



**Nyamai v Mbaluka & another (Civil Case E057 of 2022)
[2023] KEHC 26215 (KLR) (Civ) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26215 (KLR)

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

CIVIL

CIVIL CASE E057 OF 2022

JN NJAGI, J

NOVEMBER 30, 2023

BETWEEN

KOREA MUENYI NYAMAI PLAINTIFF

AND

JAMES KIMANTHI MBALUKA 1ST DEFENDANT

HIGHWAY HOLDING LIMITED 2ND DEFENDANT

JUDGMENT

1. By her plaint dated 7th April 2022, the Plaintiff sued the Defendants for recovery of the sum of Ksh.90,000,000/= made up as follows: Ksh. 2,000,000/= being a friendly loan and Ksh 88,000,000/= being damages.
2. The evidence of the Plaintiff is that sometimes in the year 2017, she used to make frequent business trips to Emali town. She would reside at Eden Hotel that is owned by the 1st Defendant. She then got acquainted with the 1st Defendant. The 1st Defendant at one time asked her to extend to him a loan of Ksh.2,000,000/= to buy fuel for his petrol station. The 1st Defendant gave him the bank account of the 2nd Defendant company where the 1st Defendant and his wife are the majority shareholders. She transferred the money from her bank account into the bank account of the 2nd Defendant. It was her evidence that despite numerous promises to pay back the money, the defendants have neglected and or refused to do so. She sued and sought the prayers:
 - a) Damages for fraud Kshs 4,000,00/-
 - b) Exemplary damages for fraud Kshs 12,000,000/-
 - c) Punitive damages for fraud Kshs 12,000,000/-



- d) Damages for deception Kshs 4,000,000/-
 - e) Exemplary damages for deception Kshs 12,000,000/-
 - f) Punitive damages for deception Kshs. 4,000,000/-
 - g) Damages for breach of trust Kshs 4,000,000/-
 - h) Exemplary damages for breach of trust Kshs 12,000,000/-
 - i) Punitive damages for breach of trust Kshs 12,000,000/-
 - j) Lost profits for illegally withheld Kshs 2,000,000/- at 20% compounded monthly interest from April, 2017 until payment in full.
 - k) Costs.
 - l) Interest on the above at court rates from 7th April, 2017 until payment in full.
 - m) Account and disgorgement of the Kshs 2,000,000/- and all profits raised using the Kshs 2,000,000/-
3. It was further evidence of the plaintiff that after the Defendants refused to pay back the money she created a WhatsApp group under a banner heading “Debt” in which the 1st Defendant and his wife were members vide their phone numbers +2547225042017 for the 1st Defendant and 254722961385 for his wife. That in one of the messages to the group the 1st Defendant admitted to owing the money and pleaded with the Plaintiff to give him time to settle the debt. During the hearing, the Plaintiff produced as exhibits an extract of the said WhatsApp message together with a certificate of electronic evidence as to how the same was extracted.
4. The Plaintiff called one witness in the case, Ancent Mbithi PW2. It was the evidence of the witness that he was at the material time a manager at the 1st Defendant’s Eden Hotel at Emali town which is owned by the 2nd Defendant herein. That the Plaintiff was a frequent visitor at the hotel. That at the end of one of her stays she had incurred a bill of Ksh.28,000/=. She settled the bill. He denied that she at any time incurred a bill of Ksh.2,000,000/= at the hotel.
5. The Defendants denied the claim. The 1st Defendant testified in the case and stated that the Plaintiff used to have extended stays at his hotel. That she would book her guests at the hotel and throw numerous parties for friends at the hotel. That at the end of one of the stays she had accumulated a bill of Ksh.2,096,000/=. That the 2nd defendant invoiced the Plaintiff for the accommodation and she subsequently paid Ksh.96,000/= in cash and Ksh.2,000,000/= by a bank transfer to the 2nd Defendant company. The 1st Defendant denied that the sum of Ksh.2,000,000/= was extended to him as a loan. During his evidence, he produced a copy of the invoice of Ksh.2,000,000/= issued to the Plaintiff when she settled the bill of the Ksh.2,000,000/=.
6. The defendants did not call any witness in the case. The Plaintiff denied that the money was paid for services offered by the 1st Defendant’s hotel.

Plaintiff’s Submissions

7. The Plaintiff formulated four issues for determination:
- 1) Whether the defendants are indebted to the plaintiff



- 2) Whether the 1st Defendant is liable to the plaintiff in general damages for fraud, deception and breach of trust
 - 3) Whether the plaintiff is entitled to the various facets of damages as specified in the Plaint
 - 4) Whether the sums owed ought to be paid with interest.
8. On the first issue, the Plaintiff submitted that 1st Defendant admitted in cross-examination that the phone number +2547225042017 belonged to him while number 254722961385 belonged to his wife. That the 1st Defendant confirmed that the Plaintiff created a WhatsApp group under the banner heading DEBT in which the 1st Defendant and his wife were added as members through their phone numbers. That the 1st Defendant also admitted that him and his wife are directors in the 2nd Defendant company.
 9. The Plaintiff submitted that the 1st Defendant admitted to owing the Defendant Ksh.2,000,000/= in the said WhatsApp group. The Plaintiff further submitted that the said admission was uncontroverted both in the statement of defence and in the testimony by the 1st Defendant. The Plaintiff argues that the same amounts to an admission as per section 17 of the *Evidence Act*.
 10. The Plaintiff submitted that the 1st Defendant by his conduct is estopped from denying that he borrowed money amounting to Ksh. 2,000,000/= from the Plaintiff. The Plaintiff relied on the case of Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR where it was held that:

“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.”
 11. The Plaintiff argues that the loan was given out of friendship and not as a commercial transaction hence, there was no need for a loan agreement. She relied on the case of Keshar Shiani V Susan Munyi [2000] Eklr where it was stated that:

“The Plaintiff expressed the loan to be a friendly loan by this I take her to mean that it was given out of friendship and not as a commercial transaction. Had it been the latter, I would have expected the same to have been reduced to writing.”
 12. The Plaintiff argued that the 1st Defendant having admitted to owing the Plaintiff and then later coming back to deny the loan was a sign of deceit and a plot to defraud her of the money.
 13. The Plaintiff while relying on the decision in Gerald Ndoho Munjuga v Republic [2016] eKLR submitted that for an offence of false pretense to be proved, the prosecution has to demonstrate that there was pretense, the pretense emanated from the accused person, that it was false and the accused person knew it was false and that there was an intention to defraud.
 14. On the issue of whether the Plaintiff should be awarded exemplary damages, it is the Plaintiff’s position that the object of exemplary damages is to punish and deter and therefore that the 1st Defendant should be punished for his deceit and breach of trust. She cited the case of Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR where the court held that:

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of Rookes V Barnard [1964] AC 1129 where Lord Devlin set out the categories of case in which exemplary damages may be awarded



which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute."

15. On the issue of interests, the Plaintiff submitted that during the 6 years' period when the loan was not paid, the Plaintiff lost proceeds that would have been gained had the Defendant repaid the loan as agreed and therefore the Plaintiff should be awarded interest.

Defendants' Submissions

16. The defendants proposed four issues for determination:
- 1) Does the court have jurisdiction to entertain the suit?
 - 2) Are parties allowed to depart from their pleadings?
 - 3) Is the plaintiff allowed to bring this suit without a written agreement with the Defendant?
 - 4) Was the right procedure followed before the Plaintiff allegedly lent money to the 2nd defendant?
17. On the 1st issue, the Defendants submitted that the court does not have jurisdiction because the pecuniary jurisdiction of the Plaintiff's case lies in the Resident Magistrate's court. The Defendants contend that the Plaintiff steered clear of the thirteen prayers in her plaint and instead concentrated on Ksh.2,000,000/=. That she could not explain how the claim of more than Ksh.90,000,000/= was arrived at. The Defendants cited the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR.
18. On the second issue, the Defendants submitted that parties are not allowed to depart from their pleadings. They cited the case of Yang Guan Property Design & Manufacturing Limited v China Wu Yi Company (K) Limited [2021] eKLR.
19. On the third issue, the Defendants contend that the Plaintiff did not produce any written document to prove that she lent money to the 2nd Defendant. They further contend that this offends section 3(1) of the *Law of Contract Act*.
20. On the last issue, the Defendants argued that the right legal procedure for lending money to a limited company was not followed. They sought reliance on section 37(2) of the *Companies Act* 2015.

Analysis and Determination

21. I have carefully considered the pleadings filed herein, the submissions by counsels for the parties together with the authorities that they cited. The following issues fall for determination:
- 1) Whether this court has jurisdiction to entertain the current suit?
 - 2) Whether the Plaintiff has proved her case against the defendants?
 - 3) Whether the Plaintiff is entitled to the reliefs sought?
 - 4) Who should bear the costs of this suit?

