IN THE COURT OF APPEAL

AT KISUMU

(Coram:Kneller, Hancox JJA & Platt Ag JA)

CIVIL APPEAL NO. 58 OF 1983

BETWEEN

MWAI.....APPELLANT

AND

KENYA TOURIST DEVELOPMENT

CORPORATION.....RESPONDENT

JUDGMENT

Hancox JA The appellant sued the respondent corporation before the Senior Resident Magistrate - Kisumu to recover Kshs 13,000 representing twenty six deliveries of red soil to the Homa Bay Hotel at Kshs 500 per delivery, for the purpose of planting flowers and shrubs in the grounds. By its defence the respondent denied

a) that the corporation ordered or requested the appellant to supply the soil;

b) that it had received the soil; or

c) that any service or work had been done.

Both the trial magistrate and the learned judge on the first appeal found in favour of the appellant on issue (b) which the defence had raised, in the sense that they were satisfied the deliveries had been made. The magistrate additionally found that the one Oluoch whom the appellant said was the hotel manager at the material time; was the agent of the corporation and acting within the scope of his ostensible authority in ordering the red soil. This finding was reversed by the learned judge who held that the representations by Oluoch did not amount to evidence of agency, and neither was there a holding out of such agency by the corporation. It was not disputed that the corporation was one of three major shareholders in Homa Bay Hotels Ltd, the company which owns the Hotel, the others being the Homa Bay County Council and Homa Bay Urban Council, and that the Hotel was managed by African Tours and Hotels Limited.

Mr Gumba, arguing this appeal on behalf of the appellant, took us through the correspondence passing between himself and his client on the one hand, and the corporation on the other hand in the years 1979 and 1980, the purport of which was that the corporation would be prepared to entertain the claim for payment if satisfactory evidence of the validity of the appellant’s claim, in particular of the requisition order, was forthcoming. This however was refuted by Mr Njoroge, the corporation’s chief technical officer, in evidence.

The correspondence may, however, have led the appellant to believe that the corporation might be prepared to pay, but I do not see that the conduct by the officers of the corporation can operate to ratify something which was not capable of ratification, namely, orders by the manager employed by the managing agents of the hotel, which was not the corporation at all but a separate entity. As was said in *Keighley, Maxsted & Co v Durant*, [1901] AC at p 244, which was a case of undisclosed principle.

> "It is suggested by the judgement of the Court of Appeal as possible, that what is described as ratification might, if the parties had so pleased, make the contract, which was one made between A and B to include C as one of the contracting parties. I think such a suggestion is contrary to all principle".

Even if the manager could be said to have been the agent of Homa Bay Hotel Ltd, this is still not the same as the corporation which is merely a shareholder in that company.

It was, however, said for the appellant that there was evidence that the corporation was responsible for the capital development of the hotel, thus the plaintiff could legitimately look to them for payment, the delivery of the soil amounting to capital development and expenditure.

For myself, I cannot accept the proposition. There is no evidence that this form of development was in the contemplation or even within the knowledge of the corporation until they started to receive letters from the plaintiff. I do not think there was any nexus shown between the orders for these deliveries and the corporation. I do think, however, that the letters sent by the corporation in reply to the appellant, initially, at any rate, were misleading, in that they probably led him to think that the corporation would entertain his claim, whereas by their defence, and by Mr Njoroge's evidence, it is clear that they wholly rejected it.

I have read the draft judgement of Kneller JA and respectfully agree with it as regards the result of the appeal. I would also dismiss the appeal, but speaking for myself, I would not make any order for costs against the appellant, either in this court or in the High Court.

Platt Ag JA. I agree that the appeal should be dismissed, and I have only a few observations to make.

The appellant based his appeal on four propositions put forward by Mr Gumba:

1) That the respondent corporation had previously accepted responsibility for capital development, of the kind claimed to have been provided by the appellant.

2) That other provision of sand had been previously paid for by the corporation.

3) That even if the corporation did not pay, the corporation was partly responsible, as the chief technical adviser to the corporation had explained in evidence; and

4) That the correspondence after the delivery of the sand confirmed the corporation's liability to pay for it, on the basis of a contract of agency or ratification of the action of the manager of the Homa Bay Hotel.

The corporation had not been involved in the provision of sand to the Homa Bay Hotel before the arrangement entered into between the appellant and Mr Oluoch, the then manager of the Homa Bay Hotel. It cannot be said that the corporation had already accepted that provision of such items as sand was a capital development for which the corporation would accept liability. Reading the evidence of Mr Njoroge as a whole, (who was the chief technical officer of the corporation) it becomes clear that if there is a capital expenditure to be made, the corporation would enter into a written contract with the contractor concerned; and indeed, if there had been any requisition for sand by the Homa Bay Hotel, payment would have been made by the company, Homa Bay Hotel Ltd. There was no general connection between the corporation and the provision of the sand. It was the responsibility of Homa Bay Hotel. Which owned the hotel in question? The suit should have been brought against the company which owned the hotel.

Secondly, it is clear from the evidence that no other contractor had been paid for the provision of sand by

the corporation. The sand was provided by the appellant between February and March 1979, according to the appellant in his letter dated October 14, 1979. Other supplies were paid for deliveries during April and May 1979 as shown in the hotel records. It follows that the corporation had had nothing to do with the provision of sand.

Thirdly, it is not true to say that Mr Njoroge explained that the corporation would be partly liable. A fair reading of his evidence is that the corporation was anxious not to ignore the first claim of a contractor but would intervene with the management of the hotel to see that the claim was paid if justified. The corporation considers that it would try and assist members of the public who complain of non-payment.

