REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

HCCC NO. 1088 OF 2002

MOHAMED MUNIR CHAUDHRI.....PLAINTIFF

-VERSUS-

CAPTAIN MUSA HASSAN BULHAN.....1ST DEFENDANT

EQUATOR AIRLINES LTD.....2ND DEFENDANT

AFRICAN EXPRESS AIRWAYS (K) LTD.....3RD DEFENDANT

J U D G M E N T

Introduction

1. This suit was instituted on 5th February 1998 vide a Plaint dated 4th February 1998. The suit was initially instituted as ***Nairobi High Court Civil Suit No. 237 of 1998*** before it was transferred to Milimani Commercial Court and acquired the suit number **HCCC No. 1088 of 2002.**

The Plaintiff sued the three defendants jointly and severally seeking the following orders:-

a. Judgment be entered against the defendants jointly and severally for Kshs.10,524,088.50

b. Interests on (a) above on commercial rates of 32% from the date of filing suit until payment in full.

c. Costs of the suit herein

d. Interests on (c) above at court rates from date of filing suit.

e. Any other or further relief that this court may deem just.

2. The claim is laid down at paragraph 4 of the plaint where the plaintiff states that the claim against all the defendants is for a sum of Kshs.10,524,088.50 together with interests as more specifically set out in the memorandum agreement dated 27/10/1988, payment vouchers and correspondence dating upto 1994 fully acknowledged by the defendant herein, which agreement, payment vouchers and correspondence the plaintiff shall seek to refer to for their full meaning and terms and tender evidence during the full hearing of the suit. The amount of Kshs.10,524,088.50 is therefore claimed as the amount due and owing to the plaintiff from the defendants in respect of the memorandum agreement dated 27/10/1988

3. On 6th November 1998, the Defendants filed a joint defence which is dated the same date. They denied being indebted to the Plaintiff in the stated sum OF Kshs.10,524,088.50 or any other sum alleged or at all and puts the plaintiff to strict proof. The defendant avers that the agreement of 27/10/1998 never materialized at all and that the defendants had no legal capacity to enter into such an agreement as the 3rd defendant was in receivership. The defendant further averred that that they would rely on the limitation period in the statute. The defendants deny ever receiving any demand notice, invoices and vouchers with regard to the claim.

It is also averred that they had no control of the banks accounts of all the defendants and that the plaintiff was the principal signatory of the account.

The pleadings closed the defendants filed an application dated 9/8/2016 seeking an order that the matter be referred to arbitration in line with clause 7 of the memorandum of agreement. A ruling dismissing the notice of motion was delivered by **Tuiyot J** (as he then was) on 9/3/2018.

In his ruling the Judge held that since the parties had agreed on a sole arbitrator who passed away, the arbitration agreement is incapable of being performed. He invoked Section 6(1) (a) of the Arbitration Act and held that the arbitration agreement was incapable of being performed. It was also held that the application was filed after the defendants had entered appearance and filed a defence which contravened **Section 6(1) of the Arbitration Act.**

The application was dismissed. The ruling effectively allowed the dispute to proceed in this court. No appeal was preferred against the ruling.

4. The matter was then listed for hearing. The plaintiff adduced evidence and was cross-examined at length. The defendants did not adduce evidence to substantiate their defence case.

5. Summary of the Plaintiff's Case

The plaintiff relied on his detailed witness statement dated 1/4/2019 which he highlighted in his testimony in court on 2/9/2019. He testified that he was in a director of Mac's Pharmaceuticals Company Limited holding 65% of the shareholding which was reduced to 40% at later stage. The plaintiff testified that the defendant approached him claiming that he had problems and needed money. He agreed to assist the 1st defendant and advanced him a loan of Kshs.8.5 million in the name of Mac's Pharmaceuticals soon thereafter they entered an agreement for Kshs.988,000.00. The genesis of the relationship between the plaintiff and the 1st defendant is a memorandum of agreement dated 27/10/1988. The 1st defendant was the director and Chief Executive Officer and Managing Director of Equator Airlines Limited and African Express Airways (K) Limited who are the 3rd and 2nd defendant. The 1st defendant requested the plaintiff to advance him some money for his companies which were by then experiencing financial difficulties. The 1st defendant later reduced the oral request into a writing vide a letter dated 10/5/1988 and another dated 12/10/1988.

The Plaintiff did not have money then but through a mutual acquaintance, the late Mohammed Aslam, he was advised that he could secure a financial facility for him to keep the 1st defendant and his companies afloat as he did not have enough collateral to qualify for financing. The plaintiff agreed and memorandum of agreement dated 27/10/88 was executed. It was he express and unambiguous term of the Memorandum of Agreement that-

1. The 1st defendant who was the majority shareholder in the 2nd and 3rd defendant companies would transfer fifty one percent (51%) management and ordinary shares in both 2nd and 3rd defendant companies.

2. The plaintiff would be appointed chairman and director of the companies

3. The companies would guarantee the repayment of all amounts owed to the plaintiff once the companies debts had been repaid or if the companies could raise monies from any bank or institution.

4. The interest charged by the bank on the loans shall be repaid by the companies. The plaintiff agreed to assist the 1st defendant in saving the said companies from winding up.

The plaintiff approached Mac's Pharmaceuticals Limited to borrow the money from Pan African Bank Limited for the purpose of advancing the money to the defendants. Mac's Pharmaceuticals Limited obtained a loan of Kshs.7,650,000/- (Seven Million Six Hundred and Fifty thousand) to be paid to the account of the 3rd defendant and Kshs.850,000 to one Mariam Abdi who was owed by the 1st defendant making a total of Kshs.8,500,000/- (eight million five hundred thousand.)

Upon disbursement of the loan, the plaintiff was appointed chairman to both 2nd and 3rd defendant companies and an agreement for the sale of the shares was drafted but was never executed nor was the transfer of the shares effected. In the meantime upon disbursement of Kshs.7,650,000/- (this was not proved with evidence) into the account of 3rd defendant, it paid off its debtors who had sued it in winding up Cause No.4/1987 and the receivership against the 2nd and 3rd defendant was discharged. The 2nd and 3rd defendant sought to liquidate the loan taken by Mac's Pharmaceuticals Company Limited with monthly installments of Kshs.300,000/-. This however did not happen and the 1st defendant disputed the resolution in the minutes. The 1st defendant maintained that the agreement between him and the plaintiff was for buying shares. The agreement did not show the value of the shares on the face of it. The contention by the 1st defendant was that the plaintiff was not seeking enforcement of the agreement dated 27/10/1988 or the transfer of 51% shares purchased through the said agreement. The 1st defendant went ahead and had the valuation of the shares done by Mr. Knight of Kanda Limited who was instructed by the plaintiff and 1st defendant. The value stated is Kshs.15,605,000/- page 31-61 of plaintiff's documents. The 1st defendant vide a letter dated 10/11/89, page 22 of the Plaintiff's document offered to sell the companies as they were. The plaintiff offered to take over both the companies and take over their managements See page 27 of plaintiff's documents. The 1st defendant maintained that he was willing to sell the companies and demanded a goodwill of Kshs.5,600.000/- and remuneration of Kshs.60,000/- per month. The total shares of the two companies was given as Khs.33,000,000/- Pan African Bank issued notice to recall the loan. The 1st defendant proposed to liquidate the loan with a monthly instalment of Kshs.300,000. This however according to the plaintiff did not happen. The plaintiff informed the 1st defendant that he would not pursue he buy out option. The 1st defendant did not honor his commitment to repay the money to the plaintiff and he as a result incurred a loss of Kshs.20,000,000/-

6. On the other hand, the Defendants did not call any evidence to buttress their defence. It was the Defendants averment that after filing their

defence, they did not participate in the proceedings thereafter as they ceased trading.