Whether this court has jurisdiction to entertain the current suit?

22. It has to be noted from the outset that jurisdiction is the starting point on every judicial determination. For a court of law to entertain a matter, when not ceased of jurisdiction is an exercise in futility.



23. The jurisdiction of each court flows from either *the Constitution* or legislation. In Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others [2012] eKLR Supreme Court held that:

“A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

24. The civil jurisdiction of the High Court is clearly set out in Article 165(3) (a) of *the Constitution* which provides that, the High Court shall have, unlimited jurisdiction in criminal and civil matters. I agree with the observation of the court in Interactive Gaming & Lotteries Limited v Safaricom Limited (Commercial Civil Case E684 of 2021) [2021] KEHC 335 (KLR) where the court stated that:

“The express grant of jurisdiction to the High Court cannot be taken away except with clear and express words of *the Constitution* itself. Thus, the fact that the Magistrates Court is granted jurisdiction to deal with matters whose value is below KES. 20,000,000/= does not take away the jurisdiction of the High Court to deal with any civil matter within its jurisdiction.”

25. Section 7 of the Magistrates’ Courts Act gives those courts a pecuniary jurisdiction of up to Ksh.20 million. In this case the amount that is being claimed as per the plaint is Ksh.90,000,000/=. It is then obvious that the amount that is being claimed is beyond the pecuniary jurisdiction of the Magistrates’ courts. That being the case, the matter fell within the jurisdiction of the High Court. The Defendants’ argument that this court lacks jurisdiction because the lawsuit should have been initiated in a Resident Magistrate’s court is not correct.

Whether the Plaintiff has proved her case against the defendants?

26. Sections 107(1), (2) and 109 of the *Evidence Act* are on the burden of proof. They state as follows:

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- (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.
- and

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

27. In civil cases such as this one, the law places the burden of proof on the Plaintiff to prove his/ her case. The evidential burden only shifts depending on circumstances of the case. In Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR the Supreme court held that:

“Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential



burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”

28. In the instant case, the testimony by the Plaintiff was that she entered into an oral agreement with the 1st Defendant for a friendly loan in the sum of Ksh 2,000,000/= that was paid through the 2nd Defendant. The 1st Defendant admitted to receiving the said amount but categorically denied the same being a loan subject for repayment.
29. The Defendants submitted that a money-lending contract must be in writing pursuant to Section 3(1) of the [Law of Contract Act](#) which provides as follows:

“ 3.

- (1) No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.”

30. In *Abdulkadir Shariff Abdirahim & another v Awo Shariff Mohammed T/A A. S. Mohammed Investments* [2014] eKLR the court held that:

“There is no general rule of law that all agreements must be in writing. The numerous advantages of a written agreement notwithstanding, all that the law requires is that certain specific agreements must be in writing or witnessed by some written note or memorandum. Section 3(1) of the [Law of Contract Act](#) is one such provision. The origin of this provision has been traced to section 4 of the Statute of Frauds, 1677, whose object was to prevent fraudulent claims based on perjured evidence and to protect guarantors, (See G. H. Treitel, *Law Of Contract*, 10th edition, Sweet & Maxwell, Page 161-170). Section 3(1), therefore, applies where the defendant has guaranteed the creditor that he shall answer for the debtor’s debt should the debtor fail to pay. In such a situation, the guarantee agreement between the creditor and the defendant must be in writing or witnessed by some note or memorandum in writing and signed by the parties. (See also *Agricultural Finance Corporation & Another Vs Kenya Alliance Insurance Co Ltd & Another*, (2002) 1 KLR 231 where the High Court held that S 3(1) of the [Law of Contract Act](#) applies to suits founded on contracts of guarantee or surety).”

31. Based on the foregoing, it goes without saying that a money-lending agreement need not to be in writing for it to be enforceable. If at all there was an agreement between the Plaintiff and the Defendant for lending of money, there was no requirement in law for it to be in writing. The argument by the Defendants that such an agreement had to be in writing is therefore dismissed.
32. The Plaintiff in a bid to demonstrate that the money advanced to the 1st Defendant was a loan that was meant to be paid back, produced in evidence a screenshot of a conversation in WhatsApp group and certificate of electronic evidence. The 1st Defendant in cross-examination confirmed to being a participant in the group and that the number used to send the messages to the group was his.
33. The 1st Defendant is said to have sent a message to the Plaintiff, expressing apologies for the delayed refund and assuring her that the debt would be settled once security in favour of the bank was perfected. I have examined this evidence. I am convinced that the 1st Appellant was a member of the group and



sent the said message to the group. The Plaintiff did establish a case against the Defendants whereby the evidential burden shifted to the Defendants to rebut the Plaintiff's evidence.

