



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 1670 OF 2007**

**MENNO TRAVEL SERVICES LIMITED.....PLAINTIFF**

**- VERSUS -**

**MENNO PLAZA LIMITED.....DEFENDANT**

**JUDGMENT**

1. This suit was initiated by the plaintiff in the High Court as **Nairobi HCCC No 1265 of 2005**. It was subsequently transferred to this court. Through a plaint dated 19/8/2015, the plaintiff sought the following verbatim orders against the defendant:

- a. Order for valuation of the suit property and payment of the said value to the plaintiff (sic)**
- b. Interest on (a) above at court rates**
- c. Any other relief(s) that the honourable court may deem fit to grant.**
- d. Costs of this suit.**

2. Subsequently, on 10/5/2012, the plaintiff filed an amended plaint dated 9/5/2012 in which it sought the following verbatim orders against the defendant:

- a. Kshs 123,000,000**
- b. Interest on (a) above at the rate of 4% above the base lending rate**
- c. Any other relief(s) that this honourable court may deem fit to grant**
- d. Costs of this suit**

**Plaintiff's Case**

3. The plaintiff averred in the amended plaint that, by an oral agreement entered into by parties to this suit in the month of October 1999, dated 21 October 1991 (sic), the plaintiff agreed to sell to the defendant, and the defendant agreed to purchase from the plaintiff, **Land Reference Number \*\*\*\*\***, comprised in **Title Number IR 25991 (the suit property)** at a purchase price of Kshs 123,000,000. The suit property was subsequently transferred to the defendant and the defendant took possession thereof. The plaintiff further averred that the defendant had failed/ignored to pay to the plaintiff the said purchase price of Kshs 123,000,000 despite demand.

**Case of the Defendant**

4. The defendant responded to the claim through an amended statement of defence dated 14/5/2012. The defendant averred that the plaintiff was a shareholder of the defendant company and a subscriber to the memorandum and articles of association of the defendant company. Further, the defendant denied existence of the alleged oral agreement and contended that, parties to this suit not being natural persons, were incapable of entering into an oral agreement. The defendant further averred that, in the absence of a contract for sale of land within the meaning of Section 3(3) of the Law of Contract Act (Cap 23), the amended plaint did not disclose any reasonable cause of action against the defendant

5. Admitting that the plaintiff caused the suit property to be transferred to the defendant for a consideration of Kshs 123,000,000, the defendant averred that the said transfer was made in pursuance of a pre-incorporation agreement dated 21/7/1998 between the plaintiff and the Co-operative Bank of Kenya Limited Staff Retirement Benefits Scheme Registered Trustees (**the Fund**). It denied owing the plaintiff the said sum of Kshs 123,000,000.

6. The defendant further averred that in or about 1996, the plaintiff approached Co-operative Bank of Kenya Limited (**the CBL**) and Co-operative Merchant Bank Limited (**the CMBL**), seeking financing to enable it discharge outstanding liabilities owed to Kenya National Capital Corporation (**the KNCC**), relating to a proposed development by the plaintiff, of a commercial building on the suit property, which was owned by the plaintiff. Consequently, the CBL and the CMBL agreed to advance the plaintiff the sum of Kshs 50 Million and 95 Million, respectively, to enable the plaintiff to pay off the amounts owed to KNCC. Pursuant to the above arrangements, the charge in favour of KNCC was discharged and two new charges were created in favour of the two lenders. In due course, the plaintiff was unable to complete the development and the servicing of the loan and invited the equity participation of, inter alia, the two lenders. To enable the effectual participation of, inter alia, the two lenders, it was agreed that the parties would incorporate a new company, Menno Plaza Limited, to which the development would be transferred. Menno Plaza Limited (the defendant) was incorporated and the suit property was subsequently transferred to Menno Plaza Limited subject to the existing charges in favour of the two lenders. The defendant denied liability.

### **Plaintiff's Evidence**

7. Hearing commenced on 6/11/2017. The plaintiff called one witness, WDK, who testified as PW1. He adopted his written witness statement dated 9/12/2016 as part of his evidence-in-chief. He produced the 27 documents contained in the plaintiff's bundle dated 27/2/2014. His testimony was that, he was the chairman and director of the plaintiff company. The plaintiff was at all material times the registered proprietor of the suit property, situated at the junction of Bunyala Road and Lower Hill Road in the Lower Hill Area of Nairobi.

