



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

Civil Case 3841 of 1991

MIPROMA SERVICES LIMITEDPLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA.....DEFENDANT

J U D G M E N T

These 6 suits have been consolidated. They are HCCC No.3838, 3839, 3840, 3841, 3842, and 3843 all of 1991. The respective plaintiffs are George Macodawa, Alex Mbugua both t/a Professional Consultants; James Kamwere t/a Kamwere Associates; Michael Joshua Njuguna, Benard Njuguna Ngugi both t/a Miguna Consultants; Michael Joshua Mbugua, Benard Njuguna Ngugi both t/a Miproma Services; Samura Engineering Limited; James Gathecha Waweru, James Waweru Kimari, Benjamin Mbugua Waihenya all t/a Waweru & Associates and Joseph Irungu Kaigutha, Kiprotich Arap Chepkwony t/a Chepkwony Kaigutha & Partners.

The defendants are Consolidated Bank of Kenya Limited and Home Savings & Mortgages Limited.

The plaintiffs claim various sums against the defendants being sums due under various Fixed Deposit Receipts issued on 14.12.1989 – together with interest on those sums at the rate of 13% p.a. from 14.12.1989 until payment in full. The 1st defendant is described as a Bank duly incorporated and registered under the Banking Act and the Companies Act. The 2nd defendant is described as a Finance House also incorporated and registered under the same Acts. It is averred by the plaintiffs that the 2nd defendant was operating the business of a finance house until 1990 when the 1st defendant took over its affairs and management.

The 1st defendant denied that it took over the affairs and management of the 2nd defendant in 1990 or at all but pleaded that it became the beneficial owner of 100% of the share capital of the 2nd defendant on 14.12.1989. All the other allegations made by the plaintiffs are denied. The 2nd defendant also denied all the plaintiff's claims and more specifically denied that the plaintiffs made any deposits with it and averred that if any Fixed Deposit Receipts were issued on 14.12.1989, the same had no legal effect there being no deposit against which Fixed Deposit Receipts could be acknowledged. In the alternative the 2nd defendant pleaded that if the alleged Fixed Deposit Receipts were issued by any servant or agent of the 2nd defendant, they were so issued fraudulently for no consideration to the knowledge of the plaintiffs.

In the Replies filed by the plaintiffs, issues were joined. The plaintiffs reiterated that the 1st defendant had indeed since 1990 been managing the business of the 2nd defendant and for all intents and purposes the 1st defendant is and had been an agent of the 2nd defendant.

When the pleadings were closed the following issues were drawn:-

- (1) Did the 1st defendant take over the affairs and management of the assets and liabilities of the 2nd defendant?**
- (2) Did the 2nd defendant issue the various FDR's to the plaintiffs?**
- (3) Did the 2nd defendant make financial arrangements with its customer Juja Development Company Ltd. for the payment by the 2nd defendant of the sums in the FDR's in settlement of professional services rendered to Juja Development Co. Ltd. by the plaintiffs?**
- (4) Were the Boards of Directors of Juja Development Co. Ltd. and the 2nd defendant identical in whole or in part?**
- (5) Did the plaintiffs agree to retain and invest their money in fixed deposit accounts?**
- (6) Were the FDRs issued by the 2nd defendant to the plaintiffs as an acknowledgement of the sums in the FDRs?**
- (7) Are 1st and 2nd defendants jointly and severally liable to the plaintiffs for the various sums on account of the FDRs?**
- (8) Were the Fixed Deposit Receipts issued fraudulently and for no consideration as alleged by the 2nd defendant?**
- (9) Were the Fixed Deposit Receipts issued and executed by the 2nd defendant's authorized officers?**
- (10) Do the plaints filed by the plaintiffs disclose causes of action against the 1st defendant?**
- (11) Does the 2nd defendant's defence disclose any reasonable defence and is it an abuse of the process of the court?**
- (12) Does the 2nd defendant's defence comply with Order VI Rule 1 and 8 (1) of the Civil Procedure Rules?**

