



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NUMBER 399 OF 2011

KENNEDY NJUGUNA MWANGIPLAINTIFF

- V E R S U S -

COLLINS KIPRONO BETT DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff came to this Court by way of the Plaint dated **16th September, 2011** and sought for judgment against the Defendant for:-
 1. **Special damages of Kshs.15,500,000/=.**
 2. **Interest on (a) above at commercial rates prevailing from time to time from when the cause of action arose until payment in full.**
 3. **Costs of this suit and interest thereon.**
 4. **Any other or further relief this Honourable Court may deem fit and just to grant.**
2. In response to the Plaintiff's claim, the Defendant filed his Statement of Defence dated **15th July, 2012.**

THE PLAINTIFF'S CASE

3. The background to this case is that the Plaintiff and the Defendant entered into a Joint Venture Agreement on **22nd January, 2009** for purposes of importing and selling bauxite and other cement raw materials to East Africa Portland Cement Company Limited (EAPCC) and other cement manufacturing companies under the name of C.K Bett Traders. The Joint Venture was started with a capital injection of **Kshs.10,000,000/=** which was contributed on a fifty-fifty ratio between the Plaintiff and the Defendant.
4. The Plaintiff avers that as per the terms of the Joint Venture agreement, he was to be paid a fixed net profit of **Kshs.500,000/=** every month from **5th March, 2009** till the order with EAPCC was exhausted or the contract terminated. He further averred that his capital and profits were to be secured by a personal guarantee by the Defendant. It is the Plaintiff's contention that after the first six (6) months, the Defendant started defaulting on remitting the net profits and continued in such manner by giving false promises of repayments. Due to the aforesaid, it is the Plaintiff's assertion

that his outstanding account with the Defendant is now at **Kshs.15,500,000/=** the same being **Kshs. 10,500,000/=** profit balance and **Kshs.5,000,000/=** capital.

5. The Plaintiff's case therefore is that the Defendant has breached the terms of the contract between them by failing to remit the initial capital and net profits of **Kshs.500,000/=** per month. Further, on the breach of contract, the Plaintiff avers that the Defendant has failed to render accounts of the joint Venture and has misappropriated the funds therein.

THE DEFENDANT'S CASE

6. The Defendant admitted the existence of the Joint Venture Agreement between him and the Plaintiff. It was his assertion that the joint Venture and the projected profit margins were all limited to and pegged on the continuance of the supply contract with EAPCC such that if the contract was terminated the Joint Venture also stood terminated. The Defendant averred that for the first 7 months he paid the Plaintiff his monthly share of profits of **Kshs.500,000/=** amounting to **Kshs.3,500,000/=** even though the supply contract with EAPCC had at one time been suspended for three (3) months.
7. It is the Defendant's contention that the Plaintiff was aware that the profit margins were not always guaranteed and depended on so many other factors some beyond his control such as weather and exchange rate fluctuations. It was further his contention that the Plaintiff was well aware that the business nearly ground to a standstill from around the seventh month into the Joint Venture when their supplier in Tanzania started supplying bauxite directly to EAPCC. This forced the Joint Venture to source for a new supplier in addition to significantly reducing the orders coming from EAPCC. The Defendant averred that the business subsequently collapsed when the new supplier went under after being paid a large sum of money in advance for long time supplies of bauxite. He further averred that the attempt to recover anything from the said supplier bore no fruits as most of its assets were seized by Banks and other creditors. It was his position that as per the terms of the Joint Venture Agreement, the Plaintiff was at all times aware of the financial status and performance of the venture and approved all payments made out of the Joint Venture Bank account.
8. The Defendant denied the particulars of breach of contract as stated under paragraph 10 of the Plaintiff. With regard to the refund of capital, it was the Defendant's case that as per the Joint Venture agreement the Plaintiff was only entitled to a refund of his capital in the event of the occurrence of any of the 3 specific events none of which occurred. (*see clause 14 and 15 of the agreement*). As for the profits, the Defendant disputed the amount of **Kshs.10,500,000/=** claimed by the Plaintiff and averred that in the event the Venture lasted for a whole year as initially planned, then the Plaintiff's share of profits would have been at **Kshs.6,000,000/=** and not the aforesaid amount.

