



REPUBLIC OF KENYA



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**Pangaea Holdings Kenya Limited & another v Haienda Development Holdings Limited
(Civil Case 55 of 2015) [2024] KEHC 11530 (KLR) (30 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 11530 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 55 OF 2015
MN MWANGI, J
AUGUST 30, 2024**

BETWEEN

PANGAEA HOLDINGS KENYA LIMITED PLAINTIFF

AND

HACIENDA DEVELOPMENT HOLDINGS DEFENDANT

AND

HAIENDA DEVELOPMENT HOLDINGS LIMMITED DEFENDANT

JUDGMENT

1. The current Mombasa HCCC No. 55 of 2015 was initially filed as Milimani HCCC No. 366 of 2011, whereas the current Mombasa HCCC No. 56 of 2015 was formerly Milimani HCCC No. 367 of 2011. The two suits were thereafter transferred to the Mombasa High Court for hearing and determination. On 13th June, 2016, the defendant filed an application of even date, which was later amended on 17th June, 2016. The defendant sought consolidation of the two suits in the Mombasa High Court.
2. On 19th June, 2016, the parties herein compromised the said application by recording a consent in Court, thereby consolidating Mombasa HCCC No. 55 of 2016 with Mombasa HCCC No. 56 of 2016. Mombasa HCCC No. 55 of 2016 became the lead file. I thereafter gave pre-trial directions for the filing of a consolidated defence and a reply to the consolidated defence.
3. In Mombasa HCCC No. 55 of 2015, the plaintiff is Pangaea Holdings (K) Limited and the defendant is Hacienda Development Holdings Limited. The cause of action against the defendant as per the averments in the plaint dated 30th July, 2011 and filed on 26th August, 2011 is that the plaintiff advanced to the defendant a loan amount of USD 175,000.00, being an equivalent of Kshs.13,597,500.00 in the year 2008 at the request of the defendant when it started facing financial difficulties in the course of constructing the housing units at Mwakirunge and after the housing project stalled.



4. The plaintiff avers that it was mutually agreed that the loan was to attract interest on the principal at the rate of 15% per annum, which interest was to accrue immediately, and that the loan was to be repaid by the defendant within one year, but that was not done.
5. The plaintiff's prayer is for judgment to be entered against the defendant for-
 - a. The sum of USD 175,000.00;
 - b. Interest on (a) above at the rate of 15% per annum from the date of receipt of the said loan amount until payment in full;
 - c. Costs of the suit; and
 - d. Any such other or further relief as this Honourable Court may deem appropriate.
6. In HCCC No. 56 of 2015, the plaintiff is Bruce Bouchard (now the 2nd plaintiff), whereas the defendant is Hacienda Development Holdings Limited. In a plaint dated 30th July, 2011 and filed on 26th August, 2011, the plaintiff therein averred that the defendant's housing project known as Hacienda Eco-City Development was to be constructed at Mwakirunge in Mombasa within the Coastal (sic) Province of Kenya on the registered property known as LR No. MN/11/10279 belonging to Hacienda Development Holdings Limited. That in the year 2007, the defendant company started facing financial difficulties during the course of constructing the housing units at Mwakirunge and the project almost stalled, but in the year 2008, at the request of the defendant, the 2nd plaintiff advanced to the defendant a loan amount of USD 450,000.00 upon the mutual understanding of both parties that the said loan would attract interest at commercial rates until repayment in full.
7. The plaintiff averred that the defendant is indebted to it for the sum claimed and that the defendant has failed to repay the said loan amount of USD 450,000.00 thereby necessitating this suit.
8. The plaintiff (2nd plaintiff now) prays for judgment to be entered against the defendant for –
 - a. The sum of USD 450,000.00;
 - b. Interest on (a) above at current commercial rates from the date of receipt of the loan to (sic) the defendant;
 - c. Costs of the suit; and
 - d. Any other relief which this Court deems appropriate.
9. As per the consent of 19th June, 2016, the defendant was to file a consolidated defence, which it did on 22nd December, 2016. In response to the 1st plaintiff's claim, the defendant avers that it has no evidence of incorporation of Pangaea Holdings (K) Ltd or its date of alleged incorporation and will put the 1st plaintiff to strict proof thereof. The defendant also states that the property in issue is no longer registered in the defendant's name.
10. The defendant avers that the Shareholders and Directors of the 1st plaintiff are the 2nd plaintiff and his wife Diana Bouchard, and that the 2nd plaintiff was at all material times, and at the present time a Director of the defendant. The defendant states that its Shareholders are Hacienda Development Ltd and a company incorporated in the Republic of Botswana known as Pangaea Development Holdings Ltd, wherein the 2nd plaintiff is directly or through his family members, the majority Shareholder of Pangaea Development Holdings Ltd and is also a Director of that company.



11. The defendant contends that it did not pass any resolution to borrow money from the plaintiffs or enter into any agreement to borrow money from them. The defendant accuses the 2nd plaintiff of fraudulent false accounting of the defendant and for abusing process, by making claims for payment of the purported loans in this suit and an arbitral cause wherein Pangaea Development Holdings Ltd is the claimant and Hacienda Development Ltd and Adam Tuller are the respondents. The defendant accused the 2nd plaintiff of concealment of financial and accounting records of the defendant. The defendant prays for the plaintiffs' suits to be dismissed with costs.
12. The plaintiffs filed an amended reply to the defence on 15th February, 2017. In the said reply, the plaintiffs contend that the lending of the monies to the defendant was duly approved by the said defendant, and that at the time of lending, the 2nd plaintiff was not in charge of finance and further, the defendant's Board was well aware of the loans. The plaintiffs aver that the defendant's allegation that the advanced monies were stolen is outrageous, preposterous and unfounded, and put the defendant to strict proof thereof. The plaintiffs deny and put the defendant to strict proof for the allegation that the 2nd plaintiff duly manipulated the defendant's financial records and further, that Adam Tuller was denied access to documentation.
13. In response to paragraph 9 of the statement of defence, the plaintiffs reiterate that the loans made to the defendant were in US Dollars and the defendant's allegation to the contrary was misplaced and puts the plaintiff to strict proof of the said allegation.
14. The plaintiffs deny the allegation contained in paragraph 10(d) of the amended statement of defence and put the defendant to strict proof thereof. The plaintiffs contend that there was no admission that the accounts were fraudulent, and that the plaintiff (2nd plaintiff) had recanted the said statement as it was obtained through undue influence of Adam Tuller & others.
15. The plaintiffs deny the averment at paragraph 12 of the amended statement of defence that the claim herein forms part of the subject of arbitral proceedings.

