



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 109 OF 2014

CHRIS SANDEN.....PLAINTIFF

VERSUS

JATCO TOURS & TAXIS LIMITED.....1ST DEFENDANT

CHRIS BANKS.....2ND DEFENDANT

DANIEL MUOKI.....3RD DEFENDANT

JUDGMENT

1. Chris Sanden (Sanden) has sued Jatco Tours & Taxis Limited (Jatco), Chris Banks (Banks) and Daniel Muoki (Muoki) for the sum of Kshs. 8,877,113.00, Special Damages of Kshs. 346,390/=, interest thereon at Commercial rates from 23rd November 2007 and costs of the suit.

2. In a plaint presented to Court on 20th November, 2012, Sanden avers that through a written Contract entered with Jatco on 23rd November 2007, Sanders invested a sum of Kshs. 5,000,000/= in Jatco. The Investment Agreement was for a year from the date of execution and Sanden was to earn quarterly dividends of Kshs. 487,500.00. At the end of the Contract, Sanden was also to be repaid the principal sum of Kshs. 5,000,000/=.

3. Following that arrangement, Jatco was to pay Sanden a total of Kshs. 6,950,000/= worked out as follows:-

(a) Principal.....5,000,000.00

(b) Dividends.....1,950,000.00

But Jatco defaulted and paid only a total sum of Kshs. 4,667,500/= leaving a debt of Kshs. 2,882,500/=.

4. It is averred by Sanden that at the expiry of the Contract term, Banks and Muoki proposed to convert the debt of Kshs. 2,882,500/= into a loan payable with interest of 15% by Jatco. This is what Sanders sues for.

5. In addition, Sanden complains that he has incurred great costs and expense in following up the

Defendants to pay the money due as he ordinarily resides in Dubai in the United Arab Emirates (U.A.E.). He states that the travel costs and related expenses amount to 13665 UAE Dirhams (or its equivalent being Kshs. 347,390/=).

6. Banks filed a statement of Defence in July 2015 exonerating himself. Banks avers that the Investment Contract was made between Sanden and Jatco and he bears no personal liability in respect thereof. Banks also stated that he long resigned from Jatco and sold off his shareholding and has no interest in the Management and Control of the affairs of the Company.

7. Jatco and Muoki filed a joint statement of defence. They deny entering into the Contract since there was no resolution by the Jatco's Board of Directors to borrow or invest as required by Jatco's Articles of Association or law. They deny enjoying a financial benefit from the alleged investment or paying or issuing any cheques to Sanden.

8. Banks and Muoki also point out that the alleged Investment contract was not stamped as required by the Provisions of The Stamp Duty Act and The Evidence Act.

9. At the hearing, which commenced before Gikonyo J, on 25th February 2015, Sanden explained how he invested in Jatco. This would be after he was introduced by a Mr. Ramogo to Banks. Ramogo was the Chief Accountant of Jatco. After negotiations, an Investment Contract was entered between the Jatco and himself (P EXH. 1 page 7-17). The execution was on 23rd November 2007. Pursuant to the terms thereof, Sanden made a telegraphic transfer of Kshs. 5,000,000/= from his account (P Exhibit 1 page 13 (c)).

10. As comfort for the repayment of the principal sum, Jatco drew and left Sanden with a cheque for Kshs. 5,000,000/= (P Exhibit 1 page 14). This cheque was later to be returned unpaid upon presentation.

11. In the course of time, Jatco paid to Sanden a total of Kshs. 4,067,500/=.

12. Upon expiry of the Contract on 24th November 2007, Sanden held meetings with Muoki and Banks whereupon it was agreed that the outstanding investment money be converted into a loan. Eventually a written Contract was prepared (P Exhibit 1, page 16) but never signed. However it is Sanden's case that evidence of the varied position can be found in emails exchanged between him and Banks and copied to Muoki (P Exhibit 1 page 21-24).

13. In cross examination, Sanden told Court that he was not in a position to know whether Jatco has made a resolution to borrow. It was his evidence that when dealing with a Director, one assumes that they have authority of the Company they represent.

