



**Ibrahim v Mwarania (Civil Case 72 of 2019) [2023] KEHC 1354 (KLR)
(Commercial and Tax) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 72 OF 2019
A MSHILA, J
FEBRUARY 10, 2023**

BETWEEN

ABDIWAHAB ADAN IBRAHIM PLAINTIFF

AND

GRACE MWARANIA DEFENDANT

JUDGMENT

1. The Plaintiff filed the Complaint dated January 22, 2019 against the Defendant who on or about December 2016 approached the Plaintiff with a business idea and presented that she works as a representative of Jubilee Party and that she had been given the tender to supply the Jubilee Party with T-shirts and hand bags printed with Jubilee Party logo and slogan.
2. It was the Plaintiff's averment that the Defendant asked him to finance the business in form of investments from which the Plaintiff would earn profit of an interest rate of 10% of the principal amount. It was upon this understanding and trust that the Plaintiff advanced the Defendant a total sum of Kshs 36, 000, 000 (the principal) which money was paid on diverse dates.
3. Further, the Plaintiff stated indeed the Defendant placed an order for the said T-shirts and hand bags from a printing company in Dubai. Thereafter the Defendant asked the Plaintiff to travel to Dubai to supervise and approve the printing works. The Plaintiff did travel to Dubai and confirmed and approved the printing works.
4. When the Plaintiff came back from Dubai, the Defendant gave him Kshs 6, 000, 000 in cash and later added Kshs 2, 000, 000 totaling to Kshs 8, 000, 000 as part payment for the money he had advanced to her leaving a balance of Kshs 28, 000, 000. The Defendant received the remainder of the consignments but the Defendant totally refused and neglected to pay him the balance advanced of Kshs 28, 000, 000.



5. The Plaintiff prayed for judgment against the Defendant in the following terms;
 - a. Payment of Kshs 28, 000, 000 being the refund of the balance of the principle amount owed together with interest.
 - b. Payment of Kshs 3, 600, 000 being the profit and 10% interest on the principal amount.
 - c. General damages for the economic loss of business occasioned by the Defendant and breach of contract.
 - d. Interest in a, b and c above at court rates from the date of filing the suit.
 - e. Costs of the suit.
6. In Response, the Defendant filed a Statement of Defence dated October 28, 2019 denying the averments by the Plaintiff and stated that indeed there was an arrangement between her and the Plaintiff and that he did avail the requisite funds and the whole transaction was based wholly on trust.
7. However, the Defendant denied that the Plaintiff gave her Kshs 36, 000, 000 but concedes that the Plaintiff availed Kshs 6, 000, 000 for procuring and supplying the T-shirts and the hand bags to the Jubilee Party.
8. It was the Defendant's averment that on July 24, 2017 upon withdrawing Kshs 6, 000, 000 from her account Chase Bank Ridgeways Branch Kiambu Road she personally gave the Plaintiff Kshs 6, 000, 000 in person in full refund of the amount invested by the Plaintiff.
9. Having refunded the Plaintiff, and the Defendant never having recovered and/or had any payment transmitted to her by the Jubilee Procurement and Supply transaction, the Plaintiff's claim for profit sharing is unwarranted and baseless.
10. Further, the Defendant admitted that having received a total amount of Kshs 8, 000, 000 from the Plaintiff and in addition to the Kshs 6, 000, 000 she paid a further Kshs 2, 000, 000 on diverse dates in 2017. The Defendant having not received any benefit, profit or advantage from the Jubilee Party T-shirts and hand bags supply transaction, denied that she is obligated to account to Plaintiff on the transaction.
11. It was the Defendant's contention that she was not in any way indebted to the Plaintiff for any moneys allegedly due and owing to the Plaintiff. The Defendant prayed for the suit be dismissed with costs.

Plaintiff's Case

12. The matter came up for hearing on June 9, 2022 when PW1 testified for the Plaintiff. PW1 relied on his witness statement dated January 22, 2019 as his evidence and further produced a bundle of documents marked 'PEXH 1-PEXH 9'.
13. PW1 testified that he gave the Defendant Kshs 36, 000, 000 on diverse dates and the Defendant has only returned Kshs 8, 000, 000 in total leaving a balance of Kshs 28, 000, 000. He added on July 31, 2017 the Defendant gave 6 cheques of Kshs 950, 000, 000 and RTGS of Kshs 7, 000, 000 all which bounced.
14. It was the Plaintiff's submission that indeed the Plaintiff and the Defendant entered into an oral agreement for the Plaintiff to finance the business to the tune of Kshs 36, 000, 000. There was a mutual understanding between the Plaintiff and the Defendant and further, the Defendant in her Defence dated October 28, 2019 did not contest that it entered into an oral and mutual agreement with the Plaintiff for the supply of T shirts and bags. In [*Frankline Matat Mwagona vs Boniface Kalama \[2019\] eKLR*](#) the court in assessing whether the parties entered into a valid contract made reference to Law



of Contract by Edwin GH Treit London, Sweet & Maxwell where the learned author dealt with the doctrine by observing as follows:

' That under the law of contract it is general acceptable the terms of any agreement will not be reduced into writing save where the expressly provides for such contracts to be in written form. The law applicable on all contracts whether oral or written to be ascertained from the agreement must fulfil the following conditions:

- a) The intention of the parties
- b) sufficient offer and acceptance
- c) capacity
- d) Lawful subject matter
- e) Mutuality of obligation
- f) Consideration'

15. In addition, it was the Plaintiff's submission that the Defendant has not paid up the loan amount together with the profit. The Defendant still owes Kshs 28, 000, 000 as the principle amount and Kshs 3, 600, 000 as the agreed profit.

