



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 218 OF 2015

ARAFCO AGRICULTURAL INTERGRATION

COMPANY LIMITED.....PLAINTIFF

=VERSUS=

HASSAN BABAKAR OSMAN.....DEFENDANT

R U L I N G

Introduction

1. This file is replete with Applications and Affidavits.
2. The first Application that was filed by the Plaintiff is dated 19th November 2015.
3. In the Application, the Plaintiff is seeking for the following orders;

(a) That there be a temporary injunction restraining the Defendant whether by himself, his agents, employees and/or servants from leasing, cultivating, entering into any dealings with third parties and/or interfering with the Plaintiff's quiet and peaceful enjoyment and possession of the property known as Title Number Galana Ranch/Block 1/1 situated in Malindi pending the hearing and determination of the suit.

(b) That the costs be provided for.

4. When the Application came up for hearing at the ex-parte stage, the court granted to the Plaintiff interim orders of injunction. Those orders necessitated the filing of the Application dated 21st January, 2016 in which the Defendant sought for the following orders:-

(a) That this Honourable court be pleased to discharge, or vary, or set aside the orders of the 3rd December 2015 in as far as they relate to Title Number Galana Ranch/Block1/1 and specifically the resultant suit company which is the Plaintiff/Respondent herein pending the hearing interpartes of the application dated 19th November, 2015 or further orders of this Honourable Court.

(b) That an order do issue setting aside the decision of the Registrar General of Companies purporting to determine the lawful shareholders and

Directors of the Respondent/Plaintiff company contained in their CR 12 Form referenced CPR/2010/27780 dated 1st July, 2014 referred to in the Plaintiff/Respondent supporting affidavit as “NAM-3” and as requested and supplied to the Applicant/Defendant advocated dated 20th January, 2016.

(c) THAT this Honourable Court be pleased to issue such orders and or directions it may deem just in the interest of justice.

(d) THAT costs be borne by the Respondent.

5. While the matter was pending for Ruling on the above two Applications, the Defendant filed another Application dated 21st March, 2016 in which the court temporarily stayed the earlier orders of injunction.
6. The Plaintiff then filed another Application dated 31st March, 2016 in which it sought to stay the orders that were granted to the Defendant at the ex-parte stage.
7. The parties agreed to have all the Applications argued once.

The Plaintiff's case:

8. The Managing Director of Milestone Developers Limited who also doubles as the Plaintiff's Director deponed that Milestone Developers Limited is a majority shareholder of the Plaintiff; that the Plaintiff through a lease dated 28th September, 2010 leased 100,000 acres of land from the Agricultural Development Corporation for 16 years with effect from 3rd September, 2010 and that the Plaintiff agreed to partner with Sultan Bin Nassir Bin Abdulaziz Al-Said (Sultan) to initiate a project on the land.
9. It is the Plaintiff's case that the Sultan was to make certain financial commitments towards the projects and that the parties transferred shares to the Sultan on condition that he makes the financial commitments within 90 days from the date of execution of the MOU.
10. According to the Plaintiff's director, the Defendant executed the MOU and an agreement as a holder of a Power of Attorney on behalf of the Sultan; that in the event the Sultan failed to meet his financial commitments, he was to loose interest in the suit property and that the Defendant does not have any interests in the suit property.
11. Mr. Mohamedulmin Mohamed deponed that he is a former shareholder and founder of the Plaintiff; that the Sultan was given 90% of the shares because his representative, the Defendant, promised to inject a sum of 216,000,000 USD for a sugar project in the land and that the Defendant agreed to reimburse Mr. Nuh for the payment he was to make to secure the suit property.
12. When the Respondent was unable to raise the required amount, Mr. Mohamedulamin deponed that they brought on board the Plaintiff's director (Mr. Nuh).
13. It is the deposition of Mr. Mohammedulamin that the Board resolved to open an account with Equity Bank where all funds were to be channeled to the Company's account.
14. According to the deponent, he resigned from the company after the MOU was signed by the Defendant in his presence.
15. According to the deponent, they also instructed their lawyer to prepare a post-dated letter of resignation, affidavits and transfer documents which were signed by the Defendant so that in the event the Defendant defaults, the same would be lodged at the company's registry.
16. Another Director of Milestone Developers Limited, Mr. Noor ahmed Noor deponed that he was present when Mr. Nuh, Mohamed Hirei Bare, Mohamudulamin and the Defendant signed the MOU and agreement dated 3rd August, 2010 before a lawyer; that Mr. Nuh was supposed to transfer 25 shares to him and that he was present when Kigen advocate was instructed to prepare a post-dated letter of resignation, affidavit and transfer documents which were to be lodged with the Company Registry in the event that the Defendant defaulted in his promise to inject money in the project.
17. Another former shareholder of the Plaintiff, Mr. Mohamed, deponed that in the year 2010, him, together with the Defendant, who posed as a representative of the Sultan, Mohamed Koriow Nur

