



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 386 OF 2016**

STEVE ONYANGO..... PLAINTIFF

VERSUS

TECHSPA GENERAL SUPPLIES LTD..... 1<sup>ST</sup> DEFENDANT

WILLIAM KURIAH JOSIAH.....2<sup>ND</sup> DEFENDANT

JENNIFER NJERI KURIA.....3<sup>RD</sup> DEFENDANT

**JUDGMENT**

1. Steve Onyango, the plaintiff has filed this case against three defendants, namely Techspa General Supplies Limited, the 1<sup>st</sup> defendant, William Kuria Josiah, the 2<sup>nd</sup> defendant and Jennifer Njeri Kuria, the third defendant.

2. The plaintiff by this claim seeks judgment against all the defendants, jointly and severally, for Ksh 13 million being the amount the plaintiff advanced the defendants; Ksh 12 million being the plaintiff's share of profit; Ksh 4,212,000 the accrued interest as at 20<sup>th</sup> August 2016 and further interest at the rate of Ksh 468,000 per month until payment in full; and Ksh 162,400 as special damages.

3. The plaintiff adduced evidence in support of his case and after closing his case the defendants failed to attend court to submit their evidence in defence. Accordingly the defendant's defence was marked as closed. It follows that the defendant's defence is unsupported by evidence. That means that the plaintiff's evidence remains uncontroverted and the defendants' defence, which is unsupported by evidence remains mere allegation. See the case of **Shaneebal limited v County Government of Machakos (2018) eKLR** where the court stated:

*“In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997** held that:*

*“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.*

28. Similarly in the case of *Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.*

29. If one is still in doubt as to the legal position reference could be made to the case of **Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996** where **Rawal, J** (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff.”

4. It follows that defendants' defence is not for consideration in this judgment. It also follows that the plaintiff's evidence is uncontroverted.

**PLAINTIFF CASE**

5. The plaintiff stated in evidence, which was unshaken by cross examination as follows: that the defendants approached him seeking Ksh

13 million which amount was to be used by the 1<sup>st</sup> defendant to obtain steel cross-arms, bolts, nuts and stay rods. Those items were to be procured in respect to a tender. The 1<sup>st</sup> defendant obtain the tender when it purchase it from a company called Fourgoldstar Agencies.

6. The plaintiff transferred Ksh 13 million on 20<sup>th</sup> November 2015 into the 1<sup>st</sup> defendant's account. In that regard the plaintiff produced a remittance application form of standard chartered Bank for that amount of Ksh 13 million. The plaintiff also produced his bank statement which reflected on 20<sup>th</sup> November 2015 the debit of Ksh 13 million which the statement shows was remitted to the 1<sup>st</sup> defendant's account.

7. Subsequently after that remittance the plaintiff and the 1<sup>st</sup> defendant entered into an agreement dated 23<sup>rd</sup> November 2015. That agreement was known as the "Funding Agreement. That agreement confirmed that funds of Ksh 13 million was availed to the 1<sup>st</sup> defendant. The agreement provided that the plaintiff would earn profit of Ksh 12 million which would be paid by the 1<sup>st</sup> defendant. The interest on the loan amount, that is Ksh 13 million, was Ksh 468,000 for the first month and thereafter interest would be at the rate of 23% for each day. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants executed a guarantee, guaranteeing the 1<sup>st</sup> defendant's indebtedness to the plaintiff. In addition as security, the defendants provided the plaintiff post dated cheques issued by Fourgoldstar Agencies in favour of the plaintiff.

8. The plaintiff and the 1<sup>st</sup> defendant entered into another agreement referred to as addendum which was related to the 'Funding Agreement'. By that agreement the repayment schedule, of the 1<sup>st</sup> defendant, was modified as follows: that the 1<sup>st</sup> defendant (the borrower) was to offset the balance of Ksh 1,014,000 being the interest accrued as at 19<sup>th</sup> March 2016 on or before 18<sup>th</sup> March 2016; the 1<sup>st</sup> defendant was to pay the plaintiff the entire loaned amount of Ksh 13 million on or before 24<sup>th</sup> March, 2016; the profit of Ksh 12 million was to be "payable from the lender (the plaintiff) to the borrower (the 1<sup>st</sup> defendant)" on or before 24<sup>th</sup> April 2016; and the 1<sup>st</sup> defendant was to settle the accrued interest as demanded by the plaintiff's banker.

9. The latter two provisions of the addendum are a little confusing to me.

10. The first of the latter provision provides that the lender, in this case the plaintiff, would pay to the 1<sup>st</sup> defendant ksh 12 million profit. I have quoted that provision as it is in the addendum agreement because that provision goes contrary to the oral evidence of the plaintiff where the plaintiff stated that it was the 1<sup>st</sup> defendant who was the pay him the profit of Ksh 12 million. It's important to state that the Funding Agreement provided that the 1<sup>st</sup> defendant would pay the plaintiff Ksh 12 million being profit.

