



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 5954 of 1992

DAVID NGUGI MBUTHIAPLAINTIFF

-V E R S U S-

CHARLES NDERITU MUKORA.....DEFENDANT

J U D G M E N T

The parties to this suit were business associates. In 1977, they incorporated Computer Stationery & Supplies Ltd., a limited liability company (hereinafter referred to as the “company”) in which they were the sole shareholders and directors. The plaintiff’s case against the defendant as outlined in the plaint is that the plaintiff was the majority shareholder in the company, holding 5000 out of the 8000 issued shares of the company while the defendant held 361 shares. By an oral agreement made between the parties sometime in 1987, it was agreed that the defendant would sell his shares in the company to the plaintiff for the sum of Ksh.40,000/=. It was further agreed that the said sum of Ksh.40,000/= would be paid by the plaintiff to the company, which would in turn pay it out to the defendant.

It is the plaintiff’s case that he duly paid the said sum to the company, and the company in turn paid it out to the defendant. Thereafter, the defendant refused and continues to refuse and neglect to take any steps towards the completion of the said agreement for sale by transferring the shares in question to the plaintiff. The plaintiff therefore claims from the defendant-

- (a) Specific performance of the said agreement by the defendant.
- (b) Alternatively the Registrar of the High Court do execute the transfer.
- (c) Damages for breach of contract
- (d) Costs of the suit.

In his defence, the defendant specifically denies that the plaintiff is the holder of 5,000 shares in the company and that he is himself the holder of 361 shares. If the plaintiff is the holder of 5000 shares, which the defendant denies, then such shares were allocated in contravention of the company’s articles of association. The defendant further denies that by an oral agreement in 1987 or at all, he agreed to sell his shares in the company to the plaintiff for Ksh.40,000/= or at all. He therefore states that he is a stranger to any arrangements for the payment of that money by the plaintiff to the company and the subsequent payment to him of the same by the company. In the alternative and without prejudice to the foregoing, the defendant contends, without admitting, that if the plaintiff paid any moneys to him, either

by himself or through the company, such sums were paid as a gift to assist him in his election campaign and not for the alleged purported sale of shares. For these reasons, the defendant prays that the plaintiff's suit be dismissed with costs.

Arising out of these pleadings, the parties advocates have filed two statements of agreed issues. The first statement is dated 24th August, 1994, signed by M/s Hamilton Harrison & Mathews Advocates for the plaintiff, and Rustam Hira, Advocate for the defendant, and the same was filed in court on 27th September, 1994. According to this statement, the issues between the parties are-

1. Does the plaintiff hold 5,000 shares in the company known as Computer Stationery & Supplies Limited"
2. If so, have the plaintiff's shares been allotted to him in contravention of the articles of association"
3. Does the defendant hold 361 shares in the company"
4. Was there an oral agreement between the plaintiff and the defendant for the sale of the defendant's shares in the company for Sh.40,000/=
5. Was there an agreement that the plaintiff would pay Sh.40,000/= to the company which would in turn pay the said sum to the defendant"
6. Did the plaintiff pay the said sum to the company"
7. Did the company pay the said sum to the defendant"
8. Was the sum paid to the defendant in consideration for the sale of the shares or as a gift"
9. Is the plaintiff entitled to an order for specific performance"

The second statement of issues is dated 5th April, 2000, signed by M/s Waruhiu, Kowade & Ng'ang'a Advocates for the plaintiff and Rustam Hira, Advocate for the defendant, and the same was filed in court on 9th May, 2000. According to this one, the issues between the parties are-

1. What is the number of shares held by the plaintiff and the defendant respectively in the company known as Computer Stationery & Supplies Limited"
2. Has there been any share certificates issued" If yes, at what price and what was the mode of payment"
3. Have any shares been allocated to the plaintiff in contravention of the articles of association of the company"
4. Did the defendant vide an oral agreement or otherwise agree to sell his shares to the plaintiff"
5. If any agreement existed in 3 (*sic*) hereinabove, have both parties performed their obligations"
6. Did the plaintiff pay any money to the defendant either directly or through the company" If yes, what was the purpose of the payment"

7. Is the plaintiff entitled to his claim in the plaint"
8. Who is liable to pay costs"

At the hearing of this case, the plaintiff gave evidence in person and produced some documents in support of his case, and the defendant also testified in person and produced the company's memorandum and articles of association in support of his case. None of them called any witnesses and their respective counsel filed written submissions on which they said they would rely exclusively. The first issue relates to the number of shares held by respective shareholders in the company. The plaintiff's evidence was that out of the 10,000 shares into which the company's share capital was divided the parties allotted 8,000 shares. He was allotted 5000 shares whereas the defendant was allotted 3000 shares. Whereas he paid for all his shares by depositing money in the company's bank account at National Bank of Kenya between 23rd October, 1981 and 20th April, 1983, the defendant paid only Ksh.36,000/= which would be payment of only 360 shares as the value of each share was Ksh.100/=. He produced plaintiff's exhibit No.1 which were the minutes of a Board meeting held on 4th April, 1981. The minutes are signed by both the plaintiff and the defendant. Clauses 5 and 6 thereof read-

"5. Agreed that the share capital of the company be and is hereby increased from Sh.300,000/= divided into 3000 shares of Sh.100 each to Sh.1,000,000/= divided into 10,000 ordinary shares of sh.100 each.

