



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

CIVIL CASE NO. 541 OF 1999

P.S. BHANGRAPLAINTIFF

VERSUS

AUSTIN KITOLOLO

T/A KITOLOLO CONSULTANTS.....DEFENDANT

J U D G E M E N T

The Plaintiff, **P.S. BHANGRA**, seeks judgment against the Defendant, **AUSTIN S. KITOLOLO**, for the sum of Kshs.9.5 million plus costs and interest. It is pleaded in the amended plaint dated 7th June, 1999 that the said sum is “money had and received by the defendant from the Plaintiff as a personal loan on various dates.....”. In his amended defence dated 22nd June, 1999 the Defendant pleaded as follows, *inter alia*:-

“4a. The Defendant denies that the amount involved was a personal loan as alleged and states that the Defendant received the money on behalf of Kitololo Consultants for services rendered.

“4b. The Defendant states that the Plaintiff as an agent of Ruaha Concrete Company Limited director (sic) and with the authority of its Harbinder Singh Sethi requested the Defendant on diverse days to assist in drawing technical papers in support of claims for additional payments in respect of increased scope of work, value added tax and extension of time, in respect of the construction of an access road to Ngema Station for Kenya Pipeline Company by Ruaha Concrete Company Limited and for which Kitololo Consultants Limited were the Consulting Engineers. The claim for additional work was for Kshs.100,000,000/00 for which it was agreed that the Defendant would be paid 10% upon completion of the said additional drawings.

“4c. The Plaintiff paid the Defendant on behalf of the contractor in instalments due to cash flow problems with a balance of Kshs.500,000/00 still unpaid to date in respect of services rendered in the aforesaid project by the Defendant.

“4d. Towards the end of 1997 the friendship between the Plaintiff and Mr. Harbinder Singh Sethi of Ruaha Concrete Company Limited went sour and the Plaintiff has sought to recover money from the Defendant who had already rendered services as agreed.”

The Defendant thus denied the Plaintiff’s claim. There is a reply to the amended defence in which the Plaintiff denies the Defendant’s allegations.

There was an application by the Plaintiff by chamber summons dated 8th June, 1999 for an order to strike out the defence and for entry of summary judgment. The same was dismissed by Commissioner of Azzize Gacheche (as she then was) on 21st September, 1999.

No agreed statement of issues appears to have been filed. In his amended statement of defence the Defendant admits receiving the sum claimed. The issue to be determined is therefore straight-forward. Was the money a personal loan advanced to the Defendant by the Plaintiff, as pleaded by the Plaintiff, or was it money due to Kitololo Consultants Limited for services rendered from Ruaha Concrete Company Limited (hereinafter called Ruaha), and paid by the Plaintiff on behalf of Ruaha, and received by the Defendant on behalf of Kitololo Consultants Limited, as pleaded by the Defendant?

Both parties testified. None called any other witness. I have carefully considered the testimonies of these two. I have also read the written submissions filed for the Plaintiff. None were filed for the Defendant despite further time being granted to enable the Defendant's counsel to file his submissions. It is to be noted that both counsels chose to put in written submissions. None of them asked to submit orally.

The Plaintiff produced in evidence copies of some six cheques by which he paid the Defendant varied sums of money totaling Kshs.9,500,000/00. The cheques are dated between 20th June, 1996 and 15th February, 1997. They are all in the Defendant's name. Although they all do not bear the name of the drawer, the Plaintiff stated that they were all drawn on his personal account and that he could get bank statements to show the name of the account. The Defendant did not take him up on this offer. All the cheques save one were signed by the Plaintiff. But he did say that three other persons were signatories to the account. They were his wife, his cousin called MR. SIRA and also MR. HARBINDER SINGH SETHI. Each of them could withdraw any amount from the account. The one cheque not signed by the Plaintiff was signed by the aforesaid MR. SETHI.

The Plaintiff further testified that the Defendant had asked him for a personal loan of Kshs.11,000,000/00. But he was able to advance him only Kshs.9.5 million. The Defendant had told him that he required the money to buy out some partners with whom he owned property. The Defendant had been his friend since 1990. He knew he was a consulting engineer. They had been involved professionally though not directly. At one time between 1993 and 1997 the Plaintiff was a consultant to Ruaha while the Defendant was supervising one of Ruaha's projects, the Ngema Road Project, for Kenya Pipeline Company Ltd. They met socially and the Plaintiff visited the Defendant's office many times.

