REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO.58 OF 2018

OILFIELD MOVERS LIMITED...1ST PLAINTIFF

MAYPHIL INVESTMENTS LIMITED...2ND PLAINTIFF

C&G VENTURES LIMITED...3RD PLAINTIFF

VERSUS

KENYA ENERGY SERVICES LIMITED..1ST DEFENDANT

EAST AFRICAN OILFIELD SERVICES LIMITED.....................2ND DEFENDANT

JUDGMENT

1. One of the issues to be determined in this shareholder disagreement is the effect of an "entire agreement" clause found in three share subscription agreements entered by the parties herein.

2. On 30th September 2014, Oilfield Movers Limited (the 1st Plaintiff or Oilfield) entered into a share subscription agreement with East African Oilfield Services Ltd (the 2nd Defendant or EAOS) for the purchase of 150,000.00 common shares at a value of USD 150,000.00. On 31st December 2014, Oilfield subscribed for more shares valued at USD 150,000.00 to make a total of 300,000.00 common shares.

3. Oilfield avers that a term of the agreement was that it would appoint two directors namely Mwenda Nyaga (Nyaga) and James Mbote (Mbote) to the Board of EAOS. And so as to effect this covenant, EAOS would call a Board of Directors meeting to approve and allocate to Oilfield the shares and to formalize the appointment of the two Directors. Further, that there were 400,000.00 common shares issued and outstanding as at the time of subscribing to the shares.

4. For Mayphil Investment Limited (Mayphil), it is averred that on or about 28th October 2014, it entered into a share subscription agreement with EAOS and was allocated 120,000 common shares after paying subscription fees of USD 120,000.00.

5. Similarly, on 3rd November 2018, C&G Ventures Limited (C&G) entered into a share subscription agreement with EAOS for 80,000.000 common shares for which it paid USD 80,000.000.

6. The three Plaintiffs state that the funds raised through the sale of the common shares were used to invest in the operations of Kenya Energy Services Limited (Kenya Energy or the 1st Defendant).

7. A grievance of the Plaintiffs is that contrary to the terms of the subscription agreement (it would have to be that of 30th September 2104), none of their nominee-directors have been appointed to the board of directors of EAOS. In addition, no meeting was ever called as agreed to formalize the appointment of the two nominee-directors.

8. On another front, EAOS is criticized for failing and/or neglecting to prepare audited company and group financial statements detailing the income and expenditure of the company.

9. A critical part of the Plaintiffs' case is that, on or about January 2018, they learnt of non-disclosure of the following material facts:-

a. The shareholding structure of EAOS.

b. That Mr. Craig John Bridgman (Bridgman) and Mr. Philip Jason Moore (Moore) had been issued with class B shares which entitled a shareholder to an extra ordinary 100 voting rights per share.

c. That the class B shares voting rights superseded the common shares voting rights in a manner the Plaintiffs are sidelined in the decision making and operations of the company.

10. It is the Plaintiffs' case that EAOS, through its Directors Bridgman and Moore, made representations that the Plaintiffs would be represented in the board of directors and management of the company through directorship. Secondly, that the two were holding common shares which do not have unique rights that would dilute the voting right of the 3 Plaintiffs.

11. The Plaintiffs contend that the representations were fraudulent as their nominee-directors have never been appointed to the Board of EAOS and that the Management and running of the Company is the preserve of Bridgman and Moore.

12. Ultimately the Plaintiffs seek the following prayers:-

a. THAT the share subscription agreements executed by the 1st, 2nd and 3rd Plaintiffs are void *ab initio.*

b. THAT the 1st and 2nd Defendant do refund USD.300,000.00, 120,000.00 and 80,000.000 to the 1st, 2nd and 3rd Plaintiffs respectively.

c. THAT interest be charged on (b) at commercial banks rate from the date of payment of the subscription fees by the Plaintiffs.

d. THAT cost of the suit be borne by the Defendants.

e. Any other relief the court deems fit.

13. The Defendants filed a joint statement of Defence and Counterclaim. It is their positon that at the incorporation of EAOS its founders, being Bridgman and Moore, were each allocated 50,000 class B shares. In June 2014, the Company offered for sale 1,200,000 common shares at a price of USD 1.00 per share. Bridgman and Moore acquired 110,000 common shares each, while a Mr. John Story (Story) and ADL International Holding (ADL) acquired 500,000 and 80,000 shares respectively.

14. The Defendants concede to the share subscription agreements but state that in accordance with the terms of the agreements the Plaintiffs had an obligation to seek independent legal advice before signing them. The Defendants state that the Plaintiffs did in fact seek legal advice and its lawyer's recommendations were included in the final agreement of 30th September 2014.