8. PW1 added that the plaintiff sought to develop the suit property and in so doing, obtained a loan facility of Kshs 20,000,000 from KNCC. The plaintiff subsequently ran out of funds and approached CBL to finance the completion of the development. CBL decided to partner with CMBL. After various meetings involving Mr FA of CBL and Mr AK of CMBL, it was agreed that: (a) CBL would advance the plaintiff a loan of Kshs 50 Million while CMBL would advance the plaintiff a loan of Kshs 95 Million; (b) the money would be used to discharge the suit property from KNCC and the balance would be used to finish the construction works; (c) the loans would be secured by two charges in favour of the two lenders; (d) a new company would be incorporated to undertake the said development; and (e) the property would be transferred to the new company at a consideration of Kshs 123,000,000.

9. PW1 added that, subsequently, the moneys were advanced; the debt owed to KNCC was repaid; the new legal charges were registered in favour of the two lenders; and the defendant company was incorporated on 21/8/1998 with a share capital of Kshs 2 Million. The shareholders of the defendant company at incorporation were the plaintiff (**1 Share**) and Mr EM— representing Co-operative Bank of Kenya Limited Staff Retirement Benefits Scheme (the Fund) - (**1 Share**). It was the evidence of PW1 that on 21/10/1999, the defendant purchased the completed building for a sum of Kshs 123,000,000 which was to be paid to the plaintiff as per the transfer. He added that besides paying to the plaintiff Kshs 123 Million, the defendant was to take over the charges in favour of the two lenders. Subsequently, on 29/10/1999, the property was transferred to the defendant subject to the encumbrances.

10. PW1 added that by the year 2000, the mortgage debt by the plaintiff stood at Kshs 283,787,015. Parties agreed to liquidate the indebtedness of the defendant company by restructuring the shareholding of the defendant company as follows: the Co-operative Bank of Kenya Limited Staff Retirement Benefits Scheme (the Fund) would buy shares from the defendant for a sum of Kshs 30 Million; the CBL would also buy 8293 shares in the defendant company for a sum of Kshs 30 million to be paid as a set-off against the loan; the Fund would purchase a further 38,799 shares from the defendant company for Kshs 118,000,000. The shareholding of the company would thereafter be as follows: the Fund - 76%; Menno Travel Services Limited-13%; and Co-operative Bank of Kenya Limited-11%. The Fund would pay the Bank Kshs 148,000,000 and the Bank would give a further set-off of Kshs 30 Million making a total payment of Kshs 178,000,000. PW1 stated that the shareholding of the defendant company was subsequently increased by an additional 56,000 ordinary shares. He added that the defendant had never paid the purchase price of Kshs 123,000,000 and that the mortgage debts owed in the sum of Kshs 283,787,015 to the CBL and CMBL were fully repaid by the defendant company.

11. His evidence under cross-examination was that the oral agreement referred to in paragraph 3 of the amended plaint involved FA who represented Co-operative Bank; AK who represented Co-operative Merchant Bank Limited; and himself (PW1) who represented the plaintiff company. Asked to tell the court who represented the defendant company in the said oral agreement, he stated that the defendant company was represented by FA and AK.

12. His further evidence under cross-examination was that the defendant company was newly incorporated and did not have Kshs 123,000,000 in its books to pay for the property at that time. He added that the plaintiff did not contribute any money towards the purchase price. He further testified that the plaintiff company owned the suit property and in the course of developing the property, it ran into financial difficulties. The plaintiff did not directly make any repayments to the lenders. It was his understanding that the financiers were to pump into the defendant company Kshs 115,000,000 and in addition the plaintiff was to be paid Kshs 123,000,000 which was to be raised by the defendant company. It was up to the directors of the defendant company to find a way of raising the sum of Kshs 123,000,000. The Board of the defendant company dismissed the demand of Kshs 123,000,000 after the transfer and there was no conclusive resolution of the subject. Together with the Late Prof HP, they signed the pre-incorporation agreement and the pre-incorporation agreement spelt out a framework on how they were going to form a new company.

13. PW1 added in his evidence under cross-examination that the shareholders agreement dated 26/7/2000 was entered into after the suit property had been transferred to the defendant company. He further stated that the property was transferred before completion of construction works.

14. In re-examination, PW1 stated that the preceding oral discussion was between himself, FA and AK. He added that A and K were also members of the Fund. He further stated that the pre-incorporation agreement stipulated at page 26 that the plaintiff would enter into an agreement for sale of the suit property to the defendant company. Lastly, he stated that the issue of the sum of Kshs 123,000,000 was not

raised in the shareholders agreement because it was never in doubt.

### **Defendant's Evidence**

15. The defendant called one witness, SMK, who testified as DW1. He adopted his witness statement dated 19/11/2013 as part of his evidence-in-chief. He produced the 22 documents in the defendant's bundle as Defendant Exhibit 1 to 22 in the order in which they were itemized in the bundle filed on 19/11/2013.

16. In summary, DW1's testimony was that the plaintiff is a shareholder of the defendant company holding 13% of the shares in the company in terms of the shareholders agreement dated 26/7/2000. The plaintiff was a subscriber to the memorandum and articles of association of the defendant. In 1997, at the request of the plaintiff, CBL in partnership with CMBL agreed to enter into a financing arrangement pursuant to which they were to provide funds to the plaintiff to partly pay off a debt the plaintiff owed KNCC and partly complete the development on the suit property. A schedule of activities and an indicative term sheet were then drawn up for financing of phase one of the project which was then referred to as Menno Towers. However, this initial structure was never implemented as originally contemplated. This was partly due to documentation delays and partly due to the fact that the debt owed to KNCC (a subsidiary of National Bank of Kenya) grew from Kshs 65 Million at the time the structure was negotiated to approximately Kshs 103 Million at the time of redemption, due to interest and penalties.

17. He added that CBL and CMBL lent the plaintiff an aggregate of Kshs 145 Million against two legal charges registered against the title. The money was partly used to repay the debt owed to KNCC (Kshs 103,000) and partly used to finance the development on the suit property. The plaintiff agreed to pay interest on the loans at 31% p.a

18. On 21/7/1998, the plaintiff entered into a pre-incorporation agreement with the Fund's registered trustees pursuant to which the defendant company was incorporated with the plaintiff and Mr EM (a trustee of the Fund) holding one share each. In 1999, the plaintiff transferred the suit property together with the completed development thereon to the newly incorporated company (the defendant) at a consideration of 123 Million. Also transferred to the defendant were the debts secured by the two charges. The only two shareholders of the defendant company at the time were the plaintiff (49%) and the Fund (51%). At all times, the defendant understood that the transfer was part of the restructuring of the plaintiff's debt to CBL and CMBL which was now to be shouldered by the defendant company.

19. Following negotiations which took into account all payments made by the parties involved and the then existing status, it was agreed that the debt owing by the defendant be restructured along the express terms to be set out in a shareholders agreement. The shareholders agreement was to supersede all other agreements between the parties. The shareholders agreement was subsequently signed by all parties thereto, including the plaintiff and the defendant on 26/7/2000. Under the shareholders agreement, the defendant and the lenders agreed to restructure the loan. Parties to the shareholders agreement further agreed to restructure the debt of the defendant through equity participation (conversion of part of the debts into shares) in the defendant company. At that point, no more shares were issued to the plaintiff because the plaintiff was unable to invest further in the equity of the defendant. DW1 added that had it been the intention of the parties that the consideration of Kshs 123 Million contained in the transfer instrument be refunded to the plaintiff, nothing would have been easier for the defendant than to issue more equity to the plaintiff at the point of settling the shareholders agreement.

20. DW1 further testified that under clause 9.3 of the shareholders agreement, to which both the plaintiff and the defendant were parties, the shareholders agreement constituted the entire agreement between the parties in relation to the subject matter and superseded all other agreements in relation to the subject matter covered in the agreement. It was the evidence of DW1 that parties did not agree that the defendant would re-imburse the plaintiff the consideration stated in the transfer. He added that over the years, the plaintiff had never raised the issue of consideration in any of the board meetings of the defendant company where it is represented. He further stated that through a letter dated 17/4/2003 from Murage & Mwangi Advocates, the plaintiff asserted that the CBL and the Fund owed it the sum of Kshs 123 Million and threatened to institute legal action against CBL and the Fund. Lastly, DW1 denied existence of any oral agreement between the plaintiff and the defendant.

21. In cross-examinations, DW1 stated that his testimony was based on documents held by the defendant. He added that he was not aware of the alleged oral sale agreement pursuant to which the plaintiff sold the suit property to the defendant. Shown paragraph 5.1 of the pre-incorporation agreement, he agreed that the plaintiff was expected to enter into a sale agreement in respect of the suit property.

### **Plaintiff's Submissions**

22. The plaintiff filed written submissions dated 4/9/2019 through its advocates, **M/s Wandabwa Advocates**. Counsel for the plaintiff submitted that, at common law, an agreement entered into between promoters of a company and third parties does not bind the company nor can the company subsequently ratify the pre-incorporation agreement. However, the new company can be bound by agreements entered into prior to incorporation if, upon incorporation, it enters into a new contract to give effect to the pre-incorporation agreement. Counsel added that prior to the incorporation of the defendant company, its promoters mooted the incorporation of the defendant to acquire the suit property from the plaintiff but no formal agreement for sale was entered into. Counsel argued that the plaintiff had demonstrated that upon incorporation of the defendant, the defendant entered into an oral sale agreement for the property at an agreed consideration of Kshs 123,000,000 which sum remains unpaid.

23. Counsel added that that, the plaintiff had demonstrated that upon incorporation, it acceded to the transfer of the property to it, took possession, collected rents from it, and after paying the debts due, it was enjoying the full benefits of the suit property. It was further submitted that even if the court were to find as pleaded by the defendant that the transfer of the suit property to the defendant was pursuant to the pre-incorporation agreement, by acceding to the transfer, taking possession of the suit property, and enjoying the proceeds thereof; the defendant was bound by the agreement. Counsel further argued that though the transfer instrument indicated that the consideration had been paid, both PW1 and DW1 confirmed that the consideration was not paid. Counsel added that the defendant was trying to protect a benefit that had accrued to it through its wrong doing, to the detriment of the plaintiff; conduct which neither law nor equity will countenance.

24. Counsel for the plaintiff further submitted that although the defendant denied the existence of the oral agreement, it had failed to controvert the plaintiff's evidence to the effect that meetings were held culminating in the transfer of the suit property to the defendant. Counsel added that Section 34 of the repealed Companies Act allowed companies to enter into oral agreements. He added that the legal framework applicable to the material oral agreement was Section 3 of the Law of Contract Act of 1961. Counsel argued that the amendments effected to the Law of Contract Act in 2002 did not apply because the oral agreement was entered into in 1999.

25. Lastly, counsel for the plaintiff submitted that the sum of Kshs 145,000,000 advanced by CBL and CMBL cannot be said to be the basis of the transfer because the lending was effected before the transfer. Further, counsel submitted that because this suit involves a liquidated claim, the plaintiff is entitled to interest from the date of filing suit. Counsel urged the court to grant the plaintiff's plea and award him interest at 12% from the date of filing the suit.

### **Defendant's Submissions**

26. The defendant filed written submissions dated 15/12/2019 through the firm of **Ochieng Onyango, Kibet & Ohaga Advocates**. Counsel submitted that the following three issues fell for determination in the suit: (i) whether there was an oral agreement between the plaintiff and the defendant and its legal standing with regard to the transactions in question; (ii) whether, considering the legal principle that a company cannot ratify a contract made before its incorporation, the circumstances infer the creation of a new contract to the effect of the previous contract; and (iii) whether the consideration of Kshs 123,000,000 claimed by the plaintiff was justifiable.

27. Counsel for the defendant submitted that the foundation of the plaintiff's suit was an alleged oral agreement between the plaintiff and the defendant, for the disposition of the interest in the suit property herein. Counsel argued that the plaintiff's claim was untenable because the alleged oral agreement did not comply with mandatory requirements of Section 3(3) of the Law of Contract Act. Relying on the decisions in (i) **Patric Tarzan Matu & Another v Nassim Shariff Abdulla & 2 others [2009] eKLR** and (ii) **Machakos District Co-operative Union Limited v Philip Nzuki Kiilu [1996] eKLR**; the defendant argued that the plaintiff's claim which was predicated on an alleged oral agreement was untenable. Counsel argued that in October 1999, the applicable version of the Law of Contract Act was the law cited by the Court of Appeal in the Machakos District Co-operative Union Limited case, hence this suit was a non-starter.

28. Counsel further submitted that, even if the court were to find that the 1961 version of the Law of Contract Act is what was applicable in October 1999, there is no evidence of any memorandum or note thereof, in writing and signed by the party to be charged or by some person authorized by the defendant company to sign it. Counsel argued that none of the documents relied on by the plaintiff was a memorandum by the defendant in terms of the Law of Contract Act of 1961. Counsel argued that the transfer was the culmination of some other engagements and cannot in itself be the foundation of the agreement.

29. Counsel further submitted that the defendant had refuted the existence of the alleged oral agreement by demonstrating that, upon registration of the two new legal charges to cover the aggregate amount of Kshs 145 Million, the plaintiff and the Fund entered into a pre-incorporation agreement with the intention of acquiring the suit property as part of the debt restructuring programme, and that the transfer of the suit property together with the debts of the company was part of the debt restructuring programme. Counsel added that the debt restructuring culminated in the shareholders agreement dated 26/7/2000. It was further argued that under Clause 9.3, the shareholders agreement was the entire agreement between the parties in relation to its subject matter and superseded all other agreements in relation to the subject matter.

30. Counsel for the defendant further submitted that PW1 had confirmed that the alleged oral agreement was entered into prior to the incorporation of the defendant company and was between PW1 representing the plaintiff, Frank Amollo representing CBL; and AK representing CMBL. It was contended that the said oral agreement could not bind the defendant. Counsel argued that, considering the legal standing of clause 9.3 of the shareholders agreement, the court should completely disregard past negotiations between the parties as they had been superseded by the shareholders agreement.

31. Relying on the decision in **Trevor Price & Another v Raymond Kessel CA No 81 of 1957 EA 762**, counsel submitted that it is trite law that a company cannot ratify a contract made prior to its incorporation; it can only enter into a new contract to give effect to a previous agreement. Counsel submitted that the purpose of the pre-incorporation agreement was to acquire the suit property from the plaintiff and both the plaintiff and the Fund were to be allotted shares in the defendant company as part of the restructuring of the plaintiff's debt to CBL and CMBL. Counsel added that the shareholders agreement was a new superseding contract which achieved the purpose of the pre-incorporation agreement. Counsel urged the court to note that the validity of the shareholders agreement was not disputed.

32. Lastly, counsel submitted that the plaintiff's claim was unjustified because the plaintiff who was unable to redeem or develop the suit property was granted financing through legal charges against the suit property and subsequently, as part of the debt restructuring programme, the defendant company was incorporated as a joint venture and both the property and the debts of the plaintiff were transferred to the defendant company and the equity of the defendant was restructured appropriately. Counsel argued that the purpose of the joint venture was to essentially ensure the viable payment of the loans advanced to the plaintiff. It was contended that there was no agreement that the plaintiff would be refunded the consideration stated in the transfer. Counsel urged the court to dismiss the plaintiff's suit.

### **Analysis and Determination**

33. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence on the key questions in this dispute. The amended plaint which contains the plaintiff's claim contains, at paragraphs 3, 4 and 6, a straight forward claim of Kshs 123,000,000 claimed as unpaid purchase price, pursuant to an oral land purchase agreement alleged to have been entered into between the parties to this suit on 21/10/1999. Although subsequent evidence by the parties appear to convolute the dispute and shift the focus, the broad key issue discernible from the pleadings remains the same. That broad key issue was stated by Mr John Ohaga (Counsel for the defendant) and confirmed by Mr Andrew Wandabwa (Counsel for the plaintiff) at the commencement of the hearing of this suit on 6/11/2017 in the following words: **Whether the defendant is indebted to the plaintiff in the sum of Kshs 123,000,000 or at all.**

34. In determining the above broad key issue, and in line with the legal requirement that trial issues be framed from pleadings, the following questions will, in my view, require to be answered: (i) whether there was an oral agreement between the parties in this suit, entered into on 21/10/1999, requiring the defendant to pay the plaintiff Kshs 123,000,000 as purchase price of the suit property; (ii) if the answer to question number (i) above is in the affirmative, whether the said oral agreement is enforceable under the relevant law applicable at the time of the oral agreement; (iii) whether the transfer of the suit property from the plaintiff to the defendant was in pursuance of a pre-incorporation agreement between the shareholders of the defendant company; (iv) whether the shareholders agreement dated 26/7/2000 achieved the purpose of the pre-incorporation agreement dated 21/7/1998 and superseded all other agreements between the parties to the shareholders agreement in relation to the matters covered in the agreement; (v) what order should be made in relation to costs of this suit. I will make brief analysis and pronouncements on the five questions sequentially in the order in which they are itemized.

35. The first question is whether there was an oral agreement between the parties to this suit, entered into on 21/10/1999, requiring the defendant to pay the plaintiff Kshs 123,000,000 as purchase price of the suit property. Sections 107 to 109 of the Evidence Act place the burden of proof on the plaintiff. The plaintiff was required to demonstrate to the court that there was an oral agreement for sale of the suit property, entered into on 21/10/1999, as specifically pleaded in the amended plaint.

36. There is common ground that there was a pre-incorporation agreement dated 21/7/1998 between the plaintiff and the Fund. There is also common ground that the pre-incorporation agreement provided for the incorporation of the defendant company. Further, there is agreement that upon incorporation of the defendant company, the suit property was transferred into the name of the defendant company. Similarly, the liabilities secured by the two charges which existed against the title were taken over by the defendant company. Lastly, there is agreement that subsequent to the transfer of the suit property, there was a shareholders' agreement dated 26/7/2000 allotting the shares of the defendant company as follows: (i) Trustees of the Co-operative Bank of Kenya Limited Staff Retirement Benefits Scheme (**the Fund**) – 76%; (ii) Menno Travel Services Limited (**the Plaintiff**) – 13%; and (iii) the Co-operative Bank of Kenya Limited (the CBL) – 11%.

