



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CIVIL SUIT NO. 11 OF 2016**

**BETWEEN**

**COPANA LIMITED.....PLAINTIFF**

**AND**

**OSIENALA (FRIENDS OF LAKE VICTORIA).....1<sup>ST</sup> DEFENDANT**

**DR FELIX ONYANGO OBIERO ONG'ANG'A....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. According to the plaint, the 2<sup>nd</sup> defendant (“Dr Ong’ang’a”), the Executive Director of the 1<sup>st</sup> Defendant, a Non-Governmental Organisation (“Osienala”) approached Copana Limited (“Copana”) in early 2014 with a proposal to establish a television station to be known as Lake Victoria Television (“LVTV”) which was at the time registered as a business name under the *Registration of Business Names Act (Chapter 499 of the Laws of Kenya)*.

2. LVTV was to be incorporated as a limited liability company to be known as Lake Victoria Television Limited with an authorized share capital of Kshs. 40,000,000/- made up of Kshs. 20/- each. To effect the joint venture Copana and Osienala entered into Memorandum of Understanding dated 10<sup>th</sup> February 2014 under which Copana accepted to purchase 300,000 ordinary shares valued at Kshs. 6,000,000/- being 15% of the share capital of the proposed LVTV Ltd. It was agreed that LVTV would be sooner incorporated and that Copana would be issued with a share certificate for the shares purchased and that it would be a director. Copana paid Kshs. 6,000,000/- on 5<sup>th</sup> February 2014, Kshs. 6,500,000/- and a further Kshs. 2,000,000/- on 2<sup>nd</sup> April 2014 and 5<sup>th</sup> August 2014 respectively bringing the total aggregate investment to Kshs. 14,500,000/-.

3. Copana’s case is that the investment did not materialize and because of the misrepresentation by the defendants, it decided to rescind the Memorandum of Understanding. By a letter dated 28<sup>th</sup> January 2015, it demanded the money it had paid to the Osienala with interest thereon. Osienala refunded Kshs. 3,000,000/- on 14<sup>th</sup> July 2015, Kshs. 1,000,000/- on 13<sup>th</sup> August 2015 and Kshs. 1,000,000/- on 16<sup>th</sup> September 2015 leaving a balance of Kshs. 9,500,000.00 which forms the basis of the claim together with interest and costs.

4. In their statement of defence dated 31<sup>st</sup> May 2013, the defendants admitted the Memorandum of Understanding signed between Osienala and Copana but denied making any false representation to Copana about the viability of the investment. They also denied that LVTV Ltd would be incorporated within the stipulated period as the incorporation of the company was in the hands of a third-party lawyer

which fact was well known to Copana which was represented on Board of Directors which discussed the matter.

5. The defendants further averred that the money paid by Copana was put towards operational costs of the proposed television station. They contended that operations at the television station were ground to a halt because equipment worth about Kshs. 4,000,000/- was stolen from its premises. They further contended that the policy environment occasioned by digital migration was uncertain making it difficult to start operations.

6. The defendants took the position that the performance of the contract was frustrated and Copana, being a member of the Board of Directors of the proposed LVTV acquiesced to the delay. The defendants also contended that the Memorandum of Understanding did not confer on Copana the power to unilaterally alter the agreement to claim interest.

7. From the pleadings, the following matters were not in dispute;

- Osienala and Copana entered into a Memorandum of Understanding dated 10<sup>th</sup> February 2014.
- In consideration for shares in the proposed LVTV Ltd, Osienala received a sum of Kshs. 14,500,000/- from Copana.
- On or about 27<sup>th</sup> January 2015, Copana issued a notice to rescind the agreement.
- Osienala refunded Copana Kshs. 5,000,000/- it had paid for the purchase of shares.

8. After the close of pleadings, the plaintiff a Notice of Motion dated 21<sup>st</sup> October 2016 seeking to strike out the defendants' statement of defence. By a ruling dated 31<sup>st</sup> January 2017, I struck out the statement of defence in so far as it related to the 1<sup>st</sup> defendant and entered judgment against it for Kshs. 9,500,000/- after finding that since Osienala agreed to refund the Copana part of the money and had indeed made part payment, it had no defence to the claim.

9. In the ruling I found that there were only two triable issues. First, whether the plaintiff was entitled to interest as prayed in the plaint. Second, and as regards the 2<sup>nd</sup> defendant, whether he is liable for misrepresentation as pleaded in the plaint. Johannes Akelo Omboto (PW 1) testified on behalf of the plaintiff while Dr Ong'ang'a (DW 1) testified on his own behalf. Counsel for the 1<sup>st</sup> defendant failed to attend court for the hearing hence the matter proceeded in his absence.

10. I will deal with the issue of misrepresentation first. The basis of this claim is to be found at paragraph 10 of the Plaint where the plaintiff avers that it emerged that the defendants had misrepresented the facts surrounding the proposed venture. The plaintiff pleaded as follows:

#### *PARTICULARS OF BREACH AND MISREPRESENTATIONS*

*a) Exaggerating the prospects of success in the proposed business venture so as to induce the Plaintiff to sign in and pay for shares.*

*b) Failing to avail the Memorandum and Articles of Association and other incorporation documents for the Plaintiff's execution.*

*c) Failing to incorporate the proposed company within the agreed period of time or at all.*

*d) Misstating the timelines within which the incorporation of the proposed company will be completed with the intention of inducing the Plaintiff to enter into the dealings.*

*e) Putting funds paid by the Plaintiff to personal use of the 2<sup>nd</sup> Defendant rather than towards the proposed joint venture.*

11. In his testimony, PW 1 explained why Copana sued the 2<sup>nd</sup> defendant, the executive director of

Osiendela. PW 1 told the court that he knew the DW 1. He testified that DW 1 approached him and sold the idea of the investment as a viable business before Copana invested in purchasing shares. He recalled that he dealt with DW 1 at all times as he is the only one he knew. PW 1 complained that DW 1 put the funds Copana invested for his personal use and the monies were never accounted for as he was never even shown any statement of account for LVTN to confirm that all the funds raised were paid for the specified purpose. He contended that he was not shown any evidence that television equipment worth about Kshs. 4 million was stolen or that the money was used for the benefit of LVTN.

12. In cross-examination, PW 1 told the court that he wrote a letter dated 23<sup>rd</sup> January 2014 expressing his intent to invest in the television venture. In that letter he indicated that he be allowed to conduct due diligence by a consultant. He however, admitted that he did not engage a consultant for due diligence but relied on DW 1 as he was an expert.

13. DW 1 denied that he was liable personally as the agreement was between Copana and Osiendela and that in fact, Copana paid for the shares and was ultimately refunded part of the amount paid. He testified that PW 1 wanted to be a member of the Board and that he attended several meetings of the proposed company. He agreed that the plaintiff was allowed to do due diligence on the investment but he did not do so.

14. In cross-examination, DW 1 admitted that Osiendela failed to incorporate the LVTN within 90 days and after the plaintiff made demand, Osiendela undertook to pay the money but there was no money. Ultimately, LVTN was incorporated on 21<sup>st</sup> July 2015. He confirmed that the TV station closed down due to lack of funds after operating for three years.

15. In order to succeed against the 2<sup>nd</sup> defendant, the plaintiff must prove that the 2<sup>nd</sup> defendant made a statement of fact, whether by words or conduct, which was untrue and which was intended to induce it to enter into the contract and that he did enter into the contract.

16. The plaintiff's case is that the defendants exaggerated prospects of success of the proposed venture so as to induce it to purchase shares. The evidence is clear that the discussions leading to Copana purchasing shares was between PW 1 and DW 1. PW 1 did not, in his testimony, show the basis of the exaggerated prospects or the nature of the exaggeration. The plaintiff did not produce any documents like a prospectus, business plan, proposed cash flow statements and any other documents showing the business prospects of the proposed venture for the court to gauge the nature of these statements and whether the prospects were extravagant. PW 1, in his letter dated 23<sup>rd</sup> January 2014, expressed his intention to engage a consultant to perform due diligence but he did not engage one thus negating the fact that there was an intention on the part of the defendants to misrepresent the nature of the business. The totality of the evidence means this ground 10(a) fails.

17. Grounds 10(b), (c) and (d) of the Plaint relate to incorporation of the LVTN Ltd. Osiendela admitted that it failed to incorporate the LVTN within the timelines agreed at Clause 12 of the Memorandum of Understanding which states as follows:

*12. That OSIENALA shall endeavor to incorporate Lake Victoria Television Limited within a period of NINETY (90) DAYS of the date hereof in default whereof the Purchaser will be at liberty to rescind the agreement entered into.*

18. Under this agreement, the parties contemplated that there was a possibility that LVTN Ltd would not be incorporated within the agreed timeframe. The parties thus provided a remedy provided which was that Copana would exercise the option to rescind the Agreement. Copana exercised this option and was refunded part of the money. The judgment entered against Osiendela was a consequence of the breach.

