



REPUBLIC OF KENYA



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**Kimotho v Equity Bank Limited & another (Civil Case 496 of 2014)
[2023] KEHC 21837 (KLR) (Commercial and Tax) (25 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21837 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 496 OF 2014
A MSHILA, J
AUGUST 25, 2023**

BETWEEN

JACKSON NGECHU KIMOTHO PLAINTIFF

AND

EQUITY BANK LIMITED 1ST DEFENDANT

KENYA REVENUE AUTHORITY 2ND DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit against the Defendants via a Plaint dated 22nd December, 2011 seeking special and general damages on the following grounds:-
 - a. The Plaintiff had an account with the 1st Defendant banker from 2005.
 - b. The 1st Defendant wrote a letter dated 21st May 2009 informing the Plaintiff that they were acting as agents on behalf of the 2nd Defendant and were to manage the Plaintiff's savings of Kshs.6,252,195 being tax due and owed to the 2nd Defendant without any investigations.
 - c. The Plaintiff was only informed about the 1st Defendant's action when the money had been moved to the 2nd Defendant in breach of the client's confidentiality.
 - d. The 1st Defendant later reinstated the funds minus Kshs.800,000 which it argued constituted the amount of tax due and owed to the 2nd Defendant.
 - e. The actions of the 2nd Defendant exposed the Plaintiff to loss and damage as he was unable to purchase his supplies in good time and optimize the sales during the peak period.
 - f. The 2nd Defendant acted recklessly by retaining Kshs.800,000 which amounted to double taxation because the Plaintiff had already paid his taxes.



2. Both Defendants filed statements of Defence to the claim. The 1st Defendant filed a Statement of Defence dated 5th March, 2012 stating the following:-
 - a. The 1st Defendant was appointed by the 2nd Defendant as an agent pursuant to Section 96(2) of the [Income Tax Act](#) and was acting within the scope and limits of the agency and sought for indemnity from the 2nd Defendant.
 - b. The Plaintiff was aware of the demand of the outstanding tax and the duty placed on the 1st Defendant by law to deduct the amount from the Plaintiff's account on behalf of the 2nd Defendant.
 - c. The 1st Defendant correctly debited the Plaintiff's account as demanded by the 2nd Defendant under the Agency Notice and was in order to do so.
3. The 2nd Defendant filed a Defence and Counterclaim dated 27th February, 2012 stating the following:-
 - a. The 2nd Defendant conducted a tax investigation and audit on the Plaintiff based on the bank statements obtained from the 1st Defendant banker.
 - b. The Plaintiff had failed to file returns for the years of assessment 2005-2007. The 2nd defendant issued notice to the 1st Defendant on 18th November, 2008 under Section 56((1) of the [Income Tax Act](#) to provide bank statements of the Plaintiff for purposes of tax assessment. The bank statements were analyzed and estimated tax arrived at Kshs.4,946,236. Penalties and interests were still accruing,
 - c. The Plaintiff did not comply with the request for production of records. The 2nd Defendant decided to assess him based on the bank credits and to take lawful enforcement measures by issuing agency notices to the 1st Defendant to act as the Plaintiff's agent for purposes of tax collection. A demand letter dated 29th July, 2009 was sent.
 - d. The Plaintiff and one Ruth Ngechu (the mother) on various occasions visited the 2nd Defendant's office wanting a clarification of the collection procedure of tax defaulters. It was explained to them that the tax assessment was done based on the Plaintiff's bank statements because they had failed to provide evidence of their income. He also refused to clarify the source of the funds.
 - e. On 10th June 2009 the Plaintiff offered to deposit Kshs.800,000 with the 1st Defendant. Based on that agreement, the 2nd Defendant lifted the Agency Notices issued and reversed the collection of kshs.6,252,136.15. The Plaintiff agreed to furnish the 2nd Defendant (taxman) with tax returns within 30 days because he was a non-filer.
 - f. Kshs. 800,000 was paid on the account and the Agency Notice was withdrawn pending continued assessment of the Plaintiff's tax liability based on the Nil Returns that the Plaintiff later submitted. The Kshs.800,000 was accounted for and receipts availed.
 - g. Since the withdrawal of the Agency Notices, the Plaintiff did not communicate further with the 2nd Defendant and his whereabouts were unknown until this suit.
 - h. The 2nd Defendant raised a counterclaim that the Plaintiff was in tax arrears amounting to Kshs.4,946,236 for the period under investigation, 2005-2007. He also owed interest and penalties.
4. In reply to the 2nd Defendant's Defence and Counterclaim, the Plaintiff stated the following:-