37. The plaintiff asserts that there was an oral agreement entered into on 21/10/1999 for sale of the suit property, and that under the said oral agreement, the defendant undertook to pay the plaintiff Kshs 123,000,000 as purchase price of the suit property. The defendant company was incorporated on 21/8/1998. PW1 was a director of both the plaintiff company and the defendant company. The other director of the defendant company at incorporation was EKM who represented the Fund. PW1 testified during cross-examination that the material oral agreement referred to in paragraph 3 of the amended plaint involved Frank Amolo who represented Co-operative Bank (the CBL); AK who represented Co-operative Merchant Bank (the CMBL) and PW1 who represented the plaintiff company. Asked to state who represented the defendant, he stated that Frank Amolo and Anthony Kamundia represented the defendant company.

38. From the evidence before court, the defendant company was a new outfit as at 21/10/1999. PW1 and EM were the directors of the new outfit. AWK was a Manager of Co-operative Merchant Bank, a subsidiary of the Co-operative Bank. FA was a Manager of the Co-operative Bank. The only shareholders of the defendant company at the time were the plaintiff and the Fund. The only known persons who could have entered into an oral contract on behalf of the new outfit were PW1 and Mr EM. PW1 testified that he represented the plaintiff in the oral agreement. No evidence was led to demonstrate that FA and AWK were directors or authorized officers of the defendant company detailed to enter into the alleged oral agreement on 21/10/1999.

39. What emerges from the evidence on record is that, the engagements between the plaintiff and the two managers happened before the Fund came on board, at the request of CBL, to team up with the plaintiff and incorporate the defendant company. That teaming up took the form of a pre-incorporation agreement between the plaintiff and the Trustees of the Fund. There is no evidence of any oral agreement entered into on 21/10/1999 by any authorized officer or director of the defendant company on one part and the plaintiff company on the other part.

40. In my view, given that the defendant is not a natural person and the plaintiff's claim against it was entirely founded on an alleged oral contract entered into on a specific day (21/10/1999), the plaintiff had a duty to lead evidence to demonstrate that specific authorized officer(s) or director(s) of the defendant company entered into the alleged oral contract on the alleged day. The plaintiff did not discharge that burden. First, the amended plaint was silent on the identity of the natural person who orally contracted on behalf of the defendant company. Second, both the written witness statement of PW1 and his oral evidence-in-chief did not focus on the identity of the natural person who purportedly committed the defendant company through an oral agreement on 21/10/1999. It was only during cross-examination that, after asserting that Frank Amolo represented the Co-operative Bank while AK represented Co-operative Merchant Bank, PW1 changed positions and contended that the duo at the same time represented the defendant company. There was, however, no evidence to suggest that the duo were, as at 21/10/1999 or at any other time, directors or authorized officers of the defendant company.

41. In my view, in the absence of evidence to demonstrate that specific director(s) or specific authorized officer(s) of the defendant company entered into the alleged oral agreement on behalf of the defendant company on 21/10/1999, the court has no evidential basis upon which to make a finding to the effect that there was an enforceable oral agreement entered into on 21/10/1999 by the parties to this suit, binding the defendant to pay the plaintiff Kshs 123,000,000. Consequently, my finding on the first question is that there is no evidence to support the allegation of an oral agreement between the parties to this suit, entered into on 21/10/1999 or any other date in October 1999, requiring the defendant to pay the plaintiff Kshs 123,000,000 as purchase price of the suit property.

42. The second question is whether, if the answer to the first question is in the affirmative, the said oral agreement would be enforceable under the relevant law. I have already made a finding to the effect that there is no evidence of existence of the alleged oral agreement. A more detailed analysis of the second question would have been necessary if the answer to the first question was in the affirmative. Suffice to observe that, if existence of the oral agreement had been proved, its enforceability would have depended on whether the alleged oral agreement, together with the attendant activities, satisfied the requirements of Section 34 of the now repealed Companies Act (Cap 486) and the applicable framework in the Law of Contract Act as they existed in October 1999.

