



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

COMMERCIAL & ADMIRALTY DIVISION

HIGH COURT CIVIL APPEAL NO 4 OF 2018

MASENO UNIVERSITY SAVINGS AND CREDIT

CO-OPERATIVE SOCIETY LIMITED.....APPELLANT

VERSUS

STIMA SAVINGS AND CREDIT

CO-OPERATIVE SOCIETY LIMITED..... RESPONDENT

(Being an Appeal arising from the Judgment of the Co-operative Tribunal at Nairobi dated 12th January 2018 in the Co-operative Tribunal Case No 32 of 2017)

JUDGMENT

1. This Judgment relates to an appeal from the decision of the Co-operative Tribunal rendered on 12th January 2018, in Tribunal *Case No. 32 of 2017, Maseno University Savings and Credit Co-Operative Society Limited vs Stima Savings and Credit Co-Operative Society Limited*. It is based on the grounds in a memorandum of appeal dated 10th February 2018.

2. The brief background facts of the case are that, on or about 9th January 2016, the parties herein entered into a share transfer agreement (herein “the agreement”), in which the Appellant was to sell to the Respondent a total of 9,000,000 shares of; Co-op holding & Company Limited, at a unit cost of; Kshs 12 per share, totalling to a sum of; Kshs 108,000,000.

3. The Appellant avers that, the sale transaction was approved by the authorized officers of the respective parties and subsequently, the Respondent was notified by the Shares Operations Department of, Co-operative Bank of Kenya, that the documentation process was complete and should pay the consideration and the applicable commission to the Registrar of Shares. The Respondent paid a sum of; Kshs 5,832,110 as the transfer fees and/or taxes, but did not pay the consideration.

4. That, as a result of non-payment of the consideration, the Appellant was exposed to very difficult financial problems and mass exodus of its membership. Despite repeated request for payment, the Respondent failed and/or neglected to make the payment, leading to the Appellant filing the subject claim herein dated 17th January 2017.

5. The Appellant sought for orders that:

- a) *The Respondent pays the Claimant a sum of; Kshs 108,000,000.00, for the 9,000,000 shares purchased;*
- b) *The Respondent pays interest at the rate of 14% per annum on (a) above from; the 12th April 2016, until payment in full;*
- c) *The Respondent pays the Claimant damages for loss of membership; and*
- d) *The Respondent pays the costs of the claim and interest thereon.*

6. However, the Respondent filed a statement of defence and counter claim dated 21st February 2017, denying the claim. It argued that, it did not enter into any agreement with the Appellant and if any agreement was entered into, it was without proper authority and/or null and void.

7. That the commissions and taxes were paid out of fraudulent activities perpetuated by; the Appellant, as it had come to the negotiation table

with unclean hands. Further, the Appellant is guilty of fraud, mischief and bad faith. That the Appellant borrowed a loan from the Respondent which was used for money laundering activities.

8. The Respondent denied being responsible for any losses and damages suffered by the Appellant as a result of failure to honour the alleged agreement. To the contrary, it filed a counter claim seeking for orders against the Appellant; on the ground that, on 17th February 2016, the Appellant applied for a loan from the Respondent in the sum of; Kshs 45,000,000.00, pending the discussions on the purchase and sale of shares.

9. Pursuant to the letter of offer dated; 18th February 2016, the loan was approved and disbursed. It was secured by the original share certificate of the 9,000,000 shares, which the Respondent was in the process of purchasing. However, the Respondent avers that, the loan was not utilized as agreed and claims repayment of the balance of; Kshs 43,057,365.00, interest of; Kshs 10, 330, 000, from the 21st February 2017 until payment in full and a refund of; Kshs 5,832,110, paid as commissions and taxes for the share transfer transaction.

10. However, the Appellant filed a reply to the defence and defence to counter claim dated 10th March 2017, reiterated the averments in the statement of the claim and denied all the particulars of fraud, mischief and bad faith on its part or in engagement in any criminal activities. It averred that, the sum of; Kshs 45,000,000 was a secured loan which was connected to the sale of shares. It denied the allegations of layering and illegal transaction and prayed for the Respondents counter claim to be dismissed with costs.

