REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 593 OF 2010

SACHIN SHAHA.....PLAINTIFF

VERSUS

JAGAT MAHENDRA KUMAR SHAH.....1st DEFENDANT

MITESH MAHENDRA SHAH.....2ND DEFENDANT

JUDGMENT

1. Sachin Shaha (the Plaintiff or Sachin) brings this suit against his former co-shareholders in Mitsuminet Cable Vision Limited (Mitsuminet Cable or the Company). These are Jagat Mahendra Kumar Shah (the 1st Defendant or Jagat) and Mitesh Mahendra Shah (the 2nd Defendant or Mitesh).

2. It is Shachin's case that he owned 50% shareholding in Mitsuminet Cable, although as will be apparent in the course of this decision that is disputed by Jagat and Mitesh. The entire dispute is in respect to the sale of Sachin's shares in Mitsuminet Cable.

3. Sachin contends that he was duped by his co-shareholders into entering a settlement with them on 24th July 2007 to sell his shares in the Company for Kshs.60,000,000.00 and was made to sign a settlement agreement in full settlement of his claim in the Company. He avers that the Defendants had prior to the settlement conceived an idea that Wananchi Online Limited had offered to purchase the Company at Kshs.240,000,000.00. That commission of Kshs.40,000,000.00 would be paid and Kshs.70,000,000.00 would be paid to the Bank on account of a debt by the Company. And so from the balance of Kshs.130,000,000.00, his share was worked at Kshs.60,000,000.00.

4. Sachin further contends that the Defendants had already received a letter of intent fro Wananchi Online Limited by 11th July 2007 to sell the shares of Mitsuminet Cable for some Kshs.400,000,000.00 or such amount and not the sum of Kshs.240,000,000.00 as had been represented to him by the Defendants. He adds that by an agreement dated 31st July 2007, Wananchi agreed to buy the shares in the Company at a consideration of Kshs.440,000,000.00, just seven (7) days after the settlement agreement of 24th July 2007.

5. Sachin's case is that the settlement agreement dated 24th July 2007 was *non estum factum* and that had he known the true state of affairs then he would not have agreed to sign it and requests this Court to declare it a nullity. His claim is for the sum of Kshs.220,000,000.00 being his share of 50% of the sale price paid to the Defendants by the purchaser and as the Plaintiff has already received Kshs.60,000,000.00, the Plaintiffs claim is for the balance of Kshs.160,000,000.00 with interest thereon from 31st July 2007. The Plaintiff also seeks Judgment against the Defendants jointly and severally for:-

a) Nullification of the settlement agreement dated 24th July 2007.

b) General damages for loss of earnings for a period of three years with interest.

c) Costs and interest of this suit.

6. Jagat and Mitesh filed a joint statement of Defence dated 29th September 2010 and filed on the same day. Shorn of the details of a statement of facts in the Defence, the Defence can be abridged.

7. That at one time the shareholding of Mitsuminet Cable was:-

1. Sachin Shaha 489 shares

2. Shital Patel 300 shares

3. Jagat Shah 110 shares

4. Mitesh Shah 100 shares

5. Anton Olomutie Kinaiya 1 share

Overtime, Jagat injected the sum of Kshs.70,000,000.00 into the Company as additional capital and the company obtained a loan of Kshs.70,000,000.00 from East African Building Society Limited (EABS).

8. That in the latter part of the year 2007, Wananchi Online approached Mitsuminet Cable and Mitsuminet (k) Ltd to buy their rights and investments in the two companies and negotiations ensued. Part of which that Wananchi demanded that the injection of Kshs.70,000,000.00 capital of Jagat be converted into shareholder's equity as a precondition to the buyout. It is contended that both Anton Olomutie and Sachin were unhappy about this .

9. That on or about 17th July 2007, Sachin filed High Court miscellaneous Civil Case Number 1213 of 2007 (Sachin Shaha –vs- Jagat Shah, Mitesh Shah and Shitel Patel) seeking an order of the Court to appoint inspectors to investigate and report on the affairs of the Company as well as to restrain the Defendants from conducting the affairs of the company. Again, Olomutie filed Chief Magistrate Court Yatta Civil Case No. 179 of 2007 Anton Olomutie Kinaiya –vs- Jagat Mahendra Shah, Mitesh Shah, Shital Patel and Sachin Shaha and obtained an order to stop a proposed extra ordinary general meeting of the Company. That in respect to the latter proceedings it is stated that Olomutie has since denied filing it.

10. Jagat and Mitesh contend that a settlement agreement was entered on 20th July 2007 between, inter alia, Jagat and Sachin which resulted in the compromise of the two suits and which was subsequently marked as settled. In the settlement, Sachin agreed to sale all his 119 shares in the Company to the Jagat for Kshs.60,000,000.00 and Olomutie agreed to sale his one share for the sum of Kshs.500,000.00 to Mitesh. Sachin subsequently transferred his shares and resigned as a director having received the pay off.

11. The Defendant's assert that all grievances, complaints, calls of action that the Plaintiff had and may have had were thus fully compromised and settled. They plead full accord and satisfaction in the light of the compromise reached in the two suits. Further, that upon the sale and transfer of the shares and payment of the agreed consideration, the Plaintiff cannot maintain this suit and is non-suited.

12. The two deny any misrepresentation or fraud on the sale of the shares to Wananchi and contend that Sachin entered into the settlement agreement consciously with full capacity and knowledge of the terms and implications.

13. It is also averred that the sale of the Plaintiff's shares to the 1st Defendant and the eventual sale of the Company shares to Wananchi Online were independent of each other and the decision of the Plaintiff to sale was his shares was voluntarily and with no inducement, misrepresentation or fraud as alleged or at all. Further, that the agreement with Wananchi Online Limited involved the sale of shares in both Mitsuminet Cable and Mitsuminet (k) and that the Plaintiff was never a shareholder at Mitsuminet (k) Ltd and cannot claim any payments made in regard thereto.

14. It is alleged that Sachin has attempted to use blackmail and extortion to force Jagat to pay him additional money and the same is the subject of a police complaint. In the end the Defendants aver that the suit is brought as aid to blackmail and extortion and is tainted with illegality and is contrary to public policy.

15. At the hearing only Sachin and Jagat testified. They rehashed what they had respectively pleaded and gave further details. The Court shall set out that evidence as it proceeds to determine the issues that present themselves for determination. These are:-

1. Can the Plaintiff maintain this suit in view of the consent decree and settlement agreement dated 24th July 2007 entered in High Court Misc Civil No. 1213 of 2017?

2. Did the Defendant's procure the aforesaid settlement agreement by fraudulent misrepresentation?

3. Did the Plaintiff hold 50% of shares in Mitsuminet Cable Vision Limited as at 24th July 2007?

4. Should the prayers sought in the suit be granted?

16. An argument taken up by the Defence, perhaps preliminary in nature, is that this matter *is res judicata* the consent decree entered in HCCC 1213 of 2007. The basis of this objection is Section 7 of the Civil Procedure Act which reads:-

> [S.7] 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.
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> Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

17. Called into aid, in particular, is explanation 4 of that rule which reads:-

Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

18. This rule encapsulates what is known as cause of action *res judicata* and for which the old decision in Henderson –vs- Henderson [1843-60] All E.R. 313 as often quoted. There Wigram V.C held;

"In trying this question, I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".

19. Misc Suit No. 1213 of 2007 was commenced by way of Notice of Motion (D. Exhibit Pages 101-114) and said to be brought under the provisions of Section 165 of repealed Companies Act (Cap 486). The substantive prayers in the Motion were:-

1. That his honourable Court be pleased to appoint inspectors to investigate and report on the affairs of Mitsuminet Cable Vision Ltd. in such manner as the Court directs.

2. That this honourable Court be pleased to appoint any reputable firm of Certified Public Accounts to carry out the investigations.

3. That pending the outcome of the Inspection and report, the Respondents JAGAT MAHENDRA KUMAR SHAH and MITESH MAHENDRA SHAH the managing and financial directors of the Company respectively and or their agents, servants or any person claiming under them be restrained by an order of this honourable Court from conducting the affairs of the said company to the exclusion of the Applicant and in a manner prejudicial and oppressive to the interests of the Applicant in the company.

4. That this honourable Court be pleased to restrain the respondents, their agents or servants or whoever from transferring, selling, disposing, alienating or in any dealing in any manner with the moveable and immoveable asserts of the company without the prior consent of the Applicant or until further Court Orders.

5. That this honourable Court be pleased to restrain the respondents, their servants or agents from withdrawing or transferring monies from the Bank Accounts of the Company without the prior Consent of the Applicant or until further Court Orders.

6. That this honourable Court be pleased to annul the false returns made by the respondents to the registrar of Companies.

7. That this honourable Court be pleased to issue a Court injunction restraining the respondents and mutual registrars from convening the proposed extra ordinary general meeting on 19/7/2007 until the application is heard and decided.

8. That upon completion of the investigation this honourable Court be pleased to make further Orders as it may deem necessary.

20. These are the proceedings which were eventually settled by way of the settlement agreement of 24th July 2007. It is in this Agreement that Sachin agreed to sale his stake in the company at Kshs.60,000,000.00.

21. It seems to me that the grievance of Sachin in those proceedings was the manner in which the respondents were conducting the affairs of the Company. Sachin had alleged financial impropriety on the part of the Defendants and one Shital Patel and falsification of company records. In the end he opted out through the settlement Agreement.

22. The present grievance is about the bargain that Sachin got when he opted out. He alleges that he negotiated a bad bargain on the basis of willful misrepresentation by the Defendants. Knowledge of the alleged misrepresentation came after the action was compromised and could obliviously not have been raised in the miscellaneous cause.

23. It is, however, common knowledge that a consent agreement is akin to a contract and can be set aside if obtained through misrepresentation. So it may be asked why Sachin commenced these proceedings instead of seeking to re-open the consent entered in the miscellaneous cause. This is because, although commenced simply to attend to grievances in the management and conduct of the affairs of the Company, the parties had chosen to settle it by way of a shareholder buyout.

24. Yet on the other hand there had been a fundamental change to the ownership of the Company after the settlement agreement. Ownership had changed hands as Wananchi Telecom Limited had bought all the shares in the Company for itself and its nominees through the Agreement of 31st July 2007 (P. Exhibit Pages 82-111). For that reason there was a third party involved and so even the setting aside of the consent order could not achieve a reversal of the ownership to the pre-settlement agreement position. The only viable option, in these circumstances, was for Sachin to press for recovery of what he thought to be a fair bargain. That could only be done through a substantive suit like the present one before Court. It is for this reason that in the uniqueness of this matter, the present proceedings cannot be said to be *re-judicata* Misc Suit No. 1213 of 2007 or an abuse of Court process. Indeed, Henderson (supra) had contemplated that there would be exceptional instances such as this.

25. There is a somewhat related issue. The Defendants submit that these proceedings are an attempt to re-open the purchase agreement (P Exhibit pages 57-81) in a manner not consistent with the terms of the agreement. Clauses 16.1 and 16.2 of the agreement are invoked in support of the argument. These read;

> [16.1] This Agreement constitutes the entire agreement between the parties hereto in respect of the matters dealt with herein and supersedes cancels and nullifies any previous agreement or arrangement between the parties hereto in relation to such matters notwithstanding the terms of any such agreement or arrangement including any terms as to any rights or provisions expressed to survive termination.
>
> [16.2] Each of the parties hereto hereby acknowledges that it has not been induced to enter into this Agreement by and is not for any other reason relying upon any statement of fact or opinion or any representation or warranty save as expressly contained or referred to in this Agreement or in any document referred to in this Agreement and irrevocably and unconditionally waives any right it may have:
>
> [16.2.1] to claim damages for any misrepresentation (whether or not contained in this Agreement or for any breach of any warranty not contained in this Agreement unless such misrepresentation or warranty was made or given fraudulently and/or
>
> [16.2.2] to rescind this Agreement.

26. The Plaintiff has a sufficient answer, I think, to this proposition. As is evident from the provisions of Clause 16.2.1 the waiver in the settlement agreement did not extend to where the agreement was entered into on the basis of misrepresentation or warranties of a fraudulent nature. In so far as the Plaintiff asserts fraudulent misrepresentation then this Court is entitled to examine whether indeed there was any fraudulent misrepresentation upon which a claim for damages can be made out.

27. That leads the discussion to the heart of the controversy. Unpacked, the allegation by Sachin is that he sold his shares for the price he did only because it had been misrepresented to him that Wananchi had offered a purchase price of Kshs.240,000,000.00 in consideration of acquiring all the shares of the Company when the real offer was for Kshs.440,000,000.00 or in the very least Kshs.400,000,000.00. Sachin asserts fraudulent misrepresentation. Perhaps before looking at the evidence, a brief survey of the relevant law is necessary. On this I am indebted to Counsel for both sides who set out the law in their respective submissions.

28. As pointed out by Counsel for Sachin, Black's Law Dictionary (Eighth edition) defines fraudulent misrepresentation as:-

> " A false statement that is known to be false or is made recklessly without knowing or caring whether it is true or false and is intended to induce a party to detrimentally rely on it".

29. There is no departure between the parties that fraud is proven when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false (Derry -vs- Peek (1889) 14 App Cas 337). Further elements were pointed out by Counsel for the Defendants to be that the representation was made with the intention of influencing the claimant. And that the claimant relied on the information and as a consequence suffered material loss.

30. As to the relationship between non-disclosure and misrepresentation. Chitty on Contracts ,General Principles, 31st Edition states:

> "Non-disclosure. The general rule is that mere non-disclosure does not constitute misrepresentation, for there is, in general, no duty on the parties to contract to disclose material facts to each other, however dishonest such non-disclosure may be in particular circumstances.
>
> But there are exceptions to the general rule that there is no duty to disclose. First, there are many statutory exceptions. Second, there are exceptions at common law where the contract is within the class of contracts uberrimae fidei, where there is a fiduciary relationship between the parties, and where failure to disclose some facts distorts a positive representation. It is also possible for a person to be guilty of misrepresentation by conduct".

31. Lastly, as there is an allegation that a fraud was committed, the party alleging it carries the heavy burden of proving it past a balance of probability yet not beyond reasonable doubt.

32. There is evidence that at the time of negotiating and entering the share settlement agreement Sachin was made aware that a third party had offered to purchase all shares in the Company and this is even the clearer because in the settlement Agreement both parties declare that:-

> "The company and its shareholders are in the process of negotiating an Agreement for the sale and purchase of all share to a third party".

33. The testimony of Sachin is that the Defendant jointly misrepresented to him that the purchase price was Kshs.240,000,000.00. He testified:-

> "The Kshs 60M was based on Kshs.240M said to be paid by Mwananchi …. a document showing Kshs.240M was shown to me".

Elsewhere he echoes this;

> "I had been told that the sale was for Kshs.240M. I had been shown a document of Kshs.240M but I do not have a copy".

34. How does this compare with the evidence of Jagat? Jagat says that Sachin was also involved in the discussion with Wananchi. He testified:-

> "The two Agreements were independent. I told him that original price was Kshs.400M".

He then stated;

> "If he wanted to, the Plaintiff could have been party to the 2nd Agreement and signed off his shares…. Shaha was aware of the back to back discussion with Wananchi".

35. The further evidence is that in the letter of intent (plaintiffs Exhibit pages 37-45) to directors and shareholders of Mitsuminet Cable Vision Limited and Mitsuminet Limited, Mwananchi made its intention to acquire the sale of shares in both companies in the "region of Kshs.400,000,000.00 or such other amount as the parties agree to in writing''. However in the end, Wananchi Telecom Limited bought shares only in Mitsuminet Cable at an enhanced consideration of Kshs.440,000,000.00.

36. As to why the purchase was only in the shares of Mitsuminet Cable, Jagat testified:-

"We were to sell companies with no liabilities. On due diligence it emerged that we had litigation with Microsoft USA. So Wananchi indicated that they did not want to take up this liability hence the need to merge the assets of Mitsuminet Cable and Mitsuminet".

37. Although Jagat persisted in his position that the consideration of Kshs.440,000,000.00 was for both Mitsuminet Cable and Mitsuminet Kenya but was hard put to explain why the shareholding in the latter company was still with Shital Patel and Shah Mitesh as at 3rd April 2012(Plaintiffs Exhibit 2 page 1). He simply explained that Wananchi had been given the transfer of shares in the Mitsuminent Kenya but did not implement the changes.

38. Given the above evidence has Sachin made out a case of fraudulent misrepresentation to the threshold required by the law? This Court takes it that as the Plaintiff, at the time of entering the settlement agreement, was well aware that negotiations were underway to sale the shares of the Company to a third party, he does not, in principle, fault the Defendants for entering the negotiations even prior to the conclusion of the settlement agreement. There is this express acknowledgement in the settlement agreement.

"B) The company and its shareholders are in the process of negotiating an Agreement for the sale and purchase of all its shares to a third party".

39. In respect to the purchase price offered for the sale of shares to the third party, it is the word of Sachin against that of Jagat. Sachin says he was told of a purchase price of Kshs.240,000,000.00 and saw a document to that effect. Jagat says that there was full disclosure of an offer of Kshs.400,000,000.00 as set out in the letter of intent to both companies.

40. Yet it has to be remembered that the settlement agreement was made against the backdrop of litigation (Misc. 1213 of 2007) between Sachin and the two Defendants in which the gravamen of the complaint by Sachin was about breach of fiduciary duty on the part of the Defendant and Shital Patel. It would not be surprising if the warring parties were suspicious of each other and so I wonder why Sachin did not keep a copy of the document he allegedly saw in which the offer was for Kshs.240,000,000.00.That undoubtedly would be an important document. Now that he did not produce it the question begs whether he really saw such a document?

41. On the other hand, notwithstanding the explanation given by Jagat that the sale for Kshs.440Million was in respect to both Mitsuminet (K) and Mitsuminet Cable in which the Mitsuminet (K) merged its assets with Mitsuminet Cable ,the evidence does not quiet support that story. This is because Mitsmuninet (K) is not party to the sale agreement. It is not improved by the fact that the shareholding of Mitsuminet (K) as at 3rd April 2012 (five years after the alleged sale of the shares to Wananchi) shows that the old shareholders were still owners of Mitsuminet (k).

42. In these circumstances, the version of the Plaintiff is even with that of the Defendants. None is stronger than the other. Had it been a cause of action that requires the ordinary proof in the civil cases, then the Court would have perhaps held that the Plaintiff had made out his

case on a balance of probabilities. However, the standard for proving fraud is higher and I am afraid the evidence tendered by the Plaintiff lacks that extra punch that would tilt the scales in his favour.

The Plaintiff's shares in Mitsuminet Cable

43. Even though the Plaintiff has not proved his main claim, I need to address the issue of his shares in Mitsuminet Cable as at 24th July 2007. That date being of some significance because this was the date of the settlement agreement. The Court needs to address it not only because it is identified as an issue for determination but also because its determination possibly impacts on the quantum of damages the Plaintiff would have been entitled to had succeeded in his claim. Something this Court is obliged to determine notwithstanding that it has not found on liability.

44. Although Sachin asks this Court to look at the Articles and Memorandum of Association of the Company and the Memorandum of Understanding dated 3rd March 2006,the Court takes the view that the settlement agreement of 24th July 2007 provides a complete answer as to the shareholding of the Company as at 24th July 2007. The circumstances in which the settlement was entered, it must be remembered, was for purposes of compromising a litigation between the shareholders of Company. The validity of that settlement has been upheld by Court.

45. An important statement in recital to the said agreement it reads;

> "The company is a limited liability company incorporated in Kenya and has at the date hereof an authorized share capital of Kenya Shillings 100,000/= divided into 1000 ordinary shares of Kenya shillings 100/= each all of which are issued and fully paid".

46. It is an acknowledgement by all parties that the 1000 ordinary shares in the Company have been issued and credited as fully paid. In recital (C), Sachin is said to own 119 ordinary shares in his name and 1 share through his nominee Anton Olomutie Kinaiya. The effect being that he owns 120 shares in the Company. As the total number of issued shares was 1,000 as at that date, Sachin could not possibly own 50% of the shares in the Company. While it may be true that he previously held a bigger stake, that was diluted over time and the explanation seems to be provided by recital D.

