



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 335 OF 2005

INSPECTOR GENERAL (CORPORATIONS).....PLAINTIFF

VERSUS

MAURICE S.M MAKHANU.....DEFENDANT

JUDGMENT

Introduction

1. The current suit was instituted by way of a Plaint dated 13th June 2005 and filed on 15th June 2005. The Plaintiff sought for Judgment against the Defendant for:-
 - a. **The sum of Kshs. 1,076,250.00 plus interest at Court rates from 17th November 2003.**
 - b. **Costs of the suit.**
2. In opposition to the Plaintiff's suit the Defendant filed the Defence dated 20th September 2005 on 23rd September, 2005.
3. On 23rd August 2006, the Plaintiff filed a Reply to the Defence dated 22nd August 2006.

The Plaintiff's Case

4. The Plaintiff is described as the Inspector-General (Corporations), having been appointed as such under Section 18 of the State Corporations Act, Cap. 446. It is averred that the Plaintiff has statutory authority and power to, *inter alia*, surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred by a state corporation. The Plaintiff also has power to recover any sum of money from any person so surcharged if the said sum is not paid within the statutory period provided.
5. The facts of the case as narrated by the Plaintiff are as follows. On or about 17th November 2003, the Plaintiff issued a Certificate of Surcharge No. 066 informing the Defendant of the decision to surcharge him for a sum of Kshs. 1,076,250/= . This was the net amount of honoraria irregularly paid to him between November 2001 and March 2003 in his capacity as Board Chairman of Nzoia Sugar Company Ltd.
6. The Defendant did not contest or appeal against the said surcharge to the State Corporations Appeal Tribunal within the period prescribed by the State Corporations Appeal Tribunal.
7. The Plaintiff's case is that, despite demand and notice of its intention to sue, the Defendant has

failed and/or refused to pay the surcharged amount within the period stated. The Plaintiff therefore claims for the sum of Kshs. 1,076,250/= being the surcharged amount and for a decree against the Defendant for the said sum and costs.

8. The Plaintiff called one witness, Theodora Kerubo Gichana and filed its submissions dated 26th June 2012 in support of its case.

The Defendant's case

9. The Defendant once served as a Board Chairman at Nzoia Sugar Company. He essentially denied the Plaintiff's claim against him in totality. He averred that he was never made aware of any decision to surcharge him for the sum of Kshs. 1,076,250/= by the Plaintiff. He further averred that he was never paid the said sum of money and therefore he did not owe the Plaintiff any money.
10. The Defendant testified on his own behalf and filed the submissions dated 6th July 2012 in support of his case.

ANALYSIS

11. The hearing of the case commenced on 29th February 2012. Theodora K. Gichana (PW 1), a Senior Assistant Inspector General, testified on behalf of the Plaintiff. The Defendant's case was heard on 29th May 2012 when the Defendant testified on his own behalf.
12. From the pleadings and evidence of the parties, as well as the written submissions by Counsel the Court has established the following issues for determination:-

- **Whether the Plaintiff has statutory authority or power to surcharge any amount of money from the Defendant**
- **Whether the Defendant received irregular honoraria between November 2001 and March 2003 in his capacity as Board Chairman, Nzoia Sugar Company Ltd;**

Whether the Plaintiff has Statutory authority or power to surcharge any amount of money from the Defendant

13. The Defendant averred that the Plaintiff had no statutory authority or power to surcharge any amount of money from him.
14. The Plaintiff submitted that in surcharging the Defendant, it was acting within its statutory power and authority derived from the State Corporations Act, Cap 446 Laws of Kenya. Section 19 of the Act gives the Inspector-general power:

"19. (1).....

- a.
- b. **to surcharge the amount of any expenditure so disallowed upon the person responsible for incurring or authorizing the expenditure;**
- c. **to surcharge any sum which has not been duly brought to account upon the person to whom that sum ought to have been brought into account;**
- d. **to surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred;**
- e."

15. Therefore, the Plaintiff has statutory power to surcharge. In instituting the suit, the Plaintiff was also exercising his statutory powers under the Act. Further Section 24 (2) of the Act states that the inspector shall take all necessary steps in any competent court to recover from the persons surcharged any sum which is unpaid. It therefore implies that the Inspector general has the mandate to institute the suit.

Whether the Defendant received irregular honoraria between November 2001 and March 2003

