



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT NO. 3 OF 2014

MERU CENTRAL COFFEE CO-OP UNION LTD.....PLAINTIFF

VERSUS

INTERGRATED REAL ESTATE SERVICES LTD.....1ST DEFENDANT

SOLOMON DERICK OSURO.....2ND DEFENDANT

DOROTHY AWOUR OSANO.....3RD DEFENDANT

J U D G M E N T

1. The plaintiff herein **MERU CENTRAL COFFEE CO-OPERATIVE UNION LTD** through a plaint dated 5th February, 2014 and amended on 27/4/2014 sued the three defendants praying for judgment against the defendants jointly and severally for:-
 - a. *The equivalent of USD 24,000 in Kenya Shillings at the prevailing exchange rate.*
 - b. *Specific delivery up of Co-opholdings Co-operative Society Limited Share Certificate Number 001439 for 6,306,800 shares in the name of the plaintiff's predecessor in Title M/S Meru Central Farmers' Co-operative Union Limited; and in default the shares registrar of the said Co-opholdings Co-operative Society Limited be empowered to issue the plaintiff with a duplicate Share Certificate for the said 6,306,800 shares.*
 - c. *General damages for breach of contract.*
 - d. *Costs and interest.*
2. The amended plaint was served upon the defendants by advertisement in a Daily Nation, Newspaper as per affidavit of service dated 6th November, 2014. The plaintiff filed a request for judgment on 1st December, 2014. That on 6th January, 2015 interlocutory judgment was entered in favour of the plaintiff for USD 24,000 equivalent to Kshs.2,160,000/-. The suit was subsequently set down for formal proof.
3. That when this matter came up for formal proof Mr. Mwenda Mwarania, learned Advocate appeared for the plaintiff. The plaintiff called one witness and closed its case.
4. The plaintiff's case through PW1 is that by contract dated 30th October, 2012 executed between the plaintiff and the defendants it was agreed inter alia; that the defendants would source for the plaintiff off-share financing for plaintiff's proposed development of Imenti House Project located on L.R. No. 209/2349 along Tom Mboya/Moi Avenue in Central Business District of Nairobi City, to a maximum 2,000,000,000/- in consideration of equivalent of USD 24000. PW1

produced the loan processing and approval agreement as plaintiff's exhibit P1.

5. The plaintiff paid to the 1st defendant USD 24000 equivalent to Kshs.2,040,000/- through three(3) Bankers Cheques drawn by Co-operative Bank, Meru Branch. The copies are attached to plaintiff's list of documents which sum was part of the consideration for sourcing of funds. The sum was refundable in case the defendants failed to secure the agreed funds as per clause 2 of the plaintiff's exhibit P1 within five (5) working days of receipt of notice to refund. The sum being sourced was as per agreement to be availed within 3 months from the date of the agreement. The agreement was guaranteed by the 2nd and 3rd defendants as shareholders and directors of the 1st defendant's company.
6. The defendants failed to source and/or secure the agreed sum of Kshs.2.1 billion hence the plaintiff issued a demanding notice demanding refund of their money but the defendants failed to do so. The demand notice was produced as plaintiff's exhibit P5.
7. The defendants meanwhile had requested for proof of owners' equity supposed to be 1 percent in cash or 5 percent in kind of the sum to be sourced. The plaintiff offered proof of funds in kind by submitting share certificate No.001439 from Co-operative Holding Ltd for Kshs.6,306,800. Certificate produced as plaintiff's exhibit P3. The defendants in return gave the plaintiff loan commitment documents which plaintiff produced as plaintiff's exhibit P2. The plaintiff's also produced evidence as proof of funds as requested in the loan agreement as plaintiff exhibit P3 being share certificate(serial No. 001510). The plaintiff further produced plaintiff exhibit P4 being a letter for conditional loan commitment.
8. The plaintiff testified that as the defendants failed to source funds as agreed and the plaintiff having performed their part of the agreement they made losses due to breach of the contract. That the Board of the Union made several trips to Nairobi to meet the defendants involving their counsel and wasted time. That they failed to put up ultra-modern plaza as had been planned and at that time. That as the building was to be pulled down the tenants on learning of the intended demolition of the building ran away and they have lost rent. That with the intended building they expected upon construction to earn more. That due to the breach of contract in 2012 the future construction would cost the plaintiff more. That they would in future construction spend more than what they would have spent in 2012 and sought general damages as such.
9. I have carefully considered the pleadings, the plaintiff's evidence and exhibits in support thereof, and in my view the issue for consideration can be summed up as follows:-
 - a. ***Whether the plaintiff has formally proved its case on balance of probabilities?***
 - b. ***What reliefs(if any) is the plaintiff entitled to?***

