



**Finaltus Ventures Limited v Safaricom Investment Co-operative Society
Limited (Civil Appeal E307 of 2023) [2024] KEHC 11079 (KLR)
(Commercial and Tax) (16 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11079 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E307 OF 2023
JWW MONG'ARE, J
SEPTEMBER 16, 2024**

BETWEEN

FINALTUS VENTURES LIMITED APPELLANT

AND

**SAFARICOM INVESTMENT CO-OPERATIVE SOCIETY
LIMITED RESPONDENT**

*(Being an Appeal from the Judgement and Decree of Hon. C.K. Cheptoo, PM dated 19th
October 2023 at the Commercial Magistrates Court, Milimani in Civil Case No. E7470 of 2020)*

JUDGMENT

Introduction and Background

1. Before the court for determination is an Appeal filed by the Appellant supported by the grounds as set out in its Memorandum of Appeal dated 17th November 2023 wherein the Appellant seeks to set aside the lower court's judgment of 19th October 2023 where the Appellant's suit was dismissed and judgment entered in favour of the Respondent.
2. In the suit at the subordinate court, the Appellant sought inter alia a sum of Kshs.5,806,250.00/= as the success fee arising out of a Transaction Advisory on Debt Restructuring Agreement that the parties had entered into in March 2019("the Agreement").
3. As per the Agreement, the Appellant stated that it offers Investment and Transaction Advisory whereas the Respondent deals in Real estate development, buying and selling of land, Value addition on land parcels, Commercial farming and Trading in equity and money markets. The Appellant was thus engaged by the Respondent to provide an independent assessment of the latter's debtors' portfolio and



provide transaction advisory on structuring the debt where the Appellant was expected to conduct due diligence on the portfolio to determine the status and that, based on the due diligence aspect, the portfolio was to be grouped into appropriate classes. The Appellant was then to prepare relevant documents, source for investors to take up the whole or portions of the debt portfolio and close deals with the selected investors.

4. In consideration of the Appellant providing the aforementioned services, the Appellant was to pay an advisory fee of Kshs. 2,400,000/= exclusive of VAT and reimbursements. The Respondent was also to pay a success fee on completion of a transaction ("the Success Fee") which was calculated as a percentage of the total value raised. A transaction was deemed completed when an offer letter from a financier was signed and accepted by the Respondent and over Kshs.100/= million worth of funds raised attracted a Success Fee of 2.5% of the funds raised exclusive of VAT.
5. The Appellant claimed that it not only conducted its obligations under the Agreement but also successfully and sufficiently fulfilled all the agreed assignments and that it sourced an investor, Stanbic Bank Limited (Stanbic) which offered the Respondent and the Respondent agreed that Stanbic would take over a debt portfolio of Kshs. 250,000,000.00/=. The Appellant averred that Stanbic drafted an Agreement for Loan Take over between itself and the Respondent which it claimed the Respondent signed and therefore duly accepted on 3rd February, 2020. The Appellant confirmed that it was duly paid the Kshs.2,400,000.00/= and averred that it was also entitled to the Success Fee having managed to raise Kshs. 250,000,000.00/= from Stanbic. It thus claimed 2.5% of this amount which was Kshs. 6,250,000.00/= plus interest of 2% per month and thus, it sent the Respondent an invoice of Kshs. 7,250,000.00/= on 3rd March 2020 which it states the Respondent only paid Kshs. 2,000,000.00/= on 14th May 2020, 2 ½ months after the offer letter was signed and invoice sent.
6. The Appellant stated that despite not paying the full amount, the Respondent issued it with a withholding tax certificate for the full success fee being Kshs.312,500.00/= and also withholding tax certificate on the full VAT amount charged paid being Kshs. 125,000.00/= which actions it claimed was an admission of debt. The Appellant therefore argued that the Respondent admitted that it was under a contractual obligation to pay the Plaintiff Kshs.7,250,000.00/=. It thus calculated the total outstanding amount as Kshs.5,806,250.00/= after factoring in the amount already paid, the withheld taxes and monthly interest and therefore claimed this sum.
7. In response, the Respondent generally denied the Appellant's claim or that it was entitled to summary judgment or judgment on admission. It admitted to issuing the withholding tax certificate but denied that it did not pay the full amount under the Agreement. It averred that it duly performed its obligations under the Agreement and urged the court to find that the Appellant's suit was ill founded in the circumstances.
8. When the matter was set down for hearing, the Appellant called its director, Paul Kamau as its witness (PW 1) whereas the Respondent called its Legal Officer, Agnes Bukachi (DW 1). In the judgment, the subordinate court stated that some of the issues for its determination included whether there was a valid and enforceable agreement between the parties, whether the Appellant performed its part of the agreement and whether the Appellant was entitled to the reliefs sought in the plaint.
9. The subordinate court found that the Appellant had proved that there was a valid agreement between the parties, that there was no agreement signed between the financier and the Respondent and that the only agreement presented was the one signed by the Appellant and the Respondent. That there was no loan takeover agreement presented and as such, the Appellant did not perform part of its agreement so as to be entitled to the Success Fee.



