



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO 783 OF 2009

MYC4 A/S.....PLAINTIFF

VERSUS

EBONY ENTERPRISES CAPITAL KENYA LIMITED.....1ST DEFENDANT

JAMES MAINA.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a plaint dated 22nd October 2009 and amended on 3rd November 2009, seeking for judgment against the Defendants for;

a) *A declaration that, the plaintiff is entitled to unconditionally conduct audits on all records and documents in the 1st defendant's possession or custody relating all loans given to borrowers by the 1st defendant pursuant to business relationship between the 1st defendant and the plaintiff.*

b) *A mandatory injunction compelling the defendants forthwith to provide the plaintiff and its representatives unconditional access to all documents and records in its possession in relation to their agency relationship and transactions thereunder;*

c) *Costs of the suit together with interest thereon at such rate and for such period as the court deems fit;*

d) *The sum of €1,652,549 and any such and further or alternative relief as the court may deem fit to grant;*

e) *A declaration that the plaintiff has exclusive rights to all funds transferred by the plaintiff to the 1st defendant pursuant to the business relationship between the 1st defendant and the plaintiff;*

f) *A declaration that the plaintiff has exclusive rights to the portfolio comprised of loans extended to borrowers by the 1st defendant or under the administration of the 1st Defendant pursuant to the business relationship between the 1st Defendant and the Plaintiff;*

g) *A mandatory injunction compelling the defendants to transfer to the plaintiff all amounts in the hands of the defendants which have been collected by the 1st defendant as repayments on loans advanced to borrowers under the business relationship between the 1st defendant and the Plaintiff;*

h) *A mandatory injunction compelling the defendants to execute a deed of assignment in the form acceptable to the plaintiff transferring any and all rights of the 1st defendant to collect or receive repayments in respect of loans disbursed to borrowers by the 1st defendant under its business relationship with the plaintiff.*

2. The Plaintiff avers in brief that, by a memorandum of understanding executed on 16th February 2009, by the 2nd Defendant on behalf of the 1st Defendant and the Plaintiff on 16th February 2009, in Nairobi, Kenya, the 1st Defendant was to act as an agent of the Plaintiff in; administering and managing loans given by investors through the Plaintiff, to borrowers approved by 1st Defendant.

3. That, it was a term of the agency relationship that, the 1st Defendant would;

a) *Remit payments received in respect of loans advanced by the investors;*

b) The Plaintiff would act as an agent for the investors in receiving these payments; and;

c) The 1st Defendant by itself or its employees would make available immediately upon request all information for audit or inspection by the Plaintiff or any person authorized for that purpose.

4. Pursuant to that agreement, the investors transferred through the Plaintiff to the 1st Defendant a sum of; €1,652,549, to be advanced to borrowers approved by it. However, to review capacity building needs within the 1st Defendant's company and to ascertain compliance by the 1st Defendant, the Plaintiff, between 22nd September 2009 and 1st October 2009, conducted spot-checks and assessments at the premises of the 1st Defendant's company in Nakuru.

5. That the Plaintiff established that, the 1st Defendant was not administering the loans in accordance with the memorandum of understanding, and the same were characterized by risks inter alia;

a) Potential for conflict of interest and bias in decision making.

b) Potential risk of loss of independence and mismanagement.

c) Weak internal audit department.

d) Weak management information systems.

e) Incomplete filing leading to risks of misinterpretation, potential default and fraud.

f) Weak credit approval process.

6. The Plaintiff brought the results of the inspections to the knowledge of the 1st Defendant, and on 6th October 2009, the Plaintiff suspended the 1st Defendant from any further activities on its internet-based infrastructure. On 16th October 2009, the Plaintiff notified the 1st Defendant that, it had engaged the firm of; KPMG, to conduct a forensic audit on 21st October 2009, at its Nakuru premises. On 20th October 2009, the 1st Defendant wrote to the Plaintiff terminating the agreement.

7. The Plaintiff avers that, the 1st and 2nd Defendants, in flagrant breach of the memorandum of understanding, have connived and failed or refused to make itself or its employees available and/or avail information to the authorized personnel for the purpose of the audit. That, the 2nd Defendant has categorically stated that, it will not allow the audit of the 1st Defendant, hence the suit and prayers therein.

8. However, the Defendants filed a joint statement of defence dated; 30th November 2009 and averred that, the Plaintiff is an amorphous body with no capacity to sue or be sued and/or operate within the jurisdiction of the Republic of Kenya. That, the suit is bad for misjoinder; as the 1st Defendant is a limited liability company, distinct from the 2nd Defendant. It is further averred that, the memorandum of understanding relied on has expired, is unenforceable and illegal for all purposes. It cannot be a basis of any contractual obligations and/or cause of action. The Defendants denied being privy to the alleged agency relationship between the Plaintiff and the investors and/or that, the terms thereof are not binding on them.

9. It was pleaded on a without prejudice basis that, the 1st Defendant's only duty was to recommend borrowers to investors and it was for the investors to decide which borrower to advance the loan. That the loans advanced were transmitted to the borrowers, whom the investors approved. The Plaintiff has no contract with the said borrowers. Further, the Plaintiff has no locus and/or capacity to investigate the affairs and operations of the 1st Defendant, and if any spot checks and/or assessment were done, which is denied, then, they were illegal, unilateral, inconclusive and based on premeditated and unfounded suspicion and conjecture.

10. The 1st Defendant averred that, it has a strong and competent internal and external audit department, sound management information systems and credit approval process plus a good filing system thus, the allegations to the contrary are grossly untrue and baseless.

11. Further, the decision to suspend the 1st Defendant from the internet-based infrastructure was unlawful, defamatory, malicious and/or without any reasonable cause or justification. That, the Plaintiff and borrowers having no contractual relationship, the 1st Defendant cannot disclose or avail documentation, securities or collateral to third parties without the borrower's consent. In addition, the 1st Defendant is also restrained from disclosing the borrower's confidential information, assigning and/or transferring their loans, chattels or securities to third parties pursuant to orders issued on; 22nd October 2009, in HCC 306 of 2009 at Nakuru involving the same parties with the subject matter pending for hearing and determination.

12. I have considered the averments in the submissions, however to put this matter in perspective, I shall set out the factual history from inception and in that regard, it suffices to note that, the plaint dated 22nd October 2009, was filed alongside a notice of motion application seeking for orders inter alia;

a) That an injunction do issue restraining the respondents whether by themselves, their employees, servants, agents, assignees or anyone claiming under them whatsoever from removing any documents, information or records from the premises of the 1st Respondent;

b) That, a mandatory injunction do issue compelling the respondents to provide the applicants forthwith with unconditional access to the 1st respondent's premises, employees documents, records and information for audit or inspection, by the applicant or any person authorized for that purpose by the applicant;

c) That, orders in terms of the prayers (a) and (b) do issue ex parte in the first instance on a temporary basis until the inter parties hearing and determination of this application;

d) That, costs of the application be provided for.

13. The same was supported by an affidavit of the even date sworn by; Mars Kjaer, the Plaintiff's Chief Executive Officer. The application was heard and set for ruling on 11th December 2009. In the meantime, the Defendants were restrained from removing documents or records from the office of the 1st Defendant.

14. As the ruling was pending, the Plaintiff filed another notice of motion application dated 13th November 2009, seeking for orders;

a) That, an injunction do issue restraining the respondents whether by themselves, their employees, servants, agents, assignees or anyone claiming under them whatsoever from selling, transferring, assigning or disposing off the assets of the respondents pending the determination of the suit herein.

b) That, the respondents furnish security to the court in the value and amount of € 1,652,549 pending the determination and final disposal of the suit herein.

c) That, the court be pleased to attach the bank accounts of the 1st respondent held with Cooperative Bank of Kenya Limited, Nakuru Branch, account numbers 22128026067901, 2212826067901, and 01136026091200 respectively in the name of Ebony Foundation and Ebony Enterprises Capital (K) Limited and account number 018236587202000100 held with Family Bank Limited, Nakuru Branch, and to thereby prevent the respondents from transacting thereon pending the final determination and disposal of the suit herein.

d) That, pending the determination of the suit herein, a mandatory injunction do issue compelling the respondents to transfer forthwith to an escrow account held jointly by the advocates herein, all amounts collected or received by the 1st respondent in repayment of loans advanced to borrowers by the 1st respondent pursuant to its business relationship with the applicant to be held on such terms as the court deems fit.

e) That, pending the determination of the suit herein, a mandatory injunction do issue compelling the respondents to transfer to an escrow account held jointly by the advocates herein, forthwith upon receipt, any and all amounts that may come into the hands of the respondents as collections or repayments on loans made by the 1st respondent to borrowers to be held on such terms as the court deems fit.

f) That, pending the determination of the suit herein, a mandatory injunction do issue compelling the respondents to transfer forthwith to the joint custody of the advocates herein, any security, interest or collateral given by borrowers to the 1st respondent to be held on such terms as the court deems fit.

g) That, pending the determination of the suit herein, a mandatory injunction do issue compelling the respondents to assign and transfer forthwith to the applicant all rights and interest of the 1st respondent to its loans advanced to borrowers pursuant to its business relationship with the applicant and the applicant to hold such terms as the court deems fit; or in the alternative, that the respondents assign and transfer the same forthwith to a third party jointly appointed by the advocates herein, on such terms as the court deems fit.

h) That, orders in terms of prayers (a) to (g) do issue ex parte in the first instance on a temporary basis until the inter parties hearing and determination of the application.

i) Any such further or alternative relief as this court may deem fit.

j) That, costs of the application be provided for.

15. The application was supported by an affidavit sworn by; Executive officer of the Applicant company, Pete Ondeng. The court ordered that, the application be served for inter parties hearing and granted prayer (4) of the application in the meantime which that, pending ruling, the Defendants, be restrained from removing any documents, information or records from the office of the 1st Defendant.

16. The Defendants responded to the application by filing a notice of preliminary objection dated 23rd November 2009, on the grounds that;

a) A similar application was canvassed before the Honourable court and a ruling fixed for 11th December 2009;

b) The issues raised in the instant application are thus res judicata;

c) The Plaintiff has no capacity to sue and/or be sued in the Republic of Kenya;

d) *The Plaintiff has no locus standi to institute the application and/or suit;*

e) *The entire suit and application is grossly inept, redundant and an abuse of the court process;*

17. The 2nd Defendant also filed a replying affidavit of the same date. Similarly, an application was filed by one, Mary Wambui Mwangi on her own behalf and on behalf of; 180 others seeking to be enjoined in the suit, on the grounds that; the applicants are customers with the 1st Defendant, a micro finance company. That, they borrowed money from the 1st Defendant and gave securities and have been repaying their loan without fail.

18. That, prior to being given loan, they had disclosed confidential information and given their business plans, and the 1st Defendant has now threatened to disclose confidential information received in the course of banker/customer relationship to third parties. The contract between the Applicants and 1st Defendant was in personal. Further, the 1st Defendant has threatened to assign the loans and hand over the securities to undisclosed development partners.

19. The application was opposed by the Plaintiff vide an affidavit dated 27th November 2009 and a supplementary affidavit dated 7th December 2009, sworn by its Executive Officer, in charge of African operations and holding the title of Director of Africa Operations, Pete Ondeng. The application was certified as urgent and fixed for inter parties hearing on 24th November 2009.

