



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CIVIL SUIT 49 OF 2008**

1. GOVIND MEGHJI  
2. TARSEN SINGH NYOTA  
3. GURDIAL SINGH GHATAURHAE ..... PLAINTIFFS

**VERSUS**

1. M. AGGARWAL  
2. S.S. ROOPRAL .....DEFENDANT

**JUDGMENT**

1. This matter came up for formal proof on 29<sup>th</sup> May, 2012. The Plaintiffs, filed a plaint on 7<sup>th</sup> March 2008, and having served the Defendant's, they obtained interlocutory Judgment with costs and interest on 5<sup>th</sup> November 2008. The Defendants had entered appearance on 20<sup>th</sup> March, 2008, through Muriu Mungai & Co. Advocates, but failed to file a defence.

2. The Plaintiffs sought the following prayers:

**“a) A permanent injunction restraining each of the Defendants jointly and severally from transferring and/or disposing of land parcel Number CR 10352/1 and CR 10351/2 to any third party other than the Plaintiffs.**

**b) An order of specific performance of the agreement reached between the Plaintiffs and the Defendant's.**

**c) Recovery of sum of Kshs. 1,572,533/70 due to the 1<sup>st</sup> Plaintiff.**

**d) Costs of the suit.**

**e) Interest on (c) above at commercial rates.**

**f) Any other relief this Honorable Court may deem just and appropriate to grant.**

3. At the hearing, Govind Meghji, the 1<sup>st</sup> Plaintiff, appeared and gave evidence. He is a self employed architect. He stated that he knew Tarsen Singh Nyota and Gurdial Singh Ghataurhae, the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs, who are both in the construction industry. They were involved together in a construction

project in North Coast in which they agreed to each contribute sh. 150,000/= in late 1985, into a company known as Shukran Limited that was developing cottages. The Defendants were the directors of the said Company.

4. On or about 5<sup>th</sup> December 1985, the Plaintiffs and the Company entered into an agreement for the sale to them of one (1) share each in the Company. It owned plot Nos. 404 and 417 in Section III Mainland North title numbers CR 10352/1 and 10351/1. Two other shares in the company were held by the Defendants. Each share was to constitute a cottage, and the 1<sup>st</sup> Plaintiff was to provide free architectural services. The 1<sup>st</sup> Plaintiff produced the original, duly signed, agreement dated 5<sup>th</sup> December 1985 as PEXB 1. Plaintiff also produced as PEXB 2, copies of caveats lodged on 20<sup>th</sup> December, 2007 by the Plaintiffs claiming a purchaser's interest. The 1<sup>st</sup> Plaintiff stated that the originals were still held by the Defendants.

5. Pursuant to the agreement, the Plaintiffs invested in the said properties and the 1<sup>st</sup> plaintiff provided the architectural services as required by the agreement, and the cottages were constructed. In addition, the 1<sup>st</sup> Plaintiff paid for water and electricity as he was based in Mombasa, and also paid salary and expenses for the contractor. In total, he said he paid sh 1,972,533.70 over and above his contribution of shs. 150,000/=. He produced a valuation report as PEXB 3 by Michie Consultants, registered quantity surveyors, showing that the value of work done as at 16<sup>th</sup> June, 1988 was shs. 790,000/=.

6. The 1<sup>st</sup> Plaintiff produced as PEXB 4 a list of expenses incurred, and as PEXB 5, a bundle of correspondence from the Company and the contractor showing the payments made by the Plaintiffs. As PEXB 5, are a bundle of minutes of meetings of the company. The first was held on 6<sup>th</sup> March 1989, and is signed by Madam Aggarwal, the 1<sup>st</sup> Defendant. Present were the 2<sup>nd</sup> Defendant as chairman, 1<sup>st</sup> Defendant, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs and Mrs SL Rooprani and Mrs SK Aggarwal, the latter two by proxy. From the minutes, the completion date for the cottages was to be 15<sup>th</sup> June 1986 but as of the date of the meeting no accounts and approved plans had been availed. There was a suggestion to sell the properties by public auction for cash, but finally this was not agreed.

