



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 67 OF 2016

MOHIDEEN A. GILANI.....PLAINTIFF

-VERSUS-

ABDUL MEHDI MOHAMMED.....1ST DEFENDANT

FARID MEHDI MOHAMMED.....2ND DEFENDANT

JUDGEMENT

BACKGROUND

1. The plaintiff instituted this suit through plaint dated 27th June 2016 and filed on 28th June 2016 seeking judgment to be entered against the defendants for the following prayers: -

- a. Refund of the Plaintiff's capital investment of a sum of Kshs. 520,000,000/= plus 5,000,000.**
- b. Interest on the above at court rates and / or prevailing bank rates whichever is higher.**
- c. General damages for breach of contract.**
- d. Costs of the suit plus 16% VAT.**
- e. Any other relief the court deems fit.**

2. The plaintiff's case is that he entered into a contract with the defendants being shareholders and owners of Kwa Ndege Ltd to acquire 167 shares of Kwa Ndege Ltd which translated to 33.33% of the company and for plaintiff to facilitate property development dubbed as Airport Gardens situated at Syokimau.

3. The plaintiff's argument is that USD 520,000 and additional kshs 5,000,000 was paid by him and his partner **Ekbha Rayani** as capital investment to be refunded in 18 months' period. The plaintiff alleges breach of the said contract and particularized breach of the contract/fiduciary duty and fraud as hereunder: -

- a. Failure to timely communicate actual financial information in relation to the investment.**
- b. Withholding crucial information in relation to the investment and employing the same in their own interest at the expense of the Plaintiff.**
- c. Knowingly manipulating company resources, funds and information and eventually defrauding the Plaintiff of his capital investment.**
- d. Deliberately or recklessly exposing the plaintiff to unwarranted financial risk.**
- e. Disposal of land without the knowledge of the shareholders to the detriment of the company**

4. The defendants filed defence 1st day of August 2016, denied the defendants allegations. The defendants further argued that the money paid

by the plaintiff and his partner **Ekbah Rayani** was for purchase of shares in Kwa Ndege Company Limited and was not loaned to them as alleged by the plaintiff and stated that the plaintiff had declined being a co- director of the Kwa Ndege Ltd and every shareholder had contractual obligation to outsource financing to construct and sell over 200 apartments.

PLAINTIFF'S EVIDENCE

5. **Mohideen Alibhai Gilani** PW1 testified that he signed witness statement filed on 28th June 2016, together with the documents dated 27th June 2016, marked as EXB1 and adopted the same before court. He informed the court that he had known the defendants for a long time as they were good friends and in March 2010 the plaintiff agreed with the Defendants to participate in development of a project known as Airport Gardens in Syokimau under company known as Kwa Ndege Ltd. The plaintiff testified that he purchased 33.3% shares. He said that his family, friends invested 520,000 Dollars plus 5 million shillings in the project being 520 Dollars to buy off the shares and part of it to be used in the construction.

6. He testified that the investment was a loan to the company and it was a term of the agreement that once construction started, the money would be refunded within 18 months and profits would be shared between the partners being **Abdul** and his brother 66.67% and the plaintiff 33.33%. He said he was buying shares for his family, his brother in law's friend and himself. He said the friend is from Australia and that his brother in law **Ekbah** invested in the project.

7. He testified that he was not assigned any role because he had undergone surgery and the defendants were handling the project; and once in a while he would get email on how the project was going on.

8. The plaintiff testified that it was an express term of the contract that the defendants would disclose to the plaintiff as a shareholder, information relating to the progress of the development/investment, accounts expenditure or any corporate disclosures. He said the defendants kept giving him information that the project was going on well. Saying he would get the deposits but they were lying.

9. He further testified that at some point, the defendants agreed to sell the property because the value had gone up. He said he sent **Mr. Musangi** but they were not open to him and he later learnt that the property was under receivership and that he had not been supplied with any statements of accounts on how the money was spent.

