



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Misc Appli Civ Suit 64 of 2005**

**SAID WAMBOGA.....**

**PLAINTIFF**

**VERSUS**

**MR. H.A.T. ANJARWALLA T/A H.A.T. ANJARWALLA & CO. ADVOCATES.....**

**DEFENDANTS**

**JUDGMENT**

This is an Originating Summons (OS) brought under Order 36 Rule 12 and Order 52 Rule 4(1) of the Civil Procedure Rules in which the Applicant (whom I will hereafter refer to as the plaintiff) seeks orders against the Respondent (whom I will hereinafter refer to as the defendant):

**“1. THAT the Defendants/Respondents as the advocates of the Plaintiff in HCCC 419 of 1994 Said Wamboga – Vs – Heavy Engineering Limited and Bamburi Portland Cement to deliver from the decretal amount plus costs received on behalf of the Plaintiff/Applicant of which the Defendant/Respondents (sic) have not completed settling to date.**

**2. THAT that the Defendants/Respondents to deliver to the Applicant/Plaintiff a list of monies (sic) which they Defendants/Respondents have in their possession or the control (sic) on behalf of the Applicant/Plaintiff which monies the Defendants/Respondents received on behalf of the Applicant/Plaintiff with interest at court rates.**

**3. THAT the Honourable court do order that the Defendants/Respondents to comply with the above within (14) days from the date issuing (sic) of this order in default of which judgment be entered in favour of the Plaintiff/Applicant against the Defendants/Respondents.**

**4. THAT the cost this application be borne by the Defendants/Respondents.”**

The Originating Summons is supported by the affidavit of the plaintiff sworn on the 0<sup>th</sup> February 2005.

In it the plaintiff deposed that on his instructions the defendants filed HCCC No. 419 of 1994 which was a claim for damages for the injuries he suffered on or about the 30<sup>th</sup> August 1993 on the premises of the defendants in that case. The case was filed and later settled at a sum of Sh. 1,728,220/= plus costs making a total of Sh. 1,930,939/= of which the defendant paid him Sh. 1,272,845.95 leaving a balance of Sh. 455,375/=. The plaintiff also claimed that there was a sum of Sh. 127,800/= due to him under the Workmen Compensation Act. He further deposed that despite standious efforts including complaints to the Advocates Complaints Commissioner and the Police the defendant has refused to pay him the said balance of Sh. 455,375/= rendering this Originating Summons necessary.

In response the defendant filed a replying affidavit in which he stated that inspite of having fully accounted to the plaintiff on the amount he received on his behalf in the said case the plaintiff has continued to harass him by false allegations to the Advocates Complaints Commission, the police and other advocates. He annexed to that affidavit copies of the statement of account he said he gave to the plaintiff, and correspondence exchanged with the Advocates Complaints Commission and other Advocates that the plaintiff engaged.

Directions were taken that the matter be heard by *viva voce* evidence.

The plaintiff testified and produced several documents but called no witnesses. He said that out of the sum of Sh. 1,728,220/= awarded to him in HCCC No. 419 of 1994 the defendant transferred to his account Sh. 1,272,845.95. He produced a copy of his bank statement showing that a total of that sum was deposited into his account. When he asked the defendant about the balance and the defendant chased him from his office he went to Labour Offices. There he was given a copy LD 102 form allegedly showing that Sh. 127,800/= over and above Sh. 1,728,220/= had been paid to the defendant on his behalf.

The plaintiff further testified that he went back to the defendant's offices on the 12<sup>th</sup> January 1997. The defendant lied to him that the case had not been decided and when he disputed that and threatened to go to police the defendant told him there was no need and asked him to go back the following day. When he returned the following day with his witnesses Mohamed Rashid, said Baya (now deceased) and one Bakari he found two police officers in the defendants offices. Those officers told him that the defendant had lodged a complaint at the police station against him and asked him to follow them to the police station.

At the police station, the plaintiff further testified, he was, under threats of being handcuffed and thrown into cells forced to sign an acknowledgment **Ex. 4** stating that he had received Sh. 1,400,000/= together with interest thereon in full settlement of his claim in HCCC No. 419 of 1994. The police after that asked him to follow them to the Housing Finance Company of Kenya Limited (HFCK) which he did. On arrival at HFCK he found the two police officers and the defendant seated in the Manager's office. The Manager asked him to go back on the 15<sup>th</sup> January 1997 by which time the money could have been transferred from the defendant's account to his. The Manager then wrote his ID card number on the acknowledgment note Ex. 4, which he had earlier been forced to sign at the police station. He signed for a copy of that note and went away. When he returned on 15<sup>th</sup> January 1997 he was given a House Development Bond for Sh. 1,272,845.95. As he was desperately in need of money he withdrew Sh. 250,000/= out of that sum. He went back to the defendants office and complained but the defendant chased him and told him to take whatever action he deemed fit. That is when he went to the Labour Offices and later to the Advocates Complaints Commission. As the two did not assist him he decided to file this action.

