



REPUBLIC OF KENYA



**Mutua t/a Dream Life Products Enterprises & another v Jones (Civil Appeal E01 of 2020) [2023] KEHC 1216 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1216 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E01 OF 2020  
MW MUIGAI, J  
FEBRUARY 16, 2023**

**BETWEEN**

**PAUL MUTHENGI MUTUA T/A DREAM LIFE PRODUCTS  
ENTERPRISES ..... 1<sup>ST</sup> APPELLANT**

**MOSES SAFARI MUTUA T/A DREAM LIFE PRODUCTS  
ENTERPRISES ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LOUIS JONES ..... RESPONDENT**

*(Being an Appeal from the whole judgment of Hon. H. Onkwani (Principal Magistrate) in Mavoko PMCC No 150 of 2018 delivered on 19/08/2020)*

**JUDGMENT**

**Plaint Dated 14th February, 2018**

1. By a Plaintiff filed on the 14/02/2018, the Plaintiff herein sued the Defendants in Mavoko PMCC No 150 of 2018. The Plaintiff's claim against the Defendants is for the sum of Kshs 2,392,980/- (Two Million Three Hundred and Ninety Two Thousand Nine Hundred and Eighty only) due and owing from the Defendants being payment for the raw materials (honey) supplied at the Defendants request and instance full particulars whereof are well within the Defendants knowledge.
2. The cause of action arose within the jurisdiction of this Court.
3. The Plaintiff prayed for judgment against the Defendants for:
  - a. The sum of Kshs 2,392,980/-
  - b. Costs and interest of this suit.
  - c. Any other relief that this Court may deem fit and just to grant.



### **Statement of Defence Dated 9<sup>th</sup> March, 2018**

4. The Defendants filed their joint statement of defence on 12/03/2018. They denied the allegations and stated that they are strangers to the contents of par 4 and par 6 of the Plaintiff. They also denied that the Plaintiff had any cause of action against them in respect of the matters complained of in the Plaintiff. The defendants deny liability and puts the Plaintiff to strict proof of the claim alleged.

### **Reply to Defence**

5. The Plaintiff in reply to the defense reiterated in entirety all the averments as contained in the Plaintiff.

### **Plaintiff's Case**

6. The Plaintiff called three (3) witnesses in support of his case.
7. PW1 Louis Jones (the Plaintiff) stated that he was carrying out a business with Moses and Paul Mutua (the defendants). The Defendants were buying raw honey and process the same for sale. They needed money for the business. They approached him for loans. He first lend them Kshs 250,000/- repayable within 3 months. They did not repay in full. He later advanced them subsequent loans. The total amount due was/is Kshs 2,392,980/-. His role was to finance the honey purchases and the Defendants repay the loan after processing and selling the honey. He provided his car for marketing purposes. He paid them Kshs 300,000/- for 25% stake of the company. He was not a partner despite the payments. The defendants traded as Dream-life Products Enterprises. The Plaintiff bought Swaleh's and Patrick Mwenda's shares but was never allocated the shares paid for. He later on withdrew from the business due to integrity issues.
8. On cross – examination by Mwalimu advocate for the Defendants he stated that the loan of Kshs 250,000/- was paid. That one Onesmus was an agent of the Defendants. That he became a permanent Resident in 2019. That he bought Patrick's shares.
9. On re-examination the Plaintiff stated that his name did not appear on the registration certificate. That he was both a partner and a financier.
10. PW2 Onesmus Mbuilo a Tanzanian citizen testified that he came to know the Plaintiff through the Defendants. That the Plaintiff was the Financier. The Plaintiff used to deposit monies in an account of Moses Muita Ntari and then PW2 would supply the honey to the Defendants. He only supplied the Plaintiff with honey just once with 1.4 tonnes.
11. On cross – examination by Mwalimu for the Defendants he stated that he just acted as an agent. That he did not know the dealing between the Plaintiff and the Defendants.
12. On re-examination he told the Court that it is the Defendants who introduced him to the Plaintiff.
13. PW3 Margaret Mwaura testified that she is the wife to the Plaintiff herein. That she was aware of his dealings with the Defendants. They were in honey venture whereby the Plaintiff was the financier. That she was a partner in the business until 2018. The Defendants owed the Plaintiff some money about Kshs 2 million. The defendants are aware of the debt and they used to service the debt. They paid the Plaintiff Kshs 340,000/-. The outstanding balance is Kshs 2,392,980/-.
14. On cross – examinations by Mwalimu for the Defendants the PW3 stated that she was aware of a share transfer to the Plaintiff. That the Plaintiff was not incorporated in the business. That she was also part of the business but was not incorporated. The money was disbursed in cash, cheques and bank