There were therefore no underlying or past arrangements upon which the alleged estoppel and ratification could operate. I agree with the reasons given in each of the judgments read, that no contract of agency could arise nor that the actions of Mr Oluoch could be ratified.

It is a pity that the good intentions of the corporation, which must be applauded, were found misleading by the appellant. However, the appellant ought to have been aware of the real situation, and therefore I agree that the appeal should be dismissed with costs.

Kneller JA. On April 27, 1983. the High Court (Schofield J) in Kisumu allowed the appeal of Kenya Tourist Development Corporation (the corporation) from the decision of the Senior Resident Magistrate of Kisumu who gave judgment and consequent orders in favour of Justus Opanyi Orwai (Opanyi).

Opanyi now comes to this court to reverse the High Court orders and restore those of trial magistrate.

Opanyi claimed Kshs 13,000, costs and interest from the corporation ‘for work done to the corporation’, namely, transporting red soil for flower beds to Homa Bay Hotel which had been ordered by its manager, Oluoch. The cost of each trip was Kshs 500 and there were twenty six of them. This is set out in a plaint of June 10, 1981.

Liability was denied by the corporation in a written statement of defence of July 20, 1981 on the grounds that it did not order the soil or receive it. Opanyi did not reply to this.

On pleadings, therefore, there were two issues for the magistrate to resolve. First did the corporation order the soil from Opanyi? Secondly, if so, did the corporation receive it?

The magistrate recorded evidence from Opanyi, a Homa Bay hotelier with a seven-and-a-half-tonne Isuzu lorry, Odero, its driver, Agudha, its turnboy and the corporation’s chief technical officer, Njoroge.Both courts made no finding on the credibility of these witnesses but from the tenor of the judgements and their results it seems as if they found they were all speaking the truth as they knew it.The magistrate found the corporation, in effect, ordered the soil from Opanyi whereas the judge came to the conclusion it did not do so. Both found the corporation received the soil.

How did they reach these different results? The evidence was this. Opanyi proved on the balance of probabilities Oluoch ordered from him in February or March 1979 twenty six loads of this soil from Ndhiwa at Kshs 500 a load which he and his staff delivered to the hotel and Oluoch signed the relevant delivery notes. Opanyi asked for payment and Oluoch told him to ask the corporation for it. When he did this, the corporation asked him to supply a copy of “the company’s” local purchase order or requisition order and delivery certificate which he could not because he was never supplied with one. Instead, he sent a photocopy of the delivery notes and invoices which were rejected as inadequate by the corporation because, among other things, they were unclear. Threatened with litigation, the corporation maintained its denial of the claim in the absence of ‘relevant document’ in support of it and added that Oluoch would not answer its letters, his successor could not find any documents relating to Opanyi’s claim but had discovered other transporters had been paid for deliveries of red soil ‘to the site’. Two and a half years after Oluoch ordered the soil, Opanyi sued the corporation for payment for it.

Njoroge explained that the hotel is owned by Homa Bay Hotels Limited in which the corporation has

shares. It was built with funds contributed by the corporation and the Homa Bay Urban and County Councils. Another company, African Tours and Hotels Limited, managed the hotel and employed Oluoch and his successor. The corporation does not own African Tours and Hotels Limited. None of these people or companies was an agent of the Corporation.

Out of this, the magistrate found Opanyi supplied the soil to the site of the hotel as part of the corporation's contribution to its erection and development. It was ordered by the corporation's agent, Oluoch, with its authority or when he was acting within its scope. The corporation did not for 21/2 years deny outright its liability and indeed paid two other transporters for the soil or other deliveries.

The learned judge, on the other hand, having found Opanyi delivered the soil to the hotel on the orders of Oluoch found no evidence that the corporation was liable to pay for it. It did not hold out Oluoch as its agent and he was not his servant so it could not and did not ratify what he said or did. It was not bound by his representation(s). It was not liable for any breach of contract by Homa Bay Hotels Limited because it was a shareholder in the corporation. Homa Bay Hotels Limited did not employ Oluoch.

It has been submitted in this court that by not repudiating Oluoch's order and instead telling Opanyi it was trying to find documents verifying Opanyi's claim and trying to persuade Oluoch to help, the corporation accepted Oluoch as its authorized agent to make this contract or subsequently ratified what he had done.

The answer is, first the agency was not specifically pleaded and the plaint was drawn by Opanyi's advocate. So it was not an issue. Secondly, even if it were, the contract was an oral one and because Oluoch did not give evidence it is not known why, later, he told Opanyi to look to the corporation for remuneration. Supposing he intended to act for the corporation? It would be an undisclosed principle and he could only effectively act within the scope of his actual authority (per Lord Davey in *Keighley Maxsted & Co v Durant* [1901] AC 240, 256 (HL) which was not proved. Nor was any implied authority or agency of necessity proved.

Therefore, in my view, the learned judge's orders were right and should be upheld.

As Hancox JA and Platt Ag JA agree the appeal must be dismissed and it is so ordered.

Platt Ag JA. I agree that the costs should follow the event. So it is ordered that the respondent will owe the costs of this appeal.

Dated and Delivered at Kisumu this 8th day of December 1983.

A.A.KNELLER

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JUDGE OF APPEAL

A.R.W.HANCOX

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JUDGE OF APPEAL

Z.R.CHESONI

.....

AG.JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR