IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, O'KUBASU & GITHINJI, JJ.A.)

CIVIL APPEAL NO. 295 OF 2005

BETWEEN

PATRON CARD INTERNATIONAL LTD. ……...…...…… APPELLANT

AND

HARAMBEE CO-OPERATIVESAVINGS & CREDIT SOCIETY LTD.….RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Milimani Commercial Courts, Nairobi (Emukule, J.) dated 22nd November, 2004

in

H.C.C.C. NO. 1832 OF 2001)

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JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court (Anyara Emukule, J.) dated 22nd November, 2004 dismissing the appellant's suit with costs.

By a plaint dated 28th November, 2001 filed in the superior court, the appellant claimed Shs.29,400,000/= from the respondent:

"being the sum due and payable …… under a contract and or letter of commitment and undertaking between the plaintiff and the defendant on 21st November, 1996 under which the plaintiff was to print and supply to the defendant a total of 98,000 membership security identification cards for its Nairobi Members at a cost price of Kshs.300/= per card".

The appellant further pleaded that subsequent to the execution of the contract it embarked on mass production of Membership security cards samples at its cost; that the respondent in breach of the contract awarded the same contract to another competitor who virtually adopted the security card samples and design submitted to the respondent and virtually at the same contract price, and, that, at the time it learnt of the award of contract to the competitor the appellant had incurred and undergone profound expense in security and sourcing its materials for the contract work from its partners in Britain and Europe at a great

financial expense.

The respondent filed a defence denying, *inter alia*, that any contract was ever concluded between the parties. The respondent further averred that the alleged contract was not binding as it was not made under the seal of the parties; that the appellant rendered the contract void by altering materially the terms by a letter dated 9th December, 1996 relative to the form of the card and the completion period; that the agreement was subject to the respondent completing its internal financial and related arrangement and a final approval; that the internal arrangements were not completed or final approval given; that the appellant was in breach of the contract; and lastly, that, the contract document does not specify the alleged consideration of Shs.29,400,000/=.

The appellant filed a reply to the defence. In paragraph 3 of the reply, the appellant averred that:

"the letter of commitment/undertaking is binding upon the parties to it as the same was not reduced to a formal contract and even then there is no legal requirement for such letter to be sealed by the seal of the parties".

Further in paragraph 6 of the reply the appellant pleaded:

"The plaintiff denies paragraph 9 (iv) *(alleging breach by failure to provide a computer image printer at its costs)* **as the supply of the computer image was to be done with initial delivery of the cards to defendant which supply the defendant sabotaged and totally breached by engaging another company to supply it with the same security card ……".**

The trial judge framed three main issues, thus:

1. whether the letter of contract/undertaking dated 21st November, 1996 amounts to a contract in law and if so which of the parties breached the contract.

2. Whether the said contract was conditional.

3. Whether the plaintiff is entitled to the suit sum of Kshs.29,400,000/=.

The appellant called one witness, Duncan Otieno K'Onyango (PW1) (Duncan). According to him the appellant company had three shareholders; himself; Robert Alias Aluoch and Hon. Linus Aluoch Polo who died on 28th September, 2000 leaving two shareholders. He produced the relevant correspondence to support the claim.

By a letter dated 8th March, 1996, Duncan forwarded a sample card to the General Manager of the respondent following earlier introductory discussions. He also enclosed a proposal to the letter and requested that it be placed before the Board in his presence so that he could elaborate on the card performance effectiveness, specific special features and traits as well as physical characteristics intended but not designed on the sample card for security reasons. He stated in the letter that *"the product is security product and not merely an identification card"*.

Duncan testified that after the letter of 8th March, 1996, the appellant's directors held a meeting with the Management Committee of the respondent on 24th May, 1996 at which it was agreed that he would provide proposals of how the card would be made; that he forwarded the proposals by a letter dated 3rd May, 1996; that the appellant reduced the cost of each card to Shs.300/= by a letter of 31st July, 1996 as requested by the respondent; that by a letter dated 14th August, 1996 the respondent accepted the price offered; that the parties signed the agreement on 21st November, 1996; that the appellant thereafter ordered 98,000 cards from a U.K. Company Piedmont Ltd; which nevertheless supplied 124,000 cards to the appellant; that the appellant paid £235,200 equivalent to Kshs.20,462,400/= at the time in April, 1997; that the cards were delivered to the General Manager of the respondent who acknowledged receipt by a

letter dated 28th May, 1997 and promised to pay, and, lastly, that the respondent did not pay for the cards.