10. He said he tried many times to advertise sale of property and indicated anybody interested to get in touch with 1st defendant. He said the nature of properties were apartments approximately 11 in number and each of the apartment was to be sold independently but they were not sold because none of them got completed. He said he was not given accounts for sale or use of money and his money has not been refunded after the 18 months.

11. On cross examination, the plaintiff said he did not approach defendants but they were the ones who approached him for financing as the directors and shareholders in Kwa Ndege Company; that they approached him to finance the project called Airport Gardens which was registered under the company Kwa Ndege Ltd.

12. He confirmed that he never signed any official agreement; that his investment was to be by way of shares and profits in the company. He confirmed that he became a shareholder in the company when he paid USD 520,000 to Kwa Ndege's account and the 1st defendant confirmed through email that they had received the money; that part of the money was to pay the owner of the land.

13. He said the Certificate of title are in the name of Kwa Ndege and that the company acquired the property. He said after payment of the \$ 520,000, he was informed that the land owner required 5 million more and at that time he helped the company get more financing from Prime Bank and a facility of Kshs 70 million was advanced to the company but the loan from Prime Bank was not paid; he said he managed to get statements from Prime Bank.

14. He said Prime bank appointed a receiver manager in the project for non-payment of the loan and the project is still under receivership. He confirmed that profits would be realized if the project was completed but it is with the receiver. He said he wants a refund of his money injected into the projects.

15. The plaintiff stated that he learnt that the property had been placed under receivership 5 to 6 months after and that one apartment had been sold to one **Bharat Dabasiya** for kshs 3,500,000 which was never accounted for and that no accounts have been given to him and all information sent to the plaintiff by Prime Bank was withheld by the defendants whose address was used to deliver the same.

16. The plaintiff confirmed that there was no formal agreement between the parties relating to purchase of shares.

DEFENDANTS' EVIDENCE

17. **Abdul Mohdi Mohammed** DW1 testified that he signed witness statement filed on 12th October, 2018 together with the list of documents dated 11th October 2018 marked as DEXB 1, and adopted the same as his evidence. He testified on his behalf and that of his co-defendant.

18. DW1 testified that the project known as Kwa Ndege started in 2006 with **Ruth Mumo** who owned original plot measuring 5 acres. He said in 2010, during the burial ceremony of **Gilani** (plaintiff's) wife, he met Gilani's brother in law **Ekbah Rayani** (brother to his late wife) who said he is a property developer and that he would source funding.

19. He said he talked to the plaintiff about his project in Syokimau and informed him that a shareholder who was also the land owner wanted

to exit and that she had already sold the land to the company. He said the plaintiff and his brother in law came to Nairobi in mid-March 2010, and went to the site and that there were few mansionettes under development, while the rest of the 5 acres was empty.

20. DW1 said that he explained to them of the project they had with Kenyans in diaspora in USA and that the land had been divided into 75 plots with titles which originally belonged to Kwa Ndege and out of the 75 plots, they had transferred 31 plots to Kenyans in diaspora. Further that they had a tripartite agreement between new owners (diaspora), KCB and Kwa Ndege, where KCB was to mortgage finance the development of mansionettes.

21. He said he further explained to them that that part of development was not available because of the tripartite agreement but the balance of 44 plots were still in the name of Kwa Ndege and they suggested that the 44 plots be changed to multi-dwelling apartments as their neighbor had done. DW1 further stated that the problem at that time was land owner who was to be paid 40.5million for her shares in company and the plaintiff was willing to pay off the land owner and take over not only her shares but add; and it was agreed that they take 33.3% of the company.

22. He stated that they agreed to transfer very quickly 40.5 million for shares and 5 million to use to get change of user to be accomplished. He said that the 45.5million was transferred to Kwa Ndege in Kenya Shillings and that it took a whole year to pay the amount of Kshs 45.5million; and the money paid was for purchase of 167 shares which was 1/3 of the company.