11. Upon hearing the matter, the Tribunal made the following orders: -

- a) *The Appellant be awarded damages of; Kshs 2,500,000 as general damages and that is all;*
- b) *The Appellant to pay Kshs 43,057,365 plus interest from the judgment date to the Respondent for the loan that was granted to the Appellant by the Respondent;*
- c) *The Appellant to pay the sum due to the Respondent less the general damages awarded to the Appellant;*
- d) *All other claims and counter claims stand dismissed.*

12. The Appellant is aggrieved by the decision based on the grounds stated in the memorandum of appeal that: -

- a) *The Honourable Tribunal erred in law and in fact by failing to appreciate the fact that the Appellant's 9,000,000 Co-op holding Co-operative Society Limited shares had been transferred to the Respondent and by virtue of the judgment the Respondent would retain them and yet the Respondent did not pay the consideration for the shares agreed upon in the contract;*
- b) *The Honourable Tribunal erred in law and in fact by failing to appreciate the fact that the market price for the Appellant's 9,000,000 Co-op holding Co-operative Society Limited shares varied with time and changed in value to the Appellant's detriment due to the sole breach of the contract by the Respondent and this would cause the Appellant huge financial losses which were not factored into the damages awarded by the Honourable Tribunal which holding is extremely prejudicial to the Appellant;*
- c) *The Honourable Tribunal erred in law and fact by failing to appreciate the fact that the 9,000,000 Co-op holding shares sold to the Respondent by the Appellant were transferred to the Respondent after the Respondent paid taxes and commission amounting to Kshs 5,832,110.00;*
- d) *The Honourable Tribunal erred in law and in fact by failing to appreciate the fact that there were two independent contracts between the two parties but treated them as one resulting into the Appellant being victimized and yet it is the Respondent's action of unilaterally breaching a valid contract that led to the Appellant's financial woes;*
- e) *The Honourable Tribunal erred in law and fact by appreciating the fact that the Appellant had financial challenges which promoted it to sell the shares to the Respondent but proceeded to order the Appellant to pay for a loan which was taken in reliance to the proceeds of the share sale;*
- f) *The Honourable Tribunal erred in law and fact by failing to appreciate the fact that the 9,000,000 Co-op holding Co-operative Society Limited shares which were owned by the Appellant and sold to the Respondent through a valid contract varied in value to the detriment of the Appellant after the Respondent breached the contract leading to huge financial losses which were not factored into the damages awarded by the Honourable Tribunal;*
- g) *The Honourable Tribunal erred in law and fact by failing to appreciate that the Appellant hired and paid an Agent who sourced for and negotiated the breached contract with the Respondent at a cost of Kshs 39,600,000 which amount was not factored in the judgment and the damages awarded by the Honourable Tribunal;*
- h) *The Honourable Tribunal erred in law and fact by failing to determine that the Appellant could not take back the shares which had already been transferred to the Respondent and no longer enjoyed the dividends as a shareholder;*
- i) *The Tribunal erred in law and fact by considering factors which were never presented to it including the fact that the Respondent was not able to pay for the shares as contracted;*
- j) *The Honourable Tribunal erred in fact and law by introducing matters which were not covered before it such as the fact that the*

Respondent would be breaching SASRA Act if it paid the shares as contracted between it and the Appellant;

k) The Honourable Tribunal erred in law and misapplied the concept and law related to specific performance and the authorities tendered;

l) The Honourable Tribunal erred by failing to exhaustively scrutinize the pleadings and annexures thereto; and

m) The Honourable Tribunal erred in law and fact by failing to consider all the evidence tendered and introduced considerations which were not presented before it.

13. The Appellant thus prays for orders herein that:

a) The judgment of the Honourable Tribunal (sic) delivered on the 12th January 2018, be set aside;

b) Judgment be entered in favour of the Appellant as per the statement of claim and an assessment of damages be made by the Honourable Court; and

c) The Respondent be equally condemned to pay the costs of this appeal.

