



Mukaba Investments Limited v Quadco Two Hundred & Forty Four Limited (Commercial Case 393 of 2016) [2024] KEHC 15486 (KLR) (Commercial and Tax) (29 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 393 OF 2016
MN MWANGI, J
NOVEMBER 29, 2024**

BETWEEN

MUKABA INVESTMENTS LIMITED PLAINTIFF

AND

QUADCO TWO HUNDRED & FORTY FOUR LIMITED DEFENDANT

JUDGMENT

1. This suit was instituted by the plaintiff vide a plaint dated 30th September 2016 seeking judgment against the defendant for –
 - a. The sum of USD 423,877.00 as particularized at paragraph 9 of the plaint;
 - b. Interest on (a) above at Court rates from 31st December 2014 to the date of satisfaction of the judgment in full; and
 - c. Costs of the suit.
2. The plaintiff's case is that it entered into an Investment Agreement dated 1st July 2014 with the defendant, under which it advanced the defendant a convertible loan of USD 300,000.00. That on 3rd July 2014, the loan was disbursed and USD 900.00 was deducted for legal fees incurred by the plaintiff. The plaintiff averred that it was a term of the Investment Agreement that the defendant would repay the loan advanced to it together with all the accrued interest thereon to be calculated at 17% per annum on the maturity date, six months from the closing date, before 30th June 2014 or as adjusted under Clause 3.4 of the Agreement.
3. The plaintiff contended that as the loan's closing date was not deferred, the loan matured on 31st December 2014, and the principal amount and the interest became due for payment to the plaintiff. The plaintiff claimed to have received only USD 25,186.00 on 2nd February 2015, as part payment of



interest. The plaintiff referred to Clause 7 of the Investment Agreement and stated that the defendant had failed to repay the principal sum or make further interest payments, thereby breaching the Agreement.

4. In opposition to the suit, the defendant filed a statement of defence dated 19th November 2019 where it denied all the averments in the plaintiff's plaint and stated that the total sum of USD 300,000.00 was not advanced to it by the plaintiff. It further averred that if at all there has been any breach of the Investment Agreement, the same was caused and/or induced by the plaintiff. The defendant claimed that the parties herein had varied the Investment Agreement to cap recovery and default interest at the LIBOR rate. The defendant asserted that the plaintiff's claim was premature, as no formal request or demand for settlement of the outstanding amount had been served.
5. This case proceeded to hearing where the plaintiff called one witness in support of its case. The defendant on the other hand did not call any witnesses to ventilate its case.

Plaintiff's Case.

6. Mr. Paul Robert Kavuma, the plaintiff company's Director testified as PW1. He adopted his witness statement dated 22nd November 2022 as his evidence in chief, and produced the bundle of documents filed by the plaintiff on 30th September 2016, and the supplementary bundle of documents filed on 8th March 2023 as plaintiff exhibit Nos. 1, 2 & 3. He stated that the plaintiff entered into an Investment Agreement with the defendant on 1st July 2014, and advanced to the defendant a convertible loan of USD 300,000.00, with USD 900.00 deducted for legal fees.
7. He testified that the loan was designated for the defendant's capital expenditure and business operations, and was to be repaid with 17% annual interest by 31st December 2014, or later under Clause 3.4, with a 2% penalty interest in case of default. Mr. Kavuma contended that despite demand notices and attempts at court-annexed mediation, the defendant has only paid a total of USD 25,186.00 being payment on interest, and has failed to repay the principal sum and the remainder of the interest.
8. In cross-examination, PW1 confirmed that his submitted documents neither had a copy of the Loan Agreement referred to in his evidence in chief, nor the plaint, or a Board resolution authorizing him to attend Court and testify on behalf of the plaintiff. He stated that the plaintiff did not require a licence to lend money in Kenya. He confirmed that the loan accrued daily interest at 17% per annum, compounded semi-annually, but he could not recall if the loan was rolled over or if a different interest rate applied under such circumstances. He explained that the 2% interest penalty rate referred to in Clause 4.1 of the Investment Agreement was intended to be interpreted as a total of 19%, as per Clause 5.4 of the said Agreement.
9. Mr. Kavuma stated that while the 2% penalty interest was only to be applicable in the event that the loan advanced to the defendant was converted, the said loan was not converted into equity. He asserted that the Loan Agreement complied with both Kenyan and Mauritian law. He acknowledged that the USD 900.00 deduction for legal fees was not explicitly provided for in the said Agreement. He referred to Clause 5.5 of the Investment Agreement which states that legal costs related to the Agreement would be borne by each party. He testified that the loan amount of USD 300,000.00 less the USD 900.00 was disbursed to the defendant through the law firm of Kaplan & Stratton Advocates, acting on the defendant's instructions. He also clarified that the Investment Agreement did not obligate the plaintiff to provide the defendant with monthly loan account statements.
10. In re-examination, PW1 referred to the Investment Agreement and pointed to an imprint showing that revenue was paid. He also pointed out another stamp, and a signature, and asserted that the Agreement was properly registered. He confirmed that he instructed the disbursement of the loan to