34. The 1st Defendant adduced evidence that the Plaintiff owed him Ksh. 2,096,000/= as a result of a hotel bill for accommodation of the Plaintiff and her friends. He stated that the Ksh.2,000,000/= that he received from the Plaintiff was part payment of the said hotel bill. The 1st Defendant produced an invoice of Ksh.2,000,000/= alleging that it was for the hotel bill.
35. It is important to note that a copy of the invoice was forwarded to the Plaintiff a day before she testified in court. The 1st Defendant had not brought it to the attention of the Plaintiff since the time the suit was filed. The 1st Defendant did not seem to have been working at the hotel as he said in cross-examination that the invoice was issued by the personnel of the account's office of the hotel. He did not call any witness from the accounts office to confirm that they indeed issued the said invoice to the Plaintiff. I am convinced that the evidence about the hotel bill was all a fabrication in an attempt defeat the Plaintiff's claim. If the invoice was a genuine document, the 1st Defendant could not have served it on the Plaintiff so late in the day when she was about to testify in the case. I accordingly find no merit in the defence and dismiss it. I find that the Plaintiff has proved on a balance of probabilities that she advanced the defendants a loan of Ksh.2,000,000/= that they have refused to refund.

Whether the Plaintiff is entitled to the reliefs sought?

36. The Plaintiff requested compensation in the form of general damages, punitive damages and exemplary damages while citing fraud, deception and breach of trust as the grounds. However, the evidence presented by the Plaintiff only confirmed a breach of an oral contract by the 1st Defendant. The allegations of fraud, deception and breach of trust were not substantiated and in the premises the remedies sought cannot be granted.
37. As a general rule general damages are not recoverable in cases of alleged breach of contract-see Court of Appeal decision in Kenya Tourism Development Corporation Vs Sundowner Lodge Ltd 2018 eKLR. On the other hand, punitive damages also known as exemplary damages are awarded in two instances. First, where the conduct complained of is oppressive, arbitrary or unconstitutional. Second, where the Defendant has calculated that its conduct will result in a profit for himself and may well exceed the compensation payable to the claimant. The Plaintiff did not prove the claims under these sub-headings.
38. The Plaintiff also prayed for an award of lost profits for the illegally withheld sum of Ksh.2,000,000/=at 20% compounded monthly interest from April 2017 until payment in full.
39. The law on lost profits was well articulated in the case of Hyrdo Water Well (K) Limited v Sechere & 2 others (Sued in their representative capacity as the officers of Chae Kenya Society) (Civil Suit E212 of 2019) [2021] KEHC 22 (KLR) where the court held as follows:

“The most important consideration in any lost profits case was how much and what type of evidence a party needed to prove the alleged lost profits. Typically, lost profits damages referred to the loss of net profits rather than gross profits or revenue. Lost profits were damages for the loss of net income to a business and broadly speaking they reflected income from lost business activity, less expenses that would have been attributable to that activity. After calculating net profits, the plaintiff had to show:

- a. that the conduct upon which the claim was based caused the lost profit damages (proximate cause);



- b. that the parties contemplated the possibility of lost profit damages or that the lost profit damages were a foreseeable consequence of the conduct (foreseeability); and
- c. that the lost profits were capable of proof with a reasonable degree of certainty (reasonable certainty).”

40. The Plaintiff did not adduce evidence that laid basis for the grant of damages for lost profits. There was need for professional evidence to explain the amount claimed as lost profits.

41. The upshot is that the Plaintiff has proved being owed the sum of Ksh. 2,000,000/= by the Defendants. For that sum, I enter judgment for the Plaintiff, jointly and severally, against the Defendants with interest thereon at court rates from the date of filing suit until payment in full. The rest of the Plaintiff's claim is dismissed.

As the Plaintiff's suit has partly succeeded, I award her costs of the suit.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2023

J. N. NJAGI

JUDGE

In the presence of:

Mr. Mayende for Plaintiff

No appearance for Defendant

Court Assistant – Amina

30 days Right of Appeal.

