



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 461 of 2007

KENYA ANTI-CORRUPTION COMMISSION PLAINTIFF

VERSUS

JOHN FAUSTIN KINYUA 1ST DEFENDANT

JOHNSON J. GITHAKA 2ND DEFENDANT

MBUYU FARMS LIMITED 3RD DEFENDANT

R U L I N G

Application dated 21/1/2009 brought under Order VI Rule 13 (1) (b) (c) and (d), Civil Procedure Code and Section 3A, Civil Procedure Act seeking orders that the defences of 1st defendant, 2nd defendant and 3rd defendant dated 16/1/2007, 21/1/2007, 17/1/2007 respectively be struck out and judgment be entered for plaintiff against the defendants in favour of the plaintiff on the grounds stated and supporting affidavit of John Lolkoloi, described as an investigator with the plaintiff.

The first respondent is a former Managing Director of Kenya Reinsurance Corporation, second respondent is a former Financial Director.

This suit is brought under the Anti-Corruption & Economic Crimes Act 2003 on behalf of Kenya Reinsurance Corporation Ltd., a public body established under the Companies Act, Cap. 486. The application is based on the grounds stated in the application and the affidavit of John Lolkoloi, an investigator appointed under the Act. The affidavit has exhibited documents as exhibit marked "JL1" being a letter addressed to Kenya Reinsurance Corporation "Corporation" by Rockhound Properties "Rockhound" of Box 34638, Nairobi and dated 12/9/2003 offering to purchase the Corporation property situate on Villa Franca project on Mombasa Road. Rockhound Properties offered to purchase the property and was ready to pay Kshs.5,466,383/= and attached the cheques to the said amount. The letter was signed by Mary Nganga, Director.

On 28/10/03 the Corporation replied "commercial unit No.307" confirming offer and setting out conditions of the proposed sale. The price was set out made of payment with deposit of 20% of Kshs.12,000,000/= (Kshs.1,200,000/=). However, it was a deposit of Kshs.5,466,383/= which was enclosed with that letter which was signed by Mrs. Nganga. On 15/3/2004 the Rockhound cancelled the offer and applied for refund of deposit of Kshs.5,466,383/= to be issued to Fazia Ngatia & Co. Advocates.

On 16/4/2004, a cheque in the sum of Kshs.5,423,183/= was dispatched to the advocates, Faiza Ngatia

& Co. Advocates authorized by J.F. Kinyua, Financial Controller of the Corporation. Cheque Requisition Voucher is exhibited "JL 4S". This sum was paid as evidence by that cheque.

On 12th September 2003. Heritage AII Insurance Co. Ltd. wrote to the Corporation attention to KINYUA, Financial Controller enclosing a cheque No.027161 in the sum of Kshs.1,072,086/= dated 10.9.2003 and cheque for Kshs.3,113,761, No.07162. And cheque for Kshs.1,280,536 dated 10/9/03 payable of Kenya Re Corporation.

The response filed by the defendants are simple denials alleging malice on the part of the applicant. The second defendant has filed grounds of opposition and written submissions and a list of authorities. The second defendant has also filed written submissions and a list of authorities. There is also a replying affidavit filed by the first defendant on behalf of the 3rd defendant.

The law invoked in this application is the Anti-Corruption & Economic Crimes Act, No.3 of 2003. The Act provides for investigator who has power to investigate matters covered by the Act and may institute suit in the name of the Commission and recover in the name of the Commission.

In this case the investigator appointed was John Lolkoloi, employed by the Commission. He carried information and was satisfied that the defendants were involved in siphoning money from the Corporation, a public body incorporated in Kenya. His findings are contained in his affidavit supporting the application sworn on 21st January 2009. He found that the sum of Kshs.5,466,383/= was taken by the defendants fraudulently. Exhibit "JL1" where a body calling itself "Rockhound Properties" of P.O. Box 34638, Nairobi offered to purchase the Reinsurance property on Villa Franca project on Mombasa Road and offered to pay Kshs.5,466,383/= "in cheques". The date was 12/9/2003.

A letter of offer by the Reinsurance was forwarded to Rockhound on 28/10/2003 stating the price as Kshs.12 million with a deposit of 20% . The acceptance was on the same document where the cheques amounting to Kshs.5,466,383/= were forwarded as deposit. On 15th March 2004, the Rockhound cancelled the sale and requested for refund of the said deposit paid. This was accepted by the Corporation and Financial Controller dispatched Corporation cheque in the said sum of Kshs.5,423,183/= as directed by Rockhound. The cheque was paid on 15/4/2004 to Faiza Ngatia, Advocates.

Thereafter, some cheques, (3) are exhibited:-

1. Kshs.1,072,086/= dated 10/09/2003 to pay to Kenya Re by Heritage AII Insurance Company Ltd.;
2. Kshs.3,113,761/= dated 10.9.2003 was paid to Kenya Re by Heritage AII Insurance Company Ltd.;
3. Kshs.1,280,536/= dated 10.9.2003 payable to Kenya Re."

These cheques were deposited at National Bank of Kenya Ltd. to the credit of Corporation on 7/10/2003. And the total was Kshs.5,466,383/=. The forwarding letter of these cheques states:-

"We attach our cheques (3) in the same amounts as the said cheques. Settlement of old treaty balances."

This letter was dated 12/9/2003 and was marked for the attention of "Financial Controller". It is therefore clear that although a similar amount was allegedly paid in the land purchase agreement which flopped, the pay was not of the Rockhound.

Thereafter J.F. Kinyua requested Faiza Ngatia, Advocates to issue Kshs.2 million payable to Suntra Investment Bank which was done (see Exhibit JL 6 a). J.F. Kinyua with his wife opened CDSC account.

Furthermore, Mr. Githaka, 2nd defendant on 23rd April 2004 entered into a land buying agreement of plot No. L.R.7158/548 with Cecilia Wairimu Muchemi as vendor. On 29/11/04, J.F. Kinyua, first defendant authorized Faiza Ngatia, Advocates to release Kshs.3 million to Cecilia Wairimu Muchemi.

The cheque is exhibit "No. JL 9 (c) of same date. The evidence shows that Mr. J.F. Kinyua, Financial Controller of the Corporation forwarded to the Corporation cheque in the sum of Kshs.5,423,183/= to Faiza Advocates as directed by Rockhound Properties, the body which showed interest in purchasing a property in Villa Franca in the first place, and who had offered 3 cheques as deposit for the deal. Those 3 cheques were obtained from Heritage AII Insurance Co. Ltd.

It is clear that what defendants state in their defences is false and unbelievable. They did take the money of the Corporation fraudulently and used it for own benefit and the investigator has proved the case. The defendants are liable under the Act.

I therefore allow the application and grant orders as prayed in terms of prayer 1.

Judgment is entered for plaintiff against the defendant in the sum of Kshs.5,423,183/= with interest at court rates of 14% till payment in full, together with costs of the suit to the plaintiff.

Costs of this application go to applicant.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 7th day of July 2009.

JOYCE N. KHAMINWA

JUDGE