



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 248 OF 2008

MOHAMMED BASHIR :::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

SHAUKAT FAROOQ SHEIKH :::::::::::::::::::::::::::::::::::::: DEFENDANT

J U D G E M E N T

1. By an **Amended Plaintiff** dated **1st June 2010** and filed in court on **6th October 2010** the Plaintiff sought Judgement against the Defendant in this suit as follows:-
 - a. ***Kenya Shillings 20 million.***
 - b. ***Costs of the suit.***
 - c. ***Interest on (a) and (b) at court rates until payment in full.***
2. The claim is based on the allegation by the Plaintiff that on or about the year 2000/2001 the Plaintiff held 7,500 shares (75%) in Firoze Construction Company, while the Defendant held 2,500 (25%) shares in the said Company. Soon thereafter, it is alleged that the Plaintiff became of ill health and surrendered the day to day running of the Company to the Defendant but on the condition that all major transactions had to be approved by the Plaintiff being the majority shareholder, and that all drawings, gains and/or profits from the said Company would be shared equally between the Plaintiff and the Defendant.
3. The Plaintiff alleges that in the cause of business the Defendant withdrew from the the Bank account of the said Company at Habib Bank Limited Kenyatta Avenue Branch Nairobi Kshs.40,000,000/= irregularly, fraudulently and without the knowledge or authority of the Plaintiff. When the Defendant was confronted with the evidence of his alleged fraudulent conduct, it is alleged that the Defendant owned up to the crime and agreed to pay the Plaintiff Kshs.20 million to settle the matter. However, the Defendant failed to honour his promise hence this suit.
4. By his undated Amended Statement of Defence filed in court on 8th August 2012, the Defendant, except for admitting that the Plaintiff and the Defendant were equal shareholders in Firoze Construction Company Limited, denies virtually all the allegations contained in the Plaintiff. The Defendant states that in any event the claim against him is barred by Section 4 of the Limitation of Actions Act, Cap 22, in that the cause of action arose in 1999 whereas the suit was filed in 2009. However, entirely without prejudice to his defence the Defendant avers that he in any event made gratuitous payment of the amounts claimed in the Plaintiff to the Plaintiff who acknowledged the receipt thereof. The Defendant totally denies the claim.

5. There were many interlocutory applications leading to the amendments of both the Plaintiff and Defence, and one dated 14th October 2010 by the Defendant seeking, among other orders, an order that the Plaintiff do provide security for the costs of the Defendant. That application was allowed vide this court's Ruling dated 27th October 2011, which required the Plaintiff to provide security for the Defendant's costs before this matter was fixed for hearing. To date the Plaintiff has not complied with that order, and he remains in contempt of this court without any or any valid explanation. Also on record is a prohibitory order against the Defendant's property LR No. 209/1210/17. The order establishing the prohibition was to be in place until the determination of this suit.
6. The Plaintiff filed his Bundle of documents on 6th June 2012, while the Defendant did the same on 3rd May 2013, and the hearing of the suit commenced before me on 11th June 2012 with the Plaintiff's witness, and proceeded on 8th November 2013 with the defence witness. After the close of the defence case, parties filed written submissions. The Plaintiff filed his submissions on 17th December 2013 while the Defendant did the same on 3rd February 2014.
7. Relying on the witness statement filed in court on 5th June 2012, the Plaintiff, PW 1, testified that he resides in Sutton, Surrey in the United Kingdom. He and the Defendant are blood brothers. He took over the running of Firoze Construction Company after the sudden death of their father in 1959. At that time, the Defendant was a minor of 14 years, and the Plaintiff brought him up, and educated him. After the Defendant finished school, the Plaintiff employed him in the Company in 1968 – 1969 at the request of their elder brother the late Honourable Mr. Justice Amin. In 1997, the Defendant's son Adel was employed in the Company. He was never a director. In the same year, the Plaintiff's health started to deteriorate and he put his brother in charge of the Company with the understanding that they were equal shareholders. In the meantime, the Defendant's son, Adel was stealing and selling illegally Company property, including sale of tarmac and gate pass records, and he also burnt all the books of account. The Plaintiff demanded from the Defendant the removal of Adel, but this never happened. In 1999, the Plaintiff testified that he was informed by the Company accountant Mr. Jitu, that the Defendant had withdrawn Kshs.40 million from the Company account at Habib Bank Kenyatta Avenue Branch, Nairobi. This was done without the Plaintiff's knowledge on authority and with fraudulent intention. In 2002, the Plaintiff had to travel to London for medication and he appointed the Defendant as the Managing Director of the Company. He stayed in the UK for several months. He testified that while recovering in the UK he received from the Defendant an e-mail of April 2003 where the Defendant admitted that he swindled Kshs.40 million and he offered to repay half that is, Kshs.20 million to the Plaintiff to settle the matter. The Defendant made the same admission in 2007. When the Plaintiff came back to Kenya in 2003 he was informed that the Defendant had opened a secret account into which some monies due to the Company was paid. Such client companies whose cheque were deposited in the secret account was Karen Rosses Limited. Altogether a sum of Kshs.3 million had been paid to this secret account and, further the Defendant had failed to pay taxes amounting to Kshs.180 million including penalties. The Plaintiff testified that when he felt better, he removed the Defendant from management of the Company and appointed Mr. Ali Yasin to take over. Mr. Yasin, later passed away in Duba due to an illness. There was an attempt initiated by Justice Amin to settle the matter but the Defendant refused to pay, and the Plaintiff's claim remains outstanding as he had never waived it.
8. Upon cross-examination the Plaintiff confirmed that the alleged withdrawal of kshs. 40 million took place in 1999. He did not have the copies of the withdrawal cheques since those were in the defendant's possession, but the witness stated that the Defendant had admitted withdrawing the money, and owing Kshs. 20 million to the Plaintiff.
9. The Defendant, D.W. 1 was the sole witness in his defence. He testified that he is a retired businessman and lives in Duba with his son. The Plaintiff is his elder brother and a former business partner at Firoze Construction Limited where the Plaintiff owed 75% shares and the Defendant owned 25% shares. The Company was incorporated in 1952 by their late father. The Defendant testified that he sold his shareholding in the Company in February 2005, and has had

nothing to do with the Company since 2005 and has since lived in the United States of America. The witness denied any knowledge of Kshs.40 million allegedly withdrawn by him from the Company accounts in 2001. However, the witness admitted that in April 2003, there were several allegations against his son Adel by the Plaintiff and, as a parent, he was anxious to end these allegations as they had a real danger of causing a huge rift in the family. To this end, he wrote a letter to the Plaintiff offering him Kshs.20 million to finally end the fighting. On 21st August 2002, the Plaintiff wrote a letter to the Defendant accusing the Defendant's son Adel of taking Kshs.40 million in 2001. Adel was also a Director of the Company and was also authorised to withdraw money from the Company accounts. On 24th July 2004 the Plaintiff wrote another letter on this matter to the Defendant. In that letter, the Defendant testified that the Plaintiff confessed that he was wrong in accusing the Defendant's son Adel of the alleged offence. On 9th August 2004, the Defendant further testified, the Plaintiff wrote a letter in which he stated clearly that he has no claim on the issue of Kshs.40 million of Firoze Construction Company. In addition, the Plaintiff apologised for upsetting the Defendant, and so the Defendant believed that this was the end of the matter, but that was not to be and in 2008 these proceedings were filed.

10. I have carefully considered the suit, the testimonies of witnesses, and the submissions of the parties. This is essentially a family dispute dressed up as a commercial case. I must state that it is very unfortunate that the parties have failed to settle a matter like this, and they allowed it to proceed to this level. This matter having reached this stage the court has no option but to apply the law to the facts of the case to solve the dispute. However, before I proceed in this matter any further, there is a house keeping procedure to dispense with.

11. On 19th May 2014 I directed the Plaintiff to deposit the security for costs in court within 7 days from the date of that order. That security was assessed at Kshs.2,000,000/= . I also ordered that if the said security was not deposited as directed the court would proceed in this matter as if the Plaintiff has never participated in these proceedings anytime after this suit was listed for hearing. At the time of writing this Judgement there is no indication on the court record that the Plaintiff has complied with those orders.

12. Order 26 Rule 5 of the Civil Procedure Act 2010 states as follows:-

5 (1) "If security for costs is not given within the time ordered and if the Plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit."

In this matter, the Defendant has, twice raised the issue of the Plaintiff's disobedience to the court order which was given on 27th October 2011. The Defendant, through his submissions, asked the court to dismiss the suit within on account of that disobedience.

13. The Plaintiff has never come to court to explain why he could not comply with the court order. Neither has the Plaintiff sought the extension of the time to enable it comply with the said court order. This court has been extremely lenient to the Plaintiff, and by the order of 19th May 2014 this court provided the Plaintiff with a last opportunity to comply with the said order. The Plaintiff has chosen to disobey that order. Accordingly, this court will also not allow the Plaintiff to abuse its process. The Plaintiff is bound to obey the orders of the court. It would be a gross miscarriage of justice if this court were to allow the Plaintiff to continue with such disobedience. The result is that, that act of disobedience by the Plaintiff necessarily, and by operation of the law aforesaid, brings to a screeching halt these proceedings. This suit is dismissed with costs to the Defendant.

That is the Judgement of the court.

DATED, READ AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Githii for Plaintiff

Mogere for Defendant

Teresa – Court Clerk