



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 285 OF 2000

TABITHA ATSINGA MUSAMBI.....PLAINTIFF

VERSUS

THE STANDARD LIMITED.....1ST DEFENDANT

BETTING CONTROL & LICENCE BOARD.....2ND DEFENDANT

Introduction and outline of facts

1. The initial plaintiff, David Abwao J Odera, sought leave to sue as a pauper and did file the suit against two defendants and claimed that he had participated and won a bonus and a jackpot on a lottery run by the 1st defendant but that 1st Defendant had refused to announce him as the winner and to release the prize won to him. He thus sought an order for: -

- a) **The recovery of STG 3,451,567 equivalent to Kshs 371,198,427.90,**
- b) **A declaration that the 1st defendant was fraudulent in syndicating the UK MEGA LOTTERY and did so with the sole aim of increasing its sales *maleficus***
- c) **A declaration that a Bonus set No.028 in Game No.5 and a jackpot set No. 023 in Game No. 7 by the Plaintiff won in the month of November 1997 drawn by CAMELOT GROUP P/C of UK and the 1st defendant refused to release the prize to the Plaintiff.**
- d) **General and Exemplary/Punitive damages.**
- e) **Any other relief this Court may deem fit to grant.**
- f) **Costs and interest.**

2. In support of that plaint, the plaintiff filed a statement of claim as well as documents being newspaper cutting, draw results, letters to the 1st defendant as well as a letter to **Camelot group PC** and a response thereto stating that the quoted lottery was confined to Europe and not beyond. The plaintiff then filed a list of the documents it intended to rely upon at trial.

3. Pursuant to an application by the 2nd defendant, which yielded a ruling dated 29th October 2003, the 2nd Defendant's name was struck off from the proceedings and therefore the particulars and prayers of negligence against the 2nd defendant are not available to be determined by this court.

4. Before the matter could be heard and determined the said plaintiff died on the 27.8.2000 and one **Tabitha Atsinga** sought and was granted limited letters of administration ***Ad colligenda bona***, in ***H.C Succ Cause No 66 of 2000***, limited for the purposes of commencing a suit on behalf of the deceased's estate, then sought to be joined to the proceedings by the Notice of Motion dated 19th June 2001. That application was allowed by consent on the 5.3.2002. However, there was no evidence that the plaint was ever amended to reflect the substitution by the time parties concluded production of evidence, offered submissions and a judgment reserved. Since this fact did not arise during trial until it became apparent to court during the preparation of this judgment, the court invited the parties to address it on whether or not there had been an amendment to capture the substitution. In their address to court it was agreed that the amendment be effected. That amendment was done when the amended plaint dated 3.4.2019 was filed on the same day. The defendant did not however seek to amend its defense.

5. For the 1st defendant, the only defendant now in the suit, a statement of defence was filed in which a critical admission was made to the effect that it did promote the competition known as **The Standard Syndicate Game** but denied all the allegations pleaded at paragraphs 6 through to 9 and put the plaintiff to very strict proof thereof, denied being in breach of its advertised terms of the lottery as well as the allegations at paragraphs 11 and 12 of the plaint. It was then pleaded in the alternative that the suit as framed and filed did not reveal any cause of action and thus deserved being struck out. The defendant equally filed request for particulars and the answer to such request was then provided and filed on the 8.9.2006.

6. As the matter progressed the plaintiff served a Notice to produce copies of the newspaper and the permit authorizing the promotion of the game. That notice would later on form the basis of the plaintiff producing copies of the documentary evidence without protestation from the defendant.

7. The foregoing was the state of the pleadings when the pleadings closed and evidence led with the plaintiff calling one witness who then produced all the documents. The defendant on its side opted not to call any evidence and closed its case as such

Plaintiff's Case in the evidence tendered

8. The evidence offered on behalf of the Plaintiff was to the effect that that the 1st Defendant advertise a lottery in which the plaintiff participated and won but the defendant refused to announce him as such a winner and withheld his prize money. The plaintiff, as substituted, testified that her husband died on the 27th August 2000 and that she was in possession of a limited grant of representation. She produced the death certificate and grant as **PEXHIBITS 1 & 2**. She testified that the plaintiff used to buy the standard newspapers from Monday to Saturday and would collect a token for each day then on Sunday buy the newspaper for the day WHICH had a form and set-numbers which form was then filled with the numbers and submitted to designate regional drop-points. For the deceased the said forms were said to have been submitted to **Sabasaba Mini Grocery** in Mombasa. The summary of the evidence was that each newspaper had a token number which tallied with the date of the Newspaper and on Sunday's the newspaper had an entry form and the set numbers running from 001 to 500. The witness then produced an application by the defendant to promote the game, receipt for payment of the license and the license issued to the defendant to operate between 22.9.1997 and 21.12.1997 which license capped the prize at Kshs. 2,200,000/-. Those documents were produced as **PEXHIBITS 3, 4, & 5**. She added that the deceased participated in the lottery from beginning to the end and that in the defendant's newspaper of 24.10 1997, guidelines were given on what to do. The newspaper copies were produced as **PEXHIBITS 6 & 7**.

