (as he then was) in *Kenya Commercial Bank Ltd v Osede* [1982] eKLR, expounded on the limited scope of originating summons as follows, citing with approval his decision in Salehmohamed Mohamed v PH Saldanha (3), Kenya Supreme Court (Mombasa) Civil Case No 243 of 1953, (unreported):

“Such procedure is primarily designed for the summary and ‘Ad hoc’ determination of points of law or construction or of certain questions of fact, or for the obtaining of specific directions of the court... Moreover, the originating summons procedure is not for the purpose of obtaining decisions on disputed questions of fact - see *Re Sutcliffe* [1942] 1 Ch at 455 per Bennett J followed by *Madan J in Official Receiver v Sukhdev* [1970] EA at p 248.”

It follows therefore that this issue cannot be determined before the parties have an opportunity to adduce further evidence in support of or against the numerous facts in contention, and that this originating summons is not the proper forum for determining the same.

The upshot of this is that the Plaintiff is entitled to the orders sought in prayer 3 but not entitled to the orders sought in prayer 4 of the originating summons. It is hereby declared that the Defendants are under a contractual obligation to meet the legal costs arising from **Kisumu HCCC No. 48 of 2007** and **Kisumu ELC Misc. No. 65 of 2014**. **The plaintiffs are awarded half costs.**

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 28TH DAY OF FEBRUARY, 2020.

In the presence of:

MR MBAGADA FOR APPLICANTS

MR INDIMULI FOR I/P

N/A FOR RESPONDENTS

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE