REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 198 OF 1999

AZIZ EBRAHIM.....PLAINTIFF

-VERSUS-

RAMZAN EBRAHIM.....DEFRENDANT

JUDGMENT

BACKGROUND

The Plaintiff (Herein "**Aziz Ebrahim")** vide Plaint dated 22nd February 1999, sued the Defendant (herein "**Ramzan Ebrahim**"). The Plaintiff's claim is that by written agreement dated 18th November 1995 between the Plaintiff on the one part and the Defendant on the other part, the Defendant agreed to sell his one half undivided share in an immovable property known as Wazir House, Moi Avenue, **Nairobi situated on L. R. NO. 209/593 Nairobi** for the price of **Canadian Dollars 575,000** and on the terms and conditions contained in the said Agreement.

The Plaintiff averred that it was one of the terms of the said Agreement that the Defendant would immediately upon execution of the said agreement transfer his one half share in the said immovable property to the Plaintiff.

The Plaintiff made numerous demands and requests on the Defendant to transfer the said onehalf share in the property to the Plaintiff but the Defendant has to date failed and or neglected to transfer it to the Plaintiff.

That by reason of the said breach of contract by the Defendant the Plaintiff suffered loss and damage;

Particulars of Loss and Damage

The value of the said one half share purchased by the Plaintiff has depreciated in value by nearly **60%** between the period when the contract was executed and the present market value. The value of loss to the Plaintiff is therefore **C $ 345,000/-** which the Plaintiff claims from the Defendant.

The Plaintiff performed all his obligations under the said agreement and alternatively has been ready, able and willing to perform the same except where he has been unable to perform by breach aforesaid by the Defendant.

DEFENCE AND COUNTERCLAIM

The Defendant in response to paragraph 3 and 4 of the Plaint stated that on 18th November 1995 the parties hereto agreed to the sale of Defendant's entire shareholding in Ebrahim and Company Ltd, a private limited company incorporated in Kenya, valued at that date at **C $800,000** which then equalled **Ksh 40,000,000/-.** There was also on the same date**,** the sale of the one half undivided share of the Defendant in a commercial property in Moi Avenue, Nairobi known as Wazir House situated on **L. R. 209/593** (hereinafter referred to as **"the suit property")** from where the said Ebrahim & Company Ltd carried out its business of a supermarket. The business was intended to be run by the Defendant's brother and the Plaintiff's father Noorali Ebrahim as a going concern. The total consideration for this transaction involving the sale of the Defendant's shares as aforesaid and his half share in the suit property was agreed at **C$ 575,000.**

The Defendant further stated that at the insistence of the Plaintiff herein who is the Defendant's nephew, the Defendant in good faith agreed to enter into two memoranda of understanding to be executed simultaneously to give effect to the transaction between the parties as set above, namely:

a) One for the sale of the entire shareholding of the Defendant herein to the Plaintiff in the private limited company incorporated in Kenya known as Ebrahim & Company Limited for the nominal consideration of Ksh 100 only and the other

b) For the sale of one half undivided share or interest of the Defendant to the Plaintiff in a commercial property known as Wazir House situated on L. R. 209/593 Moi Avenue, Nairobi (hereinafter called the **"suit Property")** for the price of Canadian Dollars 575,000 to be paid as set out in the said Memorandum of Understanding.

The Defendant stated that the entity referred to as "OCS" in the Memorandum of Understanding which stands for "Olympic Corporation Suites" is a trade name registered by an Alberta corporation known as 404703 Alberta Limited of which the Plaintiff is the only shareholder and director.

The Defendant stated that the Memorandum of Understanding relating to the suit property provided for the purchase price of the suit property being Canadian Dollars 575,000 to be paid by OCS as therein provided and it was the obligation of the Plaintiff to ensure that all payments were duly made.

The Defendant averred that the said Memorandum of Understanding relating to the suit property further provided, inter alia, that the Defendant at his option may accept 6% shareholding in a private limited company incorporated in Canada known as 395432 Alberta Limited either in satisfaction of the purchase price as specified in the said Memorandum of Understanding or as security for the same. The Defendant did not exercise the option to accept the said shares towards the payment of the purchase price and the said purchase price and interest still remain unpaid.

