



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**  
**CIVIL CASE NO. 1254 OF 2002**

TRUST BANK LIMITED (IN LIQUIDATION).....PLAINTIFF

VERSUS

FAHARI COMMODITIES LIMITED.....1<sup>ST</sup> DEFENDANT

EUSTACE MURAGURI KARUA.....2<sup>ND</sup> DEFENDANT

ERASTUS KUBUGI WAHOME.....2<sup>ND</sup> DEFENDANT

**J U D G M E N T**

**PRELIMINARIES**

1. As the case number will show this case was filed in the year 2002. It is now 2019, as I prepare this judgment.
2. Despite the age of this case when the same came up for hearing before me on 5<sup>th</sup> November 2018, the Defendant Learned Counsel sought an adjournment on the ground that the Defendant had failed to respond to his correspondence. Learned Counsel also sought to cease to act for the Defendant or to be granted time to file an application to cease to act.
3. The Plaintiff's Learned Counsel objected on the ground that the Defendant was served with a hearing notice on 20<sup>th</sup> August 2018.
4. I declined to grant an adjournment and also decline to grant leave to the Defendant's Counsel to cease to act.
5. The 1<sup>st</sup> Plaintiff proceeded to prove its case. The Defendant did not adduce any evidence in support of its defence. That defence, as it has been held severally by the courts, remained mere allegation. This was the holding in the case of **PHELISTA MUKAMU MAKAU V ELIZABETH KANINI MULUMBI (2015) eKLR** where the court stated:

*“In this matter, apart from filing its statement of defence, the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations... Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”*

6. The same sentiments were expressed in the case of **MARY NJERI MURIGI V PETER MACHARIA & ANOTHER [2016] eKLR**:

*“I am in agreement with the above persuasive exposition that indeed, it is not sufficient for a party and more specifically the Defendants in this case to have made strong statements of defence on paper blaming other people for the accident. Their defence remains mere allegations not proved by evidence as required under Sections 107 and 108 of the Evidence Act.”*

7. It follows that the Defendant's defence remains unproved and is not for consideration in this judgment.
8. In similar vein, there was no evidence adduced on behalf of the 2<sup>nd</sup> Plaintiff. Accordingly, there is no claim on behalf of that Plaintiff against the Defendant.