- a. During the alleged period of investigation, 2005-2007 he was not earning an income since he was in college. He only opened an account in 2005 to facilitate payment of school fees.
- b. In March 2007 the Plaintiff started a herbal clinic in partnership with his mother, Ruth Waithera Ngechu after dropping out of college. The Plaintiff denied any tax liabilities and stated that the 2nd Defendant contradicted itself by alleging that the estimated tax liability was Kshs.5,746,236 yet in the Agency Notice dated 21st May 2009 the 2nd Defendant requested for Kshs.6,381,935.
- c. Contrary to 2nd Defendant's claim that the Plaintiff is a non-filer, the Plaintiff's ledger account with the 2nd Defendant shows that he honoured his tax returns filing obligation.
- d. The 2nd Defendant did not send any demand letters and reminders to the Plaintiff. The Plaintiff knew about the Agency Notice when the 2nd Defendant moved his funds, Kshs.800,000 out of his account at Equity Bank without consulting him. The Plaintiff was not aware of any investigations against him.
- e. The Plaintiff denied offering to pay Kshs.800,000. The 2nd Defendant is not sure of the amount owed in taxes. It claims Kshs.4,946,236 in its Defence and Kshs.6,252,136.15 in its Agency Notice dated 21st May, 2009.
- f. The 2nd Defendant did not follow the lawful procedure while investigating its claim. It failed to realize that the Plaintiff PIN was different from the one they sought payment for Kshs.800,000.
- g. The 2nd Defendant contradicted itself since the request for statement of account from the 1st Defendant was for the period between 2002 during which period the Plaintiff was still in secondary school (Form Three) and did not have a bank account.
- h. The 2nd Defendant owed the Plaintiff a duty of care to act diligently but instead proceeded unlawfully and caused the Plaintiff to suffer loss and damages. Kshs.800,000 paid to the 2nd Defendant from the Plaintiff's account reflected that the payments were done on another person's account because the taxpayer's PIN number indicated on the receipt provided by the 2nd Defendant shows a PIN different from the Plaintiff's.

The Plaintiff's Evidence

5. PW1, the Plaintiff testified that he sought the return of Kshs.800,000 that was removed from his account together with interest. He enquired from his banker, the 1st Defendant, about the money after discovering that the same was missing. The 1st Defendant informed him that the 2nd Defendant (taxman) issued it with an Agency Notice. The 1st Defendant acted in accordance with the Agency Notice and paid Kshs.800,000 from the Plaintiff's account to the 2nd Defendant.
6. The Plaintiff visited the 2nd Defendant's offices after being told that his account had been frozen due to an Agency Notice. He reached an agreement with the 2nd Defendant to pay Kshs.800,000 to be able to access the rest of his money in his account. He admitted to authorizing the 2nd Defendant, taxman, to deduct the said Kshs.800,000 only because he needed to access his frozen account due to dire financial needs. He also agreed to submit audited accounts to the 2nd Defendant which he claimed he did.
7. The Plaintiff denied having received a demand letter from the 2nd Defendant. He however agreed that a letter dated 29th July 2009 from the 2nd Defendant had his postal address and was referring to tax investigations for the period between 2005-2007. He admitted there was a receipt for Kshs.800,000 from the 2nd Defendant but stated that the funds were withdrawn without his consent. He admitted to



a letter in which he committed to paying the 2nd Defendant Kshs.800,000 pending production of his audited accounts. He confirmed he had not paid withholding taxes and agreed that the 2nd Defendant is authorized to freeze a person's account if any taxes are owed to it.

8. In re-examination, the Plaintiff clarified that he had an account with KRA and his PIN No.xxxxxxxxxx distinguishes him from any other taxpayer. The agency notice dated 21st May, 2009 did not bear his PIN but had a name similar to his. The bank statement refers to a different person, a Jackson Ngechu Makini. He stated that he had never been in tax arrears. He acquired his PIN on 16th August, 2007 but the 2nd Defendant notice under section 56(1) of *Income Tax Act* states that the commencement date is from 2002. In 2002 the Plaintiff was in Form Two and neither earned an income nor had an identity card. The 2nd Defendant's letter dated 18th November, 2008 makes reference to Makini Herbal Clinic and a Jackson Ngechu Makini. These two have no relation with the Plaintiff.
9. A receipt for Kshs.800,000 was only amended on 14th July, 2021 to bear the Plaintiff's rightful PIN yet the money was withheld on 29th May, 2009. The letter written by the Plaintiff allowing the 2nd Defendant to deduct Kshs.800,000 was only written out of desperation because he could not access any funds from his frozen account.
10. He prayed that he be compensated Kshs.800,000 and general damages plus costs and interest.

