



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 782 of 1998

THE PICTURE COMPANY LIMITED.....

PLAINTIFF

VERSUS

EARNEST MWANGI NDEGWA1ST DEFENDANT

MRS ANNE M NDEGWA2ND DEFENDANT

J U D G M E N T

In the summary the following is the plaintiff's claim as filed in court in this matter.

1. That the plaintiff was at all material time holder of the sole filming rights for Hugh Masekela Tour sold to it by the defendant (1st)
2. It was a condition of the said purchase of that right that the defendant (1st) would facilitate the filming by the plaintiff that entire tour.
3. Following that purchase the plaintiff paid kshs 206, 490/- in furtherance of its rights to film the said tour.
4. The defendant breached the said agreement and as a consequence the plaintiff was unable to exercise its rights to film resulting in the total loss of kshs 836, 490 in incurred by the plaintiff.
5. The 1st defendant acknowledge in several memorandum liability to the plaintiff and partly paid kshs 259, 000 leaving a balance of kshs 577, 490 owing to the plaintiff.
6. The second defendant, who is the mother of the 1st defendant through an advocate Mathenge & Muchemi made an offer to pay plaintiff kshs 630, 000 in liquidation of the 1st defendant.
7. The plaintiff accepted that proposal.
8. The 2nd defendant paid kshs 100, 000 but failed to pay the balance of kshs 530, 000/- by instalments of 256, 00 by 30.1.1998 and the same amount on 18.2.1998.
9. The plaintiff then finally prayed for judgment against the defendants jointly and severally for kshs 577, 490 with interest from 3.11.1997 and costs

The 2nd defendant denied the plaintiff's claim and stated that the offer to made to pay, although not made to offset the 1st defendant's indebtedness, was made gratuitously. The second defendant denied being indebted to the plaintiff the amount of kshs 530, 000/.

The 1st defendant also denied the plaintiff's claim and denied admitting the plaintiff's claim. That the payments he made were made under duress and coercion.

The plaintiff's evidence was adduced by GEORGE NDIRANGU GITHUA (P W 1). He described himself as a film produce for the plaintiff. He said that he is responsible for making production contracts, supervision products, negotiating products and authorising payments in respect of product or acquisition of products for the plaintiff company.

That on or about October 1997 he received a telephone call from the 1st defendant when he said that "**they**" were bringing musicians from South Africa that is Jazz Player Hugh Masekela.

The 1st defendant inquired whether the plaintiff was interested in filming the concert with a view to the plaintiff making videos to sell to the public.

That they finally agreed at the price for those film rights at US dollars 10, 000. That is for the rights to film the concert in Kenya.

The plaintiff paid 20% of that agreed fee that is kshs 126, 000/-.

The plaintiff then produced a 30 seconds video to go to Kenya Television Network (KTN), as also booked airtime on KTN nod paid KTN on account.

The plaintiff paid the balance due on those rights, that is khs 340, 000 which money P W 1 said he paid to the 1st defendant.

That on the day of concert the plaintiff was denied the right to film the concert at the carnivore restaurant. That the reason for the refusal, P W 1 was told, was because the plaintiff had not paid enough for the rights and secondly because a Murage of South Africa had not given the consent for the filming to be undertaken. P W 1 was told he could not carry out the filming by Joe Kabiru, the 1st defendant and by Murage.

That P W 1 agreed with the 1st defendant, that evening of the concert, that "**they**" would refund the money to the plaintiff.

P W 1 said that the plaintiff lost USD10, 000 plus the costs of organising the camera, light equipment and also testing them.

P W 1 produced a fax message dated 10th November 1997, written by the plaintiff to the 1st defendant at Metro Media audio – visual production. The letter/fax is as follows:

"10th November 1997

Mr Ernest Mwangi Ndegwa

Metromedia Audio – Visual

Production Nairobi

FAX 214853

Dear Mwangi

HUGH MASEKELA TOUR

Thank you for your letter of November 3 and your agreement to make restitution of all consideration paid to you or on your behalf to Media Owners.

For your records cash paid to your organization is kshs 466, 200 in two cheques Nos 88 for kshs 126, 000/- on 23rd October and 091 for kshs 340. 200/- on 27th October respectively. Media buys on your account are at KTN for 17 spots.