(A) WHETHER THE PLAINTIFF HAS FORMALLY PROVED ITS CASE ON BALANCE OF PROBABILITIES

10. The plaintiff filed this suit and served the defendants who did not appear nor file any defence. The plaintiff in support of its case called PW1, the CEO, who produced loan processing and approval agreement dated 30th December, 2012 which document is duly signed by the plaintiff and the defendants before an advocate. The contents of the sale agreement has been proved by the plaintiff. The terms and conditions of the agreement are well spelt in paragraph 1, 2, 3, 4, 5 and 6 of the agreement. The plaintiff's evidence on terms and conditions of the agreement has not been controverted by the defendants. There is clear evidence that plaintiff performed its part of the agreement. The exhibits by the plaintiff support the plaintiff's case. I am therefore satisfied that the plaintiff and the defendants entered into a loan processing and approval agreement on 30th October, 2012 as per terms and conditions as set out in the aforesaid agreement. That the plaintiff paid to the defendants USD 24000 through three Bankers cheques for the consideration of sourcing funds as agreed. That the defendants failed to meet their part of the contract. That demand notice was issued after the sum required to be sourced was not availed yet the defendants to date have not met their obligation as spelt in the agreement nor have they bothered to refund the

sum paid to them as agreed.

11. The 2nd and the 3rd defendants have not as guarantors ensured the sum of Kshs.2.1 billion has been sourced nor the sum paid to the 1st defendant refunded as per duly executed agreement.
12. I further find and I am satisfied that the plaintiff offered proof of funds in kind by submitting its share certificate No.001439 from Co-operative Holdings Ltd for Kshs.6,306,800 shares fully owed by Co-operative Bank. That the defendants also gave their loan commitment documents.
13. I am therefore satisfied that the plaintiff pleaded and proved sum equivalent of USD 24,000. I am also satisfied that the plaintiff has formally proved his case on balance of probabilities as required in a civil suit.

(B) WHAT RELIEFS(IF ANY) IS THE PLAINTIFF ENTITLED TO?

14. The loan processing and approval agreement under Clause 2 stipulated that in the event that the intended loan facility was not disbursed within ninety (90) days from the date of the agreement or if it was declined by the principal for reasons whatsoever, the equivalent of USD 24, 000 in Kenya Shillings shall be refunded to the principal by the Agent without any deductions whatsoever within five(5) working days of receipt of notice to that effect by the principal.
15. The defendants did not source any funds within 90 days as stipulated under Clause 2 of the agreement nor have they refunded the amount since issuance of the demand notice dated 18th September, 2013 and as such I find and hold that the plaintiff is entitled to a refund of USD 24 000 or its equivalent of Kshs.2,160,000 as per the interlocutory judgment.
16. The plaintiff delivered to the defendants co-upholding Cooperative Society Limited share certificate number 001439 for 6,306,800 shares in the name of the plaintiff's predecessor M/S Meru Central Farmers' Co-operative Union Limited on the defendants request so as to perform their part of the contract. The defendants failed in discharging their duty and I find that they have no right or justifiable cause to retain the said share and the same should be returned to the plaintiff.
17. On prayer for general damages for breach of contract, I have no doubt that the defendants were in breach of contract. The plaintiff was seeking funds to enable them put up an ultra-modern premises with a view of improving on their income from the would be building after demolishing their existing building. That three years since the contract was made and breached the plaintiffs have not been able to have the agreed funds. Costs of constructions must have since then gone up both in terms of professional services, labour and materials due to inflation and other factors. The plaintiff to put up a similar building to that they had in mind as of the time of the agreement would cost them more in terms of sourcing funds and in terms of construction, that though the plaintiff did not produce documents in support of their prayer for general damages for breach of contract I am satisfied that due to the breach of the contract in part of the defendants the plaintiff is entitled to general damages. That doing the best I can in view of the scanty evidence on prayer for general damages and in view of what I have stated herein above I am of the view that an award of general damages for breach of contract in view of the sum that was to be sourced for the plaintiffs project an award of general damages of Kshs.1,000,000/- would be fair and reasonable.
18. The upshot is that the plaintiff succeeds in this case and I enter judgment for the plaintiff jointly and severally against the defendants as follows:-
 - a. ***USD 24,000 equated to Kshs.2,160,000/- at the prevailing exchange rate.***
 - b. ***Delivery of co-opholdings co-operative society limited share certificate number 001439 for 6,306,800 shares in the name of the plaintiff's predecessor in title M/s Meru Central Farmers' Co-operative Union Limited, in default the Shares Registrar of the said co-upholding co-operative society limited be and is hereby empowered to issue a duplicate share certificate for Kshs.6,306,800 share and the original share certificate be deemed as duly cancelled upon issuance of a duplicate share certificate.***

- c. *General damages of Kshs.1,000,000/- to the plaintiff against the defendants for breach of contract.*
- d. *Cost of the suit to the plaintiff.*
- e. *Interest at court rates on prayer (a) from the date of filing the suit and on(c) from the date of this judgment.*

DATED, SIGNED AND DELIVERED AT MERU THIS 9TH DAY OF APRIL, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:-

1. *Mr. Mwenda Mwarania for the plaintiff(absent)*

2. *Plaintiff - absent*

3. *N/A for the defendants*

3. *C/clerk Mwenda*

J. A. MAKAU

JUDGE