REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 65 OF 2013

ARTHUR MUNYAO MUUO …..…..…...…….....1ST PLAINTIFF

LILIAN GETURO ……...……..……..…….2ND PLAINTIFF

BEATRICE CHELANGAT……...…….…..……..3RD PLAINTIFF

CHRISTOPHER MAINA ……...…….……4TH PLAINTIFF

PAULA RUBY INVESTMENTS LIMITED ……..……....…….……5TH PLAINTIFF

AFRICAN RUBY INVESTMENTS LIMITED…..……...……..…….6TH PLAINTIFF

Versus

ROSEMARY WANGUI KIMAKU .....……...……..... 1ST DEFENDANT

NELSON ASEKA MUNYASA……..……....……2ND DEFENDANT

Both trading as

SIMPLE FX ONLINE…..…….……...……..3RD DEFENDANT

JUDGMENT

INTRODUCTION

[1] The Defendants filed appearance on 12th March, 2013 but did not file a defence as required by law. Following that default, the Plaintiffs, on 4th of April, 2013 applied for interlocutory judgment in default of defence under Order10 Rule 4(1) of the Civil Procedure Rules, 2010. The Court, on 26th April, 2913, accordingly entered interlocutory judgment in favour of the Plaintiff and against the Defendants as prayed for in the plaint and ordered the matter to proceed for assessment of damages. A formal proof of the case was then conducted on 27th April, 2014 where the Plaintiffs called two witnesses. The defendants did not attend the formal proof despite having been served with Notice of Hearing. For completeness, Order 10 rule 4(1) is the correct rule which govern this case and the entry of judgment, which makes a

formal proof necessary because the plaint sought, liquidated demand together with some other claim for damages for breach of agreement. The reason I say these things is because I hold the view that, a formal proof is not necessary after entry of judgment for a liquidated demand where the claim is purely for a liquidated sum. Similarly, I make a reading of rule 4(2) of Order 10 of the CPR that where a claim is for a liquidated demand and some other claim, it is only the part which requires assessment of damages should go to formal proof. I will proceed herein on that basis.

The Plaintiffs' case

[2] The Plaintiffs' case is discerned from the evidence of the 1st and 5th Plaintiffs who testified; ARTHUR MUNYAO MUUO and PAULA NYAGUTII NJUGUNA: the plaint and documents produced in court. The submissions by the Plaintiffs also clarified the claim. But before I go into the merits of the case, let me say something about the parties especially the Plaintiffs. The record shows that the 1st-5th Plaintiffs were originally members of a *'Chama'* or group registered as African Ruby Investments vide a Certificate of Registration Number 449391 under the Registration of Business Names Act which is the Plaintiff's Exhibit 5. The Agreement in issue was entered into between African Ruby Investments and the Defendants. Later, the business name registered by the 1st-5th Plaintiffs was later transformed into a limited liability company known as African Ruby Investments Limited- the 6th Plaintiff. See the Plaintiff's exhibit 6 which is a Certificate of Incorporation No C 163166. The entire members of the business name became directors of the Company as evidenced in the Plaintiff's Exhibit 7- list of directors of the 6th Plaintiff. The firm and its members were competent to enter into the contract and can sue on the contract in their own names as they have done. I do not, therefore, understand why the 6th Plaintiff was joined in the suit. But that does not vitiate the case as the proper parties have been impleaded and are before the court.

[3] The plaint sought for liquidated claims of USD 15,375.00 and Kshs. 2,000 as money received by the Defendants and bank charges on bounced cheques, respectively. It also claimed for damages for breach of agreement, interest on USD 15,375.00 at 23% per month until payment in full, costs and interest.

[4] From the evidence, the Plaintiffs and the defendants entered into a Foreign Exchange Management Agreement dated 6th June, 2008 (hereinafter *'The agreement')* which is the Plaintiffs' exhibit 8**.**

[5] In the Agreement, the Defendants contracted to manage the Plaintiffs' Forex Account for investment purposes. The 1st and 2nd Defendants entered the Agreement with the Plaintiffs as persons carrying on business in the name and style of Simple FX Online, the 3rd Defendant. See Plaintiff's Exhibit 4). According to the agreement, the Plaintiffs were to open a "*Foreign exchange trading account"* with the Defendants "*with an initial minimum deposit of USD 4,000*'. See page 2 line 1-3 of Plaintiff's exhibit 8. The Plaintiffs deposited, with the Defendants for purposes of the Agreement, a Principal Amount of USD 12,500.00 as follows:-

i. USD4,000.00 as initial minimum deposit before the Defendants' signing of the agreement;
ii. USD 1,500.00 on 14th July, 2008; (See Plaintiff's Exhibit 1a)
iii. USD 3,000.00 on 18th August, 2008; (See Plaintiffs' Exhibit 1b)
iv. USD 4,000.00 on 8th September, 2008 (See Plaintiff's Exhibit 1c)

[6] Thus the total amount of money belonging to the Plaintiffs which were held by the Defendants for purposes of the Agreements is USD 12,500.00.

