



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL CAUSE NO. 2 OF 2020**

**ERICK BARASA MAKOKHA.....1<sup>ST</sup> PLAINTIFF**

**CHRISTENSEN MILLISCENT AKELLO.....2<sup>ND</sup> PLAINTIFF**

**PENINAH KATUNGE KIIO.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**NEEMA YA MUNGU INVESTMENT CO. LTD.....DEFENDANT**

**JUDGMENT**

1. The plaintiffs herein, by their joint plaint, dated 10<sup>th</sup> February 2020, and filed herein on 17<sup>th</sup> February 2020, aver that the defendant obtained a credit facility from them of Kshs. 21, 000, 000.00 from the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, which was to attract monthly interest at the rate of 13.8%, to be payable before the 5<sup>th</sup> day of each succeeding month, and an additional penalty of monthly interest of 10% in default of payment of the month interest. The contract was to terminate on 5<sup>th</sup> October 2019, which which date the defendant was to have had repaid the credit sum of Kshs. 21, 000, 000.0 in full. It is averred that the defendant breached the term on the monthly interest of 13.8%, since September 2019, and as at the date of the suit, had not repaid the principal sum of Kshs. 21, 000, 000.00 in full. It is further averred by the plaintiffs that the 3<sup>rd</sup> plaintiff, on 5<sup>th</sup> October 2019 and 7<sup>th</sup> November 2019, advanced to the defendant further credit facilities of Kshs. 6, 800, 000.00 and Kshs. 300, 000.00, respectively, to be repaid in full by the 5<sup>th</sup> February 2020. They aver that the defendant breached the terms of the second batch of contracts by failing to honour its obligations by 5<sup>th</sup> February 2020.

2. The plaintiffs claim, therefore, is for an aggregate of Kshs. 28, 100, 000. They also claim payment of the monthly default interest of 23.8%, from the month of September 2019 until payment in full, with regard to the principal amount advanced on 5<sup>th</sup> October 2018. They also ask for costs and interests.

3. In its defence, dated 24<sup>th</sup> February 2020, and filed herein on 28<sup>th</sup> February 2020, the defendant avers that it was the plaintiffs who were in breach of the contract, by filing to release the credit facility amount as agreed, and asserting that the amount of Kshs. 28, 100, 000.00 was never released to it. It is also averred that no contract was ever signed providing for a penalty of monthly interest at the rate of 10%, between it and the plaintiffs, and that the moneys were advanced on a strictly friendly basis. It particularized that the plaintiffs breached the contract by deliberately refusing or neglecting to advance the facility loan to the defendant; and the plaintiffs had misled the defendant that, upon execution of the contract, they would facilitate the defendant, with some loans, but none were ever disbursed contrary to the contract of 5<sup>th</sup> October 2018. The defendant avers that as a consequence of the failure to release the funds the subject of the agreements, the claim of Kshs. 28, 100, 000, 00 was misconceived. The defendant asserts that no amount was deposited into its account on 5<sup>th</sup> October 2018 amounting to Kshs. 12, 800, 000.00 contrary to what had been agreed; no amount of money was ever deposited into its account whatsoever by the plaintiffs for the duration of the contract signed on 5<sup>th</sup> October 2018; that no amount was deposited by the 3<sup>rd</sup> plaintiff on 5<sup>th</sup> October 2019 amounting to Kshs. 6, 800, 000.00 as per the alleged contract; that the only amount deposited by the 3<sup>rd</sup> plaintiff was a sum of Kshs. 200.00 on 6<sup>th</sup> November 2019 and Kshs. 299, 800.00 on 7<sup>th</sup> November 2029; and that no amount of money was ever deposited on its account amounting to Kshs. 28, 100, 000.00.

4. The defendant has filed a counterclaim, on grounds that as a consequence of the breach of contract, alluded to in its defence, it has suffered damage, and claims damages therefor. It also claims an account for the loan moneys advanced, and reconciliation to ascertain the cause of the breach of the contract. It claims costs, incidentals and interests.

