



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 159 OF 2007

JAMES MUKIRI KARIUKI PLAINTIFF

VERSUS

JOSEPH NGUCHU NJERU DEFENDANT

JUDGEMENT

1. Three friends set out to do Business together. One exited. The two he left have disagreed. In this suit James Mukiri Kariuki (Kariuki) sues Joseph Nguchu Njeru (Njeru) for the sum of Kshs 7,426,300/-plus interest at 15%.

2. Kariuki was introduced to Njeru by Allan Ngure Kirika (Kirika) in 2003. Njeru was involved in an interesting business. He would buy off loans of his fellow teachers from their Co-operatives Societies and on obtaining fresh loans he would be repaid with a profit. The business required that he should have some substantial money. Kirika and Kariuki assisted him with some of the money on an agreement that Njeru would share the profit made from the trade and repay the principal. For purposes of depositing this money Kirika and Kariuki opened account No. 0150418711600 with Standard Chartered Bank Kenya Limited domiciled at Muthaiga, Nairobi.

3. Kirika opted out of the arrangement and the joint account was ran down into dormancy. Kariuki continued to deal with Njeru. For this purpose he used his own account in the same Bank and Branch, the account being [...] later designated [...]. It was his evidence that in an agreement dated 20th March 2005, it was confirmed that the Defendant owed him a sum of Kshs 5,950,000/- as of that date. Following this he made further deposits on various dates between 9th May 2005 and 3rd April 2006 amounting to Kshs 4,400,000/-. He was to explain that these deposits were made by him and sometimes by his wife Jane Charity Waititu- Mukiri (Jane). In her testimony Jane pointed to the following deposits;

Date Kshs

8th October 2005 300,000/-

5th September 2005 500,000/-

9th May 2005 300,000/-

Total 1,100,000/-

4. Kariuki asked this Court to distinguish between the principal sum lent and the income due to him on account of profit. Kariuki alleged that he lent a total of Kshs 10,350,000/- of which Njeru has repaid some Kshs 2,007,100/-. His position was that although Njeru had made various payments totaling Kshs 1,243,500/- into his account and Kshs. 872,100/- into Jane's account, these constituted his share of income and not repayment of the loan.

5. That, in a sketch, is the Plaintiff's case.

6. Njeru takes the position that the Kariuki's claim is fraudulent and undeserved. Cutting out unnecessary detail, the evidence of Njeru is that upon Kirika opting out, a reconciliation of accounts was done and it was found that he had overpaid Kirika and Kariuki a sum of Kshs150,000/- which was repaid into his account No. [...] on 8th January 2005 together with additional sums of Kshs 1,100,000/-

7. Njeru's account is that between January 2005 and 20th April 2006 he and Kariuki carried out business with a turnover of Kshs 5,950,000/-. During this period cheques amounting to Kshs 6,917,865 were paid to Kariuki and his agent. His evidence is that Kariuki overdraw his

account by some Kshs976,500/- which he promised to pay back.

8. In respect to the agreement of 20th March 2005, Njeru denies that it was an acknowledgment of a debt of Kshs 5,950,000/- or any sum to Kariuki. He explains the circumstances under which it was entered. That Kariuki requested for the agreement for purposes of his KRA Income Tax Returns only. That the agreement was made on 26th May 2006, but backdated to 20th March 2005. That when he asked Kariuki why he backdated the agreement to 20th March 2005 and not 8th January 2005, Kariuki assured him that it was for Income Tax Returns only.

9. Mercy Wanjiru Nguchu (Mercy), wife to Njeru, gave evidence in support of her husband's case. She would be aware of the transactions between Njeru and Kariuki as Njeru was a teacher by profession and she was involved in the family business.

10. Only Kariuki framed issues for this Court to determine. Given the pleadings and evidence tendered, they seem to be a fair extraction of the issues that emerge to be considered and determined. They are:-

a) Does the Defendant owe the Plaintiff the sum of Kshs 7,426,300/-;

b) Is the Plaintiff entitled to interest at 15% p.a.;

c) Has the Defendant paid the Plaintiff the sum of Kshs 6,917,965/-;

d) Has the Defendant overpaid he Plaintiff by Kshs 976,865/-;

e) Costs.

