

8. It is the Defendant's case that he was all along negotiating on behalf of Revel International Corporation and therefore the debt due could not personally attach to him. The Defendant stated that he did not admit the jurisdiction of the Court as the Plaintiff resided in Switzerland and Revel International Corporation was incorporated in Mauritius. The Defendant finally stated that the agreement made between the Plaintiff and Revel International Corporation provided that disputes arising from the contents of the agreement would be resolved by way of arbitration.
9. In reply, the Plaintiff filed a Reply to Defence on 16th November 2012. The Plaintiff reiterated that its claim against the Defendant arose from an oral agreement between them and not any agreement between Revel International Corporation and Alcazar Capital LLC.
10. The Plaintiff referred to some instances where the Defendant represented that he was liable to the Plaintiff. An example is a correspondence to the Plaintiff dated **24th January 2012** where the Defendant indicated that he was trying to sell a property as well as seeking financing from his Bank to enable him pay the Plaintiff. The Defendant concluded the letter by requesting the Plaintiff to give him a chance to honour his commitments towards him.
11. It is the Plaintiff's position that the Defendant is well aware of the remittance of the sum of US\$ 1.7 million and to whom it was made. According to the Plaintiff, the said sum of US\$ 1.7 million being the consideration of the consultancy was payable to the Defendant.
12. It is the Plaintiff's case that the issue of jurisdiction does not arise as Revel International Corporation is not a party to the proceedings. The Plaintiff reiterates that he did not enter into any agreement with the said Corporation.
13. The parties complied with the pre-trial requirements pursuant to Order 11 of the Civil Procedure Rules. On **12th November 2013**, the parties filed a List of agreed issues. The matter was thereafter set down for hearing.

THE HEARING

14. The hearing commenced on 10th March 2014 with the Plaintiff's testimony (PW1). Mr. Ayman informed the Court that he had filed a witness Statement on 17th September 2012 which he would rely on for his evidence. Mr. Ayman testified that he had known the Defendant since 2003 when they started doing businesses together. He noted that they became good friends.
15. PW 1 gave an account of how the sums of US\$ 400,000 became payable to him by the Defendant. He recounted that after they started a business called Rapid Communications, they appointed the Defendant as the Managing Director. Thereafter the Defendant and Plaintiff were authorised to jointly consult for Alcazar Capital LLC. The Plaintiff testified that they were able to convince Alcazar LLC to accept the consulting job for which Alcazar agreed to pay them US\$ 1.7 million as consulting fees.
16. The Plaintiff further testified that he agreed with the Defendant that they would share the consulting fees equally. It was the Plaintiff's testimony that the Defendant later alleged that he had to bear greater expenses which had to be covered by the said US\$ 1.7 million. Consequently the Defendant expressed that only US\$ 800,000 would be available for them to share. The Plaintiff testified that they agreed on the said sum.
17. According to the Plaintiff the sum of US \$ 1.7 m was remitted to the Defendant, towards the end of 2008. Thereafter, the Defendant started paying him his share of US\$ 400,000 in instalments of US\$ 50,000 each. He testified that the Defendant paid a total of US\$ 200,000 and then stopped. It was his testimony that the said payments were coming from Revel International Corporation which according to him belonged to the Defendant.
18. The Plaintiff further testified that the Defendant failed to pay the balance of US\$ 200,000 claiming that he had other expenses to cater for. Because of this, Plaintiff agreed to reduce the claim to US\$ 100,000. The Plaintiff referred the Court to various e-mails from the Defendant to the Plaintiff promising him that he would pay the balance. He concluded by stating that his claim was for US\$ 100,000 plus costs and interest as from 1st August 2009 being the last date the Defendant made a promise to pay.
19. On cross-examination the Plaintiff confirmed that together with the Defendant they jointly consulted for a sum of US\$ 1.7 million. He testified that they jointly did the consultation on the basis of trust. He further testified that when Alcazar asked to whom the consultancy fees would be

