



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 661 OF 2008

PETER GAKUNGI KURIA.....PLAINTIFF

VERSUS

JOHNSON WACHIRA MUGO.....DEFENDANT

JUDGMENT

1. **Peter Gakungi Kuria**, the plaintiff, by this action seeks judgment against **Johnson Wachira Mugo**, the defendant, for Ksh 5.4 million. Judgment in default of a defence was entered against the defendant on 30th July 2009. The defendant applied to set aside that judgment which application was allowed on 5th November 2012. The defendant did not after that file a defence. What therefore is on record is the defendant's draft defence.

2. This case came up for hearing on 13th November, 2019 and proceeded in the absence of the defendant and his advocate who had been served with a hearing notice. The plaintiff's case was therefore undefended because, although the defendant had filed a draft defence when he sought to set aside judgment he did not, firstly file a defence, as required, after judgment was set aside and secondly he did not attend court to adduce evidence. Even if there was a valid defence on record it was not supported by evidence.

3. The plaintiff's case is that at the request of the defendant he lent him Ksh 2 million which the defendant wished to use to trade with. The plaintiff proved, by deposit banking slip that he deposited that sum into the defendant's account. The agreement between the parties was that the defendant would repay the amount lent as follows:

- a. Ksh 1 million on 26th October, 2007;
- b. Ksh 1 million on 7th December 2007;
- c. Ksh 1 million on 18th January 2008; and
- d. Refund of Ksh 2 million on 18th January 2008.

4. The defendant failed to make payment as agreed and the plaintiff after meeting with the defendant on 22nd June 2008 rescheduled the repayments whereby the defendant agreed to remit payment on different dates, and issued the plaintiff with post dated cheques, and surrendered to the plaintiff motor vehicle registration KAV 845X. The cheques were dishonoured and the defendant by deceit recovered the motor vehicle from the plaintiff. The plaintiff was unsuccessful in recovering his money despite instructing an auctioneer and a debt collector to assist him.

5. The plaintiff has proved his case on required civil standard of proof. He has supported his case with documents and my finding is in tandem with the words of Justice G.V. Odunga in the case **Shannebal Limited v County Government of Machakos (2018) eKLR** thus:

“31. In this case the plaintiff has given evidence on oath supported by documentary evidence which go to prove its case. Accordingly, in the absence of any evidence to the contrary and as proof in civil cases is on a balance of probabilities, I find that there was indeed an agreement between the plaintiff and the defendant for the supply by the Plaintiff to the Defendant of the said mechanical equipments at an agreed price.”

6. The plaintiff having proved his case is entitled to costs of the suit.

CONCLUSION

7. In the end Judgment is entered for the plaintiff for Ksh 5,400,000 plus costs and interest at court rate.

DATED, SIGNED and DELIVERED at **NAIROBI** this **28th** day of **APRIL**, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **28th** day of **April, 2020**.

MARY KASANGO

JUDGE