15. The Defendants points to two clauses in the agreement. Clause 6(j) which provides:-

"*The Subscriber's decision to subscribe for the Common Shares was not based upon, and the subscriber has not relied upon, any verbal or written representations as to fact made by or on behalf of the Corporation and their directors, offices, employees, agents, and representatives. The Subscriber's decision to subscribe to the Common Shares was based solely upon this subscription agreement, including the Term Sheet attached hereto as scheduled A, and information about the Corporation which is publicly available (any such information having been obtained by the Subscriber without independent investigation*)".

16. Clause 12 reads:-

"*This Subscription Agreement represents the entire agreement of the parties hereto relating to the subject matter hereof, and there are not representations, covenants, or other agreements relating to the subject matter hereof except as stated or referred to herein*".

17. On the question of appointment to directorship, the Defendants aver that it was a term of the agreement that Nyaga and Mbote were to be appointed as directors of Kenya Energy and not EAOS and that this was duly done.

18. In respect to the audited accounts, the Defendants assert that EAOS has been in the process of preparing the accounts in collaboration with Nyaga.

19. The Defendants deny the allegations of misrepresentation and aver that the Plaintiffs were all along aware of the shareholding structure of EAOS and that class B shares entitled their holders to 100 votes per share. Further that the voting control of EAOS has been held by Bridgman and Moore since incorporation through class B shares.

20. The Defendants have also set up a Counterclaim. Kenya Energy avers that the Plaintiffs have instituted this suit for purposes of damaging its business operations and that the Plaintiffs have continued to interfere with contracting relationships between it and its clients.

21. The Defendants contend that the Plaintiffs have wrongfully detained some equipment belonging to Kenya Energy well aware that the equipment was required to fulfil contracts with 3rd parties. Further, that the Plaintiffs have through Nyaga and Mbote, influenced the 1st Defendant's employees namely Nathan Tarus and Thuku wa Thuku to resign.

22. The Defendants have particularized the loss they have suffered as follows:-

a. Loss of revenue from unfulfilled contracts caused by detention of the 1st Defendant's equipment being USD 10,000.00

b. Loss of opportunities being pursued by the Defendant's employees.

c. Loss of future profits being USD 2,500,000.00.

This amount is sought from the Plaintiffs jointly and severally.

23. At the hearing four witnesses testified. Mwendia (PW1), Fredrick Kangara Mbote (PW2) and Godfrey Ngugi (PW3) on behalf of the Plaintiffs. For the defence, Bridgman testified. Details of their evidence shall be discussed as the Court determines the issues which the parties herein set for themselves as requiring resolution as follows:-

a) Did the 2nd Defendant fraudulently misrepresent crucial information that voids the share subscription agreement?

b) Was there material non-disclosure on the part of the 2nd Defendant?

c) Was there a valid contract between the Plaintiffs and 2nd Defendant?

d) Is the contract between the Plaintiffs and 2nd Defendant void?

e) Is the 1st Defendant a subsidiary of the 2nd Defendant?

f) Did the Plaintiff interfere with the business of the 1st Defendant?

g) Are the remedies pleaded available to the Plaintiffs?

h) Costs of the counterclaim.

To this i would add, whether the Defendants have proved the counterclaim.

24. It is common ground that the Plaintiffs on the one hand and EAOS on the other, separately entered into share subscription agreements. The grievances of the Plaintiffs are broadly twofold. One, that there was non-disclosure of the shareholding structure in which Bridgman and Moore held class B shares which entitled a shareholder to an extra ordinary 100 voting rights per share. As a consequence the voting rights of class B shares superseded those of the common shares.

25. The second is about the representation into the board of directors and management of EAOS through directorship. It being contended that two nominee-directors of the Plaintiffs would take up directorship on the Board.

26. As the Court turns to consider the evidence in respect to the two primary issues, it mainly concentrates on the subscription agreement between the Oilfield and EAOS. This is because, while the two other subscription agreements are similar, it is in the Oilfield agreement that the controversial directorship clause is found.

27. It was the evidence of Nyaga that prior to execution of the Oilfield agreement there were negotiations in which EAOS provided information regarding its incorporation and shareholding. Of particular interest, would be a sheet of shareholding sent to him by Moore through an email of 31st July, 2014 [P Exhibit 2 pages 4, 5 and 6]. While I shall return to the contents of the email later when discussing the issue of directorship, this Court reproduces the spreadsheet forwarded via that email:-

"*Post Final Closing*

Shareholder Name	Shares held	% ownership
J. Story	500,000	31.3%
Oilfield Movers (Mwendia, James and Fred)	300,000	18.8.%
Other Kenyan Investors	200,000	12.5%
Other non-Kenyan Investors	200,000	12.5.%
C. Bridgman	160,000	10.0%

P. Moore	160,000	10.0%
A. Wilson	80,000	5%
Total Shares (2)(3)	1,600,000	100.0%"

28. To be noted is that the spreadsheet merely discloses names of shareholders and shares held without stating the categories of shareholding. It has turned out, however, that the shares of EAOS are in different classes, namely:-

a) Class A common shares

b) Class B shares

c) Series A performance shares

d) Series B performance shares

e) Series C performance shares

f) Series D performance shares

This is provided in clause 6 of the Memorandum of Association of EAOS (D Exhibit page 2).