The Defendant averred that in order to induce him to enter into the transaction set out in the above paragraph and sign the two memoranda of understating the Plaintiff falsely represented to the Defendant that the 6% shares in OCS being offered as security or in lieu of the purchase price of C $575,000 as provided in the Memorandum of Understanding relating to the sale of the suit property were worth C$ 600,000. The Plaintiff informed the Defendant that if the Defendant decided to sell the same such sale will not attract any capital gains or other tax. In relying on this misrepresentation the Defendant entered into the said memoranda of understanding only to find that if he were indeed to sell the said shares to the Defendant he would be liable to pay a minimum of 25% tax on the same which will reduce the value of this security to C $ 400,000 only

The Defendant averred that up to the date of filing this pleading the Plaintiff has failed to pay or procure OCS to pay any monies towards the purchase price or interest thereon as agreed while the Plaintiff through Ebrahim & Company Limited continues to enjoy the benefits of the use of the suit property from where it conducts its business.

By way of Counterclaim, the Defendant relies on paragraphs 2-10 of the Defense outlined above. The Defendant avers that he has performed his side of the Agreement fully and has always been and remains ready able and willing to transfer the suit property to the Plaintiff upon payment of the purchase price C$ 575,000/- plus interest C$240,000 as at 18th November 1999 and further accruing interest.

REPLY AND DEFENCE TO CONTERCLAIM

The Plaintiff averred that he performed his part on the two agreements and it is the Defendant who was in breach thereof. The allegations to the contrary contained in the Defence are denied and the Defendant is put to strict proof thereof.

The Plaintiff's defence to Counterclaim is that he reiterates Paragraphs 1,2 & 3 of the Plaint and denies committing any breach of contract or indebtedness of the amount/figures claimed or any other sum.

The Plaintiff denied being indebted to the Defendant in the sum of C $ 575,000 or C$ 240,000 or any other sum or at all. The Plaintiff averred that whereas the Defendant transferred to the Plaintiff his (the Defendant's) shares in Ebrahim & Company Limited, the Defendant had despite requests totally failed to transfer his half share in the suit premises to the Plaintiff as he had undertaken to under the said agreement. This resulted in loss and damage to the Plaintiff which he claims from the Defendant.

The Plaintiff denied owing to the Defendant the sum of C$ 800,000 equal to Ksh 40,000,000/- or any other sum or at all in respect of the shareholding in Ebrahim & Company Limited as alleged in paragraph 15 of the Defence and counterclaim or at all. The Plaintiff averred that he had paid in full the purchase price of the shares.

HEARING

The Plaintiff, Mr Aziz Ibrahim Amani testified on 18th February 2019 and relied on the content of Plaint, Witness Statement filed on 30th April 2012, Plaintiff's bundle of Documents filed on 17th July 2017 and Plaintiff's Supplementary bundle filed on 2nd October, 2017. He stated the dispute arose between him and the Defendant, brother to his father on the terms of the contract of 18th November 1995. The Plaintiff asserted that he complied with the term of transfer of 6% of shares of the Canadian Company. The Defendant failed to transfer the ½ share of Waziri House immediately as one of the terms of the contract. The Defendant refused to transfer the ½ share of Waziri House for 20 years now, due to the Plaintiff's debt to him that remains due and owing. The Defendant kept the 6% shares as collateral for the debt. The defendant sent him a fax message in 1997 and confirmed he would not buy the 6% shares and would not return or surrender the same; but keep them as collateral for the unpaid debt.

The Plaintiff sought prayers in the Amended plaint.

In cross examination, the Plaintiff admitted that 395432 Alberta Limited 6% shares worth C$1.2m dollars was transferred to the Defendant, through his mother who is not party to the suit. The valuation of the shares was done and filed in the Alberta/Canada Court as indicated in

paragraph

7& 8 of the Plaintiff's affidavit.

He paid the defendant C$ 575,000 in form of C$ 5000 dollars every month worth Ksh 200,000/- the principal amount was paid in full from December 1995- August 1998.