7. The Company's minutes of 26<sup>th</sup> March 1995 are signed by the 1<sup>st</sup> Plaintiff wherein it was agreed at minute 2.3 that:

**“2.3 All except Mr. Gorvind should contribute funds in order to complete the project”.**

Minutes of the Company's meeting held on 29<sup>th</sup> October 1997 at 2<sup>nd</sup> Defendants office are signed by Tarsen Singh Nyotta the 2<sup>nd</sup> Plaintiff. It was agreed at minute 1.3 – 1.5 as follows:

**“1.3 It was agreed that the total number of shares shall remain as five (5) and not seven (7) ie to exclude Mrs SL Rooprai and Mrs SK Aggarwal**

**1.4 The Front Two Cottages shall be for Dr Rooprai and Mr. Aggarwal**

**1.5 All Five shareholders shall share Equal Equity and contributions for Proposed development.**

8. Exhibits 6 and 7 produced by the 1<sup>st</sup> Plaintiff are copies of caveats lodged by the Plaintiffs against the two properties belonging to the Company.

9. In his written submission, counsel for the Plaintiffs Mr. S. Oguk, referred the court to several authorities:

a) **David Mberire Waweru Vs Pastor Mackenzie (2004) eKLR** where the Defendants, having entered appearance but failed to file defence, interlocutory Judgment was entered and the suit

proceeded to formal proof.

b) **Joseph Karake Vs Caltex Oil Kenya Ltd (2006) e KLR** where the court held that non compliance with mandatory conditions should not be encouraged so that in default of appearance, a plaintiff should be entitled to ex parte Judgment.

c) **Rongai Workshop and Transporters Ltd Vs Fredrick Wanjala S. Another (2006) e KLR** also on ex parte Judgment.

10. In his concluding evidence, the 1<sup>st</sup> Plaintiff said he was claiming against the Defendants, shs. 1,572,533. 700 and seeking that a share certificate be allotted to him.

11. I have carefully considered the evidence adduced and the submissions of counsel. I have no difficulty in agreeing with counsel that there was an obligation on the defendants to file a defence, failing which an interlocutory Judgment would be entered. Order VIII, Rule 1 of the repealed CPR which was then in force, is clear on this point. Order 1 Rule 1 goes further and allows a defendant to appear at any time before interlocutory Judgment. This they did not do. Order IX A Rule 3, and 9 provide for interlocutory Judgment in default of defence.

12. The hearing for formal proof on 29<sup>th</sup> May, 2012 proceeded ex parte. It was shown that a hearing notice had been served on counsel for the Defendants who signed and stamped it on 3<sup>rd</sup> April, 2012. An affidavit of such service, deponed by Maurice Abwero were filed on 25<sup>th</sup> May, 2012. None of the Defendants appeared at the hearing, which then proceeded ex parte pursuant to Order 1XB Rule 3(a). The other two plaintiffs did not attend the hearing. Accordingly, the evidence on record is only that of the 1<sup>st</sup> plaintiff who appeared. The court did not make any specific order concerning the non-attendance of the other plaintiffs. Counsel indicated to the court at commencement of the hearing, that he had only one witness that day. At the end of 1<sup>st</sup> Plaintiff's evidence, counsel notified the court that the Plaintiffs wished to close their case.

13. Taking the foregoing into account, and given the prayers sought in the plaint, I come to the following conclusions on each of the prayers in the plaint.

### **Injunction**

14. The plaintiffs sought a permanent injunction against the defendants from transferring or disposing of the two parcels of land under titles CR 10352/1 and CR10352/2. The parcels are registered in the names of the Company, of which the Defendants are directors. The injunction sought does not appear to make a distinction between the Company as a juristic person and the directors and shareholders as individuals. From the evidence of the caveats registered against the titles, and the fact that the cottages were being constructed thereon, however, I am satisfied that the agreement between the parties at PExb 1 constitutes a director/shareholder agreement in relation to the Company. Accordingly, the Defendants as co-shareholders and directors are hereby permanently restrained from transferring, or allowing or causing the Company to transfer or dispose of land parcels bearing title numbers CR 10352/1 and CR 10352/2 without the consent and participation of the Plaintiffs.

