



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC NO. 521 OF 2014

PHILIP MASINDE MANJE.....1ST PLAINTIFF
EDWIN M. MUNALA.....2ND PLAINTIFF
JOHN MOTHE.....3RD PLAINTIFF
JOAN MANJE – KHAMATI.....4TH PLAINTIFF

VERSUS

WAUMINI INVESTMENTS HOLDINGS LIMITED.....1ST DEFENDANT
WAUMINI INVESTMENTS LIMITED.....2ND DEFENDANT
EDGAR BONIFACE OTIENO.....3RD DEFENDANT

JUDGMENT

1. The outcome of this dispute may turn on whether the monies paid by the Plaintiffs to the Defendants was a loan or an investment with uncertain returns.
2. The four Plaintiffs are natural persons. The 1st and 2nd Defendants are limited liability companies in which the principal director is Edgar Boniface Otieno (the 3rd Defendant or Otieno). As a common statement the Plaintiffs assert they advanced money to Otieno by making payment to the 1st Defendant's account on instructions of Otieno and receipts were issued by the 2nd Defendant.
3. It is the 1st Plaintiff's case that he advanced a total sum of Kshs.8,950,000.00 to be invested and repaid. He avers that the Defendants have repaid Kshs.4,710,000.00 and so Kshs.4,240,000.00 remains .
4. The 3rd Plaintiff avers that he advanced the 3rd Defendant a sum of Kshs.4,935,000.00 and a receipt for the amount issued in the name of the 2nd Defendant. He states that he was repaid Kshs.1,289,484.00 leaving a balance of Kshs.3,645,516.00.
5. As regards the 2nd and 3rd Plaintiffs, they chose not to participate in the proceedings other than joining in the Plaint. The Court takes it that their claims were abandoned.
6. The remaining Plaintiffs seek the unpaid amounts from the Defendants jointly and severally.
7. The 3rd Defendant denies receiving any money from the Plaintiffs. While the 1st and 2nd Defendants admit receiving money from the Plaintiffs for purposes of investing in a foreign exchange trading platform but subject to a written Agreement. That in the said Agreement it was clear that whereas the investors could make quick gains from the foreign exchange trade, it was a volatile investment environment commonly known as high risks offshore in which losses could be made including loss of the entire investment made.
8. That on the night of 30th October 2011, the Japanese yen, an international currency, was devalued in an intervention step taken by the Japanese government, a move that was unforeseen and caused colossal losses on the foreign exchange trading platforms which included

investments made by the 1st and 2nd Defendants.

9. The Defendants avers that the Plaintiffs are not entitled to any of the reliefs sought.

10. At the hearing, the 3rd Defendant accepted the various payments made by the two Defendants to the 1st and 2nd Defendants but disputes the amount repaid. That then, abridged the dispute to determination of the following issues:-

i How much money was paid back to the Plaintiffs by the Defendants?

ii Were the 1st & 2nd Defendants obliged to repay the sums or the money paid on the basis of an investment sum which was subject to market forces and therefore without a guarantee on investment or the principle?

iii If the 1st and 2nd Defendants are liable, is the 3rd Defendant also personally liable?

iv Costs

11. In respect to the 1st Plaintiff, he produced evidence of payment of Kshs.8,950,000.00 on various dates as follows:-

10.3.2011 - 1,600,000.00

7.4.2011 - 2,500,000.00

12.5.2011 - 600,000.00

16.5.2011 - 600,000.00

29.7.2011 - 1,700,000.00

7.9.2011 - 1,950,000.00

See P. Exhibit Pages 2 and 3. These were paid into the 1st Defendants bank account and receipts issued by the 2nd Defendant.

12. The 1st Plaintiff states that the Defendants jointly repaid a sum of Kshs.4,710,000.00 and gives a breakdown of how it was repaid. On the other hand, the 2nd Defendant shows a statement suggesting that the amount repaid is Kshs.6,225,450.00 yet produces only proof of the following:-

16.11.2011 - USD 500 (D. Exhibit Page 29)

07/08/2013 - Kshs.100,000 (D. Exhibit Page 30)

06/09/2013 - Kshs.120,000 (D. Exhibit Page 31)

Pages 32 and 33 are not legible at all.

13. As the Defendants cannot prove repayment of Kshs.6,225,450, I hold that, on a balance of probabilities, the 1st Plaintiff has proved that only Kshs.4,710,000.00 was repaid.

14. The 3rd Plaintiff has a receipt of Kshs.4,935,000.00 in the name of the 2nd Defendant (P. Exhibit Page 5). There has been no repayment.

15. Shown to this Court was an investment Agreement of 9th March 2011 for investment of Kshs.1,600,000.00 between the 1st Plaintiff and Waumini Business Network Limited (D. Exhibit Pages 4-7). A similar agreement dated 2nd August 2011 christened a Forex Investment Management Agreement between Waumini Business Networks and 3rd Defendant for Kshs.4,935,000.00 (D. Exhibit Pages 10-11).

16. In all these Agreements Waumini Business Network Limited is said to be the agent of Waumini Investments Holdings Limited (the 1st Defendant). Both agreements have the following clause:-

“This is a high risk investment with high potential returns, even though the target returns are 10% per month, no guarantees are given by the Agent and losses are possible even of the principal amount invested”.

