REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 113 of 2004

MOLO MOUNT MINERAL WATER LIMITED …..... PLAINTIFF

VERSUS

INDUSTRIAL DEVELOPMENT BANK LIMITED ..... DEFENDANT

JUDGMENT

By a Plaint dated 19/4/2004, Molo Mount Mineral Water Limited, the Plaintiff herein, sued the defendant for general damages, loss of expectation of earnings and costs of the suit for breach of contract entered into between the Plaintiff and the Defendant on 26/2/2001. In the agreement, the Defendant agreed to advance a loan of Kshs.7,031,000 to finance the Plaintiff towards constructing and procuring a bottling plant for the production of mineral water. Pursuant to the Agreement, the Plaintiff put up all the factory buildings and procured a bottling plant at a cost of Kshs.20,000,000/-. The defendant failed to honor its part of the Agreement by not disbursing the agreed loan to the Plaintiff. The Defendant, filed a defence on 27.05.2004 in which it admitted that pursuant to a business proposal by the Plaintiff dated 13.08.1999, the Defendant offered a loan facility to the plaintiff vide the letter of offer dated 26.02.2001. The Defendant was to part-finance construction of factory buildings and procurement of a bottling plant for the production of mineral water at a sum of Kshs.7,031,000. The initial construction phase was to be financed by the Plaintiff's shareholders. The facility was to be secured by:-

1. **first debenture over all the present and future assets of the Plaintiff;**

2. **Charge over a five acres parcel of land to be sub-divided from L.R. No. 7592/1 Molo;**

3. **joint and several guarantees by the Directors/shareholders of the Plaintiff;**

4. **a board resolution authorizing the plaintiff to borrow from the Defendant.**

At paragraph 4 of the defence, the Defendant stated that the parties executed a loan agreement on 31.10.2001 based on the above terms of the loan application and the following pre-disbursement terms:-

1. **the Plaintiff to provide proof of funds required to complete the project inclusive of working capital before disbursement by the Defendant;**

2. **the Plaintiff was to provide evidence of shareholders contribution of kshs.10,546,000 for the project implementation; and**

3. **the disbursement was subject to non-occurrence of any event which in the opinion of the Defendant would materially and adversely affect the Plaintiff's business prospect.**

At paragraph 8 of the defence, the Defendant conducted a review of the project after 2 years of its commencement and discovered that the Plaintiff was in breach of the pre-disbursement terms and it terminated the agreement. Particulars of breach by the Plaintiff are set out in the defence. The Defendant alleged that it correctly exercised its rights under the agreement by terminating the agreement. The defendant further stated that there was no affidavit to verify the matters set out in the plaint.

In reply to the defence, the Plaintiff stated that the Defendant admitted to the existence of a contract and further stated that it complied with all the terms and conditions of the agreement. The Plaintiff denied in toto paragraph 8 of the defence and all the particulars of breach and the Defendant was put to strict proof.

John Warui Mathenge, a director of the Plaintiff, was called to testify as the only witness. He produced a letter (exhibit 1) drawn by the Defendant and addressed to the Plaintiff, dated 8.6.2001, as evidence that the loan was approved by the Defendant. The Defendant gave conditions before they could release the loan. They were contained in a letter dated 29.10.2001 which he produced (exhibit 2). In compliance with the conditions, PW1 stated that he sub-divided the land and the required five acres were registered in the name of the company as instructed by the Defendant. He handed over the title of resultant five acres to the Defendant's Advocates. It was to be used as security for the loan. PW1 also adduced a letter (exhibit 3) drawn by the Defendant bank confirming successful registration of security. PW1 testified that they did not receive the loan as the Defendant did not have money in the year to fund such projects. PW1 further adduced a letter of comfort (Exhibit 5) dated 17.05.2002 drawn by the Defendant and addressed to the Debro Engineering Limited. The letter stated that the Defendant was financing the acquisition of the plant. The Defendant however did not pay the said money for the acquisition of the plant. By a letter (exhibit No.6) the Defendant terminated the agreement because of the entry into the market by Coca Cola Limited with which the plaintiff could not compete; for lack of commitment from sponsors to contribute to the project and inability to raise working capital. PW1 wrote back to the bank on 25.02.2003 confirming the commitment of the sponsors, its belief that the Defendant was going to arrange for working capital and coca cola would not interfere with their target market. The Plaintiff testified that he lost all documents relevant to this case during the 2007 post election violence in Molo.