The letter dated 14th August, 1996 referred to by Duncan from Mr. Nyangweso, Finance Manager of the respondent to the appellant reads in part:

"RE: QUOTATION FOR MEMBERS SECURITY CARDS

Please be notified that we require a complete issuance of the members security cards for our total membership of 98,000 beginning with the Nairobi province which is about 30,000 members.

Under the circumstances, the demand is on this society to allocate a total of Kshs.29,400,000.00 in respect of the revised price quotation of Kshs.300/=.

We, therefore, need a confirmation that this exercise shall be carried out within a period not exceeding six (6) months from the time of commencement ……

In due course, we shall forward you a commitment letter of contract for commencement exercise".

The letter dated 21st November, 1996 which was the basis of the appellant's suit provides:

"LETTER OF COMMITMENT/UNDERTAKING:

This society has dully resolved to order for the printing of members security card from Patron Card International Limited which introduced innovative security systems demonstrated in the presence of our Committees and were considered satisfactory and acceptable.

We agree that Patron Card International Ltd. will undertake to print the cards in respect of the entire society's membership countrywide provided that:

(i) No price increases are made during the period of this exercise, beyond Kshs.300/= per card.

(ii) The period of the exercise does not exceed six (6) months in order to suit internal management programmes.

(iii) The quality of the final individual printed cards will be the exact quality, type and style as samples.

(iv) The computer image printer is supplied with the first batch of printed cards at no cost.

(v) Payment is to be done on quarterly basis and only the initial quarter 25% is paid in advance (as down payment) and the balance after and on each delivery of the completed portion of cards".

The letter was signed on 27th November, 1996 by the Finance Manager of the respondent and the Regional Manager of the appellant.

There is another letter of even date (that is 21st November, 1996) from S. Nyangweso (Finance Manager) to the appellant confirming the respondent's commitment to purchase the members security cards. It said in part:

"We therefore hereby nominate Patron Card International Ltd for the said exercise and shall confirm to you in due course when you should commence the exercise as soon as we complete our internal and financial related arrangements".

The defendant called one witness Gladys Gichohi – a legal officer employed by the respondent in October, 1998. She was not in employment of the respondent at the time the alleged contract was signed

but nevertheless gave reasons why the letter of 21st November, 1996 did not constitute a valid contract.

The superior court after evaluating both the oral and documentary evidence made findings, *inter alia*, that:

(i) The letter of commitment, undertaking of 21st November, 1996 was conditional upon the appellant fulfilling all the conditions set out therein.

(ii) That the appellant by a letter of 9th December, 1996 sought to soften the stricture of those terms but the respondent insisted in their letter of 17th December, 1996 that the terms be complied with despite any unforeseen circumstances on the part of the appellant.

(iii) Thereafter the appellant went into hibernation of not less than 24 months and revived the issue commencing with the letter dated 19th January, 1999.

(iv) That the letter of 21st November, 1999 did not constitute a contract in law for the reason that no consideration was given; that the contract was conditional and such conditions not having been fulfilled the contract (if any) became void and unenforceable.

(v) If indeed there was such contract (and there was none) the appellant was in breach thereof for the reasons that the appellant failed to supply computer image printer at no cost as provided; that appellant failed to supply the cards within 6 months as stipulated (part printed cards were not cards in terms of the intended contract); the appellant had no commitment or approval from the respondent to commence work without either the respondent's approval or the payment of 25% down payment.

(vi) There was no pleading that the appellant had paid Kshs.29,400,000 to the overseas supplier to procure the cards or proof that appellant paid such sum or consideration for payment of such sum.

The superior court, concluded:

"In my opinion looked at from the stand point of the law of contract all that really happened was that the Defendant had invited the plaintiff to treat, and held lengthy discussions over the merits and demerits of the plaintiffs proposals ….. unless there is specific agreement for the client or customer to pay for the costs of those proposals no contract can be founded on the mere fact of submission of those proposals however favourably they may have been received, and the client is not ultimately bound to accept them or to return the proposals to the contractor. I am afraid that is precisely the plaintiff's position in this suit".

And, lastly:

"The plaintiff had no basis for spending the massive sum of Kshs.29,400,000 of which there is no proof that the defendant had a membership of 98,000 for which it was convenient to multiply the cost per card @Kshs.300/= to find the figure of Kshs.29,400,000.00. Mathematically computation is one thing, there must however be a basis, a consideration for doing so. In the absence of that consideration, it would be a monumental fraud to the Harambee Co-operative Savings and Credit Society Limited, the defendant herein to donate to the plaintiff a sum of Kshs.29,400,000.00 for the supply of air, and for the breach of a non-existent contract".