43. The third question is whether the transfer of the suit property from the plaintiff to the defendant was in pursuance of a pre-incorporation agreement between the shareholders of the defendant company. The plaintiff contended that the transfer of the suit property to the defendant was in pursuance of an oral agreement entered into on 21/10/1999. On its part, the defendant contended that the transfer of the suit property was in pursuance of a pre-incorporation agreement entered into between the Registered Trustees of the Co-operative Bank of Kenya Limited Staff Retirement Benefits Scheme (**the Fund**) and the plaintiff herein, dated 21/7/1998. I have considered the totality of the evidence on

record. Although the plaintiff has elected to invoke an oral agreement entered into on 21/10/1999 as the foundation of the transfer, the evidence on record, including the plaintiff's own written statement, supports the position of the defendant on this issue. Indeed, the plaintiff stated as follows in paragraphs 11 to 16 of his written witness statement dated 9/12/2016:

**11. After various further meetings held between Frank Amolo from CBL and Anthony Kamundia from CBML it was agreed as follows;**

- a. CBL would advance a loan of Kshs 50 million, whilst CBML would advance a loan of Kshs 95 million to MTSL.**
- b. The said money would be used to discharge the property from KENYAC, and the balance used to finish the construction work.**
- c. The loans would be secured by two charges in favour of the CBL and CBML.**
- d. A company would then be incorporated to undertake the said development**
- e. The property would then be transferred to the said company at a consideration of Kshs one hundred and twenty three million (Kshs. 123,000,000/=).**

**12. The aforesaid agreement was undertaken in the following manner;**

- a. CBL and CBML advanced to MTSL the sum of Kshs, fifty million (50,000,000/-) and Kshs Ninety five million (95,000,000/-) respectively**
- b. Of the said sum, Kshs ninety four million seven hundred ninety two thousand six hundred shillings only (94,792,600/=) was utilized to pay of KENYAC to discharge the property, and the balance to complete the building.**
- c. The charge in favour of CBL and CBML in respect of the said property was registered on 11th June, 1998.**

**13. At that point the property still belonged to MTSL, which now owed the CBL and CBML Kshs 145 million.**

**14. Subsequently on the 21st August of 1998, Menno Plaza Limited was incorporated. Its shareholders were MTSL (1share) EM (1share). The capital was Kshs 2 million divided into 20,000 shares of Kshs 1000 each.**

**15. On 21st October 1999, Menno Plaza purchased the now completed building for a sum of Kshs 123 million which was to be paid to MTSL per the transfer, Menno Plaza would not only pay Kshs 123 million to MTSL it would also take over the charges in faovur of CBL and CBML.**

**16. On 29th October 1999, the transfer was registered giving the property to Menno Plaza Limited (MPL) subject to the encumbrances.**

44. Secondly, it is clear from the body of the pre-incorporation agreement that the plaintiff and the Fund entered into the agreement with a view to incorporating the defendant company. It is also clear from the pre-incorporation agreement that the agreement envisaged the transfer of the suit property to the defendant company. What is also discernible from the pre-incorporation agreement is that, upon incorporation of the defendant company, there was to be a shareholders agreement prior to the transfer of the suit property to the defendant. The defendant, however, elected to transfer the suit property prior to the settlement and execution of the shareholders agreement. The shareholders agreement was subsequently settled and executed on 26/7/2000. Subsequent to the incorporation, the plaintiff was allotted a 49% shareholding while the Fund was allotted a 51% shareholding. There is no evidence that the plaintiff paid any consideration for the 49% shareholding it got in the defendant company at that point.

45. The suit property was charged to two lenders at the time the transfer in favour of the defendant was registered. The plaintiff invites the court to find that the charged property was transferred on the basis of an oral agreement. However, the evidential materials on record, including the pre-incorporation agreement, the shareholders agreement and the various correspondence placed before court clearly indicate that the transfer of the suit property to the newly incorporated company (**the defendant company**) was part of the restructuring of the plaintiff's debt to CBL and CBML. That debt had been transferred to the newly incorporated company.

46. In light of the above evidence, my finding on the third issue is that the transfer of the suit property to the defendant was in pursuance of the pre-incorporation agreement dated 21/7/1998.

47. The fourth question is whether the shareholder's agreement dated 26/7/2000 achieved the purpose of the incorporation agreement dated 21/7/1998 and superseded all other agreements between the parties thereto in relation to the matters covered in the agreement. The said agreement was between: (i) the plaintiff; (ii) Trustees of the Co-operative Bank of Kenya Staff Retirement Benefits Scheme (the Fund); (iii) Co-operative Bank of Kenya Limited (the CBL); and (iv) the defendant. The recital part of the agreement provided as follows:

**“WHEREAS**

**a. The Company is a private company limited by shares incorporated in the Republic of Kenya on the 21st day of August**

1998 and having its registered office in Nairobi and has an authorized share capital of Kenya Shillings Two Million (Kshs. 2,000,000.00) divided into Twenty Thousand (20,000) shares of Kenya Shillings One Hundred (Kshs. 100.00) all of which have been issued.