I have considered the pleadings, evidence of PW1, the submissions of counsel and the issues both parties have set out for determination. I think that the issues that need to be addressed are as follows:-

1. **whether there was an affidavit to verify the plaint;**

2. **whether there existed a contract between the parties;**

3. **whether the plaintiff performed its obligations under the contract;**

4. **whether the Defendant has established that the plaintiff breached the pre-disbursement terms;**

5. **whether the defendant correctly exercised its rights by terminating the contract;**

6. **whether a provisory estoppel applies;**

7. **whether general damages can be awarded for breach of contract;**

8. **whether the Plaintiff is entitled to loss of earnings, where the same have not been proved.**

Whether there was an affidavit to verify the plaint;

At paragraph 12 and 5 of the Defence and Defendants' statement of issues respectively, the Defendant stated that there was no affidavit to verify the averments set out in the plaint. The plaintiff denied the allegation. From a perusal of the court file, the plaintiff filed the Plaint on 19.04.2004 together with a verifying affidavit sworn by John Warui Mathenge, who described himself as the managing director of the plaintiff. The plaintiff being a company the deponent should have indicated that he had the authority of the company to swear the affidavit. Having been so challenged, John Warui Mathenge who testified as

PW1 should have produced in evidence the resolution of board of directors authorizing him to sue on behalf of the company. **Order 4 Rule 2 Civil Procedure Rules 2010**, which has replaced **Order 7** of the **Civil Procedure Rules** specifically provides that if the plaintiff is a company, the plaint shall be accompanied by an affidavit sworn by an officer of the company duly authorized under the seal of the company to do so. It is therefore questionable whether John Warui Mathenge had the authority of the plaintiff to file this suit and therefore whether this suit is competent and properly before the court.

Whether there existed a contract between the parties;

At paragraph 3 of the Plaint, the Plaintiff stated that there was an Agreement between itself and the Defendant, entered into on the 26.02.2001 in which the Defendant agreed to advance a loan of Kshs. 7,031,000 to the Plaintiff.

The defendant's reply was that it offered the plaintiff a loan facility vide the letter of offer dated 26.02.2001 which contained the terms of the facility. On 31/11/2001 the parties executed a loan agreement based on the terms of the letter of offer and other pre-disbursement terms.

It is clear in my mind that the Defendant made an offer to the Plaintiff which showed willingness on its part to enter into a contract subject to acceptance of the offer by the Plaintiff. The Plaintiff seems to have accepted the offer which resulted into the parties executing a loan agreement on 31/01/2001. However neither of the parties produced the said loan agreement in court.

Whether the Plaintiff performed its obligations under the contract;

Because neither of the parties produced the loan agreement, the court has not been able to see the exact terms of the agreement. It is therefore difficult for the court to satisfy it self whether or not the plaintiff performed its obligation under the contract. The plaintiff's excuse for failing to produce the loan agreement is that his documents were lost during the 2007 post election violence. He however said that a copy of the said loan agreement was in possession of the defendant. If that be so, the plaintiff should have issued notice to produce under **Order X Rule 14** of the **Civil Procedure Rules** (old) on the defendant.

It is however clear that the Plaintiff embarked on performing its obligations upon signing the contract between the parties. By 26.09.2001 the Defendant visited the project and observed in its report dated 26.09.2001 (Exh.4) that construction was at an advanced stage, working capital to be arranged before completion of equipment installation and purchase of motor vehicles to be the final engagement before completion. All these acts show part performance of the contractual obligations on the part of the Plaintiff.

It begs one to wonder why the Plaintiff did not produce the Certificate of Completion from the contractor or proof of working capital in support of its case? The two documents are easily available to the Plaintiff from his contractor and bank.

Whether the Defendant has established that the plaintiff breached the pre-disbursement terms;

There is no evidence of where the pre-disbursements terms were contained. They could be in the loan agreement which was not adduced before this court or the letter of offer dated 26.02.2001 **(Exh. ….).** For the purpose of determining all the issues before us, I have considered the particulars of breach which are set out in the defence.

During cross- examination of PW1, he did admit that though all the directors were supposed to contribute towards the project, it was only him who did so. In the defence (para. 3), the defendants alleged that the facility was supposed to be secured by the joint and several guarantees of the shareholders/ directors of the plaintiff. In cross examination, PW1 admitted that the directors never gave any guarantees. That was a breach of one of the terms of the agreement.

At paragraph 3 of the defence, the defendant's also pleaded that the plaintiff was required to provide a

certified copy of the board's resolution authorizing the plaintiff to borrow the loan from the defendant. During cross examination of PW1, he denied having the board's resolution although he said he gave it to the bank. It is noteworthy that the plaintiff did not deny the contents of paragraph 3 of the defence which are the terms of the pre-disbursement conditions of which the plaintiff was in breach.

For these reasons, I am satisfied that the plaintiff was in breach of some of the pre-disbursement terms.

Whether prommissory estoppel applies;

It is indeed settled law that if a man makes a promise to the other and that promise is relied upon by the other to his detriment, the former is precluded from denying it. The plaintiff correctly relied on the case of **Central London Properties Trust Ltd v High Trees House Ltd** in which the court held, inter alia that:-

"where parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promise, the court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even although the promise may n ot be supported by consideration in the strict sense and the effect of the arrangement made is to vary the terms of a contract under seal by one of less value…"

The instant case is distinguishable from the above cited case because the claim therein is for general damages not specific performance and secondly, the court has found that the plaintiff did not fully comply with the pre-disbursement terms and so estoppel if any, ceased.

