



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC NO.319 OF 2015

JOHN NJUGUNA NDUATI.....1ST PLAINTIFF/APPLICANT

MONICAH W. KARANJA.....2ND PLAINTIFF/APPLICANT

VS.

MULTICON ENTERPRISES LIMITED.....1ST DEFENDANT/RESPONDENT

WALTER NGARUIYA MUKURIA.....2ND DEFENDANT/RESPONDENT

LILIAN WAIRIMU WAIGANJO.....3RD DEFENDANT/RESPONDENT

DAVID NJOROGE KIARIE.....4TH DEFENDANT/RESPONDENT

VICTOR NJUGUNA KIHARA.....5TH DEFENDANT/RESPONDENT

MINISTRY OF LANDS, HOUSING AND

URBAN DEVELOPMENT.....INTERPLEADER

JUDGMENT

1. John Njuguna Nduati and Monicah W. Karanja (the 1st and 2nd Plaintiffs respectively) bring this claim in respect to a contract for the sale of shares in Multicon Enterprises Limited (the Company or 1st Defendant) to Lilian Wairimu Waiganjo (the 3rd Defendant), David Njoroge Kiarie (the 4th Defendant) and Victor Njuguna Kihara (the 5th Defendant).

2. In an Amended Complaint dated 3rd July, 2015 and filed in Court on 22nd October 2015, the Plaintiff avers that at all material times, the two were directors of the Company holding 50% shares. At that time Walter Ngaruiya Mukuria (the 2nd Defendant) is said to have held 25% shares therein and he too was a director of the Company.

3. Through an agreement of sale dated 2nd October 2014 between the 1st Plaintiff and the 2nd Defendant of the one part and the 3rd, 4th and 5th Defendants of the other, the 1st Plaintiff and 2nd Defendant sold the Company as a going concern. At the time of sale, the Company was carrying out construction works of the Narok Storm Water Drainage System and associated works under contract number UDD/RDS + TSPT/2012/2013/10 (the works).

4. The consideration for the sale was Kshs.20,000,000 to be paid as follows:-

a) Kshs.2,000,000 deposit paid in cash at the time of the signing of the agreement.

b) Kshs.18,000,000 upon the buyers receiving the 1st payment certificate from the works or within 90 days of the date of the agreement.

5. The Plaintiffs aver that it was a further term that they would receive 55% of the variation sum of the project after completion of the project.

6. The Plaintiffs allege that the Defendants have breached the contract and seek judgment as follows:-

- a) An order canceling the change of directors and shareholding of the 1st Defendant company, MULTICON ENTERPRISES LIMITED, NO. CPR/2010/267/49, registered pursuant to the alleged meeting of 1st October 2014 and reverting to the earlier records reinstating the 1st and 2nd Plaintiffs as directors and shareholders each owning 250 shares.
- b) An order prohibiting and restraining the interpleader from releasing to the 1st Defendant company, MULTICON ENTERPRISES LIMITED, any and all further monies, proceeds or payments regarding the Rehabilitation and Reconstruction of Narok Storm Water Drainage Systems and Associated Works being undertaken and or that has been undertaken by the 1st Defendant.
- c) Permanent injunction restraining the 2nd, 3rd, 4th and 5th Defendants from acting or purporting to act as lawful directors and shareholders of the 1st Defendant company, MULTICON ENTERPRISES LIMITED.
- d) Costs on a higher scale and interest to be borne by the Defendants.
- e) Kshs.52,084,250 as particularized in paragraph 5C of the amended plaint.
- f) Interest from 21st October 2014 till full payment.

7. Joined to these proceedings as an interpleader is the Ministry of Lands, Housing and Urban Development which granted the contract of the works to the Company and which, it was averred, was holding monies due to the Company in that regard.

8. The 1st, 3rd and 5th Defendants filed a joint Statement of Defence dated 27th June 2019. In that pleading, the Defendants generally deny any breach of contract. They state that upon the 3rd to 5th Defendants taking over the Company they discovered that the Plaintiffs had not disclosed certain material facts in regard to the Company. These are that:-

- a) An interim payment of Kshs.10,500,000 for certificate No.2 had been subtracted from certificate No. 3.
- b) Kshs.3,600,000 for 2 project vehicles had not been paid.
- c) There were salary and allowances arrears for six supervision staff and engineers.
- d) Suppliers had not been paid.