7. The parties subsequently filed their written submissions for consideration by this court.

Issues for Determination

8. The issues for determination by this court as agreed by the parties are as follows:

a. Whether the parties entered into a Memorandum of Agreement on 27th October 1988.

b. Whether the said Memorandum of Agreement was valid and binding on the parties.

c. Whether the Plaintiff's claim is time barred under the Limitations of Actions Act;

d. Whether the provisions of Clause 7 of the Memorandum of Agreement can be invoked;

e. Whether the Plaintiff is entitled to the amount claimed from the Defendants in the Plaint.

f. Who should bear the costs of the suit?

Analysis

A. Whether the parties entered into a Memorandum of Agreement on 27th October 1988

9. This being an action for breach of contract, it is settled that in contractual relations, an agreement may be express or implied. In this case, the Plaintiff's claim against the Defendants is premised on an impugned memorandum of agreement dated 27th October 1988. It was the Plaintiff's testimony that sometime in 1988, he was approached the 1st Defendant herein who was known to him and was the Director, Chief Executive Officer and Managing Director to the 2nd and 3rd Defendant companies. The Plaintiff stated that at the request of the 1st Defendant, he agreed to extend a loan to the defendant companies which were apparently experiencing liquidity problems. He stated that the oral request of the 1st Defendant was then followed by his written letters of 10th May 1988 and 12th October 1988, which he produced as Exhibit 1.

In the letter dated 10/5/1988 the 1st defendant informed the plaintiff that he had cash flow problems requiring Kshs.700,000/- made up as follows: -

Kenya Shell – Kshs. 350,000/-

Equator Airlines -Kshs. 260,000/-

African Express Domestic- Kshs.90,000/-

He went on to state as follows:

> **"This is therefore to kindly request you to obtain an emergency loan to finance the above. We would surrender our Lessna 310 R Registration 5Y- AYM for security and repayment can begin in July at Kshs.100,000/- per month together with interests."**

This letter illustrates that it is the 1st defendant who requested the plaintiff to advance him some money when his company was experiencing financial crisis. The request was followed by another letter dated 12/10/1988.

10. According to the Plaintiff, he did not have money but was contacted by one Mohamed Aslam (deceased), a mutual acquaintance of his and the 1st Defendant and the erstwhile Executive Chairman of Pan African Bank Limited. The late Mohamed Aslam (also the sole named arbitrator in the impugned agreement) allegedly agreed to secure a financial facility to the Plaintiff in order to assist keep the defendant companies afloat.

The plaintiff testified as follows during cross-examination.

> **"The instructions of Agreement was to save the 2nd Defendant's Companies from being wound up – see paragraph 1.**
>
> **I was the purchaser. I agreed with the Defendants to save the Company. I approached Pan African Bank to find out if they can grant further facility to the tune of Kenya Shillings Eight Million and Five Hundred Thousand (Kshs.8,500,000/-) which would be sufficient to assist the Company. The Bank had sufficient security so they agreed to raise the amount to the tune Kenya Shillings Eight Million and Five Hundred (Kshs.8,500,000/-). I was to assist the Company by raising funds to assist the Company. I have documents at page 6. I wrote the same dated- page 6.**

It was on Letterhead of Macs' Pharmaceuticals Ltd, signed by me. It was to enable us to buy shares. The Bank agreed to our request. The Bank opened a second account – OD overdraft. There was a first account of Mac's Pharmaceuticals, a current account and loan account. The Bank opened an account, see page 8. The type of account- The Loan Account Number 01-3-1096 on 21/11/88 the amount is Kshs.8,500,000/- at page 7 it was a request to transfer Kshs.7,650,000/- to African Express Airways Kshs.850,000/- to Mrs Miriam Abdi. The purpose of the funds to African Express Company was to assist the company. The receivership of the company was lifted, page 15 & 16, letters dated 3/11/1988. The letter of page 7 instructing transfer is dated 2/11/1988.