He confirmed that he paid the Defendant Ksh 43,067,657.09/-

Every month, he paid payments on behalf of the Defendant of debts and loans he had incurred.

PW2, Mherbanu Ebrahim testified on 19th November 2019, that she is mother to the Plaintiff and she transferred 6% shares of 395432 Alberta Ltd on behalf of her son, the Plaintiff to the Defendant.

The Defendant, Mr Ramzan Ali Ibrahim testified on the same date and relied on Amended Defence & Counterclaim, Witness Statement filed on 22nd May 2017, Defendant's List of Documents of 22nd May 2017 and Supplementary List of Documents of 11th October 2017.

In cross-examination, the Defendant stated that according to the Agreement, he could be paid C$575,000 and then transfer ½ share of Wazir House. He also had the option of holding the 6% shares of the Alberta Company in Canada or be paid C$575,000. He sent a fax to the Plaintiff on 15th February 1997 that he would not be buying the shares and instead hold the shares as collateral of the debt due and owing. He confirmed the transfer of 6% of shares of Alberta Company & 3% Shares from the Plaintiff Company to secure overdraft on Ebrahim Supermarket with Barclays Bank. He objected to lack of valuation of the 9% shares of Aberta Company he holds as collateral of debt.

The Defendant to date retains title to Wazir House as the Plaintiff has not fully complied with the terms of the Agreement.

PLAINTIFF'S SUBMISSIONS

The Plaintiff's submissions on whether the Memorandum of Understanding dated 18th November 1995 is valid and enforceable, stated that **section 3(3) of the Law of Contract Act** provides that no suit based on a contract of disposition of interest inland can be entertained unless the contract is in writing, executed by the parties and attested.

That **section 3(7) of the of Contract Act** excludes the application of **Section 3(3) of the Law of Contract Act** came into effect on 1st June 2003. The Memorandum of Understanding under inquiry was entered into on 18th November 1995, prior to the amendment of **section 3(3) of the Law of Contract Act** in 2003, and is therefore exempted.

The Plaintiff submitted that it was not disputed that the 6% shares in 395432 Alberta Ltd (the Olympic Village) were transferred to Ramzan, which shares he holds to date, it was similarly undisputed that Ramzan did not communicate his decision not to keep the said shares, and only hold the same as collateral on or before 13th December 1996, as agreed between the parties. In this regard the Plaintiff did fulfill his obligation.

It was the Plaintiff's submission that it was false for the Defendant to allege, that the Plaintiff induced him, by falsely representing the value of the shares in 395432 Alberta Ltd (the Olympic Village), as being C$600,000, and not proffer any evidence in support of such an allegation.

Further that the falseness of the Defendant's allegation as to false representation is evident as he, admits by way of Affidavit that in February 2001, the value of 9% shares in 395432 Alberta Ltd (the Olympic Village) was $ 1,260,000.00, the result of which is that 6% shares would be worth approximately $ 840,000.00.

That the Defendant claims damages for breach of contract, the damages claimed cannot be special damages as they are not specifically pleaded, they can only be presumed to be General damages. As it is now well settled, and as was restated by the Court of Appeal in ***Civil Appeal No. 189 of 2014 Capital Fish Kenya Limited vs The Kenya Power & Lighting Company Limited [2016]eKLR;*** that special damages need to be specifically pleaded before they can be awarded, it is equally clear that no general damages may be awarded for a claim for breach of contract.

That this Agreement placed numerous obligations at clause 2, and 3 on the Plaintiff and allowed the Defendant to hold 3% shares in 395432 Alberta Limited (the Olympic Village), this combined with the 6% shares for the sale of Wazir House, the Defendant held 9% shares in 395432 Alberta Ltd, with the admitted value of $1,260,000.00.

