



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL ADMIRALTY & TAX DIVISION**

**CIVIL SUIT NO. 456 OF 2000**

**EQUITY BANK LIMITED .....PLAINTIFF**

**VERSUS**

**GEORGE NJIRAINI NG'ANG'A**

**T/A VERAM AGENCIES .....DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced this suit vide a plaint dated 9<sup>th</sup> March 2000, amended on 31<sup>st</sup> March 2000 and further amended on 8<sup>th</sup> April 2014. The claim against the Defendant is for a liquidated amount of Kshs. 1,213,028.60, due and owing to the Plaintiff as at 20<sup>th</sup> January 2000, plus nominal and penalty interest thereon at the rate of 32% and 3% per annum respectively, from the 21<sup>st</sup> January 2000 to the date of payment in full.

2. The background facts of the case are that the Plaintiff granted the Defendant and his partner, one Charles Irungu Kagwe (now deceased), who were trading under the firm name of "Veram Agencies" a sum of Kshs. 400,000. The amount was credited in their savings account No. 01-10035, with the Plaintiff's bank on the 8<sup>th</sup> April 1997.

3. Subsequently Charles Irungu Kagwe deposited cheques in excess of Kshs. 250,000 into the account and requested the Plaintiff to allow them to withdraw the said sum of Kshs. 250,000.00 before clearance and at a fee, which they paid. However, when the cheques were presentation for payment, they were dishonored. The parties then agreed that that money would be converted into a loan and by a letter of offer dated 8<sup>th</sup> May 1998, the facility was officially converted into a loan and secured by a charge over the Defendant's property, known as Title No. Kiamumbi/Municipality Block 5 (Kiamumbi) 707.

The loans were not timely services and upon default of repayment, the Plaintiff under their statutory power of sale, instructed Auctioneers to sell the charged property. To avert the sale the Defendant filed a suit HCCC No. 912 of 1999, seeking for an injunctive order. He was granted ex parte orders to restrain the sale and although the matter was heard, the bank subsequently released the security documents to the Defendant and sued him. The Defendant filed a defence dated 31<sup>st</sup> October 2000, amended on 7<sup>th</sup> February and 11<sup>th</sup> September 2017,

4. The Defendant avers that, he was running two businesses with his brother Charles Irungu Kagwe, known as "Veram Agencies and Njika General Supplies". They approached the Plaintiff and the two trading as Veram Agencies borrowed Kshs. 400,000. Subsequently the Defendant's banked cheques for Kshs. 250,000 were dishonored and converted into a loan as aforesaid. That the advanced was in favour of both of them trading as Njika General Supplies and the particular loan has since been fully repaid and is not a subject of this suit.

5. The Defendant avers that, on 4<sup>th</sup> March 1997, he and his late brother executed a Partnership Deed at the instructions of one Mr. Meni, an employee of the Plaintiff, (now deceased), in which it was agreed that all liabilities of the continued operations of Veram Agencies vests absolutely on Charles Irungu Kagwe while those in relation to Njika General Supplies would vest absolutely on him. Thus upon repaying the loan of Kshs 250,000, he has fully discharged of all his liability to the Plaintiff, hence the discharge and release of the title referred herein to him.

6. He alleges that, it is detrimental to him for the Plaintiff to turn around and demand that he settles the liabilities of Veram Agencies in the face of the Partnership Deed as he did not participate in the administrative management of Veram Agencies; therefore the Plaintiff is absolutely estopped from making the claim herein against him.

7. However in a brief reply to the statement of defence, the Plaintiff denied knowledge of existence of the Partnership Deed and averred that it was not notified of the same or even the execution thereof through the alleged late Mr. Meni as alleged.

8. The parties adduced evidence in support of their respective case, and during the hearing of the case, the Plaintiff called one Ambrose Makari Ngari, its General Manager to testify. He produced several documents in support of its case, which included inter alia, letters of offer dated 26<sup>th</sup> February 1997, and 8<sup>th</sup> May 1998. He testified that, as at 20<sup>th</sup> January 2002, the amount outstanding and accruing interest on the loan account of Kshs. 400,000, was a sum of Kshs. 1,213,028.60 demanded herein. He made reference to two letters, a letter dated 5<sup>th</sup> May 1999 and 19<sup>th</sup> May 1999, in which the Defendant allegedly admitted owing the money and sought for time to pay.