20. On 23rd December 2009, the Plaintiff filed a notice of motion application dated the same day seeking for orders that;

a) *Pending hearing and determination of the application, an order appointing Mr. Rajadurai Jeyepaul, MBA, Interim Receiver Manager to solely manage, control and administer all the day to day operations of the 1st defendant, including debt collection.*

b) *Pending hearing and determination of the suit and all other related proceedings including the proposed arbitration between the Plaintiff, an order appointing Mr. Rajadurai Jeyepaul, MBA, Interim Receiver Manager to solely manage, control and administer all the day to day operations of the 1st defendant, including debt collection.*

c) *The honourable court be pleased to fix the remuneration of the Interim Receiver Manager to be paid out of the funds of the company at such rate or rates and on such terms as appear to the court to be reasonable.*

d) *The honourable court be pleased to order that the police do assist the Receiver Manager once appointed in the execution of his mandate should the need arise.*

e) *Costs of the application be provided for.*

21. The application was supported by an affidavit sworn by Pete Ondeng and upon hearing it ex parte, it was certified as urgent and the court appointed Rajadurai Jeyepaul, MBA, to be the Interim receiver Manager of the 1st Defendant, to solely control and administer the day to day operations of the 1st Defendant, including debt collection, pending the hearing and determination of the application inter parties. The application was stood over to 21st January 2010. In addition, the court granted prayer (6) of the application, ordering the police to assist the Receiver once appointed in execution of its mandate and the police to ensure there was peace in the premises.

22. However, the Respondents being aggrieved by the orders appointing the Interim Receiver, filed a notice of motion application dated 14th January 2010, seeking for orders;

a) *That, pending hearing and determination of the application this Honourable court be pleased to stay ex parte orders granted by the court on 23rd December 2009, appointing a Mr. Rajadurai Jeyepaul, MBA, Interim Receiver Manager to solely manage, control and administer all the day to day operations of the 1st Defendant, including debt collection.;*

b) *That, the Honourable court be pleased to set aside and vacate the ex parte orders granted on 23rd December 2009, appointing a Mr. Rajadurai Jeyepaul, MBA, Interim Receiver Manager to solely manage, control and administer all the day to day operations of the 1st Defendant, including debt collection; and*

c) *The Plaintiff be condemned to pay the costs of the application.*

23. The application was supported by an affidavit of the same date sworn by, the 2nd Respondent alongside a replying affidavit dated 9th January 2010, to the Plaintiff's application dated 23rd December 2009; and Pete Ondeng filed a replying affidavit dated 18th January 2010, to the Defendants' application dated 14th January 2010. The appointed Receiver also filed an affidavit on the 21st January 2010.

24. On 11th December 2009, Hon. Lady Justice M. Koome, delivered a ruling on the notice of motion application dated 22nd October 2009, in which she granted prayers (2) and (3) of the motion, thus ordering an audit be carried out of the funds disbursed by the Defendants as agents of the Plaintiff. In the meantime, on 22nd October 2010, Hon. Justice L. Kimaru delivered a ruling on the application dated 23rd December 2009, and allowed the application stating inter alia that;

“In the present application, it is clear that without the Plaintiff accessing the books of accounts of the 1st Defendant, and particularly the debtor's books of accounts and thereby managing the recovery of the debts from the debtors, it is unlikely that it will

recover its fund after the conclusion of the case. The issues raised by the Defendants regarding the capacity of the Plaintiff to bring the present suit before this court shall be addressed by the court or the arbitration panel that will hear the case.”

25. On 3rd March 2011, the Defendants filed a notice of motion application seeking for orders inter alia; that, the Honourable court be pleased to set aside and discharge the following orders;

a) Temporary injunction issued on 13th November 2009 inter alia attaching the 1st defendant’s account held with Co-operative Bank of Kenya Limited, Nakuru Branch, account numbers 22128026067901, 2212826067901, and 01136026091200 respectively in the name of Ebony Foundation and Ebony Enterprises Capital (K) Limited and account number 018236587202000100 held with Family Bank Limited, Nakuru Branch, and preventing the Respondents from transacting thereon pending the final determination of the application;

b) Injunctive orders issued by Hon. Lady Justice Martha K. Koome on 11th December 2009, which orders in any event have lapsed;

