



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CIVIL CASE NO. 2 OF 2012**

**MULU MBUVI.....PLAINTIFF**

**V E R S U S**

**JOHN MUTIA SYANDA.....DEFENDANT**

**JUDGMENT**

Through an amended plaint amended on 19<sup>th</sup> of February 2014 and filed on the same date, the plaintiff Mulu Mbuvi also known as John Mulu Mbuvi claimed that between 10<sup>th</sup> March 2010 and 19<sup>th</sup> April 2010 he advanced to the defendant John Mutia Syanda an amount of Kshs. 1,274,000/= payable with interest of Kshs. 385,000/= within a period of not more than 90 days, bringing the total amount payable to Kshs. 1,659,000/=, and that the defendant agreed to be bound by the conditions, and to pay to the plaintiff the principal amount plus interest as agreed.

The plaintiff claimed that the amount comprised of monies lent by the plaintiff to the defendant through deposits made by the plaintiff in the account of the firm of Top Skill Experts at Equity Bank, a firm owned by the defendant at the request of the defendant. The plaintiff also stated that the defendant had paid part of the amount, leaving outstanding an amount of Kshs. 1,151,000/=.

The plaintiff therefore asked that judgment to be entered in his favour against the defendant for Kshs. 1,151,000/=, together with interest at the rate of 18.5% per annum, from the due date which was 8<sup>th</sup> of June 2010, till payment in full. Alternatively, the plaintiff asked that the defendant be ordered to pay him Kshs. 766,000/= together with interest at 18.5% per annum from 22<sup>nd</sup> March 2010 till payment in full. The plaintiff also asked for costs and interest on costs of the suit.

The defendant did not file a defence to the amended plaint, though he had applied to court for leave to do so. He relied on his original defence dated 19<sup>th</sup> March 2012 and filed on the same date.

In that defence the defendant denied the allegations of the plaintiff and stated that he had a partnership relationship with the plaintiff wherein it was agreed that parties be advancing soft business loans to an entity known as Spring Times Agencies owned and operated by David Maluki, and that the plaintiff as a business partner, was only entitled to a share of the profits and losses incurred by the business entity. The defendant also stated that the agreement relied upon by the plaintiff in this suit, was procured by the use of force and duress as the plaintiff had made a report to the police and caused the defendant to be held in custody at Mwingi Police Station where the defendant was forced to pay cash bail to secure his release, and thus entered into the said agreement with no free will. The defendant thus asked this court to dismiss the plaintiff's suit with costs.

During the hearing of the case, the plaintiff John Mulu Mbuvi testified as PWI.

He gave his evidence in chief before my predecessor Justice Stella Mutuku, and I took over the hearing of the case during his cross examination.

The plaintiff stated in his evidence that he was a businessman in Mwingi town and Nairobi and resided in both places. He knew the defendant as a friend, former classmate who was a neighbour both in Nairobi and Migwani. According to him, he gave money to the defendant who refused to pay, and thus brought him to court.

He stated that in 2009 the defendant offered to organize for the purchase of a plot for him at Embakasi in Nairobi, and when they were in the house of the defendant in Nairobi, the defendant showed him an LPO for Kshs 2 million and told him that he was a businessman. The two then organized for the purchase of the plot.

After about 4 months, the defendant showed the plaintiff another LPO signed by another classmate and asked for Kshs 200,000/= to act on the LPO which had been issued by an NGO. The plaintiff then gave him the money through a deposit in the bank in the account of Top Skill Experts at Equity Bank in Mwingi. The defendant agreed to pay the amount in 3 months together with interest of Kshs 40,000/=.

In March 2010, the defendant again called the plaintiff on phone and said that he had in his possession an LPO from Security Group Africa Limited and asked for a loan of Kshs. 870,000/=. The plaintiff then deposited the amount in the same bank account of Top Skill Experts firstly, Kshs 200,000/= and then Kshs 670,000/=. Thereafter, the defendant gave him a copy of the LPO and promised to pay the amount within three months with interest of Kshs. 300,000/=.

In April 2010, the defendant again asked the plaintiff to lend him Kshs 204,000/= in order to meet the obligation of an LPO. The plaintiff agreed to lend the defendant and gave him Kshs. 15,000/= cash, and on the next day sent him Mpesa of Kshs 39,000/=. The plaintiff then deposited the balance of Kshs. 150,000/= in the bank account ( of Top Skill Experts). The defendant agreed to repay the amount with interest of Kshs. 45,000/= in three months. In total the plaintiff gave the defendant Kshs 1,274,000/= and the agreed interest receivable would be Kshs 385,000/=.

It was the plaintiff's evidence that the defendant deposited in the plaintiffs account at Kenya Commercial Bank at Mwingi Kshs 240,000/=. He also paid the plaintiff cash Kshs 43,000/=. In addition, on 12<sup>th</sup> December 2010 the defendant paid the plaintiff cash Kshs. 25,000/=:, and also paid a further Kshs. 100,000/= through the plaintiffs bank account at Kenya Commercial Bank Mwingi, after demand was issued to the defendant by Mr. Nzili advocate. The plaintiff further testified that thereafter he reported the matter to the police, and the defendant paid him an additional Kshs 100,000/=. According to the plaintiff, total repayments were Kshs 508,000/= while the amount outstanding stood at Kshs 1,151,000/=:, including agreed interest.

It was the plaintiff's evidence that he had meetings with the defendant and that at one time, an uncle of the defendant tried to mediate between them and an agreement drafted by a person by the name Kenyatta which was signed, in which the defendant agreed to pay the outstanding amount in two installments. According to the plaintiff, the first installment of Kshs. 680,000/= was to be paid by 30<sup>th</sup> July 2011. The second installment of Kshs 671,000/= was to be paid by 31<sup>st</sup> December 2011. In default, interest of 1% per day was to accrue. The plaintiff stated that the original signed agreement was in Kikamba language, but was also translated into English.

It was the plaintiff's evidence that, when the defendant failed to pay the amounts as agreed, it became necessary to file the present suit. He denied ever funding Spring Time Agencies. He stated that he entered into the agreement with the defendant for settlement of the amount outstanding seven months before he reported the matter to the police. He concluded by stating that he was in the alternative asking for Kshs. 766,000/= which was the balance outstanding, together with interest of 18.5% per annum from 22<sup>nd</sup> May 2010 together with costs. He stated that the figure of Kshs. 612,000/= reflected in documents filed in court was a wrong or mistaken figure.

In cross examination, he stated that he was a shop keeper at Migwani and also a landlord in Nairobi. He admitted that the defendant was his classmate, and a friend both at Migwani and Utawala Estate in Nairobi. He maintained that he lent the defendant money in 2010 not 2009. He stated that the agreements for loans with the defendant were verbal. He stated that he was aware that Top Skill Experts was owned by Daniel Kimanzi Kitheka and John Mutia Syanda the defendant, and maintained that Daniel Kitheka did not ask for money from him. He admitted that he did not have a licence to lend money.

He said that the total amount loaned to the defendant was Kshs. 1,274,000/= but in his amended plaint, he claimed an amount of Kshs. 1,151,000/=. He admitted that somebody called David paid monies into his bank account but said that he was not aware that the said David had deposited in the bank account Kshs. 50,000/= on 30<sup>th</sup> of April 2013. He maintained that though he knew the mother of David Maluki, the said David did not owe him any money.

He said that he knew the defendant Mutia as a military officer, but did not know his business. He maintained that he only expected payment of interest and not business profits.

He stated that the agreement dated 12<sup>th</sup> February 2011 was made between Mulila Mutia and David Siaka on behalf of John Mulu Mbuvi (himself) and the defendant. He admitted that both himself and the defendant signed the agreement as witnesses, but maintained that this was a traditional Kikamba way of signing agreements which involved elders as mediators.

In re-examination he said that he deposited monies only in the account of Top Skill Experts and maintained that he did not have business relationship with Daniel Kitheka. He stated that it was acknowledged in the amended plaint that Kshs 43,000/- was paid to him in cash but maintained that it was not paid by David. He stated that an additional Kshs 25,000/= was paid by the wife of the defendant in the defendant's presence. He maintained that the defendant agreed with the format of the Kikamba agreement in which, it was stated that Mulila Mutia was to receive money from the defendant. He maintained that in the first request for the loan to finance an LPO, the defendant asked for Kshs 200,000/= and that in the LPO for Security Group, he asked for Kshs 870,000/=. He said that the defendant later told the police that the LPO was fake.

He stated that his first statement filed in court was not prepared by him but by his advocate, and that was the reason why he denied the same and amended the plaint. He stated that he did not know the identity of the individual who operated the bank account of Top Skill Experts.

PW2 was David Thyaka a casual worker in Kajiado and a cousin of John Mbubi. This John Mbubi, in my view, is a pronunciation of John Mbuvi (the plaintiff).

He stated that in 2010 Mbuvi called him and on arrival he found that John Mbuvi had also called Nyalo Mwaniki. John Syanda the defendant arrived at 9.00 pm and admitted owing money to John Mbuvi and suggested a schedule of payment and agreed that the money would attract interest. According to him the defendant admitted owing more than Kshs. 1 million and said that he would repay the amount by 20<sup>th</sup> October 2010 but did not pay the money.

In December 2010 the witness was present when Syanda's wife paid Mbuvi Kshs 25,000/= in the presence of Syanda. In February 2011 John Mbuvi called him again and they entered the house of Mulila Mutia the uncle of John Syanda the defendant, who asked for one week to meet his family and come back. After that week, the uncle called and they agreed to meet and on arrival, he found that Kenyatta Sonde present with John Syanda the defendant and his wife. The uncle said that the defendant had agreed to pay the amount and the agreement reached was thus reduced into writing. It was written in hand in Kikamba language by Kenyatta and dated 12<sup>th</sup> February 2011. According to him, in attendance on each side were three people.

On the defendant's side were Mulila Mutia, John Mutia Syanda and Musili Syanda. On John Mbuvi's side was John Mbuvi, David Nthiya and Kenyatta Sonde. All the six signed the agreement in which it was

spelled out that the money would be paid by 31<sup>st</sup> December 2011 and in default it would attract interest of 1% per day. It was his evidence that the money was not paid, and later Mbuvi reported the matter to the police. He stated that the agreement was written as between Mulila Mutia and David Thyaka, who were the middlemen in attendance, which was in line with Kamba customs.