9. In cross examination, he acknowledged that the Partnership Deed put to him by the Defendant bears a rubber stamp of the Plaintiff as Equity Building society and was received on 14<sup>th</sup> March 1997. However, he noted that the letter forwarding the same did not have any signature. He acknowledged that he knows the late Peter M. Meni, who was the Operations Manager of Equity Building Society in 1997.

10. The Defendant adduced his own evidence, in support of its case, and maintained that he has no liabilities towards the Plaintiff and that he is being pursued to pay money which is owed by the partner in business and who is now deceased.

11. At the close of the entire case the parties filed their submissions which I have considered alongside the evidence adduced, and I find that there is no dispute that the Defendant and the late Charles Irungu Kagwe (deceased) were granted a loan facility in the sum of Kshs. 400,000; vide a letter of offer dated 26<sup>th</sup> February 1997. The question that arises is whether the Defendant is liable to pay the outstanding sum thereof. As already stated, the Defendant relies entirely on the Partnership Deed allegedly executed and in which the liability for this facility was allegedly assumed by the deceased borrower. The entire suit therefore rests on whether the alleged Partnership Deed is valid and binding upon the Plaintiff.

12. To answer this question the following issues must be considered;

*a) Who borrowed the subject loan facility? Was it the Defendant and the deceased persons in their individual capacity or trading as an entity or partnership?*

*b) Has the loan been fully repaid?*

*c) If it was a partnership, is there evidence to that effect?*

*d) When was the loan disbursed and when was the subject Partnership Deed executed?*

13. I shall deal with first two issues together. I have looked at the letter of offer and find that, it's addressed to both borrowers in their personal capacity. It does not show that it was granted to them as persons trading under the name of or as "Veram Agencies", In addition the letter clearly shows the following details: the amount of the facility is Kshs. 400,000 and it was granted for the purpose of increasing business working capital. The period of repayment of the facility is 36 months. It shows the Post Office No. of the borrowers as 72492 Nairobi and is signed by the two borrowers and the Chief Executive Officer and the Credit Manager of the Plaintiff's Institution on 26<sup>th</sup> February 1997. The terms and conditions of the letter indicate that the facility is secured by a property known as L.R. No. Kiambu Municipality/block (Kiamumbi)/707, registered in the name of George Njiraini Ng'ang'a.

14. The second facility which is not the subject of this case is based on the letter of offer dated 8<sup>th</sup> May 1998, is addressed to George Njiraini Ng'ang'a, of the same box number, and the loan is for the same purpose as aforesaid and covered by the same security, save that the amount is Kshs. 250,000 and repayable in a period of three months.

15. The first loan of Kshs. 400,000 was credited to a savings account No. 01-10035. The statement of accounts produced by the Plaintiff (as exhibit No. 3) indicates that the account holders are two individuals' borrowers trading as "Veram Agencies". It is therefore clear from all the evidence adduced that, indeed the Defendant and the deceased borrowed Kshs. 400, 000.00, in their individual capacity but the funds were credited on their bank accounts describing them as the two individuals trading as "Veram Agencies".

16. I shall now deal with the issue of whether the loan has been fully repaid. As per the evidence adduced, the loan balance as at 6<sup>th</sup> July 2000 was Kshs. 1,440,254.85. However, I note that on 9<sup>th</sup> March 1999, the Plaintiff's lawyer wrote a letter to both borrowers in reference to a statutory notice dated 12<sup>th</sup> November 1998, notifying them that the charged property would be sold under the statutory power of sale, over the outstanding amount which at that date was Kshs. 833,041.80. In response to this letter, Ramesh Patel Advocate wrote a letter dated 5<sup>th</sup> May 1999, to the Plaintiff on behalf of the borrowers, indicating that his clients were going to pay the said sum of money after sale of an industrial property of 2½ acres within 90 days of completion.

17. The lawyer wrote a further letter dated 19<sup>th</sup> May 1999, seeking for indulgence for 45 days to sell the property and pay the amount demanded and requested that the loan be rescheduled. On 26<sup>th</sup> May 1999, the same lawyer wrote another letter to the Plaintiff's lawyer complaining that the Plaintiffs were selling the property based on an old valuation that was 2 ½ years old and attached a valuation report dated 26<sup>th</sup> May 1999, showing the value of the property as at that date to be Kshs. 1.2 million shillings.