- paid he told then to pay through the Defendant. This was to enable the Defendant pay the expenses and thereafter pay him his part.
20. According to the Plaintiff, Revel International Corporation came into the picture at the time of payments and after the consultancy had been concluded. He confirmed that the instalments of US\$ 50,000 paid to him were through the corporation. He testified that the money was from the defendant but through the corporation. It was his testimony that he believed that the Defendant was the proprietor of the Corporation, although he was not sure. It was further his testimony that the Defendant made several promises of payment to him in his capacity as an individual.
21. On re-examination, the Plaintiff clarified that it was the Defendant who approached him to assist in the provision of consultancy services. It was his testimony that the Defendant had no business making personal promises to him if it was true that it was the Corporation that was responsible for the payments. He testified that the Defendant never told him that he was acting on behalf of any third party or Revel International Corporation.
22. The Defendant did not testify and did not call any witnesses.

SUBMISSIONS

23. The Plaintiff's submissions are dated **18th March 2014** and filed on even date. In reply the Defendant filed its undated submissions on **26th March 2014**. The submissions were highlighted before me on 3rd April 2014.

ANALYSIS

24. I have considered the pleadings, the written and oral submissions by Counsel as well as the authorities cited. I have also been guided by the List of agreed issues as filed by the parties. In summary, the following in my view are the main issues for determination:
- a. ***Whether there was a contract between Revel International Corporation and the Plaintiff for the provision of consultancy services.***
 - b. ***Whether the Defendant was an agent of Revel International Corporation.***
 - c. ***Whether there was an agreement between the Plaintiff and the Defendant for the provision of consultancy services to Alcazar Capital LLC.***
 - d. ***Whether the Defendant owes the Plaintiff a sum of US \$ 100,000 in settlement of the balance.***
25. It is the Defendant's claim that the contract for consultancy services was between the Plaintiff and Revel International Corporation. It was submitted for the Defendant that even the payments made to the Plaintiff emanated from the Corporation. It was further submitted that the Plaintiff had admitted at paragraph 5 of its Plaint that Revel International Corporation had entered into a contract for the provision of consultancy services for the consideration of US\$ 1.7 million. Therefore, according to Counsel for the Defendant, the Plaintiff provided a benefit to the Corporation and it's from that corporation that the Plaintiff was to direct his claim.
26. The foregoing notwithstanding, the Defendant did not provide substantial evidence to prove the contractual relationship between the Plaintiff and the Corporation. The hurdle in this matter is that there was no formal agreement between the Plaintiff and the Defendant. What the Plaintiff is relying on is an oral agreement which this Court is not privy to. Further no formal agreement was presented by the Defendant to substantiate the allegations that the contractual relationship for provision of consultancy services was between the Plaintiff and the Corporation.
27. Nevertheless, the Plaintiff produced various correspondences between himself and the Defendant touching on this matter. The Plaintiff further testified on his case giving an account of how he entered into an agreement with the Defendant. I also accounted for how the sums of US\$ 100,000 became payable to him by the Defendant. It is worthy to note that, although the Plaintiff was cross-examined his evidence was not rebutted in any way as the Defendant did not testify.
28. The Defendant also contended that he was only an agent of the corporation and not the proprietor.