In cross examination, he said that he was called to the meeting as an elder though Mbuvi was born earlier than him. He said that he was born in 1970 and denied working for the plaintiff (Mbuvi) who was his cousin. He admitted that both the plaintiff and the defendant signed the written agreement as witnesses. He said that according to the agreement Mulila was to bring him money in order to reconcile the plaintiff and the defendant. He denied that the report to the police was meant to facilitate the sacking of the defendant from his job. He denied knowing David Maluki and going to school with him. He said that he only knew of a payment of Kshs 25,000/=, and was not aware that the defendant had been put in the cells. He stated that Mulila was the age of his father. He also stated at the meeting where the defendant arrived at 9.00 Pm, Mulila did not attend. He witnessed Mulila Mutia thumbprint the agreement in which the defendant agreed to pay the money at an interest rate of 1% per day. He was however not aware that the 1% interest per day amounted to Kshs. 13,000/= per day. He did not know if that interest amounted to 330% per annum.

In re-examination, he stated that there was no specific age for one to qualify as an elder and that he was married with four children. He said that the contents of the agreement mentioned the name of John Mutia as the debtor. He said that the agreement was signed on 12<sup>th</sup> February 2011 and the statement to the police was recorded later on 15<sup>th</sup> September 2011. He said that the agreement was drafted by Kenyatta and that the defendant voluntarily signed the same.

PW3 was Michael Kenyatta Sonde of Migwani Town. He stated that he knew that John Mulu Mbuvi loaned John Syanda money and that on 12th February 2011, Mulu Mbuvi called him as John Syanda had failed to pay him an amount of Kshs. 1,350,000/=. They met at Mbuvi's shop where he attended as an elder and Syanda the defendant came with his wife and uncle Mulila. He stated that Syanda said that he had not refused to pay and proposed to pay the amount in 2 installments whereupon the agreement was reduced into writing.

It was his evidence that he drafted the agreement in his own hand and that each side was represented by three people who signed it. It was his evidence that the contents of the agreement was that Kshs. 680,000/= would be repaid by 30<sup>th</sup> July 2011, and Kshs 670,000/= would be repaid by 31<sup>st</sup> December 2011. In default, the unpaid amount would attract interest of 1% per day. According to the agreement, the money was to be paid by John Syanda and be handed over to Thyaka by Mulila, and Thyaka was then to hand over the money to Mbuvi.

According to him, on the 15<sup>th</sup> of September 2011 he was called to Mwingi police station where he recorded a statement, which he produced in court. He stated that in the agreement of 12<sup>th</sup> February 2011, the names Mulila Mutia and David Thyaka appeared many times because they were the spokesmen on both sides. According to him, it was necessary to have the written that agreement because John Mbuvi and John Syanda had discussed the issue severally but had not reached agreement. He stated that John Syanda did not object to Mulila Mutia talking on his behalf.

In cross examination, he stated that he was a carpenter operating in John Mbuvi's hardware shop and that John Mbuvi was his uncle. He did not know the reason for the alleged loan between the plaintiff and the defendant. He said that he was present at a meeting where Syanda the defendant was to make proposals on how to pay, and that those who signed below the name of Mulila were described as witnesses. He maintained however that the agreement described the nature of the debt and that there was no indication or suggestion in the agreement that Mulila was to pay any money. He denied knowing David Maluki and agreed Mulila was about 70 years old at the time, which was 20 years above his age. He stated that though there were other older people in his homestead, he also qualified to be an elder as he was above 18 years of age and could inherit land. He agreed that Syanda the defendant signed the agreement as a witness. He said that the defendant was a military person and could not be forced to sign the agreement.

In re-examination, he stated that on the 12<sup>th</sup> of February 2011 at the meeting, John Syanda talked a lot and willingly agreed to what was written in the agreement. He stated that the agreement did not say that Mulila was indebted to Thyaka. He maintained that it was very clear in the agreement who the creditor and the debtor were. He stated that he only used the plaintiff's premises to operate his own carpentry machine but was not an employee of the plaintiff. He agreed that Mulila had died 3 years earlier. He said that his hand written agreement did not describe any of the signatories as a witness and also did not describe who was on which side of the creditor and who was on the side of the debtor.

That was the end of the plaintiff's case and the plaintiff's case was thus closed.

The defendant John Mutia Syanda testified as DW1. His evidence was that he was a KDF officer living in Embakasi and knew the plaintiff well as a neighbour in the village, as a classmate in nursery and primary school as well as a good friend.

He stated that he operated business together with the plaintiff which started in 2009, when the plaintiff called him to his business premises at Migwani and asked if he could secure for him a plot in Nairobi. The plaintiff later visited him at Embakasi and they looked for a plot in Embakasi and Athi River, but settled for a plot at Utawala Estate Nairobi because the defendant knew the owner a Mr. Kungu who sold the plot for almost half the market price. According to him, the plaintiff bought three plots and they became neighbours.

It was his evidence that in the course of the engagement while in the defendant's sitting room in Nairobi, the plaintiff became interested in an LPO which the defendant had. The defendant then informed the plaintiff that he funded people who owned business names and when they succeeded in servicing their tenders, they would pay him back. He stated the LPO which the plaintiff saw belonged to David Maluki and that the plaintiff requested to join the business and fund the same.