17. The Plaintiffs, in their closing arguments, submit that the 1st and 2nd Defendants claim to have offered them services which are regulated by the Capital Markets Act. They cite Section 23(1) of the Act which reads:-

[S. 23(1)] No person shall carry on business as a stockbroker, derivatives broker, REIT manager, trustee, dealer, investment adviser, fund manager, investment bank, central depository, authorised securities dealer, authorized depository, commodity dealer, commodity broker, online forex broker or hold himself out as carrying on such a business unless he holds a valid licence issued under this Act or under the authority of this Act.

18. It is argued that the Defendants failed to prove that they hold a license under the Act to carry out the regulated business.

19. In the course of hearing the 3rd Defendant testified that the Defendants entered into an Agreement with a licensed investment broker, Ryan Holdings, to carry out business as their agent. But the Plaintiffs' point to Section 2 of the Act which defines Agent as follows:-

“Any person appointed in writing by a licensed person, except in a derivatives market, to perform any of the functions ordinarily performed by the licensed person on behalf of that licensed person”.

20. It is the Plaintiffs' case that an agent must be appointed in writing and because there is no proof of such appointment in writing, the agency agreement cannot be presumed.

21. The issue of foreign exchange trade was first raised by the Defendants in their statement of Defence dated 20th January 2015. If the Plaintiffs had taken the view that the Defence is not tenable because of some illegality then they ought to have specifically pleaded it in a reply to Defence. This is the expectation of Order 2 Rule 4 of the Civil Procedure Rules which reads:-

[Order 2 rule 4] (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality —

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

(3) In this rule “land” includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land.

22. It is not open for the Plaintiffs to now take up this line of Defence. They would be travelling outside their pleadings.

23. The point of divergence must remain whether, on the basis of the high risk investment clause, the Defendants are insulated from this claim. A plain reading of the clause is that there are no guarantees on the investment and that the investor could lose out on all of his investment including the principle amount. However, it is curious that in reacting to a demand for the payment of the outstanding amount, the lawyers of the Waumini Investments Limited respond as follows on 20.5.2014 (P. Exhibit Page 14).

Simba & Simba Advocates,

20.05.2014

Ashitiva & Co. Advocates,

NAIROBI.

Dear Sirs,

RE: DEBT OF KSHS.2,200,000

PHILIP MANJE & OTHERS –VS- WAUMINI

INVESTMENT LIMITED

We thank you for your letter of the 18th May 2014 contents whereof are noted. We have called for the repayment proposal from the client and we shall advise once we are in receipt of instructions.

Yours faithfully

Simba & Simba

24. Again on 25.4.2014 (P. Exhibit Page 16), the same lawyers write;

Simba & Simba Advocates,

25.04.2014

Ashitiva & Co. Advocates,

NAIROBI.

Dear Sirs,

RE: SETTLEMENT OF DEBTS

PHILIP MANJE & 2 OTHERS –VS- WAUMINI

INVESTMENT LIMITED

We refer to the above matter and we write to advise that our client has been unable to make the payments as initially envisaged due to unforeseen circumstances.

Our client is working hard to turn around misfortunes and we shall revert within sixty (60) days with a further update.

Yours faithfully

Simba & Simba

25. It has to be asked why the 2nd Defendant would be making a proposal to repay when it was its case that the Plaintiffs' investments had been wiped out by forex losses involving the Yen. Having made this promise to repay up the investment, the 2nd Defendant cannot resile on it.

26. In doing so this Court does not seek to rewrite the contract entered between the parties but simply to enforce a promise and admission made after the contract.

27. Are the other two Defendants liable? The evidence that has emerged is that the monies invested by the Plaintiffs were sent out for investment to a forex exchange platform from the personal account of the 3rd Defendant. On this he explained as follows:-

“Money would be remitted in my name, representing the company. They money was posted in one account and traded as one”.

28. Otieno also said;-

“The sender is myself as an individual. As Principal Director of Waumini Business Network Ltd. I was the sole signatory to account”.

29. Then again he testified;-

“The Plaintiff knew me as the Principal Director of Waumini. I was making the remittance on behalf of the Company. In my capacity as Principal Director of the Company”.

30. Emerging from the evidence is that the 1st Defendant, 2nd Defendant and Waumini were related companies and a common denominator was that Otieno was the Principal Director in the three Companies. Although separate legal entities, there appears to have been an amount of informality in which the four related to each other. Money paid into the account of the 1st Defendant would be acknowledged by receipt of the 2nd Defendant and eventually traded in the personal name of Otieno. In this arrangement the account of the four appeared to have comingled and any walls of incorporation had been pulled down by the informal manner in which the assets or income of the Plaintiffs were treated.

31. As Otieno was the alter ego of the three companies and he personally sent out the monies to the destination where the loss was incurred, I would hold that he would be just as liable as the 2nd Defendant. The 2nd Defendant would not be making an admission within the authority of the Principal Director.

32. The upshot is that Judgment is entered on behalf of the 1st and 3rd Plaintiffs as against the 2nd and 3rd Defendants jointly and severally:-

a) For the 1st Plaintiff Kshs.2,624,140/=

b) For the 3rd Plaintiff Kshs.3,805,638/=

c) The Plaintiffs shall also have costs of the suit.

33. As the 1st and 3rd Plaintiffs did not seek interest then no order is given in that regard. The suit by the 2nd and 4th Plaintiffs is dismissed with costs. So too is the suit against the 1st Defendant.

Dated, Signed and Delivered in Court at Nairobi this 21st Day of February 2020

F. TUIYOTT

JUDGE

PRESENT:

Sakimpa holding brief for King'ori for Plaintiffs

Mukethah for Matasi for Defendants

Court Assistant: Nixon