



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 34 OF 2011

SAMUEL KIBUTHA KAMAU.....PLAINTIFF

VERSUS

BESTELL COMPUTERS LIMITED.....1ST DEFENDANT

BENSON OCHIENG.....2ND DEFENDANT

JUDGMENT

1. The plaintiff filed this suit vide a Plaint dated 22nd January 2011 and amended on 15th November 2011, seeking for Judgment against the defendants jointly and severally for: -

(a) The sum of Kshs.3,240,000/=;

(b) Interest from 25th May 2009, at commercial rates of 14% per annum until payment in full;

(c) Costs of the suit plus interest; and

(d) Any other or further relied the court may deem fit and just to grant.

2. The plaintiff's case as per the pleadings and evidence adduced is that, he was working with the 2nd defendant in Mombasa at the Oil Refinery and were friends, before he got a job in the UAE and relocated. That, they were intent on doing business together even before he left.

3. On 24th February 2007, he sent the 2nd defendant 30,000 Dirham, equivalent of Kshs.700,000/= to enable him buy some goods in UAE. It was initially a friendly loan. In the month of May 2007, he sent the 2nd defendant ten laptops to sell for him, at Kshs.40,000/= each and the 2nd defendant was to earn a commission of Kshs.1,000/= per laptop. The 2nd defendant sold the laptops and paid the plaintiff a sum of Kshs.270,000/=, leaving a balance of Kshs.120,000/=.

4. On 20th May 2007, the 2nd defendant sent the plaintiff an email confirming owing a debt of Kshs.120,000/= which he was willing to pay with interest of Kshs.30,000/=, totaling Kshs.150,000/=. He also confirmed the outstanding amount of Kshs.700,000/= and promised pay all he sums owing in August, 2007.

5. The plaintiff avers that he came to Kenya in August, 2007 expecting the payment from the 2nd defendant but he stated that he was unable to repay the same due to business challenges and requested for a loan of Kshs.150,000/=. To protect each other interests, the parties decided to reduce the arrangement into a written agreement dated 7th August, 2007 for a sum of Kshs.1,000,000/= made up of Kshs.700,000/=: Kshs.150,000/= and Kshs.150,000/=.

6. As per that agreement the interest payable was at Kshs.100,000/= every month at the rate of 10% and the entire principal would be refunded for one year. That the agreement was on the 1st defendant's letterhead and witnessed by the plaintiff's wife.

7. That the defendants made the first five monthly instalments on time but defaulted citing post-election violence and chaos in early 2008.

Subsequently, the 2nd defendant and his wife went to Dubai in February, 2008 and pleaded for more help from the plaintiff, and the plaintiff gave them an equivalent of Kshs.500,000/=. This formed the basis of the 2nd written agreement. The 2nd defendant was to repay the amount owing at Kshs.100,000/= every sixty day, however he defaulted.

8. As a result, the defendants requested for a merger of the two agreements in May 2008. As at that time, the principal and interest amount outstanding was Kshs.2,500,000/=. A third agreement was then executed in August, 2008, but back dated to 20th May 2008. The repayment of the sum owing was agreed at; Kshs 180,000 every month. The defendants paid three installments of Kshs.187,500/= twice and Kshs.157,000/=.

9. In the month of November 2008, the 2nd defendant requested for an interest free loan of Kshs.526,000/= and the plaintiff wired to him 25,035 Dirhams. This was repaid in full and is not part of the plaintiff's claim. However, the defendants continued to default and the Plaintiff was forced to return to the country in May 2009.

10. As a consequence of the breach, the plaintiff instructed *P. A. Asino, Advocate* to draw up an agreement between the parties dated 25th May, 2009. The agreement consolidated all the sums due and outstanding being Kshs.4,187,500/=: which the 2nd defendant agreed to repay in full by 7th September 2009. The defendants paid a total sum of Kshs.1,084,500/=: leaving a balance of Kshs.3,103,500/=: which is the subject of the claim of Kshs.3,240,000/=: in the Amended Plaintiff.

