

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

CIVIL CASE NO. 1162 OF 1999.

KESHAR SHIANI.....PLAINTIFF

VERSUS

SUSAN MUNYI.....DEFENDANT

J U D G M E N T

The Plaintiff claims a sum of Shs.2,176,997,60 from the Defendant together with further interest and costs thereon in respect of a sum of Shs.1,000,000/- advanced by the Plaintiff to the Defendant as a friendly loan on the 17.10.96.

The Defendant denies that the Plaintiff lent any money to her and the Amended Defence states that if the sum of Shs.1m. was paid to the Defendant then it was paid for services rendered from 1990 to 1996.

The Defendant further avers that the Plaintiff requested the Defendant to advance her various sums to either reconcile her clients account or for the purpose of buying a business or other financial accommodation.

The Defendant further avers that the sum of Shs.1m. was paid in respect of sums advanced by the Defendant and in part settlement of fees.

The Plaintiff gave evidence that the Defendant had financial problems and on the 17.10.96 the Defendant approached her for a loan and she gave the Defendant a cheque for Shs.1m. as a friendly loan. The payment of the cheque is not denied by the Defendant. The Plaintiff says she told the Defendant that if the sum was not repaid in six months interest at 33% per annum would be charged on the loan.

The Defendant sought to explain the receipt of the sum of Shs.1m. by saying that the Plaintiff had problems with her house and borrowed Shs.3m., 2m. of which was for the house and 1m. for her fees. The Defendant denied it was a loan which had been borrowed for her daughter's school fees nor was it to be repaid within six months and in default with interest thereon at 33%.

The Defendant produced a list of documents which were meant to show the dealings between the parties. There is no doubt that the Plaintiff and Defendant had dealings with each other. In some cases the Plaintiff would request the Defendant to help in her legal matters in which case the Defendant either provided legal documents on her computer or undertook certain litigation work relating to insurance matters where the Plaintiff found she had a conflict of evidence.

The Plaintiff stated that she did in fact received a payment of Shs.100,000/- on the 16.9.98 in part payment of the debt. This sum is shown in the Defendant's statement dated the 20.1.2000 at page 4 in her bundle. The Defendant explained this by saying the sum of Shs.100,000 was for fees.

It is to be noted that the only demand for fees from the Defendant to the Plaintiff related to a binding of copies of documents beyond that no fee notes were produced at all. However in the Bundle at page 31 there is a list of what is stated to be fees due from the Plaintiff to the Defendant in respect of Trust Bank matters but there were no fee notes produced to support this list.

The Defendant called Mr. Nyangara an Advocate who had worked with the Plaintiff. He said he left the Plaintiff for non payment of salary. At one time when the Plaintiff was abroad, Mr. Nyangara was instructed by the Plaintiff to give files to the Defendant to deal with. He did not have any knowledge however of the particulars of payments.

I preferred the evidence of the Plaintiff to that of the Defendant although I accept that there were financial dealings between the Plaintiff and Defendant and that work passed between them I accept that the sum of Shs.1m. had nothing to do with these other transactions and that the Defendant did have financial problems and asked the Plaintiff to lend her Shs.1million. Had this been for fees as the Defendant alleges, I would have expected to see a fee note for this sum.

The Plaintiff gave evidence that she was paying interest at 36% to the bank and that is why she seeks to charge the Defendant interest at the rate of 33%.

The Plaintiff expressed the loan to be a friendly loan by this I take her to mean that it was given out of friendship and not as a commercial transaction. Had it been the latter, I would have expected the same to have been reduced to writing. Although the Plaintiff may have intended to charge interest I think that she thought at the beginning that the money would have been paid back within a short time like six months. It was only when the money was not paid back that she asked the Defendant for interest. That being the case, the Plaintiff's remedy on not being paid was to demand the loan back and file proceedings for its recovery in which case interest would have become payable.

The Defendant has repaid Shs.100,000 which I do not believe was payment for fees as she allege. In the result, the Defendant owes the Plaintiff Shs.900,000, and I award this sum with interest thereon at court rates from the filing of the Plaint until payment in full. The Defendant has succeeded in so far as interest is concerned and I therefore award the Plaintiff half of the costs to be taxed or agreed.

Dated and delivered at Nairobi this 29th day of June, 2000.

PHILIP J. RANSLEY

COMMISSIONER OF ASSIZE.