



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 865 of 2009

MARY WAMBUI MUNGAIPLAINTIFF
VERSUS

DAVID MBATIA KAMAU DEFENDANT

RULING

By this application, the plaintiff prays for an order that the defence dated 12th January, 2010 and filed herein on the 13th January, 2010 by the Defendant be struck out and judgment be entered against the defendant as prayed in the plaint. She also prays that the costs of this application and of the suit be paid by the Defendant.

The application is made by a Chamber Summons taken out under **Order VI Rules 13 (b), (c) and (d) and 16 of the Civil Procedure Rules; and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act**. It is supported by the annexed affidavit of the Plaintiff, and is premised on the grounds that the defence is scandalous, frivolous or vexatious; that the defence may prejudice, embarrass or delay the fair trial of this action; and that the defence is otherwise an abuse of the process of court.

The Plaintiff's case is that at the request of the Defendant, she paid the sum of Kshs.8,500,000.00 to Athi River Mining Ltd. being the price of fertilizer purchased by Malewa Farm. The latter was the business name under which the Defendant carried on business. In addition to that sum, the Plaintiff also advanced to the Defendant the sum of Kshs.1,000,000.00 in cash towards the purchase of the fertilizer, and therefore the Defendant owed her the total sum of Kshs.9,500,000.00 which she now claims by way of this suit. It is further her case that the Defendant undertook to repay the total sum of Kshs.9,500,000.00 and accordingly issued to the Plaintiff two cheques for Kshs.8,000,000.00 and Kshs.1,500,000.00. However, both cheques were dishonoured on presentation, and although the defendant was given due notice of the dishonour, he did not pay the cheques.

In his replying affidavit, the defendant admits having issued post-dated cheques to the plaintiff in February, 1999, allegedly to fund

the importation of electrical fittings from Dubai. According to him, the understanding between the parties was that the plaintiff would present the cheques for payment upon arrival of the fittings. But the business venture as envisaged failed to take off. It was then that the Plaintiff presented the cheques for payment in disregard of the understanding earlier entered into in a bid to humiliate and embarrass the Defendant. He also avers if the Plaintiff was owed monies by Malewa Farm, she ought to have sued that legal entity and not the Defendant. He does not believe that it is just for him to be condemned to pay debts allegedly due from a separate legal entity.

Arising from these pleadings, the issues to be determined are whether the defendant is personally liable for debts, if any, incurred by his business concern; whether any such debt(s) were incurred; and whether the Plaintiff is entitled to the orders sought. Regarding Malewa Farm, the Defendant attached to his replying affidavit a Certificate of Registration of Malewa Grain Growers. This is the name under which he carries on business in conjunction with Harrison Njenga Kiarie. The registration of that name does not constitute the business a separate legal entity which is an exclusive privilege of limited liability companies upon their registration. Since there is no separation of personalities between the business and those running it, it stands to reason that the defendant and his partner, Harrison Njenga Kiarie are, each, personally liable for all the debts and liabilities of Malewa Grain Growers which the Defendant admits is commonly referred to as Malewa Farm. Consequently, the liabilities of Malewa Farm are equally the Defendant's liabilities.

The Plaintiff's case is that she paid the sum of Kshs.8,500,000.00 to Athi River Mining Ltd. on behalf of Malewa Farm. In support of that contention, she attached copies of three banker's cheques dated 14th February, 2008 for Kshs.5,000,000.00; 11th April, 2008 for Kshs.1,500,000.00; and 23rd April, 2008 for Kshs.2,000,000.00 all payable to Athi River Mining Ltd. This is the money which the Plaintiff claims to have paid to Athi River Mining Ltd. on behalf of the Defendant. In addition, she deposes that she advanced to the defendant the sum of Kshs.1,000,000.00 cash bringing the total claim to Kshs.9,500,000.00.

Whereas the plaintiff's claim is for Kshs.9,500,000.00, the two receipts referred to in the plaint and attached to the application herein stand for a total of Kshs.10,395,000.00 which exceeds the Plaintiff's claim by a sum of Kshs.895,000.00. But the Plaintiff is not claiming Kshs.10,395,000.00. She is claiming only Kshs.9,500,000.00 made up of the cheques paid to Athi River Mining Ltd., and the amount advanced to the Defendant in cash. This figure of Kshs.9,500,000.00 derives credibility and support from the two cheques issued to the Plaintiff by the Defendant. The two cheques Nos.000111 and 000113 both dated 30th August, 2009, for Kshs.8,000,000.00 and Kshs.1,500,000.00, respectively, account for exactly Kshs.9,500,000.00 which the Plaintiff claims from the defendant. Although the defendant states that these cheques were in respect of some different transaction altogether, he did not give any details about that transaction, and the same remains more of a second thought than reality.

Section 30 (2) of the Bills of Exchange Act, (Cap.27 of the Laws of Kenya) states as follows-

“Every holder of a bill is a prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation is affected with fraud, duress or force and fear, or illegality the burden of proof is shifted unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.”

Under **Section 29** of the same Act, “a holder in due course” is a person who takes a bill complete and regular on the face of it, in good faith and for value before it was overdue. In the case of **HASSANALI & CO. v. JERAF PRODUCE STORE [1967] E.A. 555**, the then Court of Appeal for East Africa held in respect of **Section 30** of the **Bills of Exchange Act (Tanzania)** which was “in pari material” with the Kenya Act, that-

“... a holder of a bill (includes a cheque) is a prima facie holder in due course, but, if it is admitted or raised in the

defence and proved that the issue of the bill is affected with fraud, duress force and fear or illegality, the burden shifts back to the holder.”

In the instant case, it is significant that the defendant has not pleaded that the issue of the bill was affected with fraud, duress force and fear or illegality. The only issue that the Defendant raises is that there was an alleged failure of consideration in respect of a business venture which failed to take off. But he does not give any particulars of that venture, if there was such a venture at all. Failure to do so casts a serious misgiving as to its existence. On the other hand, the plaintiff has given an account of the cheques she used to pay Athi River Mining Ltd., which amount she avers was being refunded by way of the cheques which were dishonoured. Against the Plaintiff's case, the Defendant has made general denials which cannot stand the test of time, and which will in all probability prejudice, embarrass and delay the fair trial of this action. For instance, he denies that he was indebted to Athi River Mining Ltd. in the sum of Kshs.8,997,500.000 as stated in paragraph 4 of the plaint while the Plaintiff's exhibit "MM 1" shows that he was indeed so indebted. He then generally denies the contents of paragraphs 6, 7, 8 and 10 of the plaint and puts the plaintiff to strict proof thereof. He even denies having received a demand and or notice of intention to sue having forgotten that he had signed an acknowledgement copy which is exhibited by the plaintiff as her exhibit "MM 5".

For the above reasons I find that the plaintiff has made out her case and that she is entitled to the orders sought. The defence dated 12th January, 2010 and filed herein on 13th January, 2010 by the Defendant is hereby struck out and judgment entered against the Defendant as prayed in the plaint. The Defendant will also pay the costs of the suit as well as those of this application.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 15th day of April, 2010.

L. NJAGI
JUDGE