11. The plaintiff avers in the pleadings that he was investing the sums of money, with the 1st defendant, a trading company and the defendants were supposed to repay the same with interests on a monthly or bi-monthly basis and eventually pay off the sum invested at the end of the year.

12. However, the defendants filed a Statement of Defence and Counter-claim dated 11th March 2011 and amended on 2nd December 2011 denying the plaintiff's claim. The defendants averred that, the 1st defendant company was legally incorporated on 11th February 2008, therefore it did not have any legal capacity to contract as at August 2007.

13. However, the defendants pleaded on a without prejudice basis that the "investment agreements" dated 7th August 2007, 24th February 2008 and 20th May 2008, were all rendered void and/or voidable for lack of consideration.

14. Further the plaintiff is not entitled by law to charge interest on any such monies as this is a preserve of banking institutions or financial institutions, duly licensed and authorized by the Central Bank of Kenya under the Banking Act (Chapter 488) and the Central Bank of Kenya Act (Chapter 491) of the Laws of Kenya to carry out banking or financial business. The plaintiff is neither a licensed bank nor financial institution, that carries on the business of lending out money at an interest or premium.

15. The defendants denied making payment or continued payment of the sum of Kshs.4,187,500/= as covenanted and/or renegotiated in an agreement dated 25th May, 2009 or at all. The 1st defendant argued that, it is not privy to the agreement dated 25th May 2009, as it was clearly executed between the plaintiff and the 2nd defendant and even then under duress and coercion on the 2nd defendant. Therefore, it cannot be binding on the defendants.

16. That the plaintiff exerted duress and coercion on the 2nd defendant, when he was misled to meet the plaintiff at the lawyer's office in Mombasa without prior knowledge of the purpose of the meeting and threatened with unspecified dire consequences if he did not sign the agreement. The 2nd defendant was not afforded an opportunity for independent legal representation or allowed to consult his co-director prior to signing the purported agreement.

17. The defendants denied the alleged breach of contract and averred that, this can only be a case of monies received from the plaintiff directly or indirectly to the defendants which the defendants undertook to refund by installments.

18. That on 24th February 2007, the plaintiff wired to the 1st defendant a sum of 30,000/= United Arabs Emirates Dirham equivalent to Kshs.600,000/= and on 15th November 2008 the plaintiff wired United Arab Emirates Dirham 25,000/= equivalent to Kshs. 500,000 to the 1st defendant supplier namely BLOC Computer LLC on the defendants request.

19. On 24th February 2008 the plaintiff gave the defendants Kshs.500,000/= while in Abu Dhabi in United Arab Emirates to buy additional business stock on a promise to refund the same in installments after selling the goods. Thus the total sum of money had and received by the 1st defendant from the plaintiff is Kshs.1,600,000/=. It was argued that, no money was given to the 2nd defendant.

20. The money that has been refunded was set out as here below: -

Date	Description	Amount (Kshs.)
15.02.2007	Deposit to the Plaintiffs Barclays bank a/c 03-016-8102739	200,000
10.08.2007	Cash payment to plaintiff	100,000
24.10.2007	Deposit to Barclays account above	93,500

24.10.2007	To the Plaintiff's lady friend on his instructions	6,500
15.12.2007	Cash payments	100,000
29.01.2008	Deposit to Barclays Bank account	100,000
26.02.2008	Deposit to Barclays bank account	100,000
14.10.2008	Deposit to Commercial Bank of Africa account No. 5304064007	187,500
8.11.2008	Deposit to CBA account	187,500
13.11.2008	Deposit to CBA account	157,500
2.12.2008	Deposit to CBA account	200,000
22.12.2008	Deposit to CBA account	100,000
10.02.2009	Deposit to CBA account	126,000
11.02.2009	Deposit to CBA account	100,000
8.10.2009	Deposit to CBA account	200,000
2.10.2010	Cash sent through ICTC to UAE	109,000
9.10.2010	Cash sent through ICTC to UAE	109,000
9.11.2010	Cash sent through express money service	109,000
20.11.2010	Cash sent through express money service	100,000
16.10.2010	Cash sent through ICTC to UAE	66,744
	Sub Total	2,513,244

21. In addition, the monies stated here below was paid to the plaintiff's sister in law *Flora Wanjiru Nyage*, on the plaintiff's instructions.