According to him, the business involved the defendant, the plaintiff, and David Maluki, and they conducted their business under the name Spring Time Agencies which was owned by David Maluki. Whenever a business opportunity arose each of them would raise the money they could afford and would be refunded that amount and share the profits according to the respective contributions. He said that the plaintiff was a businessman at Migwani while David Maluki operated from Nairobi.

According to him, they did business well and lost no money except in the business transaction in issue herein. He said that he himself contributed Kshs. 2,130,000/= to the business while the plaintiff contributed Kshs. 1,220,000/=. When the business did not work, David Maluki promised to pay both of them and made payments to the plaintiff, the latest being Kshs 20,000/= deposited in the plaintiffs bank account by David Maluki on 19<sup>th</sup> February 2015. He stated also that on 14<sup>th</sup> May 2010, David Maluki deposited Kshs 240,000/= and that throughout their business, they used Spring Time Agencies as their business firm.

He stated that Top Skill Experts a business firm, was owned by himself and Daniel Kimanzi Kithaka. He said that the plaintiff paid money to Top Skill Experts, knowing fully well that the 3<sup>rd</sup> party was Daniel Kimanzi. He stated that on 19<sup>th</sup> March 2010 a deposit of Kshs 200,000/= was made, and on the 15<sup>th</sup> of March 2010 a deposited of Kshs 20,000/= was made, both by Mulu Mbuvi the plaintiff.

He maintained that they did business together and shared profits and losses. He denied that he was given loans by the plaintiff. He admitted that the police had indicated that he had committed a fraud but did not charge him. He stated that no reconciliation of the business accounts had yet been done between the business partners. He denied owing the plaintiff any money or Kshs 700,000/= plus interest as alleged in the amended plaint. He stated that before the present dispute arose, they were good friends with the plaintiff.

In cross examination, he stated that they operated the business under the name Spring Time Agencies with one David Maluki. He stated that he did not have the certificate of registration for Spring Time Agencies. He stated that David Maluki was conned in a tender for delivery of goods to Security Group

Limited, and that the tender was for Kshs 1,470,000/= to which the plaintiff contributed Kshs 870,000/= which he deposited in the bank account of Top Skill Experts. He agreed that previous deposits by the plaintiff were also made into the same bank account. He agreed that the plaintiff also sent to him Kshs 39,000/= through Mpesa in two installments. He said that for the last deposit of Kshs 20,000/= made by Maluki to the account of the plaintiff, he did not inform the plaintiff that David Maluki had made the deposit. He admitted that he had given several documents to the plaintiff, which the plaintiff relied upon, after the plaintiff reported the matter to Mwingi police station.

He stated that though David Maluki was a partner in Top Skill Experts he had nothing to show that he was involved in the business. He also had nothing to show that John Mbuvi the plaintiff paid money to Spring Time Agencies, and had no document to show that the plaintiff was either a financier or partner in the business. He agreed that as contained in his witness statement John Mbuvi deposited Kshs 1,220,000/= in the bank account of Top Skill Experts. According to him, David Maluki deposited money in the account of the plaintiff on his own behalf. He said that after the deal did not work David Maluki owned up and promised to pay the amounts.

He agreed that he withdrew the money which was deposited by plaintiff and forwarded it to David Maluki. He stated that from the LPO from Security Group Ltd, Mbuvi the plaintiff was to receive Kshs 1,200,000/= from the business though he deposited Kshs. 870,000/= only. He stated that when he enquired about the LPO from the offices of Security Group Ltd, he was told that David Maluki had coned him. He said that David Maluki agreed to pay him Kshs 3,350,000/= by 20<sup>th</sup> November 2010 and paid Kshs 100,000/= in January 2011.

He agreed that he had a business agreement with David Maluki as partners in which he was to be the financier and David Maluki the Marketing Manager which was binding on both of them. He agreed that as contained in his witness statement, he said that he met the plaintiff John Mbuvi with elders and promised to pay him Kshs. 680,000/= by 31<sup>st</sup> July 2011 and the balance by 31<sup>st</sup> December 2011.

He said that the agreement was reduced into writing wherein Mulila Mutia and David Thyaka signed as parties and that the original of that agreement was written in Kikamba and had a condition for payment of 1% interest in default of payment as per the agreement. He agreed that he signed that agreement and that Musili Syanda whose name appeared in that agreement was his brother and that he also signed the agreement. He said that the agreement stated that John Syanda (himself) was to be taken to court in default of payment, and not Mulila Mutia. He said that David Maluki was not present when the agreement was signed.

He admitted that on 5<sup>th</sup> March 2011, he met elders at Migwani with David Maluki and promised to pay Kshs 1,000,000/= by 30<sup>th</sup> June 2011 to John Mbuvi. He agreed that the documents he signed with David Maluki did not involve John Mbuvi the plaintiff.

