



**Pwani Maoni Limited & another v Musyoka (Commercial Case
2 of 2024) [2024] KEHC 11951 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11951 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KWALE
COMMERCIAL CASE 2 OF 2024
DKN MAGARE, J
SEPTEMBER 26, 2024**

BETWEEN

PWANI MAONI LIMITED 1ST PLAINTIFF

ADRIANUS MARIA VERHOEF 2ND PLAINTIFF

AND

JANE MUENI MUSYOKA DEFENDANT

JUDGMENT

1. The plaintiffs filed suit on 22/12/2022. The plaintiffs stated that a loan agreement between the 1st plaintiff and 2nd plaintiff was for 650,000,000/= . The loan agreement does not appear to be in contention in this matter. In other words, it is not a matter for my decision.
2. The plaintiffs stated that they bought land parcel number Kwale/Diani Beach/800 & 801 and invested in it. At that time the 2nd plaintiff and the defendant were shareholders of the 1st Plaintiff.
3. The 2nd plaintiff stated that he was an investor and a director of the 1st plaintiff and could at the said time remit money to a director of the 1st Plaintiff (this appears to be the defendant). Subsequently, the 2nd Plaintiff transferred his shares to the Defendant's brother, William Kalii Musyoka. It appears, the erotic liaison between the 2nd Plaintiff and the defendant hit the rocks resulting in this suit mainly to bar the defendant from involving herself in the affairs of the plaintiffs.
4. The plaintiffs, or rather the 2nd plaintiff averred that he remitted funds to the defendant, but she refused to account. It was the plaintiffs' case that the 2nd Plaintiff remitted a sum of Kshs. 26,726,657.40 (Euros 198,519) for investment. It was his case that the said sums were not accounted for by the defendant.
5. According to the Plaintiffs, the defendant refused to release the money. The 2nd plaintiff stated that the said amounts were due and payable to the 1st plaintiff. They prayed for a refund of Kshs. 26,720,657.40.



6. The 1st plaintiff did not file any claim. The defendant entered appearance on 10/2/2023 and filed defence and Counterclaim. A request for judgment was filed on 14/2/2023 which was not acted upon as it was unnecessary. The defence denied the claim.
7. The plaintiffs filed a reply to defence and defence to Counterclaim on 3/3/2023. The 2nd plaintiff stated that he only had a business relationship and no other. The plaintiffs aver that due to prior good relationships, the plaintiffs were shocked that the money was not released. They prayed the court to dismiss the Counterclaim.

Evidence

8. The 2nd plaintiff filed a humongous witness statement dated 19/12/2022. It reproduces word for word the contents of the plaint. The plaintiffs also attached minutes, loan agreement between themselves, CR 12 for the 1st plaintiff, 2 transfers for the period 24/5/2018 – 11/2/2022 and 30/11/2020 – 5/12/2022, demand notice, and communication through WhatsApp Messaging service.
9. There was a resolution signed by 2nd plaintiff and Ward Verhoef as directors of the 1st Plaintiff. An agreement dated January 2e of 2015 (sic) was attached. The Directors were then, 2nd plaintiff and Dorcas Waithera Kiiru.
10. There is an attachment indicating 50,000 but it is in a foreign language. It is not certified nor translated. The CR 12 indicate that as at 26/5/2022 there were 3 directors – Ward Verhoef, Adrian Maria Verhoef and Jane Mueni Musyoka with 499, 500 and 1 ordinary shares respectively. The company secretary is indicated as Apolo Mutisya Muinde.
11. What the plaintiffs call WhatsApp discussion is a bunch of lines in papers, which are indicated to be from Jane to John. Who the two parties were, is anyone's guess.
12. Upon testifying on 18/9/2023, the 2nd plaintiff was cross examined by the defence. He stated that they met with the defendant in 2018. The company was buying and selling. It is his case that the company was his debtor. The relations with the defendant was businesswise, but not a love relationship. The defendant was signing documents while the 1st plaintiff was not in Kenya.
13. It was his case that the defendant was notified of the meeting of 16/7/2022. The court inquired who Festus Kalii Musyoka was and was informed that it was a brother to the defendant. He stated that he sent money to Jane as an investor.
14. The defendant testified that they had a relationship and he used to send money to her personal account. When they fell out, he filed suit. The defendant adopted her statement and produced 21 documents.
15. In her statement she stated that the 2nd plaintiff relentlessly stalked her, pursued and wooed her until he had the courage to open his heart and of course the wallet. After some time he stopped staying in hotels and moved in with the defendant. She opened everything to him including her bedroom to him. He started behaving like a husband and was even taken to Masaku for introduction and also visited her brother in Chagamwe.
16. They purchased properties. He promised her Kshs. 500,000/= as salary for services she was rendering to the company, among others. She oversaw workers, slashed grass landscapes and made a perimeter wall and ensured they were well kept. He used the money to purchase the properties and preferred cases in court including Mombasa ELC 234/2020.
17. The love birds lived together with the 2nd plaintiff opening the purse while the defendant opened her heart for 5 years. They bought land parcel No. Kwale/Diani Beach/800 and 801, so that the 2nd plaintiff



could not pay monthly rent. It appears, like every responsible man, he took over the business of paying rent for the defendant. The defendant stated that she was promised marriage and oversaw building of a house which she thought will be their future matrimonial home.

18. In December 2020 she was pleasantly surprised with a gift of 26,000,000/=. She was overjoyed and oversaw building of a house. The 2nd plaintiff oversaw the house being built. Once the 2nd plaintiff got work permit in 2021, her services were no longer required. This was a pertinent issue which the 2nd plaintiff did not contest. She stated that he was only using the defendant and her brother to purchase property in Kenya. They denied ever resigning and that their signature was forged.
19. On cross examination she stated that she did not have a marriage certificate. She stated she was taking care of workers and Adrian was sending money.
20. The second witness was Sheila Mumbi who adopted her statement dated 4/8/2023. She stated that she was staying in the same house with the 2nd plaintiff and the defendant. It is the defendant who did shopping. The next witness was Javan Mukabi who adopted his statement dated 4/8/2023. He stated that he built the house in issue, through instruction of Erick Omollo Ogola. He was building a house for the defendant.
21. PW4 was Emmanuel Karisa Keya. He was a forensic examiner. He examined a document and prepared a report, now provided as exhibit 23. He had 20 years experience in Jerusalem, Moshi. He received documents A1 and A4 and specimen signatures. He found that the signatures were not of common origin. He did not produce his documents but he had them as he was testifying virtually.
22. The last witness was Festus Kalii Musyoka. He produced his statement dated 4/8/2023. He stated that he did not consent to be removed as a director. He stated that he has never interacted with Apollo Muinde. He stated that he formally met the 2nd defendant in his house in Changamwe where the 2nd plaintiff and the defendant, who is the witness's sister went for introduction. The 2nd plaintiff proposed that the witness be appointed as a director. The 2nd plaintiff visited the rural home twice.
23. Parties filed lengthy submissions.

Issues

24. Only three issues arise:-
 - a. The status of Euro 198,519 (Kshs. 26,720,657.40).
 - b. The status of the company directorship and shareholding.
 - c. Fate of the Counterclaim.

Analysis

25. Section 107-109 of the *Evidence Act* provides as follows:-
 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
 3. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.