The 1st Defendant's Evidence

11. DW1 was the 1st Defendant's operations manager. He relied on his statement dated 5th March, 2012. He referred to a letter dated 21st May, 2009 from the 2nd Defendant requesting the 1st Defendant to remit to it Kshs.6,381,935. If funds were not remitted, the same was to be recovered from the 1st Defendant. Kshs. 6,252,136.15 was consequently debited from the Plaintiff's account. On 11th June,2009 the 1st Defendant credited the Plaintiff's account with the debited amount after receiving instructions from the 2nd Defendant to remit Kshs.800,000. It also received instructions to provide a list of account opening documents for the Plaintiff. The 1st defendant followed all the instructions lawfully as agent of the 2nd Defendant and did not breach its duty of care and confidentiality.
12. In cross-examination, the witness agreed that the agency notice only referred to the Plaintiff's name but did not bear his PIN, ID card numbers and postal address. There was also another letter with the same reference number but addressed to a different person, a Jackson Ngechu Makini and it asked for the same amount. He only informed the Plaintiff of the agency notice on 30th May,2009 when the Plaintiff was unable to transact an ATM machine. No letter was sent to him.
13. The 1st Defendant later delivered a cheque of Kshs.800,000 to the 2nd Defendant. The witness couldn't tell if the amount was deposited in the Plaintiff's KRA account. He stated that the Plaintiff opened the account in March 2005 but the 2nd Defendant's letter dated 7th May, 2009 requested for account documents from 2002 to 2009. Some documents forwarded to the 2nd Defendant by the 1st Defendant referred to a different person, one Jackson Ngechu Makini. This is because the 2nd Defendant had requested for documents on the Plaintiff and Makini who are both clients of the 1st Defendant. The 1st Defendant provided documents for the period between 2008 and 2009.

The 2nd Defendant's Evidence

14. DW2 was the 2nd Defendant's assistant manager, large taxpayers' office. He relied on his witness statement dated 27th February, 2012. After conducting a tax investigation on the affairs of the Plaintiff



- the 2nd Defendant established a tax liability of kshs.5,746,236. An agency notice was issued to the Plaintiff's banker, the 1st Defendant under Section 56 of the [Income Tax Act](#).
15. The Plaintiff approached the 2nd Defendant on 10th June, 2009 and committed to pay Kshs.800,000 and submit audited accounts. The Plaintiff still has a tax liability plus interest from 2009 to date.
 16. On cross-examination, he stated that he used bank statements to assess tax arrears for the period between 2005 and 2007. He agreed that the 2005 statements were not attached. Same with 2006-2007 statements. He admitted that the 2nd Defendant issued two agency notices bearing same dates to the 1st Defendant with regard to the approximately the same amount. Kshs.6,000,000, but on different persons, one Jackson Ngechu Makini and the Plaintiff, Jackson Ngechu Kimotho. The reference numbers on the notices were also the same.
 17. He admitted that although the agency notice mentions Kshs.6 million plus as tax liability, the defence mentions Kshs.4.4 million plus. He stated that the agency notice was simply meant to preserve the money held at the bank.
 18. The amount paid to KRA, Kshs.800,000 was credited to the tax payer against his PIN No. xxxxxxxxxxxx. The final demand letter dated 29th July, 2009 for Kshs.4 million plus did not indicate the PIN No. There were also no statements for the period 2005-2007. There was no distinguishing factor captured in evidence or documentation. No documents were attached to show that the Plaintiff was a non-filer for the period under investigation.
 19. He admitted that the receipt for payment of Kshs.800,000 was amended almost one year ago due to clerical mistake. The PIN was changed.

Issues For Determination

20. The court has considered the Plaintiff's case, the Defendants' case, the evidence and written submissions by the parties and frames the following issues for determination:
 - a. Whether judgment should be entered against the Defendants as prayed by the Plaintiff in the Plaintiff;
 - b. Is the Plaintiff entitled to general damages?
 - c. Whether the 2nd Defendant proved the Counterclaim to the desired threshold;

Analysis

Whether judgment should be entered against the Defendants as prayed by the Plaintiff in the Plaintiff;

21. It was the Plaintiff's case that there was an unlawful transfer of Kshs.800, 000 from the Plaintiff's account that was without his consent and was never accounted for.
22. On the other hand, it was the 2nd Defendant's position that the Plaintiff had failed to file returns for the years of assessment 2005-2007. The 2nd Defendant then issued a notice to the 1st Defendant on 18th November, 2008 under Section 56((1) of the [Income Tax Act](#) to provide the Plaintiff's bank statements for purposes of tax assessment. The bank statements were analyzed and estimated tax arrived at Kshs.4,946,236. Penalties and interests were still accruing,
23. During the hearing, the Plaintiff in his testimony admitted that he had authorized the 2nd Defendant to deduct the Kshs.800, 000 after reaching an agreement. In confirming this, the 2nd Defendant (DW2)



while testifying acknowledged that the Agency Notices were withdrawn upon the payment of the Kshs.800, 000.