23. DW1 testified that there was no provision to refund the money in 18 months and stated that the money was for purchase of shares and the plaintiff received shareholding. He said that it was the proposal of the plaintiff that they embark on apartments and not mansionettes and when they indicated they did not have enough resources, the plaintiff brought in Prime Bank as a financier; that Prime bank insisted on personal guarantees and the 2nd defendants and plaintiff gave personal guarantee.

24. The defendant added that with the financing from the bank they managed to complete the apartments and were ready for occupation but what was missing was money for advertising and the bank interest. He said the current position is that 5 apartments have been sold from Kwa Ndege Ltd.

25. On cross examination, DW1 confirmed that at the time **Ruth Mumo** was still a shareholder, 5 acres were transferred to Kwa Ndege and 31 flats were to be sold to Kenyans in Diaspora had the titles transferred. He further stated that the mortgage for the 31 flats were to be financed by KCB and the 31 flats were not placed under receivership and Mr. Gilani was given 167 shares. He confirmed that each share costs 100/= each at inception of the company. He said Ruth owned 10% of the company which is 50 shares and 50 shares were to be sold to plaintiff but upon negotiation the shares were added to 167 shares. He said after the title was transferred, share value of the company increased.

26. He confirmed that he had not produced accounts of the company and at the time negotiations took place and that the company had 44 plots of about 1 million each and confirmed that in the year 2015 the whole project was under receivership.

27. He said on 28th July, 2015 there was a discussion with Mr. Gilani, the bank and himself to bring down the price of apartments from 6 million to 4.5 million and the email written on 6th May, 2015 in reply to an email by **Rehani** dated 25th April, 2015 addressing the challenges the company was facing and it did not state that the money was being refunded.

PLAINTIFF'S SUBMISSIONS

28. The plaintiff in submission dated 18th August 2020 started by summarizing evidence adduced in court as captured above. He submitted that he purchased shares from a registered company and that no formal agreement on purchase of shares was done but amounts loaned were paid directly to the company. Plaintiff submitted that the payments was in part payment of shares and in part loan to be paid within 18 months; and that the company required additional financing which he assisted to be acquired from Prime Bank.

29. The plaintiff submitted that clarification was made that shares were purchased at kshs16,000 @ kshs100 per share and that the alleged property had already been bought by the company from **Ruth Mumo** who was once a shareholder.

30. The plaintiff submitted that DW1 confirmed that he was the one running the affairs of the company and confirmed that he had not furnished the accounts of the company to the plaintiff.

31. The plaintiff raised the following issues: -

- i. Whether a valid contract existed between plaintiff and defendants.
- ii. Whether the defendants are in breach of the contract and fiduciary duties as directors.
- iii. Whether plaintiff is entitled to prayers sought.

32. On whether there was a valid contract, plaintiff submitted that evidence adduced affirmed existence of a contract; that an offer was made on investment in Kwa Ndege Project by the defendants which was accepted by the plaintiff; that he gave consideration and in turn, the defendants registered the plaintiff in the company as shown by CR12 produced by defendant as shareholder and agreed to repay loan in 18 months' installments as consideration on their part.

33. The plaintiff submitted that both parties have produced evidence confirming money loaned being USD 520,000 with additional kshs

5,000,000 was paid by plaintiff at inception of the project.

34. The plaintiff submitted that the three fundamental elements of a contract being offer, acceptance and consideration were present in the contract entered into by the parties herein and cited the case of **RTS Flexible Systems Ltd v Molkerei Alois Miller GmbH & Co KG (UK Production) [2010] UKSC14 [45]** as cited in the case of **Mamta Peeush Mahajan [suing on behalf of the estate of the late Peeush Premal Mahajan] vs Yashwant Kumara Mahajan [sued personally and as executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan [2017] eKLR** where the court stated as follows:-

“The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be precondition to a concluded and legally binding agreement.”

35. The plaintiff submitted that the defendants do not dispute that the sum of USD 520,000 and kshs 5,000,0000 was received from the plaintiff; the mutual contract being that the plaintiff would grant a loan to be paid in 18 months and it therefore follows that the agreement is not denied; and there was therefore a valid contract.