26. On the first issue of Euro 198,195, the plaintiff stated that the 2nd plaintiff sent the money to the defendant's account. The building of the residential house was approved and continued. Certified accounts of the defendant's account were produced. They show that money was being remitted to that account from 20/3/2018 and was being spent. The particular complaint was that money was sent on:
- a. 1/12/2020 - 50,000 Euro
 - b. 2/12/2020 - 50,000 Euro
 - c. 4/12/2020 - 49,919 Euro
 - d. 2/2/2021 - 48,600 Euro
- Total - 198,519 Euros
27. These amounts are not reflected in the bank statement. Nevertheless there was an admission that they were received. The defendant maintained that they were a gift on one hand and the 2nd plaintiff stated that they were for investment. There is no single communication to that effect. However there is a house duly approved and signed by the defendant for building. I am unable to find evidence that this was the investment.
28. The money is already expended. The money was sent without any evidence of its application. The 1st plaintiff does not have a claim on the money. As at the time of remitting the 2nd plaintiff had already divested his interest to Festus Kalii Musyoka. He has not involved Musyoka in recovery of his shares. Legally, the money sent was a gift. It was perfected on arrival. Justice Kiage once stated as follows regarding love and landmines in the case of *Walutsachi v Mary's Mission Hospital* (Civil Appeal E050 of 2021) [2022] KECA 1023 (KLR) (23 September 2022) (Judgment) Neutral citation: [2022] KECA 1023 (KLR):
- “The field of love, no doubt, is littered with the wreckage of many a broken heart. The tears that have flowed, in the wake of betrayal, perfidy and other two- or multiple-timing adventures of lovers, is beyond reckoning. Thus must one who ventures into love do so alive to the perils that abound.
16. For the appellant herein, whose sad tale is well-captured in the judgment of my learned sister Mumbi Ngugi, JA, with which I am in full agreement, the lesson learnt is that the wounds of love find scant balm in the courts of law. Love's ills and woes can only be found in lovers' return and reconciliation, failing which, in accepting and moving on, while holding onto hope for comfort elsewhere, or leaving love's threshing floor altogether, paying heed to Kahil Gibran's The Prophet: “But if in your heart you would seek only love's peace and loves pleasure, then it is better for you that you cover your nakedness and pass out of love's threshing floor”
29. I find that the 1st plaintiff had no property in Euro 198,519 claimed. The 2nd plaintiff sent money to his lover who utilized the same. It is not the duty of the court to recover benefits given between lovers. The court will be involved in dealing with tangible benefits received by the defendant while letting the 2nd plaintiff get away with intangible benefits. It will be unfair.
30. The 1st defendant is duly registered. It has or ought to have a bank account. Nothing could have been harder than the money to be sent to the 1st plaintiff. Further, the money was sent at the height of ecstasy. Whereas there was a breach of the promise to marriage, there was no tangible wrongdoing in



- perfecting the gift. It is the lovers' duty to ensure they act prudently. This court, in absence of fraud cannot interfere. Immoral liaisons have consequences.
31. The bid to ensnare the defendant is absurd at best. This was a gift. A gift is perfected on receipt. Once the relationship breaks down, everyone must walk away with their scars, and nurse wounds.
32. Odunga's Digest on *Civil Case Law and Procedure* Vol (III) Page 2417 at paragraph 5484 (d) e – 1 thus:
- “Generally speaking the moment in time when the gift takes effect is dependent on the nature of the gift; the statutory provisions governing the steps taken by the donor to effectuate the gift. (See in *Re Fry Deceased* {1946} CH 312 *Rose: and Trustee Company Ltd v Rose* {1949} CL 78 *Re: Rose v Inland Revenue Commissioners* {1952} CH 499 *Pennington v Wulfe* {2002} 1WLR 2075 *Maledo v Beatrice Stround* {1922} AC 330. Equity will not come to the aid of volunteer and therefore, if a donee needs to get an order from a Court of equity in order to complete his title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee need no assistance from equity and the gift is complete. It is on that principle that in equity it held that a gift is complete as soon as the donor has done everything that the donor has to do that is to say as soon as the donee has within his control all those things necessary to enable him, complete his title. Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor.
33. The issue is the question of disclosure. The defendant was candid that she rendered erotic services to the 2nd plaintiff. The 2nd plaintiff must have been moved and opened his purse and gifted the defendant the amounts.
34. I agree that the 2nd plaintiff had an ulterior motive, that of getting a work permit. After getting this, the defendant and her brother were no longer useful. Unfortunately this was after the 2nd defendant had sent what Gen Z call fare. It was already consumed.
35. The process of gifting for erotic services rendered is not enforceable. In the circumstances, the gift was perfected and services rendered. It may not have been a marriage but 5 years continued groinic services and comfort must have been worth. In the circumstances I dismiss the claim for Kshs. 26,720,657.40 (or Euro 198,519) as the same was a gift.
36. The second aspect is the directorship of the 1st plaintiff. The shareholding as at 18/3/2021 was:
- i. Festus Kalii Musyoka (99 shares – ordinary)
 - ii. Jane Mueni Musyoka (1 share – ordinary)
37. A meeting to change these must involve the 2 sole directors and shareholders. Festus Kalii Musyoka admitted to have been roped in to be a director. Transfer was done. The resolution of 22/2/2022 was found to have been fraudulent. The allocation to Adrian Maria Verhoef and Ward Verhoef of 900 shares was thus a nullity.