9. The 3rd to 5th Defendants aver that as a result of these state of affairs they invested Kshs.25,000,000 into the project but no sooner some floods swept away existing works. That they therefore sought emergency funds from the Interpleader which were not forthcoming because of this suit and letters written to the interpleader by the Plaintiffs. The Defendants allege that the Plaintiffs perjured themselves in affidavit after affidavit and defamed the Defendants by calling them fraudsters. The Defendants aver that they have suffered loss and damage as particularized in paragraph 19 of its pleadings.

10. The Defendants also aver that clause 8 of the Sale agreement provides for an Arbitration/Dispute Resolution Clause which the Plaintiffs have failed to exhaust.

11. As for the 2nd Defendant, he avers that pursuant to the agreement of 1st October 2014, the 1st and 2nd Plaintiffs willingly resigned as directors of the Company and signed off their shareholding and directorship upon receipt of the agreed consideration. He admits that new accounts were opened but that was a normal practice of business following a change of directorship of the company.

12. At the hearing 4 witnesses testified. The 1st Plaintiff testified on his own behalf and on behalf of the 2nd plaintiff. One Nicholas Nyariki gave evidence on behalf of the interpleader. David Njoroge Kiarie (4th Defendant) testified on behalf of the 1st Defendant and 3rd and 5th Defendants. Walter Mukuria (2nd Defendant) made his own defence. The highlights of the respective evidence of the witnesses is discussed and evaluated in so far as they are useful in resolving the controversy herein.

13. But first what issues emerge for determination? In my view, arising from the pleadings, the following call for this Court's attention:-

- i. Who between the Plaintiffs and the 4th to 5th Defendants are in breach of the contract?
- ii. If the answer to (1) above is in favour of the Plaintiffs what damages if any are due to them?
- iii. What is the appropriate order on costs?

14. As the Court turns to address the issues it has curved out, it needs to make two observations.

15. The first is in respect to the pleadings filed by the Plaintiffs. Before amending their plaint, the Plaintiffs had sought to fault the transfer of their shares and Directorship to the 3rd and 5th Defendants. In paragraph 6 of the pleadings as they stood, the Plaintiffs had alleged fraud,

unlawfulness and illegality on the part of the 2nd to 5th Defendants. The allegations of impropriety on the part of the Defendants include preparing and executing minutes, letters, affidavits and transfer of shares deeds all of 1st October 2014 purporting to have been prepared and executed by the Plaintiffs formalizing the transfer of their shareholding and directorship.

16. Even having amended the Plaint, the 1st Plaintiff, in his testimony, did insist that the signatures on the said documents are fraudulent. Yet because the Plaintiffs had formally abandoned this line of allegations by amending their pleadings, the Court holds that they cannot press any case on the basis of the said fraud or illegalities.

17. A second matter is that in the cause of the proceedings the interpleader deposited a sum of Kshs.10,000,000 into Court awaiting the determination of this matter. The fate of this sum will be part of the ultimate order this Court shall be making.

18. It is common ground that the 1st Plaintiff and the 2nd Defendant of the one part entered into a share sale agreement on 2nd October 2014 (P. Exhibit 1 page 3-6) in which the 3rd to 4th Defendants bought the Company as a going concern. The purchase price and its payment is provided for in clause 2 of the agreement as follows:-

Clause 2: The purchase price is agreed at Kenya Shillings Twenty Million only (Kshs.20,000,000) which shall be paid as follows:-

(a) Kenya Shilling Two Million Only (Kshs.2,000,000) being 10% deposit is paid in cash and whose receipt the seller acknowledges upon signing this agreement and on the other term as here below.

(i) The buyer shall effect payment of the deposit upon the successful change of directorship with the registrar of Companies and surrender of all documents in proof of such change to the custody of the parties lawyers herein together with the original certificate of incorporation, memorandum and articles of association.

(b) Kenya Shillings Eighteen Million only (Kshs.18,000,000) being the balance of the purchase price shall be paid upon the buyers receiving the 1st payment certificate from the Government of Kenya in evidence of payment for the current project of construction of Narok Storm Water Drainage System and associated works or within the next 90 days from the date hereof. (Hereinafter referred to as the completion period).

19. There is then clause 6 of the agreement which reads:-

Clause 6: After the completion of the project and subject to the Variation from the Project sum (278m) as passed and approved by the project engineer, the said sum will be shared by the two parties proportionately (55:225) depending on the amount approved and disbursed.

