REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

CIVIL APPEAL NO. 179 OF 2012

NATHANIEL KIPKORIR TUM..... APPELLANT

VERSUS

INSPECTOR OF STATE CORPORATIONS ..... RESPONDENT

(BEING AN APPEAL FROM THE DECIISON OF STATE CORPORATIONS APPEAL TRIBUNAL DELIVERED ON THE 13TH MARCH, 2012 IN THE STATE CORPORATIONS APPEAL TRIBUNAL NO. 133 OF 2010)

J U D G M E N T

1. Nathaniel Kipkorir Tum, the Appellant was appointed in or about 1985 as the Managing Director of a state corporation known as Kenya Seed Company Limited (hereinafter "KSC"). He held that position until 2003 when he was removed therefrom. Upon his removal, an in-depth audit was carried out in the said corporation whereby it was found that a sum of Kshs.21,198,028/= had been paid to a company known as Soet (K) Limited in 2001 for alleged delivery of seed maize variety No.H9401 to KSC.
2. Pursuant thereto on 23rd February, 2010, the Respondent, the Inspector of State Corporations issued the Appellant with a Certificate of Surcharge surcharging the Appellant with the aforesaid sum of Kshs.21,198,028/-. In the said Certificate, the Respondent contended that the Appellant as the Managing Director of the KSC had caused a loss of the said sum to the company by authorizing the payment of the said sum to Soet (K) Ltd. The Respondent therefore demanded the payment of the said sum within thirty (30) days.
3. Aggrieved by that decision, the Appellant appealed to the State Corporation Appeals Tribunal against that decision. The Appellant contended that the Respondent did not have jurisdiction to surcharge him as the KSC was not a state corporation and he had not been given a hearing; that the decision to surcharge the Appellant after 11 years was malicious; in the circumstances that there was no basis for the surcharge and that the Respondent's action was unjust and bad in law.
4. The Appeal was contested by the Respondent and by a judgment delivered on 13th March, 2012, the Tribunal dismissed the Appeal and held that; the KSC was a state corporation within the

provisions of the State Corporations Act Cap 446 Laws of Kenya (hereinafter "the Act"), that the surcharge against the Appellant was lawful and there was no malice on the part of the Respondent in surcharging the Appellant. Finally the Tribunal made a finding that the facts giving rise to the surcharge had not been sufficiently challenged and therefore dismissed the Appeal.

5. Aggrieved by that decision the Appellant has appealed to this court setting out 18 grounds of appeal in his memorandum. Those can be summarized to four; that the Tribunal was in error in holding that the Appellant was lawfully surcharged for having authorized the payments; that the Tribunal's decision was erroneously based on hearsay and unreliable evidence; that the Tribunal failed to consider the evidence given in favour of the Appellant; that the Tribunal erred in censuring the Appellant for failing to testify before it; that the Tribunals decision is against the weight of evidence and is unlawful.
6. This Appeal was determined by way of written submissions which Mr. Yano and Mr. Swanya, Learned Counsels for the Appellant and Respondent, respectively ably hi-lighted. It was submitted on behalf of the Appellant that the evidence on record disclosed that the Appellant did not give any instructions for the subject payment; that the vouchers that were produced before the Tribunal did not have the Appellants signature; that the audited accounts by the internal and external auditors for 2001 – 2003 did not disclose any loss for KSC; that the tribunal relied on investigations carried by a biased person, RW1; that the evidence of officers from KEPHIS which was relied on by the Tribunal was of less probative value as opposed to the evidence of RW3, RW4, RW8 and AW1 and AW2.
7. It was further submitted for the Appellant that the Tribunal failed to consider the evidence on record that showed that Soet (K) Ltd was a seed grower in its own right and that the payment of Kshs.21,198,028/- was justifiable; that there was a difference between seed grower and seed growing fields or farms which the Tribunal failed to appreciate. The Appellant further complained that the Tribunal erred in holding that he had failed to appear and clarify the relationship between the company known as Soet (K) Ltd and KSC; that the Tribunal failed to consider the explanation given for the alterations to the weighbridge vouchers; that the tribunal engaged in irrelevant issues of floatation of shares instead of the justification of the surcharge and that the judgment of the Tribunal was bad in law.
8. The Respondent opposed the appeal and contended that the appeal was res-judicata as there were several proceedings lodged by the Appellant against the same issue, to wit, **Kitale H.C Misc Civil Appl. No. 1 of 2004 and Eldoret Civil Appeal NO.137 of 2005** wherein the matter had been determined against the Appellant. Learned Counsel for the Respondent submitted that Section 19 of the State Corporations Act, Cap 446, empowers the Respondent to surcharge an officer who misappropriated or caused loss of public funds after giving the officer an opportunity to be heard. That the surcharge of Kshs.21,198,028/= on the Appellant was justified as it was loss of public funds paid over to Soet (K) Ltd a company in which the Appellant was a majority shareholder.
9. It was further submitted for the Respondent that the evidence before the tribunal justified the upholding of the surcharge under Section 19 of the Act; that since the Appellant was the overall in-charge, accountable and responsible for the company's operations and financial resources, the Appellant must have been aware about the payment of Kshs.21,198,028/- to a company he had a controlling shareholding; that the Tribunal was right in finding that the KSC was a State Corporation in terms of the decisions of the High Court and Court of Appeal.
10. It was further submitted that Soet (K) Ltd was the Appellant's own company; that Soet (K) Ltd was paid for seeds for which it was not a registered grower; to wit, H9401,which had been grown in KSC's. Farm; that the payments was based on altered documents. It was argued that while the Respondent brought witnesses from the KSC the Appellant brought witnesses from outside. That the basis of the Appellants appeal was that the surcharge was wrong because KSC was not