Date	Description	Amount(Kshs.)
10.11.2009	Deposit to KCB account 1108281117	100,000
20.11.2009	Deposit to KCB account 1108281117	200,000
18.03.2010	Deposit to KCB account 1108281117	50,000
26.03.2010	Deposit to KCB account 1108281117	50,000
19.06.2010	Deposit to KCB account	40,000

	1108281117	
20.04.2010	Deposit to KCB account 1108281117	50,000
8.07.2010	Deposit to KCB account 1108281117	60,000
4.06.2010	Deposit to KCB account 1108281117	50,000

22. The defendants prayed in the Counter-claim for Judgment against the plaintiff in the sum of Kshs.1,513,244/= with interest at court rates until payment in full, being the refund overpaid to the plaintiff.

23. However, the plaintiff filed an Amended Reply to Defence and Amended Defence to Counter-claim and averred that, *Benson Ochieng* has always held himself out as contracting on behalf of the 1st defendant's company. Further there was always consideration which passed between the plaintiff and the 2nd defendant and duly acknowledged.

24. The plaintiff reiterated that, prior to the first agreement of 7th August 2007, he would send the defendants laptops which the defendants would sell at a commission and pay him back, as such the amount of Kshs.270,000/= was part of the sale proceeds. That as at 25th July 2007, the amount outstanding was Kshs.1,880,000/= comprising of Kshs.700,000/= and Kshs.850,000/=, which parties agreed to convert to a business loan by the first agreement of 7th August 2007.

25. The defendant repaid the first repayment of Kshs.100,000/= in advance as per the plaintiffs request on 10th August 2007 and subsequently repaid the loan faithfully for five months, at Kshs.100,000/= per month making a total of Kshs.500,000/= as at February 2008. However, they defaulted on the remaining period of seven (7) months making the interest payable accrue to Kshs.700,000/= as at August 2008, and outstanding principal and interest sum being Kshs.1,700,000/=, while the second loan had accrued to Kshs.800,000/=, hence the agreement reached on 7th August 2008 referring to an amount of Kshs.2,500,000/=.

26. The plaintiff averred that, the two payments of Kshs.187,500/= and Kshs.157,500/=, were in accordance with agreement of paying the Kshs.180,000/= per month. That as at 25th May 2009, the sum outstanding was Kshs.4,187,500/= and the payments received after that date total to Kshs.947,500/= leaving a balance of Kshs.3,240,000/=.

27. Finally, the plaintiff averred that the defendants have never demanded the sums claimed in the Counter-claim from him and have continued to repay the owed amounts without any claims of overpayment whatsoever.

28. At the conclusion of the case and evidence adduced the parties filed their final submissions and invited the court to determine inter-alia whether;

(a) whether the agreements dated 7th August 2007, 24th February 2008 and 20th and 25th May 2009, are valid and binding?

(b) if they are valid, whether the defendants breached the terms of thereof and/or owe the plaintiff a sum of Kshs.3,103,500/= or Kshs.3,240,000/=;

(c) whether the Plaintiff owes the Defendants' a sum of Kshs. 1, 513, 244;

(d) whether the Plaintiff and/or the Defendants are entitled to the relief sought; and

(e) who should bear the costs of this suit.

29. I have considered the evidence adduced in total and in particular the documents produced by both parties and I note that, the agreements dated 7th August 2007, 24th February 2008 and 20th May 2008 were executed by the plaintiff and an entity known as "*Bestell Computers*". The evidence adduced was to the effect that the 1st defendant was initially a partnership and converted into a limited liability company, in the year 2008. Therefore, it cannot have entered into the contract dated 7th August 2007.

30. Even then, after incorporation in the year 2008, the 1st defendant, is still described in the agreements dated 24th February 2008 and 20th May 2008, as "*Bestell Computers*." The 1st defendant become a limited liability company after incorporation hence its description herein as, "*Bestell Computers Limited*" and can only have been described as such in the contracts post incorporation.