The Plaintiffs' Case

16. PW1 was Bruce Edward Bouchard, a citizen of the United States of America. He is an Investment Banker and also a consultant in many areas. He stated that he is a joint shareholder in Pangaea Holdings Kenya Limited (1st plaintiff), hereinafter referred to Pangaea Holdings (K) Limited or as the 1st plaintiff in this judgment. His wife Diana Louise Bouchard was also a Shareholder of the 1st plaintiff. PW1 stated that he was a Director of Hacienda Development Holdings Ltd (defendant) and a Shareholder of the said company. His evidence was that in his own capacity and as a Director of the 1st plaintiff, he lent money to the defendant.
17. In regard to the joint venture, PW1 stated that it was owned slightly over 50% by Pangaea Development Holdings Company Ltd (Botswana) and just under 50% by the defendant, a Kenyan company which was run by Mr. Tuller, and that the defendant was incorporated in the year 2005, as the joint venture company.
18. His evidence was that the main objects of the defendant was to develop housing estates and eco cities and the said company, and it acquired 500 acres of land at Mwakirunge LR No. MN/11/70279. He gave the names of the Directors representing Pangaea Development Holdings Limited (incorporated in Botswana) as himself, Eric Postel and Caesar Siwale, whereas Adam Tuller, Paul Antroburse and David Munia were the Directors representing the defendant in the joint venture.



19. PW1 testified that the defendant commenced development of the project at Mwakirunge but it was never completed due to an injunction that was brought against the Joint Venture Company which lasted for nine (9) months. He also stated that costs were being incurred and the joint venture ran short of funds.
20. PW1 stated that the 1st plaintiff put in additional capital into the joint venture and tried to raise additional capital in the year 2008 from international financial markets, but the said markets collapsed and capital became unavailable.
21. It was PW1's evidence that when that happened, he and Pangaea Holdings Development Ltd (Botswana) agreed to inject loan financing into the Joint Venture Company (defendant) in USD 625,000.00. He stated that from their personal account, that is his and his wife's, they injected USD 450,000.00. He stated that he had account statements from Commercial Bank of Africa to demonstrate the transfers they made of USD 450,000.00. It was the evidence of PW1 that Pangaea Holdings (K) Ltd (1st plaintiff) injected USD 175,000.00 to the Joint Venture. PW1 stated that by doing so, they acted in good faith as Shareholders by providing cash to the defendant, but no formal agreements were signed. He further stated that in accounts of the defendant for the year ending 31st December, 2008 audited by Ernst & Young, running from pages 28 to 67 of the plaintiff's documents, the two loan amounts are reflected thereon.
22. PW1 referred to the credits made to the defendant's company bank account at page 53 Note 13, page 62 at Note 11 and page 63 at Note 13. He stated that the loans were discussed in Board meetings but the defendant objected because it did not believe that its capital injection was reflected in the accounts. It was PW1's evidence that the claim the defendant made had no supporting documents and it was difficult to support it in the accounts.
23. PW1 indicated that the defendant contended that the payments had been made to the Joint Venture Company (defendant) without supporting documents, but it was agreed that they needed to proceed to sign the audited accounts. As such, he and David, who was the Chairman and a Director appointed by the defendant company signed the audited accounts.
24. PW1 stated that he later signed a statement indicating that he had fiddled with the accounts, which statement he signed under considerable duress. He further stated that in the year 2009, the company was in severe distress as there were considerable shareholder differences. It was PW1's evidence that Mr. Tuller (DW1) called and asked him to meet with Mr. Richard Redmoor who had replaced Mr. Antroburse, as a Director at the Joint Venture Co. Ltd representing the defendant company.
25. PW1 contended that when he met Mr. Redmoor, the latter presented to him a statement which he asked him to sign, and that Mr. Redmoor called DW1 who insisted that PW1 should sign the said statement. He stated that on asking DW1 the reason as to why he needed him to sign the statement, he told him to go ahead and sign it, and he would keep it in his safe and that would be it. PW1 stated that he felt that if DW1 felt strongly about the said statement, he would go ahead and sign it.
26. It was PW1's evidence that the person in charge of accounts in the year 2008 was Yvonne Makatiani, who was their Accountant and Paul Antroburse was their Financial Director, and that he resigned in the year 2008.
27. PW1 asserted that he was never involved in making any entries in the accounts but he could review the accounts that Ms Makatiani and Mr. Antroburse produced.
28. PW1 indicated that at the time he signed the statement, only Richard Redmoor was present but there was no Advocate present. He explained that the reason why he signed the said statement was because



he was being badgered constantly by being bullied, and he felt that he needed to go along, in order to get along, and if DW1 needed it that much, and so as to go along, he signed the statement. He referred to the statement he signed at page 60 of the defendant's bundle of documents but denied that there was an Advocate by the name of Keith Howard Osmond who witnessed the said statement.

29. In making reference to the said statement, PW1 indicated that he stated therein that the capital contributions made by Adam Tuller (DW1) were improperly accounted for resulting into erroneous accounts for 2007 and 2008, and that DW1's Director's account operated under his direction, deprived DW1 of the value contributed.
30. PW1 stated that the foregoing statement did not refute the contribution that he and his wife made to the defendant company, and that the said statement is unrelated to his cash injection.
31. PW1 testified that a Forensic Auditor was appointed to review the accounts and the defendant company agreed. He urged this Court to recognize that two (2) loans were made to the defendant company in USD 175,000.00 by the 1st plaintiff and the 2nd loan of USD 450,000.00 was made to the defendant on account of him and his wife, and that the said loans are outstanding and should be paid.
32. In cross-examination, PW1 admitted that the plaintiffs never signed loan agreements with the defendant but he and his wife extended the loan to the defendant, as it was in serious distress and that thereafter, serious disputes arose.
33. He stated that the loan was extended in US Dollars and they would suffer exchange loss if the payment to the plaintiffs for the loan was to be made in Kenya Shillings. He asserted the sum of USD 450,000.00 was transferred from a Dollar Account in CBA and USD 175,000.00 which was transferred to the defendant's Kenya Shillings Account in I & M Bank. PW1 denied that their aim of converting an amount of USD 25,000.00 in his and his wife's account at I & M Bank was not to defraud the defendant.
34. He reiterated that there was no loan agreement for the USD 450,000.00 and USD 175,000.00 as the plaintiffs were acting in good faith and the money was received by the defendant. He stated that previous loans from the defendant were captured in loan agreements. He confirmed that there were no emails or written documentation for the loan that he and his wife advanced to the defendant, and that the discussion was made at an informal meeting. He stated that if there were objections, the funds would have been returned to them.
35. PW1 stated that the reason why the audited accounts were rejected by Directors was not because the loan they advanced was credited into the defendant's account and debited immediately from the said account. He indicated that the loan credit would appear in the defendant's bank statements.
36. PW1 admitted that he knows that companies make decisions through resolutions but could not recall if there was a formal Board resolution to borrow, and he had no letter from the defendant asking him for a loan of USD 175,000.00, but he agreed with Mr. Tuller (DW1), in an informal meeting that he would loan the defendant the said money.
37. PW1 stated that there had been informal meetings between Directors on injection of additional capital, and that it had been agreed that no two Directors could make decisions beyond the sum of USD 100,000.00. PW1 stated that the loan of USD 175,000.00 was to be repaid in a year.
38. He stated that the sum of USD 175,000.00 was transferred to the NIC Bank in favour of the defendant and there are bank statements of the transfer of the said amount. He further stated that there was one deposit of USD 25,000.00 and another deposit of USD 150,000.00.