a state corporation but a private company; that since the issue had been conclusively determined by the courts, the appeal herein was res-judicata. Counsel for the Respondent therefore urged that the appeal be dismissed with costs.

11. Although this is a second appeal, since it is at the Tribunal that for the first time evidence was presented through testimony, I believe that it behoves this court to re evaluate and analyse the evidence afresh and come to its own independent findings and conclusions. (See the case of ***Selle v. Associated Motor Boat Co. Ltd 1968 E.A 123***. However, in so doing this court must bear in mind that it did not have the advantage of seeing the witnesses testify to gauge their demeanor.
12. The evidence before the tribunal was that the Appellant was the Managing Director of KSC at the material time the loss is alleged to have occurred; that KEPHIS which is an organization that certifies and inspects the growing of seed did not register Soet (K) Ltd as a seed grower for seed type H9401 for the 2001 – 2002 growing season; that an entity belonging to KSC by the name Elgon Downs Farm leased some land from Gatatha Farmers Company in the 2001 – 2002 season where seed type H9401 was grown. Between October and November 2001 deliveries of seed type H9401 were made to KSC from the said farm/field. The Weighbridge Ticket Vouchers that were computer generated showed the supplier to be Elgon Downs Gatatha Endebes but were later altered to read Soet (K) Ltd. Consequently the said Soet (K) Ltd in which the Appellant was a majority shareholder was paid for the said deliveries. The Appellant was removed from office in 2003 and an Audit investigation carried out on KSC in 2004 concluded that the payment of Kshs.21,198,028/= to Soet (K) Ltd was irregular. It is on this basis that the Appellant was surcharged with the said sum on 23rd February, 2010 vide Certificate of Surcharge No.133 of even date.
13. It would seem and quite correctly so, that Appellant abandoned his contention before the Tribunal that KSC was not a state corporation. This is after both the High Court and the Court of Appeal had made firm findings to that effect. The Respondent argued that on that basis, this appeal is res-judicata. A close look at the appeal to the Tribunal will show that, the legal position of KSC was not the only basis that the Appellant challenged the surcharge. Ground Nos. 3, 7, 8, 10 and 12 of the Memorandum of Appeal dated 18th March, 2010 that was lodged before the Tribunal were the ones that were amplified in the Appeal before this court. In this regard, the plea of res-judicata does not arise in that, the issues raised in this appeal were first raised before the Tribunal and its decision thereon is appellable to this court under Section 23 of the Act. Those issues had not been the subject of the High Court and Court of Appeal decisions referred to by the Respondent. The plea of Res Judicata therefore fails.
14. The first issue for determination is the Appellant's complaint that the Tribunal was in error in censoring him for failing to attend and testify before it. It was submitted on the Appellants behalf that the evidence the tribunal sought the Appellants to clarify was on the issue of the relationship between Soet (K) Ltd and KSC was before it and the Appellant's attendance was unnecessary. From the evidence on record, it was clear that Soet (K) Ltd was registered by KSC as a grower of some type of seed. Through the testimonies of AW1 and AW2, RW3, RW4 and RW8 the relationship between Soet (K) Ltd and KSC and how the subject payments were made was clarified. I do not think that there was any reason why the Appellant was to testify on the said relationship yet there was sufficient evidence on record on that fact. I have always known the law to be that unlike in criminal cases, it is not mandatory in civil cases for a party to testify personally. He can prove his case through acceptable direct evidence of witnesses other than himself. **See the case of Juliae ULRKe Stamm Vs Tiwi Beach Hotel Ltd (1998) eKLR.** The censor in my view was unfortunate and unwarranted.
15. The next issue is the complaint that the Tribunal failed to consider the evidence in favour of the Appellant and that the Tribunal relied on the evidence of KEPHIS witnesses which was unreliable and hearsay. From its judgment, the Tribunal made findings that by investigations carried out by