He said that he made a report to Kasarani police station on the failure of David Maluki to honour the agreement but when David Maluki was arrested, he met the mother of David and went to the police station and authorized David Maluki to be released. He said that on 1<sup>st</sup> September 2011, David Maluki said he had deposited Kshs. 100,000/= in Mbuvi's account at Kenya Commercial Bank Mwingi. He stated that Kitheka Kitema was the father in law of David Maluki. He denied that his wife paid Kshs 43,000/= to the plaintiff, but admitted that she was present when the money was paid. He said that when they talked with Mbuvi the plaintiff on joining the business, David Maluki was not present.

In re-examination, he stated that David Maluki called him one day and said that because Christmas was approaching he would pay him money and that when they met at Thika David Maluki gave him Kshs 50,000/= which was received by his wife because he was driving, and that the instruction by David Maluki was that Kshs 25,000/= should be paid to Mbuvi the plaintiff. He stated that Mulu Mbuvi came at his home at Migwani and that he paid him. He maintained that throughout the period, they did business through Spring Time Agencies. He admitted that he had issued a third party notice on David Maluki, but he maintained that he was not prosecuted and was thus not at fault.

DW2 was David Maluki. It was his evidence that he was born in Migwani but lived in Nairobi. He knew the defendant John Syanda as they went to primary and secondary school together and John Syanda was a class ahead and they came from the same locality.

He stated that he knew Mulu Mbuvi the plaintiff very well. They also went to the same primary school at Migwani. When he joined secondary school, Mulu Mbuvi was his geography teacher in Form 1.

It was his further evidence that the three of them had conducted joint business under the firm name Spring Time Agencies. He said that he was duped in a deal where the client disappeared as the man who gave him the LPO was not from the company. The LPO was under the business name Spring Time Agencies which he owned. It was his evidence that the plaintiff John Mbuvi gave out the bigger amount of money for the LPO but Syanda the defendant also contributed and that he also did the same.

According to him, the money from John Mulu Mbuvi was always paid through John Syanda who withdrew the money from the bank and delivered the same to him. He said that when the deal went sour, he reported the matter to the police and the three sat together and put the problem into writing. He said that he was not coerced to reduce the issue into writing.

It was his evidence that he did not talk to Mulu Mbuvi directly but only talked to Syanda who called Mulu Mbuvi on phone to inform him that he had lost the money. He said that he committed himself to repay the money because the three came from the same place. He said that Syanda wanted the commitment to be reduced in writing and he consulted his late mother, and as they came from a Christian family, they went to Syanda's family to find a solution. He said that Mulu Mbuvi was aware of the consultations and was served with the agreement. He said that the firm which had coned him was Security Group Kenya Limited where he was given a fake LPO for Kshs 1,470,000/=. He said that the total amount received by him from the two others, Mbuvi and Syanda was Kshs. 870,000/=, but it was paid to him in small portions.

He stated that he had been repaying the money and had receipts to confirm such re-payments. He stated that he had not paid John Mbuvi in cash but was paying through a bank account. He could not remember how much he had paid John Mbuvi because they had not met and reconciled accounts. He stated that he was not even sure whether he had overpaid the amounts. He denied depositing monies in Equity Bank and said he paid the monies to Kenya Commercial Bank at Mwingi to the account of Mulu Mbuvi and that the last amount he deposited was Kshs 20,000/= in February 2015. He stated that when he paid Mulu Mbuvi he also paid Syanda because he had committed himself to do so. He also stated that from the documents available, it was clear that on 14<sup>th</sup> May 2010 he paid Kshs 200,000/= into the account of Mulu Mbuvi at Kenya Commercial Bank Mwingi.

It was his further evidence that things started cooling down when he started paying the money and they called a meeting whereby Syanda the defendant told him to go to Utawala Estate Embakasi to meet them. When he told them to be patient, John Mbuvi said that he had already engaged a lawyer and demanded to be paid before the case was filed. He stated that on the Kshs 50,000/= which he handed over to Syanda, it was to be split in half so that Mbuvi was paid Kshs 25,000/= as things were very tense at that time. He stated that the payment was made in cash in the presence of his brother.

He accepted that he paid Kshs 240,000/= in May 2010 to the plaintiff but maintained that the last payment of Kshs 20,000/= was not reflected in the plaintiffs schedule of payments. He stated that as the schedule of payments from the plaintiff showed that he had paid the amount, he denied owing the plaintiff any money. He stated that the amount of Kshs 1,151,000/= in the amended plaint was not agreeable to him.

In cross-examination, he stated that he recorded his statement on 5<sup>th</sup> of October 2012. He stated that previously he was engaged in material and stationeries supplies. He said that they entered into a settlement agreement on the dispute with his other two business partners, but could not give the year the three started operating business together. He maintained that they operated their business though the firm of Spring Time Agencies which was still operating. He stated that the firm had an office in Luthuli

Avenue Nairobi and that John Syanda had access to that office while John Mbuvi did not. He said that the books of the firm were prepared by one Jonh Kinyua, and that John Mbuvi had no access to the firms account. He said that he operated a bank account at Kenya Commercial Bank in Kariobangi and was the only signatory, but after getting the business transactions in issue, he introduced his wife as a signatory.

He agreed that he had said in evidence that Mbuvi and Syanda were the financiers and that Mbuvi sent money through Syanda who withdrew the money and paid same to him. He said that Mbuvi never sent money directly to him or the firm. He maintained that both Syanda and Mbuvi gave him authority to act as he did but that Syanda and Mbuvi met in his absence. He said the responsibility of Mbuvi was to finance, while he was responsible to look for contracts.