39. He stated that he had read the Audit Report by Ernst & Young and confirmed that as at the said time, the audited accounts were correct. He confirmed that at page 139 of the said Report, it showed that the loan from the 1st plaintiff was Kshs.13,597,500.00 which was reflected in Kenya Shillings as the bank account for the defendant was a Shilling denominated account.
40. PW1 stated that the demand letter to the defendant was for USD 175,000.00 and it was dated 20th May, 2011, and the demand notice for USD 450,000.00 was for a personal loan.
41. He indicated that the answers he had given in respect to the loan advanced by the 1st plaintiff applies to his claim for the personal loan. He stated that he would like to have the money loaned to the defendant paid in US Dollars. PW1 could not recall Mr. Redmoor rejecting the loans they advanced to the defendant.
42. He stated that at the time he signed the document at page 109, he had already signed the document at page 110 on 24th January, 2009. He stated that in the year 2008, they sold some property in Zambia and injected the capital with the 1st plaintiff and from his personal account.
43. On being re-examined, PW1 asserted that he signed the declaration of events and actions at page 60 of volume 1 of the defendant's documents because he was under a lot of duress. He reiterated that he signed the said statement in the presence of Mr. Redmoor at the insistence of DW1 who told him that he would keep it in a safe and lock it away after he (PW1) had signed it.
44. He contended that the defendant company was going through a great deal of stress and duress and he thought to himself that if the declaration would give DW1 some comfort, he would sign it.
45. PW1 stated that the declaration does not state that he meddled with the accounts and in the arbitral proceedings, he said that there was something wrong with the accounts but they could be reconciled.
46. He elaborated that the accounts were wrong because the documentation that would have been required to modify the accounts were not available at that time. PW1 explained that he and Mr. Muniu signed the financial statements for the year ending 31st December, 2008 and that Mr. Muniu was representing the defendant. Further, the accounts had the blessings of the representatives of the parties to the Joint Venture.
47. He admitted having signed documents showing that some amounts were owed to DW1, but he expected him to avail supporting documentation to substantiate the said amounts. PW1 denied defrauding the defendant and then re-injecting the money back through his account. He stated that he had not been charged with defrauding the defendant, which has not filed a counter-claim in this case.
48. PW1 asserted that money was transferred from his bank account in US Dollars and credited to the defendant's bank account. He explained that the Shilling exchange rate fluctuates and as a lender, he would not have borne the foreign exchange loss.
49. He reiterated that there were no formal loan agreements or advancements as the company was under a lot of duress and they were acting in good faith. He stated that the Shareholders' Agreement was between the defendant and Pangaea Development Holdings Ltd (Botswana), which was a Shareholder of the defendant company, together with the defendant.
50. PW1 clarified that the Shareholders' Agreement had an agreement (clause) of not borrowing more than USD 100,000.00 without a Board Resolution, but he, his wife and the 1st plaintiff were not parties to the Shareholders' Agreement. He explained that the repayment period of the loan was 1 year because they thought that houses would be built and sold or the defendant's progress would



permit it to refinance the loan. He asserted that the defendant owes them money for which they claim reimbursement as per the prayers sought.

51. PW2 was Vincent Wood, he adopted his statutory declaration sworn on 4th July, 2016 as his evidence in Court. He was a quasi-site agent of the defendant. On being cross examined, he stated that he knows that this case is about the 1st and 2nd plaintiffs advancing money to the defendant but he was not there when the money was advanced.
52. PW2 stood by paragraph 10 of his statutory declaration that Mr. Mwaniki told him that there was no evidence linking the 2nd plaintiff to misappropriation of funds of the Joint Venture.
53. PW3 was Jerome Shlomo, an employee of Priority Development Limited. He stated that he used to work for the defendant as a Project Manager. He testified that when he was engaged, the impression he got was that the contractor was not acquainted with construction, and although there were labourers, work would stall due to lack of construction material. PW3 said that he was told that hiccups arose due to lack of a budget for construction of 5,000 houses, and he advised DW1 and the 2nd plaintiff that they could work on construction of fewer units, which the budget could allow.
54. PW3 stated that he was sacked in either October or November 2009 and he sued the defendant. He explained that the Managers were being paid large amounts of money, but he opted to take a smaller amount of money for his salary in a meeting he had with the Accountants and DW1, after he had been asked what he needed for the project to operate smoothly. He stated that he managed to construct 10 houses in a project at Mwakirunge known as Eco City.
55. On being cross examined, he stated that he did not know what this case is all about, and that he did not witness the 2nd plaintiff and Diana Bouchard giving money to the defendant.
56. He stated that he and Priority Development Company won two cases against the defendant, but he found out that the defendant had transferred the 500 acres of land to Hacienda Development Limited.
57. In re-examination, he explained that his lawyer told him that the defendant had changed its name to Hacienda Development Limited. He was not aware that money was given by the plaintiffs to the defendant.

The Defendant's Case

58. In its defence, the defendant called one witness, Adam George Henry Tuller, who testified as DW1. He stated that he was the Managing Director of the defendant and Messers David Muniu, Richard Redmoor, Ceasar Siwale, Eric Postel were Directors, and that the 2nd plaintiff was a Director of Finance and Accounts, from the time the company was registered, and Mr. Paul Antrobarse was the Accountant.
59. DW1's evidence was that there was no agreement for a loan between the 2nd plaintiff and the defendant. He denied that the defendant received USD 175,000.00 from the plaintiff. He asserted that no amount of USD 175,000.00 ever entered into the defendant's books of accounts from the 2nd plaintiff.
60. In referring to the witness statement of the 2nd plaintiff, DW1 stated that it does not mention the sum of USD 450,000.00, although in his plaint he has sued for the said amount.
61. DW1 contended that in the plaintiffs' list of documents, as well as the defendant's documents, there is nothing to show that the defendant received USD 450,000.00 from the 2nd plaintiff.
62. DW1 made reference to pages 28 to 67 of the plaintiffs' consolidated list of documents which contain a management letter and financial statements from Ernst & Young who were the Auditors for the



