



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 15 OF 2011

KWA-MATINGI FARMERS CO-OPERATIVE SOCIETY LTD.
.....PLAINTIFF/APPLICANT

VERSUS

TROPICAL FARM MANAGEMENT (K) LTD. DEFENDANT

RULING

1. Before the Court is an application by the Plaintiff dated 6th February, 2013 brought under the provisions of **Order 20 Rules 1, 2, 3 and 4** of the *Civil Procedure Rules*. The applicant seeks the following prayers inter alia”

- “1. THAT the Defendant do deposit a sum of Kshs.23,703,953/- in the Court pending the accounts audit.**
- 2. THAT the accounts between the parties for the period beginning 1st day of October, 2010 to 31st day of March, 2012 be audited.**
- 3. THAT the sum certified due and owing from the Defendant to the Plaintiff be paid to the Plaintiff forthwith.**
- 4. THAT the costs of the audit and this application be provided for”.**

The application is brought upon the grounds that after the Applicant was supplied with statements of accounts, it was established that the Defendant had unlawfully over-charged and/or withheld Kshs. 23,703,953/- from the applicant, contrary to the provisions of the **Coffee Act** and that the accounts presented by the Defendant were false, misleading and outside the contractual agreement between the parties.

2. The application is further supported by the Affidavit and Further Affidavit of **Anthony Mwanza Wambua**, Chairman of the applicant company, sworn on even date and 12th April, 2013 respectively. It is deponed to therein that after a careful scrutiny of the accounting documents, it was established that the Defendant had concealed material facts with an intention to defraud the

- Applicant and that, further, the Defendant overcharged for goods and services that were not contractual, amongst other malpractices. Further, it was averred that the amount of Kshs. 23,703,935/- was due and owing to the Applicant, and consequently, it was only fair and just that the amount be deposited with the Court, pending the determination of the suit.
3. In opposing the application, **Maina Ruo**, the Agronomy Manager of the Defendant Company, filed his affidavit in response sworn on 3rd April, 2013. In refuting the averments of the Applicant, he contended that there was no basis whatsoever calling for the deposit of Kshs. 23,703,593/- in Court by the Applicant, and that in so doing, Applicant was seeking for judgment against the Defendant before trial. The deponent further contended that the Defendant is a substantial company and that it would be able to satisfy any Decree, if issued against it, which may require it to pay any monies that the Court found to be owing to the Applicant. It was surmised that the application before Court is misconceived and an abuse of the process of the Court.
 4. **Order 20** of the *Civil Procedure Act*, upon which the Applicant relied upon provides for applications for accounts. This Court, on 31st July, 2012 in determining an application by the Applicant dated 2nd May, 2012 brought under the provisions of **Order 20 Rules 1, 2, 3 and 4**, issued orders *inter alia* for the production of documents of accounts relating to the contract as between the Applicant and Defendant. Mutava, J who deliberated upon the matter, ordered the Defendant to furnish the Applicant with the schedule of coffee sales made between 1st April, 2009 to 31st December, 2010, a schedule of all expenses incurred and paid by the Defendant and the delivery of tractor registration number **KBH 447Q** and trailer number **T.A 10041 B 107244** to it. The statements of account were issued as per the Court's Orders to the Plaintiff, who thereafter, allegedly established that the Defendant had unlawfully over-charged and withheld the amount of Kshs. 23,703,953/- from the Applicant. This was evidenced in the annexure marked as **"AMW-1"** being the Applicant's appointed auditor's report on the statements of account for the period 1st April, 2009 to 31st December, 2010.
 5. The sum of Kshs, 23,703,953/- was arrived at ostensibly after an audit conducted by the Applicant's self-appointed auditor. The Plaintiff further alleged that the sum was predicated upon the establishment of over-charging and/or withholding of money received from coffee sales by the Defendant. It was also attributed to inflated costs in the procurement of goods and services from the Defendant's related companies. The Plaintiff relied on **Section 35** of the *Coffee Act* in demanding for the payment of money received from the sale of coffee and that the Defendant had no contractual right to hold onto the money, once the coffee is sold. The amount claimed for the sale of the coffee but not paid over was Kshs. 3,397,517/47.
 6. That sum is disputed by the Defendant, who further contended that the audit was carried out independently by the Applicant, whose appointment of the auditor was carried out unilaterally. The Defendant further contended that the Applicant sought summary judgment on trial by affidavit and such cannot be justified as the issues herein have not been properly canvassed before the Court. It reiterated that it had no objection to an audit being carried out but that the same should be carried out by a jointly appointed auditor.
 7. Under **Order 20 Rule 4**, the Court is empowered to issue orders for the payment of any amount certified on taking accounts due from either party to be paid within a specified period of time. The Applicant prayed that the amount of Kshs. 23,703,953/- be paid to the Court, pending the hearing and determination of the suit. It deemed that this process as being reasonable. It portended that the provisions of the *Coffee Act* applied to the claimed amount of Kshs. 23,703,953/- and for the benefit of doubt, the same should be deposited, nonetheless. It would therefore seem that both parties are in agreement that the above sum or any amount, once certified by an independent auditor, should be paid to the claimant as money due under the Management Agreement entered into on 19th September, 2006 (herein "the Agreement"). The Applicant has not shown what risk or loss or damages it stands to suffer or incur should the said amount of Kshs. 23,703,953/- not be deposited into the Court as per its application. In any event, it has not demonstrated that the Defendant company would be unable to repay that or any amount certified after the taking of accounts or any decretal sum as may be ordered by the Court after the hearing of the matter. In my view, the Applicant has not given any compelling or cogent reasons as to why the Court's discretion to issue the Orders as prayed for under **Order 20 Rule 4** should be exercised in this matter.

8. In light of the foregoing and in consideration of the circumstances, the conclusion is that this Court finds that the application is without merit and is hereby dismissed. However, in exercise of its inherent powers under **Section 3A** of the *Civil Procedure Act* and in furthering the overriding objective of the Court under **Sections 1A and 1B** of the Act, the Court has noted that neither of the parties has raised any objection to the appointment of an **independent** auditor. As a result, the Court directs that the parties jointly appoint an accredited auditor being a practicing member of the Institute of Certified Public Accountants for the auditing of the statements of account as provided to the Plaintiff by the Defendant and as directed by Court, within 30 days of the delivery of this Ruling. In the event that the parties cannot agree upon a mutually acceptable auditor after 30 days, then the Chairman for the time being of the Institute of Certified Public Accountants shall be called upon, at the instance of either party, to make such appointment. Costs of the application shall be costs in the cause.

DATED and delivered at Nairobi this 2nd day of May, 2014.

J. B. HAVELOCK

JUDGE