29. Nyaga's testimony is that before 19th August 2014, when negotiations closed, Oilfield was not aware of the existence of class B shares and this was buttressed by the introductory words to the Share Subscription Agreement of 30th September 2014 (P Exhibit 1 pages 1-4) which read:-

> "*The Subscriber understands that the Corporation intends to offer (the "offering") a maximum of 1,200,000 common shares in the capital of the Corporation (the "Common Shares") to eligible investors. Prior to the sale of any Common Shares hereunder, there are 400,000 Common Shares and issued and outstanding".*

30. Alluding to fraud on the part of the Defendants, Nyaga contends that directors had altered the share structure of EAOS on 9th April 2014.An alteration that was not disclosed to the Plaintiffs nor was it registered with the Financial Services Authority, Republic of Sychelles until 22nd August 2014, 3 days after the close of negotiations. This, Nyaga alleges was deliberate.

31. On his part, Bridgman explained that he and Moore founded EAOS on 8th April 2014 with an authorized capital of USD 1,600,050.00 divided, *interalia*, into 1,500,000 Class A shares of USD 1.00 each and 100,000 Class B shares of USD 1.00 each. The Court understands the other 50 shares to spread between series A Performance Shares, series B Performance Shares, series C Performance Shares and series D Performance Shares. At incorporation each of the founders were allocated 50,000 Class B shares.

32. On 1st June, 2014, 110.000 common shares each were allocated to Moore and himself and 80,000 of the same Class of shares allocated to BDL. That at the same time the Company commenced marketing a private placement of upto USD 1.2 million at a price of USD 1.00 per share. The evidence was that on 1st June, 2014, Story was the first investor when he acquired 500,000 shares for USD 500,000.00.

33. As is evident, the spreadsheet sent by EAOS to Nyaga did not specify the type of shares which make up the total shares of 1,600,000. Important as well is that the spreadsheet was sent on 31st July 2014 prior to the execution of the first subscription agreement. What, however, may be of interest is the heading of the Spreadsheet which reads "*Post final closing*". Although not explained to Court, Moore would have been depicting a picture of how the shareholding would stand after the placement of 1,200,000 shares hence the use of the words "Post final closing". Indeed, in the closing submissions by their counsel, the Plaintiffs assert that the spreadsheet showed how the shareholding would stand after admission of the plaintiffs.

34. But let me examine the allegation of non-disclosure of the shareholding structure of the 2nd Defendant. First, this Court notes that throughout the subscription agreement, the shares under purchase are referred to as common shares. Common share is defined in clause 1(f) as follows:-

> "…*the meaning ascribed to it in the preamble to the Terms and Conditions of subscription*".

35. The preamble to the terms and conditions of subscription reads:-

> "*The Subscriber understands that the Corporation intends to offer (the "offering") a maximum of 1,200,000 common shares in the capital of the Corporation (the "Common Shares") to eligible investors. Prior to the sale of any Common Shares hereunder, there are 400,000 Common Shares and issued and outstanding*".

36. Under cross-examination Bridgman states,

> "*I can see the recital. 1,200,000 shares plus 400,000 is 1,600,00 shares. We had class B shares of 100,000. 1,600,000 plus 100,000 is 1,700,000".*

From the Memorandum of Association, the class A common shares were 1,500,000, class B shares were 100,000 and shares in class C were 50. The total number of shares would then be 1,600,000.

37. From the evidence of Bridgman, which was not debunked, the number of shares allocated at the time of incorporation was as follows:-

a) 56,000 class B shares to Moore

b) 50,000 class B shares to Bridgman

That would take up all the class B shares.

38. His evidence was that allocation of further shares, this time being of common shares, happened on 1st June 2014 as follows:-

a) 110,000 common shares to Moore

b) 110,000 common shares to Bridgman

c) 80,000 common shares to BDL

Adding them, the total number of shares allocated were 300,000 shares.

39. His evidence was that at around that time the Company commenced a private placement of upto US$ 1.2 million at a price of US 1.00 per share. On offer therefore were 1,200,000 shares. It was pursuant to this that Story acquired 500,000 common shares for US$ 500,000.