14. Sanden acknowledged that the draft agreement was never executed by Jatco but he sought to rely on it as it was his evidence that Muoki made some amendments thereon. (P Exhibit PAGE 18).

15. As to travel and other expenses, he claimed, travel costs 695,230/= and Lawyer's fees of Kshs. 300,000/=.

16. Banks gave evidence that supported Sanden. He admitted that Sanden gave a loan of Kshs. 5,000,000/= to Jatco to assist in cash flow. That although this was discussed primarily between him, Mr. Hassan and Sanden, Muoki was kept abreast in regular Board Meetings and Shareholders Meetings. Thus Muoki was informed about the arrangement in November or December 2007. That Muoki had access to the statements of Jatco and a cash deposit such as Kshs. 5,000,000/= made by Sanden would be noticeable.

17. Banks clarified that Muoki first met Sanden in 2008 after the loan agreement was signed. Banks also talked about a meeting between himself, Muoki and Sanden held in September 2009 at Village Market. His evidence is that at the meeting, Muoki recognized the loan and agreed to repay it within a re-agreed interest. That on 30th October 2009 Muoki reported a negotiation of interest rate at 8% flat rate to the

Board.

18. It is Muoki's evidence that at the time material to the matter before Court, Jatco had two Directors. He denied that Jatco ever traded with Sanden. He denied the Investment agreement. He denied that Jatco made any payments to the Plaintiff although he was aware that some Company cheques were given to Sanden and paid.

19. His evidence was that he questioned and objected to the transactions and so Sanden asked for a meeting. In his view the transaction between Sanden and Banks was illegitimate and not authorized by Jatco. He denied ever communicating with Sanden.

20. In cross-examination by Counsel for the Plaintiff, Muoki informed Court that his usual email address is dmuoki@jatcotaxis.com. He confirmed that emails of 13th November 2009 and 1st December 2009 exchanged between Banks and Sande were copied to this address.

21. The witness says that he was never told of the deposit of Kshs. 5,000,000/= nor did he see it.

22. On the cheques which were issued by Jatco to Sanden, Muoki confirmed that he co-signed them but this was because he would sign several blank cheques as he was away from the office from time to time. That a Management Meeting would sanction the signing of blank cheques.

23. That in essence was the evidence received by Court. This Court also received written submissions by counsel.

24. Emerging from the pleadings, evidence and submissions, would be the following issues for the Court to determine:-

- (a) Was there a valid Contract between Sanden and Jatco.
- (b) Was Jatco in default?
- (c) If so, are Banks and Muoki also personally liable.

25. In addition to other evidence, Sanden has sought to rely on two agreements to prove his claim. These are the investment Contract executed on 23rd November 2007 (P Exhibit 1, page 11-13) and the unexecuted Loan Agreement (P Exhibit 1, page 16-20). Yet the reliance on the Investment Contract runs into immediate headwinds.

26. It was pointed out by Muoki, as early as on 24th February 2015 when he filed his witness Statement, that the Investment Contract was not duly stamped as required by the provisions of the Stamp Duty Act. That is true and even at the date of giving of evidence by Sanden, the Contract remained unstamped.

27. Now, the requirements of section 19 of the Stamp Duty Act are as follows:-

(1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—

(a) in criminal proceedings; and

(b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.

(2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.-

(3) Upon the production to any court (other than a criminal court), arbitrator, referee, company or other corporation, or to any officer or servant of any public body, of any instrument which is chargeable with stamp duty and which is not duly stamped, the court, arbitrator, referee, company or other corporation, or officer or servant, shall take notice of the omission or insufficiency of the stamp on the instrument and thereupon take action in accordance with the following provisions—

(a) if the period of time within or before which the instrument should have been stamped has expired and the instrument is one in respect of which a person is specified in the Schedule to this Act as being liable for the stamping thereof, the instrument shall be impounded and, unless the instrument has been produced to a collector, shall forthwith be forwarded to a collector;

(b) in any such case, before the exclusion or rejection of the instrument, the person tendering it shall, if he desires, be given a reasonable opportunity of applying to a collector for leave under [section 20](#) or of obtaining a certificate under [section 21](#);

(c) in all other cases, unless otherwise expressly provided in this Act, the instrument shall, saving all just exceptions on other grounds, be received in evidence upon payment to the court, arbitrator or referee of the amount of the unpaid duty and of the penalty specified in [subsection \(5\)](#), and the duty and penalty, if any, shall forthwith be remitted to a collector with the instrument to be stamped after the instrument has been admitted in evidence.