THE HEARING

9. The hearing of the suit commenced on **9th October, 2014** and was concluded on **27th May, 2015**. The Plaintiff testified on his own behalf while the Defendant elected not to testify.
10. In his evidence-in-chief, the Plaintiff essentially reiterated the facts of his case as stated in the Plaintiff. He reiterated that under the venture he had so far received a total of **Kshs.3,000,000/=** as profit and that he was to receive **Kshs.6,000,000/=** per year as profits. It was his testimony that he had not received any notice of termination of the Venture and therefore it was his position that the contract was still subsisting.
11. On cross-examination, it was the Plaintiff's testimony that he was only to finance the business under the Joint Venture and that the management of the same was upon the Defendant. It was further his testimony that he was to gain **Kshs.500,000/=** every month from the business profits and that at the end of the Joint Venture agreement he was to get back his capital of **Kshs.5,000,000/=**. He confirmed that the Defendant had paid him **Kshs.3,000,000/=** in total after payment of **Kshs. 500,000/=** for six months. It was also the Plaintiff's testimony that he was not aware that the business was not doing well and that the Defendant never informed him about any difficulties in the business.
12. Upon re-examination, the Plaintiff testified that he was not aware of the Defendant's dealings with

third parties. He further testified that by the time he was filing the suit, the outstanding amount in profits was **Kshs.10,500,000/=** and he was therefore claiming the sum of **Kshs.15,500,000** which included his capital contribution of **Kshs.5,000,000/=**.

THE WRITTEN SUBMISSIONS

13.The Plaintiff filed his submissions dated **9th October, 2015** on even date while the Defendant filed his submissions dated **6th November, 2015** on **9th November, 2015**.

ISSUES FOR DETERMINATION AND ANALYSIS

14.I have considered the pleadings herein, the oral evidence given by the Plaintiff and the written submissions by Counsel for the respective parties. Having done so, this Court considers the issues for determination in the present suit to be as follows:-

1. **Whether the Defendant was in breach of the Joint Venture Agreement;**
2. **Whether the Plaintiff is entitled to the special damages of Kshs.15,500,000/- being the outstanding profits of Kshs.10,500,000/= and his initial capital of Kshs.5,000,000;**

15.On the first issue, the Joint Venture agreement between the parties herein is not disputed. The Plaintiff's case is that the Defendant breached the Joint Venture agreement by defaulting to pay him **Kshs.500,000/=** being profits as had been agreed, six months after the execution of the agreement. The Defendant on the other hand averred in his statement of defence that he had paid the net profit for seven months (7) amounting to **Kshs.3, 500,000/=**. It was his case that the projected profit margins were all limited to and pegged on the continuance of the supply contract with EAPCC such that if the contract was terminated the Joint Venture also stood terminated. The Defendant did not testify in the present case and there is therefore no evidence to show that the contract by EAPCC was terminated. The Defendant's position was that the said contract was at one time suspended and that orders from EAPCC reduced when they started receiving bauxite directly from a supplier in Tanzania. There is nowhere in the agreement providing that the Defendant would not pay out profits where business was low for one reason or another. Even so, the Defendant did not produce any evidence to substantiate the aforesaid allegations. It is trite law that he who alleges must prove. (**see section 107 of the Evidence Act**).

16.In light of the foregoing, it is clear that the Defendant breached the agreement by failing to pay the Plaintiff the net profits due to him after the first six (6) months of the contract and failing to refund him the initial capital.