There are eight grounds of appeal maintaining in essence that the findings of the trial judge as restated above were erroneous in law and infact and further that the trial judge exhibited open bias in respect of some findings.

The main issue in the suit was whether or not the *letter of commitment/ undertaking* dated 21st November, 1996 constituted an enforceable contract. That was the 4th issue framed by the parties. We shall henceforth refer to the letter as document. It was also the first issue framed by the trial judge

although the letter is erroneously referred by the trial judge as *a letter of contract/undertaking*. The parties had framed a 5th issue, thus:

"Was the alleged contract under seal of the parties. If not is the failure to have the seal of the parties make the contract null and void to bind the parties".

The finding of the trial judge was that the document was just a proposal – an invitation to treat from the respondent to the appellant; that if there was an agreement, it was conditional, that the conditions were not fulfilled, and, lastly, that if there were any agreement the appellant breached it.

Mrs. Njeri Onyango, learned counsel for the appellant, submitted that from the totality of the correspondence the document constituted a contract.

The court should construe the document together with the previous and subsequent correspondence in order to ascertain the intention of the parties. Prior to 21st November, 1996 the appellant had been negotiating with the respondent – particularly with Mr. S. Nyangweso, the Finance Manager, since March, 1996 – a period of over seven months. By the letter of 8th March, 1996, Duncan requested that the proposal be placed before the board in his presence so that he could elaborate on the card performance, among other things. Duncan explained in his evidence in re-examination that what he termed as the *"board"* comprised of two committees, namely, the staff management committee comprising of the General Manager and other senior employees and the central management committee comprising of elected officials and members of staff management committee. In a letter dated 3rd May, 1996 Duncan refers to a meeting he had with staff management committee on 26th April, 1996. The letter of 21st November, 1996 refers to a demonstration of the innovative security system by the appellant in presence of committees. In the subsequent letters written by the appellant – e.g. the letter dated 19th January, 1999 the appellant stated that the entire board was agreeable, impressed and satisfied that the details of its proposals were suitable to Society's needs.

By 1996, when the document in issue was signed, the respondent was governed by the *Co-operative Societies Act – Chapter 490 of Laws of Kenya* which was repealed and replaced by the *Co-operative Societies Act 1997 – Act No. 12 of 1997* which became effective on 1st June, 1998. By Section 28 of former Act a registered society is a body corporate with a perpetual succession and common seal and with power, *inter alia*, to enter into contracts and to institute and defend suits. *The Co-operative Society Rules* made under **Section 84** of the former Act required a registered society to, among other things, make by-laws governing various matters including the authorization of officers to sign documents on its behalf (**Rule 7 (1) (0);** to have an elected committee (**Rule 32 (1)**). **Rule 34 (1)** provided, among other things, that, the committee of a registered society shall be the governing authority of a society with power to enter into contracts.

The respondent pleaded that the agreement was not binding on the respondent as it was not made under the seal of the parties. The appellant in reply to the Defence stated that the letter was binding as it was not reduced to a formal contract. Further, Gladys Gichohi, testified that the contract was not valid as it was not signed in accordance with Sacco's rules and Acts and that the Finance Manager was not an authorized agent of the respondent. The appellant's counsel submitted that the 3rd party believed that the Finance Manager had authority to sign the contract and that the question as who was the authorized signatory is an internal matter.

In determining whether or not the document in issue constitutes an enforceable contract against the respondent, the manner of its execution is a relevant consideration. Although a copy of the By-laws of the respondent was not produced at the trial, it is clear from the repealed statute and also from the current statute, that a registered society is a body corporate with a common seal and enters into contracts through its elected management committee. The disputed contract is signed by a Finance Manager – an employee of the respondent and does not have the seal of the respondent. Duncan knew that a central management committee – the governing authority, existed and infact dealt with it on his own request, previously. Indeed, one of the shareholders of the appellant – Hon. Linas Aluoch as indicated by

correspondence, (see letters of 12th May, 1997 and 4th June, 1997) was a Member of Parliament for Rongo Constituency and thus knowledgeable on applicable law.

