



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 286 OF 2012**

**KAMAU MUCUHA..... PLAINTIFF**

**VERSUS**

**CHARLES MUNGE..... DEFENDANT**

**JUDGEMENT**

1) Kamau Mucuha, the plaintiff herein sued Charles Mungai, the defendant herein, vide the plaint dated 11.6.2012 and sought for judgement as follows:

***a) Special damages plus interest from the date of filing suit.***

***b) General damages and interest from the date of judgement***

***c) Costs of the suit.***

2) The defendant filed a defence and denied the plaintiff's claim arguing *inter alia* that the plaintiff's suit is statute barred.

3) When the suit came up for hearing, the plaintiff and defendant each testified without summoning independent witnesses in support of their respective cases. The plaintiff's case is clearly narrated by the plaintiff in his evidence. It is apparent that the plaintiff and the defendant were bosom friends prior to the year 2002. During this period, the plaintiff was a tenant on ground floor of Rumwe House standing on L.R no. 209/14985.

4) It is the evidence of the plaintiff that the defendant masquerading as the Managing Director of a company he called **EXCO Ltd** asked him vide a letter dated 15.10.2002 to sublet that space to the aforesaid company which the plaintiff later on came to know was a Phantom Company.

5) The plaintiff said that he honestly believed that the Phantom Company was a duly incorporated limited liability company registered under the Companies Act. The plaintiff produced the aforesaid letter as an exhibit in evidence.

6) It is said that the defendant purporting to represent the Phantom Company accepted to take the sub-tenancy from the plaintiff of that space for a term of 5 years and three (3) months with effect from 1<sup>st</sup> October 2002 at a monthly rent of ksh.40,000/=.

7) The plaintiff told this court that the defendant still purporting to represent the Phantom Company paid the agreed rent to the plaintiff without much fuss for just a year.

8) The plaintiff also stated that the Phantom Company fell into arrears of rent by the end of the year 2003, prompting the plaintiff to write the letter dated 10<sup>th</sup> February 2004 to the defendant as the Managing Director of the Phantom Company which he produced as an exhibit in evidence. In the aforementioned letter, the plaintiff informed the defendant first that the three months rent deposit of ksh.120,000/= had not been paid contrary to the agreed terms and secondly that the Phantom Company was in arrears of rent in the sum of ksh.131,955/=.

9) The plaintiff further stated that in response to the aforesaid letter the defendant wrote the letter dated 25.2.2004 enclosing a cheque for kshs.131,955/= thus settling the arrears of rent the plaintiff had demanded.

10) In the same letter the defendant promised to deal with other issues including the three months rent deposit of ksh.120,000/= upon his return from Mombasa. The plaintiff also produced various letters the defendant wrote addressed to the plaintiff's lawyers enclosing cheques both current and post dated to settle the outstanding rent by the Phantom Company.

11) In his evidence, the defendant admitted before this court that he issued the cheques on account no.019667006 maintained by his business name known as "LONE STAR RESTAURANT" at the Commercial Bank of Africa Ltd. The plaintiff pointed out that notwithstanding those payments, the Phantom Company still fell into arrears of rent forcing the plaintiff to issue a notice to terminate tenancy under the Land and Tenant (shops, Hotels and Catering Establishments) Act (Cap 301) thus attracting the filing of a number of suits before the Business Premises Tribunal by the Phantom Company namely: Tribunal case no. 149 of 2005, 740 of 2005 and 687 of 2007 which suits were consolidated by the chairperson of the Business Premises Rent Tribunal (B.P.R.T.) on 4<sup>th</sup> November 2008.

12) Eventually on 6<sup>th</sup> November 2009, the Tribunal granted the plaintiff leave to levy distress upon the movable goods of the Phantom company to recover arrears of rent in the sum of kshs.4,007,530/=. The plaintiff further stated that he instructed Wagly Auctioneers to enforce that order who issued a proclamation notice to levy distress on the Phantom company goods on 27<sup>th</sup> March 2007.