- defendant. In reference to page 62 notes 11 and 12, DW1 stated that there are loans from the 1st plaintiff and Pangaea Development Holdings Ltd, as well as Director's loan of Kshs.35,480,774.00. He further stated that on page 21 there is a debit in the sum of USD 50,000.00 from the 2nd plaintiff and Diana Bouchard, and on page 22, there is an email referring to the said amount of USD 50,000.00.
63. DW1 testified that the email of 13th April, 2011 referred to the bank account of the 1st plaintiff and/or Diana Bouchard which makes reference to a debit of Kshs.3,900,000/=, but no explanation was given as to why the transfer from a USD account was remitted in Kenya Shillings.
 64. DW1 also testified that in the year 2008, the defendant was involved in construction and the expenses were made in Kenyan currency. He stated that the exchange rate then was Kshs.78.00 to the dollar.
 65. DW1 contended that by PW1 claiming the alleged loan in USD, he was bent on making an exchange gain of Kshs.22.00 to the dollar at the exchange rate applicable as at the time he testified in Court.
 66. DW1 referred to page 23 of the plaintiffs' consolidated bundle of documents containing a debit note from Bruce Bouchard and/or Diana Bouchard with a transfer amount of Kshs.7,814,600.00, with an exchange rate of Kshs.78.15 to the dollar. He indicated that the amount debited in dollars was 99,994.00. He also indicated that on page 24, there is a debit advice of USD 275,000.00 at an exchange rate Kshs.75.65 to the dollar. He also stated that on page 25, there is a debit advice of USD 25,000.00, at an exchange rate of Kshs.78.00 to the dollar.
 67. DW1 expressed the view that the 2nd plaintiff and his wife were selling dollars to the bank in exchange of Kenya Shillings and they would then transfer the money to the defendant in Kenya shillings.
 68. DW1 explained that when transferring money from one bank account to another, the customer gives the bank instructions on where to transfer the cash and in what currency.
 69. DW1's evidence was that the statement of accounts from the 1st plaintiff shows a debit of USD 25,000.00 at the rate of Kshs.65.00, but the same was reversed and corrected to Kshs.65.37 to the dollar. DW1's opinion was that if the claim herein is to be paid in dollars, the plaintiff would stand to gain Kshs.35 to the dollar.
 70. In making reference to page 27 of the documents, DW1 stated that the statement of accounts shows a transfer of USD 150,000.00, and on the said document it is written that the said amount was a Shareholder's loan. He explained that the Shareholders of the defendant were Pangaea Development Holdings Ltd (Botswana) and the defendant herein, but the 1st plaintiff was not a Shareholder of the defendant company.
 71. DW1 testified that the defendant would get loans from Shareholders after assessing the need, and the Directors would in a meeting reach a resolution to borrow from a lender, but he did not see any Board Resolution made by the defendant to borrow money from the 1st plaintiff.
 72. DW1 testified that they had two forensic audits, one by Mr. Mwaniki of Rhino Consult appointed by the defendant and the 2nd one by Mr. Smith. DW1 stated that he appointed Mel Smith on behalf of the defendant to carry out an audit of the defendant.
 73. DW1 contended that the audited accounts for the financial year ending 31st December, 2008 at pages 53 - 67 of the documents were fraudulent, and after realizing that there was a problem with the said statement of accounts, they appointed Mr. Redmoor to look at them and he said that they were fraudulent. DW1 stated that they then appointed Mr. Mwaniki to undertake an audit of the accounts but he did not finalize the work. He stated that the Board of the defendant rejected the accounts several times.



74. DW1 referred to page 60 of the defendant's list and bundle of documents in which the 2nd plaintiff takes full responsibility for the misrepresentation and misappropriation of the accounts in the defendant company. He stated that he signed the said document at page 61 together with the 2nd plaintiff and Ms Yvonne Makatiani who was the Book Keeper.
75. He explained that the purpose of the document at page 110 was aimed at capturing money contributed which was missing from the accounts. DW1 stated that Ms. Makatiani sent PW1 an email on 7th October, 2009 because she could not trace the accounting documents which he had asked her to look at, and he advised her to keep the documents in a lock down mode.
76. DW1 explained that the statement of accounts was rejected because the defendant had not signed a loan agreement for the said amount of USD 625,000.00 and the Board of Directors had not reached a resolution to borrow the amount.
77. He further explained that Ms. Makatiani had warned him that strange things were going on and they invited Mr. Redmoor to look at the accounts, and he said that they did not reflect the true state of accounts and he advised that they bring in any Auditor to ascertain why money was missing.
78. He referred to page 50 of the plaintiffs' documents and said that it was signed by the 2nd plaintiff (PW1) and Mr. Muniu on 2nd July, 2009, and that PW1 signed the said statement of accounts to verify that they were corrected.
79. On being cross-examined, DW1 stated that the owners of the Joint Venture were Pangaea Holdings Ltd and the defendant. He explained that the initial shareholding was 50% for each Shareholder and the defendant purchased a property in Mombasa whose copy of the title is at page 68 of the plaintiffs' list of documents. He stated that Pangaea Development Holdings Ltd (Botswana) put in USD 1.8 Million and the defendant injected Kshs.89,137,794.00 which was paid in cash and cheques. He indicated that he was appointed as the Managing Director after the establishment of the company.
80. DW1 stated that the Civil Servants Housing Scheme did not materialize because the defendant was not able to function as it did not have enough money to keep it going. He indicated that in Nairobi HCCC No. 367 of 2011 (now Mombasa HCCC No. 56 of 2015), he filed a witness statement in which he stated that the company was not in financial difficulties and that the construction of the houses had nearly stalled. He further stated that the Civil Servants Housing Project never started when the representative of the Government of Kenya learnt that they had problems.
81. DW1's evidence was that in the documents filed in Nairobi HCCC No. 366 and 367 of 2011 (Mombasa HCCC No. 55 of 2015 consolidated with HCCC No.56 of 2015), he annexed minutes of the Joint Venture of 28th May, 2009 in which it was indicated that for the last 2 years the company had a finance situation. He added that he was given indemnity as he was not trained in finance.
82. It was DW1's evidence that the company needed to raise money quickly and it could not carry on with business without finances, and that was when Mr. Redmoor came in. DW1 stated that at that time, it was agreed that shareholders should inject some money into the defendant and he gave Kshs.89,937,974.22 from the year 2006 to 2009, in different batches. He stated that the company started having problems in the year 2007, and in the year 2009 he gave money to the Joint Venture but he was not paid back. DW1 admitted that they did not pass a Board Resolution for him to inject money to the defendant.
83. He stated that the defendant had a bank account at NIC Mombasa and I & M Bank in Nairobi. He acknowledged that the 2nd plaintiff and Diana Bouchard made transfers to the defendant of USD