There was no evidence to support the contention by the appellant's counsel that the appellant believed that the Finance Manager had authority to sign the contract and Duncan did not say so in his evidence. On the contrary, the evidence show that Duncan was aware that the committee had the ultimate authority. The appellant specifically pleaded in the reply to the defence that the contract was not made under the seal of the parties because it was not reduced to a formal contract.

In the circumstances of this case, it is reasonable to draw an inference, which we hereby do, that the disputed agreement was not sealed by the common seal of the respondent nor signed by the authorized members of the central management committee because it was not intended to have contractual force.

Secondly, the document is described as a "*letter of commitment/undertaking"* and not as an agreement. Whilst the name given to a document is not decisive as to whether or not the document is a contract, the words *"commitment/undertaking"* as used in the document are imprecise. According to **Chambers English Dictionary**, to *Commit* oneself, is to pledge oneself and to *pledge* is to engage for by promise while to *undertake* means to bind oneself to perform. Further, according to **Concise Oxford Dictionary of Current English**, 7th Edition, to *commit* means, *inter alia*, to pledge oneself by implication or bind oneself to a course of action. An *undertaking is* defined in the same dictionary as, among other things, a pledge, a promise. Thus, *a letter of commitment/undertaking* may mean an agreement or a mere solemn promise. There are other imprecise words used in the letter e.g., ….. "society has duly *resolved to order* for the printing of members security cards ….." and "we agree that Patron Card International Ltd. *will undertake to print* the cards". The underlined words may signify actions to be taken in the future.

The document has to be read together with the letter of the same date i.e. of 21st November, 1996 where the Finance Manager stated that he would confirm to the appellant when it should commence the exercise as soon as the respondent completes its internal financial and related arrangements.

The document has also to be read together with the appellant's letter dated 19th January, 1999 signed by Duncan where he stated in part:

"The entire Board were agreeable (sic) impressed and satisfied that the details of our proposals were suitable to society's needs. However, we were advised to shelve the project until we would be advised accordingly when to commence the project".

And further, on:

"Our view is that we have been unfairly engaged in expensive and lengthy exploratory exercise with the Society's tacit approval …..".

The appellant admitted in the reply to the Defence that the document was not a formal contract.

It is clear from the two letters dated 21st November, 1996 and 19th January, 1999 respectively, that, the parties did not agree on the commencement date of the alleged contract; that the respondent did not thereafter confirm the date of commencement and that the project was by mutual agreement shelved before it commenced.

Furthermore, the respondent did not pay the 25% down payment stipulated in the document nor did the document indicate when the down payment was to be made.

Lastly, the respondent did not confirm that it had completed its internal financial arrangements and that it had set aside money for the performance of the contract.

In summary, the document has the following characteristics, namely, that it was not made under the common seal of the respondent and executed by its authorized officers; that the description of the document and some of the terms used in the document do not exclude the possibility that the contract envisaged was futuristic; that the appellant admitted in the reply to the Defence that the document did not constitute a formal contract; that the document does not stipulate the effective date of the alleged contract and that the respondent was to confirm the date, which it did not; that the respondent did not confirm that it had allocated money for performance of the contract; that the document does not stipulate when the 25% down payment was to be paid and, lastly; the appellant intimated in its letter of 15th January, 1999 that the contract was shelved and described the transaction between the parties as *lengthy, exploratory exercise*.

On our evaluation of the evidence, we are of the view that decision of the trial judge that there was no contract cannot be faulted.

Indeed, the document is the culmination of lengthy negotiations and is a summary of what the parties had agreed upon up to the date of execution. On true construction of the document in the light of the prior and subsequent, correspondence it does not indicate that the parties had immediate contractual intention on the date of execution. Rather, the document is a mere commitment or agreement to enter into a future contract broadly on the terms stated therein. It can be characterized loosely as a *"contract to make a contract"*. A contract of such a nature is not enforceable.

Although that finding effectually disposes of the appeal it is expedient to determine whether or not the appellant breached the contract. The trial judge held that if a contract existed then the appellant breached it by failure to supply the cards within six months and also by failure to supply computer Image Printer. The superior court further held that the part printed cards were not cards in terms of the intended contract and further that the appellant had supplied "air".

Mrs. Njeri Onyango submitted, among other things, that the letter of 21st November, 1996 was varied by a letter of 9th December, 1996 which was in turn approved by a letter dated 17th December, 1996; that according to the agreement as varied, the appellant was to print 98,000 cards using its own money; that the respondent agreed to make part payment of 75% and that although the appellant did not complete the printing, the judge should have awarded at worst, something less than the sum claimed.