On 3/11/1988 the Receivership was lifted. I met the obligation to assist the companies as we had agreed. The consideration as transfer of 51% shares at nominal share value. That nominal share value was not determined. It was to be determined after the Valuation. It was done. This is the valuation I referred to from the bundles. Page 32, Valuation was by Kanda Limited. It was Valuation of the assets not the shares. Upon determination of the assets, the liabilities, the share value would then be determined. The nominal value was to be determined after the valuation of the assets. There was no valuation because the 1st Defendant came up with his own Valuation. He wanted Kenya Shillings Thirty Three Million (Kshs.33,000,000/-) for the companies. Page 77 is where he demanded Kenya Shillings Thirty Three Million (Kshs.33,000,000) I did not agree to that Valuation. The Agreement I signed with Captain Musa. We were not the only beneficiaries, there was also the Company."

The burden was on the plaintiff to prove that the allegations that a memorandum of agreement was entered. The plaintiff was the sole witness whose testimony was subjected to cross examination. He gave evidence and supported it with documentary exhibits to corroborate his testimony. This testimony and the exhibits were not abutted. The testimony given on oath and challenged through cross-examination calls for sworn evidence to rebut it. It is not controverted on oath, it remains weighty and is considered as the truth with regard to the facts in dispute. Submissions cannot take the place of evidence see ***Douglas Odhiambo Apel & Another –v- Telkom Kenya Ltd, C.A, (2014) eKLR.***

11. Consequently, the parties executed the Memorandum of Agreement dated 27th October 1988 which was produced in evidence as Exhibit 2. In my view, the Plaintiff sufficiently proved that the 1st Defendant approached him with an offer to finance his companies and the Plaintiff accepted to do the same as evidenced by the subject agreement. No evidence was placed before this court to negative the voluntary action of the parties in executing the impugned agreement.

12. The Plaintiff also produced in evidence several letters exchanged between the parties as well as minutes of meetings held by the parties following the execution of the impugned agreement. In light of these exhibits, it is my view that Plaintiff proved on a balance of probabilities that there was indeed a written agreement entered between the Plaintiff and the 1st Defendant. Having established this, the next question for determination is whether the said agreement was legally binding between the Plaintiff and the Defendants herein.

B. Whether the impugned agreement was valid and binding on the parties

13. The Court of Appeal in the case of **William Muthee Muthami vs. Bank of Baroda (2014) eKLR** observed that:

"In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach."

14. The Learned authors**, Chesire, Foot** and **Formstons,** in their book, **The Law of Contract**, (14th Edition) at pages 34 and 35 have stated that: -

"The first task of the plaintiff is to prove the presence of a definite offer made…. Proof of an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the offer to accept that offer."

15. In the case of **Rose and Frank Co. vs. J R Crompton & Bros Ltd (1923) 2 KB 293, Atkin, LJ** stated that: -

"To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly."

16. In the instant case, the validity of the impugned agreement has been attacked on two fronts. First, the defendants claim that there was no consideration and secondly, they claimed that the defendants did not have the legal capacity to enter into the agreement.

17. On the issue of consideration, the Defendants averred at Paragraph 3 of their defence statement that the said agreement never materialized at all. It was their submission that the agreement could not be enforced for want of consideration. The question that then begs determination is whether the Plaintiff gave the 1st Defendant any valuable consideration for the purchase of shares in the defendant companies.

18. In **Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another [2014] eKLR** the Court of Appeal referred to ***Chitty on Contracts, Vol. 1, General Principles, 29th Edition*** at paragraph 3-004 which defines consideration as follows:-

"The traditional definition of consideration concentrates on the requirement that 'something of value' must be given and accordingly states that consideration is either some detriment to the promisee (in that he may give value) or some benefit to

the promisor (in that he may receive value). Usually, this detriment and benefit are merely the same thing looked at from different points of view. Thus payment by a buyer is consideration for the seller's promise to deliver and can be described either as a detriment to the buyer or as a benefit to the seller; and conversely delivery by a seller is consideration for the buyer's promise to pay and can be described either as a detriment to the seller or as a benefit to the buyer. It should be emphasized that these statements relate to the consideration for each promise looked at separately. For example the seller suffers a 'detriment' when he delivers the goods and this enables him to enforce the buyer's promise to pay the price."

19. From the wording of the agreement, the Plaintiff agreed "to assist in saving the said companies from winding up" subject to several conditions including that the 1st Defendant would accept "to transfer Fifty-One (51%) shareholding in both management and ordinary shares in both the Companies" to the Plaintiff at "their nominal share price." In my view, there was sufficient consideration from both the Plaintiff and the 1st Defendant towards the fulfilments of their individual obligations under the said contract.

20. However, it was the defendants' case that since the parties drafted an agreement of sale of shares but never got to execute the same, then the impugned agreement did not materialize as the value of the shares was not determined at the time of executing the agreement. There was no specific amount that was indicated as the purchase price for the shares. That the agreement was not enforceable for failure of consideration. The various correspondences shows that the plaintiff never paid for the shares. It was the plaintiff's evidence that he had no money. He stated that their mutual friend late Mohammed Aslam contacted him and advised him that he could secure a financial facility to him to keep Captain Musa and his companies afloat as captain Musa did not have enough collateral to qualify for financing. The facility was obtained by Mac's Pharmaceutical who were not parties to the agreement. It is trite that parties are bound by their pleadings. The plaintiff admitted that he did not pay any money for the transfer of 51% shares. He further testified that the norminal value of the shares was not determined. There was an attempt to transfer the shares but the agreement was never executed. The plaintiff never paid for the shares and he was therefore in breach of it. It is therefore my view that the agreement between the plaintiff and the 1st defendant did not materialize as consideration was not paid and the shares were not transferred. The agreement is therefore unenforceable for want of consideration. The plaintiff is bound by his pleadings that he had no money. The agreement is null and void.

21. The next issue for determination is whether the defendant companies had the legal capacity to enter into the subject agreement given that they had been placed under receivership due to the liquidity issues they were facing. The impugned agreement was made on 27th October 1988. The law applicable at the time was the Companies Act (Chapter 486 of the Laws of Kenya), now repealed. **Section 34** of the *repealed Act* provided as follows:

"(1) Contracts on behalf of a company may be made as follows-

a. A contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied.

b. a contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the Company by any person acting under its authority, express or implied.

22. (2) A contract made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto…"

23. It is a matter of law that a company which is a corporate entity acts through natural persons. A company in receivership still has its corporate status intact. It is trite that the management of a company ordinarily vests in the director of that company. From the wording of the impugned agreement, the 1st Defendant entered the same as the majority shareholder of the 2nd and 3rd Defendants and that the Plaintiff agreed to assist the said companies with their liquidity problems. At the time of signing and executing the subject agreement, the 1st Defendant was the director of both the 2nd and 3rd Defendant companies. As relates the circumstances of this case, it is therefore my view that the 1st Defendant had the implied authority of the 2nd and 3rd Defendants to enter the subject agreement. As such, it is also my view that the issue of privity of contract raised by the defendants does not apply to the circumstances of this case.

Furthermore, from the evidence laid before this court, the Receiver was appointed by a virtue of a debenture. There was no court order which was produced in this court. The 1st defendant who alleged that there was a debenture did 87not produce it as evidence before this court to prove that he lacked capacity to enter the agreement. It remained an allegation which was not substantiated. The agreement was produced in this court and was signed by the 1st defendant. It meets the threshold of a valid contract which requires that whether written or oral is signed on behalf of the company by a person with express or implied authority from the company. Such agreement is valid and legally enforceable against the company.

In this case the agreement was entered by the 1st defendant on behalf of the two companies with express or implied authority and are therefore valid and legally enforceable against the companies.

C. Whether the Plaintiff's claim is time barred under the Limitations of Actions Act

24. It is not in dispute that the Plaintiff's claim is founded upon the alleged breach of a Memorandum of Agreement dated 27th October 1988. It is also apparent from the court's record that this suit was instituted on 5th February 1998 vide a Plaint dated 4th February 1998. What is in question with regards to the issue of limitation of actions is when the cause of action arose in this matter.