Defendant's Case

16. The Defendant did not participate in the hearing and hence did not file any submissions. The Defence closed its case without calling any witness or adducing any evidence.

Issues For Determination

17. After considering the suit and the testimony by PW1 the court frames the following issues for determination;
- a. Whether the Plaintiff should get the refund of the balance of the principal amount owed of Kshs 28, 000, 000 together with interest?
 - b. Whether the Plaintiff is entitled to the payment of Kshs 3, 600, 000 being the profit and 10% interest on the principal amount?
 - c. Whether the Plaintiff should be awarded General damages for the economic loss of business occasioned by the Defendant and breach of contract?

Analysis

18. From the facts of this case, it is not in dispute that the parties herein entered into an oral contract where the Plaintiff was to finance the Defendant's business to the tune of Kshs 36, 000, 000.
19. Section 3(1) *Law of Contract Act* does not make all contracts void and unenforceable if they are not reduced into writing. There is only a requirement for certain contracts be in writing therefore, oral agreements can be and are enforceable.



20. Further, the court in *Ali Abid Mohammed versus Kenya Shell & Company Limited (2017) eKLR*, stated that a contract between parties can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded.

' It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See *Timoney and King v King 1920 AD 133 at 141*. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per liter and for a certain period of time.'

21. Having been satisfied that the Plaintiff had established that there is a binding contract between the parties, is the Plaintiff therefore entitled to the prayers sought?

Whether the Plaintiff should get the refund of the balance of the principal amount owed of Kshs 28, 000, 000 together with interest?

22. While the Defendant admitted to the Plaintiff financing the business, she denied that the Plaintiff ever gave her Kshs 36, 000, 000 and instead the Defendant admitted that having received a total amount of Kshs 8, 000, 000 from the Plaintiff and in addition to the Kshs 6, 000, 000 she paid a further Kshs 2, 000, 000 on diverse dates in 2017 and was thereby not indebted to the Plaintiff. It is noteworthy that the Defendant did not adduce any evidence in support of her denial of the amount of Kshs 36, 000, 000 invested into the business by the Plaintiff.
23. The Plaintiff produced numerous bank statements and cheques which were undisputed by the Defendant and among the documents produced by the Plaintiff there was an agreement dated November 17, 2017 in which the Defendant was to pay the Plaintiff Kshs 10, 000, 000 on or before November 29, 2017 being money that she owed him. This agreement was not objected to by the Defendant and it can thus be concluded that indeed the Defendant acknowledged the debt owed to the Plaintiff. It is clear that the Plaintiff kept his end of the bargain and delivered the consignment for the T-shirts and handbags however the Defendant failed to pay for the consignment. The Plaintiff having been paid Kshs 8, 000, 000 there remains a balance of Kshs 28, 000, 000 yet to be paid by the Defendant.
24. On this ground this court is satisfied that the claim against the Defendant succeeds.

Whether the Plaintiff is entitled to the payment of Kshs.3, 600, 000 being the profit and 10% interest on the principal amount?

25. It was the Plaintiff's testimony and evidence that as part of the parties' oral contract, the Plaintiff would earn profit of an interest rate of 10% of the principal amount. Taking the profit of 10% from the principal amount of Kshs 36, 000, 000 into consideration, this court is satisfied that the Plaintiff is entitled to the sum of Kshs 3, 600, 000.

Whether the Plaintiff should be awarded General damages for the economic loss of business occasioned by the Defendant and breach of contract?

26. On whether the Plaintiff is entitled to general damages for the economic loss of business occasioned by the Defendant and breach of contract; as a general rule general damages are not recoverable in cases of alleged breach of contract as was held by the Court of Appeal decision in *Kenya Tourism Development Corporation Vs Sundowner Lodge Ltd 2018 eKLR*.



27. The reason for the above was explained by the court in the case of *Consolata Anyango Ouma vs South Nyanza Sugar Co Ltd (2015) eKLR* as follows:

' The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No 37 of 2003 [2004] eKLR) Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No 192 of 92 (UR) and Charles C Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No 154 of 1992 (UR)).'

28. This claim fails for the reason that this is a case of breach of contract where the nature of the general damages were not proved and are therefore not recoverable.

29. On the issue of interest, the grant of an award of interest is an exercise of a judge's discretion, but that discretion must always be exercised within limits. This court finds no basis to order interest on the principal sum as it was not established that this was a term of the oral contract.

30. In summary, judgment is entered for the Plaintiff against the Defendant for the balance of the principal amount owed of Kshs 28, 000, 000 and the 10% profit of Kshs 3, 600, 000.

Findings And Determination

31. For the forgoing reasons this court makes the following findings and determinations;

- a. Judgment is hereby entered in favour of the Plaintiff for the refund of the balance of the principal amount owed of Kshs 28, 000, 000/=; together with the sum of Kshs 3, 600, 000 being the profit of 10% interest on the principal amount;
- b. The claim for General damages for the economic loss of business occasioned by the Defendant and breach of contract is found to have no merit and is hereby dismissed.
- c. The Plaintiff shall have costs of the suit and interest at court rates.

Orders Accordingly.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2023.

HON. A. MSHILA

JUDGE

In the presence of;



Mutunga for Ayieko for the Plaintiff

No appearance for the Defendant