[7] In accordance with Clause 3 of the Agreement, the Defendants were to remit to the Plaintiffs *'20% of the Account size every end of the month'* as profits. The Defendants' management fee was USD 150.00 as per Clause 5 thereof. The percentage of the Account size to be remitted was by mutual agreement of all parties, later increased to twenty three (23%) per cent. This evidenced by the

Defendants' issuance to plaintiffs of a cheque No. 000045 (*dated 24th December, 2008*) for the sum of USD 2,875.00 (see Plaintiffs' Exhibit 2) being 23% of principal Amount of USD 12,500.00 otherwise at the rate of 20% of the Principal amount of USD 12,500.00 the cheque would have been for USD 2,500.00.

[8] It was the agreement of parties that any cheques to the plaintiffs would be written in the name of the 1st Plaintiff since it was only the 1st Plaintiff, of all the other Plaintiffs, who had a Dollar Account.

[9] Clause 11 of the Agreement provided that 'either party', *"May terminate this Agreement any time upon at least thirty (30) business days" prior written notice to the other' and that 'once notice of termination is received, the Defendants shall liquidate all account by month end*.' It was a further agreed at Clause 17 that "all actions, disputes, claims or proceeding, including, but not limited to, any arbitrations proceeding, arising directly or indirectly in connection with or out of this Agreement shall be adjudicates only in Courts or other dispute resolution forums whose site is within the city of Nairobi."

[10] The defendants paid the sums as per the Agreement obligated from June to October, 2008. On 14th November, 2008, the Plaintiffs gave notice of termination and terminated the Agreement in accordance with Clause 11 of the Agreement and sought refund of the Principal amount and profits due. The Notice is the Plaintiff's exhibit 9. On receipt of the Notice of Termination, on 24th December, 2008, the Defendants issued the Plaintiffs with cheque No.000045 dated 24th December, 2008 for the sum of USD 2,875.00. The cheque was written by the 1st and 2nd Defendants and was banked on the same day. On presentation, the cheque was dishonored. The cheque is the Plaintiff's Exhibit 11b. On 15th January, 2009 the Defendants issued the Plaintiffs with cheque No.000046 for the sum of USD 12,500.00 being a refund of the Principal Amount. See Plaintiffs' Exhibit 3. That cheque too bounced and was dishonoured upon presentation at the Bank. See the plaintiffs' exhibit 11a. As a result of the Defendants' failure to act in accordance with the terms of the agreement; failure to pay the plaintiff's accrued interest and their act of issuing the Plaintiff's with bad cheques, the Plaintiffs have suffered loss and special damages.

[11] And the plaintiffs are seeking special damages of:-

a. USD 15,375.00 (i.e. 12,500 + 2,875)
b. Kshs.2,000/= being Bank charges for bounced cheques;
c. Damages for breach of contract
d. Interest on USD 15,375.00 at twenty three (23%) per cent per month from December, 2008 until payment in full.
e. Costs and any other relief the court may deem fit.

[12] The Plaintiffs submitted that the defendants contracted to remit to the Plaintiffs interest at the rate of twenty three (23%) per cent per month as profits. This percentage was a contractual term which the Defendants complied with up to a point as evidenced by the Defendants' bad cheque No.000045 dated 24th December 2008. Therefore, according to the Plaintiffs they are entitled to interest as prayed at the contractual rate. We further submit that this prayer for interest, just like the entire suit, has not been opposed by the Defendants. They referred the court to the case of **KENYA COMMERCIAL BANK LTD v THOMAS WANDERA OYALO (2005) eKLR** and **KYANGAVO v KENYA COMMERCIAL BANK LTD & ANOTHER.** In the second case it was held that since:

> ***'Contracts are made by the parties themselves, courts come in to only construct these contracts and arbitrate any disputes concerning or touching upon them'.***

[13] The Plaintiffs are also of the view that they should be awarded damages and they relied on the case of **ONGECHA v THE CITY COUNCIL OF NAIROBI CAUSE NO. 1863 OF 1982**, where the High Court held that in a case where breach of contract has been proved and an order of specific performance is not available by virtue of fact that it would involve hardship, a remedy of alternative damages is available at court's discretion.