11. Pivotal to a substantial part of Kariuki's claim is the agreement of 20th March 2005. It is a short agreement but whose significance to the matter requires that it be reproduced in full;-

“Agreement made on this 20th day of March 2005 between Mr. Joseph Nguchu Njeru of ID Card No. [...] and James Mukiri Kariuki of ID Card No.6420350 states as follows:-

That Mr. Joseph Nguchu Njeru accept owing James Mukiri Kariuki Kshs.5,950,000.00 borrowed on this said date 20th March 2005.

This total amount is returnable on demand by the Lender– Mr. James Mukiri after a written demand notice of 30 days. This money borrowed is for running the family business by the name Merjoes Golden Furniture Mart.

Failure to refund the same on demand, James Mukiri Kariuki can institute lawful recovery measures with costs from Mr. Njeru and the family business.

Signed

1. James Mukiri Kariuki (lender)20.3.2005

2. Joseph Nguchu Njeru (borrower).....20.3.2005

On behalf of Merjoes Golden Furniture Mart.....20.3.2005

Dates: 20.3.2005”.

12. Kariuki's case is that it confirms Njeru's indebtedness as at that date. As for Njeru, he makes light of it, and asserts that it was merely made at the request of Kariuki to assist him deal with his tax issues.

13. It was submitted for Kariuki that the agreement brooks of no ambiguity and must be construed according to the clear words used by the parties. I was asked to follow the proposition that “*the courts will not of course, make contracts for the parties but they will give effect to their clear intentions*” (*Jiwaji & others –vs- Jiwaji & another* [1968] EA 347). The Court was asked to give effect to the clause of the agreement ‘*that Mr. Joseph Nguchu Njeru accepts owing Jane Mukiri Kariuki Kshs 5,950,000/-borrowed on this date 20th March 2005.*’ That since there is no fraud, duress, undue influence, mistake and misrepresentation, the Court ought to find that the parties are bound to the agreement.

14. For Njeru it was argued that no sum of Kshs.5,950,000/- was advanced on 20th March 2005 as stated in the agreement. In addition that the Plaintiff was unable to provide evidence as to how the sum of Kshs. 5,950,000/- was advanced by this date. This Court was asked to believe Njeru's version on the circumstances as to how the agreement was entered into.

15. Now, on behalf of Kariuki, I am asked to make lateral and plain reading of the agreement and give effect to it. For purposes of setting out its plain meaning, I find it necessary to again reproduce the agreement in its entirety:-

“Agreement made on this 20th day of March 2005 between Mr. Joseph Nguchu Njeru of ID Card No. [...] and James Mukiri Kariuki

of ID Card No.[...] states as follows:-

That Mr. Joseph Nguchu Njeru accept owing James Mukiri Kariuki Kshs.5,950,000.00 borrowed on this said date 20th March 2005.

This total amount is returnable on demand by the Lender– Mr. James Mukiri after a written demand notice of 30 days. This money borrowed is for running the family business by the name Merjoes Golden Furniture Mart.

Failure to refund the same on demand, James Mukiri Kariuki can institute lawful recovery measures with costs from Mr. Njeru and the family business.

Signed

3. James Mukiri Kariuki (lender)20.3.2005

4. Joseph Nguchu Njeru (borrower)20.3.2005

On behalf of Merjoes Golden Furniture Mart.....20.3.2005

Dates: 20.3.2005”.

16. These would be the highlights on a natural reading:-

- a) The agreement was made on 20th March 2005.
- b) It was made between Njeru and Kariuki.
- c) Njeru acknowledges owing Kariuki Kshs 5,950,000/-.
- d) The amount is said to have been borrowed on 20th March 2005, that is the date of the agreement.
- e) The amount was returnable on a 30 day demand by Kariuki.
- f) The purpose of the borrowing was to run Njeru’s family business by the name of Merjos Golden Furniture mart.

17. It however seems to this Court what is in the agreement is not in tandem with the evidence led by the parties. There is divergence on various aspects.