The trial of the suit started before Ondeyo, J. on 18.6.2003. Michael Joshua Mbugua testified as PW1. He stated that an entity called Juja Development Company Ltd. (hereafter the developer) had a housing project on Juja Road, Nairobi. It engaged PW1's company as project managers for the said project. The Letter of Appointment was produced as "PEX 1 A". The letter is dated 9.11.84. That letter also asked PW1 to appoint other professionals. Pursuant thereto he recommended the other plaintiffs in the consolidated suits. According to PW1, the 2nd defendants were the financiers of the said project and participated by giving directions on development. They were also the bankers of the development and financed the developer. He produced documents to show correspondence between his company and the 2nd defendant and payments made for the services rendered. As at 14.12.1989, all the plaintiffs were owed Kshs.2,613,203.00 by the developer. That sum according to PW1 was paid through fixed deposit receipts issued to each plaintiff by the 2nd defendant. They were payable after 190 days at 13% interest. It was the testimony of PW1 that as from 14.12.1989 it was the 2nd defendant who owed his firm and the other plaintiffs the sums claimed. The developer agreed to that mode of payment. The Fixed Deposit Receipts were however not honoured hence the suits.

On cross-examination PW1 admitted that nothing in the documents he produced showed that the 2nd defendant was participating in the housing project. However, whenever payment was made by the 2nd

defendant, the latter requested that acknowledgement be to the developer and although the 2nd defendants were not parties to the contract they would attend project meetings.

PW2 was Daniel Kamita Gichuhi. It was his testimony that upto 1989, he was running the 2nd defendant and had been its Managing Director since 1982. He testified that he also established the developer and was also its Director and Shareholder. According to PW2, the 2nd defendant and the developer were the same group and it was the 2nd defendant who caused the formation of the developer. The two companies had common directors and the 2nd defendant doubled up as the developer's bankers – their main project being the housing development on Juja Road, Nairobi which comprised 269 maissonettes. The project according to PW2 was financed by the 2nd defendant between mid 1980's upto 1989. He confirmed that the consulting professionals were PW1's firm which firm in turn recommended the rest of the plaintiffs in the consolidated suits. It was further PW2's testimony that all titles of the developments were held by the 2nd defendant and could only be released with the consent of the 2nd defendant. He admitted writing the letter dated 9.11.84 (PEX 1 (a).) in his capacity as a director of the developer. He stated further that the 2nd defendants were the bankers for the developer and that the consultants were paid by the 2nd defendant. According to him requisition for payment would be directed to the developer who would liase with the 2nd defendant who would then pay the plaintiffs. After payment the account of the developer would be debited. Acknowledgement would be to the developer. PW2 further acknowledged that Fixed Deposit Receipts were given to the plaintiffs by the 2nd defendant for various accounts. The FDRs were in satisfaction of the debt which the developer owed the plaintiff. According to PW2 the FDRs were regular in all ways. He continued that the 2nd defendant was taken over by the 1st defendant and so were its assets and liabilities which include the sums in the FDRs and should have been paid on maturity.

On cross-examination PW2 confirmed that each of the FDRs was signed by one Kahiri who was the Chairman of the 2nd defendant and one Kimunyi the accountant then. He testified that the two were some of the authorized signatories to the FDRs at the time. He reiterated that the developer was owned by the 2nd defendant through its subsidiary Home Safe Management Services Ltd. who in turn owned shares in the developer. PW2 further testified that the developer had a building loan account with the 2nd defendant and even if the account was not in funds the 2nd defendant would still make payment. With respect to the FDR in favour of PW's firm, PW2 testified that he had not seen a fee note or letter from the developer in respect of the same.

In re-examination – PW2 stated that all invoices, bills and related papers concerning payments to consultants were with the 1st defendants. Who had taken over the 2nd defendant. He added that the loan to the developer was reduced through the sale of the 269 houses along Juja Road. In his view all parties involved benefited in the arrangement.

PW3, George Omollo Mkodawa testified on 21.7.2003 before the same Judge (Ondeyo, J.) His evidence was that he was a consulting Engineer with Professional Consultants and was the plaintiff in HCCC No.3838 of 1991 in which he claimed Kshs.593,985. That sum was in respect of professional services rendered to the developer and for which a FDR had been issued by the 2nd defendant and the same had not been honoured hence the suit.

PW4, James Kamwere also gave evidence on 21.7.2003 before Ondeyo, J. He is a qualified surveyor and for his services to the developer, he was paid through an FDR issued by the 2nd defendant for Kshs.304,000.00 which was not honoured.