c) Orders issued on 22nd October 2010, by Hon. Justice Kimaru inter alia;

i. Appointing Rajadurai Jeyapaul, MBA, the Interim Receiver of 1st defendant to solely manage, control and administer day to day operation of the 1st defendant pending the resolution of dispute between the Plaintiff and the Defendant;

ii. The remuneration of the Receiver be filed in court and the same be paid of the funds of the company;

iii. The police do provide security to Receiver Manager to enable him execute his mandate;

iv. That, in the alternative, the court be pleased to dismiss this suit with costs for want of prosecution and/or for being an abuse of the process of the court; and

v. That, the Plaintiff be condemned to pay costs of this application.

26. The application, was supported by an affidavit sworn by, the 2nd Defendant dated 2nd March 2011. The Plaintiff responded to that application by filing a replying affidavit on 17th March 2011. The application was heard and Hon. Lady Justice H. Okwengu who issued orders as follows;

a) That, the temporary injunction issued on 13th November 2009 inter alia attaching the 1st Defendant’s account held with Co-operative Bank of Kenya Limited, Nakuru Branch, account numbers 22128026067901, 2212826067901, and 01136026091200 respectively in the name of Ebony Foundation and Ebony Enterprises Capital (K) Limited and account number 018236587202000100 held with Family Bank Limited, Nakuru Branch, and preventing the Respondents from transacting thereon be and is hereby set aside and discharged pending the final determination of the application;

b) That, the injunctive orders issued by Hon. Lady Justice Martha Koome on 1st December 2009 be and are hereby set aside and discharged;

c) That, prayer no (b) and (c) are hereby rejected; #That, costs of this application be in the cause.

27. On 2nd December 2011, the Plaintiff vide an application of the same date sought for orders to be allowed to change, the Interim Receiver appointed by the court on 23rd December 2009 and the Applicant be allowed to appoint; Mr. Nick Ondari as the new Receiver in place of Rajadurai Jeyapaul. That application was heard, and determined vide a ruling dated 27th January 2012, delivered by Hon. Justice E Ogolla whereby the same was allowed as prayed.

28. To revert back to the issues herein, it is noteworthy that, upon resting the several interim applications, the case was finally set down for hearing. The Plaintiff’s witness, Mr. Julius Kasenga testified on 19th October 2017. He relied on his witness statement which he filed in court on 18th October 2017, and a bundle of documents. He basically reiterated the averments in the amended plaint. The Defendants did not testify at all.

29. The law firm of Mirugi Kariuki & Company Advocates on record for the Defendants were effectively served to appear in court and failed to do so. The court even summoned the lawyers to explain why they were declining to receive service of notices and/or pleadings. Upon appearance, they explained that, the client had relocated to South Africa with the file and they had no instructions. However, they had not ceased from acting for the Defendants. The Plaintiff was then allowed to close its case and file the final submissions.

30. I have considered the evidence adduced by the Plaintiff and the documents produced alongside the submissions filed. It suffices to note that, the Defendants having failed to file any witness statements nor documents and/or testified at the hearing of the case, then generally, the Plaintiff’s case stands unopposed.

31. Be that as it were, I find that, there is no dispute that the Plaintiff entered into a memorandum of understanding with the 1st Defendant which was duly executed by both parties herein. None of the parties thereto have disputed its validity. A perusal of the memorandum reveals that, it was valid for a period of three years from the date of the execution but subject to early termination provisions therein and/or six months trial phase. It was renewable subject to the mutual consent of the parties.

32. The various obligations of the parties are clearly stated therein at clause 4. In that respect, the 1st Defendant is described as “Provider” and was under an obligation to conduct due diligence and/or confirm authenticity of each borrower opportunity that it submitted to the online platform according to the specific instructions and guidelines which the Plaintiff would give it, from time to time. The 1st Defendant was also responsible for provision of information on the online platform about the businesses.

