



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 167 OF 2011

TITOVIS REAL ESTATE LIMITED.....PLAINTIFF

VERSUS

FESTUS MUTUNGADEFENDANT

JUDGMENT

1 This is a case that pits two directors against one director of the plaintiff company TITTOVIS REAL ESTGATE LIMITED.

2 The two directors, Peter Alexander Visser(Peter) and Florence Kyulani (Florence) in a board meeting held on 11th March 2011 of the plaintiff company resolved to remove Festus Mutunga (Mutunga) as director of the plaintiff company.

3 This suit filed by the plaintiff company against Mutunga is for the following prayers:

* An injunction restraining the defendant (Mutunga) from in any way whatsoever and howsoever acting as a director of the plaintiff and/or holding himself out as a director, officer or agent of the plaintiff;

* A declaration that the defendant (Mutunga) is no longer a director of the plaintiff;

* Account for rent collected between 2008 and March 2011 from the plaintiff's premise erected on Plot No. MN/111/4348/3.

4 The plaintiff company was registered on 7th April 2005. The founding members/subscribers of the company were Peter and Kyalo Muli (deceased) Peter held 7 shares while Kyalo Muli (deceased) held 3 shares.

5 Although Mutunga accepts that the above shareholding was as stated above he stated in evidence that he was a director from inception of the plaintiff company.

PLAINTIFF'S EVIDENCE.

6 According to the evidence of peter and Florence the directors of the plaintiff changed after the death of Kyalo Muli (deceased) on or about the 28th September 2008. This is reflected in the plaintiff's letter dated 28th October 2008 authored by Peter. This letter was addressed to the Registrar of companies and informed the said registrar of the death of Kyalo Muli (deceased) and the appointment of

Florence as a director.

7 The Registrar by his letter dated 18th December 2008 gave details of the plaintiff's record as follows;

THE COMPANIES ACT (Cap 486)

RE: TITTOVIS REAL ESTATE LIMITED.

Refer to your letter dated December 17th 2008.

According to the records relating to the above company held by this Registry as to December 18th, 2008 the name of directors/shareholders of the above company with their particulars are as follows;

Names	Address	Nationality	Shares
Festus Mutunga	P.O. Box 10059, Mombasa	Kenyan	Nil
Peter alexander	P.O. Box 10059, Mombasa	Kenyan	7
Florence Kyulani	P.O. Box 10059, Mombasa	Kenyan	Nil
	Non Director shareholder		
Kyalo Muli	P.O. Box 10059, Mombasa	Kenyan	3
	Total		10

The nominal share capital of the company is Ksh 100,000 divided into 1000 ordinary shares of Ksh 100 each.

8 Mutunga was appointed a managing director without shares. In that position he was to collect the rental income of the plaintiff of the property registered in the plaintiff's name situated in Mtwapa Mombasa. Peter in evidence stated that Mutunga was given that responsibility because of the trust he had in him. He stated that he and Mutunga knew each other from their childhood, Peter being 11 years old when they got to know each other. Because of that friendship Mutunga was his best man at his wedding.

9 When Mutunga began to manage the plaintiff's company the plaintiff's rental income was being banked at Barclays Bank of Kenya. That however, since the year 2008 Mutunga only banked rent into that account once.

10 Mutunga without the authority of the plaintiff's board of directors opened another account at Family Bank where both he and Florence were signatories. Mutunga later however changed the mandate of the bank making himself that sole signatory. As a consequence Peter and Florence testified that Mutunga had failed to account for Ksh 4,132,000.

11 That it was due to that failure to account for the said rental income that the other two directors resolved to remove Mutunga from the board of directors. That even though Mutunga was informed of the board's resolution he continued to represent himself to the public and particularly the plaintiff's

tenants as a director of the plaintiff. It is because of those acts that the board resolved to file this present case.

12 Evidence was also adduced by Peter to the effect that Mutunga has, after his removal from the plaintiff's board of directors, obtained a falsified letter from the Registrar of companies dated 19th April 2011 which reflected the shareholding as follows.

RE:TITTOVIS REAL ESTATES LIMITED.

I refer to your letter dated 18th April 2011.