(4) If any person is empowered or required by any written law to act upon, file, enrol or register a duplicate or copy of any instrument, and if the original of that instrument would require to be duly stamped if acted upon, filed, enrolled or registered by that person, that person may call for the production of the original instrument or for evidence to his satisfaction that it was duly stamped, and no person shall act upon, file, enrol or register any such duplicate or copy without production of the original instrument duly stamped or of evidence thereof.

(5) The penalty on stamping any instrument out of time referred to in paragraph (c) of subsection (3) shall be ten shillings in respect of every twenty shillings and of any fractional part of twenty shillings of the duty chargeable thereon and in respect of every period of three months or any part of such a period after the expiration of the time within or before which the instrument should have been stamped.

The Investment Contract is an instrument chargeable with stamp Duty.

28. The effect of non-stamping is that the instrument cannot be received in evidence (see amongst others, the decision in [SDV Transami \(K\) Ltd vs Scholaska Nyambura \(2012\) eKLR](#). A Party wishing to rely on such an instrument can get a respite by being granted reasonable opportunity to apply to the Collector of Stamp Duty for leave under Section 20 of the Act which provides:-

(1) Where an instrument is chargeable with stamp duty under this Act and should have been stamped before a certain event or before the expiration of a certain period, but has not been so stamped, a collector may give leave for the stamping of the instrument if he is satisfied—

(a) that the omission or neglect to stamp duly did not arise from any intention to evade payment of stamp duty or otherwise to defraud; and

(b) that the circumstances of the case are such as to justify leave being given.-

(2) If the collector grants leave under subsection (1) for the stamping of an instrument, the instrument shall be stamped on payment of the unpaid duty including any additional stamp duty and of a penalty of one shilling in respect of every twenty shillings and of any fractional part of twenty shillings of the duty chargeable thereon and in respect of every period of three months or any part of such period after the expiration of the time within or before which the instrument should have

been stamped:

Provided that—

(a) the penalty chargeable under this subsection shall not exceed one hundred per centum of the principal duty outstanding; and

(b) the collector may remit the penalty under this section up to a maximum of one million five hundred shillings, but shall not remit any penalty exceeding that amount without prior approval from the Minister.

(3) If any person applying for leave under this section is dissatisfied with the decision of the collector upon that application, that person may require his application to be referred to the Minister, whose decision thereon shall be final for all purposes.

(4) Upon any application for leave under this section, the collector, or the Minister, may require sworn or other evidence in support of the application.

(5) When an instrument has been stamped by leave under this section it shall be deemed to have been duly stamped.

(6) Notwithstanding the provisions of this section, no bill of exchange or promissory note shall, except as provided in sections 21, 22, 34 and 36, be stamped after execution.

(7) In this section, “collector” does not include the Senior Collector of Stamp Duties.

29. Sanden had received a warning that the non-stamping of the Investment Contract was an issue that would be taken up by Jatco and Muoki. Even the Ruling of Hon. Kimondo J in Winding Up Cause No. 46 of 2010 in which Sanden had sought the Winding Up of Jatco had warned of the treachery in relying on the unstamped Document. This is what the good Judge had to say,

“The ‘Investment Contract’ agreement before me is not stamped for purposes of The Stamp Duty Act. This is a matter of evidence though.”

30. Notwithstanding these, Sanden sought to rely on an unstamped instrument. He was always on slippery grounds. That evidence cannot be received and will be shut out. If he had hoped to rely on it only because there was no objection to its production at the time of the hearing, then that optimism is misplaced. The requirements of the Stamp Duty Act are mandatory and cannot be waived.