He said that the business in which he lost money in 2010 was an LPO from Security Group Ltd in which he was duped. He said the LPO was brought to his office by a client who claimed to come from the Security firm. He stated that he delivered the goods to the same person but later went to the office and those in the office disputed the LPO. He stated that he did not call the office to confirm whether the LPO was genuine.

He said that John Syanda also told him that he later went to the offices of the Security firm who told him that the LPO was fake. He admitted that he went wrong as he did not initially visit the offices of Security Group which were on Mombasa road.

He stated also that though he stated that the goods were supplied by several companies, he did not have any documents to show those who supplied the goods. He stated that the whole amount of Kshs 1,220,000/= was paid to him through John Syanda and that Mbuvi never gave him money personally. He also did not have any evidence to show that Syanda deposited the money with him because he maintained that Syanda gave him cash money. He stated that he was not connected to Top Skill Experts and that there was no connection between that firm and Spring Time Agencies. He could not confirm if Top Skill Experts borrowed money for Spring Time Agencies.

He agreed that Top Skill Experts was owned by Daniel Kimanzi Kitheka and John Mutia Syanda but could not confirm whether they operated a bank account. He stated that he met John Mbuvi and Syanda both separately and together. He said that he met John Mbuvi at his shop where he bought things from him and then met both at Utawala Estate in Nairobi. He denied entering into agreement with Mbuvi to pay him money. He stated that in his statement he had recorded that he was ready to pay up to the last cent and maintained that he was paying the partners that is Mbuvi and Syanda.

He stated that the document dated 5<sup>th</sup> of March 2011 related to what he had referred to as consulting his family. According to him, the parties were himself and John Syanda and that in that document he was promising to pay Syanda, as John Mulu Mbuvi does not feature. He said that he never signed an agreement to pay money through Equity Bank Ltd.

When referred to an agreement dated 26<sup>th</sup> June 2011, he agreed that the parties were himself and John Syanda. It was an agreement to pay in which John Mbuvi was not a party. He said that he paid Syanda in cash in small bits.

He said also that he knew Kitheka Mutema who was his father in law who deposited Kshs 100,000/= in John Mbuvi's bank account. He said that the money was deposited under his instructions though he did not testify to that in court because he was not asked that question. According to him, that amount relates to a business with John Syanda before Mbuvi came on board. He admitted having signed an agreement in which himself and Syanda were said to be equal partners in Spring Time Agencies wherein he promised to pay Syanda Kshs. 4.8 million. He could not however state who financed their business but stated that generally he got finances from Syanda but did not know the source.

He stated that by the time they entered into this agreement, the money in issue herein had been lost through fraud. He denied saying that the first time he lost money was through the LPO from Security Group. He stated that they had lost money through fraud before. According to him, the loss when Mbuvi

was in the business was the last.

He stated that the agreement dated 5<sup>th</sup> March 2011 was made before a report was made to Kasarani Police Station. He admitted that he was issued with a third party notice and said that he could not state exactly how much he had paid to Mbuvi. He said that though he had relevant documents, he had not brought them to court. He said they had not met to reconcile the account because of the court case. He said that the LPO dated 1<sup>st</sup> March 2010 from Security Group was the one in which they lost money, and that they entered into an agreement in October 2010 with the defendant after losing the money but did not include Mbuvi who was at home and aware of the same. He said that Mbuvi gave money as a partner not a financier. He admitted that in all agreements, there was no indication that he would pay Mbuvi directly, and that he explained his position at Kasarani Police Station. He admitted that Mbuvi contributed Kshs 870,000/= but did not know for sure if anybody else contributed money towards that LPO.

In re-examination, he said that he did not get the LPO from the company but that he normally dealt with companies agents. He confirmed that in the agreements he was shown in cross examination, there was no clause that Syanda would act as agent of Mulu Mbuvi or that the transactions were between himself and John Syanda alone. He accepted the schedule of payment but stated that there was a missing payment as Kshs. 100,000/= was deposited in Mbuvi's account by his father in law Kitheka.

He said that the plaintiff had not raised any issue as to why he paid him any amounts, some of which were paid before and some after the case commenced. He agreed that he described himself as Marketing and Sales Manager and John Syanda as his financier. He said that he received payment only from John Syanda. He admitted that he received Kshs 870,000/= from Mulu Mbuvi through Syanda and that, to the best of his knowledge, Mulu Mbuvi was aware of the LPO.

DW3 Josiah Musili Syanda, a brother of John Syanda. He stated that he lived in Nairobi and was a Health Inspector. He knew both Mulu Mbuvi and John Syanda as they came from the same village and location, at Migwani.

He became aware of a dispute through John Mulu Mbuvi at his place of business at Migwani market. According to him, Mulu Mbuvi said he was looking for a way to be paid. He was present in a meeting where John Mutia Syanda and Mulila Mutia were present together with Mulu Mbuvi. At the meeting, the issue of the business was discussed, and Mulu Mbuvi claimed that he was owed money and showed that some bank slips. He stated that he later met the mother of David Maluki and they tried to reconcile the amount.