> "There exists a shareholders loan by Jagat Shah in the sum of Kshs.73 Million which must be converted into equity prior to the sale of shares".

47. The finding that the number of shares held by Sachin as at the date of the settlement agreement were 120 shares is further reinforced in the agreement for the purchase of his shares by Jagat. In the schedule 1 part 2 to the Agreement (Plaintiffs Exhibit Page 71) shareholding of Sachin Shaha as at the date of the agreement is expressly stated to be 120 shares.

48. The Court does not accept the proposition that the issue of shareholding in the Company can be resolved by referencing to the default clause of the settlement Agreement. Clause 4 which is the default clause provides that in the event of default on Jagat, Sachin would be entitled to the following remedy;

> [4.1] If Jagat Shah fail to comply with any of the conditions hereof Sachin Shana shall give Jagat Shah at least Twenty one (21) calendar days' notice in writing confirming his readiness to complete the sale of shares in all respects and specifying the default and requiring Jagat Shah to remedy the same before the expiration of such notice failure which:
>
> a) Sachin Shaha shall be entitled to a retransfer of the shares transferred herein upon refunding all deposits received which shall within 21 days of default be transferred back to him and he shall be appointed as a director in the Company.
>
> b) The parties hereto shall arrange for the transfer of shares to reflect a situation where Sachin Shaha shall own 50% of the shares in the capital of the company and Jagat Shah shall own 50% of the shares in the capital of the company. No additional payments shall be due to Sachin Shaha under this Clause.
>
> [4.2] If Sachin Shaha shall fail to complete the sale and transfer of shares to Jagat Shaha due to no default on the part of the Jagat Shah. Jagat Shah may give to the Sachin Shaha 21 days' notice in writing to comply with his obligations and such notice shall specify the default and require Sachin to make it good within 21 calendar days' and if Sachin Shaha fails to comply with the notice, Sachin Shaha shall refund to the Purchaser forthwith the Deposit together with all sums received as part of the Consideration without prejudice to the Purchaser's right to sue Sachin Shaha for specific performance.

49. On the other hand, if Sachin failed to complete the sale and transfer of shares, then an option available to Jagat would be for Sachin to refund the deposit without prejudice to Jagat's right to sue for specific performance.

50. The agreement to take the shareholding to 50:50 between Sachin and Jagat would only be upon default of Jagat of terms of the settlement agreement and further upon Sachin calling in the provisions of Clause 4 of the Agreement. Neither has happened.

51. For that reason, the number of shares held by Jagat (by himself and through his nominee) in the Company was 120 shares out of 1000 shares issued and deemed to be credited as fully paid. That was not 50% of the shareholding.

Of Damages**?**

52. What damages would this Court have granted to Sachin had it held in his favour on liability? Although this Court is told by Counsel for

Sachin that he would be entitled to rescind the settlement agreement, that remedy may not be available because following that impugned agreement, shares in the Company were sold to Wananchi and would be beyond reach. The parties can never be put back to the positions they were in before entering the contract. In considering the appropriate measure of damages, he Court bears in mind that it is not all the terms of the settlement agreement that irks Sachin. What he alleges to be the issue is that he negotiated a price on the basis of a sale price of the Company's shares to the third party at Kshs.240,000,000.00 and not Kshs.440,000,000.00 that was actually achieved. A fair compensation would have been to fix a new price for his shares on the basis of the actual price paid and to award him the difference worked out as follows:-

440,000,000 x 60,000,000

= 110,000,000

240,000,000

110,000,000 - 60,000,000 = 50,000,000

53. The Court would have made an award of Kshs.50,000,000 plus interest thereon at Court rates from the date of filing suit.

54. But as this Court has not found in favour of the Plaintiff on liability, the entire suit is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 7th Day of February 2020

F. TUIYOTT

JUDGE

PRESENT:

Kadima for Chacha Odera for Plaintiff

Kivindyo for Oduol for Defendants

Nixon: Court Assistant