



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 82 OF 2014

CHARLES METO.....PLAINTIFF

=VERSUS=

AMOS KOSGEY.....1ST DEFENDANT

DAVID MUGUN.....2ND DEFENDANT

COLLINS SAINNA.....3RD DEFENDANT

CAD HOLDINGS LIMITED.....4TH DEFENDANT

JUDGMENT

1. The plaintiff, in this case, is **CHARLES METO** (hereinafter Charles). **AMOS KOSGEY** (hereinafter Amos), **DAVID MUGUN** (hereinafter David) and **COLLINS SAINNA** (hereinafter Collins) are 1st to 3rd defendants respectfully. The 4th defendant is **CAD HOLDINGS LIMITED** (hereinafter CAD). CAD is a limited liability company having been incorporated on 19th August, 2010.

2. The issues for determination in this case are:

(i) Are the defendants indebted to the plaintiff for USD 152,480.52?

(ii) Is the plaintiff entitled to an award of general damages?

(iii) Who will bear the costs of this suit?

3. This is a case involving parties that are closely related. Amos is an uncle of Charles while David and Collins were known to Charles from a very young age. Charles resides and is a citizen of USA while Amos, David and Collins are residents and citizens of Kenya.

4. The claim made by Charles is that Amos, David and Collins as directors of CAD invited him to jointly participate in the project/development of Holiday Homes in Kilifi Mtwapa. Charles pleaded in this case that in inviting him Amos, David and Collins represented to him that CAD was incorporated as a special purpose vehicle to develop those Holiday Homes. Further that they represented to Charles that the initial construction cost of the first phase was Ksh 30 million. Charles pleaded that on the basis of that invitation on diverse dates he remitted USD 152,480.52 to the bank account of CAD. That however in the year 2012 Charles visited Kenya, from USA and found that the property KILIFI/MTWAPA/729, whereupon the Holiday Homes were to be constructed, had not been acquired and that, Amos David and Collins had not met their equity contribution to that development but that rather Charles' contribution had been withdrawn by Amos, David and Collins for their personal use. Charles alleged that Amos, David and Collins had defrauded him "through an elaborate scheme of falsehood and misrepresentation." It is on that basis that Charles seeks judgment for USD 152,480.52 against all the defendants.

5. The claim is denied by the defendants. They pleaded that CAD was not incorporated as a special purpose vehicle. Rather that it was incorporated for the objects set out in the Memorandum and Articles of Association. Further that Charles was initially invited as an investor but subsequently he negotiated with CAD and he became a shareholder and eventually took up 25% of the issued paid up shares. The defendants pleaded that at all times they acted with bona fide towards the transaction of the Kilifi property but that unfortunately the transaction failed to materialize and the money paid by CAD in respect to that transaction was refunded to CAD and the same was in CAD's bank account. The defendants therefore denied defrauding Charles and stated that Charles' claim was false and misconceived.

ANALYSIS AND DETERMINATION

6. It is not disputed by the defendants that Charles provided the funds in this claim and that the same was deposited in CAD's bank account. What is in dispute is whether Charles is entitled to be refunded that amount. Although the defendants through their defence pleaded that the money was in CAD's bank account no evidence was adduced that in fact the said money is in that account available to Charles.

7. It is apt to consider the first issue identified above, that is whether the defendants are indebted to Charles as claimed.

8. Although the defendants stated that the amount sent by Charles was in respect to Charles' acquisition of shares in CAD Charles in his evidence stated that the amount he claims in this case has nothing to do with his shareholding indeed Charles stated in evidence:

“The value of my shares is only 10,000 shillings. That has nothing to do with my claim.”

9. Amos while being cross examined confirmed that Charles' shareholding in CAD was 100 shares and that the value of those shares was Ksh 10,000. David contradicted Amos by saying that out of the money sent by Charles into CAD's bank account Ksh 7.5 million was towards Charles' shareholding. Amos also stated that Charles' shareholding was valued Ksh 7.5 million.

10. It needs to be noted that CAD's bank account was operated by the three defendants, Amos, David and Collins. Although David in his evidence denied that he was a signatory to CAD's bank account the account opening forms of CAD's bank account however show that that bank account was operated by the three defendants Amos, David and Collins.

11. The court then needs to determine what the money sent by Charles into CAD's bank account was for.

12. On 19th July 2010 Amos sent an email to Charles. That email was copied to David and Collins. The subject of that email was **“MTWAPA HOMES INVITATION TO PARTICIPATE AS EQUITY PARTNER”**. By that email Charles was invited to take up 25% of the 'Company' as an equity partner. It is not clear which company Charles was invited to participate in because by then CAD had not been incorporated. It was incorporated on 19th August 2010. Amos stated in that email that the value of the company was Ksh 30 million. Amos informed Charles that they had secured the land and had obtained architectural designs and had engaged a contractor. The content of that email is as follows:

“Dear Charles,

I trust you are well.

We would like to extend to you an invitation to participate jointly with us as an equity partner at 25% of the company.

This is borne by the realization that we need much more funds to get this project going. As of now, we have secured the land, got the architectural designs drawn up, we have engaged a contractor and did the necessary registrations etc. All these steps/processes cost us a lot of funds upfront.

After some brainstorming, we have decided to invite you to take up the offer of 25% stake in the project. Am sure either David or Collins has explained the concept to you and if not am sure in your next call to either one of them, they will.

We have valued the company at KES 30 million, being the value of the assets and liabilities. A 25% stake is therefore KES 7.5 Million. This equity stake can be taken up in blocks of 5% (KES 1.5 Million).

You can take these up as yourself or as a consortium of partners of which you will be the pointman of that consortium.

Some more info on the potential:

Basically the development will go upto 100 homes with phase 1 & 2 going in blocks of 30, phase 3 will have 24 units and phase 4 16 units.

The units will be sold as follows:

Phase 1 -30 Units @ Kes 3.5 M = KES 105 M

Phase 2 -30 Units @ Kes 5.0M = KES 150m

Phase 3 – 24 Units @ Kes 10M – KES 240M

Phase 4 – 16 Units @Kes 15M-KES 240M

What we are offering to you is therefore a substantial legup on your investment.”

13. As stated before as at July 2010 CAD had not been incorporated. If indeed what Amos, David and Collins were inviting Charles to do was to obtain shareholding in the yet to be incorporated company then one cannot understand why, even after Charles sent money, through a third party Elsie Chemurgor Saina, and later into CAD's bank account, he was not reflected as director of CAD, on the Memorandum and

Articles of Association at incorporation. Amos, David and Collins were however reflected as directors of CAD. It would follow that Charles, contrary to what Amos stated in the email of 19th July 2010, was not invited to be a shareholder or director of the yet to be incorporated CAD. It would seem just as the email shows that Charles was being invited to participate in the investment of the construction of Holiday Homes on the Kilifi property. What is also clear is that Amos, David and Collins, again contrary to what was stated in the foretasted email had not secured the Kilifi land. The email obviously enticed Charles to invest in what one can only call a scam because there was no land available or purchased by Amos, David and Collins to construct the Holiday Homes. Charles on being enticed made transfers from his bank account in USA into CAD's account which account was operated by the three defendants. All the three defendants confirmed in evidence that Charles did transfer USD 152,480.52 into that account.

14. On being asked whether they would be willing to refund that amount to Charles, in view of the fact that the investment failed to materialize the defendants stated in evidence that the money had been expended in various other investment, which also did not materialize, and that it was therefore unavailable. The defendant also stated that because Charles had invested in CAD he needed to formally write to CAD to seek to withdraw his investment.