It was Plaintiff's submission that the claim of C$200,000 being the amount of diminution of the security of 6% shares in 395432 Alberta was fallacious. Over and above the fact that the Defendant had admitted by sworn affidavit that in the year 2001, the value of his 9% shareholding in 395432 Alberta Limited was C$1,260,000.00/- no evidence was produced to prove;

a) Alleged false representation on the value of the shares in Alberta Ltd

b) Alleged diminution of C$ 200,000/-

The Plaintiff submitted that the Court in considering contracts/ Contractual provisions on the basis of uncertainty or incompleteness; In the

case of ***Mamidoil –Jetoil Greek Petroleum Co.SA vs Okta Crude Oil Refinery AD [2001]EWCA Civ 406,*** the Court considered the following guidelines;

> ***"i) Each case must be decided on its own facts and on the construction of its own agreement subject to that;***
>
> ***iv) However, particularly in commercial dealings between parties who are familiar with the trade in question, and particularly where the parties have acted in the belief that they had a binding contract, the courts are willing to imply terms, where that is possible, to enable the contract to be carried out.***
>
> ***v) Where a contract has once come into existence, even the expression 'to be agreed' in relation to future executory obligations is not necessarily fatal to its continued existence.***
>
> ***vi) Particularly in the case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. Cerntum est quod certum redid potest.***
>
> ***vii) This is particularly the case where one party has either already had the advantage of some performance which reflects the parties' agreement on a long term relationship, or has had to make an investment premised on that agreement."***

DEFENDANT'S SUBMISSIONS

The Defendant submitted that the distinction between the respective legal personalities, rights and liabilities of a company and those of its shareholders has sound legal foundation as was enunciated by the House of Lords in the case of ***Salomon vs Salomon and Company Limited (1895 -9) ALL ER 33***, where it was held;

> ***"A company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities."***

The Defendant submitted in Palmer's Company Law, volume 1 at paragraph 3.101 notes as follows on method of contracting by Companies;

> a) By a company by writing under its common seal; or
>
> b) On behalf of a company by any person acting under its authority, express or implied.

The above text, at paragraph 3.112 indicates as follows with respect to contracts in writing;

> ***"A company being an artificial person, can contract in writing only through its agents. The normal form is for the company to be made a party by its corporate name, the contract being signed by the agents on behalf of the company. No personal liability under the contract attached in principle to the agents where they sign 'on behalf' of the company. Care must be taken to show on the face of the contract that the person who signs it is acting for, or on account or on behalf of, the company by inserting words to that effect in the description of the parties, or in the body of the agreement, or in connection with the signature.***

The Defendant submitted that the Agreement was uncertain and unenforceable with respect to the payment terms by OCS by virtue of the principle of privity of contract.

The Defendant in his submissions reproduced clauses 4 and 5 of the Agreement.

the above issues revolve around the interpretation of the above clauses of the Agreement. The Court is therefore enjoined to apply the accepted cannons of interpretation of contracts.

The Defendant relied on the case of ***Attorney General of Belize vs Belize Telecom Limited [2009]2 All ER 1127***, where the Privy Council was confronted with a similar scenario which required interpretation of certain clauses in the Memorandum and Articles of Association of the Respondent. Lord Hoffmann expressed the position as follows;

> ***"The court has no power to impose upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to who the instrument is addressed: see Investors' Compensation Scheme Ltd –vs- West Bromwich Building Society [1998] 1 All ER 98 at 114- 115, [1998] 1 WLR 896 at 912 -913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.***

In ***Mannai Investment Co. Ltd vs Eagle Star Lie Assurance Co. Ltd (1997) AC 749***, Lord Steyn stated as follows;

"In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore general favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. The standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.

The Defendant submitted that the Plaintiff failed to adduce cogent evidence showing that he paid C $ 575,000 plus interest as provided under clause 3 of the Agreement.

The Court of Appeal in ***National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another[2001]eKLR***, held that;

"A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proven. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge."

DETERMINATION

Considering the pleadings evidence and submissions by parties through their respective Counsel, the issues that emerge for determination are;

1) Is there a valid and/or enforceable contract?

2) Did the Plaintiff perform/breach terms of the contract?

3) Did the Defendant perform/breach terms of the contract?

4) Does Plaintiff's claim/Defendant's counterclaim fail/succeed?

5) What are the remedies available?