14. The parties disposed of the Appeal by filing submissions. The Appellant relied on their submissions dated 24th June 2019 and reiterated that, the Respondent intentionally and blatantly breached a valid contract and caused it immense loss, as the shares are a commercial commodity, whose value is bound to fluctuate.

15. Further despite the Honourable Tribunal appreciating the fact that, the Appellant hired; Rapid Equities Limited to help it source for the purchaser and paid a sum of; Kshs 39,600,000 for the agency services and Kshs 5,832,110 as commission and taxes, the Tribunal failed to reward the same.

16. The Appellant invited the court to consider; the value of the transaction, the costs of hiring the agent and the attendant economic loss; having waited for over one year for the Respondent to acknowledge breach of the contract. The court was referred to the case of; *Gitobu Imanyara & 2 others v Attorney General (2016) e KLR* where it was held that, the court has the jurisdiction, albeit to be exercised with caution, to review the evidence and determine whether the conclusions reached should stand.

17. That, the Tribunal had no basis to award the sum of; Kshs 2, 500, 000 only for breach of a transaction of; Kshs 108,000,000, yet the Respondent did not state that, they did not want to continue with the transaction. Further there was no evidence adduced to demonstrate that, the Respondent was not able to pay for the shares or would commit an illegality as against the provisions of; the Sacco Societies Regulatory Authority (SARSA) Act. That RW1 confirmed that the Respondent had finances to pay for the shares.

18. They relied on the case of; *Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) e KLR*, where the court stated that evidence not adduced and proved before the trial court cannot form the basis of a judgment.

19. The Appellant argued that, the two contracts herein are independent but inter-dependent contracts. The performance of one was to automatically lead to the performance of the other. That, the letter of offer acknowledged that, the sale of shares informed the loan agreement and the shares were listed as security in the said letter.

20. It was further submitted that, although the Tribunal allowed the counter claim by the Respondent it refused to enforce the primary contract which was for the sale of shares. Further, the Tribunal misdirected itself on the question of specific performance and failed to enforce a proper contract between the parties.

21. The cases of; *Purple Rose Trading Company Limited v Bhanoo Shashikant Jai [2014]e KLR* and *Frank Rwakijanju vs Prince Patrick Kaboyo Fort Portal HCCA No 1 of 1992 [1992] IV KALR 132* were relied on alongside, an extract from the Halsbury Laws England 3rd Edition Vol 36 paragraph 444, where it is stated that:

“A plaintiff seeking to enforce a contract must show that all conditions precedent have been fulfilled and that he has performed or been ready and willing to perform all the terms which ought to have been performed or been ready and willing to perform all the terms which ought to have been performed by him; and he is ready and willing to perform all future obligations and or the contract”

22. The Appellant argued that, having fulfilled all the conditions of

the contract and the shares having been registered in the name of the Respondent, no circumstances exist to deny it the remedy of specific performance. The Tribunal misunderstood and misapplied the principles in the case of; *Amina Abdul Kadir Hawa v Rabinder Nath Anand & another (2012)e KLR* to deny it the plea of specific performance or enforcement of contract. That, the shares herein are class A shares which cannot be traded in the open market and can only be purchased by fellow Cooperative societies.

23. However, the Respondent responded vide submissions dated 14th October 2019 and submitted that, the agreement herein is one of intention to sell and buy, and as a binding contract for the sale of shares it would only have been complete upon payment of consideration of; Kshs 108,000,000 and delivery of the title to the shares in the name of the Respondent. That even if the shares were transferred into the Respondent's name, the Honourable court has the powers to direct that, they be transferred back to the Appellant.

24. Further, although the Respondent paid the sum of; Kshs 5,832,110, as commission and taxes, the share certificate was never presented to it as required, to finalise the payment of the purchase price if any. The mere payment of that sum at the Appellants request, does not amount to acceptance of the offer to purchase the shares and/or completion of the agreement.

