REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 1484 of 2000

MKM TRADING COMPANY LIMITED ..... 1ST PLAINTIFF

MERVYN K. MELVILLE ..... 2ND PLAINTIFF

versus

NEXT TECHNOLOGY LTD .....
DEFENDANT

JUDGMENT

The Plaintiffs claim is for Kshs. 5,888,471 being money lent and advanced jointly by the plaintiffs to the defendant or on the Defendants order during the year 1999 inclusive of the agreed interest on the monies lent and advanced.

The Plaintiffs further claim interest at 30% with effect from 1:6.2000 or interest in lieu of loss of usage of money due to the Plaintiffs at prevailing convenient rates.

The Plaintiffs have also claimed general and punitive damages for breach of contract and costs and interest thereof. Of course there cannot be a claim in law for general damages for breach of contract. However damages for breach of contract would be in order.

The defence raises the following grounds:

(1) That the second Plaintiff had agreed to become a director of the Defendant company and the payment as per the initial agreement was to represent the second Plaintiffs input in the company including sale of shares and following the second plaintiffs failure to take up the shares there was a total failure of consideration and for this reason the money is not recoverable.

(2) That by a subsequent Agreement entitled “the repayment schedule the plaintiff had agreed to pay as per the schedule but again the plaintiffs breached the Agreement by failing to pay an overseas supplier of secondhand computers called Tier One. It is also claimed that the repayment by the defendants was on condition that the second plaintiff complies with the repayment schedule and having failed to comply the schedule was null and void and therefore the moneys paid were irrecoverable.

The defendant has set off and also counterclaimed against the plaintiffs

(i) for damages for breaches of both agreements

(ii) Loss of business and profits for 3 months due to delay in payment

(iii) Expenses incurred in processing of dishonoured cheques in the UK.

The agreed issues are:

(a) Whether there was any agreement between the plaintiffs and the defendant and if there were any breaches of it

(b) If the purported proposal of 3rd July 1999 could be construed as an agreement or did it remain a proposal, not more than an offer"

(c) Were any formalities for transfer of shares accomplished so that the transfer could take place?

(d) Is the defendant estopped from denying the existence of the agreement termed are repayment schedule" dated 27th September, 1999

(e) Was the purported agreement rendered impossible and frustrated due to subsequent change of circumstances and as a result of the acts of the defendant?

(f) Can these purported breaches of the repayment schedule render the monies received by the defendant as not claimable?

(g) Was the repayment of the principal claim conditional on the second plaintiffs complying with the repayment schedule at all?

(h) Is the counterclaim vague, imprecise and unsustainable in law or fact. And are damages claimed therein remote, unclaimable and unmitigated?

(i) Are the plaintiffs entitled to the reliefs sought in the plaint?

The court has examined, evaluated and considered the evidence adduced by the parties. The starting point is to examine the common ground. The defendant through its director Mr John Hurst has clearly admitted that the total moneys paid to the company or on behalf of the company by the plaintiffs is Kshs 5,888, 471 but part of it namely British pounds 14811.63 was received outside the agreed time thereby occasioning loss and damage to the defendant company as the repayment was at least received one month late. This delayed the shipping of computers from the United Kingdom to Kenya.

The defendants has claimed that had the payment been received by the United Kingdom suppliers as per the Repayment Schedule the goods should have been received in Kenya before Christmas of 1999 and before the opening of schools. It is claimed that the type of business would have performed better during Chrismas and the beginning of the term. Since this did not happen the defendants lost good business. The defendant did incur expenses in traveling to the United Kingdom where upon arrival they were advised by the supplies to their horror that the two cheques issued in favour of the suppliers by the plaintiffs and or their agent had bounced or returned unpaid. The first agreement namely that of sale of shares to the second plaintiff is based on the written proposal P Ex 1 dated 7th July 1999. The total amount payable by the second plaintiff was Kshs 11,000,000. According to the proposal the purchase of 49% shares in the defendant company was Kshs5,000,000 and the Director's in put capital was Kshs 3,100,000. The defendant claims that since the second plaintiff did attend the meetings of the Directors of the Defendant Company on 9th July, 1999, he did so in his capacity as a director. The Minutes have been exhibited as D Ex 2 and by virtue of attending the meetings he did hold himself out as a director.

According to the minutes the three persons who attended namely John Hurst, Mervyn K. Melville and

H. Wanjiru Mwangi were described as members but the body of Minutes refers to the three persons as directors. The Minutes are however signed by Mr Hurst only and the second plaintiff has claimed that he had to attend because he had already expended moneys towards the venture and that he had not made up his mind to join as a director. According to the evidence adduced and which the defendants director Mr John Hurst does not dispute the plaintiff did pay on behalf of the defendant Kshs5,888 471 but he contends that the moneys are not refundable because the second plaintiff was a director of the defendant company. He does not however indicate the value of the input of the other directors as at the time of the offer and how such value compares to the ratio offered to the second plaintiff. It as also not explained why it was necessary to enter into the second agreement concerning payment of the amounts paid or to be paid by the second defendant on behalf of the company notwithstanding the existence of the first Agreement.