### **Specific Performance**

15. The plaintiffs seek that the agreement at PExb 1 should be specifically performed or enforced. However, some of the evidence provided by the 1<sup>st</sup> Plaintiff in form of minutes appears to have altered some of the provisions of the said agreement. For example, clause 3 of the agreement provided that 1 share each be issued to Mrs S.L Rooprai and Mrs S K Aggawal. This was altered by Minute 1.3 of the minutes of the meeting of 29<sup>th</sup> October, 1977, in which all parties agreed to exclude those two ladies.

Further, the 1<sup>st</sup> Plaintiff's contribution has since exceeded that provided for in the Agreement.

Accordingly, this is not a proper case for issuance of an order for specific performance. Instead I will issue an order that the plaintiffs are each entitled to a certificate for their contribution for shares, and the 1<sup>st</sup> plaintiff is entitled to an account for his contribution.

**Recovery of Shs. 1,572, 533. 70 due to the 1<sup>st</sup> Plaintiff**

16. The 1<sup>st</sup> Plaintiff provided evidence on payments made by him as follows:

1. Capital

Exb 3 - Value of work done on

Beach Cottages	shs. 790,000.00
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Exb 4 c Contributions by each Plaintiff	150,000.00
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150,000.00

150,000.00

450,000.00

Expenses incurred by 1<sup>st</sup> Plaintiff

2.a) Exb 4a	Misc. expenses 1985 – 86	32,870.00
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b)Exb4b	Misc.Exp. upto Dec. 1989	47,450.00
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c) Exb4c	Amount committed as at end 1989	636,882.00
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d) Exb4d	Contractors Receipt January 2005	1,016,663.70
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e) Exb4e	1 <sup>st</sup> Plaintiffs Expenses 2005 – 2007	158,875.00
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f) Exb4f	1 <sup>st</sup> Plaintiff’s Fee Note for professional	
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services 23/11/90	<u>364,125.00</u>
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Total	<u>2, 256,865.70</u>
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17. The 1<sup>st</sup> Plaintiff did not clarify in his testimony which of the figures he added up to get his claim figure of sh. 1,572,933.70 or explain why. The sum total of all expenses comes to shs. 2,256,865.70. However, if one takes only items 2 a, d, e and f, the total comes to the claimed amount of shs. 1,572,933.70. It is not clear why some figures are left out in the calculation. Further, in view of the fact that the Agreement PEXb 1 provided at Clause 7 that the 1<sup>st</sup> plaintiff:

**“... Will provide free service of making plans etc “,**

It would therefore be improper to include his fee note ie item 2(f) above in the amount for which he claims a reimbursement, and I would remove it from the claim. In view of the inadequate explanations availed as to the moneys paid by 1<sup>st</sup> plaintiff, I am not persuaded, on balance, to grant the order for the amount prayed for as the amount is uncertain, and not satisfactorily proved. I order instead that an account be prepared as between the parties and the amounts paid by the plaintiffs be credited to their accounts with the Company. As no amount is awarded for recovery, no interest is awardable thereon.

18. Essentially, the 1<sup>st</sup> Plaintiff has succeeded significantly in the claim, and is entitled to his costs of the suit which I hereby award to him. Parties are to agree an account of 1<sup>st</sup> Plaintiffs expenses within forty

five (45) days from the date hereof failing which the 1<sup>st</sup> Plaintiff is at liberty to apply.

Orders accordingly.

**Dated, signed and delivered this 31<sup>st</sup> day of July, 2012.**

**R.M. MWONGO**  
**JUDGE**

**Read in open court**

**Coram:**

1. Judge:                   Hon. R.M. Mwongo

2. Court clerk:           R. Mwadime

**In Presence of Parties/Representative as follows:**

a) .....

b) .....

c) .....

d) .....