18. On the evidence of Kariuki himself the sum of Kshs 5,950,000/- was advanced over time. It was not lent on one day and certainly not on 20th March 2005. In his written testimony he says:

“21. I decided to start lending the Defendant money myself. I would do this by depositing the money in the Defendant’s account. I advanced money to the Defendant from time to time. For the purpose of my own lending to the Defendant, I used my own account at Standard Chartered Bank Kenya Ltd, Muthaiga Branch (account number [...] which later became [...]) and my wife’s account at Standard Chartered Bank Kenya Ltd, Harambee Avenue (account number [...]).

22. We decided to enter into an agreement confirming the Defendant’s indebtedness. It is dated 20th March 2005. At this time the sum the Defendant owed to me was Kshs.5,950,000/-. The agreement is at page 1 of the Plaintiff’s Bundle of Documents”.

19. The purpose of the money, it is conceded by both sides, was to assist Njeru lend money to teachers. It was not for running the family business by the name Merjoes Golden Furniture Mart.

20. Given these inconsistencies, could there be some truth in Njeru’s account? Ought not have Kariuki given some evidence that he actually lent Kshs 5,950,000/- by this date as alleged?

21. The evidence by Jane was that her husband Kariuki lent the money “by depositing cash into the Defendant’s bank account held with Standard Chartered Bank Kenya Ltd. Nyeri Branch.” This corroborates Kariuki’s written testimony that;

“I decided to start lending the Defendant money myself; I would do this by depositing the money in the Defendant’s account. I advanced money to the Defendant from time to time”.

But in cross-examination he shifted this position and stated;

“We were transacting either through Kirika or directly when the Defendant came to Nairobi. We would meet and I would give him money. This was mainly in cash. There were no banking deposits.”

As for Jane, she said as follows under cross-examination;

“The figure of Kshs 5,950,000/- was what was due to the Plaintiff. It was made up of several transactions made before that date. The transactions were from the year 2004 until the date of the agreement. I have seen the bundle of documents filed by the Plaintiff. There was no single transaction for the figure of Kshs 5.95 million. It is an accumulation of bank deposits and cash transactions”

22. On his part Njeru stated that the money lent to him by Kariuki were made by deposits into his account. He produced copies of his bank statements to show monies banked by Kariuki after January 2005 upto 20th March 2005, the date of the agreement. The amounts were;

8th January 2005 530,000/-

8th January 2005 570,000/-

10th March 2005 600,000/-

Total 1,700,000/=

His further evidence was this included an overpayment of Kshs 156,000/- discovered after the accounts between Kariuki on the one side and he and Kirika on the other had been concluded.

23. It seems to me that the story by Njeru is more truthful as it is backed by some documentary evidence in respect to payments received from Kariuki. Kariuki on the other hand not only shifted his position in respect to how the money was lent but was unable, other than the impugned agreement, to provide proof of the said sum of Kshs 5,950,000/- save for deposits made on 8th January 2005 and 10th March 2005 totaling Kshs 1,100,000/- admitted by Njeru.

24. This dearth of documentary support must be compared and contrasted with documentary proof of 12 deposits provided by Kariuki for deposits he and his wife made to Njeru’s account between 9th May 2005 and 3rd April 2006.

25. Something else sways this Court to believing Njeru. There is no agreement between the two sides as to when Kirika exited from the business. Jane (Kariuk’s wife) say it was sometime in August 2005, while Njeru says it was in December 2004. So his interaction with Kariuki alone began on or about 8th January 2005. From the contents of paragraphs 20, 21, and 23 of Kariuki’s written statement which is reproduced below, the distinct impression is that the agreement of 20th March 2005 was entered **after Kirika had exited the business**. If Jane is to be believed that he opted out in August 2005, then there would be some difficulty in believing that the agreement of 20th March 2005 was made before August 2005.

“20. This arrangement was becoming untidy due to the volumes and sums involved. Allan Kirika also opted out of the arrangement as he got into another business venture. We ran down the joint account and it became dormant.

21. I decided to start lending the Defendant money myself. I would do this by deposing the money in the Defendant’s account. I advanced to the Defendant from time to time. For the purpose of my own lending to the Defendant, I used my own account at Standard Chartered Bank Kenya Ltd, Muthaiga Branch (account number [..] which later became [..]) and my wife’s account at Standard Chartered Bank Kenya Ltd, Harambee Avenue(account number [..]).