The other common ground is that none of the parties has claimed that any of the agreements was ambiguous or vague. The reason for this is quite evident in that both the proposal in respect of the shares and the repayment schedule are very clear. The proposal ends by expressing the hope that the second plaintiff would find merit in it – see the first sentence in the final paragraph of the proposal. It follows that the proposal was definitely an offer. The question is, was it accepted? According to the defendant the proposal was accepted by the second plaintiff when he attended the company meeting of 9th July 1999 and other meetings. Can attendance at a meeting constitute acceptance in contract law to a written offer? I find that this cannot constitute acceptance in law or under the company law. In cross examination Mr Hurst admitted that Kshs5888 471 was due to the said plaintiff and that "they" would pay in accordance with the repayment schedule subject to the taking into account the loss incurred as a result of the default. He further adds, the schedule became null and void as per its terms following failure to pay British pounds 14,811.63 as stipulated in the new schedule. Both parties in the absence of any ambiguity in the agreement must be held to their bargains. The defendant admits that although British pounds 14,811.63 was paid outside the period stipulated it was none the less paid and goods arrived in April 2000. By a letter marked D Ex 4 from the defendant company Advocates Ms Rumba Kinuthia & Company Advocates the two directors of the defendant requested the advocates to prepare the necessary documents to effect the sale of shares and also seeks advice on the required company resolution. There was no evidence offered that the necessary steps were taken to effect the transfer of the shares and to have the second plaintiff as a director of the defendant company. Mr Hurst told the court that the matter was with the lawyer! John Hurst admitted that the name of the second plaintiff did not feature on the note paper of the company and that in the annual return to the Registrar of Companies after the proposal and his name was not also reflected.

On the basis of the above evidence the court is of the view that the offer was never accepted and remained a proposal.

Turning to the next agreement concerning the repayment schedule Dx3 again the agreement speaks for itself and since both parties are in agreement that condition 4 of the Agreement was never complied with by the plaintiff's on the whole schedule became null and void. The big question was what the words null and void mean or meant to the parties obviously because the plaintiffs filed the suit to them it meant they were entitled to whatever they had paid plus interest. To the defendant it meant non recovery of what had been paid although as indicated above the Mr Hurst in cross examination did accept the responsibility to pay as per schedule the principal and interest less the loss incurred. I find the sum of Kshs5888, 471 is recoverable from the defendant as money had and received or paid for a consideration that failed and or as friendly loan as per the repayment schedule. The defendant did admit this in cross-examination. However he did counter this by saying that they had incurred loss due to the plaintiffs, default. The Agreement having become void, I further find that there is no basis for the claim based on alleged further interest stemming from a void agreement.

It is not in dispute that as at the operative date the funds had not been paid as per the schedule. The effect of non-payment was to render the contract null and void. At this point in time the defendant as the aggrieved party had two options namely to regard the contract as discharged by breach and rest his claim on the basis of contract and seek damages for its breach or treat the contract as at an end and refund the moneys paid to him by the plaintiffs. However the defendant went on to accept payment after the

operative date but all the same it did not transfer the shares to the second plaintiff as initially intended although it had instructed its lawyer to make the necessary arrangements. This was not done and the plaintiffs sued the defendant for a refund on the basis that the moneys paid represented an ineffective contract and there was total failure of consideration since the second plaintiff did not become a director of the defendant company or its shareholder.

Alternatively the schedule was automatically void as per its terms after the operative date.

The courts finding on this is that the moneys were paid under an ineffective contract and there was total failure of consideration. Alternatively the schedule was null and void as expressed therein after the operative date. In my holding, moneys paid in both situations are recoverable by the plaintiff in quasi contract. Thus is *WILKIMSON v LLOYD* (1845) 7 QB 27,

"**The plaintiff agreed to buy from the defendant certain shares in a private company operations under a deed of settlement. It was necessary under the terms of this deed, for each shareholder to be approved by the directors of the company. The plaintiff received a transfer of the shares from the defendant and paid for them. Meanwhile before this payment and without the plaintiff's knowledge, the directors had passed a resolution refusing to allow any transfer of shares by the defendant as he had instituted certain legal proceedings against the company. The transfer to the plaintiff was therefore not approved by the directors. The shares depreciated in value."**

It was held that the plaintiff could doubtless have claimed damages for this depreciation in an action of contract against the defendant. He preferred, however to treat the contract as discharged by the defendants failure to secure an effective transfer of the shares and sue in quasi contract for the return of the money. It was further held that the defendant was bound to procure the assent of the directors and to take all necessary steps to invest the plaintiff with the property in the shares, that his failure to do so went to the root of the contract and that the plaintiff could recover.

I find that there are striking similarities between this case and the case before me in that the shares were never transferred to the second plaintiff as intended although funds were all the same accepted by the defendant after the operative date. The defendant did not sue for breach of contract although it had set up a counterclaim which it has not proved by way of evidence. Having accepted the money there is total failure of consideration and the court finds that the funds as claimed are recoverable. As the plaintiffs did not receive any benefit at all from the transaction or ineffective contract the plaintiffs claim is for a refund for total failure of consideration and not for breach of contract to transfer the shares and I therefore disallow the claim on interest.

Turning to the set-off and counterclaim I am full agreement with the plaintiffs' counsel submission that no evidence has been offered by the defendant as regards damages for breach of contract and that the special damages pleaded were never proved namely loss of business and profits in respect of October, November and December, 1999 or the loss incurred in processing the dishonoured cheques in the United Kingdom. The defendant should have proved the amount due to him in respect of this part of the claim on a balance of probabilities. There is no single document to support this including an air ticket.

On the basis of the above evaluation I enter judgment for the plaintiffs in the sum of shs5888.470.40 with interest there on at court rates from the date of this judgment until the date of payment. As regards costs the plaintiffs having been in default of the repayment schedule are not entitled to costs and I therefore order that parties bear their respective costs.

DATED and delivered at Nairobi the 23rd day of September, 2006.

J.G. NYAMU

JUDGE