Whether the defendant correctly exercised its rights by terminating the contract;

This issue evolves from the above, it can only be determined if the court had an opportunity to evaluate the termination clause in the contract. Disputes are widespread feature of construction contracts, their incidences are usually controlled by the terms of the contract. In a contract of such a nature, I would expect elaborate terms that provide for a series of stages through which any dispute may or must proceed before a party can terminate the contract. It is the plaintiff who alleges that the defendant is in breach of the loan agreement and the onus was on the plaintiff to prove that allegation. **Section 107** of the **Evidence Act** states:-

"107(1) "Whoever desires any court to give judgment as to any legal or liability dependent on the existence of facts which he asserts must prove those facts exist."

Whether general damages can be awarded for breach of contract; and whether the Plaintiff is entitled to loss of earnings, where the same have not been proved;

In **Chitty** on **Contracts, 26th Edition, Volume 11, Specific Contracts (sweet & Maxwell) 1989 at page 627 para 3580** answers these questions. It states that:-

"if a person contracts to lend money, and then, in breach of contract, refuses or fails to advance the money, the borrower cannot sue for the money agreed to be loaned as a debt, for this would be tantamount to an order of specific enforcement, and such an order will not normally be granted for a contract of loan. But the borrower can claim damages for the failure to advance the money. The damages will very often be merely nominal[1], but if expense has been reasonably incurred in procuring the loan elsewhere, that expense is recoverable as special damage provided it was caused by the breach and was within the contemplation of the parties ….if the borrower is unable to raise the money from other sources at all, and he is consequently unable to enter into or complete some transaction for which the money is required, the lender may be liable for loss of profit on such a transaction or other consequential loss. But it would have to be shown that the lender had express notice of the purpose for which the money was required, and possibly also that the loan was agreed to be made for that purpose and for no other".

Mr. Echessa, counsel for the defendant submitted that the law is that general damages cannot be awarded for breach of contract. The Defendant has relied on **Dharamshi v Karsan [1974] EA 41** and **Habib Zurich Finance (k) Limited v Muthoga & Another [2002] 1 EA 81** to support their case. I do agree with the Plaintiff's Submission in Reply to distinguish **Karsan** case from this case. In the **Karsan** case the court held that general damages are not allowable in addition to the quantified damages. My understanding of the case is that general damages are allowable for a breach of contract, however, they cannot be awarded where the plaintiff has quantified the damages as it would result in duplication. In the present case, there is no claim for damages and therefore it is distinguishable from **Karsan** case. Quantified damages are special damages which must be specifically pleaded and proved.

The court of appeal in **Habib Zurich Finance (k) Limited v Muthoga and another [2002] 1 EA 81** in relying on Karsan stated that general damages can not be awarded for breach of contract.

I appreciate English law as being authoritative but this court is bound by the holding of the Court of Appeal by the doctrine of ***stare decisis.*** It was therefore incumbent upon the plaintiff to plead specifically what his claim was and advance sufficient evidence in support thereof. Reiterating the words of Lord Goddard, C.J. In **Bonham Carter v HydePark Hotel Ltd. [1948] 64 TLR 177**, Sheridan, J said:-

"on the question of damages. I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages: it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying. This is what I have lost; I ask you to give me these damages; they have to prove it. The evidence in this case with respect to damages is extremely unsatisfactory".

In this case, the plaintiff merely stated that he has suffered enormous substantial expenses, has been subjected to inconveniences for which he claims compensation. **Section 107(1)** of the **Evidence Act Cap 80**….it sanctily states – "**Whoever desires any court to give judgment as to any legal or liability dependent on the existence of facts which he asserts must prove those facts exist."** The plaintiff put forth some facts but failed to prove them. As respects the claim for loss of expectation of earnings, the plaintiff did not specifically plead what his expected earnings were. He must have known what his projections were and what he expected to earn from the project. I do agree with the Court of Appeal's decision in **Mbaka Nguru v James Rakwar CA 133/98** when the court said:-

"It will suffice to say that the plaintiffs who do not plead their damages properly and who then do not prove the same do so at their own risk. They will not get those damages however sympathetic the court may feel towards them. The rules of pleadings and modes of proof must be adhered to."

In conclusion, I am of the view that the plaintiff has failed to prove that the Defendant is in breach of any contract between them. The plaintiff's suit is hereby dismissed with costs to the defendant.

DATED and DELIVERED this 12th day of October, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Gakinya holding brief for Mr. Nderitu for the plaintiff

Ms Mugweru holding brief for Kuyo for the defendant

Kennedy – Court Clerk