the Respondent, KSC through Elgon Downs Farm leased 433 acres from Gataatha Farmers Ltd which it utilized to plant Maize seed in the 2001 – 2002 season. That there was delivered therefrom maize seed type H9401 to KSC in October – November, 2001. That the delivery documents were altered to read Soet (K) Ltd without any basis and that in the absence of a letter from KEPHIS authorizing Soet (K) Ltd to grow maize seed type H9401, the surcharge was lawful.

16. From the record, the evidence of witnesses from KEPHIS cannot be said to be hearsay. They properly told the Tribunal the process of identifying and certifying the seed growers. However, their evidence as to the final actual grower of the seed would not be conclusive. That would be left to the personnel of KSC. RW3 testified that it was KSC that was effecting registration of seed farmers on behalf of KEPHIS. In his evidence in chief, he told the Tribunal that notwithstanding the approval, registration and certification of seed growers, other farmers would use other peoples farms for purposes of seed maize; that Soet (K) Ltd, grew H9401 & 614 seed on Gataatha Farm in 2001;that for security reasons Soet (K) Ltd was not disclosed but Elgon Downs Farm made deliveries to KSC as the approved grower. That Soet (K) Ltd was the one entitled to the payment for the delivery of the subject seed in 2001. He was the production manager at Elgon Downs Farm at the material time.
17. RW4 was a Seed Driers Manager. He told the Tribunal that Soet (K) Ltd was the seed grower of H9401 for field Elgon Down/Gatatha Endebes in 2001. That it is for that reason that he authorized the changes to the delivery notes. RW8, an Accountant with KSC told the Tribunal that RW4 who was in the production department was better placed to say who grew the seed the subject of the payment that led to the surcharge. That payments were made to owners of the seed grown in the farms and not necessarily the registered seed growers. She gave the example of Kabaraka Limited who were planting seeds on Maji Mazuri Farm which in exhibit 4 is shown to have been owned by KSC.
18. AW1 and AW2 were a Manager and Assistant Manager, respectively with KSC in 2001. They told the Tribunal that Soet (K) Ltd required the professional management of Elgon Downs farm, while Elgon Downs Gatatha was shown as the grower, Soet (K) Ltd was the actual owner of the seed and was paid as such. That the Weighbridge Ticket Supplier was properly altered to show the name of Soet (K) ltd as the farmer of the seed.
19. The totality of the foregoing evidence is that, while Soet (K) Ltd was not registered as a grower of the seed variety H9401 by KEPHIS and that Elgon Downs farm was the lessee of 433 acres of land from Gatatha Farmers ltd, the entity that grew the seed on that farm in 2001 was Soet (K) Ltd. There was no evidence to contradict this direct evidence by these witnesses. That evidence was also not challenged. The evidence of all the other witnesses which the Tribunal relied on was based on documents that showed Elgon Downs Farm to be the lessee of the farm, the approved grower of the variety H9401 seed in 2001 and the delivery thereof to the KSC. The Tribunal did not state why it disregarded the evidence of RW3, RW4, RW8, A1 and A2. It must be remembered that RW3, RW4 and RW8 were witnesses called by the Respondent. Even after tendering such adverse evidence to him, the Respondent did not apply to cross- examine these witnesses and discredit their evidence. Their evidence that Soet (K) Ltd grew the seed H9401 on Gatatha Farm with the authority of Elgon Downs Farm and that is why it was paid the surcharge sum was never contradicted or challenged. It was incumbent upon the Tribunal to state why it had to disregard such evidence that was so direct on the issue of the payment of the surcharge money and rely on the evidence of the other witnesses which was only circumstantial.
20. It is clear from the totality of the evidence on record that Soet (K) Ltd may not have been qualified to grow the seed type H9401 in 2001 on Gatatha Farm. However, the evidence of the witnesses identified above leave no doubt that Soet (K) Ltd planted the seed in Gatatha Farm and had its seed delivered to KSC albeit with complacency of the management of KSC. This fact coupled with the failure by the new management of KSC to sue Soet (K) Ltd for recovery of the surcharge money as recommended in the Audit Investigations Report dated 5th July, 2011 gives credence

to the Appellant's contention, through the aforesaid witnesses, that Soet (K) Ltd was entitled to the payment of the Surcharge money although it grew the seed on a farm leased by Elgon Downs Farm. Clearly the complaint by the Appellant is not without merit.