31. But would there be any other evidence upon which Sanden could still clutch at? There is evidence that some Kshs. 5,000,000/= was deposited by Sanden into Jatco’s account. This was admitted by Banks and although Jatco and Muoki deny knowledge of the deposit, they did not successfully controvert it.

32. There is also evidence that Jatco made some payment to Sanden. But there is yet evidence in that some cheques were returned unpaid. The version of evidence by Sanden and Banks is believable that the deposit of Kshs. 5,000,000/= was in pursuance of an Investment Contract between Jatco and Sanden. Sanden was to receive a return for that Investment. Of course calling the return a “dividend” may well be a misnomer because Sanden was not a shareholder of Jatco.

33. By whatever the name, Sanden was to receive a return of Kshs. 1,950,000/= in addition to the principal sum of Kshs. 5,000,000/=. There is clear evidence that only Kshs. 4,067,500/= was paid. That would leave a balance of Kshs. 2,882,500/=.

34. However, Muoki and Jatco deny knowledge of this arrangement. From the memorandum and Articles of Association of Jatco (D Exhibit 2), Jatco had power to borrow money yet that power needed to be exercised by the Directors through a resolution. As correctly pointed out by Muoki, there was no

evidence of a Board resolution to take in or borrow the investment from Sanden.

34. However, there is a proposition in law that, was stated out in Mungi Farmers Tobacco Company vs. Naushad Trading Company [2008] 2eKLR where Njage J held:

“The Plaintiff’s argument generally is that it was not involved in the transaction and did not give the requisite authority to Mr. Kithete to commit it to this deal. This is captured in para 3 of supporting affidavit. However, it is an elementary tenet of company law that where there are persons carrying on a company’s business in a manner which appears to be regular so far as this can be ascertained from the Company’s public documents, those dealing with the company are entitled to assume that all the internal regulations of the company have been complied with unless the parties so dealing with the Company have knowledge to the contrary or there are suspicious circumstances putting them on inquiry. (See MAHONY V. EAST HOLYFORD MINING CO.LTD)(1865) L.R.7 869 if Mr. Kathete did not have the Company’s authority to acknowledge the indebtedness and secure the debt, that was an internal irregularity in the operations of the applicant company which was not binding on third parties but was binding on the company. It would be unacceptable for the company’s Directors to drag the company along the path they did and, when they realize that it was detrimental to the company, to turn around and disown their own acts as being irregular. That would be tantamount to allowing the company to plead its own misdeeds in defence, without even joining the directors as defendants”

36. Although Muoki denied that the Investment arrangement was never sanctioned by Jatco, there is evidence that cheques issued by Jatco in pursuance of the arrangement were also signed by Muoki. Was Sanden not to presume that Jatco was engaging him in consonance with the Articles of Association of the Company? I find that he was so entitled.

37. Upon the breach of the Investment Contract by Jatco, there were meetings held between Muoki, Sanden and Banks. Muoki’s version was that he was objecting to and protesting at the illegitimacy of the arrangement entered between Banks and Sanden. Sanden and Banks told a different story. That the meetings were intended to work out an arrangement going forward or to how Jatco would settle its debt to Sanden. Which version is to be believed?

38. In an email dated 13th November, 2009 and copied to dmuoki@jatcotaxis.com (an email confirmed by Muoki to be his), Banks writes as follows to Sanden;-

“Hello Chris, Please see the attachment which details the payments received and the two repayment option plans which we discussed with you and Koi. I do hope you find everything in order and look forward to your positive response”.

39. A few days later, Sanden responds. This is an email of 29th November 2009 which again, is copied to Muoki’s email address. He partly says;-

“Kindly check and prove above mentioned payments.

We have looked into Jatco’s offer and would like to point out that 15% does not seem to be good enough. 15% we can easily achieve with our other investments which expose us to much lower risk than Jatco. As you remember, we started off with a rate of 39% p.a.

This contract was not honoured by Jatco at all. Our second contract had a rate of 23.4% p.a., also hardly honoured by Jatco.