40. My understanding is that the intention of the private placement was to sale up to 1,200,000 common shares because the total number of common shares in the Company was 1,500,000 and 300,000 had been taken up. In other words, if the allocations of Bridgman, Moore and BDL were put together, only 1,200,000 would be available for acquisition through private placement to eligible investors. Given my appreciation of the evidence, I am unable to see how this position contradicts with what is stated in the preamble which i once again reproduce:-

> "*The Subscriber understands that the Corporation intends to offer (the "offering") a maximum of 1,200,000 common shares in the capital of the Corporation (the "Common Shares") to eligible investors. Prior to the sale of any Common Shares hereunder, there are 400,000 Common Shares and issued and outstanding".*

41. I do not understand the preamble to be stating that the total number of common shares in EAOS is 1,600,000 (ie 1,200,00 + 400,000 shares). The preamble simply stated that a maximum of 1,200,000 shares had been made available to eligible investors and that prior to the sale captured in the Oilfield agreement, 400,000 of those shares had been issued and outstanding.

42. As to the nature of the shares that Oilfield was purchasing, three documents comprised in the share transaction are of importance. The first is the written resolution of directors of EAOS which described that the type of shares to be issued to Oilfield was class A common shares.

43. The next is the document intituled "*Subscription for common share*", which both in its heading and body make clear that Oilfield was subscribing to 150,000 common shares. The Terms and Conditions of Subscription again emphasizes this critical aspect. In this latter document is clause 6(l) which is headed 'Investment Suitability' which reads:-

> (*l) the Subscriber confirms that the Subscriber:*
>
> *(i) has such knowledge in financial and business affairs at to be capable of evaluating the merit and risks of tis investment in the Common Shares;*
>
> *(ii) is capable of assessing the proposed investment in the Common Shares as a result of the Subscriber's own experience or as a result of advice received from a person registered under applicable Securities Laws;*
>
> *(iii) is aware of the characteristics of the Common Shares and the risks relating to an investment therein and*
>
> *(iv) is able to bear the economic risk of loss of its investment in the Common Shares.*

44. The different types of shares in EAOS was set out in clause 5 of the Memorandum of Association of the Company which was amended on 9th April, 2014. There is evidence that in the lead up to the share subscription Contract, Nyaga had asked for a copy of the certificate of

incorporation of EAOS (email of 12th August 2014 D. Exhibit page 50). This Court has not heard any reason why he could not also call for a copy of the Memorandum of Association of the company. This is his evidence,

> "*Class of shares would be in Memorandum and Articles of Association. I never saw the document. I first looked at the Memorandum and Articles after I had signed the agreement*".

45. On the signing of the agreement he stated,

> "*Agreement signed on 30th September, 2014".*

46. Given evidence the Court cannot be sympathetic to the position taken up by Oilfield that,

> "*…the 2nd Defendant had already passed a resolution altering the share structure of the 2nd Defendant on 9th April, 2014, which was deliberately neither disclosed to the Plaintiffs nor registered with Financial Services Authority, Republic of Seychelles until 22nd August 2014, 3 days after the close of negotiations".*

47. The Court comes to that finding not only because the Amended Memorandum & Articles of Association was registered about one (1) month before the share subscription agreement was signed but also because there is no evidence that Oilfield had sought a copy of the Memorandum and Articles before concluding the negotiations.

48. Oilfield, through the testimony of Nyaga, acknowledged the effect of clause 6(t) of the agreement (P. Exhibit 1 page 9) which reads:-

> "*the Subscriber confirms that it is responsible for obtaining its own legal, tax, investment and other professional advice with respect to the execution, delivery and performance by it of this Subscription Agreement and the transactions contemplated hereunder including the suitability of the Common Shares as an investment for the Subscriber, the tax consequences of purchasing and dealing with the Common Shares, and the resale restrictions and "hold periods" to which the Common Shares are or may be subject under Securities Laws. The Subscriber has not relied upon any statements made by or purporting to have been made on behalf of the Corporation or Corporation's counsel with respect to such matters".*

49. Indeed Oilfield had sought the services of independent legal Counsel. It is that Counsel who had suggested certain amendments to the subscription agreement which were accepted by EAOS and included in the final agreement. One must wonder how a share subscription deal was closed without the purchasers familiarizing themselves with such a crucial document as the articles and memorandum of the company in which they were purchasing shares. So critical is that document that it is often referred to as the constitution of a company. Oilfield has itself to blame if, in fact, it misunderstood the nature of investment it was making.

50. So in respect of the shareholding structure, this Court is unable to find EAOS guilty of any misrepresentation (fraudulent or otherwise) or material non-disclosure.

51. Further, as submitted by Counsel for the Defendants, clause 12 of the agreement which is an entire agreement clause is not without some significance. It reads:-

> "*This subscription agreement represents the entire agreement of the parties hereto relating to the subject matter hereof, and there are no representations, covenants or other agreements relating to the subject matter hereof except as stated or referee to herein*".

