



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

Civil Case 597 of 2004

AHMED S. JEIZANPLAINTIFF

VERSUS

ABDULHADI AHMED TAIB.....DEFENDANT

R U L I N G

This is an application for summary judgement.

It is the Plaintiff's case that on 23rd November 1998 he lent to the Defendant the sum of Kshs. 10,000,000/=. The said loan was to be paid in two instalments, within a period of two years. In accordance with the agreement between the parties, the defendant issued two cheques for Kshs. 5,000,000/= each. Both the said cheques were postdated.

However, the Defendant later instructed the Plaintiff not to bank the cheques, on the grounds that his bank account did not have sufficient funds. Thereafter, the Defendant failed to pay the loan, prompting the institution of legal proceedings.

In support of this application, the Plaintiff has exhibited the Agreement dated 23rd November 1998. But, in his Amended Defence, the Defendant denies having requested and/or received Kshs. 10,000,000/= from the Plaintiff. He also denies issuing two post-dated cheques to the Plaintiff. As far as the Defendant was concerned, the Agreement as well as the two cheques were obtained through fraud and forgery. He asserts that he never executed any agreement with the Plaintiff for Kshs. 10,000,000/=.

In the particulars of the alleged fraud and forgery, the Defendant contends that the Plaintiff stole two cheques, wrote his name on each of them, together with the sum of Kshs. 5,000,000/= on each cheque, and then forged the Defendant's signature on the cheques.

The other line of defence put up by the Defendant was to the effect that the parties to this suit were shareholders in a transport business, City Link Express Limited. The said company was dissolved through a memorandum of understanding dated 18th January 2000, and the assets, as well as liabilities were distributed equitably between the Plaintiff and the Defendant. Following the said equitable distribution of the assets and liabilities of City Link Express Limited, the Defendant contends that neither of the parties had any claim against the other.

Notwithstanding the allegations of fraud and forgery, the Plaintiff still believes that he is entitled to summary judgement. He says that the Defence raises absolutely no triable issues, as it is a sham. As far as the Plaintiff is concerned, the allegations by the Defendant, to the effect that he had not only reported the fraud and forgery to the police, but had also recorded a statement with the police, is all an afterthought.

In any event, the Defendant's alleged statement to the police was not independent, as it was authored by the Defendant.

If the Defendant has made a self-serving statement to the police, this court cannot make a clear finding thereon. I say so because it is not the role of the court to conduct investigations on matters which were outside its perview. In other words, the issue as to whether or not the statement which the Defendant recorded with the police was genuine; and furthermore whether the substance thereof was well-founded, or absolutely inaccurate, can only be established, first, through further investigations to be conducted by the police, and secondly, after each of the parties has testified together with his witnesses, and been cross-examined.

But there is no doubt at all in my mind that the Defendant has raised some very serious issues. Clearly, he will be required to prove his assertions that the Plaintiff forged both the Agreement dated 23rd November 2000, as well as the two cheques for Kshs. 5,000,000/= each. If he should fail to discharge that burden of proof, the Defendant would probably be held liable. I say "**probably**" advisedly, as the Agreement dated 23rd November 1998 expressly stated that the two post-dated cheques were to be held "**as security for the due**

Repayment of the said loan."

One wonders why the two cheques were to be held as "**security**", instead of being the instruments for payment.

Furthermore, why did the Plaintiff fail to present the two cheques for payment, whereas it was an express term of the Agreement dated 23rd November 1998, that the "**Bank Accounts in**

Respect of which the cheques are drawn shall always have sufficient funds to clear the said cheques on their due dates."

To my mind, the decision by the Plaintiff to withhold presentment of the cheques is suggestive of the existence of other terms and conditions governing the relationship between the parties, other than the Agreement.

Having given due consideration to this matter, I hold the view that this is not a plain and obvious case. It requires the parties to provide to the court many more answers than those contained in the material already placed before the court. Accordingly, I decline the application, and direct that the Defendant shall have unconditional leave to Defend the suit.

The Plaintiff shall pay the costs of the application.

Dated and Delivered at Nairobi this 26th day of October 2005.

FRED A. OCHIENG

JUDGE