Referring to the exhibits annexed to the defendant's replying affidavit the plaintiff said he only wrote to the Advocates Complaints Commission the letter dated 4<sup>th</sup> November 1996. He denied writing the one dated 26<sup>th</sup> September 1997 and said that his signature on it had been forged. He denied receiving any money from the defendant. He said the cheque for Sh. 166,020/= though bearing his ID card number was not in his name. He said his name is Wamboga and not "Wombog" appearing on that cheque. He said he had given the defendant his ID card number at the time he instructed him and that is how he was able to get it and write it on that cheque.

It was the plaintiff's further testimony that on the 15<sup>th</sup> January 1996 when the defendant claimed he gave him a cheque for Sh. 90,000/= he had gone to visit his family at Kisumu where he was also treated at the General Hospital. He produced a hospital treatment card as **Ex. 6** to prove that. On 15<sup>th</sup> August 1996 when it was claimed he was paid Sh. 100,000/= he was at the Coast General Hospital where he was not admitted but had gone to the Out-Patient clinic. He produced the attendance notebook **Ex. 7** to verify that. He also said that his signature on the acknowledgment dated 13<sup>th</sup> January 1997 which the defendant had forged and that it was not a copy of Ex. 4.

In cross examination the plaintiff denied lodging any complaint with the police or instructing M/S Dola Magani & Company Advocates to write to the defendant that he had received Sh. 1,400,000/= from the defendant. He said that the settlement of his claim in HCCC No. 419 of 1994 at Sh. 1,728,220/= was forced on him by the defendant.

For his part the Defendant testified and called two witnesses. He said he took over the conduct of the plaintiff's case in HCCC No. 419 of 1994 from M/S Gikandi & Company Advocates and settled it for Sh. 1,728,220/=. As the payments were made piecemeal he paid the plaintiff Sh. 90,000/= vide cheque No. 879869 on 15<sup>th</sup> January 1996, Sh. 100,000/= vide cheque No. 228430 on 15<sup>th</sup> August 1996 and Sh. 166,020/= vide cheque No. 228450 on 5<sup>th</sup> December 1996 all of which he later learned were credited to the defendant's account at Bank of India. The defendant further stated that as the plaintiff complained about the settlement he had on 11<sup>th</sup> October 1996 deposited a sum of Sh. 1,400,000/= in a Housing Development Bond at HFCK in his firm's name and that of the plaintiff.

On 20<sup>th</sup> December 1996, the defendant further stated, Inspector Keha had been to see him and instructed him not to release any money to the plaintiff in his absence as the plaintiff had complained that his signature had been forged on certain documents. On 13<sup>th</sup> January 1997 three police officers in the company of the plaintiff and a gentleman who was introduced to him as the plaintiff's debt collector went to his office and asked him to accompany them to the CID offices which he did.

After discussing the matter at the Deputy DCIO's office police advised him to go with the plaintiff to the HFCK and pay him money. At HFCK he and the plaintiff signed withdrawal slips for Sh. 200,000/= as the Housing Development Bond Account was in their joint names. Out of that sum the plaintiff took Sh. 30,000/= and gave Sh. 170,000/= to his debt collector. The plaintiff then got the balance of Sh. 1,200,000/= plus the net interest of Sh. 72,845.95 which had accrued on the Bond placed in another Housing Development Bond in his name. After that the Housing Development Bond Account in his joint name and that of the plaintiff was closed.

The defendant further testified that he received letters from the Advocates Complaints Commission and M/S Dola Magani & Company Advocates complaining on behalf of the plaintiff that he had not accounted to him for all the money he received on his behalf. He had replied to all those letters and produced copies thereof. He said he had fully accounted to the plaintiff for all the money he received on his behalf and prayed that the plaintiff's claim be dismissed with costs.

The defendant's first witness was Allan Mwachala Mronge, an officer in the Bank of India. He said that between 29<sup>th</sup> September 1994 and 1<sup>st</sup> August 1996 the plaintiff maintained an account with them. He confirmed that the defendant's said cheques for Sh. 90,000/= and Sh. 100,000/= and Sh. 166,020/= were all credited to the plaintiff's Account in their bank in spite of the spelling error on one of them. He also said he knew the plaintiff personally as their customer.

The defendant's second witness was Francis Meja the Branch Manager of HFCK Mombasa Branch. He corroborated the defendant's evidence and produced records showing that sums of Sh. 30,000/= and Sh. 170,000/= were withdrawn from the Housing Development Bond Account in the joint names of the plaintiff and the defendant on 13<sup>th</sup> January 1997 and that the balance together with interest was placed in another Housing Development Bond in the name of the plaintiff. He also confirmed he knew the plaintiff personally as their customer.

That is the evidence adduced by both the parties to this suit. After that the plaintiff made a short submission and said that there is nothing to show that he paid Sh. 170,000/= to his debt collector. If that had been the case he wondered why the defendant did not call that debt collector to testify on his behalf. He also said that there is no way the cheque for Sh. 166,020/= bearing the name "Said Wombog" which is not his name could have been credited to his account.