25. The Defendants submitted that the cause of action accrued on 2nd January 1991 and that this matter was filed more than eight (8) years

after that, hence statute barred. On the other hand, it was the Plaintiff's submission that the issue of the claim being time barred was raised by the Defendants in their defence but was never substantiated with evidence. The Plaintiff thus urged this court to find that the said averment remained a mere allegation. In the alternative to this submission, the Plaintiff argued that **Section 39** of the **Limitation of Actions Act** estopped the Defendants from contending that this claim was time barred by virtue of **Section 4(1)(a)** of the **Limitation of Actions Act**. The Plaintiff maintained that the breach of subject agreement was a continuous event that traversed the many attempted negotiations and promises to pay between the parties. He relied on exhibits 12, 15, 16, 17, 18, 19, 20, 21, 27 and 32 that were produced in evidence.

26. Section 4(1)(a) of the **Limitation of Actions Act** provides that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued.

27. On the other hand, **Section 39** of the **Limitation of Actions Act** provides that:

> **"(1) A period of limitation does not run if—**
>
> **(a) there is a contract not to plead limitation; or**
>
> **(b) that the person attempting to plead limitation is estopped from so doing.**
>
> **(2) For the purposes of subsection (1) of this section, "estopped" includes estopped by equitable or promissory estoppel."**

28. A cause of action for breach of contract accrues under **Section 4(1)** of the **Limitation of Actions Act**, **when one of the parties fails to meet its obligations under the contract [See: B. Mathayo Obonyo vs South Nyanza Sugar Co Ltd (2019)EKLR]**

29. In this case, the 1st Defendant, vide a demand letter dated 5th December 1990, wrote to the Plaintiff under the 2nd Defendant's letterhead. Therein, he alleged that the loan obtained by the defendant companies on the strength of the subject agreement was a personal loan to the companies by the Plaintiff and was not obtained from Mac's Pharmaceuticals. The 1st Defendant thus demanded for the payment of the agreed 51% shares in the defendant companies within 30 days of the date of the letter, failure to which the agreement would be null and void.

30. Consequently, the Plaintiff's advocate responded to the said letter on 2nd January 1991 alleging that those demands had no effect in law. The Defendants thus allege that as of 2nd January 1991, conflict had already arisen between the parties and either of them was in breach of the subject agreement. As such, the statutory six years limit had lapsed by the time the suit was filed.

31. To this end, the Plaintiff submitted that while the parties continued haggling on the settlement terms of the agreement, they were served with **Nairobi High Court Civil Cases 5060 of 1993, Delphis Finance Ltd -vs- Equator Airlines Ltd & 2 Others** which arose from a call to crystalize the guarantees executed by the Plaintiff and the 1st Defendant in favour of the 2nd Defendant in a bid to save the obligation as undertaken in the Memorandum of Agreement and they resorted to defend the same. Judgment in that case was entered in favour of Delphis Bank Limited and vide a letter dated 29th July 1996, the Plaintiff and the 1st Defendant jointly made an offer to liquidate the decretal amount arising from the said judgment. In these circumstances, it is my view that the Defendants are estopped from claiming limitation of time owing to their conduct after their last demand was made.

The defendant though alleging in the defence that the plaint was bad in law, vexatious and abuse of court process, no particulars were given. The 1st defendant did not adduce any evidence to support his statement of defence. The assertions remained mere allegations. The defendant did not raise a pre-liminary objection to the suit. It follows that he was not convinced that the suit was time barred. His submission at this stage is not in good faith and is therefore estopped from relying on limitation by Statute.

D. Whether the provisions of Clause 7 of the Memorandum of Agreement can be invoked

32. Clause 7 of the subject agreement contained an arbitration clause which read as follows:

> **"Any dispute which may arise out of these presents shall be referred to a Single Arbitrator whose Award shall be binding on all the parties hereto, namely Mohammed Aslam."**

33. Section 6 of the **Arbitration Act** provides that:

> **"(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—**
>
> **(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or**
>
> **(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.**
>
> **(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.**

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."

34. It is common ground that one Mohammed Aslam was specifically named in the agreement as the only person who would constitute an Arbitral Tribunal to resolve any dispute arising from the subject agreement. It is also common ground that the said Mohammed Aslam died on 18th November 1991. I agree with the earlier determination of this issue by the court to wit that the Arbitration Agreement between the parties is incapable of being performed. The issue having already been determined, the same is now *res judicata*.

35. In any case, it is well settled that once the Defendant puts in their defence, the jurisdiction of an arbitral tribunal is ousted, and the court becomes properly seized of the matter. In this case, the Defendants' defences are on record and as such, it is my view that they cannot go back and claim that the matter should be referred to arbitration for disposal.

36. I am guided by the persuasive case of **Martin Otieno Okwach & Charles Ongondo Were T/a Victoria Clearing Services v Kenya Post Office Savings Bank [2014] eKLR** where the court held as follows:

"Unless, parties consent to have the matter referred to arbitration under Order 46 Rule (1) of the Civil Procedure Rules, 2010, they are firmly stuck in the court system. Indeed, while Article 165 of the Constitution of Kenya, 2010 gives the High Court supervisory jurisdiction over any person, body or authority exercising a judicial and quasi-judicial function to ensure the administration of justice, such authority can only be exercised within the parameters of Section 10 of the Arbitration Act which provides as follows:-

"Except as provided in this Act, no court shall intervene in matters governed by this Act."

As I have poined out above, the defendant had raised an objection to the matter procedings in court when there existed an arbtration clause in the agreement . A ruling was given and the defendant did not prefer an appeal against the said ruling in the Court of Appeal. It is my view that the issue was raised and was conclusively determined by this court. The issue is res judicata. It is an issue of jurisdiction which the law requires that it be determineed at the earliest stage of the proceedings. See ***Mukisha Buscuits Manufacturing Company Limited –v- West End Company Ltd (1969) E.A 696.***

On the other hand the doctrine of res judicata implies that where a court compentent jurisdiction has determined an issue in a suit between the same parties or parties litigating under the same title, the court's jurisdiction to determine the issue has been spent. The doctrine is anchored at **Section 7 of the Civil Procedure Act** which provides:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

The doctrines applies if it is proved that the issue was directly and substantially in issue in the former suit. In this case there was an application by the defendant. Secondly the issue must have been in issue betweent he same parties. Thirdly the parties were litigating under the same title. Forth, the issue was heard and finally determined in the former suit. Finally the court was competent to try the issue and it did determine the issue. This is the case with regard to the issue of arbitration and it cannot therefore be determined in this proceedings.

E. Whether the Plaintiff is entitled to the amount claimed from the Defendants in the Plaint.

37. The Plaintiff had a duty to establish on a balance of probabilities that the Defendants were jointly and severally liable to him for the sum of Kshs. 10,524,088.50/= as prayed in the Plaint. The main issue here is whether the Plaintiff has discharged the burden of proving that the Defendants are indebted to him in the said sum.

The memorandum agreement talked of transfer of (51%) shareholding to the plaintiff which never materialized. The plaintiff has raised issues that the memorandum agreement was not drawn by him.

I take note that the memorandum agreement does not indicate who has drawn. The plaintiff relied on a letter dated 27/10/1988 on the letter reads of Mac's Pharmaceuticals Limited who were not parties to the said agreement, requesting for an advance of further limits to enable them purchase majority shareholding in 2 & 3 defendants companies. In a letter of 2/11/1988 Mac's Pharmaceuticals requested Pana African Bank to open a loan Account of Kshs.8.5 million and transfer Kshs.7,650,000 to the 3rd defendant and Kshs.850,000/- to Pana African Finance Co. Ltd. The loan Account of Mac Pharmaceuticals was debited. All correspondences which the plaintiff has annexed mention the loan by Mac Pharmaceuticals. At page 23 of the Plaintiffs documents the 1st defendant lays it bare that the plaintiff had not paid for the shares of the companies. 1st defendant further pointed out that the 2nd and 3rd defendants would only be responsible for the interest of Mac's Pharmaceutical Limited's m Loan. The 1st defendant expressly informed the Plaintiff that he had no shares to buy from the plaintiff but has accepted to pay the loan.