In cross examination, he stated that in February 2012 he met John Mbuvi at Migwani, with John Syanda his brother and Mulila Mutia relating to an issue of money. He could not say however who was on the side of John Mbuvi or John Syanda. He said that after deliberations, something was written down by Kenyatta Sonde and he signed the documents but not the agreement. According to him all those present signed the document. David Maluki was not in that meeting and he could not state whether he was informed about it.

He stated that the document was written in Kikamba language, and that there was no mention that the three were doing business. The amount owing was however stated to be Kshs 1,351,000/= owed to John Mulu Mbuvi by John Mutia Syanda, both of whom signed the agreement. He stated that those who signed the documents were Mulila Mutia, John Mutia Syanda, Musili Syanda, David Thyaka, Mulu Mbuvi and Kenyatta Sonde.

He agreed that his name was Musili Syanda, but could not confirm that the agreement related to the issue discussed in the meeting. He said that what was written in the agreement might not be what was discussed.

He stated however that David Maluki acknowledged in another meeting that he had been coned in a business and that he would make payments for the loss incurred. He agreed that a document on this was also made, and he also signed a document on 5<sup>th</sup> March 2011. According to him, it related to a debt of

Kshs 2,878,000.50/= owed to John Mutia Syanda by John Maluki. He agreed that there was no indication that the two were in joint business with Mulu Mbuvi, the plaintiff.

When he was referred to a document dated 26th June 2011 in which David Maluki agreed to pay John Syanda Kshs 200,000/= by August which was part of the Kshs 2,800,000/= and the rest to be paid by March 2011, he said that though they went to Migwani to discuss the matter in the presence of John Mulu Mbuvi what was recorded afterwards was their own private matter. He stated that John Mbuvi showed them several bank slips for Kshs 870,000/=, and that there could be a difference as result of miscalculations. He agreed however that he signed the documents.

In re-examination, he said that the agreement dated 12<sup>th</sup> February 2011 did not clearly show those who were on the side of John Mbuvi and those on Thyaka's side. He said that Mulila Mutia promised to bring to David Thyaka a first installment of Kshs 680,000/= on 30<sup>th</sup> July 2011 and Kshs. 671,000/= on 31<sup>st</sup> December 2011. He stated that the document did not indicate however that the payment was on behalf of John Syanda. It also did not indicate how the amount of Kshs 1,351,000/= was arrived at. He said that from February 2011, he had not been called for another meeting on the issue. He stated that on 12<sup>th</sup> February 2011 several things were discussed and some discussions were not captured in the agreement.

The defence case was then closed, and parties counsel agreed to file written submissions which they filed but did not highlight.

In the plaintiff's submissions filed by Caroline K. Mumbo and Company Advocates, a summary of the evidence both for the plaintiff and defence and documents relied upon was given. Counsel for the plaintiff framed issues for determination and made submissions on the said issues. Counsel relied on ***Nakuru High Court Civil case No. 74 of 2006 Vijay Morjaria -vs- Moses K. K Kabergey and Another*** on payment of penalties for unpaid sums of money. Counsel concluded by stating that the conduct of the defendant in disowning documents he signed demonstrated that he was an untrustworthy person, and that the defendant was also dishonest in denying the relationship which existed between him and the plaintiff and attempting to shift liability to a third party, and felt that DW2 David Maluki testified merely in an attempt to defeat the plaintiff's claim and asked for judgment in favour of the plaintiff. Counsel also relied on the case of ***Cyrus Kariuki Waithaka -vs- Hezron K. Waithaka Nairobi High Court Commercial Civil Case No. 146 of 2005.***

The defendant's written submissions filed by Nyamu and Nyamu advocates were to the effect that the defendant had shown how monies were paid by the plaintiff. Counsel emphasized that the plaintiff conceded that he received a total of Kshs 508,000/= from the defendant. The plaintiff had also admitted that he received Kshs 20,000/= deposited in his KCB Mwingi Branch Account raising the confirmed repayments to Kshs 528,000/-. Counsel stated that the plaintiff was averse regarding payment of Kshs 50,000/- paid into his bank account which would have brought the amount paid to Kshs 578,000/-. Counsel therefore submitted that the plaintiff received payments and continued to receive payments from the defendant four years after he filed the case, and as such had no sustainable case.

Counsel also submitted that the main prayer of the plaintiff was for payment of Kshs 1,151,000/= which did not tally with alternatively prayer for payment Kshs 766,000/=. As such, his claim must fail because a liquidated claim had to be specifically pleaded and proved.

Counsel also attacked the allegation that the defendant was liable as according to him, the plaintiff paid money to the account of Top Skill Expert a business firm whose owners were Daniel Kimanzi Kithaka and John Mutia Kianda. In effect, no direct payments were made to the account of the defendant and therefore the plaintiff could not seek a remedy in court against the defendant alone in this business partnership.

Counsel also submitted that the agreement relied upon by the plaintiff which was said to be originally written in Kikamba language did not indicate that it was an agreement between the defendant as a debtor and the plaintiff as a creditor. It was also written in a way that the person who was said to be liable to pay, and the person to receive payment were neither the plaintiff nor the defendant. Though one of the

plaintiff's witnesses testified that this was the Kikamba way of entering into such agreements, legally the agreement was not binding on the plaintiff and the defendant, if and could not thus be used against the defendant.

The defendant counsel concluded by stating that the plaintiff had not proved his claim against the defendant on the balance of probabilities.

I have considered the evidence on record, the documents relied upon and the submissions of counsel on both sides, as well as the authorities cited to me.

I have to start by reminding myself that in a civil case such as the present, the burden is always on the plaintiff to prove his or her case on the balance of probabilities, even if the hearing of the case proceeded by way of formal proof – see *Kirugi & Another –vs- Kabiya & 3 Others (1987) KLR 347*

In my view the first issue is whether the plaintiff and the defendant were business partners or a creditor and a debtor. The plaintiff claimed that he was a creditor of the defendant. He stated that he paid the money to the defendant for the defendant to do his business and then repay him his money together with interest. The defendant claimed in evidence that the plaintiff was his business partner and that they went into business together with a third person called David Maluki and that they would be sharing profits or losses.

The plaintiff says the arrangement was verbal. The defendant also said that the arrangement was verbal. Though the defendant came up with a name of another business firm Spring Time Agencies, the evidence on record was that most of the payments from the plaintiff were made into the bank account of Top Skill Experts a firm owned by the defendant and David Kitheka.

The plaintiff did not have any business dealings with Daniel Kitheka the business partner of the defendant in Top Skill Experts, nor did he have any dealings with Spring Time Agencies or David Maluki of that firm.

Certainly in my view, the plaintiff was not a partner in Top Skill Experts which was jointly owned by the plaintiff and David Kitheka. The plaintiff also did not have any business dealings with Spring Time Agencies of David Maluki. There was no evidence that the plaintiff and the defendant went into a joint investment or joint venture to do business together and then share profits, or losses, in which event they would all have taken the risks.

In the circumstances of the present case, the only role played by the plaintiff was to advance money at the instance of the defendant which naturally he expected to be paid. He was also paid a substantial part of it, which the defendant agrees. In my view if there was intention of business partnership,, there would be no basis of payments of the amount to the plaintiff. The two were thus creditor and debtor.

The second issue relates to the terms under which the plaintiff loaned money to the defendant both through deposits to the bank account of Top Skill Experts and personally.

The evidence on record shows that there was no agreement in writing regarding the terms of payment. Both the plaintiff and defendant stated that they met and discussed at Migwani as well as Nyayo Embakasi in Nairobi before the plaintiff paid the monies into the bank account of TOP SKILL EXPERTS and the defendant withdrew the same. There was no witness to their discussion. It is the story of one litigant as against the other litigant. The evidence on both sides is detailed. The plaintiff has said that the amount would attract interest which he stated in evidence. The said interest being a special profit, and as it was not reduced to writing, in my view the plaintiff has not proved the same. In my view, the amount advanced was payable, but the alleged interest was not proved.

The third issue is whether the defendant entered into agreement or agreed to pay the outstanding amount, with interest of 1% per day. Reliance has been placed by the plaintiff on an agreement that was initially drawn in Kikamba language and subsequently translated into English. It was agreed by both sides that the

plaintiff and the defendant signed that agreement, not as parties but as witnesses. The contents of the agreement made other two persons Musila Mutia and David Thyaka to be payer and receiver of the money. The contents of the agreement in the main body however, are clear that it related to monies owing from the defendant to the plaintiff. None of the plaintiff and the defendant were coerced or forced to sign that agreement, though a report had been made to the police against the defendant. They are educated people, the plaintiff being a businessman and the defendant a military officer.

Both were aware of the meaning and the contents of the agreement. I find that the defendant and the plaintiff signed the agreement acknowledging a debt between them and its payment. However the interest of 1% per day has no legal basis as the claim of the plaintiff herein departs from that claim.

The fourth issue is whether the plaintiff is entitled to the prayers sought. The prayers sought in the amended plaint dated on 19<sup>th</sup> February 2014 are as follows:-

- a) Kshs 1,151,000/=.
- b) interest on (a) above at the rate of Kshs 18.5% per annum from due date ie 8<sup>th</sup> June 2010 till payment in full.
- c) Alternatively to (a) and (b) above Kshs 766,000/= together with interest at 18.5% per annum from 22<sup>nd</sup> March 2010 till payment in full.
- d) costs and interest of the suit.

The evidence on record is that the plaintiff paid the defendant through the account of Top Skill Experts an amount of Kshs 1,274,000/=.

It was admitted by the plaintiff that the defendant repaid an amount of Kshs 508,000/=. This meant that the figure owing was reduced by that amount. It is thus my finding that the amount loaned by the plaintiff was reduced by the above amount which was repaid. In my view therefore the plaintiff is entitled to payment of the amount in the alternative prayer (c) with interest at court rates, and costs. As stated earlier in this judgment, the interest of interest at 18.5% was not proved, as there is nothing in writing to support the same.

I thus find for the plaintiff and grant him judgment for the request for payment of Kshs 766,000/= by the defendant together with interest at court rates from 22<sup>nd</sup> of March 2010 till payment in full.

As for costs, I award costs of the suit to the plaintiff against the defendant.

**Dated and delivered at Garissa this 17th November 2016.**

**GEORGE DULU**

**JUDGE**