36. On whether the defendants are in breach of the contract, the plaintiff submitted that shares offered were 167 out of 500 which were estimated at kshs100 each and it therefore implies that the plaintiff bought shares of kshs 16,700.

37. In response to defendant’s assertion that the money paid to Kwa Ndege was not a loan, the plaintiff submitted that the defendant did not prove that was not proven as the defendants never produced MEMARTS for Kwa Ndege Company which provide share cost and any statement to the contrary would be falsehood.

38. Further that it was evidence of parties that loans were taken to complete the project and plaintiff himself was key to getting a further loan from Prime Bank Ltd and defendant cannot change to say, the loan amounts were all were investment and not to be repaid.

39. The plaintiff submitted that the defendants were in breach of contract by misappropriating the amounts and now want to lie that it was for purchase of shares.

40. Plaintiff submitted that directors of a company play a big role in safeguarding its interests and its members as provided under the **Companies Act 2015**; that the defendants owed the company fiduciary duty; that their actions ought to be in good faith and cited the case of **Ajay Shah v Deposit Protection Fund Board as Liquidator of Trust Bank [In liquidation] [2016] eKLR** where the court cited **Gower’s Principles of Modern Company Law, 4th Edition at page 571** as follows:-

“...To describe directors as trustees seems today to be neither strictly correct nor invariable helpful. (See City Equitable Fire Insurance Co. (1925) Ch. 407 per Romer J. at P.426). In truth, directors are agents of the company rather than trustees of it or its property. But as agents, they stand in a fiduciary relationship to their principal, the company. The duty of good faith which this fiduciary relationship imposes are virtually identical with those imposed on trustees and to this extent, the description “trustee” still has validity. The duties of directors can conveniently be discussed under two heads: (a) fiduciary duties of loyalty and good faith (analogous to the duties of trustee’s *stricto sensu*) and (b) duties of care and skill”. (See “Fiduciary Relationships” (1962 (C.L.J. 69 and 91963), C.L.J. 119 and “The Director as Trustee” (1967 C.L.J. 83”

41. The plaintiff submitted that directors have obligation to promote that success of the company but the defendants herein did not in any way promote the success of the company but led the company to ultimate down fall putting the creditors and shareholders to significant loss. He cited further authorities where the court held that the directors are required to act in good faith, carefully, diligently and honestly and with regard to best interest of the company and submitted that the defendants manipulated company resources and eventually defrauded the plaintiff of his capital investment and further did not pay tax for sale of any completed apartments and no accounts were rendered to the plaintiff.

42. Plaintiff submitted that the defendants were in breach of the contract as evidence by personal acts of withholding important information in relation to the investments from the plaintiff as he was entitled by the fact that he was a shareholder of Kwa Ndege Company and were further in breach when they directed all communications to themselves to the exclusion of the plaintiff.

43. Further that there was fundamental breach by defendants by failing to comply with **Section 662 of the Companies Act** which require that financial statements and reports be circulated to every member of the company.

44. The plaintiff submitted that the defendants failed to service the loan given by Prime Bank Ltd ending up being in arrears of kshs 13,741,804.60 plus interest accrued as shown by letter dated 17th January 2015 addressed to the company by the bank.

45. That it is clear the defendants continued with the business while aware the company was insolvent which amount to fraudulent trading and should be penalized for fraudulent conduct as held in **Re W C Litch Brothers Ltd [1932] 2 Chp.71** where the court held as follows: -

“If Directors continue to carry on business and to incur debts at a time when there is, to the knowledge of the Directors, no reasonable prospect of the creditors ever receiving payment of those debts, it is in general a proper inference that the Company is carrying on business with intent to defraud.”

46. On the last issue, the plaintiff submitted that being the bonfide party to the contract, he is entitled to prayers sought. Plaintiff submitted that the defendants should be held personally liable for breach of contract because they acted ultra vires and against company policy as guaranteed under the Companies Act; that an injustice would be done in upholding the legal personality of the company and limited liability of its shareholders; that the defendants engaged in fraudulent trading to the detriment of the plaintiff.