25. It was submitted that the contracts were independent of each other. Further, the Appellants acted negligently in paying the commission of; Kshs 39,600,000, which amount was 36.6% of the share purchase price even before the purchase price was received. That, an agent is only paid where the transaction they are mediating is successful. It is therefore “laughable” that the Appellant prioritized its obligations to an agent, instead of its shareholders.

26. The Tribunal did not misapply itself to the law on specific performance as set out in the case of; *Amina Abdul Kadir Hawa v Rabinder Nath Anand & another (2012)e KLR*. Further, the Appellant is clear in its submissions that, it has no problem with the award of damages save that, Kshs 2, 500,000 be “enhanced”. However, the award is sufficient as the Respondent has paid the sum of; Kshs 5,832,110, to the Registrar of shares on behalf of the Appellant and at their request.

27. I have considered the arguments advanced by both parties and the submissions and in particular the grounds of appeal and in a nutshell, I find the Appellants avers that the Tribunal failed: -

- a) *To appreciate that the shares had already been transferred, when Kshs 5,832,110 was paid;*
- b) *To factor in damages devaluation of the market value of the shares which is extremely prejudicial to the Appellant;*
- c) *To appreciate there were two independent contracts for sale of shares provision of the loan facility;*
- d) *To appreciate the Respondent caused default to repay the loan and failed to factor the sum of; Kshs 39,000,000;*
- e) *To properly apply the law on specific performance and exhaustively scrutinize pleadings and documentary annexures, and introduced matters of breach of SASRA Act; not pleaded.*

28. However, before I address these issues it suffices to note that parties are bound by the averments in their pleadings and/or claim. The Appellant cannot raise issues herein that were neither in the statement of claim or canvassed before the Tribunal for determination. The Appellant’s claim was basically claiming for an order of specific performance, interest on the sum owing, and general damages for loss of membership, costs of the claim plus interest thereon.

29. In addressing this claim, the Tribunal raised four issues for determination as follows:

- a) *Is the share transfer agreement valid?*
- b) *Was there fraud involved in the share transfer transaction between the Claimant and the Respondent?*
- c) *Is the Claimant entitled to the prayers sought in the statement of claim and is the Respondent entitled to the counter claim?*
- d) *Who bears the costs of this suit?*

30. In my considered opinion these issues broadly covered the issues in dispute. The first issue is informed by the fact that, the basis of the relationship between the parties is founded on the agreements entered into. In the instant matter, there were two agreements; in relation to the sale of the shares to the Respondent by the Appellant and the agreement relating to the loan granted by the Respondent to the Appellant.

31. The Tribunal considered the issue of the validity of the share transfer agreement, at paragraphs 22 to 27 of the judgment by analysing the evidence adduced, the applicable law, in particular, the law as to the officers authorized to execute the agreements on behalf of both parties. The minutes endorsing their respective actions were also considered. The Tribunal made its findings at paragraphs 27 of the judgment to the effect that, the sale transfer agreement was “valid”.

32. The Tribunal further considered the allegations of fraud and the particulars thereof and held that there was no evidence to prove that the signatures of the Respondent’s officials were forged and or the particulars of fraud were proved. Neither did the Respondent support their plea of money laundering. The Tribunal further dismissed the allegation that the Respondent’s board disregarded the advice of its officers or sub-committee. The Tribunal then concluded at paragraph 35 of the judgment, that the contract of sale of shares entered into was “binding and enforceable between the parties”.

33. Having analysed the evidence adduced and the documents produced before the Tribunal, in particular the share transfer agreement dated 19th January 2016, I find that, from the agreement that, the Appellant is the vendor and the Respondent is the purchaser. The agreement relates to the sale of; 9,000,000 ordinary shares in Coop Holdings Co-operative Limited; for consideration of; Kshs 108, 000,000 at a share price unit of; Kshs 12 each. The agreement is signed by the chairman and secretary of both respective parties, though not sealed by the purchaser.

34. On the basis of the above said, I am in agreement with the findings of the Tribunal that, the parties entered into a binding agreement. More so, the finding that, the allegation of forgery of the signatures of officials of the Respondent to the agreement, was not proved. Indeed, it is trite law that, he who alleges proves

35. However, there are essentially six elements that must be present for a contract to be enforceable. There must be an offer, acceptance of the offer, consideration, capacity, mutuality and the terms and conditions must be legal and not in violation of any laws.