transfers. She received some of the repayments of the loans. The loan of Kshs 250,000/- was repaid in full. She was a director and back signatory of the company.

15. On re-examination she stated that the Plaintiff bought for her the shares. That her name did not appear on the certificate of Incorporation.

### **Defense Case**

16. DW1 Moses Safari Mutua testified that he is a business man venturing in a honey business jointly with Paul, Swaleh and Patrick. On 15/04/2015 Paul one of his business partners, requested for a loan from the Plaintiff herein of Kshs 250,000/- which they repaid at Kshs 310,000/-. That later on the Plaintiff lent Swaleh (the other partner) Kshs 300,000/- and he started claiming a stake in the business. The Plaintiff later ventured into the business and would buy honey directly from Onesmus who was their supplier of honey. That he is not aware of any monies rendered to them other than the Kshs 250,000/-. That they refunded the Kshs 300,000/- share capital the plaintiff had paid.
17. On cross-examination by Turunga for the plaintiff DW1 told the Court that the Plaintiff wanted to join their business. That they used to pull funds to buy honey in bulk from one supplier and later take their respective shares. That there was an intention to conduct business with the Plaintiff but the same did not materialize. The Plaintiff was not incorporated in the business because his documents were not in order.
18. On re-examination he reiterated that the share contribution that the Plaintiff had paid was refunded back to him.
19. DW2 Paul Mutua testified that the Plaintiff wanted to join their business. He gave them a loan of Kshs 250,000/- which they repaid. He could not join their business as he did not have a work permit. He wanted his wife to be incorporated in the said business.
20. On cross – examination by Turunga for the Plaintiff he stated that the plaintiff suggested that his wife joins the business in his place. That on two occasions they had made a joint purchase together. The Plaintiff's wife was at some point a signatory to business bank account. That sometime the plaintiff would operate the said account.
21. On re-examination the witness told the Court the loan agreement preceded the share transfer agreement.
22. DW3 Patrick Mwendwa testified that the DW1 and DW2 are his nephews. They stated a business venture comprising of 4 partners registered under the name Dream life Business with 251 shares for each of the 4 partners. He experienced financial difficulties and decided to sell his interest. The Plaintiff took over his 251 shares in the business. The Plaintiff later lend the company Kshs 250,000/- which was repaid.
23. On cross –examination by Turunga he stated that he came to learn that they had a misunderstanding in respect to the shares in 2018. There could have been some sort of financing after he left the company but he was not involved then.

### **Trial Court Judgment**

24. The Trial Court in its judgment delivered on 19<sup>th</sup> day of August, 2020 judgment was entered against the Defendant as follows:-
  1. Payment of a sum of Kshs 2,392,980/-



2. Costs and interest of the suit.

## Appeal

25. The Appellant aggrieved by the judgment delivered on 19/08/2020 on the following grounds:

1. That the Trial Magistrate erred in law and in fact when he held that the Appellants owe the Respondent's Kshs 2,392,980/- a conclusion that could not be borne by from the respondent's evidence.
2. That the Trial Magistrate erred in law and in fact when he failed to examine the respondent's evidence critically before arriving at the conclusion that the Appellants owe the Respondent Kshs 2,392, 980/-.
3. That the Trial Magistrate erred in law and in fact when he determined the suit on the basis of documents that were not formerly produced and exhibited in Court.
4. That the Trial Magistrate erred in law and in fact when he relied on inadmissible and irrelevant evidence of the respondent.
5. That the Trial Magistrate erred in law and in fact when he held that the loan agreement indicated that the Appellant owed the respondent Kshs 2,392,980/- when in fact there was no such a loan agreement.
6. That the Trial Magistrate erred in law and in fact when he held that ban statement indicated that the Appellant owed the Respondent Kshs 2,392, 980/- when in fact the statements did not indicate so.
7. That the Trial Magistrate erred in law and in fact when he held that the Appellants owed the Respondent's Kshs 2,392,980/- when in fact there were no WhatsApp messages to that effect.
8. That the Trial Magistrate erred in law and in fact when he failed to appreciate that there was no proof that the appellant were given any loan by the respondent except that which they paid.
9. That the Trial Magistrate erred in law and in fact when he held that there were cheques by the appellants to the respondent paying part of the debt when in fact the payments made were properly explained in the Appellants statement adopted in Court.
10. That the Trial Magistrate erred in law and in fact when he relied on the Respondent's minutes dated 14/08/2017 when the contents of the minutes were questioned by the appellants as they were not certified and confirmed by the makers of the minutes.
11. That the Trial Magistrate erred in law and in fact when he relied on the minutes dated 14/08/2017 when in fact the minutes did not affect and concern the Respondent.
12. That the Trial Magistrate erred in law and in fact when he failed to consider that the minutes were suspicious and could not be relied in evidence.
13. That the Trial Magistrate erred in law and in fact when he failed to appreciate that the motive of the suit was suspect since one of the Respondents witness was a signatory of the minutes dated 14/08/2017.
14. That the Trial Magistrate erred in law and in fact when he relied on the evidence of PW2 when in fact PW2 was just an agent of the Respondent.



15. That the Trial Magistrate erred in law and in fact when he found PW2 as the agent of the Appellants.
16. That the Trial Magistrate erred in law and in fact when he failed to appreciate that the Respondent failed to prove his case to the required standards.

## Written Submissions

### Appellant's Submissions Dated 21<sup>st</sup> March 2022

26. On ground 3 & 4 of the Appellant's Appeal it is submitted that the documents filed by the Plaintiff were not produced as exhibits. Filing the documents is one thing. Producing the same as exhibits is another.
27. Reliance was made in the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR.
28. On Ground 1, 2 & 16 it is submitted that the Respondent gave to Appellants cheques amounting Kshs 2,732,180/- and the Appellants only paid Kshs 300,000/- in cash and Kshs 40,000/- in cheques. Leaving a balance of Kshs 2,392,980/-. The Respondent is unable to show in whose favour the cheques were drawn. The furthest the Respondent goes is to say that the cheques were drawn but deposited in account of Moses Ntari. This clearly raises the question as to whether the money went for the purposes for which it is/was intended. The Respondent has a heavy task proving that money given in such a way can be demanded from the Appellants. The Respondent has not discharged the task.
29. On ground 5, 6, 7 & 8 on the issue of the loan agreement it is submitted that the loan was for Kshs 250,000/- the Respondents admits that this loan was paid off. The Respondent also says that there were other subsequent loans that he gave the Appellants. The question is whether there were any other further agreement for them. According to the bank statements produced by the Respondent it does not show their value. It gives misleading information that cannot be relied under whatever circumstances. The following transactions do not appear anywhere in the bank statement;

Date	Cheque no	Amount
26/01/2015	000061	500,000/-
12/08/2016	000070	180,000/-
30/08/2016	000071	150,000/-
09/09/2016	000073	500,000/-

There was no WhatsApp message from the Appellant admitting the claim. That the loan agreement, bank statements and WhatsApp messages do not aid in proof of this case. Hence the same are worthless pieces of evidence.