16. PW 1 testified that the Plaintiff established the irregular payments in March 2003 having collected information including vouchers, board minutes and papers. The said documents were tabled before a Committee of the Plaintiff which established that the payments made were irregular.
17. PW 1 averred that according to the Board minutes dated 3rd August 2001, the allowances payable to the Defendant was to be reviewed upwards to Kshs. 60,000/= . This proposal was however not approved by the Ministry. She stated that the said decision was conveyed to the managing director of the Nzoia Sugar Company. The Board of the Sugar Company appealed against the decision but the ministry declined.
18. It was PW 1's testimony that having established the irregular payments, the Plaintiff issued a Notice of intention to Surcharge to the Defendant. The Defendant replied indicating that it was not his decision to implement the Kshs. 60,000 allowance but that it was upon the Management of the Nzoia Sugar Company to make a decision. Subsequently, on 17th November 2003, the Plaintiff issued the Defendant with a Surcharge Certificate. PW 1 testified that the Defendant made an appeal to the State Corporations Appeal Tribunal by way of a letter dated 9th December 2003. However, the Plaintiff established that the Defendant did not lodge a formal appeal with the States Corporation Tribunal.
19. PW 1 referred to Section 10 of the State Corporations Act in testifying that the Defendant was liable to pay the surcharged amount which he received without the Government's approval.
20. On cross examination, PW 1 noted that during the Board meeting the Defendant stepped out to allow for the discussions reviewing his honoraria upwards.
21. On the other hand, it was the Defendant's testimony that a policy statement arising from a report in all sugar companies indicated that all chairmen of sugar companies were to be paid Kshs. 60,000/-. He testified that the said report was minuted and adopted by the Board. He further testified that though he was chairing the meeting in which this report was tabled, he excused himself when it came to discussing the said item. It was therefore his position that he was not a party to the resolution that reviewed his honoraria upwards.
22. The Defendant testified that the resolution was forwarded to the Ministry of Agriculture for approval and implementation. It was his contention that he was not privy to the correspondences which passed between the management and the said Ministry. According to him the Resolution was implemented since the Plaintiff started paying him the sum of Kshs. 60,000 per month as honorarium. He received an amount of Kshs. 47,520/= after tax. It was his testimony that he signed payment vouchers prepared by the management and that the said vouchers were examined by auditors before payment.
23. It was also the Defendant's testimony that in 2003, when this matter was brought up in parliament as to whether he had been authorised to receive Kshs. 60,000/=, the position of the managing Company (Schaffer & Associates) was that they were paying what the Company had approved.
24. On cross examination, he testified that vide the letter dated 8th December 2003, the Management Company had taken over his liability, if any. It was his testimony that when he started being paid Kshs. 60,000/= he thought that the said payment had been approved. However, when he received the notice of surcharge is when he realised that probably the same had not been approved.

25. I have perused the letter dated 8th December 2003 from the management Company and addressed to Nzoia Sugar Company. I respectfully disagree with the Defendant's testimony that the management company took over his liability, if any. It is clear in the last paragraph of the said letter that the said company did not admit liability to the surcharge against the Defendant. The Company only suggested that Nzoia sugar Company withhold an equivalent amount of USD 1,406 payable to them pending resolution of the issue with the Inspector-General.
26. In the same letter, the Management Company stated that with regard to the honoraria paid to the Defendant the same was paid based on the unanimous approval of the Board of Nzoia Sugar Company Limited.
27. It is not in dispute that the Board approved the Defendant's honoraria upwards. The issue is that the ministry did not approve the same. The Defendant has averred that he was not aware of the Ministry's rejection of the said proposal as he received payments of the reviewed honoraria. On the other hand, the Plaintiff has admitted that it received the Ministry's rejection towards the proposals to increase the honoraria and the Board even appealed the decision which was thereafter rejected. It is therefore not clear how the Nzoia Sugar Company continued remunerating the Defendant the reviewed honoraria which the Ministry had rejected. The payments were obviously approved by responsible officials in the said sugar company. None of them was called to testify so as to shed light why the Defendant was remunerated irregularly. The Plaintiff does not dispute that the Defendant was not privy to the communication between the management and the ministry with regard to the reviewed honoraria.
28. The Plaintiff has failed to prove that the Defendant in any way conspired with the management of Nzoia Sugar Company or any of its officials to receive the irregular payments. In the circumstances, the Plaintiff cannot be heard accusing the Defendant that he irregularly received the honoraria. It was upon the Plaintiff to do its due diligence and establish how the payments that had not been approved were made to the Defendant. If there was any oversight or negligence on the part of Nzoia Sugar Company Board, Section 19 (b) and (d) of the State Corporations Act, gives the power to the Plaintiff to recover the same from the Board of Management of Nzoia Sugar Company. The Plaintiff is clearly looking for a remedy from an innocent party. It is clear throughout the proceedings in this Court that the Defendant carried out his duties as Chairman of the Board of Directors professionally. At all relevant times he never deliberated on matters concerning his remuneration. Even when the same was approved he received a net sum of Kshs. 47,520/= after taxation. The claim against the Defendant is brought to make it appear as if the Defendant is a dishonest, corrupt individual who is susceptible to accept dishonest gain. This image is false. Before the Court was an upright man who diligently performed his duties and earned a monthly allowance approved by the Board of the Company, and in which approval, the Defendant played no role.
29. The Plaintiff's sole witness did not give evidence to prove the Plaintiff's case on a balance of probabilities. The Plaintiff also had an opportunity to call other witnesses especially from the management of Nzoia Sugar Company to explain the genesis of the alleged illegal honoraria, but the Plaintiff did not do so.

DISPOSITION

30. In view of the foregoing, this Court finds that the Plaintiff has not proved its claim on a balance of probabilities and the same is hereby dismissed with costs.

That is the judgement of the court.

DATED, READ AND DELIVERED AT NAIROBI

THIS 17th DAY OF APRIL 2015

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for Plaintiff

Mr. Mwiti holding brief for Achile for Defendant

Teresia – Court Clerk



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