Counsel for the defendant did not make any submission.

I have read all the documents produced as exhibits in this case and carefully considered the evidence adduced by both the plaintiff and the defendant and his witnesses. The Originating Summons raises one simple issue and that is whether or not the defendant paid to the plaintiff the whole decretal sum of Sh. 1,728,220/= in HCCC No. 419 of 1994. The defendant said he did while the plaintiff insists there is a balance of Sh. 455,375/= still outstanding. The determination of that issue is dependant on whose evidence I believe, that of the plaintiff or that of the defendant and his witnesses.

The plaintiff is a leg amputee on crutches. Whether or not that was from the injuries that gave rise to HCCC No. 419 of 1994 I was not told and is not clear from the records in this case. Whatever may have caused him the amputation is not an issue in this case. What is important is that being in that condition I was quite sympathetic to him and being a lay man unrepresented in this case I gave him a lot of leeway even when he was labouring on irrelevancies. That notwithstanding, however, having considered as a whole the evidence tendered in this case I have reached the conclusion that the plaintiff was not truthful. He was obviously not happy with the settlement reached in HCCC No. 419 of 1994. The defendant said so and the plaintiff himself said it was imposed on him. Whether or not that is what made him lie in this case I do not know.

The plaintiff denied receiving from the defendants the cheques for Sh. 90,000/= Sh. 100,000/= and Sh. 166,020/= certified copies of which were produced as **Exhibits 7, 8 and 9** respectively. He said no bank could pay to him the sum of Sh. 166,020/= in the cheque **Ex. 9** which bore the payee's name as "Said Wombog" instead of his correct names of "Said Wamboga." According to him the payee's name on the cheque for Sh. 90,000/=, **Ex. 7**, is "Said Waimboga". I cannot myself see the letter "I" in that name but he insists it is there. May be it is my poor eye sight that is failing me. Be that as it may, Allan Mwachala Mronge, DW 1 an officer in the Bank of India said that between 29<sup>th</sup> September 1994 and 1<sup>st</sup> August 1996 the plaintiff maintained an account, No. 10175, in his bank into which all the three cheques were credited. He produced copies of bank statements, **Exhibits 18 and 19**, showing that the cheque for Sh. 90,000/=, **Ex.7**, was credited to that account on the 17<sup>th</sup> January 1996, cheque No. 228430 for Sh. 100,000/= **Ex. 8** was credited on the 28<sup>th</sup> August 1996 and cheque No. 228450 for Sh. 166,020/= **Ex.9** was credited to that account on the 13<sup>th</sup> December 1996. It is significant to note that the plaintiff did not deny owning the said account in the Bank of India. The defendant's bank statements Exhibits **11A, 11B and 11C** show that those same cheques were debited to his account on or about the same dates they were credited to the plaintiff's account.

I have no doubt in my mind that the plaintiff was issued with those cheques and that they were all credited to is said account, in spite of the spelling mistake on one of them. As DW 2 said Banks are normally strict on such things when the cheques are being encashed on the counters and when they do not know the payees. In this case the bank of India knew the plaintiff and the amounts were credited to into his account.

The plaintiff also denied withdrawing a total of Sh. 200,000/= from the Housing Development Bond Account No. 2/85999 at HFCK in his joint name and that of the defendant. However, withdrawal Notices **Exhibits D13A and D14** show that the plaintiff jointly with the defendant withdrew sums of Sh. 30,000/= and Sh. 170,000/= from that Account on the 13<sup>th</sup> January 1997. I am also satisfied that those sums were withdrawn from that account and as the defendant said the plaintiff took Sh. 30,000/= and paid Sh. 170,000/= to his debt collector named "Njoroge Civil Debt Collectors" (sic) in the plaintiff's Advocates' letter to the defendant **Ex. D16**.

I cannot understand how the defendant could have forged or caused to be forged the letter of complaint, **Ex. D17B**, dated the 26<sup>th</sup> September 1997 addressed by the plaintiff to the Advocates Complaints Commission or the one **Ex. DII** dated 30<sup>th</sup> January 1997 and addressed by M/S Dola Magani Advocates to the defendant. The reason why the plaintiff denied knowledge of them is because they both state that the plaintiff received Sh. 1,400,000/= from the defendant. The plaintiff also lied when he said that he met police officers in the defendant's office on 13<sup>th</sup> January 1997. The truth of the matter is that it is plaintiff who lodged a complaint to the police against the defendant.

Having evaluated all the evidence tendered by both parties in this case I am satisfied that the defendant paid to the plaintiff the full decretal sum in HCCC No. 419 of 1994 of Sh. 1,728,220/= and in fact over paid him by Sh. 27,800/=, and therefore fully accounted for that sum. This Originating Summons is founded on concocted lies and has therefore no merit at all. It is hereby dismissed with costs.

DATED and delivered this 12<sup>th</sup> day of May 2006.

**D. K. MARAGA**

**JUDGE**