9. It was also PW1's testimony that the plaintiff participated so many times in the lottery until he won games 5 and 7. The winning lottery numbers for game number 5 was published on the 3rd November 1997 but the names of the winners were published on the 4th November 1997. In that publication, the name of the plaintiff was not among the names of the lucky winners and the highest winner locally was a **Mr. Kennedy Monda** who won a sum of Kshs.50, 000/= on game number 5 but the name of that winner was published without a set of winning numbers. For game no. 5, the plaintiff said, the deceased had chosen No 028, which turned out to be one of the three numbers to win **STG Pounds 8,837,967** equivalent to **Kshs 892,000,000/** to be shared equally. The plaintiff produced the newspaper of 3.11.1997 as **PEXHIBIT 9** in which it was published that the **winning numbers were 9, 10, 14, 16, 37 39** while the **bonus number was 28**. It was then promised in that newspaper that the names of the winners would be published the next day. However, come the next day the deceased's name was not one of those published to have won and the highest winner won a paltry **Kshs 50,000/** and not the hefty millions represented and published. The copy of the newspaper of 4.11.1997 was produced as **PEXH 10**.

10. For Game number 7, which the witness said had a problem, the deceased was said to have chosen No 23 which was contended to have won a jackpot in the sum of **STG POUNDS 3,333,334/** to be shared from the grand price of One billion Sterling Pounds. Having so won and with no word from the defendant, as the promoter of the game, the deceased wrote a letter dated 4th December 1997 (**PEXH 12**) with a reminder dated 2.12.1999, (**PEXH 13**) to defendant's marketing manager, in which he demanded that his price cheque be sent to the provided address but the letters were never replied to. He then wrote to **Camelot Group PC** seeking to know the prices for various games promoted by the 1st defendant but received a response that the license of **Camelot** did not extend outside of Europe. He therefore prayed for judgment as prayed in the plaint. With apparent feeling that he was not about to get his prize easily, the plaintiff then instructed an advocate who made a demand by a letter produced as **PEXH 17** to which the defendant responded by their letter of 1st March 2000.

11. On cross-examination PW1 stated that her claim was based on contract as opposed to tort. She went on to state that Camelot lottery had a license restricted to Europe and also referred to a license from the Betting Control and licensing Board which stated that the local lottery by the defendant was limited to **Kshs.2, 200,000/=**. She admitted that she did not have the coupons because she sent the same to the defendant and that she had no evidence of having sent the coupons to the defendant.

12. On re-examination, the witness said that the advert by the defendant put the price at Kenya shillings one billion which was not true as the permit limited the price to Kenya shillings 2,200,000. She added that in the draw held on 1.11.1997, the deceased won a bonus of **STG Pounds 118,033** while in the draw conducted on 15.11.1997 won and was to share ten million Sterling Pounds.

13. With that evidence the plaintiff's suit was closed on the 12.3.2009 for the defence case to be led but that was not to be. On 7.4.2011 there had been a change of advocates and the new counsel, **Mr. Tindika**, sought time so that he makes an application to open the plaintiff's case so as to produce a diary kept by the deceased in which he made entries of the games he participated in. An application dated 18.05 2011 was filed and was allowed by consent to the effect that the plaintiff produces the pages of a diary dated 28th September, 5th October, 12th October, 16th October, 26th October and 9th November as Exhibits.

14. The defendant through counsel had indicated the intention to call two witnesses for the defence but the witnesses were never called and on the 8th March 2017, the defendant's case was close without calling any witness. Accordingly, therefore the pleadings filed remain what they are bare allegations with no probative value and of no assistance at all to the court[1].

15. The court then directed parties to file submissions and the plaintiff and defendant filed respective submissions on the 7.7.2017 and 14.2.2018.

