



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

HCC CASE NO.523 OF 2016

IAF (EAST AFRICA LIMITED).....PLAINTIFF

VERSUS

THIKA GREENS LTD.....DEFENDANT

RULING

BACKGROUND OF THE APPLICATION

The Defendant by a **Notice of Motion** dated **6th November 2017** filed an application for the orders that the Plaintiff's suit be dismissed on account that the **Engagement letter** dated **18th January 2016** and **Sale Agreement** dated **23rd June 2016** are void in law and founded on an illegality. The application is supported by the Supporting Affidavit of **Charles Kibiru** on the grounds that;

- a) The Plaintiff is not properly registered as a company in line of section 129 of the Companies Act;**
- b) David L. Massie did not have a valid work permit conferring the authority to carry on business and entering into contracts on Plaintiff's behalf therefore lacking *locus standi* to file any claims;**
- c) The Engagement letter and Sale Agreement are in contravention to the provisions of the Kenya Citizenship & Immigration Act which has been brought to the attention of the court through the Statement of Defence;**
- d) The Plaintiff was aware of the aforesaid illegality and is not entitled to any interest or rights arising from the Engagement letter and Sale Agreement;**
- e) The contracts are illegal and hence not capable of performance.**

DEFENDANT'S SUBMISSIONS

In the Defendant's submissions dated **31st October 2018**, the Applicant contends that there has been no denial by the Plaintiff in its pleadings that **David L. Massie** did not hold a valid work permit at the time of entering into the contracts and the absence of such denial is tantamount to an admission of the facts giving rise to the illegality.

They set out their issues for determination as:-

- 1) Whether the Engagement letter and Sale Agreement are void in law.**
- 2) Whether the entire suit should be dismissed based on the maxim of *ex turpi causa non oritur action*.**

The Defendant also submitted that there is no document confirming **David L Massie** appointment as a Chairman of the Plaintiff or any written authority confirming he is authorized to sign pleadings on its behalf. Furthermore, David L Massie is not listed as a director in the **CR 12**, he is just the majority shareholder of the Plaintiff.

The Defendant also submitted that the Plaintiff and **David L Massie** should be treated as identical as he controls the company and is also responsible for running the undertakings of the Plaintiff including agreements entered into on his behalf.

The Defendant relied on the case of; Zingo Investments Ltd vs Miema Enterprises Ltd[2015] eKLR where the court held that:

“Notwithstanding the effect of a company’s incorporation, in some cases the court will ‘pierce the corporate veil’ in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company.”

The Defendant also relied on the case of Mapis Investment Ltd vs Kenya Railways Corporation [2006]eKLR where the court held that failure by the Appellant to deny that its agent was not registered was tantamount to an admission of the facts giving rise to an illegality.

PLAINTIFF’S SUBMISSIONS

Through the Plaintiff’s Replying Affidavit dated 23rd April 2018, **David L Massie** opposed the Application dated 6th November 2017 stating that the Plaintiff was legally and lawfully registered on the 10th of September 2015 in Kenya and was not in breach of section 129 of the Companies Act. **David Massie** also claimed that he neither carried out business in Kenya nor enter into any agreement with the Defendant. He was only appointed by the company to sign the pleadings on behalf of the Plaintiff.

He claims to be the Plaintiff’s chairman and principal officer who does not carry out the day to day running of the company and therefore, not required to have a valid work permit. He further submitted that the company sued in its capacity as a limited company and that the Defendant had already benefitted from services of the Plaintiff and therefore dismissing the suit would be unjust to the Plaintiff.

David Massie submitted that the two documents were executed by the Plaintiff which is a properly incorporated legal entity independently capable of concluding and executing contracts and hence relied on the case of Post Bank Credit Ltd vs Nyamangu Holdings Ltd[2015]eKLR, where it was held that;

“the separate corporate personality of a company as a legal person in Salomon v Salomon is the greatest legal innovation in company law. And, although it is artificial person that does not possess the body of natural person, a company is a juristic person; a legal person in law. It exists only in contemplation of law. Because of its artificial nature, a company acts through human persons, namely, the directors, officers, shareholders, and corporate managers, etc., for its management and day to day running. But these individuals represent the company and accordingly whatever they do within the scope of the ostensible or authority conferred upon them by the Memorandum and Articles of Association, in the name and on behalf of the company, they bind the company and not themselves.”

The Plaintiff also claims that Mr. David Massie did not require a work permit as he was on a special pass as per **Rule 34 of Immigration Act** which states that;

“Special pass

1) Any person who wishes to enter or remain in Kenya for—

- a) a limited period for the purpose of applying a review of a decision denying a permit;*
- b) applying for a permit or pass;*
- c) temporarily conducting any business, trade or profession; or*
- d) any other purpose which an immigration officer considers suitable.*

2) may apply to an immigration officer, in Form 32 set out in the First Schedule, for a special pass or in the case of an application that is to be made at the point of entry, completion of an entry declaration form shall be deemed to be an application for a special pass.