- 50,000.00 as per page 22 USD 99,994.88, USD 275,000 as page 24 and USD 25,000.00 and that the paying bank was denominated in USD and the receiving bank account was in Kenya Shillings.
84. DW1 stated that he was the Managing Director of the defendant in the year 2008 but he never wrote to the two banks to verify if the money in issue was remitted to the defendant's bank account.
85. DW1 stated that he did not have with him the minutes of the Board meetings of the year 2009 which described the amount he had contributed as call notes and demand notes. He asserted that the amounts he had contributed had been omitted from the statement of accounts. He denied that the said amount was not reflected due to lack of supporting documents. He indicated that the amount then was Kshs.47 Million and he relied on the Accountant and computer records, and he had receipts of cash paid to the defendant.
86. He stated that Richard Redmoor was appointed by the Board of the defendant as a Director. That the minutes of 22nd June, 2009 stated that the defendant was unable to pay its bills and was insolvent, and that was said by Richard Redmoor as per the documents filed in this consolidated suit. DW1 added that the Board Chairman of the defendant said the same thing.
87. DW1 reiterated that he had an issue with the audited accounts by Ernst & Young for the year 2008 in regard to the amount that the 2nd plaintiff (PW1) had put into the defendant because the amount that he (DW1) had put in had been excluded. He stated that the amounts of USD 175,000.00 and USD 450,000.00 put in by the plaintiffs were not approved, but he did not have the Board resolutions to that effect in Court.
88. DW1 stated that in the minutes of 28th May, 2009 filed in Mombasa HCCC No. 55 of 2015 and the minutes of 22nd June, 2009 filed in Mombasa HCCC No. 56 of 2015, the problem he had with the financial statement for the year 2008 was that the financial contributions he had made to the defendant were not reflected thereon. DW1 stated that in the minutes of 22nd June, 2009, Mr. Richard Redmoor presented a tabulation of what the 2nd plaintiff had contributed and asked for a revised tabulation. He further stated that in the said minutes there was reconciliation of the dispute involving the contributions made. He stated that the 2nd plaintiff and Paul Antroburse were dealing with accounts in the years 2006, 2007 and 2008. He indicated that he made a report to Nyali Police Station in respect to theft of his funds, fraudulent financial statements and threats to his person.
89. Upon further cross-examination, DW1 referred to page 60 of volume 1 of the defendant's documents where there is a declaration of events and actions. He stated that he was not there when the document was prepared and does not know if Keith Howard Osmond Advocate was present. He explained that the said declaration is a confession of fraud and theft by PW1, who stole a substantial amount of cash from DW1 and his company and prepared fraudulent accounts to cover the theft and fraud when he was running the company.
90. In reference to page 3 of the said declaration, DW1 stated that the 2nd plaintiff (PW1) took full responsibility for misappropriation conducted under his supervision. DW1 stated that the document does not say that the 1st and 2nd plaintiffs did not give money to the defendant.
91. On being referred to page 111 of volume 1 from the documents availed by the defendant, DW1 stated that it was Paul Antroburse who interfered with the accounts and not the 2nd plaintiff (PW1). DW1 could not recall if the accounts were re-audited. He indicated that the Joint Venture Company no longer owns the Mwakirunge property, as it is now owned by Hacienda Development Limited, where he and Onyango Keyuka are Directors and Shareholders of the said company.



92. In re-examination, DW1 stated that the amount in the schedule reflected as Kshs.15,000,000/= shown as historic undocumented, explains the fact that he had contributed the said amount of money but the documents confirming receipt of the said cash had vanished.

Determination

93. On the 5th April, 2017, the plaintiffs filed their separate list of issues dated 23rd March, 2017 as outlined below –
- i. Was the defendant Company undergoing any financial issues in the years 2007 - 2008?
 - ii. Did the 1st and 2nd plaintiffs lend USD 175,000.00 and USD 450,000.00 to the defendant?
 - iii. When were the loans repayable?
 - iv. What were the terms of repayment?
 - v. Has the defendant repaid the said loans?
94. On 15th March, 2017, the defendant filed its separate list of issues dated 14th March, 2017 as follows –
- i. Whether the defendant entered into any agreement to borrow any money from the plaintiffs or either of the plaintiffs;
 - ii. Whether the defendant passed any resolution to borrow any money from the plaintiffs or either of them;
 - iii. Whether Mr. Bouchard was and remains the Director in charge of Finance of the defendant and whether he has custody and control of the defendant's documents;
 - iv. Whether Mr. Bruce Bouchard is a Shareholder and Director of Pangaea Holdings (K) Limited;
 - v. Whether Mr. Bruce Bouchard committed fraud for his own benefit and for the benefit of Pangaea Holdings (K) Ltd against the defendant and whether he withheld financial records of the defendant from the defendant's Managing Director in order to conceal that fraud;
 - vi. Whether Mr. Bruce Bouchard together with another Director of the defendant produced and signed fraudulent accounts of the defendant in order to conceal that fraud.
 - vii. Whether the money allegedly advanced by the plaintiffs in both cases to the defendant were in fact monies stolen from the defendant;
 - viii. Whether the filing of these suits for claims in United States Dollars when the monies allegedly advanced to the defendant were in Kenya Shillings and whether pleading the claims in US Dollars amounts to further fraud;
 - ix. Whether Mr. Bruce Bouchard in his personal capacity and in his capacity as Shareholder and Director of Pangaea Holdings (K) Ltd and Pangaea Development Holdings Ltd signed a confession of theft and fraudulent accounting in relation to the defendant.
 - x. Whether the amounts pleaded in the plaints are the subject matter of an arbitration between Pangaea Development Holdings Limited, Hacienda Development Limited and Mr. Adam Tuller;
 - xi. Whether the plaintiffs in both suits had in fact any monies of their own to lend to the defendant or whether the funds were stolen from the defendant;



- xii. If the plaintiffs advanced any monies to the defendants in which currency were those funds received;
 - xiii. Whether the defendant has been prejudiced in his defence by the failure and refusal of Mr. Bruce Bouchard to release to the defendant all the financial records of the defendant from 2006 up to 2010 and thereafter; and
 - xiv. Whether the plaintiffs should pay the costs of these two suits.
95. In order to put things into perspective, it is necessary to give a brief background on how the parties in this consolidated suit inter-relate. Although the plaintiff's Counsel in his written submissions refers to Bruce Bouchard as the 1st plaintiff, he is the 2nd plaintiff and Pangaea Holdings (K) Ltd is the 1st plaintiff. That position can be traced back to the application dated 13th June, 2016, as amended on 17th June, 2016 which was compromised by consent on 19th September, 2016. In the said Notice of Motion filed in HCCC No. 55 of 2015, the defendant prayed for the following orders-
- a. That the application be certified as urgent and be heard expeditiously in the first circumstances;
 - b. Mombasa High Court Civil Suit No. 56 of 2015 (Bruce Bouchard vs Hacienda Development Holdings Ltd) be consolidated with this suit or both suits be heard together for purpose of this application that file (sic) be availed to the Court;
 - c. After both suits are consolidated the heading in the title be Pangaea Holdings Kenya Ltd, 1st plaintiff and Bruce Bouchard, 2nd plaintiff vs Hacienda Development Holdings Ltd (emphasis mine);
 - d. The defendant be granted leave to amend its defence in both suits by filing a consolidated and amended defence to both suits; and
 - e. Costs of the application be provided for.
96. Since the consent was adopted as an order of the Court, in line with the above prayers, the 1st plaintiff in this suit is Pangaea Holdings Kenya Limited, the 2nd plaintiff is Bruce Bouchard and the defendant is Hacienda Development Holdings Limited.
97. From the evidence adduced by PW1, who is the 2nd plaintiff herein, he and his wife Diana Bouchard are the Directors and Shareholders of the 1st plaintiff. The Shareholders of the defendant were Hacienda Development Holdings Ltd and Pangaea Development Holdings Limited (incorporated in the Republic of Botswana), with the 2nd plaintiff either directly or through his family members being a majority Shareholder of the latter company.
98. From the evidence adduced by PW1 and DW1, the defendant was incorporated for the purpose of construction of low costing housing estates and eco cities. It was a noble idea, and the project took off but it hit headwinds and it was not fully actualized due to financial problems that arose in funding of the project.
99. The 1st and 2nd plaintiffs herein claim that they injected a sum of USD 175,000.00 and USD 450,000.00, respectively, into the defendant's project, which amounts they were not reimbursed. I have considered the issues raised by both the plaintiffs and the defendant. I will first address the issues that I consider non-contentious, and move on to the highly contested issues;