**b. The company is the registered proprietor as Lessees from the Government of the Republic of Kenya of all that piece of land known as Land Reference Number 209/8180. Nairobi (hereinafter called “the property”).:**

**c. MTS and the Trustees are the beneficial owners of the issued shares in the Company in the ratios of 49:51.**

**d. The company is primarily engaged in the business more particularly defined in Clause 3(a) of the Company’s Memorandum of Association.**

**e. The property is currently charged to the Co-operative Merchant Bank Limited (“CMB”) and the Bank to secure certain facilities as more particularly set out in the charge documents.**

**f. The company owes both CMB and the Bank the following amounts:**

**i. CMB Kshs76,813,698.40 (“CMB Loan”)**

**ii. The bank Kshs. 206,963,317.45 (“the Bank Loan”)**

**g. The company and the Bank have agreed to restructure the Bank Loan as hereinafter provided to enable the Company to be in a position to service the Loans.**

**h. The Bank owes certain monies to the Trustees and the Trustees have agreed as part of the restructuring of the Company’s Loans to accept equity in the Company in part settlement of such indebtedness.**

**i. The Bank has agreed to accept equity in the Company for the sum of Kenya shillings Thirty Million (Kshs 30,000,000.00) in part settlement of the Bank Loan.**

**j. MTS is unable to invest further in the equity of the Company on the terms hereinafter set out.**

**k. MTS, the Fund and the Trustees wish to make provision for their participation in the Company.**

48. The shareholder’s agreement captured both the assets and the liabilities of the company. It also captured the shareholding portfolio of the company, reflecting the equity contribution of each shareholder. Thirdly, it provided a framework on injection of more money into the company to enable the company meet its financial needs. Fourthly, it altered the shareholding portfolio of the three shareholders to reflect the changed capital contribution of each shareholder.

49. Clause 9.3 of the shareholders agreement provides as follows:

**“This agreement contains the entire agreement between the parties with respect to its subject matter and may not be modified except by an instrument in writing signed by the duly authorized representatives of the parties and supersedes all other agreements in relation to the subject matter. In the event of any conflict between the provisions of this Agreement and the provisions of the Memorandum and Articles of Association, the provisions of the Agreement shall prevail.”**

50. What emerges from the totality of the body of the shareholders agreement, in my view, is that it identified the asset and liabilities of the company; apportioned shares of the company based on the equity contribution of each shareholder; and provided a framework on further equity participation by the shareholders who were able to inject more capital into the defendant company at that point. It is inconceivable that the plaintiff would have executed the shareholders agreement in the form in which it was executed while aware that the defendant owed it purchase price of Kshs 123,000,000 relating to the company’s only asset at the time, knowing very well that the only asset was transferred to the defendant company as part of a debt restructuring arrangement. My understanding of real property law is that, there would have been no legal basis for the plaintiff and the other shareholders to contend in the shareholders agreement that the defendant was the owner of the suit property if, as at 26/7/2000, the sum of Kshs 123,000,000 (the entire consideration in the transfer instrument) was owing from the defendant to the plaintiff.

51. More significantly, PW1 conceded under cross-examination that the defendant company did not have any cash and the plaintiff company did not contribute any money towards the capital of the defendant company. What he failed to explain is the basis upon which the plaintiff got the initial 49% shareholding in the defendant company, a shareholding which was subsequently reduced to 13% following the injection of more equity into the defendant company by the other shareholders.

52. In light of the foregoing, my finding on the fourth question is that the shareholders agreement dated 26/7/2000 achieved the purpose of the incorporation agreement dated 21/7/1998 and settled outstanding issues relating to the shareholding, assets, and liabilities of the defendant company. The said agreement superseded all other agreements between the parties to the agreement in relation to the matters covered in the agreement.

53. The totality of the foregoing is that the plaintiff has failed to prove its claim against the defendant on a balance of probabilities.

54. I have reflected on the history of this matter and the relationship between the two parties in this suit. The plaintiff is a key shareholder of the defendant. There is need to rebuild trust and rebuild broken bonds between the two sister companies. I will for those reasons refrain from making an award of costs in this suit.

**Summary and Disposal Orders**

55. In light of the foregoing, it is my finding that the defendant is not indebted to the plaintiff in the sum of Kshs 123,000,000 or at all. Consequently, the plaintiff's suit is dismissed for lack of merit. Each party shall bear its respective costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF JUNE 2020**

**B M EBOSO**

**JUDGE**

**In the presence of: -**

Ms Kamau holding brief for Mr Wandabwa for the plaintiff

Mr Koskei holding brief for John Ohaga for the defendant

Court clerk - June Nafula