13) The Phantom company appealed against the decision of the Business Premises Rent Tribunal vide Nairobi H.C.C.A no. 619 of 2009. The plaintiff tendered evidence showing that the court struck out the appeal on 12<sup>th</sup> March 2012 on the basis that the appellant was a non-existent entity.

14) I have already stated that the defendant filed a defense to deny the plaintiff's claim on the basis that it was statute barred. The defendant also stated that the plaintiff filed this suit without seeking for prior leave. The defendant further pointed out that the plaintiff had sworn an affidavit on 20.11.2009 which was filed in Nairobi H.C.C.A no. 619 of 2009 where he stated that EXCO LTD is not duly registered thus there are no directors and the proceedings were a nullity for there is no locus to bring about the suit.

15) The defendant stated that the plaintiff came to know that EXCO Ltd did not exist in 2009 contrary to the averment made in paragraph 6 of the plaint that he became aware of that fact on 12<sup>th</sup> March 2012.

16) The defendant told this court that he was not a party to the suits filed before the Business Premises Rent Tribunal and before the High Court. He however admitted he knew one a Mr. Odeny.

17) At the close of evidence, learned counsels appearing in this suit were invited to file written submissions. Having considered the evidence and the rival submissions, I think the following issues arose for the determination of this court.

***i. Whether the plaintiff's suit is time-barred?***

***ii. Irrespective of the finding of (i) above, whether the plaintiff established his claim on a balance of probabilities.***

***iii. Whether the plaintiff is entitled to the remedies he sought.***

18) On the first issue, it is the submission of the defendant that this suit is time-barred hence it is a nullity since the plaintiff failed to seek for an extension of time under Section 26 of the Limitation of Actions Act. The defendant pointed out that the plaintiff was aware that EXCO Ltd was non-existent in the year 2009 contrary to what is pleaded in paragraph 6 of the plaint. The plaintiff is of the submission that this suit is not statute barred.

19) Having carefully considered the evidence and the rival written submissions over this issue, it is important to state from the outset that this suit was filed on 11<sup>th</sup> June 2012 where the plaintiff seeks for damages for breach of contract and trust and also for arrears of rent. Such an action may not be filed after the lapse of six (6) years from the date the cause of action arose under Sections 4(1)a and 8 of the Limitation of Actions Act.

20) The plaintiff has pleaded that he became aware that EXCO Ltd did not exist on 12<sup>th</sup> March 2012. The defendant on the other hand is of the submission that the plaintiff deponed that he became aware that EXCO Ltd did not exist as of 20<sup>th</sup> November 2009.

21) The plaintiff has specifically pleaded that the defendant fraudulently duped him to enter into a tenancy agreement with a non-existent company.

22) Under section 26 of the Limitation of Actions Act, it is expressly stated that limitation period does not begin to run until the plaintiff has discovered the fraud or the mistake or could not with reasonable diligence have discovered.

23) It is abundantly clear that whether the plaintiff discovered the defendant's fraud in the year 2009 or in 2012 is immaterial because the six years period required in filing this action had not lapsed.

24) The other issue which was ably argued by the defendant is that the plaintiff should have sought for leave to extend time before filing this action. The plaintiff is of the submission that he was not bound to seek for extension of time.

25) A careful reading of Section 26 of the Limitation of Actions Act, will reveal that the Act does not impose a duty on a party to seek for extension of time before filing a suit. The defendant's arguments over this issue cannot therefore stand. For the above reason(s) I find that this suit is not statute barred.

26) The second issue is whether the plaintiff proved his claim on a balance of probabilities. I have already set out the plaintiff's claim. The defendant has argued that the plaintiff has failed to discharge the burden of proof. It is pointed out that the plaintiff failed to produce the decree to prove the claim of kshs.5,209,792/90. He also stated that the plaintiff did not tender any evidence showing that the defendant

instituted the alleged suits and or that he instructed advocates to file the alleged suits.

27) In paragraph 3 of the plaint, the plaintiff averred that he was duped by the defendant to enter into a relationship with non-existent entity called EXCO Ltd which the defendant knew from the beginning that it had not been incorporated under the Companies Act. The plaintiff tendered various correspondences he exchanged with the defendant. There is credible evidence that the plaintiff and the defendant knew each other very well before the year 2002. Though the defendant vehemently authoring he aforesaid correspondences, those letters clearly show that the defendant was not telling the truth.

