



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 24 OF 2014

NORRIS KIBE.....1ST PLAINTIFF

GIBSON WACHAGA.....2ND PLAINTIFF

BARBEL INVESTMENTS LIMITED.....3RD PLAINTIFF

VERSUS

EXXIM ENTERPRISES LIMITED.....1ST DEFENDANT

KENYA TEA DEVELOPMENT AGENCY LIMITED.....2ND DEFENDANT

RULING

1. The plaintiffs, **NORRIS KIBE, GIBSON WACHAGA** and **BARBELL INVESTMENTS LIMITED**, have asked the court to grant them judgment against the 2nd Defendant, **KENYA TEA DEVELOPMENT AGENCY LIMITED**. That application is premised on the applicants' contention, that the 2nd Defendant had admitted liability.
2. In the alternative, the plaintiffs sought an order to compel the 2nd Defendant to deposit in court, the sum of Kshs. 12,356,000/-, pending the hearing and determination of the suit.
3. **NORRIS KIBE** and **GIBSON WACHAGA** are Directors of **BARBELL INVESTMENTS LIMITED**.
4. The said directors contend that they purchased a business operating in the name and style of "T - Spot" which was situated at the building called "Chai House" in Nairobi.
5. It was the understanding of Norris and Gibson that the 1st Defendant, **EXXIM ENTERPRISES LIMITED**, had bid and won a tender from the 2nd Defendant for the purchase of the 2nd Defendant's entire restaurant business named "*T-Spot Restaurant*".
6. Exxim Enterprises Limited thereafter offered to sell that business to Norris and Gibson, on the understanding that it would thereafter be conducted under the name of "**OASIS HOTELS AND RESTAURANTS LIMITED**".

7. At the time Exxim Enterprises Limited was making that offer to Norris and Gibson, it told them that the company had already obtained the approval of the 2nd Defendant to sign the Agreement which would enable Norris and Gibson to purchase the business. That is what the plaintiffs have asserted at paragraph 9 of the Plaintiff.

8. Thereafter, Norris and Gibson entered into an Agreement with Exxim Enterprises Limited. This is what the plaintiffs have stated in paragraphs 10 and 11 of the Plaintiff;

*“10. On or about 27/08/2012, the 1st and 2nd plaintiffs entered into an agreement with the 1st Defendant to acquire **OASIS HOTELS AND RESTAURANTS LIMITED** which was to operate the business known as “T- Spot Restaurant” for the consideration of Kshs. 12,356,000.00.*

11. The 1st and 2nd Plaintiffs and the 1st Defendant agreed that the said consideration of Kshs. 12,356,000.00 would be paid directly to the 2nd Defendant, in the account details supplied by the 1st Defendant”.

9. Having so agreed with Exxim Enterprises Limited, Norris and Gibson sourced financing from their company, Barbell Investments Limited.

10. When Norris and Gibson got the funds, they deposited the same into the account of the 2nd Defendant. However, Exxim Enterprises failed, refused or neglected to transfer to Norris and Gibson the business at “T – Spot Restaurant”.

11. Thus, by their own assertion, the plaintiffs appear to appreciate and acknowledge that it was Exxim Enterprises Limited which breached its contractual obligations.

12. One of “*particulars of Misrepresentation of the 1st Defendant*” is cited in the following words;

*“The 1st Defendant misrepresented that it had obtained the 2nd Defendant’s approval to operate the business using **OASIS HOTELS AND RESTAURANTS LIMITED**”.*

13. The plaintiffs went further to declare that Exxim Enterprises Limited had misrepresented to the plaintiff’s that the company (Exxim) was making concerted efforts to convince the 2nd Defendant to agree to the intended purchase of the business called “T – Spot Restaurant”.

14. It would therefore appear that the plaintiffs were well aware about the party who owed them some obligations. And the plaintiffs have made it clear that that party was not the 2nd Defendant.

15. Meanwhile, the 2nd Defendant has acknowledged receipt of the sum of Kshs. 12, 350, 000/-.

16. Does that constitute an admission, in respect to the claims made against them in the Plaintiff?

17. In my considered view, the answer to that question is in the negative.

18. The 2nd Defendant says that Exxim Enterprises Limited had won the tender from the 2nd Defendant, for the purchase of the business operating in the name and style of “T – Spot Restaurant”.

19. Having won the tender, Exxim was required to enter into an Agreement which would enable it to purchase the business. Exxim was also required to enter into a lease for the premises at which the business was to be conducted: the lease was to be for a term of six (6) years.

20. The 2nd Defendant categorically denied the plaintiffs’ contention that the said defendant was supposed to have prepared a lease in the name of **OASIS HOTEL & RESTAURANTS LIMITED** or in any name other than that of Exxim Enterprises Limited.

21. At the time it was informed that Kshs. 12,356,000/- had been credited into its account, the 2nd Defendant believed that that sum was the purchase price which had been agreed upon between Exxim Enterprises Limited and the 2nd Defendant. It was only thereafter that the 2nd Defendant learnt that the funds had actually come from Barbell Investment Limited (the 3rd plaintiff).

22. Given the fact that Exxim had been given the premises which they had leased from the 2nd Defendant, and because the 2nd Defendant had also handed over the business of “T – Spot Restaurant” to Exxim, it would appear that the 2nd Defendant had given due consideration for the money which it received.

23. On a prima facie basis therefore, I find that there is no admission of liability by the 2nd Defendant. Secondly, I find that the plaintiffs have not made out any prima facie case that would warrant an order compelling the 2nd Defendant to deposit Kshs. 12, 356,000/- in court, pending the hearing and determination of the suit.

24. The Defence filed by the 2nd Defendant raised serious issues of fact and law, which entitle the 2nd defendant to unconditional leave to defend itself.

25. There is no merit in the plaintiff’s application dated 17th May 2014. Therefore, that application is dismissed, with costs to the 2nd Defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 11th day of November 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

.....for the 1st Plaintiff

..... for the 2nd Plaintiff

.....for the 3rd Plaintiff

.....for the 1st Defendant

.....for the 2nd Defendant.

Mr. C. Odhiambo, Court clerk.