31. It also suffices to note that, the 2nd defendant is not a party to the agreements dated 7th August 2007, 24th February 2008 and 20th May 2008. The question that arises then, is whether the defendants are liable on these agreements, in the circumstances.

32. Be that as it were, I note that, the agreement dated 25th May 2008, was executed by the plaintiff and the 2nd defendant. It is noteworthy that despite the 2nd defendant having not executed the earlier agreements as aforesaid, this agreement of 25th May 2008, makes reference to

the agreement dated 7th August 2007. What then is the legal effect of such reference?

33. Be that as it may, the agreement describes the 2nd defendant as a “*Manager*” and the plaintiff as an “*Investor*”. It further states that the “*Manager*” who is named as *Mr. Benson Ochieng*, agrees that he is indebted to the “*Investor*” in the sum of Kshs.4,187,500/=. The agreement thus consolidates all the alleged sums of money advanced by the plaintiff allegedly to the entity “*Bestell Computers*” and the 2nd defendant in the said sum of Kshs.4,187,500/=:, and the 2nd defendant acknowledges liability for the same.

34. It is therefore evident that, the 1st defendant, “*Bestell Computers Limited*”, did not execute the agreements dated 7th August 2007, 24th February 2008 and 20th May 2008 and cannot be liable on the same. However, the question however remains as to whether those agreements are binding on the 2nd defendant.

35. The defendants argued that, the agreements are not valid or are voidable due to lack of consideration. First and foremost, having found that both defendants did not execute the agreements dated 7th August 2007, 24th February 2008 and 20th May 2008 and are not liable thereon then the issue of lack of consideration does not arise, unless the defendants ratifies and/or adopts the agreements.

36. It is noteworthy though that, none of the parties herein raised the issue of the legal status of “*Bestell Computers*” and “*Bestell Computers Ltd*”, but I was able to pick it out, from the documents produced and of course the law is settled upon incorporation of a company, it acquires legal status independent of its membership and/or shareholders and it can sue and be sued in its own name. However, the contracts impugned cannot be said to be void and/or voidable, as they are valid as between the parties named therein.

37. I shall now revert to the agreement dated 25th May 2009. The 2nd Defendant argues that, he was coerced or induced to enter into the same. However, it suffices to note that, although the 2nd Defendant did not execute the agreements dated 7th August 2007, 24th February 2008 and 20th May 2008 on his behalf, he executed them on behalf the entity referred herein as “*Bestell Computers*”. He was thus all along aware of the matters herein.

38. He knew the agreements were in relation to the Plaintiff’s investment of funds in “*Bestell Computers*”. The contents of the agreements stipulate, the amount to be invested, the interest payable and the duration of investment. Indeed, the 2nd Defendant signed the agreement dated 25th May 2009, with full knowledge that it referred to the agreement of; 7th August 2007. Having executed all these agreements from the year 2007, how can he now claim that he was coerced to sign the agreement of 25th May 2009? The argument is not tenable. It is an afterthought.

39. The next issue to consider is whether the plaintiff has proved the sum claimed in the Plaintiff together with the interest as prayed. It is clear from the evidence herein that, the Plaintiff is relying on the consolidated sum of; Kshs.4,187,500/= in the agreement of 25th May 2009. What is however not clear, is how the sum came about.

40. The documents produced are not self-explanatory. According to the Plaintiff, he advanced the Defendants the following sums of money: -

Date Dirham Kshs.

(a) 24 February 2007 30,000 700,000

(b) May 2007

10 laptops @Kshs.40,000 400,000

(c) August 2007 150,000

(d) February 2008 500,000

41. The plaintiff testified that, these sums of money was earning interest as stated in the agreements executed by the 2nd defendant on behalf of “*Bestell Computers*”. Therefore, as at 20th September 2008, the total outstanding amount was Kshs.2,500,000/=:, being the principal and interest. Apparently, after that date, the next amount claimed is the Kshs.4,187,500/=:. So how did this sum of money build up?