17.On the second issue, the Plaintiff has claimed for a sum of **Kshs. 15,500,000/=** as special damages made up of **Kshs. 10,500,000/=** being the outstanding profits and **Kshs. 5,000,000/=** being the initial capital invested by the Plaintiff. With regard to the capital of **Kshs.5,000,000/=**, this Court refers to clause 14 and 15 of the agreement. Clause 14 provides instances under which the agreement may be terminated which includes a one month's written notice, the lapse of the agreement after one year if not renewed and the termination of the supply contract by EAPCC for whatever reasons. On the other hand clause 15 provides that the Plaintiff (the first joint venturer) shall be paid his full capital contribution of **Kshs.5,000,000/=** and all unpaid and due proportion of his monthly net profits upon termination or lapsing of the Joint Venture.

18.The Joint Venture agreement herein was to run for one year from **1st February, 2009** and the parties had the option to renew it on the same or different terms. This is provided for at clause 2 of the agreement. There is no evidence before this Court to show that the agreement was renewed by the parties. Therefore, the Plaintiff's claim that the same was renewed as the Defendant continued to supply bauxite to EAPCC cannot stand. Besides, the Plaintiff's claim that the Defendant continued to supply bauxite cannot be substantiated.

19.In view of the foregoing the Joint Venture agreement between the parties was terminated by virtue of the fact that one year had lapsed and the same was not renewed as envisaged under clause 14 (ii) of the agreement. In that case it follows that the Plaintiff is entitled to his full capital contribution as provided for under clause 15 (a) of the agreement.

20.As regards the outstanding profits, Clause 5 of the Joint Venture agreement provided that the

Plaintiff was to be paid a fixed net profit of **Kshs. 500,000/=** every month from **5th March 2009** and thereafter on the 5th of each succeeding month till the current order with the EAPCC was exhausted or the contract terminated. This Court has already established that the Joint Venture Agreement was in existence for one year. In that case, the Plaintiff was entitled to the fixed net profit of **Kshs.500,000/=** for eleven (11) months with effect from **5th March 2009** to **1st February 2010**. The Plaintiff testified that the Defendant started defaulting in remitting the profits after the first six (6) months of the Joint Venture which claim was uncontroverted by the Defendant. The Plaintiff therefore admitted that he was paid net profits for the first six months amounting to **Kshs.3,000,000/=**. Therefore, the unpaid net profits is for five (5) months amounting to a total of **Kshs.2,500,000/=**. In the circumstances, the Plaintiff's claim for outstanding net profits of 23 months amounting to **Kshs.10,500,000/=** cannot stand as the Joint Venture agreement herein was in existence for only one year.

21. It is trite law that special damages must be pleaded and strictly proved. The Plaintiff has failed to prove the amount of **Kshs.15,500,000/=** as claimed in the Plaint. This Court will however award the Plaintiff the sum of **Kshs.5,000,000/=** being the refund of the capital contribution he was entitled to upon termination of the agreement and the outstanding net profit of **Kshs.2,500,000/=** due to him.
22. The Plaintiff also claimed for Interest on the special damages at commercial rates prevailing from time to time from when the cause of action arose until payment in full. The Plaintiff however laid no basis for the commercial rates he sought which are not automatically grantable by the Court. There is no indication that the Plaintiff borrowed the capital he invested in the Joint Venture from a Bank or a financial institution or that they had agreed on any interest rates in the said Joint Venture Agreement. On those grounds, the Court declines the Plaintiff's claim for interest on the special damages at commercial rates.

DISPOSITION

23. In the upshot, Judgment is herein entered for the Plaintiff in the following terms:-

- a. **Special damages of Kshs.7,500,000/= and interest thereon at Court rates until payment in full.**
- b. **Costs of this suit shall be for the Plaintiff.**

That is the judgment of the court.

READ, DELIVERED AND DATED, AT NAIROBI THIS 17TH DAY OF MARCH 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

M/s Nyamweya for Plaintiff

No Appearance for Defendant

Teresia – Court Clerk