Benard Njuguna Ngugi was PW5. He is the plaintiff in HCCC No.3840/91 and also testified on 21.7.2003. It was his testimony that he was a quantity surveyor and for his services he was paid by the developer which payment included an FDR for Shs.230,000 issued by the 2nd defendant which FDR was not honoured.

PW6, Mungai Ngaruiya also gave evidence before Ondeyo, J. on the said date. He testified that his firm supplied electrical material to the developer and the last payment of Kshs.248,068 was vide an FDR issued by the 2nd defendant but which FDR has not been honoured.

On the same dated (21.7.2003) James Gagecha Waweru testified as PW7. It was his testimony that he was an architect and had rendered services to the developer who settled the fees which included a FDR issued by the 2nd defendant for 418,000.00 which had not been honored.

The plaintiffs then closed their cases. In the event the plaintiff in HCCC No.3844 of 1991 did not testify.

All the parties agreed to continue with the case from where Ondeyo, J. had left. I heard the defendant's case on 9.2.2007. Only one witness testified. That is Julius Gikonyo Mwaniki. He stated that he was an employee of the 1st defendant deployed in its Credit department and his duties included debt recovery. It was his evidence that the 1st defendant took over the running of the 2nd defendant on 14.12.1989 although a vesting order was made in 1990 vide Gazette Notice No.37 of 14.6.91. From records held by the 1st defendant the plaintiffs rendered professional services to the developer who had a loan account with the 2nd defendant. He confirmed that the directors of the developer were also the directors of the 2nd defendant. However, according to DW1, one J.G. Kahi who was acting as the Chairman of the developer had no authority to instruct the issuance of the FDRs to the plaintiffs. Indeed, according to him, the developer owed the 2nd defendant Kshs.121,808,678.40 as at 30.12.89 and no FDR could be issued against the account. DW1 further testified that the requirements for the issuance of the FDRs were not met. In the premises, the defendants did not owe the plaintiffs any sums. With respect to the 1st defendant, DW1 testified that the vesting order vide the said Gazette Notice was effective in July 2002 long after the transactions in question.

Under cross-examination, DW1 admitted that although fraud had been alleged in the defence, he was not aware of any investigation in respect of the allegation. He however added that the want of investigation in the matter did not create liability against the defendants.

On the conclusion of the evidence, the counsels appearing agreed to file written submissions which they did and highlighted the same on 20.3.2007.

Having outlined the pleadings and the evidence in support thereof and having considered the submissions of counsel, I can now answer the issues which the parties framed for determination. The answer to issue number one is in the affirmative. There is now no doubt that the 1st defendant took over the affairs, management, assets and liabilities of the 2nd defendant. There is also no doubt that the 2nd defendant issued to the plaintiffs the FDRs produced in the consolidated suits. Issue number 2 must therefore be answered in the affirmative. On whether or not the Boards of Directors of Juja Development Company Ltd. and the 2nd defendant were identical in whole or in part, I accept PW2's and DW1's evidence that the developer and the 2nd defendant had common directors. The answer to the 4th issue is therefore in the affirmative. I can only add that the directors of both entities were wholly identical. On whether the 2nd defendant made financial arrangements with the developer for the payment by the 2nd defendant of the sums in the FDR's to the plaintiffs in the consolidated suits in settlement of professional services or materials rendered or supplied to the developer, I have found as follows. PW2 managed the 2nd defendant as its Managing Director from the year 1982 upto the time it was taken over by the 1st defendant in or about 1989. At the same time he was a shareholder and director of the developer. Indeed, according to PW2, the 2nd defendant caused the formation of the developer and was the developer's banker and financier in respect of the housing project the developer was having along Juja Road, Nairobi. It was PW2's further testimony that in his capacity as a director of the developer he authored DEX 1 which was a clear admission of indebtedness of the developer to the plaintiffs. He also categorically admitted that the 2nd defendant issued the FDRs produced by the plaintiffs. In his view the FDRs were regular in all ways and should have been paid on maturity. The FDRs were signed by the 2nd defendant's

Chairman and accountant who according to PW2 were authorized signatories to the FDRs at the time.