36. I find that, in the instant matter, there was an offer and acceptance. But there was no consideration. At this point it is important to consider the legal consequences of lack of consideration in the execution of a contract. Lack of consideration means that one of the parties to a contract is not obligated in any way while the other party holds an obligation to act.

37. Generally, courts will not interfere with parties to a contract. However, there are several instances when the court will declare a contract enforceable even where consideration was lacking as shown below:

- a) *When one party is already legally bound to perform*
- b) *When consideration is more like a gift*
- c) *When consideration is made as a result of a past event, or*
- d) *When consideration is based on an illusory promise*

38. Taking into account the circumstances of this case, none of above exceptions apply to this case. The question that arises is; whether in the absence of consideration, the Tribunal arrived at the correct decision by its finding that, the contract was binding and enforceable and/or whether the Tribunal should have ordered the Respondent to pay consideration.

39. The answer to this question will be determined by the terms and conditions of the agreement between the parties. First and foremost, by signing the agreement, the Respondent agreed to be bound by the terms and conditions thereof. In that regard, the provisions of clause 3:2 states that: -

“payment of consideration as aforesaid (as per clause 3:1 where it is stated that the total consideration for the sale of shares is Kshs 108,000,000) shall subject to the terms and conditions of this agreement be made in full on the completion date.”

40. The question that arises is; when was the completion date? The provisions of clause 4 on completion date provide that;

“the completion shall be such a date when the parties shall have submitted all the necessary documents to the registrar and have executed all the necessary documents as the registrar may prescribe and the registrar has processed the share certificate in the name of the Purchaser”.

41. At this stage the question that arises is whether the parties complied with the completion date. From the documents produced, it is noteworthy that, by a letter dated 12th April 2016, Cooperative Bank Limited wrote to the chairman of Respondent herein under “Ref: Co-op holdings Co-operative Society Limited- Payment for Purchase of 9,000,000 shares from Maseno University Sacco Ltd”, advising them that, the shares transfer was complete.

42. To enable the Registrar, proceed with the transfer, the Respondent was required disburse a sum of Kshs 108,000,000, to the Co-op holdings account number 01120186222000 at Co-operative Bank, Co-op House branch. A certificate of payment was enclosed for the signature, sealing and return.

43. Apparently, the Claimant responded to the request by the Share Registrar, signed and returned the undated payment certificate but the Respondent’s officials signed the same but did not seal it nor made the payment.

44. The question that arise is; why didn’t the Respondent make a response and make payment? According to the evidence, the Respondent did not pay due to; the alleged fraud, overpricing of the shares, signing of the agreement by unauthorised officers and money laundering activities. However, all these issues have been rightfully dismissed by the Tribunal for lack of evidence.

45. In that case I find that, the Respondent had no legal basis of failing to pay consideration. In fact, the Tribunal captured the same in the judgment when it stated that as follows:

“we have already found the contract is binding and enforceable. The Respondent are without any legal basis, trying to walk away from the same. They feel that the terms are now unfair. They are citing their view that the deal is now not profitable. We are guided by the opinion of the court of Appeal in; National Bank of Kenya Limited v Pips Plastic Samkolit (K) Limited & another (2002) EA 503 where it stated;

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause”

46. I concur that the role of the court is to interpret the terms of the contract and enforce it. It is not to re write it. Therefore, Respondent should not be allowed to alter the terms of the contract midstream, after the Claimants have performed all their obligations under the agreement.

47. The next issue to consider is whether; the Tribunal had any justification to hold that, the order for specific performance should not be granted. I note from the judgment at paragraph 39 that, the Tribunal advanced reasons for not granting an order for specific performance; being that, if the Respondent went ahead with the contract it will affect their liquidity ratios and make it run afoul of the SACCO Societies Act. That the consideration sum is substantial at; Kshs 108,000,000; and since the Claimant still retains ownership of their shares; it can receive dividends on the same as the Respondent has no objection and find another buyer at a later date.

