



REPUBLIC OF KENYA



KENYA LAW
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**Kanyotu v Mogalo (Civil Suit 673 of 2012) [2023] KEHC 118 (KLR)
(Commercial and Tax) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 118 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 673 OF 2012
A MABEYA, J
JANUARY 20, 2023**

BETWEEN

BRIAN MAREKA KANYOTU PLAINTIFF

AND

ABSALOM PHILIP MOGALO DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit against the defendant via a plaint dated 28/9/2012. He sought judgment against the defendant for a sum of Kshs 28,646,600/- together with interest and costs.
2. His case was that the defendant was a forex trade dealer who was in the business of investing money and making returns for the investors. That for some months in the year 2011, the plaintiff invested with the defendant a sum of Kshs. 20,955,000/- anticipating a return of Kshs 28,646,500/- constituting the interest together with the principal sum. However, the defendant failed to honour the payments upon maturity of the investment.
3. The defendant filed his statement of defence dated 12/6/2013. He denied that the plaintiff had invested any money with him or having received any investment from the plaintiff. His case was that the plaintiff and the defendant had entered into a joint venture agreement wherein the profits of the business would be shared jointly and the same applied to the risks as well.
4. The defendant contended that he had warned the plaintiff that the business was subject to risks. That notwithstanding the warning, the plaintiff invested into the defendant's business. The defendant pleaded that the business returned losses as the projection of profits had failed to match the expectations. That the capital injection was nonrefundable and that there was no requirement for payment of interest. That the plaintiff was in breach of their agreement for insisting on payment of profit yet there was none that had been earned.



5. The defendant made a counter-claim on the basis that he had suffered loss and damage due to the plaintiff's failure to inject additional capital contribution thus leading to a collapse of the venture. That the plaintiff sabotaged the business by introducing unilateral demands. The defendant thus prayed for the court to hold that the joint venture collapsed due to circumstances beyond the control of the defendant.
6. The hearing took place on 1/2/2022 whereby the plaintiff adopted his witness statement dated 28/9/2012 as his evidence in chief and produced the bundle of documents dated 25/3/2022 as evidence. The defendant did not appear at the hearing.
7. I have considered the plaint, the defence and the documents produced in Court. The issues for determination are; was there any agreement between the parties for investment? If so, what were the terms of the agreement? Who breached the agreement? Is the innocent party entitled to compensation and if so how much?
8. The general rule under section 107 of the Evidence Act is that he who alleges must prove. In the present case, the burden was on the plaintiff that there was an investment agreement in respect of which, monies were paid to the defendant and for which repayment with interest was never forthcoming.
9. The plaintiff's case was that he knew the defendant in 2008. He joined the defendant in the latter's forex business. That it was agreed that the plaintiff would he would bring people to invest in the business and he would in turn get a percentage of whatever is earned.
10. In 2011, he collected a total sum of Kshs.20,955,000/- from people and invested the same with the defendant. The defendant agreed to pay back a sum of Kshs.28,646,500/- constituting the principal and interest.
11. However, the plaintiff started experiencing problems in late 2011 when the defendant started delaying in making payments when they fell due. The defendant explained that the delayed payments was as because the foreign brokerage firm called ODL based in the UK with which the defendant had an account was being bought off by a USA based firm called FXCM. Thereafter, the situation did not change which forced the plaintiff to commence the present suit.
12. In support of his case, the plaintiff produced a bundle of documents marked PExh1. In that bundle, there was correspondence between the parties, investment agreements, powers of attorney and cash deposit receipts.
13. The correspondence shows that as at September, 2011, the defendant had fallen behind in payments which led to a demand for Kshs.10 million. The defendant proposed to settle this sum by instalments commencing January, 2012. The powers of attorney attest that various people paid to the defendant various sums of money and appointed him for purposes of investing those monies in forex, commodity and stock trade for a period not exceeding 3 months and pay interest thereon at 45%. The cash deposit slips show that the said monies was deposited in the account of the defendant.
14. This testimony that was on oath was nether denied, tested nor rebutted.
15. All that the defendant did was to deny the claim in his defence. He stated that the parties had entered into a joint venture agreement to work as partners whereby the profits made by the business would be shared amongst them. That the business venture incurred losses and that there was no provision for return of the principal sum and neither was there a requirement for payment of interest. He also counterclaimed against the plaintiff for breach of contract.



16. The evidence on record proves that indeed there was a business relationship between the parties. The testimony of the plaintiff being unopposed, he was able to show that monies were deposited in the defendant's account towards investment in forex, commodity and stocks for periods not exceeding 3 months. The monies was supposed to be repaid with 45%.
17. Although the defendant denied the claim, he admitted that there was a joint business venture with the plaintiff. There is no evidence to show that in that venture, the parties were to share losses and profits as contended by the defendant. He failed to appear at the hearing to challenge the plaintiff's case or prosecute his defence and counter-claim.
18. In the premises, I am satisfied that there was an investment agreement between the defendant and the plaintiff. That the terms of the agreement included that the defendant would invest the sums for a period not exceeding of three months and refund the same together with interest of 45% after the expiry of the three months. Further, all deposits were to be insured against any risk of loss by regulatory authorities.
19. The defendant's allegation that there was no agreement to refund the money was incorrect. The defendant was required to insure the money in the event of loss. This then would shield the investors from loss as they would have their money back.
20. In the premises, it is clear that the defendant obtained the investment money with an aim of enriching himself. He duped the plaintiff into collecting large sums of monies from members of the public which he used for himself and fleeced the investors. There was no evidence that he ever invested the same anywhere for the plaintiff or the latter's clients. The Court is therefore satisfied that the defendant breached the agreement and the plaintiff is entitled to compensation.
21. Accordingly, judgment is entered for the plaintiff against the defendant for Kshs.28,646,500/- together with interest thereon at court rates from the date of filing suit until payment in full. The plaintiff will have the costs of the suit.
22. On the other hand, there was no evidence to support the counter-claim. The same is therefore dismissed with costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY, 2023.

A. MABEYA, FCIArb

JUDGE