An immigration officer may, after considering an application made under paragraph (1), issue a special pass to the applicant in Form 35 set out in the First Schedule, for such period that does not exceeding six months as he may specify in the pass.

3) A special pass shall, subject to the terms and conditions as may be specified in the pass, permit the holder to enter Kenya within the period specified therein and to remain in Kenya for such period, not exceeding six months from the date of issue and to re-enter Kenya at any time during the period of validity of the pass.”

DETERMINATION

The issue for determination is;

1. Whether the Plaintiff’s suit against the defendant should be dismissed on the account of the fact that the Engagement letter of

18th January 2016 and Sale agreement of 23rd June 2016 are void in law on the basis of illegality as the plaintiff's Company is not properly registered in Kenya and its officer/shareholder or Director did not hold a work permit.

1. Whether the Plaintiff Company was legally incorporated

A company is said to be properly and legally incorporated when it has complied with **Sections 11 to 19 of the Companies Act**. The Act provides that for a company to be registered the promoters lodge the Memorandum of Association, Articles of Association, Statement of capital and initial shareholdings and Statement of Proposed Officers with the Registrar of Companies. The Plaintiff has furnished the court with the above registered documents, however, the particulars of persons who are directors of the company show that the directors are **Curzon Nominees Limited and Nisk Capital Limited**.

Section 129 of the Companies Act provides;

“(1) A company is required to have at least one director who is a natural person.

(2) Subsection (1) is complied with if the office of director is held by a natural person as a corporation sole or otherwise by holding a specified office.”

Although the statutory restrictions on appointment of directors tend to suggest that only a natural person can be appointed as director, **Subsection 129 (2)** provides a situation where a natural person can be a corporation sole. Holding companies appoint themselves directors of subsidiary companies with a view to securing and maintaining complete control of the subsidiaries. Therefore, in line with **Section 129 (2), Curzon Nominees Limited and Nisk Capital Limited** are legally the directors of the Plaintiff Company.

Furthermore, the body corporate should appoint a natural person whom it has formally authorized to attend board meetings on its behalf. It is not possible at this stage of the proceedings to determine whether **David L Massie** has an appointment as a Chairman of the Plaintiff or any written authority confirming he is authorized to sign pleadings on the Plaintiff's behalf as he is not listed as a director but the natural person of the Curzon Nominees Limited. If the registration was/is faulty the regulatory arm, **Company's Registry/Office of AG** would have declined registration or formally written to the Applicants on that basis of any irregularity and/or defect and mandate compliance. In the absence of such evidence; this is an issue for determination during the hearing of the substantive suit.

2. Whether the Sale Agreement and the Letter of Engagement are based on an illegality

For a contract to be valid, it has to meet the elements of a contract which are: offer, acceptance, consideration, capacity, legality and intention to be legally bound. The Sale Agreement and the Letter of Engagement have satisfied all 5 elements, what is in contention is the legality. **Massie** and one **Ms Irene Ndikumwenayo** executed the said contracts as directors of the company yet the **CR12** shows **Curzon Nominees Limited and Nisk Capital Limited** as the directors of the Plaintiff Company. In his Replying Affidavit dated 23rd April 2018, David L. Massie alleges that he is a duly authorized principal officer of the Plaintiff. He signed documents on behalf of the Company which is confirmed as duly registered by the Company's Registry. The Company has not in any form contested the its representation by **David L.Massie**. Until such evidence is adduced at this stage the Court cannot determine the legality question with regard to the contracts and it is a matter for hearing and determination during hearing and determination of the suit.

On the issue of a work permit, David L. Massie has deponed that he was issued with special pass under Rule 34 of Immigration Act. He is lawfully in Kenya unless there is formal/official communication on the contrary from the Immigration Department.

This Court relies on **Section 107 Evidence Act Cap 80** in essence provides that he who alleges must/shall prove. If a party is in possession of cogent and/or tangible evidence, it's upon the party to produce/present the evidence.

Section 109 Evidence Act Cap 80 puts the burden of proof on the party in possession of special facts to adduce them. If the Applicant has special knowledge of the Plaintiff Company; its directorship and/or any illegality the same shall be raised during the hearing of the main suit and as one of the issues for determination.

DISPOSITION

After considering submissions by Counsel for both parties the Court finds as follows;

- 1. The Notice of Motion filed on 21st December 2017 is dismissed with costs;**
- 2. The issues of illegality shall be heard and determined during the *interpartes* hearing of the suit.**

DATED SIGNED & DELIVERED IN OPEN COURT ON 11TH MARCH 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR MWORIA FOR PLAINTIFF

MR ADUDA FOR DEFENDANT

COURT ASISSTANT- JASMINE