52. In so far as this Court has not found any evidence of misrepresentation, on the issue of the shareholding structure, i accept the strength of the proposition of Lightman J. in Inntrepreneur Pub Company vs. East Crown Ltd [2000] Cld in which he stated,

> "*The purpose of an entire agreement clause is to preclude a party to a written agreement form threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms ae to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document. The operation of the clause is not to render evidence of the collateral warranty in inadmissible in evidence as is suggested in Chitty on Contract 28th ed. Vol 1 para 12-102; it is to denude what would otherwise constitute a collateral warranty of legal effect*".

53. Let me turn to the issue of whether there was misrepresentation that the Plaintiffs would be represented in the board of directors and management of EAOS through directorship.

54. Clause 4 (the "Directorship" clause) of the Oilfield Agreement reads:-

> "*Closing. Delivery and sale of the Common Shares and payment of the Aggregate Subscription Price will be completed (the "closing") at the offices of the Corporation, at the closing time on the closing date or at such other place as the Corporation may determine.*

Directors meeting.

At completion the Corporation must procure that a meeting of its directors is held at which it is resolved that, subject to receipt by the Corporation of the subscription moneys for the New Shares, all of the following will occur:

The Corporation allots to the Subscriber the number of New Shares set out against its name in clause 1.1 for the aggregate consideration set out against its name that clause.

The corporation issues certificates for the New Shares so allotted in the respective names of the Subscriber or in the names of such person as the Subscriber may direct and registers the Subscriber or such person as the Subscriber may direct as the holders of them.

Mwendia Nyaga and James Mbote are appointed as a director of the Company.

If, prior to the Closing Time, the terms and conditions contained in this Subscription Agreement (other than delivery by the Corporation to the Subscriber of certificates representing the Common Shares) has not been complied with to the satisfaction of the Corporation, the Corporation and the Subscriber will have no further obligations under this Subscription Agreement".(my emphasis)

55. In its defence, and which was reiterated at hearing ,EAOS takes the position that it was a term of the agreement that Nyaga and Mbote were to be appointed as directors of the company, being Kenya Energy not as directors of "the corporation" which was specifically defined in the agreement as "East African Oilfield Services".

56. In respect to clause 4, Nyaga testified as follows:-

"*I understand the Company to be EAOS. This was the only Company we were dealing with. Request to be appointed directors was made by our lawyer.*

My lawyer is the one who introduced the insertion into clause 4".

57. EAOS makes heavy weather of the fact that it was the lawyer for Oilfield who inserted this provision and that in the event of any ambiguity it has to be construed against the party who introduced it in the contract. It is also argued that Nyaga and Mbote were indeed aware that they were eligible to directorship in the 1st Defendant and not EAOS and it is not reasonable that they took 3 years to learn that they had not been so appointed.

58. This Court has familiarized itself with the entire agreement and it is true as submitted by Counsel for EAOS that, save for clause 4, the word "Company" does not appear anywhere else in the agreement. It is therefore not assigned any meaning. However, this Court has been urged by Oilfield to look at negotiations leading to contract so as to arrive at the true effect of the Directorship clause.

59. But first the law. It is a general proposition of law that evidence of prior negotiations to a written contract will not be used to construe a written contract. The rationale for the exclusion of pre-contract negotiations was explained by the Court of Appeal in Fidelity Commercial Bank Limited vs. Kenya Granze Vehicle Industries Limited [2017] eKLR as follows:-

"*The principle undergirding this rule flows from the notion of freedom of contract that is central to the law of contract; that it would be perverse and directly inconsistent with the intention of the parties after reaching a bargain and choosing to record that bargain in writing, for any court to resort to the prior history of exchanges and negotiations in order to resolve a dispute arising from the interpretation of the terms of the written bargain; and that the parties by consensus have themselves chosen not to give their prior negotiations contractual force and instead they have reached an agreement, and documented it*".

60. Yet like many other general principles of law, the rule of exclusion of pre-trial negotiations is subject to exceptions. On this the Court of Appeal in the aforesaid case observed:-

"The rule of exclusion of negotiations prior to entry of a contract as well as the parole evidence rule are subject to a number of exceptions. For instance, evidence of surrounding circumstances will be admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible to more than one meaning, but not to contradict the language of the contract when it has a plain meaning. Extrinsic evidence of terms additional to those contained in the written document will be admitted if it is shown that the document was not intended to express the entire agreement between the parties. If the parties intend their contract to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement. In Gillepsie Bros. & Co. v Cheney, Eggar & Co. (1896) 2QB 59 Lord Russell C.J. expressed this as follows;

"…although when the parties arrive at a definite written contract the implication or presumption is very strong (sic) and such contract is intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement."

61. Evidence of pre-contract negotiations can be used to unlock an ambiguity. It being conceded by both sides that the Directorship Clause is ambiguous, should this Court then look to the pre-contract negotiations for a possible resolution of the ambiguity?