38. In *Macfoy v United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172(1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

39. The plaintiff did not address the forgeries on 22/2/2022. It is clear that the purported resignation of Festus Kalii Musyoka and the defendant was fraudulent. The purported affidavit is prima facie fraudulent. Therefore subsequent transfer indicating 499 shares for Ward Verhoef and Adrianus Maria Verhoef cannot stand. The transfer of shares after 18/3/2021 is therefore null and void. I am satisfied with the experience and learning of the forensic examiner. He has the necessary experience to make the report.

40. Further the forensic report is consistent with other evidence. It is clear that from 2021 issues had gone south. It is not fathomable that a meeting could be held between the parties and the defendant voluntarily leaves without laying any claim. The transfer was also without consideration. Such a transfer, were it valid, was still voidable.

41. All factors considered, the directors of the 1st plaintiff are:-

- i. Festus Kalii Musyoka – 99 ordinary shares
- ii. Jane Mueni Musyoka – 1 share.

42. The purported further allotment are null and void. They are set aside. In lieu thereof, I revert the status as at 18/3/2021 where the defendant had one share and Festus Kalii Musyoka had 99 shares. If the 2nd plaintiff has a claim to the company, then he must have Festus Kalii Musyoka transfer all or some of the shares, depending on the terms of original transfer. Given that Festus Kalii Musyoka is not party, I shall make no further comments.

Costs

13. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award



of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

43. Section 27 of the *Civil procedure Act* provides as follows: -

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

44. The claim is between persons who have sinned against each other. The 1st plaintiff is a company owned by the 2nd Defendant. The same was fraudulently transferred to strangers. In the circumstances, the 1st plaintiff shall not bear any costs.

45. On the other hand the defendant is successful both on the plaint and counterclaim. There is no reason to deny her costs. The Supreme Court recently stated that even a small win is a win. In the circumstances the defendant shall have costs, both of the suit and counterclaim.

Determination

46. The upshot of the foregoing is that I make the following orders:-

- a. The suit lacks merit and is accordingly dismissed with costs of Kshs. 640,809/=.
- b. The Counterclaim is allowed with costs of Kshs. 240,000/= as follows:-
 - i. The transfer of shares after 18/3/2021 is fraudulent. It is hereby set aside. The sole directors and shareholders are reinstated, that is, Jane Mueni Musyoka 1 share and Festus Kalii Musyoka 99 shares.
 - ii. The names of Adrianus Maria Verhoef and Ward Verhoef and their respective shareholdings are struck out.
 - iii. I decline to value the shares given that the transfer was void and as such cannot confer any rights.
 - iv. The award of extra shares are null and void since only shareholders can sit and allot non-allotted shares.
 - v. Costs of Kshs. 240,000/= for the Counterclaim.
- c. Stay on costs only for 30 days.
- d. Adrianus Maria Verhoef be at liberty to pursue his shareholding with Festus Kalii Musyoka.
- e. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF SEPTEMBER, 2024.



JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the plaintiffs

Mr. Kamau for defendant

Court Assistant – Jedidah