According to the records relating to the above company held by the Registry as at 19th April 2011 the names of directors/shareholders of the above company with their particulars are as follows:

Names	Address	Nationality	Shares
Festus Mutunga	P.o. Box 98291-80100 Mbs	Kenyan	600
Peter Alexander	P.o. Box 98291-80100 Mbs	Kenyan	7
Esther Nzami	P.o. Box 98291-80100 Mbs	Kenyan	100
	Non director shareholder		
Estate of Kyalo Mulie	P.o. Box 98291-80100 Mbs	Kenyan	3
		Total	710

The nominal share capital of the companies is Ksh 100,000 divided into 1,000 ordinary shares of ksh 100

DEFENDANT'S EVIDENCE.

13 Mutunga began by stating that it was he who pursued that reservation of the plaintiff company name before its registration. He referred to the registrar of company's letter dated 19th April 2011, reproduced in the previous paragraph, which he stated showed he was the majority shareholder of the plaintiff. Indeed he referred to himself as the legitimate founder of the plaintiff company.

14 That the plaintiff owns a property in Mtwapa, Mombasa and was also engaged in real estate business.

15 Mutunga confirmed that it was in his capacity as a director of the plaintiff that he received plaintiff's rental income.

16 On being cross examined by learned counsel for the plaintiff Mutunga accepted that the Memorandum and Articles of the plaintiff reflected that the initial directors/shareholders were Peter and Kyalo Muli (deceased). Mutunga was unable to show minutes of any meeting which allotted him shares of Plaintiff Company. He further stated that he allotted himself the 600 shares and also allotted 100 shares to Esther Nzami.

17 Mutunga made admission, while being cross examined of his receipt of rental income of the plaintiff of Ksh 4,032,000 which he had not accounted for. That rental income, according to Mutunga was used by the plaintiff company.

ANALYSIS.

18 The following issues are borne out of the pleadings before court:

a) was Mutunga a director of the plaintiff company in charge of the plaintiff's operations"

b) if the answer to (a) is in the affirmative did Mutunga fail to account to the plaintiff for the income earned"

c) did the plaintiff's board of directors resolve to remove Mutunga as a director of the plaintiff company"

d) if the answer to (c) is in the affirmative did Mutunga despite that resolution continued to act as director of the plaintiff company"

e) is the plaintiff entitled to the orders of injunction and for account as prayed"

ISSUE (a)

19 Even though Mutunga through his defence denied that he was a director of the plaintiff who was in charge of plaintiff's operation his evidence before court was contrary to that defence. He confirmed in his evidence that he was director of the plaintiff and even stated that he was founding director. He also confirmed that he had received rent on behalf of the plaintiff.

20 From his evidence there is no doubt that Mutunga was running the operations of plaintiff. Accordingly the issue (a) is in the affirmative.

ISSUE (b)

21 Mutunga in evidence under cross examination acknowledged receipt of Ksh 4,032,000 being plaintiff's rental income. He was however unable to prove how this amount had been utilized by the plaintiff company.

22 In my view having failed to prove that the plaintiff in anyway utilized that amount Mutunga is liable to have judgment entered against him for that amount.

ISSUE (c)

23 On behalf of the plaintiff Peter produced minutes of the meeting of the plaintiff's board of directors held on 11th March 2011 where by the meeting resolved to remove Mutunga as a director of the plaintiff.

24 The plaintiff therefore was able to prove that such a meeting was held and that such a resolution passed.

25 Mutunga in his written submissions has made much "mileage" of this resolution terming it illegal and arguing it was not supported by the provisions of the law. Those submissions however were not

supported by the pleadings before court. That being so, the submissions cannot assist this court in resolving this issue. That holding is in keeping with the decision in the court of appeal in the case **GLOBLA VEHICLE KENYA LIMITED –VS – LENANA ROAD MOTORS (2015)** e KLR where the court considered the purpose of pleadings thus:

Before we consider the issue raised in this appeal, it bears repeating the central role of pleadings in dispute resolution in our jurisdiction. Pleadings serve several fundamental purposes. Firstly, they define the nature and contours of the dispute that the parties have submitted to the court for resolution. Secondly it is through pleadings that the fair hearing that is promised by article 50(1) of the Constitution is actualized. That provision guarantees every person who has a dispute that can be resolved by the application of the law the right to have it decided in a fair and public hearing by a court or independent and impartial tribunal or body. That right to a fair hearing comes alive in pleadings, which make known to each party the exact case it has to prove or rebut.