18. The Court's attention has also been drawn to paragraph 9, of an affidavit sworn by the Defendant dated 9<sup>th</sup> February 1999, in support of an application he filed in the suit HCCC No. 912 of 2000, in which he admitted that the loan of Kshs. 400,000 and of Kshs. 250,000 referred to in paragraph 2, 6 and 7 respectively were in arrears. That loan has not been repaid to date. So the question still remains, who is liable to pay the loan. It suffices to note that the security given to secure the loan was found to have been improperly processed and invalid. It was then discharged and released to the Defendant. Therefore the loan is for all intent and purpose is unsecured and unpaid.

19. Is the Defendant therefore liable to repay the loan alone? The evidence adduced by the Defendant is that, he and the deceased were trading as "Veram Agencies" and "Njika General Supplies". Therefore a question arises as to whether, the borrowers were doing business in

their own names and/or trading in a different name, other than their individual name, and/or were partners in a Partnership relationship. For better understanding it suffices to address certain terms and/or concepts referred to herein.

20. What is a Partnership? It is governed by the Partnerships Act, Act No. 6 of 2012 (herein “the Act”) which stipulates that:

*“Partnership is the relationship which exists between persons carrying on a business in common with a view of profit.”*

21. Similarly in the case of; *Joseph Chesire Sirma-vs- Erick Kipkurgat Kiprono (2005) 1KLR 197*, the court observed that, it is the conduct of the parties to a business that determines whether there exists a partnership.

22. On the other hand the concept of “trading as” is used where parties have registered a business in their names but are trading in a name other than their names. The term is usually applicable when bringing suits for or against the business. In this regard the case of; *Mehul Nemchand Haria v Hombe Saw Mills & another [2013] eKLR* and the case of; *Nderitu vs Waweru (1975) EA 308*, held that, persons who are registered as carrying on business together are held to be partners, if they are registered as such under the Registration of Business Names Act.

23. The definition of a business name is provided for under Section 2(1) of the Registration of Business Names Act as follows:-

*“Business Name” means “the name or style under which any business is carried on, whether in partnership or otherwise”.*

24. It therefore follows that for the law to recognize a business name and in particular the subject names herein of; “Veram Agencies” and “Njika General Supplies” that the Defendant alleges they were trading under, then those business names should have been registered as aforesaid. There is no evidence to that effect herein.

25. It also suffices then to examine what constitutes a Partnership Deed. It is a written document or agreement among the partners specifying rules and regulations and/or the powers, duties, rights and responsibilities of all the partners. Thus a Partnership Deed provides a legal responsibility between partners of the firm. It also states the profit sharing ratio, nature of business, name-address of partners as well as firm.

26. In regard to this matter, I have looked at the Partnership Deed referred herein and I note that it is expressed to have been made on 4<sup>th</sup> March 1994, between Charles Irungu Kagwe and George Njiraini Ng’ang’a, identified as joined proprietors/partners in business/firms known as Njika General Suppliers and Veram Agencies.

27. The parties expressly agreed on the following clauses in the Deed;

*a) That the names of the respective parties herein shall remain in both firms.*

*b) That henceforth Charles Irungu Kagwe shall be solely and absolutely responsible for and/or assume all liabilities accruing from the continued operations of Veram Agencies.*

*c) That henceforth George Njiraini Nganga shall be solely and absolutely responsible for and/or assume all liabilities accruing from the continued operations of Njika General Supplies.*

*d) That all liabilities against both firms/businesses have already been settled.*

*e) That henceforth Charles Irungu Kagwe shall alone or as he shall decide utilize all the profits accruing from the continued operations of Veram Agencies.*

*f) That henceforth George Njiraini Nganga shall alone or as he shall decide utilize all the profits accruing from the continued operations of Njika General Supplies.*

*g) That within seven days of the due execution of this deed, the sole bankers of the businesses/firms herein mentioned namely; Equity Building Society Ltd, be expressly notified and a copy of this deed supplied to them.*

*h) That this deed be reviewed at the expiry of five years.*

28. As can be deduced from the terms above, the Defendant is relying on clause (b) above to defend the suit as he alleges that the deceased Charles Irungu, solely assumed liabilities accruing from the operations of Veram Agencies. However, under clause (d), it is stated that; “all liabilities against both firms have been settled”. It is therefore presumed that, any monies owing to the Plaintiff had been repaid, presumably as at 4<sup>th</sup> March 1997, when the deed was executed.

29. However, the documents produced by the Plaintiff show the history of the matter as follows: the Plaintiff offered the Defendant and the deceased, a loan of Kshs. 400,000 on 26<sup>th</sup> February 1997, which is about 5 days before the subject Partnership Deed was executed. I have looked at the record of the account No. 01-10035, produced by the Plaintiff and it shows that, the advance of Kshs. 400,000, which is the subject of this suit, was made on 8<sup>th</sup> April 1997. It is therefore clear that, the deed was executed before the facility was advanced. It is therefore not possible that, when all the firm’s debts were settled, the subject debt herein was settled too.

