



REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT NAIROBI

CORAM: TUNOI, GITHINJI, & WAKI, J.J.A.
CIVIL APPEAL 318 OF 2000

BETWEEN

MOHAMMED ELTAFF.....1ST APPELLANT
SAGA SAFARIS LTD.....2ND APPELLANT
SAGA TRAVEL & SAFARIS A.B.....3RD APPELLANT
TOUR AFRICA SAFARIS LTD.....4TH APPELLANT

AND

DREAM CAMP KENYA LIMITED.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi
(Kasanga Mulwa, J) delivered on 28
th
July, 2000
in
H.C.C.C. NO. 450 OF 1999)

JUDGMENT OF THE COURT

Though the appellants had lodged no less than 16 grounds of appeal, their counsel Mr. *Gautama*, abandoned all other grounds of appeal contained in the Memorandum of appeal and the Amended Memorandum of Appeal and focused his submission before us on the alleged defects in the judgment and the resultant decree which he contended were bad in law for failing to comply with the mandatory provisions of **Order 20 Rules 4 and 5** of the Civil Procedure Rules.

The genesis of the dispute giving rise to this appeal is contained in the plaint lodged in the superior court on 21st April, 1999. It is averred that at all material times the 1st appellant was a shareholder and director in the 2nd, 3rd, 4th appellants and the respondent companies. By an Agreement dated 19th December, 1997, the 2nd appellant sold to the respondent a tourist business known as **Big Simba Camp** together with the remainder of the lease over Title Number **CIS MARA/TALEK/153**, plus the goodwill and all assets specified in the said Agreement. It was a further term of the Agreement that the 2nd appellant would retain 10% proprietary interest in the business venture but the interest would not create an obligation on the 2nd appellant to inject any venture capital nor would the injection of any venture

capital in the business by any party dilute the measure of the 2nd appellant's interest in the business. Pursuant to the agreed terms the parties signed a Memorandum of Understanding simultaneously with the Agreement by which the 2nd and 3rd appellants were appointed as agents of the respondent in Kenya and Sweden.

It was the appellants' case that the respondent, in breach of the Memorandum of Understanding, terminated the agencies and sought to compel the 1st appellant to resign as a director of the respondent and has by devious and illegal means sought to compulsorily acquire his shares and inherit the company.

The appellants sought reliefs, inter alia, for general damages against the respondent for breach of contract; an order for specific performance to compel the respondent to transfer 10% of the shares of the respondent to the 2nd appellant; a declaration that the attempt by the respondent to compulsorily acquire the appellants' shares is unlawful; an injunction to restrain the respondent from disposing the business (**Big Simba Camp**) and damages for detinue and conversion.

The respondent in its defence filed on 14th May, 1999, denied generally all the averments made in the plaint and counterclaimed. It averred that the 1st appellant was holding office as director illegally as it had breached his fiduciary duty and sought an order that all the appellants, having breached the Agreement of Sale, be restrained from interfering in the business of the respondent and that the 1st appellant be compelled to offer his shares for sale to the other existing shareholders.

The learned Judge in a reserved judgment held that the Memorandum of Understanding was merely a document to express business goodwill between the parties and that it did not amount to a binding contract. He thought that it only expressed a loose understanding of the agreed terms with the intention of reducing it into a legally binding contract in the future.

The learned Judge concluded:-

“It is quite clear that the relationship between the parties has deteriorated to the extent that it may not be possible for the plaintiff to work with the defendant again. The situation is made worse by the fact that the plaintiffs are running competing business to that of the defendant. I note that the Agreement for sale contains an arbitration clause. This dispute would have been best handled through arbitration rather than litigation. For some reasons litigation was preferred to arbitration. I may however observe that where parties have chosen to resolve their dispute through arbitration, the courts will endeavor to give effect to the wishes of the parties. The trend world over is to construe any such agreement in favour of arbitration particularly if the dispute involves parties of different nationalities. It is possible that if this matter had been handled through arbitration the business relationship between the parties could have been saved. The best way out of the existing situation which was made worse by this litigation is that the 1st plaintiff sells his shareholding of 10% to the other existing shareholders of the company at a fair market value to be determined by an arbitrator to be agreed by the parties and if not to be appointed by the court. The plaintiff would then have to relinquish his Directorship in the defendant company.

The existing shareholders will by an ordinary resolution reduce the 1st plaintiff shareholding of the issued shares.”

The synopsis of this judgment is that the 1st appellant is ordered to sell his shareholding of 10% in the respondent company to the other shareholders at a fair market value to be determined by an arbitrator to be agreed upon by the parties and if not to be appointed by the court. The judgment also allowed the counterclaim.

Mr. *Gautama* contended that the judgment suffers from infirmities which are incapable of being cured. He argued that the learned Judge had no jurisdiction to suggest that the best way out of the existing situation was to coerce the parties into arbitration.

Mr. *Gautama* further submitted that the judgment is neither conclusive nor final and at best it is vague and unenforceable and not capable of execution or implementation. He maintained that the judgment is deficient and defective as there is no clear order as regards the counterclaim of the respondent and also any definite order on the issue of “tents”.

Order XX rules 4 and 5 of the Civil Procedure Rules are as follows:-

“4. Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

5. In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue.”

The learned Judge (**at pages 256 and 257 of the record of appeal**) laid out in detail the background of the case, the facts and all other relevant material which led to the suit being instituted. He then summarized the evidence tendered before him by each of the witnesses, both for the appellants and the respondent.

At page 258 of the record the learned Judge listed four issues which were for determination. These were:-

1. Whether the 1st appellant, Mohammed Eltaff, holds B of the shareholdings in Dream Camp;
2. Whether there was a breach of the of Memorandum of Understanding entered into by the parties;
3. Whether the respondent is illegally holding the tents belonging to the appellants; and 4. Whether the appellants are entitled to the prayers sought in the counterclaim.

The judgment the subject matter of this appeal shows ex-facie that the learned Judge applied his mind to all issues presented to him by the rival parties. He answered in detail each and every one of them after giving what, we think, were good reasons. In that onerous task the learned Judge was aided by very elaborate and well researched written submissions by both counsel.

The parties, together with the learned Judge, framed the issues and the record bears him right that he gave his findings on all of them, separately.

It has not been contended before us that the learned Judge failed to consider a material portion of the evidence and in the process skipped determination of a relevant issue. However, we do not think that the learned Judge was bound to discuss in detail the evidence of each and every witness but he would be perfectly right to ignore evidence which is irrelevant to the issues presented before him for determination.

We have anxiously considered the submissions by Mr. *Gautama*. But, with great respect to him, the judgment of *Mulwa, J.* contains points for determination as presented to him by the parties. It is plain, also, that the judgment discussed the evidence, oral and documentary. The conclusion reached thereafter was only after an incisive reasoning.

We hasten to add that though this is not a model judgment it, nevertheless, complies with the mandatory requirements of **Order XX rules 4 and 5**, even though it is brief.

We agree with Mr. *Gautama* that it is indeed a substantial objection to a judgment if it does not dispose of the questions that were presented by the parties for determination by the trial court or that the judgment has left certain issues unresolved. However, on our part we are satisfied that the learned Judge gave his decision consonant with **rule 5 of Order XX**. The decision on each issue was based on reason.

In the result, we find no merit in the grounds of appeal argued before us and as the other grounds of appeal listed in the Memorandum of Appeal and those added by way of Amended Memorandum of

Appeal were abandoned, the entire appeal is accordingly hereby dismissed with costs to the respondent.
We so order.

DATED and DELIVERED at NAIROBI this 14th day of October, 2005.

P.K. TUNOI

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR