REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 393 OF 2014

ANGALUKI MUAKA.....PLAINTIFF

VERSUS

BERYL AWINJA SAKWA…….....DEFENDANT

JUDGEMENT

1. The relationship between Angaluki Muaka (Angaluki) and Beryl Awinja Sakwa (Beryl) has seen better days. They are now locked in a dispute in respect to an Agreement dated 14th February 2013 (hereinafter the Agreement).

2. Through a Plaint presented to Court on 12th September, 2014, Angaluki avers that the two entered into a Joint Business Venture to set up a Colon Cleansing and Beauty Shop. That pursuant to that Agreement, Angaluki paid to Beryl a total sum of Khs.1,927,797/=.

3. That in breach of the terms of the said Agreement, Beryl has failed to pay to Angaluki the agreed monthly instalments of Kshs.300,000/= with effect from June 2013. Angaluki's claim, as at the date of filing suit, was Kshs.6,702,797/= which includes monthly instalments of Kshs.300,000/= together with late payment penalty. This would be for the months of June 2013 to August 2014.

4. Angaluki claims further dividends of Kshs. 300,000/= per month and late payment fee of 8% thereon from September 2014 until the date of termination of the Agreement.

5. Beryl resists the claim and filed a statement of Defence dated 29th October 2014. The averments in the Plaint are denied. Beryl states that if there was a transaction then the same was a joint business venture and Beryl did not give any commitment to pay any monies, penalties or interest. Further that any profits were conditional to the success thereof but that the business failed. The failure is blamed on Angaluki and the acts of third parties whom Beryl claims were not within her control.

6. At the hearing Angaluki reiterated the contents of the Plaint. He stated that his only role was to provide the startup capital and he could not be in breach of the Agreement. He emphasized that the business took off and was operational as recently as 2015. And that in any event the contract was not conditional upon the success of the business.

7. He accepted that he had offered to settle the matter with acceptance of a refund of the capital investment but Beryl was unwilling to pay the monthly amounts.

8. In her evidence, Berly stated that Angaluki invested some Kshs. 1,977,797/= into the business but it was her understanding this was finance to the business and was not to be repaid. But confronted with the contents of the agreement of 12th February 2013, she pleaded that she did not enter it on her own freewill. Asserting that she was in a marriage and was coerced into it.

9. Parties gave separate proposals on the issues for determination. I have considered them in the context of the pleadings and I take the view that the following emerge for determination;

> 1. Did the Plaintiff and the Defendant enter into an Agreement dated 14th February 2013 and if so, what was the nature of that agreement.
>
> 2. What amount, if any, did the Plaintiff pay into the business under the terms of the said agreement?

3. Wether the Defendant is liable to refund to the Plaintiff money referred to in issue 2 above.

4. Whether the Defendant is liable to the Plaintiff for the sum of Kshs.6,702,797/- as pleaded in the Plaint or at all.

5. Whether the Defendant is liable to pay to the Plaintiff the sum of Kshs.300,000/= per month together with late penalty fee of 5% thereon from 1st September 2014 under the terms of the Agreement dated 14th February 2013 or at all.

6. Who pays the costs of this suit?

10. There is no doubt that Angaluki and Beryl entered into what they called a Business Agreement on 14th February 2013. There is no serious contention that pursuant to the terms of the Agreement, Angaluki advanced Kshs.1,977,797/= as a startup capital for purposes of establishing and running a Colon cleansing and Beauty Shop. Evidence of this payment is on Plaintiff's exhibits at pages 25,26,27 and 28.And this was in fact confirmed by Beryl in cross-examination when she stated;

"*I was paid the principal sum of Kshs. 1,977,797/=***"**

11. Even before turning to the question as to the nature of the agreement and the terms under which the money was given, it is necessary to decide on the allegation by Beryl that she entered the Agreement under coercion. Beryl postulates that because she was married to Angaluki, she did not contract on her own freewill and was under coercion. When she raised the matter she was challenged by Counsel for Angaluki that she never pleaded it. Counsel must have had in mind the provisions of Order 2 Rule 10(1) which reads,

"(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

See also Order 2 Rule 4(1).

Having failed to plead coercion, Beryl cannot be permitted to take it up as a defence.

12. What then was the nature of the agreement? For an answer to this, one looks to clause V of the Agreement which provides:-

"6. In consideration of their responsibilities in the business services anticipated by this Agreement, the parties shall share business revenue as follows:-

a. After a grace period of three (3) months from the launch of the anticipated business services on 1st March, 2013, the Operator shall pay the Financier Kenyan Shillings three hundred thousand (300,000/-) every first of the month for the first two (2) months of June 2013 and July 2013;

b. The Operator and Financier shall meet during the last week of July 2013 to review the performance of the business services in good faith and accordingly agree on a new monthly payment rate to the Financier from 1st August 2013, which payment rate shall be in perpetuity;

c. Operator's payments to the Financier shall be made into the Financier's Equity Bank business account of the following details:

Account NO. xxxxxxxxxxxx

Account Name: A.M Ventures, Ltd

Branch: Community Corporate, Nairobi, Kenya

Swift Code: EQBLKENA

7. After meeting her monthly payment obligations to the Financier, the Operator shall retain the rest of the earnings form the business services for herself.

8. Payment not received by the Financier by the 5th of the month shall be deemed to be late and shall attract a five percent (5%) late fee.

9. Operator shall be deemed to be in default if the Financier has not received a payment in thirty (30) days, at which point the Financier may commence legal proceedings to recover the outstanding payment(s) and any applicable penalties".

13. It is not doubted nor contended that Angaluki fulfilled his side of the bargain by providing the startup capital as set out in the Agreement. Indeed by the time of the signing of the Agreement, Angaluki had paid up a sum of Kshs.760,000/=.

14. There is no evidence that Beryl made any payments as contemplated by the Revenue sharing terms of the Agreement. Beryl asserts that such payment was pegged on the profitability of the Business. Angaluki thinks it was unconditional. However ,Berly blew hot and cold on this important aspect of the case.Under pressure that sometime comes with Cross-examination she said;

> "*I have not refunded the money .It was not a loan….The repayment of the principal was not pegged on the success of the business*"

On this, I resolve in favour of Angaluki!

15. The Court is fortified by my understanding of clause V of the agreement. Although the wording of clause V is that parties shall share business revenue, the obligation on Beryl to pay Angaluki in respect to the months of June 2013 and July 2013 is absolute. Clause V6(a) is unequivocal as follows:-

> "After a grace period of three (3) months from the launch of the anticipated business services on 1st March, 2013, the Operator shall pay the Financier Kenyan shillings three hundred thousand (300,000/-) every first of the month for the first two (2) months of June 2013 and July 2013".

And if there was any doubt as to the nature of the Agreement then it is clarified by clause X16 which reads:-

> "This business Agreement does not constitute a business partnership. The business relationship anticipated by this Agreement is limited to the Financier providing business startup finance as venture capitalist and the Operator operating business services as an independent owner".

16. It is the finding of this Court that the payments from Beryl to Angaluki were not conditional on the success of the business. And in respect to the months of June and July 2013, the payments ought to have been Kshs.300,000/= per month and as this amount was not paid thirty days after it fell due (clause V9) then there would be default on the part of Beryl.

17. Angaluki however has difficulty proving default from 1st August 2013. This is because the amount to be paid was subject to an Agreement between the parties. This is the clear purport of clause V 6b which bears reproduction:-

> "The Operator and Financier shall meet during the last week of July 2013 to review the performance of the business services in good faith and accordingly agree on a new monthly payment rate to the Financier from 1st August 2013, which payment rate shall be in perpetuity".

If the rate was not agreed then an argument that there was default because of non-payment cannot be sustained.

18. Angaluki also claims a refund of the startup capital he paid being Kshs.1,977,792/=. But is there a basis for this? Having read the Agreement, I have understood it that had both sides carried out their obligations then there would be no need for a refund and the consideration for the advance was the payment of the revenues as set out in clause V of Revenue sharing. But this Court has found Beryl was in very early default of the Arrangement.

19. Angaluki would have to look at Clause XI of the Agreement for his entitlement in the event of default. It reads:-

"20. This is a mutual agreement that shall be binding to both parties with equal force.

21. Either party that shall be in violation of any provision of the Agreement shall compensate the other to the extent of the profits that the other will have lost and other losses that the other party will have incurred, in addition to other remedies that a competent court may so award".

20. This Court has made a finding that on the construction of sub-clause 6(a) and (b) the only amount due to Angaluki is Kshs.600,000/= for the months of June 2013 and July 2013 and late payment fee of 5%. What is unclear and not provided for is whether the late fee is a one off payment or is applicable as long as there is default. In the absence of this clarity this Court will have to find that it is a one-off penalty.

21. Clause XI.21 also calls for compensation to the extent of profit cost and other losses. The profits cost by Angaluki are, in my view, the revenue he was entitled to in the months of June and July 2013 which had been properly agreed and the late penalty thereof. There being very early default, then the advance he made did not work for him and to allow Beryl to keep it would be to sanction a loss to Angaluki.

22. The upshot is that I would enter judgment for Angaluki for Kshs.630,000/= (Revenue for June 2013 and July 2013 plus 5% late fee) and refund of Kshs.1,977,797/- paid. Judgment is hereby entered in favour of Angaluki against Beryl for Ksh.2,687,797 plus interest thereon at Court rates from the date of filing of the suit. The Plaintiff shall also have costs of the suit.

Dated, Signed and Delivered in Court at Nairobi this 1st day of February, 2019.

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F. TUIYOTT

JUDGE

***PRESENT*;**

Opakas for Kangethe for Plaintiff

Waweru for Thuita for Defendant

Nixon - Court clerk