11. The second of the latter provision reproduced above provided that the 1<sup>st</sup> defendant would settle accrued interest as demanded by the plaintiff's banker. The plaintiff did not adduce evidence on what that accrued interest was nor did the plaintiff state whether his banker had demanded that accrued interest.

## **ANALYSIS AND DETERMINATION**

12. There are only two issues which require my determination hereof. They are:

(i) *Whether the defendants are in breach of the agreement?*

(ii) *Whether the plaintiff is entitled to the prayers sought.*

13. Although the learned advocate for the defendant in his cross examination of the plaintiff intimated that the parties could not have intended to be bound by some terms of the agreement, in particular the agreement on sharing of profit, the learned advocate needs to be reminded that parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. See the case **National Bank of Kenya Ltd v Pipeplastics Samkolit (K) Ltd & another (2001) eKLR.**

14. That decision is in the same tandem as a Canadian case:

*In the Canadian Supreme Court case, that is **Grow Biz v. D.L.T. Holdings Inc., 2001 PESCTD 27 (CanLII).** that court referred to the case **Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.**, 1982 CanLII 19 (SCC), [1982] 1 S.C.R. 726 as follows:*

*"Where parties experienced in business have entered into a commercial transaction and then set out to crystallize their respective rights and obligations in written contract drawn up by their respective solicitors, it is very difficult to find or to expect to find a legal principle in the law of contract which will vitiate the resultant contracts. Certainly where the parties have capacity in law to enter into the contract, where the terms of the contract are clear and unambiguous, where there is a valid consideration passing between the parties, and where there is no evidence of oppression or operative misrepresentation, the law recognizes no principle which fails to enforce the validity of such a contract. No doubt the law of contract in this connection reflects the needs for certainty in commerce. This is particularly true where, as here, the two contracts, at the time of commencement of action, are not executory but have been acted upon and performed by the parties. Where, as here, the persons engaged in the commerce at hand were fully and continuously in contact with their legal advisors, there is neither need nor warrant for the intervention of the courts to remake or set aside these contracts."*

15. The intent of the parties is as it is reflected in the parties agreement. The plaintiff lent to the 1<sup>st</sup> defendant Ksh 13 million loan on certain conditions some of which have been reproduced above. The plaintiff's evidence is that the defendants had failed to honour the agreement. He therefore seeks that judgment be entered, as prayed, in his favour.

16. The plaintiffs evidence of breach of contract by the defendants was uncontroverted. The plaintiff's evidence is that the defendants failed

to abide by the timeline of repayment of the loan. It follows that the plaintiff has proved on a balance of probability that there was breach as provided under clause 8 of the Funding Agreement. The answer to the first issue identified above is in the positive – the defendants breached the terms of the agreement that provided for the repayment of the loan amount plus interest and payment of the profit and other costs coincidental to the agreement.

17. Is the plaintiff then entitled to the prayers sought in the case at bar?

18. The plaintiff has proved that he advanced to the 1<sup>st</sup> defendant Ksh 13 million. The addendum agreement provided that the 1<sup>st</sup> defendant was to pay, on or before 18 March 2016 Ksh 1,014,000 being accrued interest. That claim is also proved to the required standard. Under clause 6 (3) of the Funding Agreement the defendant was required to pay interest on the loaned amount at the rate of 23% each day from 24<sup>th</sup> December 2015 (a month after the Funding Agreement). Under clause 6(4) of the Funding Agreement it is provided that the plaintiff was entitled to a share of the profit at Ksh 12 million.

19. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants guaranteed the 1<sup>st</sup> defendant's indebtedness to the plaintiff but the guarantee was limited to the principal sum of Ksh 13 million plus "**interest, fees, commissions, costs charges and expenses.**" Because of that limitation the entry of judgment against 2<sup>nd</sup> and 3<sup>rd</sup> defendants will be limited, in that regard. The defendants, all of them are liable to reimburse the plaintiff Ksh 162,400, money paid to the advocate for services in preparing the agreements.

## **CONCLUSION**

20. The judgment of the court is as follows:

- a. There shall be judgment for the plaintiff against all the defendants jointly and severally for Ksh 13 million with interest at 23% per day from 24<sup>th</sup> December 2015 until payment in full.*
- b. There shall be judgment for the plaintiff against all the defendants jointly and severally for Ksh 1,014,000.*
- c. There shall be judgment for the plaintiff against all the defendants jointly and severally for Ksh 162,400 with interest at court rate from the date of filing suit until payment in full.*
- d. There shall be judgment for the plaintiff against the 1<sup>st</sup> defendant for Ksh 12 million with interest at court rate from the date of filing this suit until payment in full.*
- e. The plaintiff is awarded the costs of the suit to be paid by all the defendants jointly and severally.*

**DATED, SIGNED and DELIVERED at NAIROBI this 28th day of APRIL, 2020.**

**MARY KASANGO**

**JUDGE**

## **ORDER**

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17<sup>th</sup> April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **28<sup>th</sup>** day of **April, 2020**.

**MARY KASANGO**

**JUDGE**