15. The bank accounts of CAD were produced in court in evidence. It is clear that the funds transferred by Charles into that account were unavailable for refund to be made to Charles. If indeed those funds were genuinely used to advance CAD's investment the defendants who raised that defence, that the money was used by CAD in investment, did not produce any company's accounts to show how that money was utilized by CAD. Most of the transaction in CAD's bank account seem to be encashment of cheques. The defendants did not produce cheque stubs to show what the encashment was for. For all the court knows those encashment were made to the defendants for reasons other than the advancement of CAD's objects. Indeed, Charles in his testimony stated that the defendants, when he met them after he demanded his refund, admitted that they used the funds for their own use. In particular Charles stated that Collins admitted to have used Ksh 3 million, of the money sent by Charles, to fund his "own matters".

16. Having had the opportunity to see and hear the parties testify before me I formed the opinion that Charles was a truthful witness. The defendants were not truthful, in my view, and much more importantly they failed to prove their defence by providing documentary evidence. It was not enough, in my view, for the defendants to produce various documents relating to investment they pursued on behalf of CAD. They needed to support their use of money sent by Charles by producing company accounts. This indeed is what Charles requested for in his email to the defendants dated 17th July 2011. Charles stated:

"Lastly as a business entity, I am concerned when we don't seem to have any monthly, quarterly and annual financial statements. These should have been availed whether or not any business takes place. We have invested a lot of money and at some point there should be a record of this."

17. The above highlights the failure of the defendants to account for money they withdrew from the bank account of CAD. Indeed, one can only surmise that the defendants operated the bank account of CAD, which account only held the money transferred by Charles, as though it was their private bank account. They withdrew the money from that account willy-nilly for their personal use and hence they cannot now account for it. The defendants knowingly misrepresented to Charles that he was being invited to invest in the construction of Holiday Homes which would yield a high investment. They concealed the truth in that misrepresentation by lying to Charles that they had already purchased the land where the Holiday Homes would be constructed. They indeed had not purchased that land. Charles stated that because Amos was his uncle and David and Collins were his childhood friends he trusted them and their representation to him which representation was not truthful. In this regard I rely on the definition of fraud as discussed in the case **Kibiro Wagoro Makumi v Francis Nduati Macharia & another (2018) eKLR** thus:

*".....the term fraud is in **Black's Law Dictionary** as follows;*

"Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another".

18. It is clear that the money transferred by Charles into CAD's bank account was not used by CAD or for its benefit. If it had been so used the defendants would have produced company's accounts and receipts to prove so. Rather it is this court's finding that the amount was used by the account's signatories for their own personal use. David in his evidence confirmed that the three defendants agreed when withdrawals were made in the account when he stated:

"If there were any withdrawals, we all agreed on what needed to be withdrawn....."

19. In view of the above discussion I find and hold that the 1st to the 3rd defendants, that is Amos, David and Collins are indebted to Charles for the amount of USD 152,480.52. CAD is not so indebted.

20. On the second issue I find that indeed Charles was inconvenienced by the defendants when they put his money to their personal use rather than investing it in CAD, as was intended. For that reason, I will award Charles Ksh 1 million in general damages.

21. Charles has succeeded in his claim and it would follow that he is entitled to the costs of this suit.

CONCLUSION

22. In the end, the judgment of the court is:

- a. Judgment is entered in favour of the plaintiff as against the 1st, 2nd and 3rd defendants jointly and severally for US Dollar 152,480.52.
- b. Judgment is entered for the plaintiff as against the 1st, 2nd and 3rd defendants jointly and severally for Ksh 1 million in general damages.
- c. Interest at court rate is awarded on US Dollar 152,480.52 from the date of filing this suit until payment in full and interest is also awarded on the amount of Ksh 1million from the date of this judgment until payment in full.
- d. The plaintiff's costs of this suit shall be paid by the 1st, 2nd and 3rd defendants jointly and severally.

DATED, SIGNED and DELIVERED at NAIROBI this 13th day of OCTOBER, 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Plaintiff:

For the Defendants:

ORDER

This decision is hereby virtually delivered this 13th day of October, 2020.

MARY KASANGO

JUDGE