



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
HCCC NO. 612 OF 2015

ROBERT KELLEY.....1ST PLAINTIFF
SHANNON KELLEY.....2ND PLAINTIFF
ISSAC GITONGA MUTHUI.....3RD PLAINTIFF

VERSUS

EDWARD AKIDIVA EMBAALA.....1ST DEFENDANT
MERCY GATWIRI.....2ND DEFENDANT
ISAAC GATWIRI.....3RD DEFENDANT
INSPECTOR GENERAL OF POLICE.....4TH DEFENDANT
ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1. Isaac Gitonga Muthui (**the 3rd Plaintiff**) holds a Limited Power of Attorney for and on behalf of Robert Kelley (**the 2nd Plaintiff or Robert**). The Power of Attorney authorizes him to pursue both Civil and Criminal action concerning recovery of monies invested by the 2nd Plaintiff and Shannon P. Kelley with Edward Akidiva Embaala (**the 1st Defendant (Edward)**).
2. The allegation is that the 1st Defendant has alongside the 2nd and 3rd Defendants defrauded the 1st and 2nd Plaintiffs of the investment money.
3. This matter has its genesis in a church at Afghanistan. Sometimes in the year 2014 and while attending that Church, Robert and Edward met and developed a good friendship. This friendship led to a discussion of Edward's possibility of investing in Kenya and encouraged his new friend Robert to also invest in the Country. Edward cited profitability and easy start up as advantages in investing in Kenya.
4. Mercy Gatwiri (the 2nd Defendant or (Mercy) is the wife of Edward. After consultation with Edward and Mercy, Robert agreed on an investment plan. On diverse dates Robert transferred a total of US\$ 113,490.00 onto the Joint Accounts of Edward and Mercy.

5. The money was to be invested in a Taxi business and Real Estate venture in Kenya. Robert was shocked when he travelled to Kenya on 16th February 2015! He discovered that Edward had lied to him about the construction of houses for the Real Estate Venture and Taxi business and could not account for the Kshs.10,000,000/= entrusted to him by Robert.

6. Upon hiring the services of Sironet Universal Consultancy, a firm of private Investigators, Robert got information that Isaac Gatwiri (the 3rd Defendant or Isaac) was being used by Edward and Mercy to hide the monies belonging to the Plaintiff.

7. In the Plaint filed on 4th December 2015 the Plaintiff seeks the following prayers:-

a. The Defendants be compelled to pay back an amount of Kenya Shillings 10,000,000.00 owing to the 1st Plaintiff with interest accruing at market rates.

b. A declaration by the honourable Court that the Defendants actions against the Plaintiffs amounted to fraud.

c. An order directed to Banking Fraud Investigation Unit (BFIU) inspect the book or books of Equity Bank Ltd which relates to account No.0270195080405 in the names of EDWARD AKIDIVA EMBALIA AND MERCY GATWIRI respectively which are held with the said bank or any other account.

d. The Defendant's moveable and immovable properties to be identified and/or attached and/or sold at a public auction to recover monies for the Plaintiff.

e. The registrar of motor Vehicles be directed not to register any transfer in respect of motor vehicles no's

a. KCC 222Q

b. KBR 718S

c. KVR 334

d. Trailer 2D 449

f. The Registrar of Lands in Meru be directed to deregister the property LR No.3/24 Kangatia amounting to 2.5 acres and transfer to Robert Kelley.

g. A declaration that the Defendant's property was acquired fraudulently therefore cannot transfer the property to a 3rd party because he has no good title to transfer it.

h. A declaration that the Defendant's movable and immovable title is null and void ab initio.

i. Costs if the suit.

ii. Any further or better relief this Honourable Court may deem fit to grant.

8. The suit was not defended and at Formal proof, the 3rd Plaintiff rehashed the story set out above.

9. Robert's evidence is that he initially sent some US\$.8,000 to Edward. In an email of 2nd August 2014 he asks Edward,

"What happened to the US\$.8,000 that I gave you".

Edward responds,

“Actually I wanted to take on this project as your project. I will totally own nothing from it. I’ll keep myself busy to meet my daily needs with something else. Price of land is included in the US\$ 75,000”

There is acknowledgment of USD 8000 sent by Robert to Edward.

10. There is the documentary evidence of money transfers made through Wells Fargo. There is also a foray of emails exchanged between Robert and Edward in respect to how Edward had invested the money. It now turns out that none of the investments were made. The Defendants have not contested this suit or controverted the evidence and allegations by the Plaintiffs.

11. The evidence is that on diverse dates, Robert transferred a total of US\$ 113,490/= to Edward and Mercy for purposes of a joint investment. Edward and Mercy never made the investments and have failed to account for the money. Robert and his son would be entitled to a refund of that money.

12. What is less clear and on which I could not find evidence is the role of Isaac. It is alleged that Isaac is being used by Edward and Mercy to hide the monies under contention. The only connection is the following Report by the Investigator:-

“We commenced our investigation at the Meru post Office where we searched the box 2126-60200, Meru used by the above named debtors. We noted the same is rented by Isaac Gatwiri of telephone 062-2031640. We called the above telephone number and we talked to him personally who informed us that he is the brother to Mercy Gatwiri and live in Nanyuki area ,,,,,,,,,,,,,,,,,,,,,,

,,,,,Upon receiving above information, we visited Kimbo Village located along Kangatia-Timau road near Kimbo Primary school where we met with Mercy Gatwiri who informed us that her husband had travelled to their rural home in Western. She uses mobile number 0723-212792. They also uses box number 521-10400 Nanyuki which is rented by a brother to Mercy Gatwiri Mr. Isaac Gatwiri.

Surely that cannot be sufficient evidence to implicate Isaac.

13. Although this Court has been asked to enter Judgement of Khs.10,000,000/=, it is not told how that is connected to US 113,490 that was paid. Is it after a conversion? As a general rule where a Claim is in foreign currency and the Claimant seeks its conversion, then the conversion rate to apply would be that at the date of judgement. See for example The Court of Appeal decision in Kenya **Commercial Bank Ltd Vs. Stephen Mukiri Ndegwa & Another** [2014]eKLR. For that reason this Court will enter Judgement for US 113,490 or its equivalent in Kenya Shillings as at the date of this Judgement.

14. Order C of the Plaint has been overtaken by events as the proceedings against the Inspector General of Police (**4th Defendant**) and The Attorney General (**5th Defendant**) were withdrawn. Prayers (d), (e), (f) and (g) are prayers in execution that cannot be granted at this stage of the proceedings.

15. The outcome. Judgement is entered in favour of the Plaintiffs jointly against the 1st and 2nd Defendants for US 113,490 or its equivalent in Kenya Shillings at the date of the Judgement. There shall be interest at Court rates from the date of this Judgement and costs of the suit.

Dated, Signed and Delivered in Court at Nairobi this 29th day of June, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Kurauka for Njiru for Plaintiff

N/a for Defendant

Alex - Court clerk