**THE PLAINTIFF'S CASE**

9. The Plaintiff's evidence was adduced by Wilfred K. Machini, a Credit Manager with the 1<sup>st</sup> Plaintiff.
10. He stated that on 31<sup>st</sup> October 1998, the 2<sup>nd</sup> Plaintiff executed a debenture charging all its undertaking, property and assets of whatsoever nature, both present then or in the future, as security for the loan of Kshs. 45,000,000 which was advanced by the 1<sup>st</sup> Plaintiff to the 2<sup>nd</sup> Plaintiff. The Plaintiff also obtained other securities of that loan in the form of guarantee and legal charge over immovable property.
11. The 1<sup>st</sup> Plaintiff was placed under statutory management of the Central Bank of Kenya, on 21<sup>st</sup> June 2001. The Statutory Manager wrote to the 2<sup>nd</sup> Plaintiff, in exercise of her duties of collecting debts owed to the 1<sup>st</sup> Plaintiff. The Statutory Manager demanded Kshs. 44,987,592.93 with interest from the 2<sup>nd</sup> Plaintiff. There was no settlement of that amount as demanded.
12. The Statutory Manager, on 7<sup>th</sup> March 2002, in exercise of his power under clause 18 of the Debenture, appointed the Defendant as Receiver and Manager over the 2<sup>nd</sup> Plaintiff.
13. The 2<sup>nd</sup> Plaintiff by letter dated 24<sup>th</sup> April 2002 wrote to the Statutory Manager and informed him that the Defendant, in his capacity as Receiver Manager had collected from the 2<sup>nd</sup> Plaintiff a total of Kshs. 14,881,109.95.
14. The Defendant had between 19<sup>th</sup> March and 24<sup>th</sup> April 2002 remitted to the Statutory Manager a total of Kshs. 900,000. The Plaintiff's witness stated that no other payment was made by the Defendant to the Statutory Manager.
15. The Statutory Manager was later to learn that the Defendant, in the course of the receivership, had received Kshs. 8,800,000 from Chemelil Sugar Company Limited. On being requested to account for that amount, the Defendant stated he had used the amount to import generators for Block Hotels.
16. The Defendant was however unable to prove such importation and made payment, to the Statutory Manager, of Kshs. 2,200,000 towards refund of the amount received from Chemelil Sugar company Limited.
17. It was later to transpire that the amount of Kshs. 2,200,000 the Defendant paid to the Statutory Manager had indeed come from the 2<sup>nd</sup> Plaintiff's company and not from the Defendant himself. That payment was evidence in the 2<sup>nd</sup> Plaintiff's bank statement at Stanbic Bank Ltd.
18. The Defendant, despite being requested to do so by Statutory Manager, failed to remit any other payment of the misapplied funds.
19. The Statutory Manager therefore requested a firm PKF Consulting Limited to carry out an investigative audit of the 2<sup>nd</sup> Plaintiff.
20. The court, by an order issued on 17<sup>th</sup> October 2002 the court removed the Defendant as Receiver Manager.
21. The investigative audit revealed that the Defendant had received Kshs. 24,678, 757 during his tenure as Receiver Manager of the 2<sup>nd</sup> Plaintiff Company. The Plaintiff witness stated that the Defendant had failed to account for that amount.
22. The amount claimed by the Plaintiff is well document in a statement of account which is in the Plaintiff's further list of documents.

#### **ANALYSIS AND DETERMINATION**

23. There is no doubt that the Defendant had a duty to account to the Plaintiffs. This was stated in Halbury's Laws of England Vol. 39 4<sup>th</sup> Edition as follows where it was stated, of the Receiver Manager:

***“Appointment as an officer of the court or an agent. A receiver is a person appointed for the collection or protection of property. He is appointed either by the court or out of court by individuals or corporations. If he is appointed by the court, he is an officer of the court deriving his authority from the court's order. If he is appointed out of court, he is an agent and has such powers, duties and liabilities as are defined by the instrument or statute under which he is appointed and derive from the general law of agency. It is usually the practice for a receiver appointed out of court to be so appointed as agent of a mortgagor or charger company and where the receiver is an administrative receiver such agency status is conferred by statute.”***

24. The Plaintiff has proved by irrefutable evidence the Defendant's negligence and recklessness in the course of his appointment. He was required to collect debts owed under the debenture but evidence shows he diverted the 2<sup>nd</sup> Plaintiff's funds.
25. The 1<sup>st</sup> Plaintiff has proved that the Defendant should pay it the amount unaccounted for. However, as correctly stated in the Defendant's submission, the 1<sup>st</sup> Plaintiff did not have an agreement on the rate of interest. Accordingly, the Plaintiff will get interest at court rate.
26. The Plaintiff having proved its case on required standard of proof is entitled to the costs of the suit.

***27. There shall be judgment for the 1<sup>st</sup> Plaintiff against the Defendant for Kshs. 24,678,757 plus interest at court rate from the date of filing suit until payment in full. The Defendant shall pay the 1<sup>st</sup> Plaintiff costs of this suit.***

DATED, SIGNED and DELIVERED at NAIROBI this 5<sup>th</sup> day of MARCH, 2019.

MARY KASANGO

JUDGE

*Judgment Read and Delivered in Open Court in the presence of:*

Sophie.....COURT ASSISTANT

.....COUNSEL FOR THE PLAINTIFF

.....COUNSEL FOR THE 1<sup>ST</sup> DEFENDANT

.....COUNSEL FOR THE 2<sup>ND</sup> DEFENDANT

.....COUNSEL FOR THE 3<sup>RD</sup> DEFENDANT