62. A strong argument has been made by the Defendants that the 'entire agreement' clause precludes the Plaintiffs from relying on any pre-contract representations save where the representations amount to fraudulent misrepresentation. The Defendants further submit that even where the 'entire agreement' clause does not preclude the claim based on misrepresentation then the "non-reliance" clause would serve the purpose.

63. EAOS points to clause 6(j) as being a non-reliance clause. It reads:-

> "*(j) the Subscriber has not received or been provided with a prospectus or offering memorandum within the meaning of the Securities Laws, or any sales or advertising literature in connection with and the offering. The Subscriber's decision to subscribe for the Common shares was not based upon, and the Subscriber has not relied upon, any verbal or written representations as to fact made by or on behalf of the Corporation and their directors, officers, employees, agents and representatives. The Subscriber's decision to subscribe for the Common shares was based solely upon this Subscription Agreement, including the Term Sheet attached hereto as schedule A, and information about the Corporation which is publicly available (any such information having been obtained by the Subscriber without independent investigation)*".

64. Cited by EAOS as upholding a non-reliance clause is the English decision in E A Grimstead & Son Ltd vs. McGarrigan [1999] EWCA CIV 3029 which explained the rationale as follows:-

> "*I can see no difficulty in an acknowledgement by a purchaser that a representation which was made was not relied upon; but I cannot see how a purchaser who has acknowledged that a representation was not relied upon can afterwards say that that was nothing more than what he thought was the position at the time. Put another way, I reject the contention that it is open to a purchaser to assert both that he did not rely on a representation which was made to him and that he did rely upon that representation".*

65. Does the 'entire agreement' and 'non-reliance' clause preclude this Court from looking at pre-contract negotiations in construing the meaning of 'company' in the "Directorship" Clause?

66. Let me start with the 'non-reliance' clause. As i understand it, this clause is only in respect to the subscriber's decision to subscribe for the common shares. The language used in the clause 6(j) brooks of no doubt and is only in regard to Oilfield's decision to subscribe to common shares. The clause "non-reliance" does not extend to the clause which provides for Nyaga and Mbote to be appointed as directors of the Company.

67. On the other hand the 'entire agreement' clause governs all the terms of the Share Subscription Agreement and this would include the "Directorship" Clause. As the 'entire agreement' clause unequivocally expresses the parties intention that the contract represents the entire agreement, pre-contract negotiations will not be permitted to include or exclude covenants which are not captured in the agreement.

68. That said, where the language in the contract is ambiguous or open to more than one meaning, then, there should be no reason why an "entire agreement" clause should bar the use of pre-contract negotiations to give effect to the true intention of the parties. In that instance the application of pre-contract negotiations will not be to defeat or pervert the meaning of the contract but to give effect to what the parties truly intended, absent the ambiguity. Put simply the use of the pre-contract negotiations will be to give true meaning to what is already in the contract. Being of that view, there is a basis in the circumstances of this case to revisit the pre-contract negotiations.

69. It is not in dispute that this clause was introduced by the lawyers of Oilfield by way of amendment to the agreement. The evidence by Nyaga is that,

> "*Some of the representations made to me found their way into the agreement (P Exhibit 2 page 4). The agreement was to make Mbote and I Directors of EAOS*".

70. The exhibit referred to is the email of 31st July, 2014 (P Exhibit 2 page 4) from Moore to Nyaga and reads,

> '*Mwendia,*
>
> *Further to our call this week I have attached a spreadsheet outline the shareholding for EAOS, the notes at the bottom describe all options, etc. outstanding. On the local holdings you will see it is just above 30% but with the performance plan we have provided in your contract this moves to in excess of 50% Kenya ownership. I hope this makes sense but always happy to answer any questions you might have.*
>
> *As we discussed we like and support the idea of contributing the ten light towers to EAOS in exchange for equity in the company, could you provide further information on the equipment so we can start papering this properly.*
>
> *For the board of directors, I can confirm we would look to have a four person board with yourself, James, Craig and I as members. The articles of incorporation do not expressly articulate the term of a director so there is no specific term limit.*
>
> *I hope I have not missed anything, if I have my apologies and please let me know.*
>
> *We are excited to move forward with you and James on what will no doubt be a profitable and exciting venture*". *(my emphasis)*

71. Six days earlier, on 15th July, 2014 (D Exhibit 46) Nyaga had emailed Craig and made proposals which included,

> "„„
>
> <u>*Directorship*</u>
>
> - *In our earlier discussions, the proposal was that I would be a director in EAO.*
> - *We now proposal (sic) to have 2 board positions reserved to represent Kenya shareholders, the initial occupiers being Mwendia and James.*
> - *What is the term? 3 years*?„„

72. From the emails, it is clear that what Oilfield had proposed that Nyaga and Mbote be included as Directors in the Board of EAOS. In the email of 31st July, 2014 by Moore to Nyaga the subject of the email was <u>EAOS</u> (the abbreviation for East African Oilfield Services Ltd). In this email Moore confirmed that the board of EAOS would comprise of himself, Bridgman, Mbote and Nyaga.

