



REPUBLIC OF KENYA



**Kinuthia v Broadplace Corporate Enterprises & 3 others (Civil Suit E042 of 2019)
[2024] KEHC 15685 (KLR) (Commercial and Tax) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15685 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E042 OF 2019
FG MUGAMBI, J
DECEMBER 6, 2024**

BETWEEN

MARGARET WAIHERA KINUTHIA PLAINTIFF

AND

BROADPLACE CORPORATE ENTERPRISES 1ST DEFENDANT

INTER TROPICAL TIMBER TRADING LIMITED 2ND DEFENDANT

GEOFFREY NG'ANG'A KARIUKI 3RD DEFENDANT

ESTHER NJERI 4TH DEFENDANT

JUDGMENT

Background and introduction:

1. The plaintiff instituted this suit vide a plaint dated 20/3/2019. Her case is that on or about 18/2/2013, she and the 1st defendant entered into a joint venture agreement (JVA) for the purpose of supplying wooden poles to the Kenya Power and Lighting Company (KPLC), for tender number KP1/9AA-2/PT/50/11/12. She contends that the JVA was entered into pursuant to the tender agreement between the 1st defendant and KPLC whereby the 1st defendant was awarded the tender to supply treated power distribution wood poles.
2. According to the JVA the plaintiff was required to deposit the total sum of Kshs.10,000,000/= in the 1st defendant's bank account which would go towards procuring and the wooden poles. The profits would be shared on a 50:50 basis upon payment by KPLC.
3. The plaintiff contends that she complied and deposited the sum of Kshs.10,000,000/= in the 1st defendant's bank account and that the 3rd defendant acknowledged receipt of the same in his capacity



as director of the 1st defendant. Her case is that she only received the sum of Kshs.4,200,000/= from the 1st defendant towards satisfying its obligations under the JVA. Based on this, it is the plaintiff's case that the 1st and 3rd defendants committed a breach of the JVA.

4. The plaintiff further takes issue with the defendants for fraudulently misrepresenting to her that they were the only investors and that the profits would be shared equally. She prays for judgement against the defendants for Kshs.85,800,000/= with interest thereon until payment in full, a refund of Kshs.10,000,000/= invested as capital in the agreement, general damages and costs of the suit.
5. During the trial the plaintiff testified as PW1 and relied on her own written testimony dated 20/3/2019. During cross examination, the plaintiff testified that KPLC had made payments of Kshs. 60million to the 1st defendant although she did not have proof of this. It was her testimony that she and the 1st defendant opened a joint account for the proceeds but that no monies were deposited into the said account. She also confirmed that her claim was based on the JVA and that even if the contract was not completed, she was still entitled to Kshs.85,800,000/- which is 50% of the tender.
6. On re-examination, the plaintiff testified that she paid the Kshs.10,000,000/= in cash and the 3rd defendant signed an acknowledgement dated 30/4/2013 witnessed by PK Njiiru. It was her testimony that she received Kshs.4,200,000/= as proceeds from the venture, which is evidence that she was successful. She testified that the 1st defendant entered into another JVA that she did not know about.

The Defendants' case:

7. The defendants filed a joint statement of defence dated 24/5/2019. They contended that any contractual arrangement between the 3rd defendant and the plaintiff was purely that of a financier, and the plaintiff held no contractual interest in any works related to tender number KP1/9AA-2/PT/50/11/12. The defendants further averred that, even if there was an agreement to share profits, which they denied, such profits would be subject to deductions for expenses incurred in executing the assignment. Additionally, the defendants claimed that the contract was terminated midway, and the 1st defendant did not realize the anticipated profits alleged in the plaint.
8. The defendants deny that the plaintiff only received Kshs. 4,200,000/= but without prejudice, maintain that the plaintiff received amounts exceeding the cited figure and asserted that they would prove this during the hearing.
9. The court granted the defendants leave to file their trial bundle of documents out of time. This was conditional upon paying the plaintiff costs of Kshs. 80,000 and filing the bundle within five days of the court order, which was delivered on March 15, 2024. However, the defendants failed to comply with these directions, and as a result, their trial bundle is not part of the record.

Analysis and determination

10. In support of her case, the plaintiff filed written submissions dated 15/6/2021 while the defendants did not file any submissions.
11. It is evident that the 1st defendant was awarded a tender by KPLC for the supply of power distribution wood poles. This is supported by the notification dated 11/6/2012, and the tender contract agreement dated 20/6/2012, both of which were included in the plaintiff's bundle of documents. The plaintiff also produced official purchase orders issued to the 1st defendant by KPLC for the supply of treated wood poles.



12. It was incumbent upon the defendants to prove that the tender stalled halfway, if indeed that was the case. They did not produce any such evidence. The plaintiff had discharged her burden as required by law, by establishing that indeed the contract was awarded.
13. A copy of the JVA produced in the plaintiff's list of documents is executed on behalf of the 1st defendant and also by the plaintiff. The JVA confirms that the plaintiff would invest the sum of Kshs. 10,000,000/= towards the supply of the tender and that the 1st defendant would utilise the funds to supply the treated wood poles to KPLC. The plaintiff attached an acknowledgment from the 3rd defendant, acting as a director of the 1st defendant, confirming receipt of Kshs. 9,800,000/=.
14. Clause 4 of the JVA stipulates that profits generated from the tender would be shared equally (50-50) between the plaintiff and the 1st defendant. Other than filing a statement of defence, the defendants did not produce any documents to buttress their defence that the plaintiff had received monies beyond the Kshs. 4,200,000/=. As such, the evidence produced by the plaintiff and her averment that she only received Kshs. 4,200,000/= remains uncontroverted.
15. In the locus classicus case of National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd, [2002] 2 EA 503 the Court held as follows:

“A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge...”
16. Similarly, in the Court of Appeal case of Fidelity Commercial Bank Limited V Kenya Grange Vehicle Industries Limited, [2017] eKLR it was held:

“So that where the intention of parties has in fact been reduced to writing, under the so-called parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.... The supporting rationale for this rule is that, since the contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements of terms should not be considered when interpreting that written contract agreement, as the parties had consciously decided to ultimately leave them out of the contract. In other words, one may not use evidence made prior to the written contract to contradict the ultimate contract that has been reduced into writing.”
17. Guided by the above authorities, I am inclined to enforce the terms of the Joint Venture Agreement (JVA). It is evident that the parties were explicit about the terms they intended to govern their business relationship. However, the defendants breached those terms, causing detriment to the plaintiff. Consequently, the plaintiff is entitled to the remedies sought, having proven her case on a balance of probabilities.



Disposition

18. Accordingly, judgment is entered in favour of the plaintiff and against the defendants for:

- i. Kshs. 85,800,000/= with interest from the date of judgment until payment in full;
- ii. Kshs.5,600,000/= (being Kshs. 9,800,000/= acknowledged as received by the 1st defendant less Kshs. 4,200,000/= which the plaintiff confirms having received from the 1st defendant as refund for her investment;
- iii. Costs of the suit; and
- iv. I find that no general damages are payable for breach of contract.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 6TH DAY OF DECEMBER 2024.

F. MUGAMBI

JUDGE