21. In my view, when a decision making body such as the Tribunal is faced with competing and contradictory evidence that directly touch on the issue before it, such a body must consider all such evidence analyse the same and reach a conclusion on why it is rejecting part of the evidence before it and why it decides to rely on the evidence it chooses. In the instant case, the tribunal did not consider the evidence of RW3, RW4, RW8, AW1 and AW2 in its judgment. There was no suggestion that their evidence had been influenced or was not truthful or was irrelevant. The judgment was completely silent on this evidence. In my view, evidence of these witnesses was crucial as these were the people on the ground, they knew who planted what and where in 2001. They explained that the weighbridge ticket vouchers were altered because Soet (K) Ltd was the real owner of the seed delivered. That because of security reasons or the relationship between that company and the management of KSC, Soet (K) Ltd could not be indicated as the grower. On my part I have no reason to disbelieve their story being the people involved and the ones on the ground. Obviously the Tribunal ignored this crucial evidence and there being no explanation why this evidence was ignored, the judgment of the Tribunal cannot be said not to have been against the weight of evidence.
22. The next ground is that the Tribunal was in error in holding that the Appellant was lawfully surcharged for having authorized the payments of Kshs.21,198,028/- to Soet (K) Ltd a company associated with him. The Appellant complained that none of the witnesses said that he authorized the subject payment. That RW8 denied ever receiving any instructions from the Appellant to make the payment. On the other hand, it was submitted on behalf of the Respondent that the Appellant was the Managing Director of the KSC at the material time and therefore the overall in-charge accountable and responsible for KSC's operations and financial resources. That there is no way a whooping sum of Kshs.21,198,028/00 could have been paid to an entity where he was a majority shareholder without his knowledge or authority. The court was invited to take judicial notice that Managing Directors of State Corporations do not sign payment vouchers but do authorize payments through oral instructions. In its judgment, the Tribunal had found that as the Managing Director of the KSC, the Appellant had been properly surcharged for having allowed or authorized the payment to a company that had not supplied any seed.
23. Section 15 of the Act provides:-

"(1) A Board shall be responsible for the proper management of the affairs of a state corporation an shall be accountable for the moneys, the financial business and the management of a state corporation."

This puts the accountability for the management and finances of a state corporation and therefore KSC upon the Board of Directors of which the Appellant was head.

24. According to the Managing Director's Agreement dated 1st April, 1985 between the Appellant and KSC, the Appellants role and duties were expressly set out therein. Clause 3 thereof provided:-

"The Managing Director shall exercise and perform such of the powers and the duties of the Board of Directors as the Board shall from time to time delegate to him subject to such directions and restrictions as the Board of Directors may from time to time give or impose and subject as aforesaid, the Managing Director shall be invested with the general control of the business of the company and shall have power to appoint and dismiss clerks and servants (other than the secretary) and to enter into any trade contracts on behalf of the company and in the ordinary way

of business and to do all other acts and things which he may consider necessary or conducive to the interest of the company."

This clause is the same in the latter agreements of 10/08/89 and 01/12/01 between the Appellant and KSC. Those then were the express duties of the Appellant in KSC. There was no evidence, leave alone allegation that the contract of employment of the Appellant bound him or made him responsible for all payments made by KSC. In any event, the provisions of the contract which I have set out above do not suggest that fact.

25. The Certificate of Surcharge No. 133 dated 23rd February, 2010 stated, inter alia, that:-

"Pursuant to the powers conferred on the Inspector-General (Corporations) by Section 19 of the State Corporations Act, Cap 446 of the Laws of Kenya, this is to certify that you are hereby surcharged the sum of Kshs.21,198,028 (Kenya Shillings twenty one million, ninety eight thousand (sic) and twenty eight only)

The general circumstances on the surcharge include:-

Loss of Kshs.21,198,028 at Kenya Seed Company by authorizing irregular transactions/payments to Ms SOET (K) LTD" *(underlining supplied)*

26. The surcharge was very clear in its meaning and tenure that the basis of the surcharge was the Appellants having authorized the subject payments. The certificate was issued under Section 19 of the Act. That Section provides, inter alia, that:-

"19(1) In any investigation conducted under this Act, the Inspector-General (Corporations) shall have power –

a. ***.....***
b. ***To surcharge the amount of any expenditures disallowed upon the person responsible for incurring or authorizing the expenditure***
c. ***.....***
d. ***To surcharge the amount of any loss or deficiency upon any person whose negligence or misconduct the loss or deficiency has been incurred.***
e. ***.....***

2) .....