In cross-examination, PW2 maintained the same position and added in my view, significantly that at the material time, the 2nd defendant had granted to the developer a bridging loan and even if the account was not in funds, the 2nd defendant would still make payment. Although PW2 did not give his evidence before me I preferred his version to the version given by DW1 – Julius Gikonyo Mwaniki. The preference was informed by the fact that PW2 held very responsible positions in both the developer and the 2nd defendant whereas DW1 was merely an employee of the 1st defendant in its Credit Department and was not privy to the decisions made by PW2 and the management teams of the developer and the 2nd defendant. For instance, there was no way DW1 would know the arrangements entered into between the developer and the 2nd defendant including the arrangements with respect to the FDRs. PW2 *inter alia* testified as follows:-

“These deposits were part of the settlement in connection with the Juja Development Project. Juja Development was the debtor and it requested that the fixed deposit receipts be issued. The account of Juja Development Company Limited was debited with the total amount.

The deposits were in satisfaction of the debt which Juja Company owed the plaintiff. This receipt is regular in all ways ...

All the other receipts represent the various amounts owed to the rest of the plaintiffs. The evidence I have given applies to the receipts of the other plaintiffs save for various amounts and receipt numbers.”

The defendants in my view did not adequately answer the testimony of PW2 with regard to the FDRs. In fact whereas fraud is alleged in the defence the allegation was not put to PW2 when he testified. Further whereas want of consideration is alleged in the defence, PW2 clearly explained that the developers’s Loan Account with the 2nd defendant was used to issue the FDRs. In his own words:-

“If it is by transfer, we issue FDR like the ones in court now.”

On the evidence therefore I am persuaded on a balance of probabilities that the 2nd defendant made financial arrangements with its customer Juja Development Company Ltd. for the payment by the 2nd defendant of the sums in the FDRs in settlement of professional services rendered to Juja Development Co. Ltd. by the plaintiffs.

The answer to issue number 3 is therefore in the affirmative. This issue is related to issues numbers 5 and 6 which I also answer in the affirmative in view of the evidence analysed above. As already stated above, the allegations of fraud and want of consideration were mere allegations that were not backed by evidence and were in my view excluded by the evidence of PW2. The answers to issue number 8 are therefore in the negative – whereas issue number 9 is answered in the affirmative.

Having found that the FDRs were not issued fraudulently and were for valid consideration, the cases cited by counsel for the defendants are clearly distinguishable from the case at hand. **Kredit Bank Cassel G.M.B.H. vs. Schenkers Ltd. and others [1927] All E.R. 421** involved a forged bill of exchange; **Ruben & Another v. Great Tingall Consolidated [1906] AC 439** involved a forged Share Certificate and **J.C. Houghton & Company v. Nothard Lower & Wills Ltd. [1928] AC 1** involved arrangements that were not authorized by the company. Those facts do not exist in this case.

Arising from the answers I have given above, I find and hold that the 2nd defendant owes the plaintiffs the sums stated in the FDRs produced in the consolidated suits. In normal legal language, the plaintiffs in HCCC No.3844 of 1991 have proved their claims on a balance of probabilities against the 2nd defendant.

With regard to the 1st defendant, it is common ground that it took over the affairs and management of

the 2nd defendant. What is disputed is the time when the take over took effect. In paragraph 2 of its defence the 1st defendant averred that it became the beneficial owner of 100% of the share capital of the 2nd defendant on 14.12.1989. DW1 in his oral evidence in court stated that the 1st defendant took over the running of the 2nd defendant on the said date. However, by Gazette Notice No.36 of 2.8.2002, the vesting date was stated to be 15.7.2002. In my view, the date given in the Gazette Notice did not affect the rights of the plaintiffs in view of the admission made by DW1 and the fact that in reality the 1st defendant took over the 2nd defendant on 14.12.1989. I therefore find that the 1st defendant is liable to the plaintiffs for the various sums claimed on account of the FDRs. Issue number 7 is there answered in the affirmative.

The above findings settle issue number 10 which is answered in the negative. Issues Numbers 11 and 12 need not be considered in view of the above findings.

The upshot is that the plaintiffs, save for the plaintiff in HCCC No.3844/91 have proved their claims against the defendants on a balance of probabilities and I enter judgment for each of them in terms of prayers (a) and (b) of the prayers with costs.

DATED and DELIVERED at NAIROBI this 10th day of May 2007.

F. AZANGALALA

JUDGE

Read in the presence of Ms. Githii for the plaintiffs and Ms. Kimotho for the defendants.

F. AZANGALALA

JUDGE 10/5/07