6. Agreed both directors to allocate 8,000 shares of Sh.100 each and be immediately paid for to boost and save our present financial position, D. Mbuthia 5,000 shares of Sh.100 each C. Mukora 3,000 shares of sh.100each current fully paid up shares D.Mbuthia 1 share of sh.100 each C. Mukora 1 share of sh.100 each, allotted 8,000 shares of sh.100 each to be paid D. Mbuthia sh.499,900 C. Mukora sh.299,900."

The allotment of shares is quite clear, and both parties are agreed that clause 6 reflects what they agreed upon. Mr. Mukora however, clarified that the 5000 and 3000 shares allotted to the plaintiff and the defendant, respectively were inclusive of the 1 share taken by each subscriber to the memorandum of association on incorporation of the company. This position is confirmed by the defendant's statement as P.W. 1 in criminal case No.46 of 1992 R.V. David Ngugi Mbuthia (the plaintiff herein) in which Mr. Mukora said at P.11 of the proceedings which are the plaintiff's exhibit No.7.

"The accused (read plaintiff) had 5000 shares and I had 3000 shares. There was a balance of 2000 shares which was not collected."

I suppose the witness meant to say that a balance of 2000 shares were not allotted.

This takes care of the first issue. The plaintiff was allotted 5000 shares in the company while the defendant was allotted 3000 shares. Inasmuch as the defendant alleges in paragraph 3 of his statement of defence that if the plaintiff is the holder of 5000 shares, then such shares were allocated to him in contravention of the company's articles of association, I would hasten to add that there is not a scintilla of evidence of any breach of the company's articles.

Regarding the share certificates it was the plaintiff's evidence in cross examination by Mr. Mutinda that the company issued two share certificates, one to each of the two shareholders. His certificate showed that he was holding 5000 shares. This is contradicted by the defendant who, in his evidence in the criminal case against the plaintiff, said that there had never been share certificates in the company

as the accused (plaintiff) was his friend and as such they were operating on trust. I believe the defendant on this point. The casual and informal manner in which the parties carried on the business, including the holding of their board meetings in social places, confirms that their relationship was founded on mutual trust and confidence in one another, at least at the beginning of their operations. I believe there were no share certificates. If they had been there, it would have been only very easy for the plaintiff to exhibit his own. He did not do so. That alone speaks for itself.

Was there an oral agreement for the purchase of the defendant's shares by the plaintiff" The plaintiff says "yes" but the defendant denies it. The plaintiff's contention is that it was the plaintiff who instigated it by offering to relinquish his shares in the company if he could get a refund of the Ksh.36,000/= which he had paid as he was short of finances and had problems with his company called Mt. Kenya Garments. In the absence of some independent evidence to resolve the impasse between the parties, all one can do is to do one's best and make inferences from all the surrounding circumstances. The plaintiff's position is that even though Mr. Mukora had paid only Ksh.36,000/= , the plaintiff was ready to pay him Ksh.40,000/= in return for his shareholding in the company. There is evidence on admission that the defendant had actually paid Ksh.36,000/=. When cross examined by defence counsel in the aforementioned criminal case, the defendant said, at page 19-

"I made the initial payments for my shares in the sum of Sh.36,000/= for the start of the company's business. The sh.36,000/= was an initial payment on my part... I have not paid any other money towards the company's business apart from the Ksh.36,000/= which I initially paid..."

This corroborates the position taken by the plaintiff along the line that the defendant had paid only Ksh.36,000/= for his shares in the company, and that the parties agreed that the plaintiff would actually pay Ksh.40,000/= by way of a refund. It lends credence to the plaintiff's side of the story.

There is further evidence, on admission, that the defendant was paid some Ksh.40,000/= as stated by the plaintiff. In the criminal case hereinabove referred to, D.W.3 was a Mr. Paul Njenga Mwangi, an accountant with the company. In cross examination by defence counsel, Mr. Kowade, he said-

"I had an occasion to peruse the previous books of accounts when I joined the company. In 1987, there was a cheque for Sh.30,000/= which the company paid to Mr. Mukora as a refund of his share contribution, and this is what the records reflect together with a covering letter (i.e. for the said cheque)... which the company sent to Mr. Mukora. The letter says that the cheque is for settlement of his capital contribution in the company. The letter further states that Mr. Mukora would be paid the balance. I confirm that these records are in the company's books of account. To my knowledge this sum of Sh.30,000/= together with the balance of Sh.10,000/= were finally paid to Mr. Mukora. Mr. Mbaire was secretary to the company. The balance of Sh.10,000/= was also sent to Mr. Mukora by a covering letter. I can see MFI D-"A" & "B" and note that this is the cheque for Sh.10,000/= and the covering letter in respect of Sh.10,000/= which was for final settlement of Mr. Mukora's final capital contribution in the company; this payment is also reflected in the company's books of accounts. According to the company's records, these two cheques for Sh.30,000/= and Sh.10,000/= were encashed by Mr. Mukora.-"

I cannot recall whether Mr. Mukora finally relinquished his directorship of the company after these payments of his capital contributions. According to my records and the balance sheet which Mr. Mukora has said he had 361 fully paid shares whereas the accused has 5000 fully paid shares. Both of them (directors) have signed the balance sheets showing these shares in which they have fully paid."