23. It provided for payment of the sum of Kshs.5,950,000/= upon 30 days demand by me. The agreement did not mention the sharing of income. This was a practice and even after the agreement was signed the Defendant did share the income”.

26. This Court has said enough to demonstrate why it does not believe that the Agreement dated 20th March, 2015 is proof of the indebtedness of Njeru to Kariuki in the sum of Kshs.5,950,000/=. The only evidence available as to what Kariuki lent Njeru is as follows:-

Date Amount(shs)

8th January 2005 530,000.00

8th January 2005 570,000.00

10th March 2005 600,000.00

9th May 2005 300,000.00

9th May 2005 450,000.00

10th May 2005 200,000.00

11th May 2005 100,000.00

10th August 2005 600,000.00

5th September 2005 500,000.00

4th October 2005 300,000.00

8th October 2005 300,000.00

10th November 2005 700,000.00

8th December 2005 200,000.00

10th March 2006 500,000.00

3rd April 2006 250,000.00

27. Whilst Njeru asserted that the payment of 8th January 2005 included an overpayment of Khs.150,000/= from the Kirika era, Kariuki denied it. It was the word of Njeru against Kariuki and I do not find any evidence that it was indeed an overpayment.

28. It is the Court's finding that the total sum advanced by Kariuki to Njeru after Kirika left is the sum of Khs.6,100,000/=. What were the terms of this advance? Kariuki's evidence was that Njeru would share the interest made from the money lent to the Teachers (call this income) and repay the principal. On his part Njeru gave the following written statement,

"31. Paragraph 9 raises the issue of interest where he talks about SHARING EQUALITY FO THE INCOME which was the profit of the whole business and yet he was not my partner in business I was only borrowing some amount to add to my working capital. The Plaintiff was only entitled to 15% interest.

32. In the Plaintiff statement dated 2nd December 2011 paragraph 8 stated very well that he kept his wife Jane Charity in the picture of 10% the sum rent as interest which later came down to 8% which brings a question which is conflicting".

29. In his latter testimony he was alluding to Jane's statement in which she said,

"Initially they advanced the Defendant cash and he paid back in cash. He paid the principal sum plus interest. Initially the Defendant paid 10% of the sum lent as interest. This later came down to 8%. My husband kept me in the picture".

Under cross-examination, Njeru insisted that he was to pay interest at 8%.

30. Given this evidence the Court is inclined to hold that the money lent was to attract an interest which began at 15% and subsequently reduced to 8%. There is no evidence that income was to be shared in any other way. The evidence of Kariuki's own witness did not lend credence to that position.

31. So how much did Njeru pay back Kariuki? First, there is evidence that at the time Kirika exited the accounts had fully been settled. Njeru's own testimony was that,

"We stopped doing business with Kirika in December 2004. We concluded business fairly in December 2004. We were only referring to the bank statement. We agreed there was nothing owing in 2004. Plaintiff confirmed it in Court".

On his part Kariuki would testify,

"After August 2005, the only outstanding issue was the personal lending I did to him".

For Kariuki, August 2005 was Kirika's exit date. This Court's finding as to when Kirika withdrew, as will be apparent shortly, unlocks the question as to how much was exactly repaid by Njeru. This is because there is consensus, I think, that after Kirika withdrew no amounts were due to that partnership.

32. Kariuki's written statement was that after Kirika opted out, the Joint account was ran down and it became dormant. He then, solely, started lending Njeru. As at 20th March 2005 a sum of Khs.5,950,000/= was due (although I have not believed this story). But this would not be in consonance with the evidence of his own wife that Kirika opted out in August 2005. If that was so then Kariuki sole lending could only be in or after August 2005 and that would then defeat the theory that the agreement of 20th March 2005 was actually entered on that date.

33. In any attempt to extricate himself from this difficulty, and in denial that Kirika opted out in January 2005, Kariuki stated as follows in

his oral evidence,

“The business was running concurrently between Allan, myself and the Defendant until 2005. This was concurrent to my business with the Defendant”.

An impression that for sometimes upto August 2005 his sole business and that of the Partnership were running side by side.