48. However, with due respect these reasons advanced, by the Tribunal are not supported by evidence adduced before the Tribunal. The evidence herein reveals that RW1 Harrison Nganga Gitau, attached to the Risk Management of the Respondent and is the acting Head of Finance stated in cross examination stated that, “the Respondent has a capital base of; Kshs 2.9 billion and it is in a position to fulfil its obligations”. Therefore, in my considered opinion, the issue of the Respondent being impoverished does not arise.

49. The other issue raised concerns the amount of money payable as consideration which is alleged to be substantial. The basic rules governing consideration in a contract provides inter alia; that consideration need not be adequate or equivalent to the promise. All that is necessary is that, an agreement should be supported by consideration and the parties are left free to determine the appropriate consideration for a promise at the time of making the bargain. The adequacy or otherwise of consideration is only the lookout of the promisor and it is not the duty either of the law or the courts to determine consideration or embark upon an inquiry as to its adequacy. Therefore, the issue of substantial amount does not arise.

50. As regards the argument that the Appellant is retaining the share transfer, I find that, it is a fact that, the Appellant could not release the same as consideration had not been paid. In fact, the share certificate was being held by the Share Registrar who only released it to the Appellants vide a letter dated 11th October 2018.

51. Similarly, as to the issue of the Claimant being able to sell the shares to another party in future, I find the issue was not canvassed during the trial and even if it was, the Respondent cannot be allowed to breach the agreement and casually allege that the shares can be sold to any other party.

52. As regards the issue of contravention of the SASRA Act, first and foremost, the specific provisions that may be contravened are not stated. Secondly, the issue was not raised in the pleadings nor in the Respondents’ statements or evidence. Finally, if there is contravention of any law, then the persons who contravenes the same should be held to account.

53. Based on the aforesaid, I find that there was no basis for the Honourable Tribunal not to enforce the contract. The Tribunal relied on the case of; *Amina Abdul Kadir Awa* (supra) where the court held that, a party is bound by his or her pleadings but where an issue has not been pleaded, and evidence has been led on it, and the court is invited to rule on it, the court will rule and make a determination on the same. However, the Tribunal did not relate the facts herein to the legal principles therein but simply stated that in our “view that specific performance will not be equitable and damages will suffice”.

54. However, the Tribunal reiterated that, indeed the Respondents are in breach of the contract and stated as follows:

“on our part being fully satisfied that the Respondent are in breach of valid and binding contract, we are of the view that specific performance will not be the fair and equitable remedy. We are of considered opinion that damages will suffice”.

55. I agree with the sentiments of the Tribunal that the remedy of specific performance is an equitable remedy available where damages will not be adequate compensation. That, it should not be granted where it is likely to course hardship to the Defendant in circumstances that are not contributed to by the contracting parties.

56. Further, the remedy is a discretionally relief though the discretion should not be exercised arbitrarily but on the basis of applicable principles of law. The party entitled to earn the relief has to demonstrate that he/she has fulfilled all his/her obligations under the terms of the contract.

57. In deed the Appellant herein has demonstrated that they complied with all their obligations. Similarly, it suffices to note that, the Respondent had even paid the relevant taxes to facilitate the transfer. They had signed the payment voucher; they had willed their rights to dividends to the Appellant. But even more importantly, they had used the share transfer transaction as a security of the loan they had advanced to the Appellant. All these acts amount to part performance of the contract by the Respondent. It is only appropriate that they should complete the transaction.

58. Finally, although there is no appeal against the orders made in regard to the counter claim, I find that the letter of offer for the loan, indicated clearly that the shares which the Respondent were using as security were those they were “in the process of purchasing”.

59. It therefore follows that in case of default, the first recourse available to the Respondent would be to dispose of the shares. Therefore, these shares are not easily available for disposal as alleged by the Respondent and held by the Honourable Tribunal. They are encumbered.