DEFENDANTS' SUBMISSIONS

47. The defendant started by explaining the origin of the relationship between plaintiff, Kwa Ndege Company, one **Ruth Mumo** and the defendants. In brief, that the said Ruth Mumo sold 5 acres of land to Kwa Ndege Company Limited and that the 5 acres was subdivided into 75 plots and that the company signed tripartite agreement with KCB and with 31 purchasers from Diaspora leaving 44 plots under Kwa Ndege Company Limited.

48. The defendant submitted that it was agreed that the plaintiff would be issued with one third shares of Kwa Ndege Limited Investment of their investment of kshs 45,500,000 and that the amount was not a loan but consideration for purchase of shares which could not be refunded at will or when the company made losses; that it was agreed that the plaintiff would only be a shareholder and would not be entitled to directorship of the company.

49. The defendants submitted that the plaintiff failed to provide any prove that the money advanced to him constituted a loan; that it was apparent from cross examination that there was no contract between the plaintiff and defendants for purposes of providing capital investment in the company.

50. The defendants submitted that the plaintiff was given regular updates and he made several trips to Nairobi to have meetings as well as site visits to keep up with project advancements. Further that regular market meetings were held with the plaintiff to find buyers and after the company was placed under receivership, it was agreed between plaintiff and defendants to reduce selling price to 4,000,000 and they proceeded to advertise the same in the plaintiff's monthly magazine which was produced as part of defendants' exhibit in court.

51. The defendants submitted that while the plaintiff has claimed lack of information updates, the plaint contains all the available information on the project and the attached copies of emails in the defendants bundle of documents are a testimony of all information sent to the plaintiff and his partners.

52. The defendants listed two issues in their submissions as follows: -

i. Is the capital investment USD 520 plus Kshs 5,000,000 in Kwa Ndege Company Limited refundable by defendants?

ii. Are the defendants properly sued in this matter?

53. On the first issue, the defendants submitted that the plaintiff and his partner **Ekbal Rayani** was that their joining into the project would entail all parties to work towards its success and its profitability; that they would lend their expertise in real estate business which the said **Ekbal Rayani** claimed he had in the united states of America, Canada and Australia. That the said **Ekbal Rayani** would source overseas finance and buyers for the potential 220 apartments.

54. The defendants submitted that seeing the potential, and with application for chance of use under councils consideration, the plaintiff and partners promised to send money in 3 months to pay out the original land owner and thereafter source US dollar financing the new apartment project as their input was very important for the success of the new higher funding apartment project from the earlier single dwelling project; that **Ekbal Rayani** was very confident on his ability to raise dollar funding but he failed in arranging any overseas financing for the development of the apartments.

55. The defendants submitted that the plaintiff and his partner **Ekbal Rayani** delayed the payment for shareholding to one from the promised 3 months to land owner who in the meantime became aware of change of use to apartments and increased the land value which forced the company to deal with **Farzaque Holdings Limited** and **Madhani and Associates** whereby 33 plots were transferred to finally pay of the land owner; and the investors were to arrange financing to develop apartments on the plots; and the company had one year to buy back the plots if it did not organize funding but none of the shareholders had finance to buy back the plots.

56. The defendants submitted that the sale of the plots was not fraudulent as the intention was clear and known to the plaintiff who during cross examination admitted that he was aware of the entry of this financier.

57. The defendants further submitted that they brought in a new financier **Faisal Lalani** to provide capital of kshs32,000,000 to commence 30 apartments; then the plaintiff brought Prime Bank to finance 55 apartments on the remaining 11 plots. The defendants submitted that the project continued and after some delay the bank agreed to finance the remaining works and demanded outstanding interest and as no shareholder was able to pay, the bank brought in receivers.

58. The defendants submitted that all the partners were present in the meeting of 21st March 2016 when the plaintiff advised that Prime Bank was now allowing sale of 10 apartments and proposal was made for **Ekbal Rayani** to borrow from Housing Finance Company to save the project from Prime Bank but minutes of meeting were not signed by plaintiff who filed this suit after first making mediation request from Hindu Community Arbitration Board which they withdrew and opted to file this matter in court.

