



**Isaak v Chettri (Civil Case 386 of 2013) [2024] KEHC 13205 (KLR)
(Commercial and Tax) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 386 OF 2013
JWW MONG'ARE, J
OCTOBER 31, 2024**

BETWEEN

BURALE HASSAN ISAAK PLAINTIFF

AND

GOVINDA BHUSAL CHETTRI DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit by way of a plaint dated 6th September 2013 claiming that sometime between 9th January 2011 to 20th April 2011, the parties entered into an agreement in which they were to jointly purchase One Million Jute bags for storing maize, from India. That each Jute bag was to cost approximately USD 1.28 coming to a total of USD 1,280,000 for the said One Million Jute bags. The Plaintiff claims that later on, the parties entered into an agreement which was signed by both parties where it was agreed that the Plaintiff was to fund the business while the Defendant was to source the Jute bags and that whereas he remitted to the Defendant the sum of Kshs. 38,300,000.00/= to purchase the Jute bags, the Defendant failed to purchase the same.
2. The Plaintiff avers that, following negotiations between the parties, on diverse dates between June 2012 and April 2013, the Defendant undertook to repay the negotiated and reduced sum of Kshs.28,000,000.00/= to the Plaintiff in agreed instalments and on 28th March 2013 and 19th April 2013, the Defendant did in fact pay the sum of Kshs. 1,200,000.00 to the Plaintiff leaving an outstanding balance of Kshs.26,800,000.00/=. The Plaintiff states that despite demand, the Defendant has failed, declined and/or refused to refund the sum of Kshs. 37,100,000.00/= to the Plaintiff and as such, now seeks the sum of Kshs. 36,800,000.00/=, Interest and Cost of the suit.
3. In his defence, the Defendant filed a defence dated 24th September 2013 where he generally denied the Plaintiff's claims. He denied entering into an agreement with the Plaintiff or such memorandum of



- understanding as to the claimed outstanding debt. He stated that on a without prejudice basis that the monies deposited to the Plaintiff's account were done through coercion and undue influence.
4. The matter was set down for hearing where the Plaintiff testified as PW 1 and he relied on his witness statement dated 6th September 2013. He also produced the plaintiff's list of documents dated 6th September 2013 which included; A copy of the Memorandum of Understanding dated 31st October 2012, Copies of bank statements, a copy of the Agreement for paying the Jute bags, a Copy of the Charge Sheet and Copies of the Cash Deposit Slips (PEX 1). The Plaintiff as also called as his witnesses; Mohammed Kunyow Farah (PW 2) who relied on his witness statement dated 6th September 2013 and YUNIS ISAACK IBRAHIM (PW 3) who relied on his witness statement dated 6th September 2013.
 5. On his part, the Defendant testified as DW 1 and relied on his witness statement dated 3rd October 2014. He produced the list of documents dated 3rd October 2014 which included the Defendant's passport number 3994, his traveller history report, the Charge Sheet of Criminal Case Number 169 of 2012, his witness statement in Criminal Case Number 169 of 2012, PW3's witness statement in Criminal Case Number 169 of 2012 and the Order issued on 20th March 2014 in Criminal Case Number 169 of 2012 (D Exhibit 1-7). He also produced a further list of documents dated 23rd March 2016 which included the court proceedings in Criminal Case Number 169 of 2012(D Exhibit 8). In addition to his testimony, the Defendant called Mr. David K. Matiti, an immigration Officer working with the Immigration Department at Nyayo House, Nairobi who relied on his witness statement dated 5th March 2019.
 6. After the hearing both the plaintiff and the defendant's testimonies, the court directed the parties to file written submissions which are on record and which together with the evidence, I shall make relevant references to in my analysis and determination below.

Analysis and Determination

7. Having carefully considered the evidence tendered in this case by the parties including their rival written submissions, I note that the main issue that arise for the court's determination is "whether the Plaintiff is entitled to the Kshs. 36,800,000.00/=." In making this determination, I am guided by the fact that the standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107 (1) and (2) of the *Evidence Act*(Chapter 80 of the Laws of Kenya) which provides that "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" and that "When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person". In *Miller.V. Minister of Pensions 1947 ALL E.R 372*, Lord Denning aptly summarised the application of the standard in the following terms:

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case is which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."



