



**Amadi v Koceyo (Civil Case 257 of 2017) [2021] KEHC 69 (KLR)
(Commercial and Tax) (23 September 2021) (Judgment)**

Neutral citation: [2021] KEHC 69 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 257 OF 2017
WA OKWANY, J
SEPTEMBER 23, 2021**

BETWEEN

EDDIE J. AMADI PLAINTIFF

AND

TITUS O. KOCEYO DEFENDANT

JUDGMENT

1. The plaintiff and the defendant herein are advocates of the High Court of Kenya and former partners in the law firm known as Koceyo & Amadi Advocates. The law firm was registered as a business name sometime in the year 2006 which name the parties also used in heavy commercial vehicles transport business. Their business's bank account was domiciled at NIC Bank Harambee Avenue where they held a joint account.
2. In a bid to further the motor vehicles business, the parties bought lorries and trailers through asset financing extended to them by Family Bank where they also held a bank account. The bank accounts' mandate in respect to both banks was that "both signatories to sign".
3. The law firm was however declared illegal, null and void through a court order issued in September 2009 but the parties continued to operate the transport business until sometime in September 2014 when partnership was dissolved.
4. Through the Plaint dated 20th June 2017. the plaintiff filed this suit against the defendant, seeking the following orders: -
 - a. Kshs 11,232,246/- being 50% of the revenues received from the transport business then deposited in account No. 1000228636 NIC Bank, Harambee Avenue as at September 2014;



- b. Judgment in the sum of Kshs 7,000,000/- being 50% of the purchase price of motor vehicles Scania Prime Mover KBE 702E, Schenzhen Trailer ZC 9412, Scania Prime Mover KBH 842C and Trailer ZD 1043;
- c. Interest on (b) and (c) at court rates;
- d. Costs of this suit and interest thereon at court rate.

The Plaintiff's Case

5. A summary of the plaintiff's case was that sometime in September 2014, he discovered that the sum of Kshs 22,464,491 that they had accumulated in their business' joint bank account had been appropriated by the defendant without his knowledge or consent. He alleged that he also discovered that the defendant had unilaterally sold all the motor vehicles that were the subject of their joint venture. The plaintiff alleged that the defendant forged his signature in the cheques that were he then used withdraw money from their joint account.
6. At the hearing of the case, the plaintiff adopted his witness statement as his evidence in chief. He explained that their joint business venture dealt heavy motor vehicle transport alongside the law firm. He testified that his claim against the defendant was for the payment of Kshs 11,232,246 being 50% of the revenue from the transport business and produced bank statements to support the claim.
7. The plaintiff further testified that the defendant withdrew money from their business account without his knowledge or consent through the ATM card and forged cheques. He claimed that the document examiner established that cheques the amounting to Kshs. 15 Million had been forged.
8. The plaintiff also claimed Kshs 7 million which he alleged was 50% of the purchase price of vehicles that the defendant sold without his knowledge or consent. He testified that he retrieved a forged sale agreement at the offices of one Moitalel Ole Kenta Advocate and that he did not receive any money from the said motor vehicles sale. He added that he reported the forgery case to the police who issued him with an OB No. 15 of 2015.
9. On cross examination, the plaintiff stated that the loans that they obtained from Family Bank were repaid but that he did not have the documents in support of such repayments. He testified that the agreement in respect to motor vehicle registration number KBE 702 shows that it was drawn by Moitalel Ole Kenta Advocates and that it was sold to one Anthony Muthoga in 2012 but that neither Mr. Muthoga nor Moitalel Advocate recorded statements with the police over the said sale.
10. The plaintiff stated that motor vehicle Reg. No. KBE 702 was written off following its involvement in an accident after which their business got insurance compensation in the sum of Kshs. 1.8 million but that they later repurchased the same vehicle and put it back on the road. He conceded that he did not have proof of the said purchase and added that as at the time of the said accident, the bank loan had not been repaid in full. He confirmed that out of the insurance settlement of Kshs 1.8 Million, Kshs 1.25 million was paid to their NIC Bank account and added that their loan account at Family Bank was serviced by money held in their transport business account held at NIC bank.
11. On re-examination, the plaintiff stated that not all the withdrawals from the bank accounts were done through cheques and that the withdrawals that are the subject of this suit were done between March 2010 and March 2013. He stated that he discovered the forgery in 2014. He produced 4 cheques that he alleged had been forged and stated that the rest of the cheques could not be traced.