33. In particular, clause 4.1.12 of the memorandum of understanding provided that, “Provider will make itself, its employees and all information and documents pertaining to any MYC4 Business presented by Provider available immediately, upon request, for audit or inspection, to MYC4 or any person authorized for that purpose by MYC4; Provider shall participate actively in all compliance programs of MYC4 to ensure credibility, transparency and accountability in the information posted on the online platform; in particular, provider shall make personnel available for training.”

Indeed, the Plaintiff has availed documents showing the disbursements of funds to the borrowers through the 1st Defendant amounting to € 1,652,549, as at 21st October 2009. Similarly, a copy of the list of borrowers comprising of the loan portfolios administered by the 1st Defendant pursuant to the memorandum of understanding has been produced.

The Plaintiff has also produced a report of Risk Assessment following the spot checks at the 1st Defendant’s premises which details the risks identified. This report has not been challenged by any other evidence.

34. By a letter dated 20th October 2009, the 1st Defendant protested at the manner in which the Plaintiff suspended it from the use of its online platform and terminating the memorandum of understanding. In this regard, it is noteworthy that, the 1st Defendant did not live within the provisions of clause 8, that required that, before the memorandum of understanding was terminated, a three months’ notice be given, and/or a hearing before a neutral arbitrator agreed upon by both parties, and payments of any commissions or remunerations due and owing be addressed.

35. It also suffices to note that, before suing the Defendants, the Plaintiff served them with a demand letter dated 21st October 2009, seeking to have the Defendants avail access of all documentation and records in respect of their business relationship and loan portfolio as prayed herein. The Defendants did not oblige. The subsequent exchange of correspondence between the parties, as evidenced by the copies produced did not resolve the issue. In fact, the team from KPMG was not allowed into the 1st Defendants’ office at Nakuru, as stated in the email dated 21st October 2009, from Mars Kjaer to Mr. James Maina.

36. As already stated, various orders were issued after the filing of this case, that dealt with some of the issues raised in the plaint and had direct impact on the prayers sought for in the plaint. In that regard, it is noteworthy that, the injunctive orders given on the application dated 22nd October 2009, lapsed after three months. The appointed Interim receiver has not been removed. In the same vein, the order dated 16th November 2009 is still in force.

37. However, before I conclude I note that, the 2nd Defendant did not enter into any agreement and/or contract with the Plaintiff in his individual capacity. He did it on behalf of the 1st Defendant. Therefore, this judgment is against the 1st defendant only. The memorandum of understanding was between the Plaintiff and the 1st Defendant. The 1st defendant is a limited liability company, deemed as a legal entity and separate from its members. (See; *Salomon v A Salomon & Co Ltd* [1896] UKHL 1) The Plaintiff had no basis to sue the 2nd Defendant, to merely argue that he is the Executive Director of the 1st Defendant and was in control of the 1st Defendant, that argument has no basis in law.

38. It is also noteworthy following the Plaintiff’s application that, the Interim Receiver of the 1st Defendant was appointed on 23rd December 2009 and confirmed on 22nd October 2010. Therefore, execution of the orders granted herein will be subject to any other rights that, may have accrued to the Plaintiff after the appointment of the Interim Receiver and subject to the document filed on 6th July 2012, being a report by; Mawadha Business Support Services Limited, on the 1st Defendant’s clients’ outstanding loans follow up. The judgment herein will also have an effect of basically ending the interim receivership, which can only proceed in relation to execution of the decree and/or the judgment herein.

39. Be that as it were, having considered the evidence adduced in total and the prayers sought for in the amended plaint; I allow all the prayers in the plaint as stated, save for prayed (d) which I allow in the sum of € 1,652,549 only. Costs are awarded to the Plaintiff.

40. It is so ordered.

Dated, signed and delivered in Nairobi this 28th day of April 2020.

G. L. NZIOKA

JUDGE

In the presence of:

Ms. Mureithi for the Plaintiff

No appearance for the Defendants

By virtual communication