3) For the purposes of this Section, a member of the Board shall be deemed to be responsible for incurring or authorizing an expenditure if, being present when the resolution of the Board or committee thereof incurring or authorizing the expenditure was passed-

a) He voted in favour of it: or

b) He did not cause his vote against the resolution to be recorded in the minutes."

27. It is clear from this section that liability of a director arises from his being present when a resolution to incur the expense leading to the loss is passed. However, the surcharge upon the Appellant was under Section 19 (1) (b) of having authorized the expenditure. At least that is what the Certificate of Surcharge No. 133 indicated.

28. A careful consideration of the evidence on record will show that RW1, RW2, RW5, RW6, RW7 and RW9 gave general evidence about how the payment of the amount of Kshs.21,198,028 to Soet (K) Ltd was irregular. None of the said witnesses was directly involved in the transaction the subject matter of the surcharge except RW9 who prepared the computer Weighbridge Ticket Vouchers that were later altered. None of those witnesses named the Appellant as having been directly involved in the alteration or authorizing the payment of the subject amount.
29. To the contrary, RW3, RW4, RW8, AW1 and AW2 were directly involved in the whole transaction in one way or the other. RW3 was the Production Manager. RW4 was the Seed Driers Manager whilst RW8 was the Accountant. AW1 and AW2 were the Operations Manager and Assistant Driers Manager, respectively at the material time. Apart from explaining to the Tribunal how the alterations to the Weighbridge Ticket Vouchers were effected and the reasons therefor, none mentioned the Appellant as the one who either gave the direction or authority to any part of the transaction. Indeed, the Accountant RW8 who was the accountant and who made the payment was categorical that the Appellant never gave her any instructions to make the payment. None of the witnesses who testified either stated that the Appellant gave any instructions in relation to the transactions or authorized the same. Further, nowhere in the audit report produced as exhibit No. 3 is the indication that the investigators established that the Appellant had authorized the payment. The conclusion was only arrived at because the Appellant was both the Managing Director of KSC and a majority shareholder in Soet (K) Ltd the company which was the beneficiary of the monies.
30. To my mind, that is not a good ground to warrant the surcharge. S.19 (1)(b) imposes a personal liability upon the particular person who causes the loss. There is no room for liability being assumed vicariously since the section is very express. In this case, I am satisfied that save that the Appellant was a Managing Director of KSL and a majority shareholder of Soet (K) Ltd, there was no evidence to show that he directly participated in the transactions culminating in or ever authorized the payment of Kshs.21,198,028/- to warrant him being personally surcharged with the same. If the Respondent intended to satisfy the provisions of S19(1) (b) of the Act, he should have led evidence to show that the Appellant authorized or influenced or gave directions/instructions or exerted pressure on the employees of KSL to make the payment. I make these findings well knowing that both the investigations and trial before the Tribunal happened long after the Appellant had left KSC and it cannot be argued that the employees of KSC were under any fear or pressure from the Appellant not to disclose what actually happened. To my mind, the surcharge against the Appellant was unwarranted as there was no evidence to support the same in terms of S19(1) (b) of the Act.
31. There was one issue that was raised before the tribunal but was not taken up before me but which I think requires mention. The Appellant had complained that the surcharge was illegal as it was being raised after the expiry of 11 years. The Tribunal does not seem to have determined this fact. The loss is alleged to have occurred in 2001. Misappropriation of funds by an employee is a contractual breach. An action to recover such a claim must be brought within 6 years in terms of Section 4 of the Limitation of Actions Act Cap 22 Laws of Kenya. To my mind, I do not think that the surcharge or claim could be made after expiry of six (6) years. The right to claim the said sum must have expired in or about 2007/2008. In my view therefore, the surcharge being raised in 2010 after 10 years since the occurrence of the loss may have been in breach of the Limitation of Actions Act. Section 43 of that Act provides that the Act applies to Government. In this regard, I doubt whether the Respondent could lawfully seek to surcharge the Appellant and thereafter enforce the same in accordance with the law. However, since this issue was not argued before me, I will not base my decision on it.
32. For the foregoing reasons, the appeal is meritorious and is hereby allowed. The decision of the Tribunal dated 13th March, 2012 is hereby set aside. Consequently, the Certificate of Surcharge No. 133 dated 23rd February, 2010 is hereby set aside. The cost of the Appeal is awarded to the

Appellant in any event.

It is so decreed.

DATED and DELIVERED at Nairobi this 22nd day of May, 2015

.....

A. MABEYA

JUDGE