5. The matter was disposed of by way of *viva voce* evidence. The 1<sup>st</sup> plaintiff was the first to testify. He described the plaintiffs as investors in the defendant to the tune of Kshs. 28, 100, 000, 00, with the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs putting Kshs. 21, 000, 000.00 and the 3<sup>rd</sup> plaintiff Kshs. 7, 100, 000.00. He put in a number of documents in the record as exhibits to support their case. He referred to a letter dated 24<sup>th</sup> January

2020, in which the defendant had acknowledged receiving Kshs. 21, 000, 000.00 but alleged that it had repaid some of the moneys, leaving a balance of Kshs. 17, 000, 000.00, and where the defendant proposed to settle the debt by monthly installments of Kshs. 1, 000, 000.00. With respect to the 3<sup>rd</sup> plaintiff, he stated that the defendant had acknowledge being indebted to the 3<sup>rd</sup> plaintiff to a tune of Kshs. 300, 000.00. He stated that from his bank account a sum of Kshs. 8, 368, 000.00 was paid to the defendant, Kshs. 30, 526.00 was paid to the defendant from the account of the 2<sup>nd</sup> plaintiff and a sum of Kshs. 8, 631, 900.00 was paid to the defendant from the account of the 3<sup>rd</sup> plaintiff.

6. During cross-examination, the 1<sup>st</sup> plaintiff stated that Kshs. 20, 000, 000.00 was what the plaintiffs should have deposited with the defendant, although his statement referred to Kshs. 21, 000, 000.00. He testified that the sum of Kshs. 20, 000, 000.00 was to be advanced over a period of time. He also stated that the money was to be paid into the bank account of the defendant. He said that they advanced a sum of Kshs. 10, 900, 000.00 on 5<sup>th</sup> October 2018, which was to cover the period 5<sup>th</sup> October 2018 and 5<sup>th</sup> October 2019, and which they paid in cash, over a period of time, and in respect of which they did not issue a receipt. He conceded that they only complied partially with the terms of the contract, which was even then not signed. He said that the board resolution was for advance of Kshs. 12, 800, 000.00, and not Kshs. 20, 000, 000.00 or Kshs. 21, 000, 000.00. He said that he signed the contract in Mombasa but it had no resolution backing it. Regarding the 3<sup>rd</sup> plaintiff, the contract she signed was for Kshs. 10, 000, 000.00, but she advanced a sum of Kshs. 7, 100, 000.00 to the defendant, and another of Kshs. 300, 000, 000 on 5<sup>th</sup> October 2019. He stated that all the advances by the 3<sup>rd</sup> plaintiff were through the bank. He said that his bank statement for the period from 1<sup>st</sup> October 2018 to 3<sup>rd</sup> February 2020 did not show payment to the defendant through the bank, neither did he have receipts showing that the defendant had received the moneys.

7. Peter Obera Marengi, a Director of the defendant, testified for the defence. He conceded that the defendant entered into a contract with the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs on 5<sup>th</sup> October 2018, for an advance of Kshs. 20, 000, 000.00, to be done on 5<sup>th</sup> October 2018, by bank transfer. The first transfer of Kshs. 12, 800, 000.00 was to be paid on 5<sup>th</sup> October 2018. He asserted that it was not paid. Regarding the 3<sup>rd</sup> plaintiff, their contract was done on 5<sup>th</sup> October 2019, for Kshs. 10, 000, 000.00, out of which she was to do a first tranche of Kshs. 6, 800, 000.00 on 5<sup>th</sup> October 2019, which she did not do. He testified that she instead paid a sum of Kshs. 200.00 on 6<sup>th</sup> November 2019 and Kshs. 299, 800.00 on 7<sup>th</sup> November 2019, making a total of Kshs. 300, 000.00. He asserted that no other moneys were advanced by the 3<sup>rd</sup> plaintiff. He stated that the defendant did not have bank accounts where the plaintiffs would have deposited the moneys. He stated that the second contract was for Kshs. 10, 000, 000.00, the defendant was not given the minimum amount as per the contract, and, therefore, the defendant never refunded the money, and it never got a request for refund from the 3<sup>rd</sup> plaintiff.

8. On the counterclaim, the witness reiterated that the first contract was for Kshs. 20, 000, 000.00, which was never disbursed; while the second was for Kshs. 10, 000, 000.00, which was also not disbursed. He asserted that amounted a breach of contract, since the plaintiffs did not adhere to the terms of the contract, and that the defendant lost clients due to the breach. He asserted that the defendant also suffered decreased productivity due to the breach, as the defendant was not able to advance moneys to clients on time. He stated that the defendant's trade was to advance money to business people, and the money from the plaintiffs was to be used for that purpose. He said that the defendant was exposed to serious cash flow problems, which affected its normal operations. He asked for general damages. During cross-examination, he stated that despite the breach of contract by the plaintiffs, the defendant did not write any demand or protest to them. He said that the defendant had previous contracts with them, which went well.