28) A critical examination of the proceedings conducted before Lady Justice Ang'awa in Nairobi H.C.C.A NO. 619 of 2009 revealed that the defendant admitted on oath that he had been appointed as the Managing Director of EXCO Ltd by one Anne Mutisya Muthee.

29) The defendant further admitted in the aforesaid proceedings that he had signed those letters as the Managing Director appointed by Anne Mutisya Muthee. The defendant therefore lied when he appeared before this court and denied authoring the various correspondences.

30) With respect, I am convinced that the defendant is the one who fraudulently led the plaintiff to deal with a non-existent company known as 'EXCO Ltd'. I am also convinced that the defendant knew from the beginning that EXCO Ltd did not exist since it was not registered.

31) I am further satisfied by the evidence tendered by the plaintiff that all actions which were purportedly done by and on behalf of the Phanton Company (EXCO Ltd) were done by the defendant himself. Those actions included the filing of Business Premises Rent Tribunal nos. 149 of 2005, 749 of 2005 and 687 of 2007 ostensibly to resist the eviction levy of distress and increase of rent.

32) He was also instrumental of filing of H.C.C.A no. 619 of 2009 to challenge the Business Premises Rent Tribunals decision in granting the plaintiff a sum of ksh.4,007,533/=. The defendant weakened his defence when he failed to summon Ann Mutisya Muthee to show Njuguna acted on her behalf as the Managing Director of the fictitious company.

33) With respect, I am persuaded by the plaintiff's submission that a party who knowingly purports to act on behalf of a non-existent company is personally liable for such actions. In Palmer's Company Law (22<sup>nd</sup> Ed.) at page 271 the authors stated inter alia that before its incorporation a company has no capacity to contract. But where a contract is purported to be made a company which does not exist the person contracting is personally liable.

34) Having come to the conclusion that the defendant is personally liable for the actions he did on behalf of the Phantom Company, I now wish to determine whether the plaintiff proved his claim. There is no doubt that the plaintiff specifically pleaded and gave the particulars of the sum claimed of ksh.6,103,360/90. The defendant has argued that the plaintiff did not prove the claim.

35) I have considered the material submitted by the plaintiff to prove the special damage and I am satisfied that the plaintiff has established that the sum of kshs.4,007,533/= was in respect of arrears of rent as per the Business Premises Rent Tribunal, which amount increased to ksh.5,209,792/90 as at 6.5.2012. He also proved that he incurred a sum of kshs.740,088/= in defending and prosecution various suits which arose as a result of the defendant's actions. He further established that he had incurred ksh.153,750/= in renovating the space the defendant vacated.

36) The plaintiff prayed to be awarded a sum of kshs.10,000,000/= as general damages. The defendant is of the argument that there was no cogent evidence to establish fraud on his part hence there is no basis for the award of general damages. However I am convinced that the plaintiff presented reliable evidence to show that the defendant acted fraudulently and in breach of contract and trust. He is therefore entitled to claim general damages. I find the figure of kshs.10m suggested by the plaintiff be exaggerated and exhorbitant. I think a sum of ksh.2,000,000/= is a reasonable award on this head.

37) In the end judgment is entered in favour of the plaintiff and against the defendant as follows:

- |   |                                 |
|---|---------------------------------|
| <b>i. General damages for breach of contract and trust.</b>   | <b>Ksh.2,000,000/=</b>          |
| <b>ii. Special damages.</b>   | <b><u>Ksh.6,103,630/90</u></b>  |
| <b>Total</b>  | <b><u>Ksh.8,103,630/90.</u></b> |
| <b>iii. Interest at court rates on (i) and (ii) above from the date of judgment until full payment.</b> |                                 |
| <b>iv. Costs of this suit.</b>  |                                 |

**Dated, Signed and Delivered at Nairobi this 31<sup>st</sup> day of May, 2019.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Plaintiff

.....for the Defendants