19. On the issue of whether Dr Ong'ang'a put the money invested by Copana LVTN to his own use, counsel for the plaintiff submitted that since the defendants denied that the money was put to personal use, there was joinder of issue and the matter required proof. Counsel submitted that since there was no evidence of the use of the Kshs. 28 million which remained unaccounted for, the evidential burden

shifted on the defendants under **section 111 of the Evidence Act (Chapter 80 of the Laws of Kenya)** to prove the money was not spent as alleged as this was matter within the 2<sup>nd</sup> defendant's knowledge.

20. I disagree with the plaintiff's submission. Once there was joinder on an issue pleaded, it was the duty of the plaintiff's duty to discharge that burden by offering evidence on the balance of probabilities. For the evidential burden to shift to the defendants, there must be sufficient of prima facie evidence on the plaintiff's part showing that the defendant spent money invested in the proposed company for the 2<sup>nd</sup> defendant's own use. I do not find any evidence to show that DW 1 put the money invested in the LTVT venture to his own use as alleged in paragraph 10(e). The plaintiff did not discharge its burden to prove that the money so invested went to the personal use and benefit of DW1.

21. Counsel for the plaintiff submitted that Dr Ong'ang'a was a promoter of the LVTV Ltd and hence liable for any contracts entered into for and on behalf of the company at the pre-incorporation stage both under common law and under **section 44 of the Companies Act, Act No. 17 of 2015**. Counsel contended that at all times the 2<sup>nd</sup> defendant was acting as an agent of the proposed company and also on behalf of the 1<sup>st</sup> defendant hence he is liable as such. While I agree with the general statement of law, the issues in this case are circumscribed by the facts and pleadings. I have set out the material part of the pleadings in reference to the liability against the 2<sup>nd</sup> defendant and as a matter of fact, I have found that the misrepresentation was not proved. Further, the parties entered into a memorandum of agreement which set out the obligations on the part of either party and the consequences of such breach.

22. The totality of the evidence is that Copana failed to prove that Dr Ong'ang'a misrepresented to it the nature of the investment hence he cannot be held liable for payment of the amount invested by Copana in the joint venture to establish LVTV. The claim against the 2<sup>nd</sup> defendant is accordingly dismissed.

23. I now turn to the issue whether Copana is entitled to interest, "on a reducing balance basis from 05.02.2014 until payment in full" as claimed in the plaint. Clause No. 9 of the Memorandum of Understanding states as follows:

*9. That if OSIENALA shall for any lawful cause be unable to incorporate Lake Victoria Television Limited then in such event it shall refund to the purchase on demand the sum hereby paid to it without interest.*

24. The issue of interest is dealt with by Clause 9 of the Memorandum of Understanding and the court cannot re-write the agreement to provide for interest or interest as claimed by the plaintiff (***National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd [2002] 2 EA 503***). It is clear the plaintiff does not have a basis to claim interest on the refund but this is not the end of the matter. There is no doubt that the Copana has been kept out money until it was forced to lodge this claim. This court has the power to award interest on the amount claimed under **section 26 of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which reads as follows:

*26(1) Where and in so far as a decree is for the payment of money the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.*

25. The rationale for the above provision was explained in ***Lata v Mbiyu [1965] EA 592*** where the court held that the justification for an award of interest on the principal sum is to compensate a plaintiff for the deprivation of any money or specific goods through acts of a defendant. The court stated that:

*The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit.*

26. In this case there is no reason why the plaintiff should be denied interest on the debt that outstanding. I will therefore award interest at court rates from the date of filing the suit until payment in full.

27. Following the findings and having regard to the judgment already entered against the Osiendela, I now make the following final orders:

(a) Judgment be and is hereby entered for the plaintiff against the 1<sup>st</sup> defendant for the sum of Kshs. 9,500,000/- together with interest thereon at 12% p.a. from the date of filing suit until payment in full.

(b) The claim against the 2<sup>nd</sup> defendant be and hereby dismissed with costs.

(c) The 1<sup>st</sup> defendant shall bear the costs of the suit.

**DATED** and **DELIVERED** at **KISUMU** this 22<sup>nd</sup> day of **January** 2018.

**D.S. MAJANJA**

**JUDGE**

Mr Otieno instructed by Otieno Ragot & Company Advocates for the plaintiff/ applicant.

Mr Achura instructed by Amondi and Company Advocates for the 1<sup>st</sup> defendant.

Mr Ayayo instructed by Ayayo and Company Advocates for the 2<sup>nd</sup> defendant.