



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 638 of 2007

JEDIDAH NYAGUTHII GATHOMI.....PLAINTIFF

VERSUS

SASANET INVESTMENTS CO-OPERATIVE SOCIETY LTD.....DEFENDANT

RULING OF THE COURT

1. The application that is before the court is the Notice of Motion dated 18th January 2008. The same is brought under Order 35 Rule 1, Order 50 (no particular rule cited) Order 12 Rule 6 of the Civil Procedure Rules (CPR) and section 3A of the Civil Procedure Act. The applicant seeks the following orders:-

(i) That judgment be entered against the Defendant as prayed in the plaint.

(ii) That the Defendant be ordered to pay the cost of the suit and for this application.

2. The application is based on three brief grounds on the face thereof: (a) that the defendant is truly indebted to the plaintiff in the sum claimed; (b) that the statement of defence consists of mere denial, is a sham and only intended to embarrass, prejudice and delay the fair trial of the action and (c) that the defendant has admitted the plaintiff (*sic*) in its pleading.

3. The affidavit in support dated 18th January 2008 is sworn by **JEDIDAH NYAGUTHI GATHOMI**, the plaintiff/applicant and in it she avers that she entered into an agreement with the defendant by which agreement she was to deposit with the defendant a sum of KShs.1,500,000/= for a period of 12 months effective 12th June 2007 or within such other period of as the parties would agree from time to time; that the applicant would pay a further KShs.8,000/= to the defendant being administrative costs; that the defendant would pay to the applicant the sum of KShs.225,000/= for a period of 12 months consecutively with effect from 12th July 2007 and on the 12th of each succeeding month. The applicant says that the payments from applicants to her were subject to deduction of 5% (an equivalent of KShs.11,250/=) withholding tax payable to the KENYA REVENUE AUTHORITY.

4. The applicant also says that it was agreed that upon expiry of the contract, the defendant would pay back to her the full sum of Kshs.1,500,000/= less one month's profits. She says that she fully complied with her part of the bargain in two instalments on 8th June 2007 when she says she paid KShs.1,008,000/= and 11th June 2007 when she paid KShs.500,000/=. The annexure marked "JNG 2" are two receipts of even dates showing the two amounts duly acknowledged by the defendant/respondent. The two receipts describe the payments as "business Investment Capital". The two amounts were paid through two

cheques, both issued by NACCICO and drawn on the Co-operative Bank.

5. The applicant says further that while the contract was still subsisting the defendant on 26th August 2007 issued a public advertisement in “THE DAILY NATION” newspaper suspending all payments under the contract, among others, for a period of 45 days. The reason given for the suspension as per annexure marked “JNG3” was that the defendant was in the process of reorganizing its operations. The advertisement also indicated that detailed information about the suspension would be sent to individual members. The applicant says that the 45 day suspension period has never been lifted to date and that the defendant still holds on to both her capital investments and profits there from.

6. In her amended plaint filed in court on 18th December 2007 the plaintiff’s claim against the defendant is for a sum of KShs.4,073,000/= being the amount due and owing to her in respect of the entire deposit plus the unpaid profit particulars of which the plaintiff says are well within the knowledge of the defendant. The plaintiff also prays for costs of the suit and interest thereon from date of filing suit.

7. The defendant filed defence and averred therein that the plaintiff, is estopped from claiming the sum of KShs.8,000/= once the same was paid to cover administrative costs. It also averred that the capital investment paid by the plaintiff would remain with the defendant for a minimum period of twelve months and that since the statutory period of twelve months had not expired then the plaintiff was not entitled to the moneys claimed. The defendant also averred that the investment was “**an open risk business investment**” and for which the defendant gave no guarantees or security. The defendant also averred that on 12th August 2007 upon the plaintiff’s request, the defendant paid to the plaintiff the sum of KShs.213,750/= being part of the plaintiff’s initial share contribution/investment.

8. The defendant, while admitting the suspension averred that the contract was still in place and running and that it was holding the sum of KShs.1,286,250/= being plaintiff’s balance of investment funds but denied that it owed the plaintiff the sum of KShs.2,137,500/= or any interests thereon. Receipt of the demand notice was denied by the defendant.

9. The agreement signed between the parties shows under paragraph 3.0, that the defendant would pay to the plaintiff the sum of KShs.225,000/=, being the profit in twelve monthly instalments beginning 12th July 2007 and ending on 12th June 2008. The profit was subject to the 5% withholding tax. Under paragraph 7.0 the agreement provides as follows:-

“7.0 DISPUTE RESOLUTION

7.1 Both parties agree that any dispute relating to this agreement should {be} resolved amicably and in good faith. If an amicable solution is not reached, either party should refer the decision to an Arbitrator. Such arbitration will be done in Nairobi under the provisions of the Arbitration Act 1995, as amended from time to time. The decision made by the arbitrator shall be final and binding to both parties.”

10. The question that now arises for determination is whether the plaintiff/applicant has made out a case for the order sought. The defendant though served did not appear at the hearing of the application.

11. After carefully considering the pleadings and the submissions made to me, in light of the law, I am of the view that the applicant’s application cannot succeed. First and foremost, paragraph 7.1 of the agreement provided for resolution of any dispute arising out of the agreement either through an amicable settlement or through arbitration. There is no evidence from the plaintiff that the said provisions have been complied with. The plaintiff/applicant agreed to be subjected to the provisions of the Arbitration Act 1995 as may be amended from time to time.

12. Further, the defendant in this case is a Co-operative Society Ltd registered as an investment co-operative with the primary objective of creating wealth for its members through various types of business activities. Part XIV of the Co-operative Societies Act, Cap 490 (the Act) provides for settlement of

disputes concerning the business of a co-operative society, and section 76(1) thereof says:-

“76(1) If any dispute concerning the business of a co-operative society arises:-

(a) among.....

(b) between members, past members or deceased members and the society, its committee or any officer of the society; or

(c)

It shall be referred to the Tribunal”.

13. I therefore find and hold that this application is a matter for the Tribunal established under section 77 of the Act. It is also clear from the contracts that the applicant agreed to resolve disputes arising from the contract through arbitration. May be without realizing it, the applicant tied her own hands behind her back during the contract negotiations.

14. For the two reasons above given, I would, and do hereby dismiss the application dated 18th January 2008. Costs shall be in the cause.

Orders accordingly.

Dated and delivered at Nairobi this 21st day of February 2008.

R. N. Sitati

Judge