59. The defendants submitted that lack of sales in depressed economy should not be blamed on them but blame rests on the actions of the plaintiff approaching the bank and jeopardizing the whole project instead of allowing the company to sell the apartments within extended time frames.

60. On whether they have been properly sued, the defendants submitted that they are improperly joined in these proceedings as all monies the plaintiff invested were directly paid to the company's account for purpose of utilization in the project works; further that the plaintiff in cross examination said he has never dealt with the plaintiff in relation to the project and never sent any money to the 2nd defendant. But only sued the defendants as they were his co-directors.

61. The defendants submitted that the proper defendant should be the company where all the parties were directors. The defendants submitted that the company has a life of its distinct and separate from its directors and relied on the case of **Salmon Vs Salmon & Co. Limited [1897] AC** where the court held that the company is at law a different person and not agent of the subscribers or trustees are subscribers are not liable in any form or shape except to the extent or manner provided by the Act.

62. The defendants submitted that no proper case for lifting of the corporate veil has been made before this court; that there is no point that the defendants conduct in the running of the company was improper hence the corporate veil remains intact and should not be pierced; that the company had legitimate intentions right from registration and was never a mere sham by which the defendants could have hidden from the eyes of equity.

63. The allegations of fraudulent trading against the defendants is an issue which has arisen from verbose submissions by the plaintiff but the same was never pleaded nor did it arise in the testimony in court and should be summarily dismissed. The defendants urged this court to dismiss this suit with costs noting that the plaintiff was liable for the losses incurred by the company for failing to raise overseas funding and pitting the bank against the company; and plaintiff has also wrongly sued the defendants.

ANALYSIS AND DETERMINATION

64. It is not disputed that the plaintiff and the defendants entered into an agreement for the plaintiff to purchase 167 shares out of the 500 shares of Kwa Ndege Company Limited.

65. It is not also disputed that Kwa Ndege Company Limited properly registered as shown by certificate of incorporation number CC.129730 dated 1st November 2006. And its total shares are 500 as shown by Articles of Association dated 1st November 2006 in the defendants bundle of documents.

66. From the foregoing what I consider in issue are the following: -

- i. Whether USD 520,000 and kshs 5,000,000 was for purchase of shares from Kwa Ndege co. Ltd or it included capital investment.
- ii. Whether the defendant is entitled to refund on money paid and from who?
- iii. Whether plaintiff is entitled to damages.

(i) Whether USD 520,000 and kshs 5,000,000 was for purchase of shares from Kwa Ndege Co. Ltd or it included capital investment.

67. There is no dispute that the plaintiff acquired one third shares from Kwa Ndege Company Limited and as seen above, the company was properly registered. From evidence adduced and submissions by both parties, the plaintiff acquired one third shares from the company and the remaining 66.67 shares remained with the defendants. DW1 said that the plaintiff was to be a shareholder upon purchasing shares and not a co-director; from the submissions the defendants admitted that the plaintiff was a co-director.

68. It is not also disputed that the plaintiff made payments being USD 520,000 and additional Kshs 5,000,000 into the said company account following an understanding between him and his partner Ekbha Rayani on one part and the defendants on another part(CR12). The defendants' evidence that the money was paid by the plaintiff in a period of one-year contrary to their agreement that the amounts were to be paid in 3 months confirm that the money was paid.

69. The plaintiff has not disputed that the money paid was deposited into the Kwa Ndege Company account but argue that it was capital investment which was to be refunded after 18 months. The plaintiffs allege that the defendants failed to comply with the Companies Act and misapplied the money and even sold some of the plots and apartments without his knowledge. Further that the defendants failed to service money advanced by Prime Bank Ltd being additional funds for development which the plaintiff assisted the company to obtain.

70. On the other hand, the defendants argue that the money paid by the plaintiff into the company account was for purchasing shares and in return he was to hold one third of the shareholding of the company.