1) **Is there a valid and/or enforceable contract?**

Both Plaintiff and Defendant concede accept and agree that there are 2 memoranda of understanding executed by both parties on 18th November 1995.

A) Memorandum of Understanding referenced Re: Waziri House Nairobi Kenya- (the subject-matter of this suit)

B) Memorandum of Understanding Referenced Re: Ebrahim & Co Ltd- Nairobi Kenya.

The terms of the Contract between the parties which the Plaintiff's claim is hinged on are;

"Ramzan Ebrahim has agreed to sell Wazir House to Aziz Ebrahim based on the following terms and conditions;

1. PRICE: The Agreed Price is C$575,000

2. INTEREST: OCS will pay C$5,000 per month from Jan1st,1996(via Manji)1997. However, From Jan 1st,1996, OCS will defer C$2,500 of the monthly interest for 6 months and this amount of C$15,000(6xC$2,500) shall be paid to Ramzan before 31st December 1996.The interest only will be paid until the commencement of the installment amount on Jan 1,1997.

3. PAYMENT TERMS: OCS will commence payment to Ramzan on Jan 1st1997. The payment of the C$575,000 will be made in the form of C$25,000 monthly payments which will include principal and interest. These installments will continue to be made until the total amount is paid in full. The interest too be used will be an annual rate of 10.4% on the outstanding balance.

4. SHARES: Ramzan will hold 6% shares in 395432 Alberta Ltd (The Olympic Media Village). If Ramzan decides not to keep the shares then these shares become collateral for the above amount of C$ 575,000 until it is paid in full and upon full payment Ramzan will return the shares back to Mrs Mherbanu Noorali Ebrahim Mavani.

5. OPTION ON SHARES: Ramzan may at any time until 13th December 1996 decide to keep the 6% shares and then none of the above payments or installments would be payable. All interest paid until then shall be refunded to OCS.

6. TRANSFER: Ramzan will transfer to Aziz his ½ share in the Wazir House property ,immediately.

7. ASSUMPTIONS:

1) The instalments are based on the condition that OCS will have converted approximately 75 units, so that OCS will be able to service the debt . Payment of principal and interest shall commence.

2) The terms and conditions were agreed with goodwill and cooperation between Ramzan, Aziz and Mohammed and that if circumstances change each will be flexible in its position.

This contract was /is executed by the Plaintiff and Defendant and parties are bound by the terms of the contract.

The Defendant challenged the contract as indefinite, incomplete and uncertain and therefore failed to give rise to a binding contract. ***Mamidoil –Jetoil Greek Petroleum Co.SA vs Okta Crude Oil Refinery AD [2001]EWCA Civ 406 supra*****,** the Court considered Court's interpretation of such contracts as follows;

"The court always leans against a conclusion which will leave parties who clearly intended to contract without a legally binding contract, and that this is the more so where they have acted as though they were bound.

The court strains to supply mechanisms which will make agreements work in circumstances where the parties' own attempts to provide them have broken down, and also where it is obvious the parties must have intended to provide a mechanism in order to make their agreements work but have neglected to do so in their agreements."

From the above the instant Agreement/Contract was certain complete and definite in its terms. Each party was obligated to perform the terms of the contract. Neither of the parties claimed that performance was hindered due to vagueness or incompleteness of the Contract /Agreement. During the hearing, both parties admitted to executing a valid legal and binding agreement. The dispute arose from execution/Performance of terms of contract/agreement by the parties.

The Defendant in reliance of ***National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another[2001]eKLR***, *supra*, submitted that in the instant agreement, payment to the Defendant was to be made by a separate entity known as Olympic Corporate Suites (OCS) which was not a party to the Agreement. The Plaintiff alluded to the fact that OCS was one of his companies in Canada. The distinction between respective legal personalities, rights and Liabilities and those of its shareholders is spelt out in the landmark case of ***Salomon vs Salomon*** supra. The Defendant's reliance in the following cases;

Dunlop Pneumatic Tyre Co Ltd vs Selfridge & Co Ltd (1915) AC 847**;**

"In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such right may be conferred by way of property, as for example. Under trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam."