34. So as to make this plausible he stated that of the two deposits made on 8th January 2005, one was for the joint business and the other for the personal lending. Forgetting this position, Kariuki sought to rely on the documentary proof of both deposits to prove the alleged debt of Khs.5,950,000/= to him. He was also to say,

“On 8th January 2005, I paid the Defendant a sum of Kshs.530,000/= and Kshs.570,000/= totaling to Khs. 1,1 million”.

This further incoherency in the account by Njeru makes it unlikely that it is in fact true.

35. On the other hand the exit date given by Njeru does not face similar challenges and I believe it.

36. The significance of this finding is that all repayments made by Njeru after the exit date were solely to his debt to Kariuki and not the partnership. The repayments admitted by Kariuki as having been paid into his account are:-

Date Amount (Shs)

21.09.05 317,000.00

30.01.06 258,400.00

22.02.06 183,600.00

20.03.06 258,400.00

20.04.06 226,100.00

1,234,500.00

That paid into his wife's Account as his agent:-

Date Amount(shs)

22.06.05 51,000.00

23.08.05 80,000.00

21.09.05 192,000.00

24.10.05 124,100.00

23.11.05 241,400.00

19.12.05 183,600.00

Total 872,100.00

Those to the account he held jointly with Kirika:-

Date Amount (Shs)

21.06.05 626,740.00

22.08.05 276,500.00

21.01.05 162,000.00

20.04.05 165,400.00

20.05.05 209,525.00

1,602,165.00

In paragraph 37 of his Statement, the Plaintiff admits the following further repayments:-

a) 28th July 2005 1,030,600/=

b) 26th October 2005 976,500/=

2,007,100/=

37. There is however contention as to payments alleged made on 21st January 2005 and 23rd February 2005 for Khs.162,000/= (corrected by the Defendant from 1,162,000/= to 162,000/=) and Khs. 1,193,000/= respectively. In proof that the payments were made the Defendant produced a copy of his Bank Statement showing that the payments were made vide cheque numbers 000012 and 000013 respectively. As for the Plaintiff he makes this lukewarm statement in respect to the two cheques,

“If at all they were paid, this would be into the joint Standard Chartered Bank Kenya Limited account but not to my account in my wife’s account”.

But in paragraph 35 of his statement, the Plaintiff concedes to the payment of Khs.162,000/= into the joint account. On a balance of probability, I find that the sum of Khs.1,193,000/= was also deposited into that joint account. Now, as this Court will discuss presently, payments made into the joint account as from 8th January 2005 must be deemed as payments made to Kariuki only.

38. And as to why some monies were paid into the joint account, one has to understand the manner in which repayment to Kariuki was done. Njeru explained that he would issue blank cheques to Kariuki so that he would fill in the name and amount for repayment. This was conceded to, somewhat reluctantly, by Kariuki,

“I agree I got certain cheques in blank then I would fill the payee at the time of banking. At this time the joint account with Mr. Kirika was still active. As at this time, I would not tell how much we were owed by the Defendant”.

Njeru’s explanation as to the joint deposit is as follows,

“I have not presented different figures to the Court. According to me I have paid Kariuki Khs.6,917,865/= which includes the 3 cheques paid to the joint account. I handed over a blank cheque to Mukiri”.

Njeru gave Kariuki blank cheques and Kariuki would fill in the name of the Payee. If filled Kirika and himself jointly then it was Kairuki who desired it to be so. My finding, and I so hold is that, payment (as from 8th January 2005) to the joint account was payment to Kariuki.

39. To be drawn from the evidence is that the Defendant repaid the following sums to the Plaintiff:-

(i) Total admitted by the Plaintiff into his account ...1,243,500/=

+ 2,007,100/=

Subtotal 3,250,600/=

(ii) Paid into Plaintiff’s wife’s account872,100/=

(iii) Paid into the joint account..... 1,602,165.00/=

+ 1,193,000/=

Subtotal 2,795,165.00/=

Total amount works to 6,917,865/=. This is against a loan of Khs.6,100,000/=. The Plaintiff has not demonstrated that the amount paid does not sufficiently meet the principal and agreed interest.

40. As to the claim of overpayment of Khs.967,865/= made by Njeru, I need not say much because Njeru has not mounted a Counterclaim.

41. The outcome. The Plaintiff’s claim is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 21st day of September, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Wanjohi for Defendant

Wataka for Kimani for Plaintiff

Nixon - Court Assistant