



REPUBLIC OF KENYA



**Githiomi v Muchene & another (Commercial Appeal 376 of 2022)
[2023] KEHC 26096 (KLR) (Commercial and Tax) (24 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26096 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL 376 OF 2022
FG MUGAMBI, J
NOVEMBER 24, 2023**

BETWEEN

ANTHONY MURITHII GITHIOMI PLAINTIFF

AND

PAUL KINUTHIA MUCHENE 1ST DEFENDANT

INTERCONSUMER PRODUCTS LTD 2ND DEFENDANT

JUDGMENT

Background

1. The plaintiff commenced these proceedings vide a plaint dated 28th September 2022 seeking judgment against the defendants for:
 - i. The loaned amount of Kshs. 70,000,000/=.
 - ii. The cumulative 2% monthly earning of the loaned amount per month for 31 months amounting to Kshs. 43,400,000/=
 - iii. Interest in i and ii
 - iv. Loss of bargain at Kshs. 21,000,000/=
 - v. Costs of the suit.
2. According to the plaintiff, a clearing and forwarding businessman, the background to the dispute between the parties is a financial investment agreement dated 26th July 2018. The plaintiff's case is that the 1st defendant, who is a director of the 2nd defendant, requested for a financial investment from the plaintiff, for the amount of Kshs. 55,000,000/= to expand its product line.



3. It was a term of the agreement that the amount loaned to the defendants was loaned jointly and severally and the same was to be paid to the plaintiff at an interest of 2% of the deposit per month for a period of one year and the initial deposit or capital in full at the end of the year. Thereafter, the plaintiff increased the loan by a further Kshs. 15,000,000/= making the total loan investment a sum of Kshs. 70,000,000/=, under the same terms of earning 2% per month and extended to another year.
4. The loan amount of Kshs. 55,000,000/= was deposited into account number 0180290026212 Equity Bank, Community Corporate Branch in the name of the defendants. The second loan disbursement of Kshs. 15,000,000/= was deposited into account number 0180290026212 Equity Bank, Community Corporate Branch in the name of the 2nd defendant.
5. The plaintiff avers that the defendants diligently made the 2% payment for the first 7 months on the first instalment, before running into arrears. The plaintiff states as a result of the breach and default to make the payments he has suffered loss and damages. The particulars of the breach of the contract and fraud of the defendants is laid out in the plaint.
6. Upon service of the plaint and the summons to enter appearance, the defendants filed a memorandum of appearance and statement of defence both dated 19th October 2022. The defendants denied making any request for financial investment to the plaintiff and denied the particulars of loss and damage as well as being in breach. Instead, the defendants averred that any investment made by the plaintiff with the 2nd defendant, was based on payments on a return of profits made by the business.
7. The plaintiff testified as PW1. He adopted his written statement dated 27th September 2022, and the list of documents dated 28th September 2022, which were marked as plaintiff's exhibit 1 save for email correspondence between the plaintiff and defendant and the mobile text and whatsapp messages which were marked as MF1.
8. The plaintiff stated that the 1st defendant, who was his friend, informed him that he was selling shares in the 2nd defendant company along the terms set out in the plaint. It was a term of the agreement that the capital was to be repaid to the plaintiff upon giving 3 months' notice. He confirmed having received the 2% which was 1.4m per month until February 2020 when the defendant stopped paying the returns. He told the Court that he was depositing money in the 2nd defendant's account held with Equity Bank.
9. During cross-examination the plaintiff reaffirmed that he entered into an investment agreement and was requested to buy shares. He invested Kshs. 70,000,000/= and was entitled to some dividends which he was paid until February 2020. He reiterated that the investment agreement was with the 2nd defendant and the monies were paid to the 2nd defendant through bank transfers.
10. He admitted that the bank slips did not show the purpose of the transfers but confirmed in re-examination that the bank statement shows the bank account he was to deposit the money. He further testified that he was to deposit Kshs. 15,000,000/= but deposited 13,900,000/= as the 1st defendant owed him Kshs. 1,100,000/=. The plaintiff confirmed that the 1st defendant did not sign a guarantee in the course of the financial investment agreement.
11. The defence did not call any witnesses. Pursuant to the Court's directions on 14th June 2023, parties were directed to file written submissions. Both parties complied with the plaintiff filing submissions dated 3rd July 2023 while the defendants filed submissions dated 24th July 2023. While I see no need to regurgitate the submissions as the gist of the same have been highlighted already. I will however refer to them in my analysis and determination of the issues in dispute.



Analysis

12. I have carefully considered the pleadings, evidence, submissions filed and authorities cited by the rival parties in support of their claims. From these, I am of the opinion that the following issues arise for determination:
- i. Whether there was a valid investment agreement between the plaintiff and the 2nd defendant?
 - ii. Whether any money was received by the defendants from the plaintiff?
 - iii. Whether the 1st defendant is jointly liable with the 2nd defendant.
 - iv. Whether the Court should grant the orders sought.
 - v. Who is to bear the costs.

Whether there was a valid investment agreement between the plaintiff and the 2nd defendant?

13. The plaintiff produced a list and bundle of documents dated 28th September 2022. Among them is a Financial Investment Agreement dated 26th July 2018 between the plaintiff and the 2nd defendant. I note that the 1st defendant was not a party to the said agreement. The terms of the contract were very clear that the plaintiff was contracting with the 2nd defendant as a financial investor. Under the said agreement the minimum investment was Kshs. 55,000,000/=, for a minimum period of 1 year, at an interest of 2% per month.
14. The contract was executed by the 2nd defendant and witnessed by the 1st defendant in addition to the secretary of the 2nd defendant on one part and the plaintiff on the other part. The answer to this issue is therefore in the affirmative.