We shall have all our claim with you in a couple of days for settlement by November 14th, 1997 as undertaken.

Thank you for your co-operation.

G Githu

PP The picture Company Ltd.”

P W 1 referred to plaintiff's exhibit NO. 2 entitled “**statements of account**”, which had a breakdown of the plaintiff's claim totalling kshs 836, 490/- addressed to Metromedia Audio Visual Production, and dated 11th November 1997.

That after a demand was sent to the 1st defendant by plaintiff's advocate, the 2nd defendant wrote to that advocate and proposed to pay kshs 100, 000, and proposed to pay other sums by instalment. That the 2nd defendant paid kshs 100, 000 but failed to pay any other sums in accordance to the proposal.

The 2nd defendant, after the plaintiff complained to Criminal Investigation Department (CID) of police, issued 7 cheques for kshs 53, 000. That 4 of those cheques were presented for payment but were dishonoured. On being dishonoured the plaintiff did not present for payment the other cheques.

On being cross-examined P W 1 said that the plaintiff had contracted with Metromedia audiovisual production (Metromedia). That the 1st defendant had said that he represented the said Metromedia. That the 1st defendant had signed some letters where he said that he owned Metromedia. P W 1 however confirmed that he had not carried out a search over the company Metromedia. 1st defendant confirmed that Hugh Masekela had a contract with Metromedia. That the plaintiff paid 20% for the filing rights, that is kshs 126, 000, to a question put by defendant's counsel P W 1 said, “**I imagined 1st defendant acted for metromedia.**” That money spent by the plaintiff on behalf of the 1st defendant in preparation of filming the concert that the receipts of the same were not before the court.

P W 1 said that he had known 1st defendant for about 20 years that when 1st defendant failed to refund to the plaintiff as promised, a complaint was made by the plaintiff to CID, and that such reporting was not to pressurise the 1st defendant but to get him to refund the money.

1st defendant **EARNEST MWANGI NDEGWA** (D W 1) stated as follows; that he had known P W 1 since 1992 after P W 1 was introduced to the family the brother of D W 1.

D W 1 said that he introduced P W 1 to his business associate Joe Kabiru, who had a contract with Hugh Masekela. That Kabiru gave plaintiff Television and media rights.

D W 1 said that he is a partner with Joe Kabiru in a company called ‘**show case promotion**’ but that

he is not a partner in Metromedia.

That the contract between plaintiff and Joe Kabiru was a barter arrangement, whereby plaintiff funded adverts for the concert and also paid cash, kshs 126, 000, which was paid to Joe Kabiru and kshs 340, 000 was paid to D W 1.

That the plaintiff was refused to film the concert by the musician.

That following that refusal to film the concert, some police officers went to D W 1' house and asked him to go to CID headquarters to make a statement on the issue of the plaintiff. D W 1 said that he ran away. That following his running away, the police camped at his gate and harassed his family.

That the 2nd defendant (D W 1's mother) in attempt to stop the police harassment talked to an advocate called Muchemi and the advocate and D W 1's mother determined the money that ought to be paid to stop police harassment.

That thereafter 2nd defendant contacted an Inspector of Mr Mworira, who, on assuring D W 1 that he would not be arrested, D W 1 attended the CID and was questioned.

That under duress of the police D W 1 paid kshs 159, 000 and then issued post dated cheques in favour of the plaintiff. D W 1 said that the plaintiff at one time asked him to request his father to pay the debt.

On being questioned why he feared the police D W 1 said that in those days police were feared and that he perceived their presence at his gate as harassment. That he was genuinely afraid of the presence of the police.

D W 2, 2nd defendant, was Mrs Anne Ndegwa.

She said that that the 1st defendant (D W 1) is her son. That she had known P W 1 since 1972.

That at the material time she was called by D W 1's wife, who said that there were police officers who were camping at the gate. D W 2 at that time was in Nyeri and there was little she could do. Two days later P W 1 called her and said that D W 1 owed the plaintiff money, but that he was unable to refund it. D W 2 said that she realised she could not ignore 'it'. That at that time one did not joke with police. That after getting an advocate Mathenge Muchemi, she paid kshs 100, 000. That she paid that amount to stop police harassment. That after making that payment she set to find out why police were involved and therefore she went to police headquarters and was attended to by police Inspector Mr Mworira. After making inquiry Inspector Mworira told her that he did not understand why police were involved.