The plaintiff vide a letter dated 19/1/1990 sought to have the loan advanced to Mac's Pharmaceuticals Limited credited to either the account of 2nd and 3rd defendants. This was because the bank had issued a notice to the Mac's Pharmaceuticals to repay the loan, page 27 plaintiff's documents. The 1st defendant proposed a repayment schedule to Mac's Pharmaceuticals of Kshs.200,000/- per month; page 28 of the plaintiff's documents. Eventually vide a letter dated 12/2/1990 the plaintiff stated that subject to a cash transfer of Kshs.800,000,000/- (eight million) to the account Macs Pharmaceuticals Ltd he would cease to be a director and a shareholder of the 2nd and 3rd defendant. In

response the 1st defendant wrote to the plaintiff informing him that he had not paid for the shares and that what he had done was to invest in the company in form of loan's which he (1st defendant) did not receive documents. The plaintiff has annexed documents showing that the loan to Macs Pharmaceuticals was fully repaid,

From the foregoing it is clear that the plaintiff did not adduce any evidence to prove that he acquired the shares as agreed in the memorandum agreement. This agreement was between the 1st defendant and the plaintiff. The loans advanced to the defendants were advanced by Macs Pharmaceutical Company Limited and the loans were fully repaid.

38. As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of **Section 107** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, which provides:

> **"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."**

39. The evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence (See **Isca Adhiambo Okayo v Kenya Women's Finance Trust KSM CA Civil Appeal No. 19 of 2015 [2016]eKLR**). This is also captured in **Sections 109** and **112** of the **Evidence Act** as follows:

> **"109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**
>
> **112. 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."**

40. This being a claim for special damages, it is trite that such a claim should not only be specifically pleaded but it must also be strictly proved. The Plaintiff's pleadings and testimony establishes that he entered into an agreement with the Defendants on 27th October 1988. He agreed to help the defendant companies with its liquidity problems in exchange for 51% control and management of the said companies. The Plaintiff alleges to have approached Mac's Pharmaceuticals Limited, in which he is a director, which then took out a loan that went towards meeting the financial obligations of the defendant companies. According to the Plaintiff, he performed his obligations under the said agreement and the defendants are thus indebted to him.

The demand letter by Equator Airlines dated 5/12/90 denied the claims by the plaintiff. The plaintiff alleges that he agreed to finance the companies. He has not shown that he had capacity to carry out such financing and any purported agreement to finance the companies was in contravention of **Section 3 of the Banking Act** and was therefore null and void.

The plaintiff failed to prove by documentary evidence that he advanced any money to the defendants. The burden was on the plaintiff to prove that he as a person advanced some money to the defendants. **Section 109 of the Evidence Act** provides:

> **"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."**

The law requires that a claim for special damages must not only be pleaded but must be specifically pleaded and proved. There must be tangible evidence to prove the claim. The plaintiff filed a letter dated 27/9/1996 by Delphis Bank Limited clearly expressed that it was Mac's Pharmaceuticals which was to pay the guarantees and undertakings and no action would be taken against him.

41. It is trite that a company and a director of a company are two distinct and separate legal entities and should be treated as such. The evidence tendered herein point to the fact that the Plaintiff interchangeably acted in his own personal capacity as well as in his capacity as the director Mac's Pharmaceuticals Limited. However, since this suit was instituted in the Plaintiff's personal capacity, it is my view that the Plaintiff has failed to strictly prove that the Defendants were indebted to him as alleged.

Conclusion

For the reasons stated above, I find that the plaintiff has failed to prove his claim on a balance of probabilities. I therefore order that-

1. The suit is dismissed.

2. Costs to the defendant.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 8TH DAY OF NOVEMBER , 2021

L.W. GITARI

JUDGE

8/11/2021

The Judgment has been read out in open court virtually.

L.W. GITARI

JUDGE

8/11/2021