9. After the oral hearings the parties were directed to file and exchange written submissions, the directions were complied with, for both sides did file written submissions, which I have read through and noted the arguments made.

10. Looking at the pleading, the oral testimonies and the written submissions, the issues that I have identified for for determination are as follows:

- (a) whether there is a valid loan facility agreement between the plaintiffs and the defendant;
- (b) whether the defendant was advanced the facilities forming the basis of the plaintiffs' claim;
- (c) whether the defendant repaid the credit facilities extended to it by the plaintiffs;
- (d) whether the defendant is indebted to the plaintiffs; and
- (e) whether the defendant is liable to the plaintiffs in general damages for breach of contract, and vice versa.

11. On the first issue, whether there is a valid loan facility agreement between the plaintiffs and the defendant, the plaintiffs have produced copies of a number of contracts that they had entered into with the defendant, which I list here below, as follows:

- (a) dated 24<sup>th</sup> June 2017, for an amount of Kshs. 500,000.00, at a monthly interest rate of 11.6%, and repayable on or before 24<sup>th</sup> June 2018;
- (b) dated 13<sup>th</sup> August 2017, for an amount of Kshs. 1,700,000.00, at a monthly interest rate of 10.6%, and repayable on or before 13<sup>th</sup> June 2018;
- (c) dated 25<sup>th</sup> November 2017, for an amount of Kshs. 1,400,000.00, at an interest rate of 11.6%, and repayable in 7 months;
- (d) dated 31<sup>st</sup> December 2017, for an amount of Kshs. 1,100,000.00, at a monthly interest rate of 12%, and repayable in 12 months;

(e) dated 5<sup>th</sup> January 2018, for an amount of Kshs. 1,500,000.00, at a monthly interest rate of 12%, and repayable in 12 months;

(f) dated 22<sup>nd</sup> February 2018, for an amount of Kshs. 500,000.00, at a monthly interest rate of 12%, which does not have a repayment period;

(g) dated 5<sup>th</sup> October 2018, for an amount of Kshs. 20,000,000.00, at an interest rate of 13.8, repayable on 5<sup>th</sup> October, 2019, which is not, however, executed by either party; and

(h) dated 5<sup>th</sup> October 2019, for an amount of Kshs. 10,000,000.00, at an interest rate of 20%, and to be repaid on or before 5<sup>th</sup> February, 2020.

12. Of the eight, only two are relevant, for the purposes of this suit, since they are the ones in contention. The first is dated 5<sup>th</sup> October 2018 and the other 5<sup>th</sup> October 2019. The contract dated 5<sup>th</sup> October, 2018, is between the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs and the defendant, and it is not signed or executed by the parties. The second contract is that dated 5<sup>th</sup> October 2019, and it is between the 3<sup>rd</sup> plaintiff and the defendant. It is properly executed by all the parties. What, then, is the effect in law of an unsigned contract? Is it enforceable? The life of an unsigned contract is brought into existence by the events succeeding its making or drafting or being entered into, albeit without the execution. The court in, *Reville Independent LLC vs. Anotech International (UK) Ltd* [2016] EWCA Civ 443 (Elias, Underhill LJJ & Cranston J), said as follows, with respect to the effect of an unsigned agreement:

*“... a draft agreement can have contractual force, although the parties do not comply with a requirement that to be binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicates this, albeit a court will not reach this conclusion lightly.”*

13. Let me turn to the second issue, whether the defendant was advanced the facilities forming the basis of the claim by the plaintiffs. Part of the plaintiffs list of documents are bank statements. An analysis of the bank statements shows that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs disbursed to the defendant a sum of Kshs. 650,000.00 on 21<sup>st</sup> June 2018. The said disbursement must have related to an earlier contract, since the disputed contract was allegedly entered into after that date, on 5<sup>th</sup> October 2018. There is no evidence, from the bank statements, that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs credited the account of the defendant with an amount of Kshs. 21, 000,000.00, contrary to what is pleaded in paragraph 3 of the plaint. My analysis of the bank statements lodged on record by the 3<sup>rd</sup> plaintiff, show that a transfer was made to the defendant on 31<sup>st</sup> December 2018, of Kshs. 650, 000.00. That transfer appears to have nothing to do with the contract in contention, given that it relates to a period before the contract was entered into.