71. However, on perusal of the documents filed and in particular email dated 6th May 2015 by the 1st defendant titled Kwa Ndege Company Limited-Update, he apologized for delay in giving updates and indicated that the construction was 95% complete and were waiting bank decision in advancing ksh5,000,000 required to complete and advertised. Of importance is the last part of the email where the 1st defendant stated as follows: -

“Please note that this facility would return our project to profitability without any new injection of capital, we could also start repayment of shareholder loans.”

72. I also note from **Ekbha Rayani's** email of 25th April 2015, he said that on the onset they had been told their money would be treated as a loan to be refunded in 18 months and after that profits would be shared according to shareholding. In response through email of 6th May

2015, the 1st defendant apologized for delay in giving updates and never denied that the money paid by plaintiff was a loan and as quoted above he promised that it would be paid once the company return to profitability.

73. I also note from a letter from Registrar of Companies dated 15th May 2013 that Kwa Ndege Company Limited has 500 shares with value of kshs 100 thus value of the plaintiff's shares is kshs 16,700.

74. From the foregoing there no doubt that payment by plaintiff of USD 520,000 and Kshs 5,000,000 for purchase of shares valued at ksh16,7000 and the remainder is loan which was to be refunded to the plaintiff as agreed by the parties. The plaintiff was also entitled to profit realized from sale of apartments developed.

(ii) Whether the defendant is entitled to refund on money paid and from who.

75. The plaintiff and the defendants from evidence adduced by both sides is that they were shareholders and from evidence adduced, it is evident that the defendants were the ones running the company, in their submissions, the defendants said the plaintiff was to be shareholder and was not to be director. From their submissions, at page 6 and 8 it appears they took the plaintiff as financier or the person to source funds; that he was required to make payments to pay off initial land owner and also pay for construction of apartments which required high financing compared to single dwelling house. From their submissions the defendants said the plaintiff failed to secure financing as expected.

76. From evidence adduced, there is no doubt that the plaintiff was not involved in the running of the company though he was expected to source finances and had also paid funds which was not accounted to him.

77. The defendants also admitted selling more plots from the 44 remaining with 11. They have not demonstrated that they involved the plaintiff. The defendants from email communication admitted that they had not updated the plaintiff of the developments in the project.

78. The plaintiff being a director and shareholder was kept in the dark. Sale of the plots was not made known to the plaintiff. Sale of apartments was not also accounted to the plaintiff. The fact also that the company was placed under receivership was not made known to the plaintiff.

79. There is no doubt that the defendants acted ultra vires and the plaintiff has demonstrated to the court reason to pierce the corporate veil of Kwa Ndege Company Limited.

(iii) Whether plaintiff is entitled to general damages.

80. The general principle in award of damages for breach of contract is subject to mitigation of loss, the claimant is to be put as far as possible in the same position as would have been if the breach complaint of had not occurred. In the case of **Hadley V Baxendale [1854]9. EXCH.341** that the measure of damages is such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach. **Standard Chartered Bank Limited v Intercom Services Ltd & others [2004] eKLR.**

81. From the evidence and documents produced the plaintiff being shareholder expected refund of his capital investment and share of the profits as per shareholding. It did not happen as expected. The defendants admitted to have entered into agreements with other parties to sell the plots and an apartment. The defendants never talked of any refund at all to the plaintiff. In my view were active directors of the company failed to act in good faith and failed to update plaintiff of going on in the project.

82. I however note that the plaintiff has not demonstrated the expected earnings in terms of profit. No specifics have been given to enable me determine general damages.

83. FINAL ORDERS

- 1. The defendants to refund plaintiff USD 520,000 and (kshs 5,000,0000 less kshs 16,700 = kshs4,983,300).**
- 2. Interest on 1 above from the time of filing this suit.**
- 3. Costs to the plaintiff.**

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 3RD DAY OF JUNE, 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

Schola- Court Assistant

Mr. Opondo Counsel for Plaintiff

Mr. Muhoni Counsel for Defendants