



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

Civil Case 1220 of 2001

MOYEZ SADRUDIN BHANJI..... PLAINTIFF

VERSUS

HANIF HIRJI..... DEFENDANT

JUDGMENT

In a plaint filed in this court on 6th August, 2001, the Plaintiff one Moyez Sadrudin Bhanji sued the Defendant one Hanif Hirji. The Plaintiff claim against the Defendant is for a sum of K.shs 2,971,159/- in respect of an alleged balance of a loan amount given by the Plaintiff to the Defendant during the year 1997. The Plaintiff also claims interest at Bankcommercial rates, namely 26% p.a. from 1.7.2001 until payment in full and costs of the suit.

The Defendant lodged his defence and a counterclaim on 19th September, 2001. He denies that he ever obtained any loan facility from the Plaintiff. The Defendant avers that he entered into a business partnership with the Plaintiff on the basis of which the Plaintiff made a total payment of K.shs 5,103,500 into the business venture between 1997 and 2000. He claims that the payments were made from the profits of the partnership at a time the business was thriving. The Defendant contended in his defence and counter claim that he paid a total of shs. 3,500,000/- to the Plaintiff under duress and/or undue influence. The Defendant set up a set-off of this sum. In his counterclaim he sought the following prayers:-

- i) *That accounts be taken of the partnership*
- ii) *Payment of the amount found due to the Defendant on taking of the account and interest thereon be paid to the Defendant by the Plaintiff*
- iii) *General damages for false imprisonment.*
- iv) *General damages for breach of contract*
- v) *Interest and costs.*

The hearing of the suit came before me on 1st December, 2003. The Plaintiff and his counsel, Mr. Arwa were present. When the matter was called out, it was established that the Defendant was not in court. The record showed that his advocate, Mr. Singh Gitau was allowed by the court to withdraw from acting for

the Defendant on 28.05.03. At a scheduled hearing on 12.6.03, the Plaintiff was given an opportunity to hire another lawyer.

At the hearing before me, I confirmed that the Defendant was served with the Hearing Notice as he had not appointed another lawyer to replace the previous advocate. The hearing then proceeded in the Defendant's absence.

The hearing took place on 1.12.003, and 10.12.03. Submissions were made in writing and filed on 18.12.03. The Plaintiff testified on oath and he called 2 witnesses. From their testimonies, it was established that on 28th February, 1997, the Plaintiff at the Defendant's request and instance paid the sum of K.shs 5,000,000/- to the Defendant's supplier in the United Arab Emirates pursuant to a joint venture Agreement entered into between the Plaintiff and the Defendant whereby the Defendant was to use the money in a solely managed business by him on condition that he would account to the Plaintiff for the profits of the business which was to be shared equally by the parties.

The Defendants having invested the money in his business failed to account for the profits and loss and continued the business in circumstances that made it impossible for the Plaintiff to know how much profit or loss had been made and how much the Defendant had paid himself. The Plaintiff then decided to terminate the agreement. The Agreement had been drafted by the Defendant. The final paragraph of the Agreement entered into and signed by both parties on 17th July, 1998 provided as follows:

"If either party wants to terminate this agreement, then a notice of one month should be given to the other party at the end of which Moez Bhanji should be given back his investment plus any profits or losses".

This agreement is P Exh. No.1. The Plaintiff claims that he is entitled to be paid back his earlier investment together with all profits made (after deduction of the losses) and interest thereon as agreed by both parties. The Plaintiff and Defendant could not agree on the amount of money payable and consequently they sought the assistance of PW3, Mr. Azim Jamal Virjee, a community leader who calculated the total sum payable as K.shs 5.7 million together with interest thereon until payment in full. Both parties accepted this sum and the Defendant even gave the Plaintiff two cheques amounting to K.shs 5.9 million (including accrued interest). Both cheques bounced on presentation to the bank.

Evidence was also tabled showing that the Defendant wrote a letter assigning in favour of the Plaintiff the benefits of some insurance policies but later changed his mind.

On a balance of probability I do find that the agreement between the Plaintiff and Defendant dated 17th July 1998 constituted a valid agreement between the parties. There was uncontroverted testimony that the Agreement was written by the Defendant himself and he duly executed the same thereby binding himself to refund the Plaintiff's investments together with profits made. The Plaintiff subsequently terminated the agreement. The Defendant therefore came under a legal duty to refund the money to the Plaintiff. The question of accounts was referred to community arbitration. The parties submitted themselves to arbitration with PW3 as the appointed arbitrator. A figure of shs. 5.7 million together with interest was agreed upon which was accepted by both parties.

The Plaintiff through his counsel has invited the court to enforce the award given by PW3 as arbitrator. It is my view that the Plaintiff is bound by his pleadings. While he has been able to demonstrate the existence of the arbitral award, it was not pleaded. Doing my best I hold that the Minutes of the arbitration proceedings and what was deemed to be the award amount to admission by the Defendant of his liability to the claim in the plaint.

I cannot ignore the payments made by the Defendant in the total sum of K.shs 3.5 million which was made through his then advocate, Mr. Pravin Bowry.

I hold that the Plaintiff has proved his case in respect of the principal amount of K.shs 2,971,159/-.

The Plaintiff has been denied the use of his money due to him truly and justly. He has been kept away

from his money wrongfully and he is entitled to some compensation. The Plaintiff claims interest at the rate of 26% p.a. from 1.7.2000 when the arbitrator determined the amount due to him. Having perused the minutes of the meetings, it is not clear to me that the amount was determined on 30.6.2000. However, I do take into account that the first cheques issued by the Defendant were dishonoured as early as 15th October, 2000 and 5th November 2000.

Under Section 26 of the Civil Procedure Act, this court has, inter alia, discretion to order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit.

PW3, a qualified accountant in P. Exh. No.7 showed the bank interest rates from May 1997 - August 2000. The rate on 1.8.2000 was 25% p.a. The Plaintiff claims 26% p.a. with effect from 1.7.2000.

Doing the best and taking into account the dates of dishonour of the initial cheques, the bank rates in 2000 and all circumstances in the case, I do hereby order interest on the principal sum of K.shs 2,971,159/- at the reasonable commercial rate prevailing at the time, that is 25% p.a. The rate will accrue on the said principal from 1st November, 2000 upto the date of decree. From the date of the decree to the date of payment in full, the interest rate shall be at the rate of 20% p.a. considering the recent decline in bank commercial interest rates.

I therefore do enter judgment in the aforesaid terms, in favour of the Plaintiff against the Defendant. In addition the Defendant shall pay the cost of this suit to the Plaintiff.

DATED and DELIVERED at Nairobi this 12th day of February, 2004.

MOHAMMED IBRAHIM JUDGE