Whether the amounts pleaded in the plaints are the subject matter of an Arbitration between Pangaea Development Holdings Limited, Hacienda Development Limited and Adam Tuller.

100. The evidence of PW1, Bruce Bouchard was that the amounts of USD 450,000.00 and USD 175,000.00 were initially a subject matter of the Arbitration between Pangaea Development Holdings Limited, Hacienda Development Limited and Adam Tuller (DW1). However, when PW1's Advocate saw the response filed by the other parties in the Arbitral proceedings, he advised PW1 to withdraw the claim for the said amount, and the same was done.
101. In his evidence, DW1 also confirmed that the amounts of USD 175,000.00 and USD 450,000.00 at one point in time formed part of the claim in the Arbitral proceedings but the said claims were withdrawn. As it stands, since the claim for the said amounts was withdrawn, it follows that the said amounts cannot form part of the arbitral proceedings.

Whether Mr. Bruce Bouchard is a Shareholder and Director of Pangaea Holdings Kenya Limited.

102. In his evidence PW1 testified that he is a Shareholder and Director of Pangaea Holding Kenya Ltd together with his wife Diana Louise Bouchard. That is an issue that was not contested by the defendant.

Was the defendant company undergoing any financial issues in the years 2007 - 2008?

103. According to PW1, the main objects of the defendant was to develop housing estates and eco cities and the defendant acquired 500 acres of land at Mwakurunge, namely, LR at No. MN/II/10279. He testified that the defendant commenced development thereon, but the project was never completed due to a number of delays in getting construction underway such as an injunction being brought against the defendant which lasted for nine (9) months and the fact that costs were being incurred, and the defendant ran short of funds.
104. PW1's evidence was that the defendant in the year 2009 was in severe distress and there were considerable shareholder differences, a fact that was captured in the minutes of 28th May, 2009 and 22nd June, 2009 produced in evidence in the defendant's consolidated bundle of documents. That it was due to the said financial difficulties that he, and the 1st plaintiff loaned the defendant a cumulative amount of USD 635,000.00 which the plaintiffs are claiming in this suit.
105. PW3, Jerome Shlomo explained that financial difficulties were encountered as Managers were being paid large sums of monies in salaries and it appeared that the contractor who had been engaged to do the work did not understand the gravity of such a large project. PW3 explained that there were labourers on site who were being paid, but the defendant usually had shortage of building materials. As a result, his recommendation was that instead of construction of 5,000 housing units that were being targeted by the defendant, the number of housing units could be reduced. He confirmed that 10 housing units were constructed at the time he was working for the defendant, as he left employment when he stopped being paid his salaries.
106. On his part, in cross-examination, DW1 admitted that the defendant company was in financial distress and that he loaned it money. It is therefore evident that the defendant was in financial distress, as the said fact was also admitted by PW1, PW3 and DW1.

Whether the defendant entered into any agreement to borrow any money from the plaintiffs, and if the defendant passed any resolution to borrow any money from the plaintiffs or any one



of them, and whether the 1st and 2nd plaintiffs lent USD 175,000 and USD 450,000 to the defendant.

107. The answer to the foregoing issue is in the negative. PW1 and DW1 were categorical that there was no formal loan agreement entered into between the plaintiffs and the defendant. According to PW1, the defendant was in financial difficulties and the Directors had informal discussions about the said situation.
108. PW1's evidence was that due to the said situation he and his wife advanced USD 450,000.00 to the defendant, and that 1st plaintiff advanced USD 175,000.00 to the defendant as well. PW1 confirmed that there was no Board resolution arrived at, for the plaintiffs to lend the defendant the total sum of USD 625,000.00. PW1's evidence was that the plaintiffs advanced the said money to the defendant as an act of good faith.
109. In the defendant's submissions, Mr. Kinyua stated that it was common ground that the defendant could not lawfully borrow any sum of money exceeding USD 100,000.00 or its equivalent in Kenya Shillings without a Board of Directors' Resolution which was confirmed by the sworn evidence of PW1 in re-examination and DW1 in his evidence. Further, PW1 and DW1 were in agreement that no two Directors could approve a loan of more than USD 100,000.00.
110. Mr. Kinyua contended that no one could have been better informed of the Board resolution to any borrowing exceeding USD 100,000.00 than PW1 who described himself as an Investment Banker and who was the defendant's Executive Director in charge of Finance.
111. In regard to PW1's evidence that the plaintiffs acted in good faith as Shareholders of the defendant by providing the cash for the defendant without having a formal agreement being entered into and having been signed, Mr. Kinyua stated that the plaintiffs were not Shareholders of the defendant as PW1 was a Director of Pangaea Development Holdings Limited, a foreign company incorporated in the Republic of Botswana, which was a Shareholder of the defendant, but PW1 was not a Shareholder of the defendant.
112. The defendant's Counsel submitted that the PW1 in his evidence confirmed that the money the plaintiffs allege to have advanced to the defendant were received in Kenya Shillings even though the defendant had a US Dollar account.
113. Mr. Kinyua submitted that the absence of a Board Resolution and a loan agreement to borrow USD 625,000.00 was not a mere irregularity. Counsel stated that in the years 2007 and 2008, the exchange rate as confirmed by PW1 was Kshs.72 to 1 USD, which would have given an amount of Kshs.45,000,000.00. Counsel urged this Court to take Judicial Notice that as at the time he filed the defendants' submissions, the conversion rate was Kshs.124 to 1 USD, which would give an amount of Kshs.77,500,000.00 for repayment of the loan. He contended that this Court was being invited to bless and enforce a fraud that would unfairly enrich the plaintiffs by Kshs.32,500,000.
114. The defendant's Counsel stated that the plaintiffs have claimed interest at 15% per annum which if multiplied with USD 625,000.00 would give interest of USD 93,750.00 per year, and if multiplied with 14 years from the year 2008 to 2022, it would give an amount of USD 1,312,500.00 which is in interest alone, which if converted into Kenya Shillings amounts to Kshs.162,750,000.00.
115. Mr. Kinyua submitted that since there were no resolutions to borrow those funds and there were no loan agreements, PW1 should have explained where he got the interest of 15% from, but he did not. According to Mr. Kinyua, the said interest is above the commercial rate of about 5% for the dollar, as applicable in the year 2008.