20. The grievance of the Plaintiffs are twofold. That neither the balance of the consideration nor the payment associated with the variation has been paid by the Defendants. This is the breach complained of.

21. The Court proposes to start with an interrogation of the variation payment. The evidence of the 1st Plaintiff was that on 25th June 2016 a handover certificate (P. Exhibit 1 paragraphs 13 and 14) for completed works of Kshs.156.67 million was signed by the company and the project manager. The Plaintiffs claims entitlement of 27.5% thereof being Kshs.43,084,250.

22. The 4th Defendant on the other hand gave testimony that the Company's application for variation was not approved. This evidence is in tandem with that of Mr. Nyariki who spoke on behalf of the Interpleader. His testimony was:-

“the contractor raised a variation of Kshs.280 million. It was disqualified”.

23. On the basis of what is before court, the finding the Court is inclined to make is that there is no proof that the company has benefited from or obtained any variation. For the fact that some money was hinged on the variation, the same is not due as the variation was not approved. That limb of the claim must fail.

24. In regard to payment of Kshs.18,000,000.00 which was to be paid “upon the buyer receiving the 1st payment certificate” or “within the 90 days from the date” of the agreement, there is some commonality of evidence that it has not been paid to date. How do the defendants explain the failure to pay?

25. Mr. Njoroge Kiarie 4th Defendant testified thus;

“Once we were paid the certificate 3 we were to clear them, we were to redo some works which cost us Kshs.10 million. Money deducted from certificate No. 3”.

26. In addition the witness stated that because of the allegations of fraud made by the Plaintiff both in Court papers and outside Court, the reputation of the Company suffered and these led to delayed payments. Because of these, some loss was inevitable and the Company was unable to complete the project. It was also the Defence case that the Plaintiffs had withheld information about liabilities such as loans. In this regard of a loan of 4.6million, 3million was disclosed. On the payroll, an outstanding sum of Kshs.1million was disclosed when the debt was Ksh.2.6million.

27. In respect to certificate No. 3, the Defendant did not produce any documentary evidence in support of the assertion that the previous directors had received an interim payment of Kshs.10.5million for certificate No. 2 which was deducted from this certificate. Then there was somewhat confusing oral evidence from the 4th Defendant. This is what he also said about the deduction.

“We agreed with Plaintiffs that we plough back the money from certificate No. 3 and their payment comes from subsequent certificates”.

28. From this testimony there is no basis to blame the Plaintiffs for the Kshs.10million deducted by the Defendants from the payments received for certificate No. 3 and this cannot be used as a reason to hold back the payment of the balance of the consideration.

29. A quick observation on the loans of the vehicles. No document was produced by the Defendants to prove that the loans were for Kshs.4.6million and not Kshs.3million as disclosed in the agreement.

30. In respect to the payroll, and this holds true in regard to the general theme of the Defence, this Court has to find that even if proved, the Defendants have not set up a counterclaim or set off at all. There is no evidence that the Defendants had taken up the issue of the alleged purported claims prior to the filing of the suit. Indeed, although the issue was discussed in the Board meeting of the Company of 1st June 2016, there was no resolution to have the sums deducted from the balance of the amount due to the Plaintiffs.

31. In the result I find that the 3rd- 4th Defendants have breached the contract of 2nd October 2014 by failing to pay the balance of the purchase price of Kshs.9million being the portion due to the Plaintiffs. As to the 2nd Defendant, I am unable to find any liability on his part and this Court is not certain why the Plaintiffs found it necessary to sue him.

32. The outcome;

32.1 Judgment is entered against the 1st Defendant, 3rd to 5th Defendants jointly and severally for the sum of Kshs.9,000,000. Interest therein at Court rate from the date of filing suit and costs.

32.2 The suit against the 2nd Defendant is dismissed with costs.

32.3 The Plaintiffs are entitled to release of such sum as will satisfy the judgment sum, interest and costs from Kshs.10,000,000 deposited in Court.

Dated, delivered and signed in open Court at Nairobi this 18th day of October 2019.

F. TUIYOTT

JUDGE

Present:-

Cherop holding brief Obwayo for Plaintiff

Nyakundi for 1st, 3rd, 4th and 5th Defendants

Muvinda for 2nd Defendant

Court Assistant: Nixon