73. It is clear therefore that there were pre-contract talks to have Nyaga and Mbote appointed as directors of EAOS. Although the clause inserted by the lawyers of Oilfield did not state the company in which the two would assume directorship, it does seem to this Court that the clear intention of the parties was that the two would, upon successful subscription of the shares by Oilfield, be directors in the Board of EAOS. That can be inferred from the pre-contract negotiations.

74. My finding in this regard is fortified when one looks clause 4 ,under which the provision is found, in totality. The entire clause is again reproduced:-

> "*Closing. Delivery and sale of the Common Shares and payment of the Aggregate Subscription Price will be completed (the "closing") at the offices of the Corporation, at the closing time on the closing date or at such other place as the Corporation may determine.*
>
> *Directors meeting.*
>
> *At completion the Corporation must procure that a meeting of its directors is held at which it is resolved that, subject to receipt by the Corporation of the subscription moneys for the New Shares, all of the following will occur:*
>
> *The Corporation allots to the Subscriber the number of New Shares set out against its name in clause 1.1 for the aggregate consideration set out against its name that clause.*
>
> *The corporation issues certificates for the New Shares so allotted in the respective names of the Subscriber or in the names of such person as the Subscriber may direct and registers the Subscriber or such person as the Subscriber may direct as the holders of them.*
>
> *Mwendia Nyaga and James Mbote are appointed as a director of the Company.*
>
> *If, prior to the Closing Time, the terms and conditions contained in this Subscription Agreement (other than delivery by the Corporation to the Subscriber of certificates representing the Common Shares) has not been complied with to the satisfaction of the Corporation, the Corporation and the Subscriber will have no further obligations under this Subscription Agreement*".

75. Clause 4 enjoins EAOS, at closing, to allot to the subscriber the purchased shares and to issue certificates for the new nominees. Immediately after that covenant, one finds the provision;

> "*Mwendia Nyaga and James Mbote are appointed as a director of the <u>Company</u>*".

As the term "Company" is not defined, it only seems logical that the Company referred to therein is the corporation which the preceding covenants enjoins to do certain things. That Corporation is EAOS, the 2nd Defendant.

76. The Court comes to that decision notwithstanding that it took three years for Oilfield to initiate its directorship claim. Oilfield would be entitled to stake its claim as long as it was not statute barred. Further in reaching this decision the Court has not had to apply the *contra proferentam* rule as urged by the Defendants because the apparent ambiguity is easily resolved by give true effect to the intention of both parties to the agreement.

77. The Court shall return to consider the implication of the failure of EAOS to implement the Directorship Clause but for now, I turn to the counterclaim.

78. Although the pleadings suggest that the Counterclaim is presented by the Defendants, it is clear to this Court that it is really a claim by Kenya Energy. It is based on three grievances. One,that the Plaintiffs interfered with contractual relationship between the 1st Defendant and its clients. That the Plaintiffs have interfered with its operations by wrongfully detaining some of its equipment despite being aware that the

equipment was required to fulfil contracts with 3rd parties. Lastly, that the Plaintiffs through Nyaga and Mbote influenced its employees, Nathan Tarus and Thuku wa Thuku to resign thereby interfering with the Defendants operations.

79. Let me examine each of them in turn. The evidence of Bridgman is that the Plaintiffs stole some light towers from the Company's warehouse. This allegation was denied by Nyaga who testified,

> "*I was not involved in the incident of moving out the light towers from JKIA*".

80. Once it became apparent that the oral evidence available comprised of the word of one person against the other, the Defendant's Lawyers asked this Court to look at the totality of the circumstances. In this regard the decision of Goodman v Faber Prest Steel [2013] EWCA Civ 213 was cited for the following passage:-

> "*In Armagas Ltd v. Mundogas S.A [1985] 1 Lloyd's Rep.1, at page 57 col.1. Lord Goff described his own experience as follows:-*
>
> '*Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objectives facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth*".

81. The circumstances consist of two emails and one text message by Mr. Nathan Tarus stating that it was the Plaintiffs' directors who had taken the light towers. It will suffice to reproduce only one such communication being the email of 19th February 2018 in which he states,

> "*1. The warehouse is Empty, there is no light tower in the warehouse.*
>
> *3. Inquired from Tradewind personnel working near our warehouse and I was inform Kenyan director of Kenya energy services send personnel to the warehouse who told them all the light towers where (sic) all going to be used else where". (A Copy of this email is attached as PM 1 to the Further Affidavit sworn by Phil Moore on 23rd February 2018*)".