On being cross examined she said that she first made the payment then went to see the police. That she did not promise to pay more than kshs 100, 000 that that the advocate Mathenge Muchemi made an offer to pay by instalments to the plaintiff without consulting her. Once the advocate made that proposal, he told her that she could not retract it.

The broad issues that emanate from the pleadings hereof are:

- (1) Was there a contract between the plaintiff and the 1st defendant?
- (2) If No 1 is affirmative; is the 1st defendant indebted to the plaintiff, and if so, how much.
- (3) Did the second defendant issue a guarantee in favour of the plaintiff?
- (4) If No 3 is in the affirmative is the 2nd defendant indebted to the plaintiff, and if so, how much.

As a general rule, oral contract, as much as written contracts, are fully enforceable in law. The plaintiffs contract, according to the evidence adduced by P W 1, was an oral contract.

The plaintiff pleads that the plaintiffs agreed to buy from the 1st defendant filming rights of the concert of the Jazz musician Hugh Masekela. However in evidence P W 1, on behalf of the plaintiff stated that he contracted with metro media. He said that the 1st defendant, stated he represented metro media in the transaction PW 1 then finally said that he imagined the 1st defendant acted for metro media. The plaintiff failed to adduce evidence on the ownership of that entity metro media. The court is unable to confirm that the 1st defendant is liable, in view of the fact that P W 1 said that the plaintiff contracted with metro media. In cross-examination 1st defendant accepted that there was an affidavit where he had said he was a partner of metro media but that affidavit was not produced before court.

P W 1 alleged that in furtherance of the contract, to film the concert, plaintiff paid 20% of the agreed contract price. The 20% was kshs 126, 000/-. Plaintiff's exhibit No. 2, the statement sent to Metro media, indicates that on 23rd October 1997, that amount, being 20% for the rights to film, was paid to Joe Kabiru. That payment was not paid to the 1st defendant.

The plaintiff on the other hand pleads that the plaintiff, in furtherance of the contract spent kshs 206, 490. There are no particulars of the breakdown of this amount, and none was offered at the hearing. There is certainly no connection between the alleged 20% payment, and the alleged money spent in furtherance of the contract kshs 206, 490/- as pleaded in the plaintiff.

Plaintiff's exhibit No. 2, the statement, gives a breakdown of sum relating to payments made totalling the alleged contractual amount of kshs 836, 490/-. Those payments, relate to payments made to KTN, camera men, labour and rental thereof, van rental miscellaneous expenses etc, but the plaintiff, in view of the fact that its claim is denied, by both defendants, failed to specifically prove each item. These are after all special damage claims, and the plaintiff is obligated to prove them.

1st defendant stated in evidence that he was not a partner with Joe Kabiru, the proprietor of Metro media.

But plaintiff in its case, states that it contracted with the 1st defendant and does not admit having contracted with either Metro Media or Joe Kabiru. P W 1, as stated before did in cross-examination accept that the plaintiff contracted with Metro Media, but stated that, he imagined 1st defendant was its proprietor. It does not escape the court's attention that P W 1 stated in evidence that when the plaintiff contracted to buy the filming right, it was after the 1st defendant called P W 1, and said that "**they**" were bringing musicians from South Africa. When the plaintiff was denied the right to film, P W 1 said that he spoke to 1st defendant who said that "**they**" would refund the plaintiff. The implication of the use of the word "they" is that the plaintiff knew it was not contracting with one person, in the person of the 1st defendant, only but also with someone else.

Plaintiff alleged in the plaintiff that the 1st defendant admitted in several memorandums the plaintiff's debt. The plaintiff failed to produce those memorandums in evidence.