30. On ground 9 the Appellant submitted that they used to do business with the Respondent. Anytime he was supplied with honey he used to pay for it by cheques. It cannot be taken that the cheques exhibited were for payment.
31. On 10, 11 & 12 the Appellants produced the minutes of their meeting but the Respondent did not produce any but he filed minutes that were of a different nature. When the said minutes are contested as they are in this case the Respondent had to go a notch higher and establish how the goods were supplied but he failed to do so.



32. On ground 13 it is submitted that the motive of this case is suspect. It is choreographed to extort money. The suit is meant to sanitize the extortion.
33. On ground 14 & 15 it is submitted that PW2 Onesmus Mbwilo stated that the used to buy honey for the parties. That the Respondent would deposit the money in the account of one Moses Movita Ntani. There is no evidence that lead to conclusion that PW2 was the agent of the Appellants.

#### **Respondent's Submissions Dated 17/10/2022**

34. It is submitted for the Respondent that the Trial Court stated clearly that the Plaintiff produced as exhibits Bank Statement, Loan agreement, cheque and WhatsApp messages. Production of documents is a matter of fact hence the Magistrate who was seized of the matter together with the Advocates appearing for the parties by then were in a better position to know whether documents had been produced or not. The Trial Court stated clearly in its judgment that documents were produced.
35. Reliance is made in the case of *Ogero & another v Osoro* (Civil Appeal no 15 of 2019 [2022] KHC 641 [KLR]).
36. Production of documents is contested in this appeal yet it was not an issue in the main hearing of the suit even at the submissions stage then this Court is invited to look at the case of *Mumias Agriculture Transport v Sony Agricultural Limited* being Civil appeal Number 201 of 1997 as cited in the case of *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020] eKLR where the Court of Appeal held that where no trial is carried out as known to law the matter is to be remitted back for hearing.

#### **Determination**

37. The Court considered the Record of Appeal, the Lower Court file proceedings written submissions and the issue(s) that emerge for determination are condensed from the memorandum of Appeal as follows;
  - a. Whether the documents relied on by the trial Court were produced in Court as Exhibits or not.
  - b. Whether there was a contract between the parties and/or breach of the contract
  - c. Whether the judgment/decretal amount is due and owing or not?
38. The Appellant submitted that the Trial Court erred in holding that the Respondents be paid be paid Kshs 2,392,980 and failed to consider Respondent's evidence and relying on documents not formally produced and exhibited in Court and that the figure of Kshs 2,392,980/- was not factored in the said Loan Agreement and is not proved by the bank statements. The Minutes of 14/8/2017 were not certified and confirmed by the makers of the Minutes. The Trial Court erroneously relied on the evidence of PW2 who was an agent of PW1. The case was not proved to the required standard.
39. *Selle v Associated Motor Boat Co* [1986] EA 123 where court held as follows: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions through it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect in particular the court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or



probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

40. It is trite that the legal burden of proof lies with the person who alleges. Section 107 (1) of the [Evidence Act](#), Cap 80 Laws of Kenya provides that:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

41. Once the Plaintiff discharges the legal burden of proof, the burden is then shifted to the Defendant to adduce evidence against the Plaintiff’s claims. This burden is well captured under Sections 109 and 112 of the same Act.

42. According to Kimaru J. in [William Kabogo Gitau v George Thuo & 2 others](#) [2010] 1 KLR 526 stated that:-

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

#### **Whether the Documents Relied on by the Trial Court were Produced in Court as Exhibits or not.**

43. The Documents contested are the ones filed by the Plaintiff and not produced as exhibits during trial. The Appellants relying on the case of [Kenneth Nyaga Mwige v Austin Kiguta & 2 others](#) (2015) eKLR submitted that the documents produced were inadmissible. The ‘whatsapp’ messages, emails and Minutes were not authenticated. No verification was done at all.

44. The Respondents submitted that during trial the issue of production and reliance on documents was not raised nor were the documents contested during the interpartes hearing.

The Trial Court judgment of 19/8/2020 at Pg 6 indicates the Plaintiff produced documents as exhibits bank statements, loan Agreement, cheques of defendant paying part of the loan advanced, Whatsapp Messages various e-mails and minutes of meetings held.

45. This Court gleaned through the Trial Court record and found,

a) The Plaintiff vide Plaintiff filed on 14/2/2018 and served to the Defendants had annexed Verifying Affidavit, Plaintiff’s List of Documents actual documents namely;

i) KCB Bank Statement running from 6/01/2015-27/06/2016 duly signed and stamped on each page by KCB

ii) Copy of Loan Agreement Between Louis Jones & Dream-Life Products Enterprises duly signed by Moses Safari Mutua, Paul Muthengi Mutua, Patrick Mwendwa Mulyungi Directors off Dream-Life Products Ltd and Louis Jones & Margaret Wambui Mwaura.

iii) Copy of Cheque for Kshs 300,000/ in the name of Dream-life Products Enterprises by the Plaintiff.

iv) Copy of Cheque by Dream Life Products Enterprises for Kshs 40,000/-



- v) Copy of Demand Letter dated 14/8/2017 by the Plaintiff's advocate to the Defendants Dream Life Products Enterprises.
- vi) Plaintiff's Statement outlining cheques and amounts advanced to the Defendants through financing direct purchase of raw materials (honey) to increase the production capacity.

46. The Defendants were served the Plaint and annexures and filed Defense on 12/3/2018. The Defendants filed Pre-Trial questionnaire List of Witnesses and Witness statements on 26/7/2018.

47. The Plaintiff filed on 4/3/2019 Further List of Witnesses and Witness Statement of Onesmus Mbuilo. The Plaintiff Amended Plaint was filed on 20/11/2018 & again on 27/2/2019 and Further List of Documents on 29/4/2019.

On 22/11/2018 the Defendants filed Supplementary List of Documents.

Order 11 – Pre-trial Directions And Conference

Case Conference Order 11, rule 3.

- (1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall—
  - (a) consider compliance with Order 3 rule 2 and Order 7 rule 5;
  - (b) identify contested and uncontested issues;
  - (c) explore methods to resolve the contested issues;
  - (d) where possible secure parties' agreement on a specific schedule of events in the proceedings;
  - (e) narrow or resolve outstanding issues;
  - (f) create a timetable for the proceedings;
  - (g) change the track of a case;
  - (h) consider consolidation of suits;
  - (i) identify a test suit and order stay of other suits.
- (2) In addition to any other general power the court may at the case conference—
  - (a) deal with any interlocutory applications or create a suitable timetable for their expeditious disposal;
  - (b) order the filing and service of any necessary particulars within a specific period;
  - (c) order admission of statements without calling of the makers as witnesses where appropriate and the production of any copy of a statement where the original is unavailable; .....

48. Ideally, Pre-trial Directions and/or Case Management under Order 11 *CPR* 2010 is meant to aid expeditious disposal of disputes by parties/Counsel. At the close of Pleadings the parties conducts Case Management to confirm if the matter is ready for hearing and determination. Amongst the myriad issues to be considered agreed and/or determined between parties before Court is the disclosure of



documents to be relied on during Trial, Lists of witnesses and Witness Statements & List of Documents to be produced without calling the maker, without originals but certified etc.

49. Clearly, in the instant case the procedure provided by Order 11 [CPR](#) 2010 was not employed instead parties filed pleadings and/or documents until they were satisfied that each party filed all evidence necessary to resolve the dispute. Had the Case Management been conducted the issue of whether the documents relied on during trial had been produced as exhibits would not have been raised.
50. During the Hearing interpartes as shown at Pg 6-17 of Record of Appeal, the Trial Court heard PW1 PW2 & PW3 and each of the witnesses relied on their Witness statement. Of importance PW3 Margaret Mwaura referred and relied on the Minutes of 14/8/2017; Minute 4 confirmed Louis Jones (the Plaintiff) loan was Kshs 2,400,254/-, Moses Kshs 382,630/- & Paul Kshs 415,130/- respectively. PW1, PW2 & PW3 were subjected to cross examination by the Defense. At no point was the issue of reliance and/or production of documents by the Plaintiff raised challenged during trial.
51. Although the Trial Court record does not specifically confirm that the documents filed by the Plaintiff and Defendants were marked for identification and/or produced as exhibits, each party relied on their Witness Statement which had annexures which had been earlier filed and served to the other party. Therefore, if as alleged by the Appellant that the Trial Court relied on documents that were not produced as exhibits, the Appellant had opportunity cross examine the Respondents on the documents and/or raise objections to reliance on the documents filed.
52. Similarly, the Defendants filed documents vide List of Documents, Share Transfer Agreement of 19/3/2015, bunch of payment vouchers to Louis Jones, Loan Agreement dated 15/4/2015 Certificate of business and Minutes dated 19/8/2014 and they were also not produced as exhibits during trial and subjected to cross-examination. A party cannot demand compliance where it has also not complied. Further, even after not challenging the documentary evidence filed during trial by cross-examination the Appellants waived their right to file written submissions. So, to raise the issue of production of documents as exhibits at this stage on appeal for the 1<sup>st</sup> time is to camouflage a retrial through an appeal.

In [Galaxy Paints Company Limited v Falcon Guards Limited](#) Court of Appeal Case Number 219 of 1998, the Court of Appeal stated that:

“issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court’s determination

Sir Jack Jacob in his article entitled “[The Present Importance of Pleadings.](#)” The same was published in [1960] Current Legal problems, at P174 whereof the author had stated;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of



speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...."

53. The parties filed pleadings with documents each to fortify their case/position and failed to pursue Case management before the Court so as to agree on the documents filed and/or reliance or removal from the Court record. From the above case-law the parties and the Court are bound by pleadings. This Court finds no prejudice that the Trial Court relied on documents not produced as exhibits as both the Plaintiff and Defendants annexed documents to their pleadings and relied on their Witness Statements and documents but were not produced as exhibits. 2 wrongs do not make it right either all documents should have been ignored or relied on on both Plaintiff and Defendant's case.

#### **Whether there was a contract between the parties and/or breach of the contract**

54. The Loan Agreement between Louis Jones & Dream-Life Products Enterprises through its directors the defendants was signed by the Plaintiff and Defendants to provide the loan to improve production capacity of Shepherd's honey products to be repaid in 3 months and at 2% of the reducing balance.
55. The Agreement relates to Kshs 250,000/ advanced and the Defendants by annexed copies of cheques confirmed refund of Kshs 250,000/- and Kshs 300,000/- the Plaintiff paid the Defendants for shares in the Dream-Life Products Enterprises that he was not transferred to nor registered. Payments by Defendants was as follows;
- a. Cheque dated 18/3/2017 from Cooperative bank on behalf of Dream Life Products Enterprise to Louis Jones Junior for Kshs 150,000/-.
  - b. Cheque dated 20/5/2017 from Cooperative bank on behalf of Dream Life Products Enterprise to Louis Jones Junior for Kshs 100,500/-
  - c. Cheque dated 00147 for Kshs 40,000/-
  - d. The Plaintiff admitted repayment of Kshs 300,000/- in Cash by Defendants by Plaintiff in his statement and PW3 in her statement and testimony in Court.