This is the statement of an official of the company who had been summoned to testify against the plaintiff. His testimony can only be construed as demonstrating implicitly that there had been an agreement for the refund to the defendant of a sum of Ksh.40,000/=, which lends more credence to the plaintiff's version of the events. Indeed, the plaintiff produced as his exhibits 4 "a" and "b" and 5 "a" and "b" copies of the letters and cheques which were sent to the defendant. Exhibit 4 (a) is a letter dated 6th April, 1987 addressed to the defendant. It reads-

"Dear Mr. Mukora,

Kindly acknowledge receipt of our cheque No.4444923 dated today in settlement of your capital contribution in this company Ksh.30,000.00

Will make necessary arrangements to pay you a balance of Ksh.10,000/=

Yours faithfully,

J. K. MUCHOKI

ACCOUNTANT

To exhibit 4 "a" is attached plaintiff's exhibit 4 "b" which is a cheque No.444923 dated 6th April, 1987 for Ksh.30,000/= payable to C. Mukora. It is issued by Computer Stationery & Supplies Ltd.

Exhibit 5 "a" is a copy of another letter similar to exhibit 4 "a". It is dated 23rd June, 1988 and is addressed to Mr. Mukora and reads-

"Dear Mr. Mukora,

Kindly acknowledge receipt of our cheque No.465691 dated today being your final settlement of your capital contribution in this company of Ksh.10,000/=.

Please sign duly filled transfer forms to enable us file the same with the registrar of companies.

Yours faithfully,

Sgd.

P. MBAIRE

To this exhibit is also attached plaintiff's exhibit 5 "B" which is a cheque No.465691 dated 23rd June, 1988, for Ksh.10,000/= payable to C.M. Mukura. It is issued by Computer Stationery & Supplies Ltd.

In his statement of defence, the defendant states that presuming, without admitting, that the plaintiff paid any moneys to him either through himself or through the company such sums were paid as a gift to assist him in his election campaign and not for the alleged purported sale of shares. However, in his oral evidence in court, the defendant stated that he did not sell his shares to anyone. Otherwise he admitted having received two cheques, one for Ksh.30,000/= and another for Ksh.10,000/= from the company. But he said that he did not receive the forwarding letters. He also stated that this payment was the company's reaction to his appeal for donations for his political campaign in the 1988 elections. In his testimony in the Criminal Case referred to herein above, the witness told the court-

“The general elections were held in March, 1988 several months before I got these payments from the company as agreed between me and the accused.”

I have some doubts about the defendant's position to the effect that these payments were intended to promote his political campaign. First, it was not correct for him to say that the elections were held several months before he got the payments from the company. If that was the case, how would the money assist him after the elections had been held" In truth, he received the first payment in April, 1987. That was almost one good year before the elections were held. Was that payment in furtherance of an election campaign" More importantly, the second payment was made in June, 1988. That was three months after the elections had been held. Was that payment also made in reaction to his appeal for donations for a political campaign" That is highly unlikely. I find the plaintiff's explanation for these payments being more plausible than that of the defendant. I therefore find that the payments were made in consideration of the defendant's shares in the company, but not for a political campaign. By extension, this would also imply that the parties had reached an agreement along those terms. Being of that view, I don't find it surprising that the defendant admits receiving the cheques but not the forwarding letters. He would simply incriminate himself if he admitted receiving those letters.

My answers to the remaining issues, therefore, are that by an agreement between the parties, the defendant agreed to sell his shares to the plaintiff. The plaintiff performed his part of the bargain by paying the defendant the agreed sum through the company. It may not be practicable for him to identify the Ksh.40,000/= which he deposited into the company's bank account as his exhibit No.2 shows that he kept on depositing money into the company's account almost at will. In contrast, the defendant did not honour his side of the bargain. He acknowledges receipt of the money but then says it was a gift. I do not think so.

This case has a few loose ends. If it were a criminal matter, the plaintiff would probably have an uphill task proving his case beyond reasonable doubt. But on a balance of probability, I am satisfied that he has proved his case against the defendant, and that he is entitled to specific performance, and to the transfer to his name of all the defendant's shares in the company. The Deputy Registrar of the High Court is hereby authorised to execute on behalf of the defendant all such instruments and documents as may require execution by the defendant in order to give effect to the order for specific performance. The plaintiff will also get costs of this suit. It is so ordered.

Dated at Nairobi this 17th day of December 2004

L. NJAGI

JUDGE

Read and delivered at Nairobi by Kasango J. this 17th day of December 2004

MARY KASANGO

JUDGE



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