116. Counsel submitted that parties are bound by their pleadings, and in the consolidated reply to the defence at paragraph 5(i), the plaintiffs allege that the lending of the money to the defendant was duly approved by the defendants, he however contended that there is no evidence that the defendant approved the borrowing. He submitted that the provisions of the repealed Company's Act and Articles of Association for various Company do not authorize Directors of Limited Liability Companies to enter into any contract with the companies they are Directors of, without the necessary disclosures to the Board of Directors for obvious reasons.
117. He further submitted that in this case, the Executive Director in charge of finance purportedly lent the defendant money in USD at 15% interest per annum without a Board Resolution, falsified accounting records that he had advanced the money in US Dollars, confessed in writing to having committed fraud and thefts by ordering a junior Book Keeper to hide the evidence of that fraud from the Managing Director and testified that he knew that no two Directors could make the decision to borrow more than USD 100,000.00.
118. On this issue, Mr. Kamami, learned Counsel for the plaintiffs submitted that even though there were no formal loan agreements between the plaintiffs and the defendant, the loans from the plaintiffs were captured in the year 2008 accounts and also in the minutes adduced as evidence by the defendant.
119. Mr. Kamami stated that DW1 during cross-examination also admitted that he loaned money to the defendant during the time in issue and in cross-examination he also admitted that he did not have formal written loan agreements with the defendant. Counsel contended that it reeks of double standards that on one hand DW1 claims no monies were loaned by the plaintiffs because there were no loan agreements, but on the other hand, he testified that he is owed the money he claims to have loaned the defendant, in the absence of formal written agreements.
120. Mr. Kamami reiterated that unlike DW1's claimed amounts, the plaintiffs' loans were captured in the minutes of the defendant's meetings produced by DW1 as evidence and also in the audited accounts for the year 2008, which were also signed by DW1's nominee David Muniu. The plaintiffs' Counsel urged this Court to find that the monies transferred by the plaintiffs to the defendant company were indeed loans and that the same ought to be repaid as prayed in the plaint.
121. In resolving the issue of whether there was a loan agreement entered into between the plaintiffs and the defendant and if there was a Board Resolution approving the loan, it is not disputed there was no Board Resolution made by the defendant's Board of Directors to borrow money from the plaintiffs. There were also no loan agreements entered into between the plaintiffs and the defendant for the loan advanced of USD 625,000.00 to the defendant by the plaintiffs. As submitted by Mr. Kinyua, both PW1 and DW1 were in agreement in their evidence that no 2 Directors could make decisions beyond the sum of USD 100,000.00. DW1 in cross-examination however stated that he had in the past advanced loans to the defendant without agreements. He also acknowledged the fact that the plaintiffs had advanced the sum of USD 625,000.00 to the defendants. His major issue of contention from his evidence was that some amounts he had advanced to the defendant were not captured in the audited financial statement for the year 2008. PW1 however explained that the said amounts were not captured because there were no supporting documents to support the purported loans. Eventually, the financial statements were corrected and signed by PW1 and Mr. Muniu, a Director of the defendant.
122. On being cross-examined on the previous loans advanced to the defendant, PW1 stated that previous loans from the plaintiffs to the defendant were captured in loan agreements. PW1 further stated that there were no emails or documentation for the loan that the plaintiffs advanced to the defendant as the discussion was made at an informal meeting. He stated in cross-examination that he agreed with DW1 (Mr. Tuller) in an informal meeting that they would loan the defendant the said money.



123. It was PW1's contention that if there were objections the funds that the plaintiffs advanced to the defendant, the latter would have returned the money to them. DW1 in cross-examination admitted that he was the defendant's MD in the year 2008 but he never wrote to the two banks operated by the defendant to verify if the money in issue was remitted to the defendant's bank accounts.
124. It is apparent from the evidence adduced by both PW1 and DW1 that although the defendant was a limited liability company, the Directors and Shareholders of the company were not running the company as they should have, when it came to management of finances.
125. Looking at case law, the Court of Appeal in its decision in *Abdirahim & another v Awo Shariff Mohammed t/a As Mohamed Investments* [2014] eKLR, held that there is no general rule that all agreements must be in writing and that the Law of Contracts Act does not require that money lending agreements be in writing for them to be enforceable. The Court held that Section 3(1) of the [Law of Contract Act](#) is limited to agreements limited by guarantees which should be in writing as was stated by Judge Ringera in the case of *Agriculture Finance Corporation & another v Kenya Alliance Insurance Co. Ltd & another* [2002] 1 KLR 231.
126. In this case, before making a finding on if the money advanced by the plaintiffs to the defendant is payable, it is necessary to consider the law of contract further as settled by case law. In the case of *Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyds Rep 25 Steyn LJ stated as follows –

“.. It is important to consider briefly the approach to be adopted to the issue of contract formation..... It seems to me that four matters are of importance. The first is that law generally adopts an objective theory to contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men .. that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in case of a contract alleged to have then made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See *Brogden v Metropolitan Railway* [1877] 2 AC 666, *New Zealand Shipping Co. Ltd v Lloyds* Reo.534 at P.539 Col.1 [1975] AC 154 at P. 167 D-E; *Gibson v Manchester City Council* [1979] 1 KLR 294.....The Third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. See *British Bank for Foreign Trade Ltd v Novinex* [1949] 1 KB 628 at P. 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is vague for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalized in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar consideration may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction, it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See *Trollone & Cotts Ltd v Atomic Power Ltd* [1963] 1KLR 333” (emphasis added).



127. In addressing the issues of contracts not in writing, the Supreme Court of the United Kingdom in the case of *RTS Flexible Systems Ltd -vs- Milkorei Alis Muller GmbH & Co KG* [2010] UKSC 14, [45] stated as follows-

“The general principles are not in doubt. Whether there is a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.” (emphasis added).

