



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 146 of 2005

CYRUS KARIUKI WAITHAKAPLAINTIFF

VERSUS

HEZRON K. WAITHAKADEFENDANT

JUDGEMENT

This application is under Order 35 Rule 1 and 2 of the Civil Procedure Act. The application seeks that;

- (1) summary judgement be entered against the Defendant for the sum of Kshs.3,350,000/= plus interest at 18%.
- (2) Costs for this application be provided **for**.

It is the contention of the Applicant that the Defendant is well and truly indebted to him to the sum claimed. It is alleged that the debt arises from a request from the Defendant that there was a property **No.Dagoretti/Riruta/853** which was to be purchased jointly for the sum of Kshs. 10 million. In bit and parts the Plaintiff contributed the sum of Kshs.3,350,000/= in the purchase of the said property. The Respondent then purchased the property but effected the transfer and registration in his name. And when the Plaintiff failed to get a share of the property he demanded his contribution back.

There is substantial amount of evidence from both parties showing that they intended to purchase the property jointly. According to correspondences exchanged, there is evidence to show the Defendant received substantial amounts of monies either directly or were sent to his children studying abroad. The Plaintiff later came to know that the property had been registered in the names of the Defendant to his exclusion. He raised the matter with the Defendant and a protracted dispute ensued culminating in the exchange of several combative letters.

In a letter dated 5th October, 2004, the Defendant wrote to the Plaintiff complaining that it was the Plaintiff who breached the terms of the verbal arrangements for he failed to contribute the agreed sum of Kshs.5 million. The defendant also asserted that the said breach highly inconvenienced him making him to enter into arrangements with his bank and third parties. He also stated that out of compassion and considering past cordial relationship, he was willing to refund the money paid. It appears that defendant did not fulfill his earlier promises prompting in the filing of the present suit.

As this suit was pending for determination, the Plaintiff made a report to the police. The Defendant was

arrested and charged through Criminal case No. Kibera 2738/05. The Defendant did not take the complaint and gesture of the Plaintiff lightly therefore he filed **HCCC Misc. Application 678/2005** seeking for an order of prohibition. He was successful and the court termed the process adopted by the police as contrary in the promotion of the administration of justice. It was the view of **Justice Emukule** that the State resorted to an abuse of the process of the court, which may result in oppression of the Plaintiff. The court also expressed its view that it did not condone the behaviour or actions of the Defendant. But was of the view that the action of the present Plaintiff was actuated or motivated by an ulterior motive to achieve objects unconnected with the purpose of the criminal law process, namely to obtain collateral advantage over the Defendant so that he could settle this claim quickly. In discussing the background of the dispute the court summarized the relationship as:

“The story whether looked at from various affidavits of the applicant or the replying affidavit of the interested party appears to be this. The applicant and the interested party were friends of long standing. In that relationship, the applicant persuaded the interested party to join him in a common venture to purchase a property, the applicant had identified at Dagoretti a suburb of the city of Nairobi. The applicant estimated the value of the property to be about Kshs. 10 million. He asked the interested party to contribute one half of that value, that is to say Kshs.5 million towards the joint venture. In the event within the space of about one year February 1999 and February 2000 the interested party had contributed about Kshs.3,350,000/= towards, no doubt the purchase of at least his interest in the property at Dagoretti. Most of the payments of this money was made for the benefit by way of foreign currency drafts mostly U.S.A. Dollars for college fees of the applicant’s children who were studying in the United States of America. While the interested party was making those payments, the applicant had by June 7th 1999 procured the transfer and registration of the property title No. Dagoretti/Riruta/853 in his own name HEZRON KAMAU WAITHAKA. Correspondences by the applicant (in particular dated 12/11/99 to the interested party) acknowledges that the contribution by the interested party or at that date to be Kshs.2,211,790/=”.

In a supporting affidavit to the Judicial Review application dated 11th May, 2005 and filed on 12th May, 2005, the Defendant confirms in paragraph 3 that he requested the Plaintiff to lend him a sum of Kshs. 5 million for purposes of educating his children in various universities in the United States of America. And pursuant to the request, the Plaintiff advanced him a total sum of Kshs.3,350,000/= in installments over a period of two years. He also depones that the Plaintiff was not supposed to charge any interest during the repayment since it was a friendly loan between friends.

It is stated in paragraph 6 that if the Defendant was unable to pay back he would transfer one parcel of land in Dagoretti area worth that amount to the Plaintiff herein. And in paragraph 10 the Defendant states:

“That I have not paid back the sum of Kshs.3,350,000/= advanced and the same is due and owing.

And in paragraph 9 he depones;

“That I do not deny owing the complainant (Plaintiff) the amount of Kshs.3,350,000/= and I even made a proposal to repay the same in installments between the months of May, 2005 and December 2005 in full and final settlement”.

The Defendant now in a replying affidavit states that the Plaintiff did not advance him the sum of Kshs.3,350,000/=. He says the sum was advanced to him by a company known as Afro Freight forwarders Ltd on terms and conditions entered into between itself and himself. And as such the Plaintiff herein has no legal claim against him in respect of that money. It is also the defence of the Defendant, that the Plaintiff is not entitled to institute this suit against him as he has no locus to do so. And that the suit does not disclose any cause of action.

The Defendant says he wants the court to determine what he calls four trial issues. The issues are:-

- (1) whether the Plaintiff's suit discloses any cause of action against the Defendant.**
- (2) Who were the parties to the agreement.**
- (3) Whether the purported terms of agreement had been breached and/or materially amounted to a breach of a contract.**
- (4) Whether the Plaintiff/applicant may found a claim based on documents exchanged on without prejudice basis.**

The law is that if the defendant shows a bonafide triable issues he must be allowed to defend without conditions. In my view a defence which raises triable issues does not mean a defence that must succeed. It also does not mean that every triable issue raised must be allowed to await a full hearing. But the triable issue must be one which discloses a bona fide issue. I think there is no even one trial issue which is bonafide thereby necessitating a full trial. The purported issues put forward by the Defendant are only meant to meticulously divest the Plaintiff of his hard earned money. It is clearly a mega programme employed by the defendant to defeat or delay the case of the Plaintiff. I have used amplifying glasses to see whether the Defendant has disclosed one triable issue but unfortunately, the defence is formless and more so clouded by distinct dishonesty.

I think the defence is a melody implicitly meant to create an improbable situation, may be to prolong the protracted dispute. Without being disrespectful to the Defendant I think he is a merchant of distortion of facts. Perhaps I can say that has all the hallmarks of a dishonest person, whose judgement is clouded by anger or overwhelmed by the urge to succeed against his erstwhile friend. It is time the Defendant emancipates himself from that unpleasant characteristic. He must amend his fences with the Plaintiff by emasculating his purported vintage position. It is time, he understands that he has a responsibility to his friend. I have gone through his replying affidavit and I think it is time he appreciates there is an offence called perjury under the penal code. If there is no road ahead, this court has a duty to inform the Defendant that the journey must come to an end. I have.

In the premises the application is allowed with costs plus interest at court rate.

Dated and delivered at Nairobi this 16th day of March, 2007.

M. A. WARSAME

JUDGE