Plaintiff Submissions

16. Counsel for the plaintiff aligned himself with the pleadings and submitted that the deceased plaintiff learnt of the lottery through advertisement in the East African Standard newspaper published by the defendant and dutifully participated in it and won. However, he was never announced as a winner or rewarded. In fact his letters demanding payment of the price were never responded to. It was further submitted that the defendant deceitfully published an advertisement showing the price of Kshs.1 billion knowing very well it was limited to promote a game of not more than a cash price of Kshs. 2,200,000/= . That, the plaintiff having acted on the information supplied by defendant is entitled to full compensation for the amount won during the competition, since the 1st defendant knew very well that the UK lottery was limited to Europe only and not here in Kenya. It was stressed that that the evidence by the plaintiff remained uncontroverted as no evidence was offered on behalf of the defendant. It was thus contended that there was proof on a balance of probabilities and that the plaintiff was thus entitled to judgment as prayed in the plaint to include the declarations, the sums won as well as exemplary/ punitive damages in the sum of Kshs. 15,000,000.

17. For the proposal on general damages, Counsel relied on the decision of the Court of Appeal in **Koigi Wamwere vs Attorney General [2015] eKLR** in which an award of 12,000,000 was upheld.

Submissions by the defendant

18. For the defendant, Counsel submitted that the burden of proof rested upon the plaintiff to prove her case on a balance of probabilities with further submissions that no fraud had been pleaded and particularized against the defendant hence it was not open for the court to make a finding of fraud against the defendant. To counsel, it is trite law that an allegation of fraud borders on criminality and thus should be supported with particulars of the alleged fraud and those particulars should be strictly proved at a standard slightly higher than a balance of probabilities even though below the standards of beyond reasonable doubt.

19. In addition, Counsel submitted that for the plaintiff to be entitled to a declaration of his rights he was legally duty bound to present evidence in that regard and the court has to make its decision based on evidence and not conjecture, surmise or presumptions. Emphasis was then made that no evidence was led to show that Camelot was associated to the 1st defendants and the letter dated 23rd November 1999 confirms that Camelot was restricted to sell tickets only in the Europe and therefore Camelot could not have been in possession of any information to show that the plaintiff won. Further, counsel said no evidence was procured from **Saba Saba Mini Grocers** that the plaintiff submitted his entries and whether the entries were in consonance with the defendant's guidelines. In conclusion, counsel submitted that the fact that any person participates in a competition does not *ipso facto* guarantee that such person would actually win and that participation does not create an estoppel against the organizers of the competition guaranteeing a win; that estoppel only comes after the organizer actually declares an individual a winner therefore leading the individual to legitimately believe that they have won.

Analysis of the pleadings, evidence and determination.

20. I have carefully considered the plaintiff's claim as pleaded, her evidence and the evidence in the documents produced as exhibits. I have also considered both parties' advocates' rival submissions as supported by the cited decisions. My appreciation of the case in totality is that the fact of participation is not in dispute. What is in dispute is whether the plaintiff did submit the competition entry forms in a accordance with the rules applicable, whether the plaintiff won on the two pleaded games and therefore if the plaintiff is entitled to any of the of the remedies sought or at all. There is also the question as to what was the disclosed sum to be won by the winner. I have therefore come to the conclusion that the following issues isolate themselves for determination;-

- a) **Whether the plaintiff did submit the competition entry forms in a accordance with the rules applicable?**
- b) **What was the price to be won?**
- c) **Whether the plaintiff won on the two pleaded games?**
- d) **Whether the plaintiff is entitled to any of the declarations sought or at all?**
- e) **Whether the plaintiff is entitled to an award of exemplary/punitive damages and if so the quantum thereof?**
- f) **What orders should be made as to costs.**

Whether the plaintiff did submit the competition entry forms in a accordance with the rules applicable?

21. The evidence by the plaintiff that the deceased participated in a competition promoted by the plaintiff was never controverted by the defendant who failed to adduce any evidence. It is not enough that the defendant filed a defense denying liability because that defense is no more than allegations.[2] It is of note that the plaintiff's documents including the defendants own publications, license to operate the lottery and a diary kept by the deceased were all produced by consent. Those documents agree on one fundamental fact that the defendant was licensed to conduct the lottery for the period and did so conduct the lottery. The same documents identify the collection center for participants, like the deceased in Mombasa, to drop the entry forms and **Sabasaba Groceries** is identified as one of the dropping point. When the plaintiff led evidence that the entries were indeed dropped as directed, I do find that there then was discharged the burden of proof to the legal standards and if there was any additional need for evidence, it was only evidence in rebuttal because I find that the evidentiary burden had shifted. Having so shifted it was then upon the defendant to say who were the participants because some transparency in such an exercise would demand that the defendant keeps a record of the entries and the participants hence nothing would have been easier than to avail such a record to assist the court reach a fair decision. Now that the defendant chose not to lead evidence, I draw the adverse inference that had such evidence been availed, it would have been unfavourable to the defendant's case. I therefore do find that the plaintiff participated in the lottery and submitted the entries as directed by the defendant.