60. In my considered opinion and with due respect, having held that, all the reasons advanced by the Respondent were not sufficient, there was no justification not to order for enforcement of the contract especially when the Respondent had confirmed that they can still meet their obligation.

61. Even if I were to hold that, the Tribunal arrived at the correct conclusion by its holding that damages would be the appropriate remedy, the question that arises is whether, the amount awarded as damages is justified.

62. In that regard the Tribunal stated as follows: -

“We have given consideration to the amount involved, the time that has lapsed since the contract was duly executed and the lost opportunity discussed above. Doing the best in the circumstances we hereby award Kshs 2,500,000/= (Kenya Shillings two million five hundred thousands) as general damages”

63. However, it is noteworthy that, the Tribunal acknowledged that the Claimant has suffered loss; inter alia loss of members; However, it stated that “since membership in a co-operative society is voluntary we see no liability in members of the Claimant choosing to join the Respondent for the usual benefits as other members of the Respondent”.

64. However, taking into account that the main purpose of the society, is to give loans to the members, the members would not probably remain in a cash trapped institution that is not meeting their needs. The obvious natural consequences of failure to give loans to the members would be mass withdrawal and/or exodus.

65. Similarly, the Appellant suffered loss of opportunity. It was selling shares because of liquidity issues. The main income the Co-operative Society is interest on loans to members. A loan can only be given when there are sufficient funds. Again failure to have adequate resources would lead to lack of income and/or working capital and any organisation in that state will collapse.

66. It would will therefore not be an equitable and just to allow the Respondent to create the circumstances that, led to the mass exodus of the Appellant’s members and not compensate the Appellant adequately and appropriately while the Respondent is fully awarded proceeds of their loan.

67. In fact, if a sum of; Kshs 108,000,000 is invested for a period of one year at 12% per annum it would amount to at least, Kshs 12, 960, 000. That would be the loss of opportunity before one considers the value of retention of the members. Obviously, retention is cheaper than recruitment. Similarly, the loss of institutional reputation, which may not be compensated adequately by damages. I therefore find and hold that the award of; Kshs 2.500,000 did not take into account all the circumstances of the case and/or the loss suffered by the Appellant and therefore it is not adequate.

68. In that regard, it will be in the interest of justice to balance the rights of the parties by making the appropriate orders and which I make as follows: -

a) Judgment of the Honourable Tribunal (sic) delivered on the 12th January 2018, and all consequential orders be and are hereby be set aside;

b) The orders made therein are set aside and substituted with the following orders: -

i) An order for specific performance is issued in favour of the Appellant as against the Respondent. The Respondent should finalise and conclude the share transfer agreement within thirty (30) days of the date of this judgment;

ii) The sum payable in relation to order (i) shall be strictly the sum stated in the agreement being; Kshs 108,000,000. No interest is payable on that sum;

iii) The amount payable under (i) and (ii) above shall be reduced by the sum outstanding on the loan of; Kshs 45,000,000 plus interest thereon at the agreed interest rate which the Respondent advanced to the Appellant;

iv) The sum of; Kshs 5,832,110 paid by the Respondent shall also be deducted from the amount payable by the Respondent as consideration for the shares purchased.

v) Any sums payable by the Respondent after all the calculations and deductions have been made shall attract interest at court rates, after the expiry of thirty (30) days within which the Respondent should make the payment;

vi) All sums received as dividends on the shares be deducted from the purchase price;

vii) The sum of Kshs 39,600,000 paid to the Agent is not recoverable from the Respondent as the Respondent did not engage the Agent for any services to it and neither was IT a subject of the initial claim before the Tribunal;

vii) The Claimant to facilitate transfer of the shares upon receipt of consideration;

vii) As none of the parties has fully won or lost the appeal, each party shall meet its own costs of the proceedings before the Tribunal and this subsequent appeal.

69. Those then are the orders of the court.

Dated delivered and signed on this 15th day of September 2020 online.

GRACE L. NZIOKA

JUDGE

In the presence of

Wangira for the Appellant

Alekina holding brief for Mr. Ratemo for the Respondent

Robert -----Court Assistant