8. The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Limited* [2019] KECA 1058 (KLR) simply put it that ‘Courts will make a finding based on which party’s version of the story is more believable.’ As stated, the Plaintiff produced inter alia a copy of the Memorandum of Understanding (MOU) dated 31st October 2012 (pg. 16 of PExh 1) and a copy of the Agreement for paying the Jute bags (“the Agreement”) (pg. 27 of PExh 1).
9. The MOU indicates that the Defendant owes the Plaintiff an outstanding debt of Kshs. 28,000,000.00/= while the Agreement indicates that the Defendant took a total sum of Kshs. 38,300,000.00/= from the Plaintiff. Whereas the Defendant admitted that these documents bore his name and passport number, he denied that the signatures affixed therein were his. However, the Defendant admitted that he did not report to the DCI that his signatures had been forged.
10. On the payments made by the Defendant to the Plaintiff, the Defendant admitted that as per the proceedings in Criminal Case Number 169 of 2012 (D Exhibit 8) where he had been charged in relation to this matter, he agreed to make a payment of Kshs. 1 million by 12th February 2013 which payment was done as evidenced by the payment slip at pg. 28 of PExhibit 1. The Defendant further admitted to making another payment of Kshs. 200,000.00/= on 19th April 2013 as evidenced by the payment slip at pg. 29 of PExhibit 1. The Defendant further admitted that as per D Exhibit 8, he promised to pay an additional Kshs. 500,000.00/= by 4th June 2013 and that after the criminal proceedings were concluded, he never sought a refund from the Plaintiff for these payments. He also stated that after the criminal proceedings, he never paid any more money to the Plaintiff and that he has never made any complaint anywhere that he had been forced to make the payments.
11. From the evidence above, I find that the Defendant cannot run away from the MOU and the Agreement by claiming that the signatures were not his. I find this to be a convenient defence and an afterthought considering that he never reported or complained that his signatures therein were forged. I have also gone through the evidence of the Plaintiff, PW 2 and PW 3. They all confirmed that they were physically present when the Defendant was paid USD 400,000.00 and Kshs. 4,900,000.00/= in cash which translated to Kshs. 38,300,000.00/= using the foreign exchange rates prevailing at the time. This evidence was never really shaken in cross-examination by the Defendant’s counsel and remains unchallenged. I further note that these payments were corroborated by the Agreement which indicated that the Defendant had received this money and which agreement I have found was signed by the Defendant. On the contention by the Defendant that he was out of the country at the time when the money was given to him, I am inclined to agree with the Plaintiff’s submission that the weight of the evidence on record is against and does not support this contention.
12. As I have stated earlier in this judgment, I note that the Defendant was positively identified by PW 2 and PW 3 in this court and at the criminal proceedings (DExhibit 8). DW 2 also testified that the information he presented was extracted from a system and that it was possible for one to check in and not board a flight and that to confirm whether one actually boarded a plane and left the country on that plane, a passenger manifest was necessary, but the same was never produced to back the Defendant’s contention that he was out of the country at the time.
13. Therefore, on a balance of probability and preponderance of evidence, I am inclined to find that the Defendant received the sum of Kshs. 38,300,000.00/= from the Plaintiff as evidenced by the Agreement and testimonies of PW 1, PW 2 and PW 3. As to whether the Plaintiff is entitled to Kshs. 36,800,000.00/=, the Plaintiff stated that from the entire debt sum of Kshs. 38,300,000.00/=, the Defendant only paid the sum of Kshs. 1,200,000.00/= leaving a balance of Kshs. 37,100,000.00/=. However, the Plaintiff also stated that the parties had entered into a negotiated settlement where the Plaintiff agreed that the outstanding debt is Kshs. 28,000,000.00/= as per the MOU tendered herein



as evidence. As the Plaintiff relies on the MOU as his evidence of the outstanding debt he is estopped from reneging or going back on it and it is my finding that he agreed to a negotiated outstanding debt of Kshs. 28,000,000.00/= and not Kshs. 37,100,000.00/=. The payments made by the Defendant were towards the negotiated debt of Kshs. 28,000,000.00/= and not Kshs. 37,100,000.00/= and therefore I find that the Plaintiff is entitled to a sum of Kshs. 26,800,000.00/= only.

Conclusion and Disposition

14. In conclusion, it is my finding that the Plaintiff's suit as set out in the Plaint dated 6th September 2013 has been proved to the required standard on a balance of probabilities and the same is hereby allowed. This court therefore makes the following dispositive orders:
- a. Judgment be and is hereby entered for the Plaintiff against the Defendant for the sum of Kshs. 26,800,000.00/=.
 - b. The Plaintiff is awarded costs of the suit together with interest at court rates from the date of judgment until payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF OCTOBER 2024

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Muganda for the Plaintiff.

N/A for the Defendant.

Godfrey - Court Assistant