#### **Whether the judgment/decretal amount is due and owing or not?**

56. The Plaintiff annexed copy of cheque of Kshs 300,000/ to Defendants-Dream-Life Products Enterprises to buy shares.

The bank statement from KCB indicates as follows;

16/4/2015 Cheque 000049 for Kshs 250,000/- original loan  
26/6/2015 Cheque 000050 for Kshs 241,820/- (Mwita Moseet Ntari)  
26/8/2015 Cheque 000024 for Kshs 50,000/- paid by Paul Muthengi Loan Repayment.  
26/1/2016 Cheque 000061 for Kshs 500,000/- (Mwita Moseet Ntari)  
12/2/2016 Cheque 000062 for Kshs 111,160/-(Mwita Moseet Ntari)  
21/6/2016 Cheque 000068 for Kshs 400,000/-/(Mwita Moseet Ntari)  
27/6/2016 Cheque 000069 for Kshs 600,000/- (Mwita Moseet Ntari)  
12/8/2016 Cheque 000070 for Ksh180,000/- (Mwita Moseet Ntari)



57. From the Witness Statement of PW2 Onesmus Mbwilo filed on 4/3/2019 and his testimony during the hearing is that the 1<sup>st</sup> Defendant Mr. Paul Mutua made him aware that their honey business Dream-Life Enterprises was financed by Mr. Jones, the Plaintiff. PW2 stated that he received money paid by Cheques written by the Plaintiff Louis Jones Junior to Moset Mwita Ntari, the name he used on his transaction account at the border of Tanzania as follows;

(the cheques listed above as shown by KCB Statement of Account) and;

30/8/2016 Kshs 150,000/- cheque 000071

9/9/2016 Kshs 500,000/- cheque 000073

15/12/2016 Kshs 660,000/-

17/12/2016 Kshs 100,000/-

17/12/2016 Kshs 25,000/-

58. PW2 stated that there was a partial shipment that he delivered to Mr. Louis Jones in December 2017, 46 jerrycans of 1415 kg and he asked him to have the Defendants pay by crediting Dream-Life for that delivery and offset part of the money they owed him. He also supplied PW1 honey directly and not for the Defendant Company as illustrated above.

59. The Defendants Copy of Voucher payment for the said honey delivered to the Plaintiff was credited at Kshs 149,370/- and Vouchers of Payments made and received by PW3 as she admitted in her testimony and cross examination. There are Vouchers of Kshs 30,000/-cheque 000135, Kshs 30,000/-cheque 000138, cheques Kshs 30,000/- cheque 000152 30,000/- cheque 000147 Kshs 50,000/-Cheque 00024 Kshs 50,000/- These Vouchers confirm repayment of Kshs 250,000/- advanced loan to the Defendants. They also admitted Kshs 300,000/ - refund in Cash for the Plaintiff's payment for shares as shown by the annexed copy of cheque of Kshs 300,000/ to Defendants-Dream-Life Products Enterprises. Therefore, deducting payments of Cash Refund of Kshs 300,000/- and repayments through Vouchers of cheques for repayment the initial loan was repaid of Kshs 250,000/-. Yet other funds advanced by cheques to PW2 to supply honey to the Defendant Company were not refunded or repaid .This is the amount due and owing of Kshs 2,732,980 minus Kshs 340,000/paid and leaves a balance of Kshs 2,392,980/- and the payments of Kshs 150,000/- by cheque dated 18/03/2017 & cheque of 20/05/2019 for Kshs 100,500/-

### **Disposition**

1. The Court finds the facts evidence and documents presented during trial confirm advanced loan of Kshs 250,000/- as per the loan Agreement that was repaid by instalments cheques confirmed by Vouchers annexed by Defendants.
2. Kshs 300,000/- advanced to pay for shares is admitted as repaid in cash and not part of the debt.
3. The amount due is minus Kshs 150,000/- paid by cheque dated 18/03/2017 and Kshs 100,500/- paid by cheque dated 20/05/2017.
4. The appeal is dismissed with Costs to Respondents.

It is so ordered.

**DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS THIS 16<sup>TH</sup> FEBRUARY, 2023 (VIRTUAL/PHYSICAL CONFERENCE).**

**M. W. MUIGAI**



## **JUDGE**

In the presence of:

No Appearance - For The Appellants

Mr. Were - For The Respondent

Geoffrey/patrick - Court Assistant(s)