- and Mohamadulamin incorporated the Plaintiff.
18. According to Mr. Mohamed, the Sultan was given 900 shares because the Defendant promised that the Sultan will inject in the project a sum of 216,000,000 USD; that Mr. Nur was to make payments for securing the land and that the Defendant agreed to reimburse Mr. Nur on behalf of the Sultan the money he was to use to secure the land.
 19. The deponent stated that later on, they brought on board Mr. Nuh Abdulwahab who was to facilitate the acquisition of the land. That is when the agreement and MOU of 3rd August, 2010 was drawn by Mr. Kigen advocate.
 20. When the Defendant failed to honour his bargain, it was deposed that the Company's Board resolved to lodge the earlier documents of resignation by the Defendant from the Plaintiff's company at the Company's Registry.
 21. Mr. Mohamed deposed that he resigned from the company in the year 2014 after transferring his 10 shares to Rasmicon Construction.
 22. In his Further Affidavit, Mr. Nuh, the Plaintiff's director, deposed that he was approached in July 2010 by Mr. Mohamadulamin and Mr. Mohamed to get for them 100,000 acres of agricultural land for investment of a sugar project by the Sultan; that he was to be paid a sum of 300,000 USD by the Defendant on behalf of the Sultan within 90 days and that he was to be given 6% of the Company's share whose capital was to be 216,000,000 USD that was to be injected in the company by the Sultan.
 23. According to Mr. Nuh, all the founding Directors of the Plaintiff informed him that the Sultan was given 90% of the shares on the promise by the Defendant that he was to inject in the project 216,000,000 USD. That is when the agreement of 3rd August 2010 and MOU of the same day was done.
 24. According to Mr. Nuh, all his co-directors in Milestone Developers were present during the signing of the documents and that on 20th August 2010, he paid from his personal account Kshs.2,000,000 being the initial deposit for the land.
 25. Mr. Nuh denied that the Defendant has undertaken an investment worth millions of dollars in the suit property since no funds have been remitted to the company.

The Defendant's case:

26. In his Replying Affidavit, the Defendant deposed that he is a Saudi Arabia national and the legal nominee and appointee of the majority shareholder of the Plaintiff, the Sultan.
27. The Defendant deposed that he is the one who prepared the Memorandum and Articles of Association and executed it on behalf of his Highness Royal Prince of the Kingdom of Saudi Arabia (the Sultan).
28. According to the Defendant, the Sultan's shareholding in the Plaintiff's company is 90%.
29. The Defendant deposed that Milestone Developers Limited, in which Mr. Nuh is the majority shareholder, is not a majority shareholder of the Plaintiff; that CR 12 exhibited by the Plaintiff is a subject of police investigations as it is a forgery and that it is him who leased the 100,000 acres from ADC and not Mr. Nuh.
30. The Defendant deposed that it is him who has been paying rent to ADC regularly.
31. According to the Defendant, they had a gentleman's agreement in the form of a Memorandum of Understanding (MOU) in which the Sultan agreed to give Mr. Nuh Abdulwahab 60 shares on condition that he pays USD 300,000 within 90 days from the date of execution of the MOU which he failed to do.
32. It is the Defendant's deposition that Mr. Nuh put his own terms in the MOU; that the exhibited CR 12 is unknown to him and that the orders being sought by the Plaintiff should not be granted.
33. According to the Defendant, everything that is on the ground belongs to the Sultan; that the orders that were issued by the court to him on 21st March, 2016 were meant to confirm the lis pendense rules and that Mr. Nuh has been defaming him by writing letters to the Director of Criminal Investigations.
34. The Defendant has deposed that at the time he incorporated the Plaintiff's company, the Sultan had 90% shares while Mr. Mohamed Koriow Nur, Mohamadul Amin Mohamud Ali and Mohamed Hirie Bare Ahmed had 6%, 3% and 1% shares respectively.