Agriculture Finance Corporation vs Lengitia Ltd (1985) eKLR**,**

"As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if a contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. There existed no direct contract between the first respondent and the appellant, and so the first respondent had no cause of action against the appellant."

The Defendant submitted that the contract as is unenforceable as it was/is vitiated by lack of consideration. The Plaintiff did not provide consideration for the Defendant's transfer of ½ share of the suit property to him. Solely, OCS made payments and not the Plaintiff.

The Defendant was of the view that the Plaintiff could not rely on the said contract because payments made were by OCS Company Ltd, a separate legal entity from him and not party to this suit. Secondly, transfer of 6% shares of Alberta Company was by the Plaintiff's mother again not a party to the suit. The Plaintiff ought not to rely on what other parties did.

This Court relies on the case of;

Michael Kyambati vs Principal Magistrate, Milimani Commercial Courts Nairobi & Anor [2016] which reads in part;

"The general law, however, is that a Corporation is an artificial legal entity. Accordingly, it must of necessity act through agents, usually Board of Directors. In other words, the Corporation's brain is the Board of Directors who make decisions on behalf of the Company……Others are Directors and managers who represent the directing mind and will of the Company and control what it does."

The Plaintiff is both shareholder and director of the Alberta Co Ltd (Olympic Village Suites) OCS and therefore as part of the directing mind and will of the Company, the OCS Co Ltd paid the Defendant through the Plaintiff's authority as one of the Directors of Board of Directors of the Company.

With regard to the fact that transfer of 6% shares, Mrs Mherbanu Noorali Ebrahim Mavani DW2 testified in Court that she as mother of the Plaintiff and as per his instructions, she transferred 6% shares of Alberta Co Ltd (OCS) to the Defendant. She was the Plaintiff's agent in the transaction/Agreement.

The contract /Agreement is a certain definite and enforceable contract. The Plaintiff legally pursues his claim under the contract from the Defendant.

2) **Did the Plaintiff perform/breach terms of the contract?**

In terms of Clauses 1, 2 & 3 of the Contract of 18th November 1995, the Plaintiff made payments to the Defendant as confirmed by Plaintiff's Supplementary Affidavit of 2nd October 2017 which housed at pg 20-40 are copies of a Diary written the Defendant's name and amount of

Ksh 100,000/- or thereabouts paid out from February 1998-September 1998 and signed against each month.

The total amount is not confirmed, the Defendant objected to the acknowledgement of payments as they are handwritten in a diary and not signed by the Defendant or at all. The Defendant objected that payments of ½ share of Waziri House was to be from drawings the Defendant made from Ebrahim & Co ltd.

This Court is satisfied that the Plaintiff paid the Defendant the sums indicated because if that was not so, the same ought to have been challenged during the hearing in cross-examination of the Plaintiff.

Secondly, as at 18th November 1995 by the 2nd Agreement referenced Ebrahim & Co Ltd Nairobi Kenya, the Defendant sold Ebrahim & Co Ltd to the Plaintiff except for the Haile Selassie Godown. The Defendant would hold 3% shares of Plaintiff's Alberta Co Ltd until he paid all purchase price and settled the Barclays Bank Loan. So, as at February 1998 when the Defendant made drawings from Ebrahims Co Ltd, it was from funds belonging to the Plaintiff as owner of the Business and rightfully deducted the drawings.

The Defendant as per his statement and testimony he indicated that the full amount of C$ 575,000 was/has not been paid in order for him to transfer ½ share of Waziri House. This Court notes with concern that reconciled Accounts have not been taken on how much the Plaintiff has paid so far to the Defendant of C$ 575,000, in what currency at which point in time and what is the balance?

Section 107-109 Evidence Act mandates that he who alleges must prove;

The Plaintiff has proved payments made to the Defendant but what is the total paid to the Defendant so far? The Defendant made drawings from Ebrahims Co Ltd after he sold the business to the Plaintiff did he refund the drawings? If not after the Plaintiff deducted drawings and made monthly instalments of Ksh 100,000/- for a year how much is outstanding?

The Plaintiff proved on a balance of probabilities that he transferred 6%shares to the Defendant and paid funds to the Defendant which shall be confirmed from reconciling accounts by both parties.