The letter of 9th December, 1996 referred to is from Duncan to General Manager of the respondent and states in part:

"RE: PROPOSAL TO MAKE PRELIMINARY PURCHASES

……..

We wish to follow up the issues we raised with your office and which we agreed upon that:

1. The six (6) months operational period would be sufficient providing that,

2. We carry out this obligation through an advance printing of the cards as to their general format through our mega processor in Europe leaving the specific details of individual members to be inserted locally by the portable printers available in Kenya.

3. We in effect make advance purchase of blank cards for the said bulk printing in readiness to work within the period of six months.

The understanding was that the small portable printer cannot handle bulk jobs in order to accomplish the work in question within the required period. We are ready to launch into these preparations provided you signify your approval".

The Finance Manager of the respondent (S. Nyangweso) replied by a letter of 17th December, 1999 in part, thus:

"We have no objection to your proposal to make preliminary arrangements in securing necessary materials provided the other conditions as contained in the letter of undertaking are complied with despite unforeseen eventualities".

The appellant by the letter of 9th December, 1996 was seeking approval for preliminary purchases of blank cards. The respondent did not object to that proposal provided the other conditions in the document were complied with. One of the important conditions in the document was that the quality of the final individual printed cards would be the exact quality, type and style offered as samples. The respondent did not in the reply agree to the alteration of the terms of the document. In particular, the respondent did not agree to the supply of part printed cards containing the general format without the details of individual members. The findings of the trial judge that the respondent by the letter of 17th December, 1996 insisted that the terms be complied, with, is with respect, correct.

Further, as Mr. Mutua, learned counsel for the respondent correctly submitted, the proposal by the respondent that the appellant prints the cards without the respondent making a down payment was made by a letter of 16th November, 1996 before the alleged contract was signed. The proposal was therefore superseded by the document of 21st November, 1996 which required the respondent to pay 25% down payment in advance.

Duncan testified, inter alia, that the appellant did not supply the computer image printer; that the appellant supplied part printed cards but without individual particulars; that the delivery was within the stipulated six months; that the computer image printer would have been used to insert particulars of the members; that the appellant was supposed to complete each work with the image printer at the respondent's premises; that the respondent did not provide the details of individual members and that the exercise was not completed.

According to the document relied by the appellant as constituting a contract the appellant was to print and supply security cards in respect of the entire society's membership countrywide – of the quality, type and style as the sample. The sample submitted to the respondent and approved by the respondent comprised of a complete card with all details including individual members photographs and other relevant details. The appellant pleaded in paragraph 4 of the plaint that acting on the document of 21st November, 1996, it: *"embarked on mass production of membership security card samples at its own cost"* (underlining ours).

Duncan testified that the appellant supplied part printed cards without details of individual members which details the respondent did not even provide. This is a departure from the pleadings where appellant did not plead that it supplied anything and in particular paragraph 6 of the reply to defence where appellant pleaded that supply of cards was sabotaged by the respondent. The appellant admitted that it did not supply computer image printer as stipulated in the document which was to be used to print individual particulars of the members. Even if the appellant supplied part printed cards or samples, we nevertheless find, like the trial judge found, that the part printed cards were not membership cards within the terms of the document. The cards allegedly supplied were not complete members cards and were not useful to the respondent or to any member of the society. As admitted by the appellant, the respondent subsequently awarded the contract to another competitor. In our view, supplying incomplete cards which do not conform to the sample would not be considered as partial performance of the entire contract giving rise to liability upon *quantum meirut* to pay a reasonable sum for the membership cards actually supplied. In contrast, had the appellant supplied some quantities of complete membership cards, in lots or otherwise, and which conformed with the terms of the contract the court would have considered whether this was an entire or divisible contract, and, if the contract found to be divisible, then, to consider whether the appellant could be paid on *quantum meirut*.

Moreover, the appellant's suit was not based upon *quantum meirut* to recover reasonable

compensation for the membership cards actually supplied. Rather, the suit was apparently for recovery of damages for breach of contract.

We are satisfied like the trial judge, that, the appellant was in breach of the alleged contract by failing to supply complete members cards in terms of the contract and that the appellant is not entitled to any payment.

For the foregoing reasons, we dismiss the appeal in its entirety with costs to the respondent.

Dated and delivered at Nairobi this 12th day of November, 2010.

P. K. TUNOI

……..……

JUDGE OF APPEAL

E. O. O'KUBASU

……

JUDGE OF APPEAL

E. M. GITHINJI

……..…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR