



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL COURTS AND TAX DIVISION**

**CIVIL CASE NO. 50 OF 2010**

**HONOURABLE FREDRICK OUTA..... PLAINTIFF**

**VERSUS**

**MOSES OWITI AYIECHO .....DEFENDANT**

**RULING**

1. The Plaintiff instituted this suit against the Defendant seeking for judgment against the Defendant for a sum of Kshs.5 million with costs and interests. The sum was allegedly paid to the Defendant pursuant to an oral agreement entered with the Plaintiff for the sale and transfer of 1125 shares of Mara hippo Tented Camp Limited. The Plaintiff claims that he paid the sum of 5 million on various dates by way of cash and bank transfer. However the Defendant failed and neglected to procure the transfer.
2. The Defendant filed a defence in which he denied the claim by the Plaintiff in toto. The Defendant contends that the Plaintiff was using the services of Mara hippo Tented Camp Limited to hold meetings and conferences as he planned and strategized for his election during the 2007 General Elections. For that use of the facility the Plaintiff incurred a bill of Kshs.5, 600,000/= out of which he only paid 3 million leaving an outstanding claim of 2,600,000.
3. The Plaintiff filed a Notice of Motion dated 22<sup>nd</sup> April 2010 seeking for summary judgment as prayed in the Plaint. This is on the grounds that the defence filed by the Defendant is a mere denial. The Defendant is truly indebted to the Plaintiff as stated in the Plaint. The application is supported by the affidavit of the Plaintiff sworn on 22<sup>nd</sup> April 2010. He has annexed petty cash vouchers for a sum of Kshs.2 million which was purportedly signed by the Defendant when he acknowledged receipt of Kshs.2 million the sum of Kshs.3 million was paid to the Defendant through a direct bank transfer. The Plaintiff denied ever hosting campaigners at the Mara hippo Tented Camp as alleged by the Defendant.
4. Furthermore Mara hippo Tented Camp is a limited liability company which is distinct from the Defendant and in view of its distinct separate identity the defence by the Defendant cannot hold. The money was paid directly to the defendant. He acknowledged receipt and Mara hippo Tented Camp is not a party to this suit thus judgment should be entered for the Plaintiff.

5. This application was opposed; the Respondent relied on the replying affidavit sworn by the Defendant on 11<sup>th</sup> May 2010. He annexed documents demanding payment of a sum of Kshs. 5.6 million which is due to Mara hippo Safari Lodge. The Defendant further denies having entered into an agreement either orally or in writing with the Plaintiff for the sale of shares at Mara hippo Tented Camp Limited. The Defendant admits that the Plaintiff paid a sum of Kshs. 3 million through a bank transfers but denies having received a sum of Kshs. 2 million. He denied ever having signed the petty cash vouchers.

6. This application is brought under the provisions of **Order XXXV rule 1 and 2** of the **Civil Procedure Rules** which basically provides that a plaintiff with a liquidated claim to which there is clearly no defence he can obtain a quick summary judgment without being a necessarily kept from what is due to him by delaying tactics of the Defendant. The principle element for consideration in this application is whether the plaintiff's case is clear and plain. The Court is asked to determine whether the Defendant is truly and justly indebted to the Plaintiff. The other issue to consider is whether the defence raises triable issue(s). For the Court to establish whether the defence raises triable issue(s) it is necessary to examine the defence and the replying affidavit which must also show the Defendant has a triable defence.

7. The Applicant in this case has annexed petty cash vouchers through which he claims the Defendant acknowledged a total sum of 2 million on various dates being towards the purchase of shares at Mara hippo Tented Camp Limited. The Defendant has denied in his replying affidavit having received or signed the petty cash vouchers for the sum of Kshs. 2 million. However, the defendant admits having received Kshs. 3 million through direct bank transfers. He however contends this was for settlement of bills incurred by the Plaintiff's people while holding conferences and meetings at Mara hippo Tented Camp. The Defendant claims that the Plaintiff still owes Kshs. 2.6 million for the unpaid bills.

8. Mara hippo Tented Camp Limited is not a party to this suit although the Defendant claims that it is owed a sum Kshs. 2.6 million the Defendant never sought to enjoin them as a party so as to counterclaim for the sum of Kshs 2.6 million. The Plaintiff has demonstrated how he transferred through direct bank transfer a sum of 3 million directly to the Defendant. The Defendant also admits receipt of this money. Although he claims it was paid to settle bills on behalf of Mara hippo Tented Camp Limited. As regards the sum of 2 million, the Defendant categorically denied having signed the petty cash vouchers or receiving the money from the Plaintiff.

9. That issue regarding 2 million can proceed for trial. However, as regards the sum of Kshs 3 million which was sent through direct bank transfer to the defendant, that is a clear and plain claim. There is no credible defence in respect of the sum of Kshs 3 million which the defendant admits to have received, the contention by the Defendant that it was paid for services rendered by another entity lacks credibility. Accordingly the Defendant may defend the claim in respect of 2 million. Summary judgment is entered against the Defendant for the sum of Kshs. 3 million with interest and costs.

**RULING READ AND SIGNED ON THIS 22<sup>ND</sup> DAY OF OCTOBER, 2010.**

**M. K. KOOME**  
**JUDGE**