3) **Did the Defendant perform/breach terms of the contract?**

The Defendant was at any time until 31st December 1996 to decide [and communicate or confirm] to keep 6% shares and forgo the payments agreed upon by the Plaintiff and Defendant in the Agreement.

The Defendant would immediately transfer ½ share of Waziri House.

The defendant by Fax dated 15th February ,1997, communicated to the Plaintiff that he had decided not to buy the 6% shares and instead would hold the shares as collateral [for payment of C$ 575,000.] The Defendant stated that the agreement did not require the Defendant to communicate his decision not to keep the shares. The Defendant could only hold the shares as collateral under Clause 4 of the Agreement.

The Defendant did not transfer ½ share of Waziri House immediately. [1995]

The Plaintiff transferred 6%shares of Alberta Co Ltd (OCS) on 2nd November 1995 as evidenced by share certificate No 9 pg 13 of Plaintiff's bundle of documents

The Plaintiff made payments to the Defendant of Ksh 100,000/- as shown from Pg 20-40 of the Plaintiff's Supplementary List of Documents from February 1998-September 1998.

These payments were made to the Defendant even after he continued to hold 6% shares of Alberta Company and he had intimated he would not release them until the full C$575000 was paid in exchange for ½ share of Wazir House.

The Defendant claims this amount in the Counterclaim and interest thereof.

This Court finds that the Defendant has withheld and obtained benefit from the 6% shares of Alberta Co Ltd (OCS) from 1995 to date (26 years now) while holding them as collateral for full payment of C$575000. The Defendant received payments from the Plaintiff for 1 year 1998 which is not confirmed or accounted for by the Defendant. The Plaintiff settled the Defendant's outstanding loans and drawings he made after sale of the business.

The Defendant continues to hold ½ share as collateral yet he has retained to date the interest/suit property he ought to transfer immediately, 26 years ago.

Blacks Law Dictionary 10th Ed Pg 316 Collateral means;

> ***"Property that is pledged against a debt. In the commercial sense of the word, [it] is a security given in addition to a principal obligation, and subsidiary thereto, and is used as generally descriptive of all choses in action; as distinguished from tangible personal property……"***

The Plaintiff wanted to purchase the ½ share of Wazir House from the Defendant and was to pay C$ 575000 in instalments of C$ 25000 monthly until payment in full on condition the Defendant would immediately transfer the ½ share of Wazir House. That is after the transfer, he would then hold the 6% shares of Alberta Company as collateral, pledge against the debt of C$575000.

So if, the Defendant failed, refused to transfer the ½ share of Wazir House immediately as per the Contract, then there was/is no legal basis /justification to keep retain the 6% shares of Alberta Company Ltd as collateral because the Defendant had no risk to protect by security provided by the Plaintiff. If the Plaintiff failed to pay the agreed sum, the Defendant retained and continued to enjoy the property in ½ share of Wazir House as he retained the Title document of the premises. It is unfair and unjust to receive part payment towards purchase of ½ share of Wazir House, retain the ½ share of Wazir House and retain the 6% share of Plaintiff's Company.

By the way in the Defendant's own affidavit filed in Alberta Canada Court at Pg 211 of the Plaintiff's bundle, he deponed that the 6% share and 3% share of the Company as at November 2001 was valued at $ 1,260,000 way over the debt of C$575000. The Defendant breached the Contract as he refused to transfer the ½ share of Wazir house to the Plaintiff immediately as agreed.

4) **Does Plaintiff's claim/Defendant's counterclaim fail/succeed**?

The Defendant with reference to the 1st contract of 18th November 1995, (on the sale of ½ share Wazir House) relied on Paragraph 2-10 of the Defence and claims from the Plaintiff C$575000 and accumulated interest of C$240,000 and further accruing interest.

With regard to the 2nd contract of 18th November 1995 (on sale of Ebrahims Co Ltd), the Defendant deponed that he claimed the sum of Canadian 800,000 dollars equal Ksh 40,000,000/- being value of his shareholding in Ebrahim Co Ltd sold and transferred to the Plaintiff.