- It was submitted for the Defendant that the Memorandum and Articles of Association of the Corporation clearly showed that the Defendant was neither a proprietor nor a director of the Corporation. However, there is no evidence before this Court to show that the Defendant was a duly appointed agent of the Corporation. Nothing could have been easier than for the Defendant to produce a written authorisation from the Corporation indicating that he was its agent.
29. Counsel for the Plaintiff referred the Court to an email dated 25th June 2008. The email was written by the Defendant to one Charbel Jaoude of Agility Logistics seeking instructions on the details of invoicing the US \$ 1.7 million being services rendered. Counsel noted that in the said email, no reference was made to Revel International Corporation.
30. The Court was further referred to an email dated 3rd July 2008 in which the Defendant informed the said Mr. Jaoude that he was under certain obligations. According to Counsel, this was a confirmation that the agreement for consultancy services was a personal agreement and that Revel International Corporation was not involved.
31. In view of the above and having determined that the Defendant has not proved his agency relationship with Revel International Corporation, the Court can only conclude that the said corporation was not a party to the Consultancy agreement. Even if it was, then it had no contractual relationship with the Plaintiff.
32. The evidence before this Court show that there was a personal agreement between the Plaintiff and the Defendant. The Defendant in its defence admits to negotiating with the Plaintiff for provision of consultancy services. His contention was that the negotiation was all along on behalf of Revel International Corporation. However, the Defendant has failed to prove that he was indeed an agent of the corporation. Further, it was the Plaintiff's testimony that it was the Defendant who approached him to assist in the provision of consultancy services. This evidence was not rebutted.
33. In addition, the Defendant had already paid a sum of US\$ 200,000 out of the US\$ 400,000 being fees payable to the Plaintiff. It is of no consequence that the payments came from the account of the Corporation as there was no contractual relationship between the Plaintiff and the Corporation. The Plaintiff testified that with regard to the payment of the consultancy fees of US\$ 1.7 million, he elected for the same to be paid through the Defendant. He further testified that the Defendant gave the account of the Corporation to Alcazar Capital LLC for purposes of the said payment. This evidence was also not rebutted. There was also no evidence that the payments were made by the corporation towards settling its obligation to the Plaintiff, if any, for the provision of consultancy services.
34. In his various e-mail correspondences with the Plaintiff, the Defendant did not deny that he owed the Plaintiff and he represented that it was his personal obligation to settle the said sums. Counsel for the Defendant submitted that the communications via e-mail by the Defendant proffering reasons for delay of payment and giving promises was only on behalf of the Corporation. I beg to differ. The representations made in most of the said e-mails do not in any way indicate that the communication was on behalf of the corporation or even a third party. The representations are personal in nature.
35. At this juncture, I will refer to the Defendant's email dated **15th April 2009** at pages 12 and 13 of the Plaintiff's bundle of documents. In the said e-mail it is plain that the Defendant admitted to owing the Plaintiff money. He further requested the Plaintiff to bear with him as he resolved outstanding matters. This was followed by many other correspondences promising the Plaintiff the payment of the outstanding balance which promises were not forthcoming.
36. In **Section 120** of the **Evidence Act, (Cap 80)**, the following is provided for in what is termed "general estoppel":-

"When one person has, by his declaration, act or omission, intentionally caused or permitted

another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

This principle was also stated in the finding of Denning LJ in Combe v Combe (1951) 2 KB 215, which is persuasive, when he stated:-

"The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave a promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word.

37. In light of the foregoing, the Defendant cannot now be heard to say that he does not owe the Plaintiff money. The Defendant is estopped from reneging on his promises which the Plaintiff reasonably relied on. Further, the Defendant made various representations to the Plaintiff that he had the personal obligation to pay. Nowhere was Revel International Corporation mentioned as the responsible party to make such payments.

38. It is apparent that the Defendant had a personal agreement with the Plaintiff for the provision of consultancy services. It is not in dispute that the consultancy services were provided by the Plaintiff. Subsequently, the sum of US\$400,000 became due to the Plaintiff as fees for the Consultancy services. The Defendant managed to pay half the amount being US\$ 200,000. Due to obvious difficulties on the Defendant's part in making the payments, the Plaintiff agreed to receive US\$100,000 as full and final payment of the outstanding amount. However, the Defendant has failed to honour the payment to date. This is an act of bad faith on the part of the Defendant.

39. In view of the foregoing the Court is compelled to enter Judgment in favour of the Plaintiff as follows:-

- a. ***US \$ 100,000.***
- b. ***Interest on (a) above at court rates from from 1st August 2009 until payment in full.***
- c. ***Costs of the suit and interest thereon at court rates.***

DATED, RAD AND DELIVERED AT NAIROBI THIS 6TH DAY OF JUNE 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Gathoni Kariuki for Plaintiff

No appearance for Defendant

Teresia – Court Clerk