82. The contention by the Defendants Counsel is that Nyaga did not explain why he did not respond to the allegations notwithstanding that the communication was copied to him. An argument then being made that it was inherently unlikely that an innocent person would disregard an allegation that he was guilty of a crime once the allegation was brought to his attention.

83. The Defence Counsel would be spot on when he submits that the directors of the Plaintiffs were being confronted with allegations of criminal or quasi-criminal conduct. For that reason, i would hold that the Defendants had an onerous duty of discharging the standard of proof in civil matters in respect to that type of conduct. The standard being higher that a balance of probabilities but not as high as proof beyond reasonable doubt.

84. This Court has not been told why the persons who supposedly saw the Directors remove the light towers and Mr. Tarus were not summoned to give evidence. The point being that the circumstantial evidence available is far too tenous when evidence of better quality was probably available. I find that the allegation has not been proved.

85. The Defendants fared worse still on the other allegations. There was lack of tangible evidence. For instance, on the resignation of employees, Nathan Tarus is said to have resigned because of the dispute between the directors. A dispute between directors cannot be equated to interference with the employment of a member of staff. As to Thuku wa Thuku, it is true that he moved into the employment of an entity that belongs to Nyaga. That said, what was not proved was that Thuku wa Thuku left the employment of the 1st Defendant and joined his new employee in circumstances that were unlawfully or which amounted to unlawful interference of his employment with the 1st Defendant.

86. It is the finding of this Court that the Defendants have not proved liability against the Plaintiffs.

87. Yet even if they had, the Court would still have found that the claim fails because quantum was not satisfactorily proved. The quotations produced supposedly to prove lost businesses are neither signed by the 1st Defendant nor the customer, being Mosounds. Further, the lost business is not explained. As to the other opportunities said to have been missed, there was no proof that they were prospective business opportunities that did not happen only or substantially because of the alleged interference.

The orders of Court

88. The Court has found that EAOS breached clause 4 of the subscription agreement by failing to appoint Mwendia Nyaga and James Mbote to its Board. The important question is whether that breach warrants the Court to make a call that the share subscription agreements or at least that of 30th September 2014 are void *ab initio*? I would think not. First, there is this provision which comes at the end of clause 4:-

> *If, prior to the Closing Time, the terms and conditions contained in this Subscription Agreement (other than delivery by the Corporation to the Subscriber of certificates representing the Common Shares) has not been complied with to the satisfaction of the Corporation, the Corporation and the Subscriber will have no further obligations under this Subscription Agreement*".

89. My construction of it is that EAOS reserved a right to avoid the entire agreement in the event of non-compliance of the Terms and Conditions to its satisfaction. No such right was reserved for Oilfield.

90. Second, the Plaintiffs have taken a somewhat contradictory approach in this matter. In paragraph 15 and 16 of the Plaint they avers,

> "*15. It was a condition that the local directors appointed after the signing of the 1st Plaintiff subscription Agreement would represent the interest of the 1st, 2nd and 3rd Plaintiffs in the Board of Directors and management of the 2nd Defendant.*
>
> *16. That after the signing of the Agreement none of the nominee-directors has ever been appointed to the Board of Directors of the 2nd Defendant".*

This averment is an assertion that the issue of directorship was covenanted in the subscription agreement but breached by EAOS.

91. Oilfield then takes the path that EAOS is guilty of fraudulent misrepresentation because its nominee-directors have never been appointed as directors and that the management and running of the 2nd Defendant is a preserve of Bridgman and Moore. An allegation which seems to suggest that the issue of directorship, though promised, was not followed through in the agreement.

92. The Court has found that the agreement provided for directorship of the two but that EAOS breached by failing to appoint Nyaga and Mbote to the Board. That breach, however, cannot render the Share Subscription Agreement of 30th September 2014, *void abinitio*, being the primary order sought by the Plaintiffs.

93. A party to a contract can void a contract by rescinding it. A Court can, in appropriate cases, order for the rescission of a contract where one party is unable or unwilling to perform its obligation and more so when the obligation is fundamental to the contract. Sadly for Oilfield it has not sought the intervention of this Court by way of rescission order. This Court is reluctant to grant an order not prayed for because there is no knowing whether EAOS could have set up any of the known defences to rescission. To make such an order without giving the Defendants a fair chance to answer to it is to condemn them unheard, something this Court will not do.

94. The outcome is both the main claim and the counterclaim fail. The parties will bear their own costs for these proceedings.

Dated, Signed and Delivered in Court at Nairobi this 12th Day of July, 2019.

F. TUIYOTT

JUDGE

PRESENT;

Wachira for Plaintiff

Kahura for Defendant

Nixon – Court Assistant