30. In my considered opinion taking into account the facts of this case and the clauses in the Deed, it does appear that the parties to the Deed “severed” their “partnership relationship” (if any), by assuming personal responsibilities and/or liabilities of the entity (ies) they were trading under. Even then, as already indicated herein in the absence of registration of the alleged business names, there was no valid “partnership” and/or a business name. The borrowers thus remained identifiable in their individual names and/or capacity.

31. Be that as it may, assuming the two were trading as a Partnership, the question that arises is whether the Deed is binding on the Plaintiff /Creditor. In this regard, it suffices to refer to clause (g) of the Deed, where it is stated that, the Plaintiff would be “notified” of the execution of the Deed and a copy supplied to them. It should not be lost that, at this point the Plaintiff had not even advanced the Kshs. 400,000. What then was the purpose of a Deed? In my opinion it was executed for purpose of determining liability between the two parties thereto and therefore, it cannot be relied on to escape liability to repay the loan that was advanced to the two borrowers in their individual capacities.

32. Further, the Defendant stated that the Deed was drafted by the Plaintiff’s employee, executed and returned to the Plaintiff vide a letter dated 14<sup>th</sup> March 1997. Similarly at paragraph 7 of statement of defence and the Defendant’s statement dated 13<sup>th</sup> October 2017, the Defendant states that, “I personally applied for a loan of Kshs. 400,000”. He states at paragraph 9 therefore, that “Veram Agencies “hit some financial problems and he was not able to repay the loan which had been disbursed namely Kshs 400,000”. At paragraph 18, the Defendant states that, “I did act pursuant to the Partnership Deed, executed at the behest and/or prompting of a very senior official of the Plaintiff.”

33. Therefore the Defendant cannot deny total liability as the letters written by its lawyer seeking for indulgence from the Plaintiff to repay the money, were written in the year 1999, long after the Partnership Deed had been executed. If indeed the Defendant was of the view that he was not liable to pay this money, then he would not have been seeking for indulgence in the face of the Deed. Thus it does occur that the Defendant is acknowledging the debt even after the Deed was executed.

34. In my considered opinion the liability to pay any outstanding loan falls on the two individual borrowers as it should be recognized that, the loan was advanced to two persons. Therefore, the Plaintiff cannot purport to recover the same from the Defendant alone. The unfortunate position is that, one of the borrowers is deceased and therefore liability can only be shouldered by his personal estate. Having held that liability is upon the two borrowers, it is only in the interest of justice that, the amount owing be apportioned in the ratio of 50:50 percent as against the two borrowers respectively and in favour of the Plaintiff.

35. However, the Plaintiff having opted not to sue the deceased, then it compromised its chances of recovery of the debt, and assumed a risk as no orders can be made against a person not a party to the suit. The Plaintiff has to bear the consequences thereof.

36. In conclusion I find that, there is no dispute that the Plaintiff advanced the subject sum of money of Kshs. 400,000, to the two individual borrowers named in the letter of offer referred to herein, and the same has not been repaid. The Partnership Deed which the Defendant is relying on cannot pass the test, for reasons stated herein. Therefore as regards the prayers sought, I make the following orders:

*(a) That the sum sought under prayer (a) of the plaint and which has not been disputed, is payable by both borrowers in the ratio of 50:50% and in that regard the Defendant is only liable to pay 50% thereof;*

*(b) As regards the issue of interest and costs, I find that the Plaintiff sought that the sum awarded be paid together with nominal and penalty interest thereon at the rate of 32% and 3% per annum respectively, from the 21<sup>st</sup> January 200 to the date of payment in full. The basis of this interest rate claimed is not explained. The security offered for the loan has been discharged, the debt is unsecured and the commercial aspect in my opinion has been lost. However, in the interest of justice, I award interest at court rates on the amount payable from the date of demand to the date of judgment and/or payment in full; and*

*(c) As each party has partially won and/or lost the claim I order each shall bear its own costs.*

37. These then are the orders of the court.

**Dated, delivered and signed in an open court this 29<sup>th</sup> day of November 2018.**

**G.L. NZIOKA**

**JUDGE**

**In the presence of**

**Mrs. Njuguna----- for the Plaintiff**

**Mr. Siagi -----for the Defendant**

**Dennis ----- Court Assistant**