- the defendant and referenced a letter in the defendant's documents, which confirmed payment of USD 21,496.85 towards the loan. He noted that the defendant only raised concerns about the interest rate being unconscionable in September 2022, despite previously admitting in its witness statement to have received the loan. PW1 testified that given the unsecured nature of the loan and its higher risk profile compared to a commercial bank loan, the 17% interest rate applied was reasonable and justified.
11. Upon close of the plaintiff's case, and after the defendant's Counsel informed this Court that the defendant would not be calling any witnesses to support its case, the Court directed parties to file written submissions.
 12. The plaintiff's submissions were filed on 6th June 2024 by the law firm of Mohammed Muigai LLP, whereas the defendant's submissions were filed by the law firm of Oraro & Company Advocates on 12th July 2024.
 13. Mr. Biko Angwenyi, learned Counsel for the plaintiff relied on the case of *Jackline Njeri Kariuki v Moses Njung'e Njau* [2021] eKLR, and submitted that the defendant breached the Investment Agreement by failing to repay the loan together with the accrued interest upon maturity, despite receiving the full amount less the USD 900.00 legal fee deduction, thereby causing the plaintiff to suffer losses. He cited the case of *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* [2021] KEHC 93 (KLR), and submitted that the defendant had not demonstrated that the interest rates charged and/or applied to the loan advanced to it were unconscionable.
 14. He referred to the case of *Husamuddin Gulambusein Pothiwalla Administrator, Trustee and Executor of The Estate of Gulambusein Ebrahim Pothiwalla v Kidogo Basi Housing Corporative Society Limited and 31 others Civil Appeal No. 330 of 2003*, and argued that the Investment Agreement was entered into willingly by the parties herein, at which point the terms of the Agreement were uncontested. Counsel argued that for the said reason, the defendant's allegations that the interest rates were unconscionable is an attempt to intentionally circumvent the terms of the Investment Agreement.
 15. Mr. John Mbaluto, learned Counsel for the defendant cited the provisions of Sections 107 & 108 of the *Evidence Act*, and relied on the Court of Appeal decision in *Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau* [2016] eKLR, and submitted that the plaintiff failed to provide a signed Investment Agreement, evidence of the parties acting on it, proof of the loan disbursement, or confirmation of any part payment. Counsel submitted that the plaintiff failed to discharge its burden of proving the existence of the Loan Agreement. He cited the Court of Appeal case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR, and argued that the plaintiff could not rely on the defendant's witness statement and documents, as they were not admitted in evidence. Counsel contended that in addition to the foregoing, the plaintiff also failed to demonstrate that the loan was disbursed to the defendant.
 16. In submitting that the plaintiff failed to provide any credible evidence of a valid and enforceable contract or that the parties acted in furtherance of the contract, Mr. John Mbaluto relied on the case of *Erick Barasa Makokha & 2 others v Neema Ya Mungu Investment Co Ltd* [2021] eKLR. Counsel cited the provisions of Section 109 of the *Evidence Act* and submitted that PW1 admitted that the only evidence of the loan disbursement was a payment instruction form, which was insufficient to prove payment and lacked the necessary signatures.
 17. Mr. John Mbaluto relied on the Court of Appeal case of *Ajay Indravadan Shah v Guilders International Bank Ltd Civil Appeal No. 13512001* [2002] 1 EA 269, cited by the Court in *Danson Muriuki Kihara v Johnson Kabungo* [2017] eKLR, to support his assertion that the interest and fees on the principal loan were excessive and punitive, particularly for a USD-denominated contract. He further cited the Court of Appeal case of *Margaret Nieri Muiruri v Bank of Baroda (Kenya) Limited* [2014] eKLR, and



stated that the plaintiff's failure to provide the defendant with any statement of accounts amounted to unconscionable conduct.

Analysis and Determination.

18. I have considered and analyzed the evidence adduced by the plaintiff's witness as against the pleadings filed by the plaintiff, together with the written submissions by Counsel for the parties. The issues that arise for determination are -
- i. Whether the defendant breached the contract between the parties herein; and
 - ii. Whether the plaintiff is entitled to the reliefs sought in the plaint.

Whether the defendant breached the contract between the parties herein.

19. It is noteworthy that in as much as the defendant filed a statement of defence in opposition to the plaintiff's suit, a witness statement, and a bundle of documents, the defendant opted not to call any witness to ventilate its case and produce documents in support of its case. For that reason, the averments contained in the defendant's statement of defence, the contents of its witness statements and the bundle of documents filed, are of no probative value to this suit. That on its own does not mean that the plaintiff's suit automatically succeeds. The plaintiff is still obligated to prove its case on a balance of probabilities in order for this Court to exercise its discretion in its favour and grant it the orders sought.
20. The plaintiff's case is that it got into an Investment Agreement with the defendant which allowed it to advance the defendant a convertible loan of USD 300,000.00. The plaintiff's contention is that the said loan less USD 900.00 deducted for legal fees was disbursed to the defendant on 3rd July 2014. The plaintiff stated that it was a term of the Investment Agreement that the defendant would repay the loan advanced to it together with all the accrued interest thereon to be calculated at 17% per annum on the maturity date, being the 31st December 2014, but to date the defendant has only paid the plaintiff USD 25,186.00 being part payment of interest and has failed and/or refused to repay the plaintiff the principal sum or make further interest payments, thereby breaching the Agreement.
21. In support of its case, the plaintiff called one witness Mr. Paul Robert Kavuma, who introduced himself as the plaintiff company's Director. He testified as PW1. In support of the allegations contained in the plaintiff's plaint and his testimony, Mr. Kavuma produced a copy of the Investment Agreement dated 1st July 2014 between the parties herein, a copy of a demand letter to the defendant dated 22nd June 2016, and a copy of a payment instruction form dated 1st July 2014, as plaintiff exhibit Nos. 1, 2 & 3, respectively.
22. In cross-examination, it however came out clearly that the copy of the Investment Agreement dated 1st July 2014 between the parties herein was not duly signed by either of the said parties. As such, the defendant submitted that the plaintiff did not discharge its burden of demonstrating the existence of a Loan Agreement between the parties herein.
23. On perusal of the Investment Agreement, this Court agrees with the defendant that the same does not contain signatures of representatives of the parties herein, and those of their witnesses, a fact which was not disputed by PW1.
24. In cross-examination, PW1 confirmed that the Investment Agreement he produced has a revenue stamp, as well as another stamp and signature. He asserted that the Agreement was properly registered. Upon a close look of the stamps on the face of the Investment Agreement produced PW1, I have noted that the said stamps only confirm that revenue was paid, but do not confirm whether or not the said Agreement was registered and to which office/department the registration, if any, was done. As a result,



the plaintiff cannot rely on the said stamps in asserting that the Investment Agreement was registered, which would make it binding on the parties herein.

25. In any event, I am not persuaded that a document/agreement can be registered in the absence of signatures of the parties to the said Agreement to ascertain their acceptance of the terms therein, and of their intention to be bound by the terms of the said Agreement. I note that if that was the case, people would use that avenue to compel people whose intention was not to be bound by the terms of an Agreement to comply and/or fulfill terms that they did not agree to be bound to.
26. The foregoing however, is not the last nail in the plaintiff's case. The plaintiff still had an obligation to prove its case against the defendant by demonstrating that the parties herein by their conduct had every intention to be bound to the terms of the Investment Agreement dated 1st July 2014, despite the fact that they did not execute the said Agreement. In doing so, the plaintiff is in the very least expected to demonstrate that the loan amount was disbursed to the defendant. In support of the allegation that the loan amount, less legal fees was disbursed to the defendant, the plaintiff produced a copy of a payment instruction form for remittance of a loan in favour of the defendant dated 1st July 2014, and testified that USD 300,000.00 less USD 900.00 deducted as legal fees, was disbursed to the defendant on 3rd July 2014.
27. The defendant submitted that the plaintiff failed to provide proof of the loan disbursement, or confirmation of any part payment. Further, that the payment instruction form was insufficient to prove payment and lacked the necessary signatures. This Court has had the opportunity to peruse the payment instruction form relied on by the plaintiff as produced by PW1, and I am inclined to agree with the defendant that it is not sufficient to prove disbursement of funds. This is because from the said form, it is impossible to ascertain whether it was received by the Manager international banking, whether it was acted upon, and whether the funds were indeed disbursed. It is not clear to this Court why the plaintiff did not produce the relevant statement of accounts which would have shown movement of money from its account to the account of the law firm of Kaplan & Stratton. Further, despite the fact that the plaintiff claimed that the defendant instructed it to disburse the funds to the law firm of Kaplan & Stratton, a copy of the said instructions has not been produced before this Court for me to ascertain the veracity of the said allegation, and the correctness of the said instructions.
28. The plaintiff attempted to rely on the defendant's documents in proving that the funds in question were disbursed to the defendant. In re-examination, PW1 referred to a letter in the defendant's documents, and asserted that it confirms payment of USD 21,496.85 towards the loan. As was correctly submitted by the Mr. John Mbaluto for the defendant, since the defendant's bundle of documents were not produced in Court, the same do not form part of the evidence and/or record before this Court. The plaintiff is therefore not at liberty to rely on them in support of its case. A similar position was held by the Court of Appeal in the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* (supra), where it was held as follows –

The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held as proved or disproved. First, when the document is filed, the document though on the file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; ... Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of



the case...a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness...we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they had simply been marked for identification and they have no evidential weight...

29. Bound by the above decision, this Court finds that it cannot be called upon to interrogate the contents of the defendant's bundle of documents as they do not form part of the evidence and/or Court record as they were not produced.

30. Pursuant to the provisions of Sections 107, 108 & 109 of the *Evidence Act*, Cap 80 Laws of Kenya, he who alleges must prove. This maxim was extensively discussed by the Court the case of Koinange & 13 others v Koinange [1986] KLR 23, and also in the case of Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR, where it was stated that -

...As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue.

31. It is my finding and I hold that since the plaintiff failed to prove that there existed a validly executed Investment Agreement between it and the defendant, and/or that as a result of the said Agreement the plaintiff disbursed USD 300,000.00 less legal fees of USD 900.00 on 3rd July 2014, the question of breach of contract/Agreement does not arise. I therefore find that the plaintiff has not proved its case on a balance of probabilities to warrant this Court to enter judgment in its favour. In the end, I find that the plaintiff's suit against the defendant is not successful.

32. Section 27 of the *Civil Procedure Act* provides that costs follow the event. In this case, the costs of this suit shall be borne by the plaintiff.

33. The upshot is that the plaintiff's suit is not merited. It is hereby dismissed with costs to the defendant. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF NOVEMBER, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Ogonyo h/b for Mr. Biko Angwenyi for the plaintiff

Ms Natalie Obago h/b for Mr. John Mbaluto for the defendant

Ms B. Wokabi - Court Assistant.

NJOKI MWANGI, J.