Thirdly, pleadings contribute immensely to speedy resolution of dispute and cost-efficient delivery of justice. Because pleadings ensure that the dispute is focused and precisely defined, they not only eliminate ambushes and surprises, but also wastage of time and unnecessary expenses involved in calling witnesses to prove or disprove matters that are not in dispute before the court. It can therefore be argued that pleadings also contribute immensely to the realization of that cardinal Constitutional principle that justice shall not be delayed.

Jessel M.R. articulated this view very well in THORP V HOLDSWORTH, (1876) 3 Ch.D, 637 at 739, as follows:

“The whole object of pleadings is to bring the parties to an issue and the meaning of the rules... was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to the definite issues, and thereby to diminish expenses and delay, especially as regards to the amount of testimony required on either side at the hearing.

Lastly pleadings help in keeping the judge, literally, on a short leash because as a neutral umpire, the judge determines only the issues the parties have placed before the court. Without pleadings, the judge may be tempted to determine issues of interest to him or her, which are outside the contemplation of the parties, or to even determine matters that are not in dispute at all.

26 It follows that the discussion Mutunga’s learned counsel engaged in on the legality or otherwise of the resolution to remove Mutunga from the plaintiff’s board of directors, interesting as it may have been, cannot be considered here because it is not borne out by the pleadings before court.

27 It suffices to state that the plaintiff by producing the minute of the meeting of 11th March 2011 proved that a resolution had been passed removing Mutunga as director of the plaintiff.

ISSUE (d)

28 Having found in the affirmative on issue (c) I do also find that Mutunga, despite that resolution of the board, continued to act as the plaintiff’s director.

29 The evidence of Peter and Florence is clear on this. Indeed one got their sense of frustration by the

continue representation by Mutunga that he was still a director of the plaintiff company.

30 If documentary evidence is required to prove this issue I will refer to a letter written by Mutunga undated but received by Theuri Wanjohi Advocates on 23rd August 2011 where Mutunga had this to say:

Dear Sir,

RE: CLARIFICATION.

I was served with the attached suit papers on 17th April 2011 in Mombasa by a one Peter Nzuki with instruction from M/s Alfred Mabaya Advocate.

Upon perusing the said documents I came across your name being a director and a shareholder on my company which information was strange to me and especially being a colleague and advocate of good standing. I felt it's important to get your clarification on the same

I will appreciate your kind response.

Festus Mutunga

Managing Director

Cc. Laichena Mugamib & Co. advocates

Utalii House

NAIROBI

31 The above letter was written by Mutunga on plaintiff's letter head long after he had been informed that he had been removed from plaintiff's board of directors.

32 Furthermore Mutunga was charged with the criminal offence of obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars of the charge was that he obtained house rent of ksh 3,456,000 from the plaintiff company by falsely pretending to be the truthful owner of the plaintiff's plot No 4348/3/11/MN Mtwapa township.

33 It follows that in respect to issue (d) I find it in the affirmative.

ISSUE (e)

34 Having found that Mutunga continued to represent himself as a director of the plaintiff then the prayer for injunction to restrain him from so doing is merited.

35 Mutunga also having admitted that he received Ksh 4,032,000 on behalf of the plaintiff and having failed to account for the same judgment will be entered for the plaintiff for that amount.

CONCLUSION

36 In the end there shall be judgment for the plaintiff as follows:

(a) An injunction is hereby issued restraining Festus Mutunga from holding himself out as a director of the plaintiff or as an officer or agent of the plaintiff.

(b) A declaration is hereby made that Festus Mutunga is no longer a director of the plaintiff.

(c) Judgment is hereby entered in favour of the plaintiff against the Festus Mutnga for Ksh 4,032,000 plus interest until payment in full.

(d) Feustus Mutunga shall pay the plaintiff's costs in this suit.

(e) The rental income paid into court shall be released to the plaintiff's advocate

DATED and DELIVERED at MOMBASA this 24th day of September 2015.

MARY KASANGO

JUDGE

24.9.2015

Coram

Before Justice Mary Kasango

C/Assistant -

For the Plaintiffs:

For the defendants:

Court

Judgment delivered in their presence/absence in open court.

MARY KASANGO

JUDGE



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