14. Burden of proof lies upon the plaintiffs, to establish the indebtedness of the defendant to them, for it is trite that he who alleges has the burden to prove that which he alleges, and it would appear here that the plaintiffs have failed to discharge that burden. The position as to the incidence of burden of proof, in civil cases, is stated in sections 107 and 109 of the Evidence Act, Cap, 80 Laws of Kenya, as follows:

*“107. Burden of proof*

*(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”*

*109. Proof of particular fact*

*The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”*

15. The third issue is whether the defendant repaid the two loan facilities extended to it by the plaintiffs. Whereas there is no evidence of disbursement of any moneys under the two contracts to the defendant by the plaintiffs, at least from the bank statements that the plaintiffs have placed on record, the same bank statements show that the defendant did make numerous deposits into the accounts of the plaintiffs for the period running from May 2018 to early 2020. The said deposits total Kshs. 38,973,300.00. It is not clear what these deposits were for, given that the plaintiffs have not demonstrated, from the same statements that they advanced any moneys to the defendant, as alleged in their plaint, and clearly the same cannot be said to be in relation to the two contracts in respect of which they did not disburse any moneys. I suppose that they relate to previous contracts, as it is common ground that there were previous contracts between the parties, which were not in dispute.

16. I will now turn to the fourth issue, whether the defendant is indebted to the plaintiffs. In determining this issue, it is proper to identify the amount that was disbursed by the plaintiffs to the defendant. An amount disbursed must be clearly determined before any action is taken to redeem it. See *Zainabu Ayub Mohamed & another vs. Rafiki Microfinance Ltd* [2019] eCLR (SM Githinji J). The plaintiffs herein have failed to prove that the amount claimed in the plaint was ever disbursed to the defendant. The plaintiffs have produced a total of eight agreements between themselves and the defendant. The bank statements on record indicate that although the plaintiffs did not disburse any moneys to the defendant after they entered into the impugned contracts, the defendant continued throughout the period to pay large sums of money to them. Obviously, that cannot have been on the basis of the impugned contracts, for they had not honoured them, but previous contracts in respect of which there are no disputes. It is hard to say the payments made by the defendant to the plaintiffs related to which of the eight loans. The plaintiffs have done is literally throw a bundle of bank statements before the court, and left the court to make sense of the contents of the bank statements, without any assistance or input from them. It only fair and proper to conclude that the defendant is not indebted to the plaintiffs, going by the evidence adduced by the plaintiffs.

17. The next consideration is whether the plaintiffs are liable to the defendant in general damages for breach of contract. From the material before me, the plaintiffs have woefully failed to establish a case against the defendant. The converse is actually true, that it is the defendant who has established, through its counterclaim that it is the plaintiffs who are in breach of contract, by failing to advance the moneys that they had contracted to transfer to it. In *Kenya Tourist Development Corporation vs. Sundowner Lodge Limited* [2018] eKLR (**Ouko, Kiage & Murgor JJA**), the court stated, with respect to award of compensation for breach of contract:

*“... as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. Beyond the non-recoverability of general damages for breach of contract, a proper consideration of the nature of the respondent’s claim ought to have led to the same conclusion that only such proven loss could be compensated by way of damages ... other than for nominal damages – which really represent damages only in name, being in quantum quite negligible – what monies would have been recoverable would have been in the nature of special damages properly quantified, pleaded and proved ...”*

18. As general damages are not recoverable for breach of contract, the defendant herein is not entitled to any. It would, however, be entitled to special damages, but only if it has quantified, pleaded and proved the same. It has not done either, and, therefore, special damages are not available to it. Nominal damages are available, for the defendant has proved clearly, that it entered into valid contracts with the plaintiffs, which the plaintiffs did not honour.

19. In the end, I find that the plaintiffs claim fails, and their suit is hereby dismissed. The counterclaim of the defendant succeeds only to the limited extent of the defendant being entitled to nominal damages, which I assess at Kshs. 1, 000.00. The defendant shall have the costs of the suit.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF NOVEMBER 2021**

**W MUSYOKA**

**JUDGE**