Plaintiff produced 7 cheques issued to it by the 1st defendant. P W 1 stated that four of those cheques, on presentation to the bank, they were dishonoured. The other cheques were not banked. Can the court hold that these cheques are either acknowledgment of an existing contract between the plaintiff and the 1st defendant or acknowledgment of a debt. 1st defendant said that he issued those cheques to stop police harassment, at the initiation of the plaintiff. 1st defendant said, at the time that harassment took place, one did not '**yoke**' with police. He said that he was genuinely afraid, to the extent that he ran away from his matrimonial home. That was also supported by the 2nd defendant. The court will take judicial notice that there are days in this country's rule when it was notorious that police force was used as instruments of oppression, and that particularly with the right consideration being paid, to them police force, they were used to collect debts of civil nature. The means, by which they did this was to threaten, use coercion and

duress. The plaintiff, through the evidence of P W 1 accepted that a complaint was made to the police. It therefore follows that it is correct what 1st defendant says that police camped at his home, which led him to run away. If indeed the complaint to police was a genuine complaint of a criminal nature, the police would have proceeded to charge the 1st defendant. But what happened was that when the 1st defendant made payment and issued post-dated cheques the police withdrew from seeking to arrest the 1st defendant. The court therefore does accept 1st defendant's evidence that he paid and issued those cheques under duress. The 2nd defendant, mother of the 1st defendant, stated that on realising her son was being sought by police, she decided to pay ksh 100, 000 to stop that harassment then sought assistance from a police inspector Mr Mworira.

The burden to prove that a contract existed between the plaintiff and the 1st defendant lay squarely upon the plaintiff. The plaintiff failed to prove on a balance of probability that it contracted with the 1st defendant, indeed P W 1 stated that the contract was between the plaintiff and metro media, and in that regard the plaintiff did not prove that the 1st defendant was either proprietor or partner of the said entity metro media. The court is unable to find that such a contract between the plaintiff and the 1st defendant existed.

The claim against the second defendant is defendant on a letter written by an advocate, Mathenge Muchemi on behalf of the 2nd defendant whereby an offer was made, to pay the plaintiff the money owed to the plaintiff by the 1st defendant.

The plaintiff, in learned counsels submissions stated that the 2nd defendants promise, through the advocate's letter, amounted to a guarantee. If indeed it was a guarantee, it ought to have been pleaded as such but it was not. A guarantee, in any case, ought to be in terms that if the principal debtor does not pay the guarantor shall pay. Such document ought to also contain the guarantor's signature. That was not the case with the 2nd defendant. The letter, which she disowned in evidence, was written by an advocate. It is also legally required that the principal debtor be liable to pay the debt being guaranteed. The word guarantee is defined in Mozley & Whiteley's Law Dictionary as:

“In the strict sense where one person contracts as surety on behalf of another on obligation to which the latter is also liable as the primary party. A promise to answer for the debt, default or miscarriage of another, which to be enforceable must be evidenced in writing.....”

2nd defendant pleaded that the promise to pay was made gratuitously. That it was given without valuable consideration. Plaintiff on being put on notice of that defence did not show, by evidence, what the consideration was for that promise to pay. That promise to pay cannot be enforced in law without being supported by consideration. If such promises were to be enforced in law, it would annihilate the necessity of any consideration, in as much, the mere fact of giving a promise creates a moral obligation to perform it, to have it legally enforceable the effect might be attended with mischievous consequences on society.

The courts finding is that, that promise, made by the 2nd defendant's advocate is no legally enforceable and the plaintiff has by bringing action against the 2nd defendant, imposed on her costs of defending a groundless suit.

The plaintiff's plea, in submissions, that the 2nd defendant's promise to pay 1st defendant's alleged debt, entitled the plaintiff to plead equitable estoppel is defeated by the fact that equity follows the law. Even the estoppel in section 120 of the Evidence Act, requires that the plaintiff to prove it believed the promise made, and it acted on such belief. The plaintiff did not show how it acted on the belief that the 2nd defendant would pay.

The sum total is that the court finds that the plaintiff has failed to prove its case against the 1st and 2nd defendant.

It came out in evidence, that the 2nd defendant is the wife of the 1st African Governor of the Central bank of Kenya, whilst the 1st defendant was their son. It is possible that the plaintiff chose to follow this family for the alleged amount in the hope that if sufficient pressure was put on them, payment would be forthcoming perhaps because they are people with means. The plaintiff may have forsaken following Joe Kabiru for that reason. 1st defendant did say that P W 1 tried to persuade him to get his father to pay the debt. Also 2nd defendant did say that when police were looking for the 1st defendant P W 1 called her to tell her that 1st defendant was indebted to the plaintiff.

However, that as it may be, this suit is dismissed with costs being awarded to both defendant.

MARY KASANGO

JUDGE

Dated and delivered this 18th July 2006

MARY KASANGO

JUDGE