The Defendant's Case



12. The defendant denied the plaintiff's entire claim through his statement of defence dated 4th July 2017 wherein he states that no cause of action can be founded on the law firm of Koceyo & Amadi Advocates as the court had declared it an illegal enterprise. He also denied the claim that the transport business operated account No. 1000228636 at NIC Bank or that the said account had the sum of Kshs 22,464,491.
13. The defendant further denied the authenticity of the documents attached to the plaintiff's list of documents and maintained that the suit is defective as it offends the provisions of Order 11 of the Civil Procedure Rules.
14. The defendant adopted his witness statement as his evidence in chief at the hearing of the case and confirmed that, on or about the year 2010, he entered into a business partnership with the plaintiff with a view to running a law firm and heavy motor vehicle transport business. He stated that there was however a fall out in the partnership in 2014 that resulted in the plaintiff moving away from the partnership so as to set up his own law practice.
15. The defendant testified that during the currency of their partnership, the plaintiff was actively involved in the running of their business and in the bank transactions. He therefore noted that the plaintiff's claim that it took him a period of 6 years to discover the alleged forgeries in the bank account is inconceivable.
16. The defendant denied the forgery claim and stated that had the same been true, the police would have instituted criminal charges against him. He stated that at no time either cumulatively or separately was the sum of Kshs 22 million reflected in their bank statement and argued that the claim for Kshs 22 million was not supported by any tangible evidence and stated that it is an amount that the plaintiff picked from the internal. He observed that the claim was picked by the plaintiff from a ledger/ statement issued by a company known as Transami Bolare for the value of the work they had done for the business and was not the actual amount paid to them. He added that not all the entries in the ledger were credited in their account as the motor vehicles were to be fueled by Transami Bolare who would recover their costs before paying them.
17. Regarding the plaintiff's claim for Kshs 7 million for alleged proceeds of sale of Motor vehicle registration No. KBH 842C, the defendant stated that the said vehicle was written off following an accident and that their insurer compensated them for the loss in the sum of Kshs 1.8 million. He denied the plaintiff's claim that they repurchased the said motor vehicle and challenged him to produce proof of such purchase.
18. On the allegation that motor vehicle registration No. KBE 702E was sold without the plaintiff's consent, the defendant maintained that the said vehicle was sold on 14th September 2012 when the plaintiff was still his business partner in the law firm. He added that the plaintiff was fully aware of the sale and that he executed the sale agreement. He stated that it was an act of pure dishonesty on the part of the plaintiff to file the case 3 years after the sale in question and claim that he was not involved in the transaction.
19. On cross examination, the defendant testified that the bank account they held at NIC Bank was for both the law firm and transport business. He stated that the transport business was solely managed by the plaintiff who even procured the deal with Transami Balore.
20. At the close of the hearing, the parties summarized their respective positions by way of written submissions which I have considered. The main issue for determination is whether the plaintiff proved his case against the defendant for the liquidated sum of Kshs 18,232,246 to the required standards.



21. It is trite that special claims/liquidated claims must not only be specifically pleaded but must also be strictly proved. The general rule is that the burden of proof in civil cases rests with the claimant. This rule is captured in Sections 107, 108 and 109 of the *Evidence Act* which provide as follows: -
- 107. Burden of proof (1) whoever desires any court to give judgement 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.
 - 108. Incidence of burden The of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
 - 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.
22. The issue of burden of proof was dealt with by the Court of Appeal in *East Produce (K) Limited v Christopher Astiado Osiro* in Civil Appeal No. 43 Of 2001 where it was held that: -
- “It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of *Kiema Mutuku –Vs- Kenya Cargo Hauling Services Ltd* 1991 where it was held that “there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”
23. In the instant case, it was not disputed that the plaintiff specifically pleaded the claim for the liquidated sum of a total of Kshs 18,232,246 together with interests and costs. The question which arises is whether the claim was strictly proved. In *Virani T/A Kisumu Beach v Phoenix of East Africa Assurance Company Ltd [2004] 2 KLR*, the Court stated as follows on what amounts to strict proof: -
- “A claim for special damages should not only be pleaded but strictly proved. What amounts to strict proof depends on circumstances, that is to say, the character of the acts producing damage, and the circumstances under which those acts were done.”
24. It was not in dispute that the plaintiff and the defendant were in a business partnership which dealt in heavy motor vehicle transport and a law firm. The parties had a business bank account at NIC Bank whose mandate required that both signatories sign to authorize any transactions in the account. The plaintiff’s claim was for Kshs. 11,232,246 which he contended was 50% of the revenue that was received from the transport business. He stated that the sum was reflected in the payments shown in his bundle of documents from page 5 to 101. I have perused the plaintiff’s said bundle of documents and I note that they are a series of bank statements from NIC Bank for the period between 2007 and 2013. The statements reflect the deposits and withdrawals (debits and credit transactions) that were made in the said account over the said period. The plaintiff’s case is that since the total amount of money received in the said account cumulatively over the said period was Kshs. 22,464,491, he is entitled to half of the said sum being Kshs. 11,232,246.