COURT'S RENDITION

Judgment sum and interest

[14] As I stated earlier, judgment was entered for the liquidated demands of: a) USD 15,375.00 being money received; and b) Kshs. 2,000/= being bank charges incurred upon the dishonoured cheques. For completeness of record, judgment herein is in the sum of a) USD 15,375.00 being money received; and b) Kshs. 2,000/=. By law, once judgment is so entered under Order 10 rule 4 of the CPR, interest at court rate from the time of filing suit is also payable but the court has discretion to award interest from the time the money became due and owing depending on the circumstances of each case. I will conclude this issue at the tail end of this ruling when I will have determined the extent of interest payable under the contract.

Agreed interest represents profits

[15] According to the Agreement herein, the Defendants were to remit interest at 23% of the size of the account money every month. That may sound unconscionable until you realize the agreement was a kind of management or investment of funds whose returns or profits were measured by a rate in interest. The recitals of and the substantive clauses of the Agreement are clear that the Defendants were to trade the Plaintiffs' money on behalf of the Plaintiffs by placing orders for forex Transactions, that is, to purchase or sell or otherwise deal in Forex Transactions for the Plaintiffs. The Defendants had complete discretion to enter into Forex Transactions in the name of and for the benefit of the Plaintiffs. The Plaintiffs were to bear all risk of gain or loss in the account as well as all expenses thereto. The Defendants were expected to employ their best judgment and efforts for the benefit of the Plaintiffs. And to guard against loss, the Defendants were given unfettered discretion to hire or fire sub-advisors on Forex Exchange. See Clauses 2 and 3 of the Agreement on those aspects of the Agreement. After transactions, they were supposed to remit to the Plaintiffs a total of 23% of the size of the Account every end of the month. The agreement was for asset management and investment where the Defendants stood a fiduciary relationship with the beneficial owner of the invested fund. The obligation to pay profits or returns on the investment then becomes mandatory and it matters not the profits were calculated by way of a rate in interest. Therefore, the monthly interest of 23% payable by the Defendants to the Plaintiffs represented the monthly returns or profits on investment. That contract was not a contract for money lending as it would be between the borrower and the lender where interest is charged on the money lent. Hence, I hold the Plaintiffs are entitled to interest at 23% of USD 15,375.00 but for only 30 days of the Notice of termination. I have good legal grounds why I have taken that decision. First, the contract was terminated in accordance with Clause 11 of the Agreement and the Defendants were not under any obligation to invest the capital they hold for the Plaintiff unless in breach of the same Agreement. Therefore, an award of profits will be tantamount to an award of loss of business which the Plaintiff ought to have specifically pleaded and proved.

Issue of interest resumed

[16] In such case as this, the remedy of the Plaintiff lies in interest at court rates from the time the money herein became due and owing. The remedy in interest consists in the deprivation of the liquidated sum by the wrongful act of the Defendants. In the interest of justice, the claim of interest on the judgment sum as formulated in the Plaint will be paid at 12% per annum on USD 15,375.00 and Kshs. 2,000 from December, 2008 until payment in full. The claim of interest at twenty three (23%) per cent per month from December, 2008 until payment in full is denied except for the 30 days of the notice.

Damages for breach

[17] I should start by stating that the Plaintiffs are the ones who terminated the Agreement. Also, in view of the reliefs which the Plaintiff has received, it will be a double recovery to allow them damages for breach of the contract. For those reasons, I decline to award general damages for breach of contract.

Costs

[18] Costs follow the event and I award the Plaintiffs the cost of the suit. On the subject of costs see the following rendition of the court in **NBI HCCC NO 191 OF 2008 ORIX** where the court stated:

> **In any event, even if costs had not been awarded the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do. See SUPERMARINE HANDLING SERVICES LTD. v KENYA REVENUE AUTHORITY [2010] eKLR, ALEZANDER – TRYPHON DEMBENIOTIS v CENTRAL AFRICA CO. LTD [1967] E.A 310 and DEVRAM MANJI DALTANI v DANDA [1949] 16 EACA 35,**

ORDERS

[19] In light of the above, I grant the following reliefs:

a) Judgment is entered for the Plaintiffs and against the Defendants jointly and severally in the sum of USD 15,375.00 and Kshs. 2,000.

b) The Plaintiffs are entitled to and are hereby awarded interest on USD 15,375.00 and Kshs. 2,000 at 12% per annum from December, 2008 until payment in full.

c) In addition to (a) and (b) above, the Plaintiffs are entitled to and are hereby awarded interest on USD 15,375.00 at 23% for the 30 days of the Notice of termination as profits in accordance with the Agreement between the parties herein.

d) I award costs of the suit to the Plaintiffs.

Dated and signed at Nairobi this 4th day of July 2014

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 4th day of July 2014

J. KAMAU

JUDGE