The Plaintiff further testified that the Defendant did not render to him any professional or other services that would have required him to pay the Defendant the Kshs.9.5 million. He denied that he paid the Defendant that sum on behalf of Ruaha or on behalf of Mr. Sethi. He was not aware of any payments agreed between the Defendant and Ruaha or Mr. Sethi. He denied that he was a director of Ruaha, though between 1993 and 1997 he was doing some sub-contract work for them. But he stood in for Mr. Sethi who was the managing director of Ruaha, and who was mostly out of the country. He, Plaintiff, would sign documents on behalf of Mr. Seth for Ruaha but not cheques. He did not have any official position or capacity in Ruaha.

On his part the Defendant, a Consulting Civil Engineer of 28 years standing, admitted receiving the total sum of Kshs.9.5 million from the Plaintiff by the exhibited cheques. But it was not a personal loan. The money was part of Kshs.10 million that was due to his company, Kitololo Consultants Limited, from Ruaha, for professional services rendered. The services were a variation of the contract between Kenya Pipeline Company Limited (hereinafter called Kenya Pipeline) and Ruaha. The variation increased the contract sum by some Kshs.130,165,880/00. Ruaha instigated the variation, but the same was accepted by Kenya Pipeline. Kitololo Consultants Limited, said the Defendant, charged the additional fee to Ruaha and not to Kenya Pipeline because Ruaha instigated the variation. At one point the Defendant stated that the variation was a conspiracy between Ruaha and the Chief Officers of Kenya Pipeline to fleece money from Kenya Pipeline, and that he or his company professionally facilitated this theft by working out the variation documents. His or his company's cut of the stolen funds was Kshs.10 million which was to be paid through Ruaha. If this is what professionals do so that public parastatals may be looted one can only cry for this beloved country. The Defendant further testified that the Plaintiff paid to him the Kshs.9.5 million on behalf of Ruaha. He accepted it on behalf of his company, Kitololo Consultants Limited. All the cheques were in his name and were banked in his account. But he would subsequently transfer the funds to the account of Kitololo Consultants Ltd. He had no evidence of these transfers. He denied that the money was a personal loan to him from the Plaintiff. The Plaintiff was not his friend. He knew him only professionally. He (Plaintiff) had been introduced to him by Mr. Sethi as his "finance man". His relationship with him was not such as would have permitted him to borrow money from the Plaintiff. He did not socialize with him. They did not visit each others' homes. He (Defendant) did not buy any real estate at the time that the Plaintiff alleges he lent him the money.

As I have already stated, the issue to be decided is fairly straight-forward. Was the Kshs.9.5 million

paid by the Plaintiff to the Defendant a personal loan from the one to the other or was it money paid by Ruaha through the Plaintiff and received by the Defendant for Kitololo Consultants Limited for professional services rendered? I find no difficulty in deciding the issue. The payments were made by cheques drawn on the Plaintiff's personal account. All the cheques save one were signed by the Plaintiff. All the cheques were drawn to the Defendant personally.

They were all banked in his personal account. There is no evidence that the Defendant subsequently transferred the funds to the account of Kitololo Consultants Ltd., who in any case never raised any invoice with Ruaha for Kshs. 10million or any other sum. Nor did Kitololo Consultants Ltd. issue a receipt to Ruaha for the Kshs.9.5 million. By the Defendant's own testimony Kenya Pipeline approved the additional payments to Ruaha by letter dated 8th August, 1996. By this date more than half of the Kshs.9.5 million had already been paid to the Defendant. Is it likely that Ruaha would have paid Kshs.5million to Kitololo Consultants Limited before approval of the additional payments by Kenya Pipeline? I think not. It is also significant that the Defendant never sought to issue a third party notice to Ruaha given the nature of his defence. Nor did he call Mr. Sethi to testify who he said was still his friend. His testimony regarding the variation of the contract was contradictory. While at first he asserted that the whole variation was a fraud hatched by Ruaha and officers of Kenya Pipeline, and happily facilitated by his professional expertise, to defraud Kenya Pipeline, he admitted in cross-examination that some facets of the variation were indeed genuine and merited. His figures of the original and varied contract sums did not add up.

After carefully considering the evidence placed before the court I am satisfied on balance that the money paid by the Plaintiff to the Defendant in the total sum of Kshs.9.5 million was a personal loan advanced by the former to the latter. I reject the Defendant's defence that it was money due to Kitololo Consultants Limited from Ruaha Concrete Company Ltd. for professional services rendered, or that the money was paid by the Plaintiff on behalf of Ruaha and received by the Defendant on behalf of Kitololo Consultants Limited.

I will enter judgment for the Plaintiff for the sum of Kshs.9,500,000/00 plus interest thereon at court rates from the date of filing suit until payment in full. The Plaintiff shall also have the costs of this suit. Orders accordingly.

DATED, PRONOUNCED AND SIGNED IN OPEN COURT THIS 29TH DAY

OF APRIL, 2005.

H.P.G. WAWERU

JUDGE