



REPUBLIC OF KENYA



**Nairobi Forex Bureau Limited v Mwangi (Civil Case E099 of 2019)
[2025] KEHC 6570 (KLR) (Commercial and Tax) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6570 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E099 OF 2019**

F GIKONYO, J

MAY 8, 2025

BETWEEN

NAIROBI FOREX BUREAU LIMITED PLAINTIFF

AND

MARY MUMBI MWANGI DEFENDANT

JUDGMENT

1. The plaintiff is a private limited liability company carrying on the business of foreign exchange. It instituted this suit through a plaint dated 17th April 2019, seeking entry of judgment against the defendant for Kshs. 24,963,433/- with interest thereon at 14% per annum from 23rd June 2014 until payment in full and costs of the suit and interest thereon.
2. The plaintiff's case is that the defendant was employed as its assistant principal officer. On diverse dates between 23rd June 2014 and 14th July 2014, the defendant received Kshs. 8,061,096/- and US \$ 192,882 totalling to Kshs. 24,963,433/- which sum had been paid to the plaintiff by its foreign exchange customers.
3. The plaintiff claimed that the defendant's actions were a breach of trust and a breach of her employment contract. The particulars of the breach were stated to be: wrongfully retaining money handed over to the plaintiff by its clients; and failing to account for the sum of Kshs. 24,963,433/-.
4. The plaintiff averred that on 21st July 2014, it entered into a debt payment agreement with the defendant through which the defendant admitted being indebted to the plaintiff to the tune of Kshs. 25,584,057.86/- and surrendered Title No. Ngong/ Ngong/40575 as security for payment. Subsequently, in August 2014, it enlisted the services of MGK Associates, which established that the actual loss was Kshs. 24,963,433/



5. The plaintiff further averred that in 18th August 2018, the defendant was charged in Criminal Cause No. 1175 of 2014 which is pending hearing and determination.

Defence

6. The defendant entered appearance through the firm of Ongicho and Ongicho Advocates and filed a statement of defence on 9th September 2019. She admitted that she was the plaintiff's employee. She denied fraudulently or otherwise retaining the money. She also denied that she conducted herself in breach of trust implied in the contract of employment and/ or breach of the contract.
7. The defendant averred that the alleged deficit could not have gone undetected because it would have been detected by the digital system which recorded all transactions in real time. She also averred that before the close of the day, every teller would be required to balance the till with the supervisor who then closed the till with a password known to them alone.
8. The defendant averred that she served the plaintiff with a notice of resignation and that she was cleared by the plaintiff's employees. She also averred that the alleged agreement dated 21st July 2014 was entered into under duress and ought to be rescinded. She denied owing the plaintiff any money capable of being secured by Title number Ngong/ Ngong/40575. She also denied knowledge of the audit conducted by MGK Associates and indicated that if the audit was conducted, no queries were addressed to her. She admitted that there was a criminal instituted against her by the plaintiff. She also claimed that the court lacks jurisdiction to hear or determine the suit.

Evidence

9. Hearing of the matter proceeded before Justice Mshila on 12th May 2022. Despite service of the hearing notices, neither the defendant nor her advocate attended the hearings. Thus, the hearing proceeded ex parte.
10. The plaintiff called two witnesses. It called its director, Esther Wamitha Gichane as PW1. She adopted her witness statement dated 17th April 2019 as her evidence in chief. She also produced the plaintiff's list and bundle of documents dated 17th April 2019 which were marked as plaintiff's exhibits 1-12.
11. On 8th November 2022, the plaintiff called David Muhia, a certified public accountant, as PW2. He adopted his witness statement dated 18th April 2019. He also produced the cash loss verification report dated 25th August 2014, which was marked as plaintiff's exhibit 13.

Submissions

12. The plaintiff filed written submissions dated 16th December 2022. It was submitted that the debt payment agreement gave rise to an enforceable contract between the plaintiff and the defendant for payment of the sum due from the defendant to the plaintiff. It was also submitted that this Honourable Court has jurisdiction to give effect to the debt payment agreement entered between the plaintiff and the defendant.

Analysis and Determination

13. Court's jurisdiction to hear and determine this matter is the first issue. The defendant, in her defence, challenged the court's jurisdiction.



14. As a matter of law, jurisdiction of the court is sine qua non adjudication of the dispute at hand. (Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling)
15. Under Article 165(3) (a) of *the Constitution*, the High Court has the unlimited original jurisdiction in criminal and civil matters. Except, however, under Article 165 (5) (b), the High Court does not have jurisdiction over matters falling within the jurisdiction of the courts contemplated in Article 162 (2) (a) & (b).
16. The Employment and Labour Relations Court, established under Article 162 (2) (a) of *the Constitution*, has the exclusive jurisdiction to hear and determine disputes relating to or arising out of employment between an employer and an employee.
17. Section 12 of the *Employment and Labour Relations Court Act* provides that:-

“

“ 12. Jurisdiction of the Court
(1)The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —

(a) disputes relating to or arising out of employment between an employer and an employee;

...”
18. Some pundits have argued that, an agreement to repay money acquired fraudulently or through embezzlement of the employer’s funds or business constitutes a separate civil wrong. Others argue that this is a case of concurrent jurisdiction. Proponents of this school of thought, say that the High court may take jurisdiction.
19. But others depart; that, such claim remains a matter arising out of their employment and labour relationship.
20. In this case, claims prominently made include; that the defendant fraudulently or otherwise retained the money; that she conducted herself in breach of trust implied in the contract of employment and/ or breach of the contract. The claims have been denied. Properly consummated, such theft by an employee during the subsistence of employment, constitutes serious misconduct for which the employee may be dismissed under the employment laws.
21. The debt payment agreement dated 21st July 2014 encapsulates deeds committed during employment causing loss to the employer. See Clause (a) which states: -

“ a) The debtor agreed that she is fully and completely liable for the acts and/ or omission while in employment of the company that led to the company losing Kenya shillings twenty five million five hundred and eighty four thousand and fifty seven point eight six (Kshs. 25,584,057.86). And that she is now fully indebted to the company for the aforesaid amount.”



22. In my considered view, the dispute in this matter is between an employer and its former employee and the alleged breach of the employment contract is at the heart of the proceedings. There is nothing that prohibits ELRC from considering and giving effect to the agreement in issue.
23. It therefore falls within the jurisdiction of the Employment and Labour Relations Court.
24. In the circumstances of this case, this court is persuaded to transfer the matter in step with the thought stated by the Court of Appeal in Daniel N Mugendi v Kenyatta University & 3 others (Civil Appeal No. 6 of 2012) [2013] eKLR that: -

“... in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file “mixed grill” causes in any court they fancy. This will only delay dispensation of justice.”

See also Kenya Medical Research Institute v Davy Kiprotich Koech [2018] eKLR

25. Accordingly, I direct that this File be transferred to the Employment and Labour Relations Court for hearing and determination. I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 8TH DAY OF MAY, 2025

F. GIKONYO M.

JUDGE

In the presence of: -

Kabui for Plaintiff

Ongicho for defendant

CA Kinyua