What was the price advertised to be won?

22. The promotion conducted by the defendant as published in the newspaper, copies produced, was that the participant stood to win a sum of up to a billion. In particular, the advert of 5.10.1997 says:-

It's back, it's bigger, it's better.

THE MEGA MONEY

Uk Lottery Game

You could be a billionaire

The same advert was repeated on 24.10.1997 and again on 2.11.1997, this time round with the additional words to the effect that:-

“Kshs 1billion

Is up for grabs every week

Plus

Guaranteed weekly prizes of Kshs 125,000

To be won”

23. Any person reading the newspaper could thus not be faulted for believing that the price at stake was the sum advertised. But, conduct of lottery is controlled by the law under Betting Control Act and required a license with set the terms and price to be won. It was therefore mandatory that the defendant be licensed to conduct the lottery hence the license produced as **PEXH5**. That license allowed the defendant to award a price of no more than Kshs. 2, 200,000. The question that arises is whether the defendant promoted the lottery it was licensed to promote.

24. I have carefully perused the documents availed particularly the newspaper copies advertising the lottery together with the license issued to the defendant and it is inescapable that there defendant did misrepresent that it was offering a price of up to one billion when its license restricted it to award no more than Kshs. 2,200,000. That when added to the confirmation that the Uk Lottery was limited to Europe, one cannot escape the finding that the defendant deliberately misled their riders into participating in a lottery that was overly misrepresented. Such is the type of conduct that the law and this court cannot and ought not to make acceptable. It is possible and very likely that the conduct depicted here may not be far from the prohibited conduct under PART IV and V of Cap 131. It is an outright misrepresentation of material facts that can only lead to the inference that the defendant purposed to attract participants unfairly and dishonestly and thereby gain financial benefit and reward in the sale of its newspaper which contained the coupons to be used in the lottery. Whenever one gets propelled by machinations to earn financial advantage improperly the law dictates that a person thereby being put to peril or damages gets entitled to an award of damages otherwise called exemplary or punitive damages.

Whether the plaintiff won on the two pleaded games?

25. This issue cannot be divorced from the plaintiff's burden to prove his case on a balance of probabilities but must be dealt with together. Having found that the plaintiff did participate and submitted the participation coupon as directed, and having held that the defendant was not licensed to promote the UK Lottery and thus not promote the lottery with a price of more than Kshs 2,200,000 as the price, the answer to this issue is quite obvious. The deceased could not win what was not winnable. At least not the prices claimed. This is because being a legally controlled exercise, even if the defendant would have awarded the plaintiff the claimed price, it would have been an illegality for being contra statute and thus incapable of enforcement. In *n Birket V. Arcon Business Machines Ltd* [1999] 2 All ER 429 the Court of Appeal in England held that -

“If a transaction was on its face manifestly illegal, the court would refuse to enforce it, whether or not either party alleged illegality. If a transaction was not on its face manifestly illegal but there was persuasive and comprehensive evidence of illegality, the Court might refuse to enforce it even if illegality had not been pleaded or alleged. The principle behind the court's intervention of its own notion in such a case was to ensure that its process was not being abused by an invitation to enforce sub-silentio a contract whose enforcement was contrary to public policy”

The same position was taken by the Uganda Court of Appeal in *Makula International Ltd Vs His Eminence Cardinal Nsubuga and Another* [1982] HCB II, held that -

“...a court of law cannot sanction what is illegal and illegality once brought to the attention of the Court, overrides all questions of pleadings including admissions made thereon.”

26. All the foregoing reasons and positions of the law as I understand it leads me to the inevitable conclusion that the plaintiffs claim for the pleaded price cannot be upheld but must fail. This I must do so even if the plaintiff did not plead the particulars of fraud or illegality.