During the hearing the Defendant did not adduce evidence in support of the Counterclaim but relied on pleadings and documents filed.

The Parties filed documents that confirm the Plaintiff transferred 3% shares of Alberta Co Ltd to the Defendant to secure loan with Barclays Bank. The Share Certificate No 10 is housed at Pg 12 of Plaintiff's bundle of documents. The Plaintiff's list of documents dated 19th October 2007 is a list of 534 entries of payments made by the Plaintiff on the Defendant's account in Ebrahim & Co Ltd. Again, reconciliation of accounts was not done to confirm how much was paid to or on behalf of the Defendant and/or what remains due and owing. The defence and counterclaim fail as no evidence was adduced to prove the claim and the Defendant did not transfer ½ share of Wazir House as contracted/agreed on.

5) **What are the remedies available?**

This is a family business spanning 50 years, the business experienced challenges and some family members relocated to Canada. The Plaintiff nephew to his Uncle the Defendant by contracts drawn in 1995 agreed on terms of transfer of defendant's interest in Ebrahims Co Ltd to the Plaintiff for sums not disclosed in the Agreement. Evidence on record confirms the Plaintiff paid the Defendant for ½ share Wazir House and the Defendant's interest in Ebrahims Co Ltd. Despite payment documents filed, spreadsheet, accounts and payment evidence, the Plaintiff did not cause reconciliation of Accounts and/or avail the Accountant and/or Auditor to prepare and testify in Court on payment schedules and amounts outstanding. The defendant did not provide evidence of valuation of Ebrahims Company business for sale to the Plaintiff at the time 1995. Therefore the claim for damages cannot be granted in the absence of valuation of Ebrahim's business and reconciled Accounts.

Damages are granted where as in the case of ***Hadley vs Baxendale[1854] 9 Ex 341;***

> ***"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.***

For Specific Performance in the case of ***Wilson vs Northampton & Banbury Junction Rly [1874] 9 Ch App*** stated;

> ***"the court gives specific performance instead of damages only when it can by that means do more perfect and complete justice."***

The claim by the Defendant in the defence and counterclaim cannot be granted as they were not substantiated. The figures cannot be granted in the absence of reconciliation of accounts.

DISPOSITION

In light of Plaintiff's part performance of contracts by part payments, the Court orders as follows;

1. **The Plaintiff and Defendant and/or through respective Advocates on record shall cause joint/separate reconciliation of**

accounts within 3 months from date of delivery of the Judgment.

2. The Plaintiff partly performed terms of the contracts and the Defendant breached terms of the contracts.

3. If agreeable the outstanding amount of C$575000 after reconciliation of accounts shall be paid to the Defendant on immediate transfer of ½ share of Wazir House as agreed.

4. If agreeable the outstanding amount of purchase of the Defendant portion of Ebrahims business shall be paid by Plaintiff and immediate transfer of 3% shares of Alberta Co Ltd made by the Defendant back to the Plaintiff.

5. The 6% share of Alberta Co Ltd shall within 90 days of Judgment of the Court be transferred back to Mrs Mherbanu Noorali Ebrahim Mavani. The Defendant has no risk of losing ½ share of Wazir House, he retains title of whole property and has title document, he received part payment of C$575000 from the Plaintiff as shown by documents filed and therefore no need for collateral and it would amount to unjust enrichment.

6. If parties fail to agree and perform fully the terms of the contracts of 18th November 1995, then they shall revert to *status quo ante;* the Defendant to release and transfer back 9% shares of Alberta Co Ltd to Plaintiff's family and refund funds paid so far with regard to Wazir House and Ebrahims Ltd then retain both properties, Wazir House/Ebrahims & Co. Ltd.

7. Each party to bear own Costs.

8. Any aggrieved party is at liberty to apply to Court.

DELIVERED SIGNED & DATED IN OPEN COURT 30TH SEPTEMBER 2020 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MURGOR & MURGOR ADVOCATES FOR PLAINTIFF

OCHIENG' ONYANGO KIBET & OHAGA ADVOCATS FOR DEFENDANT

COURT ASSISTANT - TUPET