Submissions:

35. The Plaintiff's counsel submitted that although the Defendant promised to inject money in the Plaintiff's project and to refund Mr. Nuh USD 300,000, which was the condition precedent for allocating the Sultan 900 shares, no deposits have been made by the Defendant in the company's account.
36. Counsel submitted that it was a fundamental term of the agreement and the MOU that in the event of a breach of the agreement, the Sultan was to lose interest in the suit property and his shares were to be transferred back to the other Directors after the Defendant signed the undated transfer document.
37. Counsel submitted that Mr. Nuh secured land as agreed and made all the requisite deposits and that it is Mr. Nuh who executed the lease with ADC after the first one expired.
38. Consequently, it was submitted, the Defendant does not have a right to interfere with the Plaintiff's peaceful and quiet enjoyment of the suit property.
39. In his submissions, the Defendant's advocate raised a preliminary objection to the effect that the Plaintiff's advocate cannot act for the Plaintiff in this matter because he had previously acted for the Defendant; that the Plaintiff's advocate drew the contentious MOU and all the documents that the Plaintiff is relying on and that the advocate is guilty of being in possession of confidential information which he is using to the detriment of the Defendant.
40. The Defendant's advocate submitted that this matter was filed after the Applicant forged the transfer of form of shares; that the signature of the Respondent was forged and that the Applicant has not established a prima facie case with chances of success.

Analysis and findings:

41. Although there are numerous Applications before the court, the only issue that I am supposed to determine is whether, prima facie, Mr. Nuh Abdulwahab Mohamed has the majority shareholding in the Plaintiff's company and whether an order of injunction should issue restraining the Defendant from interfering with the Plaintiff's quiet and peaceful enjoyment and possession of parcel of land known as Galana Ranch Block 1/1 (the suit property).
42. Although the Defendant's counsel has raised in his submissions a preliminary objection on the ground that Mr. Kigen, the Plaintiff's advocate, should not be allowed to represent the Applicant, the said objection was not argued before me.
43. Indeed, the Defendant's counsel did not file a Notice of Preliminary Objection intimating that he shall object to the appearance of Mr. Kigen advocate in this matter.
44. A Preliminary Objection, like the one raised by the Defendant's advocate, cannot be raised in submissions considering that the court has to hear the other party on the objection.
45. In the absence of a notice by the Defendant to the Plaintiff on the Preliminary Objection raised in his submissions, and in view of the fact that the Plaintiff was entitled to respond to the objection, I shall not consider that issue in this Ruling.
46. The Plaintiff herein was incorporated on 17th September, 2010.
47. According to the Memorandum and Articles of Association of the Plaintiff, Sultan Bin Nasser Bin Abdul Aziz -Saud (the Sultan) held 900 shares of the 1,000 shares in the Plaintiff's company. The Defendant signed the Memorandum and Articles of Association on behalf of the Sultan on 13th July 2010.
48. The Plaintiff's other shareholders as at the time of incorporating the Plaintiff were Mohamed Koriow Nur (60 shares), Mohamadulmin Mohamed Ali (30 shares) and Mohamed Hirei Bare Ahmed (10 shares).
49. The main objective of the company was to carry out the business of general farming, exporters, importers and dealing in fresh farm produce.
50. It is the deposition of Mr. Nuh Abdulwahib (Mr. Nuh) that in July, 2010. Mr. Mohamedulamin and Mohamed Hirei Bare approached him in his office and requested him to get for them 100,000 acres of agricultural land for investment of a sugar project by the Sultan.
51. Later on, the two took the Defendant to his office who introduced himself as a representative of the Sultan.
52. According to Mr. Nuh, the three individuals informed him that upon securing the land for them,