27. The second reason the prayers for declaration of a win is not sustainable is the fact that it was the duty of the plaintiff to prove that after lodging his participation coupons, he did emerge the winner. The burden was squarely upon the plaintiff to prove that having chosen a number and a coupon that won then proceed to prove the prize so won. It is trite law that in civil claims the burden of proof lies upon the party who asserts and he who would fail if no evidence at all is laid. This principle is codified in Sections 107 and 108 of the Evidence Act, Cap 80. Furthermore, the evidential burden is cast by the provisions of sections 109 and 112 of the same Act upon any party the burden of proving any particular fact which he desires the court to believe in its existence. In this matter, the onus upon the plaintiff was such that he had no option to avail the quality of evidence to satisfy the court into believing that he indeed won or that the win was so probable that a prudent man ought, in circumstances of the case, to act upon the supposition that the deceased indeed won[3]. This burden was never discharged by the plaintiff all and it matters not that the defendant opted to call no evidence. Granted that the plaintiff's evidence stand unchallenged, even in its unchallenged stature it fall short of proving the pleaded win

28. It is therefore my finding that the failure by the 1st defendant to call any witness in support of its allegations in its Defence dated 8th August 2000 and filed on the 18th August 2000 renders the statements in their defence mere allegations and as a result the plaintiff evidence with regard to breach of contract stands uncontroverted. However, since the plaintiff allegation of fraud has failed then at this juncture what needs to be determined is whether the plaintiff has proved it allegation of breach of contract on a balance of probabilities.

29. The plaintiff's claim that the deceased won game 5 and a jackpot set No. 023 in game 7, in my finding, demanded that it be proved that his form completed and accompanied with the marching tokens and duty submitted to the drop-off point did participate at the draw and were declared the winning coupon.

30. I have eagerly considered the evidence by the plaintiff and the defendant's submission on the issue of whether the defendant actually won the lottery. Looking at plaintiff's exhibit number 9 the defendants newspaper dated 9th November 1997, there is a provision that that says "*having selected your set of numbers fill in the entry form and sent it complete with six tokens from that week's newspaper...please note that only original tokens and entry form will be accepted*"

31. The conclusive evidence that the plaintiff had won the lottery in my view would have been a copy of duly filled entry form with six tokens attached to it and the proof that the entry form was submitted before the defendant's weekly draw to the defendant's agent at **Sabasaba mini grocers** by Thursday before 5pm during the running of the competition by the defendant. That the plaintiff produced Exhibit **P8**, in my view, adds no much because that document is just but a form devoid of any evidence when it was submitted. There would have some believable evidence had the plaintiff called the **Sabasaba mini Grocer's** attendant or proprietor to confirm that the deceased did submit the prerequisites which marched the winning combination. That was never done and therefore there was never proof of the case to the legal standards and the court thus finds that there was no proof that the plaintiff won as pleaded. I do find that the plaintiff failed to prove her case on a balance of probabilities that the deceased regularly submitted his entry forms as per the defendant guidelines and the same was submitted on Thursday to **Sabasaba mini grocers** before 5pm.

Whether The Plaintiff Is Entitled To General Damages

And Exemplary /Punitive Damages?

32. In her evidence the plaintiff was adamant that that her claim was based on contract. That being the evidence, I take the view while guided by the decision in **Kenya Breweries Ltd. vs. Kiambu General Transport Agency Ltd. Civil Appeal No. 9 OF 2000 [2000] 2 EA 398**, that no general damages can lie for a breach of contract. On the evidence and pleading on record I find that no general damages are available for award to the plaintiff.

33. However, I have found hereto before that that the conduct of the respondent was unacceptable and must have been accentuated by the desire to shore up its newspaper sales. With that determination I now find that in promoting a lottery it was not licensed to promote and giving it a ride in its newspaper of national circulation, the defendant did mislead the plaintiff and others who participated in the lottery with eyes on the ballooned prize. That was wrongful and being propelled by the goal of profit making, the defendant has opened itself up for an award of exemplary or punitive damages. I get persuasion in the decision by Maraga, J, as he then was, in **ABDULHAMID EBRAHIM AHMED VS MUNICIPAL COUNCIL OF MOMBASA [2004] eKLR: where the judge said-**

"Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of the law. The first category relates to the oppressive, arbitrary or unconstitutional actions of servants of government. The other two categories are where the defendant's conduct is calculated to earn him profit and the third one is where exemplary damages are expressly authorized by statute"

34. With the principle of law in mind, I do award to the plaintiff the sum of Kshs 2,000,000 being exemplary damages. The plaintiff also gets the costs of the suit and interest on damages and costs

Dated, signed and delivered this 23rd day of July 2019.

P.J.O. OTIENO

JUDGE

[1] In **CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835**, Madan, J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

[\[2\]](#) Per Madan j in *CMC Aviation Ltd. vs. Cruisair Ltd.* (supra)

[\[3\]](#) Section 3(2), evidence Act