A rate of 15% after all this trouble and risk for us is too low, therefore we would suggest we meet somewhere in the middle at 20% p.a.

We think, given the high risk and bad experience we had with Jatco, 20% is only fair and is also easily achievable by Jatco. We also showed a lot of good will and patience with Jatco, this should

be rewarded, too.

Kindly talk to Daniel about it and get back to us as soon as possible. We are also waiting for your confirmation of the above mentioned payments”.

40. There is this email of 12th January, 2010 from Banks to Sanden and copied to Muoki;-

“Dear Chris & Koi,

After discussions with Daniel we have agreed to adjust the interest rate to 15%, from the previously discussed rate of 14% and request the one month’s grace period for this past December so that we may concentrate all the payments and calculations within this calendar year.

Regarding the disputed deposit of Kshs. 480,000/= we suggest that on your next visit to Kenya we have a three way meeting with Hassan so that we may finalise this misunderstanding at which time we may reconfirm the amount previously paid to you and adjust as necessary. Our records clearly state that this transaction took place and Hassan is quite precise in his recollection of the same.

Accordingly I have slightly adjusted your account to reflect this position see sheet 3 of the attachment and we will deal with the 480,000 when we confirm either way its veracity.

We will pay the first installment next week and look forward to retiring your account by the year’s end. I await your response and agreement and wish you both well.”

41. Muoki’s other name is Daniel. There is evidence, on a balance of probabilities, that Muoki was kept in the loop as to the varied arrangement and was well aware of it.

42. Any doubts would be removed by the evidence that he in fact personally made some amendments in writing on the draft repayment agreement (see P Exhibit page 18). Curiously Muoki, in his testimony, to Court did not make any comments of this alleged involvement.

43. This Court finds that there was an investment agreement entered between Sanden and Jatco which was either authorized by Jatco or later approved or sanctioned by it.

44. The evidence is that at the end of the Investment Contract, Jatco owed a sum of Kshs. 2,882,500/= to Sanden. Sanden seeks payment of this amount but also interest at 15% thereof. The clause of the amount due may not be challengeable but the claim for interest has an insurmountable difficulty.

45. The basis upon which Sanden is claiming interest is that its debt had been converted into a loan with an interest charge on it. But Sanden is not an authorized Money Lender. See the provisions of Section 3(1)(a) of the Banking Act (Cap 488) which provides:-

(1) No person shall in Kenya—

(a) Transact any banking business or financial business or the business of a mortgage finance company unless it is an institution or a duly approved agency conducting banking business on behalf of an institution which holds a valid licence.

The attempt to convert the Investment Agreement into a loan that would attract interest was illegal and contra statute. The law is that a Party cannot seek the aid of the Court to enforce a contract made illegal by statute (see for example Patel vs. Singh (1987) eKLR).

46. While Sanden can recover the principal Kshs.2,882,500/=, the claim for interest is illegal.

47. There is then a related issue. The Court has found that it is Jatco that is liable to Sanden on the debt. Banks and Muoki bear no personal liability. It was the Company that received the funds and benefited

from it.

48. Sanden has also made a claim of Kshs. 347,390/= as costs and expenses incurred in following up payment of the debt. Is the claim payable? I think not! A party owed money by another has a clear path for redress. The Creditor should make a demand and if default continuous then it can sue for recovery thereof through a Civil claim. Indeed Sanden eventually sued the Defendants. A party cannot pursue an expensive recovery path and then hope to claim back the outlay through litigation.

49. This now is the verdict of the Court.

(i) Judgment is entered against Jatco for the sum of Kshs. 2,882,500/= and interest thereon at court rates from the date of filing suit until payment in full.

(ii) The suit against Muoki and Banks is dismissed with costs.

(iii) The Plaintiff shall have costs of the suit against Jatco (The 1st Defendant)

Dated, Signed and Delivered in Court at Nairobi this 18th day of October, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Kathoni h/b Nyajala for Plaintiff

Atambo for Marambu for 2nd Defendant

Wangoi for Mwaniki for 1st & 3rd Defendants

Alex - Court clerk