128. In order to determine if there was a properly executed informal agreement despite the absence of a Board Resolution, it is important to consider the minutes of the meeting that discussed the loan amounts being claimed by the plaintiffs, and whether the loans were acknowledged by the Board of Directors in its financial statements for the year ending 31st December, 2008.
129. In the financial statements for the year ending 31st December, 2008 prepared by Ernst & Young, at page 62 of the plaintiffs’ bundle of documents, it is acknowledged that the loan of USD 175,000.00 from Pangaea Holdings Kenya Limited (1st plaintiff) advanced during the year attracted interest at the rate of 12% per annum up to 31st December, 2008, and that subsequently, the unpaid balance accrued interest at the rate of 15% per annum until it was repaid.
130. On page 53 of the plaintiffs’ documents, reference was made to Directors’ loan which relates to the loan advanced to the company (defendant) of USD 450,000.00 by one of the Directors, which had no fixed repayment terms and earned interest rate until repaid. Although Mr. Kinyua’s argument is correct that the plaintiffs were not Shareholders of the defendant, the 2nd plaintiff was however a Director of the defendant by virtue of the Joint Venture agreement, wherein Pangaea Development Holdings Ltd (Botswana) was a Shareholder of the defendant.
131. In the minutes of the Board of Directors of the defendant held on 22nd June, (the year is not indicated in the said minutes), Minute 6 on the underlined part states that Bruce Bouchard (BB) reported the loans delivered by himself, Pangaea Development Kenya Limited (PDKL), Pangaea Development Holdings Limited (PDHL), and Richard Redmoor (RR) asked Bruce Bouchard as to how the loans had been placed with Hacienda Development Holdings Limited (HDHL) as debt (reported & by E&Y) but that no debt contract was existing and none had been presented to the Board of Directors, but no direct answer was forthcoming, which was regrettably noted and a reminder was issued to Bruce Bouchard of the continuous breach of the Shareholding Agreement by Pangaea Holdings Development Limited.
132. From the above minutes there is no doubt that any amounts allegedly advanced to the defendant by the 1st and 2nd plaintiffs, to the tune of USD 175,000.00 and USD 450,000.00, respectively, was not supported by approval of the Board of Directors of the defendant, and the plaintiffs did not produce any Board Resolution to that effect.
133. There is however evidence that the plaintiffs transferred the amounts in issue from their USD accounts to the defendant’s bank account denominated in Kenya Shillings, but the said amounts were never transferred back to the plaintiffs. As an act of good faith, the best that the defendant could have done



was to refund the amount of USD 625,000.00 to the plaintiffs. It is therefore evident that there was a meeting of minds and acquiescence of the actions of the plaintiffs by the defendant, by its retention of the money, which resulted in an informal lending agreement. The defendant is therefore legally bound to pay back the said amount of USD 625,000.00 to the defendant.

When were the loans repayable and what were the terms of repayment?

134. According to PW1, the loan of USD 175,000 was to be repaid within one year and it attracted interest at the rate of 12% up to 31st December, 2008, and it would attract interest at the rate of advanced during the year attracted interest at the rate of 12% per annum up to 31st December, 2008, and that the unpaid balance accrued interest at the rate of 15% per annum until it was repaid. PW1 did not however adduce any evidence to show the interest rate applicable and the term of the loan of USD 450,0000.

Whether Mr. Bruce Bouchard committed fraud for his own benefit and for the benefit of Pangaea Holdings (K) Ltd against the defendant and whether he withheld financial records of the defendant from the defendant's Managing Director in order to conceal fraud.

135. In this case, the defendant did not file a counter-claim citing fraud and fraudulent activities against the 2nd plaintiff. Allegations of fraud must be strictly pleaded and proved. DW1 relied on a declaration that was signed by PW1 in which he purported to confess to fiddling with the accounts. In his evidence, PW1 recanted the said statement and explained that he signed it under duress from DW1. Since there was no counter-claim filed against the 2nd plaintiff, it denied him the opportunity to specifically rebut the allegation of fraud. It was clear to this Court that DW1 impressed upon the 2nd plaintiff to sign the declaration because some of the loans he had advance to the defendant were not included in the statement of accounts of the defendant. The 2nd plaintiff however explained that supporting documents were missing to support the said claims. The statement of accounts for the year ending 31st December, 2008 was however later corrected and the 2nd plaintiff and a Director of the 2nd defendant by the name of Muniu, signed the audited statement of accounts for the said year.
136. There is no proof that the audited financial statements signed by the 2nd plaintiff and Mr. Muniu, and which the 2nd plaintiff produced in evidence in this case, were fraudulent. Having heard the adduced by the witnesses, it is clear in my mind that the defendant was not prejudiced in any way if there are any financial documents/records that were not released by the 2nd plaintiff. I say so because this case is about the plaintiffs being owed money by the defendant and not about DW1 being owed money by the defendant. In this case, the documents produced by both parties prove that the plaintiffs advanced money to the defendant, which has not been repaid to date. As earlier stated, no counter-claim was filed by the defendant against the plaintiffs seeking any orders, if anything, the defendant through DW1 defended its case.
137. In addition, if financial documents were withheld by the 2nd plaintiff, the defendant never filed and served on the 2nd plaintiff a Notice to produce, and as such, it cannot be conclusively said that he withheld financial documents/records from the defendant's Managing Director (DW1).

Whether there was fraud perpetrated by the 2nd plaintiff in so far as the loan advanced to the defendant is concerned.

138. No evidence was adduced to show that the lending of money by the plaintiffs was fraudulently done from monies stolen from the defendant. The bank statements produced show transfer of funds from the plaintiffs to the defendant's bank account and those are the amounts being claimed. Under the



provisions of Sections 107, 108 and 109 of the Evidence Act, whoever alleges must prove, but the defendant failed to prove the allegations of fraud.

139. It is however clear that the amount of USD 625,000 was received by the defendant in the defendant's Kenya Shilling account. That is well captured at pages 21 to 27 of the plaintiffs consolidated bundle of documents. The said documents demonstrate that instructions would be given for transfer of monies from both the plaintiffs dollar accounts at I & M Bank and Commercial Bank of Africa, but the said amounts would be sold by the plaintiffs to the transmitting banks for conversion into Kenya Shillings. Therefore, I do agree with Mr. Kinyua for the defendant, that if the plaintiffs wanted to be paid back the loans in US Dollars, they should have transferred the amounts the loaned amounts to the defendant's US Dollar account in order for the loan to be received in US Dollars, and repaid in US dollars.
140. As for the interest rates applicable, the financial statements of the defendant at page 62 shows that the loan of USD 175,000.00 from the 1st plaintiff attracted interest at the rate of 12% up to 31st December, 2008 and the unpaid balance accrued interest of 15% per month until repayment. This Court has however made a finding that the money received by the defendant was received in Kenya Shillings, and not in US Dollars. That being the case, the interest rate captured in the financial statements is therefore not tenable in the circumstances of this case and cannot apply. The interest rate that is applicable is at Court rates.
141. In the result, I find that the plaintiffs' case is partly successful to the extent that—
- i. Judgment is entered in favour of the 1st plaintiff against the defendant for the sum of Kshs.13,597,500.00 as credited by the said plaintiff in the defendant's bank account;
 - ii. Judgement is entered in favour of the 2nd plaintiff as against the defendant in the sum of Kshs.35,480,774.00 as credited by the said plaintiff in the defendant's bank account;
 - iii. Interest is awarded on both (i) and (ii) at Court rates from the date of filing the suit;
 - iv. 2/3 of the costs of the suit is awarded to the plaintiffs.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF AUGUST, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Momanyi h/b for Ms Khasira for the plaintiffs

No appearance for the defendant

Ms B. Wokabi - Court Assistant.