10. It is for these reasons that the suit was dismissed hence the present Appeal which was disposed by way of written and oral submissions by the parties' respective counsel. Since the parties' submissions advance the positions, I have already summarized above, I will not highlight the submissions but only make relevant references in my analysis and determination below.

Analysis and Determination

11. From a careful analysis of the pleadings filed by the parties, I note that the parties agree that since this is the first Appeal, this court is enjoined by the provisions of section 78 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) to evaluate and examine the subordinate court record and the evidence presented before it in order to arrive at its own conclusion. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 where the Court of Appeal outlined the duties of a first appellate court as follows:-

[An appellate court] is not bound necessarily to accept the findings of fact by the court below. An Appeal to this court ... is by way of retrial and the principles upon which this court acts in such an Appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...

12. With the above in hindsight, the court is called to determine whether the subordinate court arrived at the correct conclusion both in law and fact in its finding that the Appellant was not entitled to the Success Fee as sought in its suit. As stated, the Clause 8 of the Agreement provided that the Success Fee was "...payable on completion of a Transaction ("the Success Fee"), a fee calculated as a percentage of the total value raised. A transaction will be deemed completed when an offer letter from the financier is signed and accepted by SIC.' 'SIC' in this case was the abbreviation the Respondent. The question before the Court is thus whether a transaction was completed with the Respondent signing an offer letter from the financier, Stanbic. The Appellant produced an "Agreement for Loan Take-Over" document which it stated was drafted by Stanbic and that the Respondent signed this document and the same was forwarded to Stanbic on 3rd February 2020, on the same day it was returned by the Respondent. For this, the Appellant stated that it had discharged its obligations under the Agreement and was thus entitled to the Success Fee.
13. I have carefully gone through the record more so the "Agreement for Loan Take-Over" and the parties' testimonies before the subordinate court. I note that PW1 admitted that it had not filed an offer letter from Stanbic and that there was nothing to show that the Agreement for Loan Take-Over originated from Stanbic. It should not be lost that sections 107 and 108 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) provides that he who asserts must prove and that a person has the burden of proving facts that are peculiarly within its knowledge as provided by section 112 of the *Evidence Act* which states that, "In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."
14. Therefore, it was incumbent upon the Appellant to prove that the "Agreement for Loan Take-Over" was an offer letter as per the Agreement and that the same was from the financier, Stanbic. I agree with the findings of the lower court that the absence of an offer letter, more so one that originated from the financier means that the prerequisites for the transaction had not been met and the transaction was not complete as per Clause 8 of the Agreement. The Appellant could not therefore claim payment of the Success Fee for an incomplete transaction. Once it was clear that the transaction was not complete for not having an offer letter from Stanbic, the Appellant was not entitled to claim the Success Fee



and it did not matter whether the Respondent withheld any taxes and/or issued a withholding tax certificate to the Appellant for the sum claimed. In any case, such issuance of a withholding certificate and/or payment of any taxes thereof was a loss of time and/or resources to the Respondent and not the Appellant.

15. In the foregoing, it is my finding that the subordinate court was right in its finding that there was no evidence of an agreement and/or a signed agreement between the financier, Stanbic and the Respondent. As such, I agree with the courts finding that the Appellant was not entitled to the Success Fee stipulated in the Agreement between the parties herein. I find no good reason to disturb the Judgment of the trial court.

Conclusion and Disposition

16. In the circumstances and in view of the above findings, I find that this Appeal lacks merit and the same is hereby dismissed with costs to the Respondent.

17. It is so ordered.

DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 16th DAY of SEPTEMBER, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Achoki for the Appellant.
2. Mr. Wakwaya for the Respondent.
3. Amos - Court Assistant