24. It is notable that the amount paid to KRA, Kshs.800,000 was credited to tax payer against his PIN No. xxxxxxxxxxxx. However, the final demand letter dated 29th July, 2009 for Kshs.4 million plus did not indicate the PIN Number. There were also no statements for the period 2005-2007. There was no distinguishing factor captured in evidence or documentation. No documents were attached to show that the Plaintiff was a non-filer for the period under investigation.
25. Based on the above, is the Plaintiff entitled to special damages as prayed in the Plaint? A claim for special damages is in the nature of restitution and, where proved, it is meant to restore the claimant to the position he would have been save for the action complained of. The evidence and the testimonies before the court did show that the 1st Respondent released the sum of Kshs.800, 000 to the 2nd Defendant.
26. The 1st Defendant under cross-examination confirmed that the Agency Notice dated 21st May, 2009 did not bear the Plaintiffs PIN, ID card number and or the postal address; and also the 2nd Defendants request for bank statements for the period 2002 - 2009 should have sounded alarm bells and the 1st Defendant was therefore obligated to provide a reasonable standard of care to its customers who are account holders to avoid actions that would prejudice and harm its customers in this instance the Plaintiff; it is crystal clear that it effected the Agency Notice and blocked the sum of Kshs,6.2Million lying in the Plaintiffs account without carrying out any due diligence by either verifying the Plaintiff's National ID, or Postal address or PIN No.xxxxxxxxxxx with the 2nd Defendant which would have distinguished the Plaintiff from any other taxpayer. The Plaintiff got to know that the 1st Defendant had effected the agency notice when he was unable to access his funds at an ATM;
27. In the circumstances this court is satisfied that the 1st Defendant failed to act prudently and thus breached its duty of care to the Plaintiff and is therefore found to be just as culpable as the 2nd Defendant. The court finds that indeed the Plaintiff has proved special damages in the sum of Kshs.800,000/-.

Is the Plaintiff entitled to general damages?

28. It was the Plaintiff's contention that during the closure of his account he was unable to effect any transactions leading to loss of business and business opportunities. Further, that the Plaintiff could not advertise for his business leading to loss of market share and that the interference with Kshs.4 million in a fixed deposit account led to losses in terms of interest.
29. The award of general damages is an exercise of discretion by the trial court based on the evidence and impressions on demeanor of witnesses made by the court. Further, general damages are given for losses that the law will presume are the natural and probable consequence of a wrong, and may be given for a loss that is incapable of precise estimation. In this case the amount the demanded by the 2nd Defendant and blocked by the 1st Defendant was in the sum of Kshs.6.2Million; as Kshs.800,000/- has been awarded as special damages this court will therefore award the approximate difference in the sum Kshs.5Million as compensation for the money that was unfairly kept from him which he could have utilized to enhance his business and optimize sales during that period.

Whether the 2nd Defendant proved its Counterclaim to the desired threshold;

30. As for the Counterclaim the 2nd Defendants claim was that the Plaintiff did not comply with the request for production of records and never paid the taxes due. The evidence of 2nd Defendant was not clear on the amounts owed in taxes. It claimed Kshs.4,946,236 in its Defence and in its Agency



Notice dated 21st May, 2009 requested that the sum of Kshs.6,252,136.15 be withheld. But produced no documents to show that the Plaintiff was a non-filer for the period under investigation; Evidence was also adduced that the estimates were based on bank statements from someone with a similar name and the 2nd Defendant and this notwithstanding proceeded to use unlawful enforcement measures by issuing Agency Notices for purposes of tax collection against the wrong individual;

31. From the evidence adduced this court is satisfied 2nd Defendant did not follow the lawful procedure while investigating its claim as it failed to first establish that the Plaintiff was the person it sought before proceeding further;
32. In the circumstances this court finds that the 2nd Defendants claim to be devoid of merit and finds that it failed to prove its claim against the Plaintiff to the desired threshold.

Findings and Determination

33. For the forging reasons this court makes the following findings and determinations;
 - i. This court finds the Plaintiff proved its claim of breach of duty of care against the 1st and 2nd Defendant to the desired threshold;
 - ii. Judgment be and is hereby entered in favour of the Plaintiff against the 1st and 2nd Defendant jointly and severally as follows;
 - a. Special damages in the sum of Kshs.800,000/- plus interest thereon at court rates from the date of filing suit.
 - b. General Damages in the sum of Kshs.5,000,000/- plus interest thereon at court rates from the date of judgment herein.
 - iii. The Defendants are hereby condemned to pay costs of this suit.
 - iv. The Counterclaim dated 27th February, 2012 is found to be devoid of merit and finds that it was not proved to the desired threshold;
 - v. The Counterclaim is hereby dismissed with costs to the Plaintiff.

Orders Accordingly

DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 25TH DAY OF AUGUST, 2023.

HON. A. MSHILA

JUDGE

In the presence of;

Mwenda – Court Assistant

Ondieki – for Plaintiff

N/A - Defendant