Whether any money was received by the defendants from the plaintiff?

15. The second issue is whether the defendants received money from the plaintiff. From the record the plaintiff has failed to demonstrate through evidence that money was paid to the defendants. The bank statement attached in the bundle of the list of documents was not produced as an exhibit and therefore cannot be relied on by the Court.
16. The plaintiff avers that the defendant diligently paid the dividends/interest in the first 7 months; this assertion has not been proved or demonstrated by any evidence. The same has not also be refuted by the defendants. Section 107 of the *Evidence Act* provides that he who asserts must prove. Without any evidence to prove the amounts deposited with the defendants, it is unclear to the Court whether any money was deposited and to which account.
17. On the flip side of things, this Court also acknowledges that at paragraph 4 of the statement of defence, the defendants admitted to the fact that any investment made by the plaintiff in the 2nd defendant was subject to a return on profits made by the business. The defendant went further and confirmed that dividends were indeed paid out to the plaintiff diligently but the same were halted by the Covid-19 pandemic. The statements made by the defendants in my view corroborate the testimony of PW1 and the investment agreement. The defendants do not aver or submit as to what happened now that the COVID pandemic is behind us. There is no evidence that the interest on investment was paid thereafter.
18. A clear and unequivocal admission of facts is conclusive, and renders it unnecessary for the other party to adduce evidence to prove the admitted facts. Order 13 Rule 2 of the *Civil Procedure Rules* is clear



that admissions made in the pleadings or otherwise are binding on the party who makes the admissions. It is due to the defendant's admission that the court will find that the plaintiff indeed deposited the said amount of Kshs. 70,000,000/= with the defendants. I also note that the defendants have not controverted the authenticity of the Agreement for Financial Investment which was the basis of the transaction.

Whether the 1st defendant is jointly liable with the 2nd defendant

19. Counsel for the defendant argued that the 1st defendant is not liable for the actions of the 2nd defendant as he was not a party to the agreement and neither did he sign a guarantee on the same. The plaintiff on the other hand disagreed and submitted that the 1st defendant was liable as he is a director of the 2nd defendant who contracted the plaintiff to make the investment. The plaintiff avers that the 1st defendant is therefore liable as an agent of the 2nd defendant.
20. The principal of separate corporate personality is one that needs no elaboration, having survived the test of time since the famous case of *Salomon & Co Ltd v Salomon*, [1897] A.C. 22 H.L. Courts have applied the principle of corporate personality strictly. But exceptions to the principle have also evolved over time and there are sufficient judicial pronouncements on the same. The effect of this is as stated by this Court (Mabeya, J) in *Multichoice Kenya Ltd V Mainkam Ltd & Anor*, [2013] eKLR that:

“... directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a contract, then only the company is liable on it.”
21. In the present circumstances, it is clear from the agreement that the plaintiff entered into an agreement with the 2nd defendant. The 1st defendant was a director of the 2nd defendant and acting on behalf of the 2nd defendant. The agreement was executed by the 2nd defendant and witnessed by the 2nd defendant's secretary and director who happened to be the 1st defendant.
22. While a company is a juristic person, it must be appreciated that it lacks hands, feet and a mind of its own and operates through its agents. Be that as it may, separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting of piercing of the corporate veil. There is absolutely no mention or prove of impropriety, fraud or dishonorable conduct on the part of the defendants to justify lifting the corporate veil.
23. I note that the agreement refers to the 1st defendant as a guarantor of the investment. The plaintiff has not proved that the 1st defendant signed any personal guarantee in respect of the transaction or the terms of such a guarantee (if any). There is also no prove that the said guarantee was sanctioned by the Company. The 1st defendant could therefore only be liable if fraud is pleaded and proved against him which it has not been.
24. In my view, it is only if the 2nd defendant cannot settle its liability with the plaintiff that the plaintiff may seek to recover the same from the 2nd defendant's directors subject of course to the principles governing the lifting of the corporate veil. In the circumstances I would therefore enter judgment against the 2nd defendant Company and dismiss the suit against the 1st defendant with costs to the 1st defendant.



Whether the Court should grant the orders sought

25. Regarding the prayer for special damages by the plaintiff, This Court held in *Richard Okuku Oloo v South Nyanza Sugar Co. Ltd* that:
- “...a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature if the act complained of...”
26. The defendants submitted that the plaintiff was not entitled to special damages and relied on the case of *Kenya Women Microfinance Ltd V Martha Wangari Kamau*, [2021] eKLR. The Court held that:
- “The law is settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as circumstances permit.”
27. I have looked through the evidence presented in Court. On the issue of the loss of bargain it is my opinion that the 2% interest that was to be paid from the invested amount is the profit to be realised by the plaintiff. I agree with the defendants that the compensation on loss of bargain has not been proved and as such the claim for loss of bargain fails.
28. From the foregoing it is my finding that the plaintiff has proved his case on a balance of probability against the 2nd defendant. The suit against the 1st defendant is dismissed with costs.

Determination

29. In conclusion, I enter judgment in favour of the plaintiff against the 2nd defendant for the following:
- i. A sum of Kshs 70,000,000/= being the capital amount invested by the plaintiff;
 - ii. A sum of Kshs 43,400,000/= in respect of the interest due from the sums deposited;
 - iii. Interests at court rates from the date of filing the suit until payment in full;
 - iv. Costs of the suit.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 24TH DAY OF NOVEMBER 2023.

F. MUGAMBI

JUDGE