25. The defendant, on the other hand testified that the NIC Bank account was the account from which the business paid its expenses. The defendant testified as follows regarding the said account: -
- “The account at NIC was both for the law firm and transport business. From the account, we paid rent, salaries, drivers’ allowances etc..... the landlord was paid in cheque form. Fuel expenses and drivers were paid in cash through cash withdrawals. For every trip, a driver was given Kshs. 40,000.”
26. My finding is that considering the fact that it was not disputed that the bank account held at NIC Bank was a business account, the plaintiff’s claim that he is entitled to 50% of all the monies received in the said account beats all logic as the plaintiff did not explain how the business operated without incurring any expenses. It would have been expected that the plaintiff would produce a balance sheet or audited statement of accounts of the business to show the income and expenditure of the business in order to establish if there was any pilferage or funds or fraudulent dealings in the account as he had alleged. The plaintiff particularized the alleged fraudulent dealings as follows: -
- a. Appropriation of monies held in the joint account without consulting the plaintiff.
 - b. Concealing and preventing the plaintiff from accessing the statements of accounts concerning the subject bank accounts.
 - c. Alteration of the account name without informing the plaintiff.
 - d. Purporting to sign documentation on behalf of the plaintiff.
27. The plaintiff accused the defendant of forging his signature and for making withdrawals from their said joint bank account without his knowledge and/or consent. He further accused the defendant of changing the bank account name without informing him.
28. On the aspect of the alleged forgery of his signature, the plaintiff testified that such forgery was confirmed by the document examiner who is the expert witness in such instances. It is however instructive to note that not only was the document examiner not called as a witness in this case, but that his alleged report on the aspect of the alleged forged cheques was also not produced in court as an exhibit. Needless to say, forgery is a criminal offence for which the defendant ought to have been prosecuted had the police found the allegations to be credible. I am not persuaded that the forgery claim was proved to the required standards.
29. It was also curious to note that even though the plaintiff claimed that money was irregularly withdrawn from their joint bank account without his knowledge and consent, at no time did the plaintiff raise any complaint with the bank or write any demand letter to that effect seeking explanation over the alleged irregularities. It did not escape the attention of this court that the plaintiff did not take any action against the bank on account of the alleged irregular dealings in their bank account thus lending credence to the defendant’s position that the instant suit is intended to harass and intimidate him following their business fall out.
30. I find that the plaintiff’s claim is quite wanting in a lot of respects and leaves a lot to be desired. For example, the court is perplexed that the plaintiff accuses the defendant of concealing and preventing him from accessing their bank account and in the same breath concedes that he was a joint signatory to the said account which, to my mind, means that he could gain access to the bank account for purposes of obtaining the said bank statements.



31. The plaintiff also claimed for Kshs 7 Million being 50% of the purchase price of 2 vehicles that were allegedly sold without the plaintiff's knowledge or consent. I note that even though the plaintiff claimed that his signature was forged in the sale agreement in respect to Motor Vehicle Reg. No. KBE 702E, no material was placed before this court to show that such forgery ever took place.
32. The plaintiff further claimed that Motor Vehicle Reg. No. KBH 842C was sold without his consent. It however emerged, from the uncontested evidence presented before this court, that the said motor vehicle was written off following an accident and that the parties herein received insurance compensation for the same in the sum of Kshs. 1.8 Million. The plaintiff however alleged, without tendering any supporting evidence whatsoever, that they repurchased the accident vehicle from the insurance company. I am not persuaded that the plaintiff proved his claim in respect to the sum of Kshs 7 Million.
33. My finding is that none of the documents presented by the plaintiff in the list of documents prove that plaintiff is entitled to the sum of Kshs 22 million. I further find that the plaintiff's case was not proved to the required standards and I therefore dismiss it with costs to the defendant.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Echesa for Plaintiff.

Mr. Koceyo for Defendant

Court Assistant: Sylvia.