- he was to be paid a flat sum of 300,000 USD by the Sultan within 90 days and in addition, he was to be allocated 6% of the shareholding in the Company, whose capital was going to be 216,000,000 USD. The 216,000,000 USD was to be injected in the company by the Sultan.
53. Because the Sultan was to be allocated 90% of the shareholding in the company, it is the deposition of Mr. Nuh that he agreed to take up the 6% shares that were held by Mr. Mohamed Koriow Nur on condition that the Sultan refunds him his money within 90 days. That is when the agreement and Memorandum of Understanding of 3rd August, 2010 was done.
 54. The Memorandum of Understanding (MOU) and the agreement of 3rd August, 2010 stated that the Sultan was a majority shareholder of the Plaintiff; that Mr. Mohamed Koriow Nur had agreed to transfer his shares (6%) to Mr. Nuh with effect from 26th July, 2010 and that the Defendant was the duly authorised representative of the Sultan vide power of attorney No.54494/1.
 55. The MOU and the agreement further provided that the local partners had agreed to make the Sultan a majority shareholder of the company, that is a holder of 900 shares, in consideration of the Sultan providing 216,000,000 USD needed to carry out the project.
 56. The MOU and the agreement also provided that Mr. Nuh was to acquire the land and the Sultan was to refund him a flat figure of 300,000 USD within 90 days from the date of execution of the agreement.
 57. The MOU and the agreement further provided that if the Sultan failed to honour the obligations in the agreement and the MOU, he was to lose interest in the land and the land was to exclusively vest in the local partner, Mr. Nuh.
 58. That agreement, according to the depositions of Mr. Nur, Mr. Mohamed Hirei, Mr. Mohamedulamin Mohamed and Mr. Noor Ahmed Noor was signed by all of them (except Mr. Noor Ahmed Noor) in the presence of Robinson C. Kigen Advocate.
 59. The advocate who witnessed the signing of the agreement signed a certificate in which he stated that he was present when the Defendant and Mr. Nuh, Mr. Mohamedulamin and Mr. Mohamed Hirei signed the MOU and the agreement of 3rd August, 2010.
 60. A lease agreement that was entered into between Agricultural Development Corporation (ADC) and the Plaintiff in respect to Galana Ranch/Block 1/1 shows that ADC leased 100,000 acres to the Plaintiff for a period of 16 years commencing 3rd September, 2010.
 61. The rent payable was Kshs.200 per acre leased per annum. The rent was to increase by 10% after every five years. The Plaintiff was required to pay Kshs.4 million in the second year being the rent for 20,000 acres that was to be utilised in that period.
 62. The lease document was signed by the Defendant, on behalf of the Sultan and Mr. Nuh. The two signed the lease for and behalf of the Plaintiff. The lease further stated that Mr. Nuh was the Plaintiff's Managing Director.
 63. Mr. Nuh has produced evidence to show that he paid a sum of Kshs.2,000,000 via RTGS from his personal account being the initial deposit for the first year rent to ADC. That payment was the condition that ADC had set before the Lease could be signed.
 64. Mr. Nuh has also exhibited evidence to show the payment he made of Ksh.430,800 from his company, Milestone Developers Limited, to ADC's lawyers on 18th October, 2010 in respect to the drawing of the lease.
 65. According to Mr. Nuh, he sublet his offices located at Town House, 7th Floor, Kaunda Street in Nairobi on the assumption that he was to recover the rent and service charge of Kshs.250,000 per month from the Sultan.
 66. The Plaintiff's case is that while entering into the MOU and the agreement of 3rd August, 2010, the Defendant signed undated transfer documents resigning from the Plaintiff in the event the Sultan does not meet his part of the bargain. Those are the documents that were lodged at the company registry after the Sultan failed to inject any money in the project.
 67. The evidence before me shows that the Defendant first signed the Lease dated 28th September, 2010 on behalf of the Sultan.
 68. The evidence before me also shows that it is Mr. Nuh who paid the initial rent of Kshs.2,000,000 to ADC and the fees for preparing the Lease.
 69. Although the Defendant has refuted the claim that he signed the agreement and the MOU of 3rd August, 2010 in which Mr. Nuh was allowed on board, the Defendant has not explained on which basis Mr. Nuh also signed the Lease of 28th September, 2010 as the Plaintiff's Managing Director.

70. Although the Defendant claim is that he is the one who leased the suit property, there is no evidence before me to show that he paid the rent for the initial Lease either from his personal account or from the Plaintiff's account. It is Mr. Nuh who paid Kshs.2,000,000 being the initial rent and Kshs438,000 being the conveyancing fees. The Defendant's bank statement annexed on his Replying Affidavit does not allude to the payments that he made to ADC for the suit property.
71. The Defendant has admitted in his Affidavit that the Sultan entered into "a gentleman's agreement in the form of a Memorandum of Understanding (MOU)" in which the Sultan agreed to give to Mr. Nuh 60 shares in the company on condition that he pays USD 300,000 within 90 days which he failed to do. According to the Defendant, the the Sultan refunded to Mr. Nuh his money.
72. The Defendant did not produce the MOU he alluded to in his affidavit, leaving the court to prima facie believe that the only Memorandum of Understanding is the one exhibited by the Plaintiff. The Defendant has also not shown by way of evidence the amount of money that was refunded to Mr. Nuh by the Sultan and on which basis.
73. All the initial shareholders, except the Defendant, who signed the Memorandum of Understanding and the Agreement of 3rd August, 2010 have deponed that the Defendant signed those documents in the presence of an advocate.
74. In addition, all the initial shareholders of the Plaintiff have deponed that the Defendant signed the undated Transfer of shares document in which he agreed to resign from the Plaintiff's company in the event the Sultan does not inject in the company the promised 260,000,000 USD .
75. Having gone through the Defendant's Affidavits, there is no evidence that the Defendant, or indeed the Sultan, injected in the Plaintiff's company the stated amount of USD 260,000,000 or at all.
76. Despite the Defendant and the other shareholders opening an account in the name of the Plaintiff with Equity Bank, there is no evidence to show that the Defendant deposited any money in that account.
77. Indeed, according to the letter dated 16th July, 2014 by ADC, the Plaintiff owes ADC rent arrears to the tune of Kshs.14,000,000. If that is the case, which investment has the Defendant or the Sultan made if the Plaintiff owes ADC rent?
78. Mr. Nuh has exhibited on one of his affidavit the second Lease dated 10th September, 2012 that was signed between the Plaintiff and ADC in respect of the suit property. That Lease was signed by Mr. Nuh and Mr. Mohamedulamin on behalf of the Plaintiff. The Defendant was not signatory to the Lease.
79. The evidence before me shows that Mr. Mohamadulamin Mohamud transferred his shares to Milestone Developers in the year 2014 and resigned from the Plaintiff's company, while Mr. Mohamed Hirei transferred his shares to Rasmicon Ltd. In the event that it is proved at the trial that the Defendant resigned from the Plaintiff's, company, the Defendant, prima facie, would have lost any shareholding in the Plaintiff's company.
80. In the absence of evidence to show that the Defendant did not sign the agreement and the Memorandum of Understanding of 3rd August, 2010 and the undated transfer of share documents resigning from the Plaintiff's company, I find and hold that the Plaintiff has established a prima facie case with chances of success.
81. In the circumstances, I allow the Plaintiff's Application dated 19th November 2015 and dismiss the Defendant's Applications dated 21st January, 2016 and 21st March, 2016 with costs.

Dated, signed and delivered in Malindi this **13th** day of **May**, 2016.

O. A. Angote

Judge