

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 815 OF 2002

FINTEL LIMITED.....PLAINTIFF

VERSUS

JONATHAN MWANGI WAIGWA.....DEFENDANT

JUDGEMENT

By a Plaint dated 6.05.2001 but filed in Court on 3.07.2002 the Plaintiff claims a sum of Kshs. 1,577,842.30 from the Defendant. The circumstances giving rise to the claim in the suit are set out in the Plaint itself but were reiterated at the hearing of the case on 25.05.2004 by the Plaintiff's sole witness, Evans Kuria Thegeya, and indeed the Defendant himself, Jonathan Muraguri Waigwa, with very minor variations.

For the record, the name of the Defendant, **Jonathan Muraguri Waigwa** was amended with leave of the court during the hearing of the suit from the name **Jonathan Mwangi Waigwa**.

By agreement of both parties Advocates, the only issue at the trial was whether or not the Plaintiff did effect payments to ALICO Kenya Ltd on behalf of the Defendant.

The evidence of the Plaintiff's sole witness Evans Kuria Thegeya (PW1) was that he and his brother Hillary Maina Thegeya owned and managed three companies, Pantech Kenya Ltd, Fintel Limited and Divan Enterprises Ltd. PW1, Evans Kuria Thegeya told the Court that the three companies engaged in different trades, Pantech Kenya Ltd dealt in the distribution of industrial and automotive filters, Fintel Ltd, the Plaintiff herein was a property company, while Divan Enterprises Ltd dealt in motor vehicle spare parts. PW1 told the Court that he and his brother still control the three companies. PW1 told the Court that the Defendant was headhunted from Unga Ltd which was at time the undergoing a management reorganization, and was brought in as a director into the Plaintiff's associate company, Pantech Kenya Ltd with effect from 31.07.1997 and remained in that position until he exited from the company on or about 31.12.1998.

According to PW1, the Defendant was brought in as a director and not as an employee, to grow the business of Pantech Kenya Ltd. He was not to be paid a salary. His remuneration was to be based upon commissions of 20% on sales in the first year, and in the second year would remain the same, but be divided into 10% commission on sales, and 10% commission on income. In the event the business of Pantech Kenya Ltd did not grow and the Defendant was unable to earn sufficient income on commission to meet his financial obligations including mortgage repayment instalments to ALICO Ltd. Pantech Kenya Ltd arranged with the Defendant's understanding and agreement that its sister or associate company, Fintel Ltd, the Plaintiff, would step in and pay on behalf of the Defendant, mortgage instalments to ALICO Kenya Ltd. The understanding is set out in a memo dated 8.10.1998 from the Defendant to the Board of Pantech Kenya Ltd.

Although the Defendant tried to deny the authorship of this document, I have no doubt that it was authored by him. It is part of the Plaintiff's bundle of documents, filed in Court on 11.07.2003. It was not challenged.

The document is entitled "Exit Proposal" and recites the genesis of the relationship between the Defendant, and Pantech Kenya Ltd, and of the Ngong properties. The Exit proposals acknowledged that it was the intention of the Defendant upon joining Pantech Kenya Ltd, to transfer the two properties, Ngong/Ngong/10482 and Ngong/Ngong/10483 to Fintel Ltd at a price of Kshs. 6.3 million, the value given to the two properties by Ngotho Wathome & Co. Ltd Valuation Report dated 13.11.1997. In consideration of the transfer, FINTEL Ltd (the Plaintiff) would take over the outstanding balance on the mortgage accounts with ALICO both bearing the same Number 391. The outstanding accounts as at 31.07.1997 were Shs. 2,423,201.01 and shs. 1,752,778.07 respectively. The rental due from the properties would be payable to FINTEL LTD.

The exit proposals also acknowledged that although FINTEL LTD had been servicing the mortgage with ALICO it had ceased being interested in the transfer of the properties, and would stop servicing the mortgages once the Defendant ceased being a director of Pantech Kenya Ltd. In a memo entitled "Resignation" dated 31.12.1998, the Defendant says:-

"I would like to propose that I give an undertaking to settle the amount I owe Fintel instead of a security, at least for the next six months, because I will need both titles to secure my intended borrowing."

This clearly shows that the Defendant rejected the Plaintiff's proposal to secure its payments already made. The Defendant's evidence that there was no consideration for the payments is simply not sustainable. There is clear acknowledgement that the Plaintiff paid moneys on behalf of the Defendant in consideration of the Defendant later transferring the properties to the Plaintiff. The principal reason for not doing so is because the Defendant had himself bought the properties at an auction and he did not readily have the titles for transfer.

At the end of the Defendant's directorship with Pantech Kenya Ltd, the Plaintiff had paid to ALICO on behalf of the Defendant, and in consideration of intended transfer to the Plaintiff, a sum of Kshs. 1,343,844.70. In addition, the Defendant also acknowledged in his evidence in Court, that he had received a sum of Ksh. 234,000/= by way of rental for one of the properties.

In his Defence, the Defendant claims that he never entered into a Sale Agreement or Rent Share Agreement with the Plaintiff, and that therefore the Plaintiff's claim for shs. 1,577,842/30 against the Defendant is baseless and called for strict proof.

It is indeed correct that no Sale Agreement or Rent Share Agreement was produced. PW1 and DW1, (the Defendant himself) acknowledged that there were no such agreements. The correspondence by way of memos cited above clearly shows that it was the intention of both parties to sell and transfer, but by virtue of the premature exit of the Defendant from the Plaintiff's associate Company Pantech Kenya Ltd, the transaction was not completed but the funds were paid, and that the Defendant received rentals for one of the properties. This he should account to the Plaintiff. It does not change the position that no formal agreement were signed and exchanged for equity deems as done that which ought to be done.

In the upshot therefore I find on evidence of both the Plaintiff and the Defendant

himself that the Defendant owes the Plaintiff the sum of Kshs. 1,577,844.70 comprising of direct payments by the Plaintiff to ALICO for the credit of the Defendant (Kshs.1,343,844.70) and rents received for the account of the Plaintiff (Kshs 234,000/=).

The interest rate charged by ALICO as at January 1998 was 23%. I would allow this rate of interest and not 30%. There shall therefore be judgment for the Plaintiff in the sum of Kshs. 1,577,844.70 together with interest at 23% up to the date of this judgement, and thereafter at Court rates until payment in full.

Dated and delivered at Nairobi this 30th day of September 2004.

ANYARA EMUKULE

JUDGE