



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 801 OF 2010

MILOO SHAH.....PLAINTIFF

VERSUS

ASHANA RAIKUNDALIA T/A A. RAIKUNDALIA

& CO. ADVOCATES.....DEFENDANT

JUDGMENT

1. **Miloo Shah** the plaintiff has sued **Ashna Raikundalia** the defendant, trading as Raikundalia & Co. Advocate for judgment for **Ksh 6,679,500**.

2. The plaintiff and two of his witnesses testified in this case. The defendant did not adduce any evidence. It follows that the plaintiff's case remains uncontroverted.

3. In his evidence in Chief the plaintiff stated that a person known as Tasneem Mustafa Najni (Tasneem) approached him for a friendly loan. He agreed but on condition that she got a guarantor. Tasneem got the defendant who guaranteed her loan of Ksh 2,337,500. In that regard parties entered a written agreement dated 20th July 2009. The agreement confirmed that Tasneem was handed Ksh 2,337,500 before signing the same. The defendant signed a guarantee for the payment of that loan, which guarantee was part of that agreement. The guarantee provided that in default of settlement of the loan by Tasneem the defendant would be liable for the debt.

4. Tasneem did not settle the debt.

5. The plaintiff also lent to the defendant Ksh 300,000.

6. By a letter written by the defendant the defendant undertook to pay the plaintiff the sum of Ksh 2,637,500 which was made up of the amount lent to Tasneem, Ksh 2,337,500, plus the money lent to the defendant Ksh 300,000. The letter is reproduced hereunder.

A Raikundalia

5th Floor

Prudential Assurance Building

Wabera Street

P. O. Box 70760-00400

Nairobi-Kenya

Our Ref:

March 18, 2010

Mr. Miloo Shah

Nairobi

Dear Sir,

RE: AGREEMENT DATED 20TH JULY 2009 BETWEEN YOURSELF (AS LENDER) TASNEEM MUSTAFA NAJMI (AS BORROWER) AND MYSELF (AS GUARANTOR)

I refer to the above matter.

Further to our discussions with regard to the same, I hereby confirm and undertake that the principal sum therein of Ksh 2,337,500 and the friendly loan advance to me by you today of Kshs 300,000 that is the total sum of Ksh 2,637,500 shall be repaid to you on or before 1st March 2010.

I further confirm that I shall hold a balance of Ksh 1,000,000 from the proceeds of the sale of **the land to your order and disburse the same as per your directions.**

Yours faithfully

Ashana Raikundalia advocate

7. While that amount was still owed to the plaintiff the defendant offered to buy the plaintiff's jewellery. The plaintiff stated that he did not enter into a written agreement when he sold the jewellery to the defendant because the transaction was straight forward. The defendant gave the plaintiff a post dated cheque for the purchase of the jewellery for Ksh 4,040,000/=. The plaintiff stated that the defendant took the jewellery against the cheque she issued from her firm's account.

8. The plaintiff banked the defendant's cheque but the cheque was dishonoured. The defendant was informed, but he did produce a letter of defendant's bankers, Giro Commercial Bank Ltd, which letter indicated that defendant's account was closed. That matter of the dishonoured cheque is the subject of a criminal case against the defendant.

9. On being cross examined the plaintiff stated that he had not demanded repayment of the debt from Tasneem because the debt had been guaranteed by the defendant.

10. Sarju Shah, the plaintiff's wife testified in this case. She stated that she was at home when Tasneem borrowed from the plaintiff some money. She witnessed the plaintiff, Tasneem and the defendant sign an agreement to that effect on 20th July 2009. She again witnessed the defendant borrow some money from the plaintiff in March 2010.

11. The evidence of the hand writing expert (Antipas Nyanjwa) had no value because the documents bearing the signatures being compared were not before court. It was therefore impossible to confirm the signatures that were compared by that hand writing expert.

12. As stated before the defendant did not adduce any evidence in support of her defence. It follows that the defendant's defence remained mere allegation. In this regard a case in point is **SHANEEBAL LIMITED V COUNTY GOVERNMENT OF MACHAKOS [2018] eKLR VIZ:**

"In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schuller Civil Appeal No. 23 of 1997 held that:

"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 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence".

28. Similarly in the case of Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

29. If one is still in doubt as to the legal position reference could be made to the case of **Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996** where Rawal, J (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff."

ANALYSIS AND DETERMINATION

13. The defendant has submitted that because the plaintiff did not make demand from the principal debtor her liability for the debt claim does not arise. That indeed is the correct statement of the law. This was discussed in the case **FINA BANK LTD V CHADARANA &**

“Both defendants in their submissions stated that there is no liability on the guarantees for lack of demand. That the plaintiff has failed to prove it demanded payment from the defendants. Indeed the guarantees state in paragraph No. 1 that payment from the guarantee is payable on demand; in paragraph 2 (i) it states that interest shall accrue on the money of the guarantee from the date of demand. The plaintiff did not produce before this court demand made to the defendants. On that account alone the defendants are not liable under the guarantees. The defendants quoted various cases in support of this contention and one of those is the case of **KENYA COMMERCIAL FINANCE COMPANY LTD – V – KIPNG’ENO ARAP NGENY C.A. 100 OF 2001**. It was found that the guarantor had no liability for lack of demand. To quote a section:

“It is equally true that no demand was made to the 1st Respondent to pay up the money he had guaranteed..... The two letters addressed to the 1st and 2nd Respondent.were clearly marked and did not amount to statutory notices that the Appellants Statutory right for sale in respect of the two properties in issue had risen. This cannot be construed by any stretch of imagination as demand on the 1st Respondent to meet his obligation as a guarantor. I find no merit in this claim.” *Owour J.A*

14. The plaintiff having failed to make demand from Tasneem the defendant cannot be held liable under the guarantee.

15. The defendant did however, by letter dated 18th March 2010 (which date the plaintiff stated was in error) give an undertaking to pay the plaintiff 2,637,500. The defendant also issued the plaintiff with a cheque for purchase of family jewellery for Ksh 4,040,000/=. There is in my view sufficient evidence that proves these two debts. The plaintiff’s evidence on this indebtedness was unchallenged since the defendant did not adduce evidence. Also the evidence of the plaintiff and his wife was unshaken by cross examination. This case is in tandem with the case of **KARURU MUNYORORO V JOSEPH NDUMIA MURAGE & ANOTHER NYERI NO 95 OF 1988**, which was referred to in the case *shahneebal limited (Supra)* where it was held that:

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”.

16. The defendant learned advocate submitted on deficiency of the plaintiff’s pleadings, which is not the case; and on the issue of the plaintiff lacking a licence to sell gem stones, is not applicable because of the plaintiff’s unchallenged evidence which is that he sold family gemstones/jewellery.

17. I do find the plaintiff has proved his case against the defendant on a balance of probability. He is deserving of judgment in this case.

18. Having prevailed in this case the plaintiff is entitled to the costs of the suit.

19. The orders of the court are:

- a. There shall be judgment for the plaintiff against the defendant for Ksh 6,679,500 plus interest at court rate from the date of filing suit until payment in full.
- b. The plaintiff is awarded costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 4TH day of OCTOBER, 2019.

MARY KASANGO

JUDGE

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

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

.....FOR THE DEFENDANT