42. I note that the plaintiff acknowledges that the defendants paid him a sum Kshs.270,000/= in respect of the laptops. It therefore follows that, most of the sums claimed arise out of the interest payable as stipulated in the agreements dated 7th August 2007, 24th February 2008, 20th May 2008 and 25th May 2009.

43. The plaintiff urged the court in the submissions to enforce these agreements on the ground that the court cannot rewrite a contract for the parties but has primary responsibility to enforce it. He relied on the case of *National Bank of Kenya Ltd v. Pipeplastic Semkolit (K) Ltd & Another (2001) eKLR*.

44. However, the defendant on its part argued that, all the monies advanced herein was Kshs.1,600,000/=:, and was advanced as a friendly loan, without conditions as to interest payable thereto. It was repaid as stated under paragraph 10 of the Amended Defence and in total the amount paid so far is Kshs.3,113,244/=:. That, the plaintiff gave the defendants monies on three occasions as follows: -

Date Dirham Kshs.

24.2.2007 30,000 600,000

26.2.2008 25,000 500,000

15.11.2008 25,000 500,000

45. Having considered all the evidence adduced herein. I find that the plaintiff and the 2nd defendants were friends and it does appear that the initial sum of money of 30 Dirhams was advanced on friendly basis. In fact, the plaintiff admitted the laptops were to be sold on his behalf and the 2nd defendant was to be paid commission as stated herein. Therefore, there is no agreement to support the plaintiff's averments that, the sum of Kshs.400,000/= was meant for investment.

46. Further, the first agreement of 7th August 2007 of Kshs.1,000,000/= was made long after the 30 Dirhams, equivalent to Kshs.700,000/= and Kshs.150,000/= had been advanced. Indeed, most of the sums advanced are not supported by documentary evidence, for example, the sums of Kshs.500,000/= and Kshs.250,000/= which are the subject of the agreement of 24th February 2008 and 20th May 2008 respectively are not supported. The last sum of 25,000 Dirhams was advanced on 15th November 2008, and said to have been repaid in full. It is therefore not clear how the sum claimed accrued.

47. It was incumbent upon the plaintiff to tabulate clearly the amount advanced, the interest earned on each and how it eventually amounted to Kshs.4,187,500/=. In the absence of the same, I am unable to hold the sum is supported. Thus although the 2nd defendant signed the agreement allegedly consolidating the sums claimed but in civil litigation once the claim is denied then the plaintiff must prove the same.

48. Assuming though that the said agreement is binding upon the parties the plaintiff averred that after that agreement the 2nd defendant paid a sum of Kshs.1,084,500/= leaving the balance of Kshs.3,103,500/=. However there is no evidence in support of the payment. That brings in the issue of interest claimed. The question that arises is whether the plaintiff was entitled to charge interest at commercial rates, in that he is not a licensed bank or financial institution, and whether the court should just enforce a contract that may be in breach of the law.

48. For a contract to be enforced it must be legal and not against public policy. The basis of interest rate of 10% indicated in the agreements of 7th August 2007 and 24th February 2008 is not explained. The third agreement for example, stipulates interest of Kshs.180,000/= on the principal of Kshs.2,500,000/= and payable after every thirty (30) days back dated to 7th August 2008. On the face value, this interest is oppressive and unconscionable.

49. The last agreement of the consolidated sum of Kshs.4,187,500/= does not provide for interest and does not include a default clause, though drawn by a law firm. Surprisingly, the lawyer who drew the same, has witnessed the signatures of both parties and as a matter of fact, is the same law firm that drew the first demand letter to the 2nd Defendant dated 20th July 2009, demanding a payment of Kshs.400,000/= due on 30th June 2009.

50. It also suffices to note that, the subject agreement was executed on 25th May 2009 and although it was executed by the 2nd defendant as a "Manager", the first demand letter dated 20th July 2009, is addressed to him as "Benson Ochieng", while the second demand letter dated 21st December 2010, is addressed to the "Managing Director, Bestell Computers Ltd." As stated his entity did not execute any of the agreements herein.

51. The upshot of all this is that, I find the plaintiff has not proved his case on the balance of probabilities for reasons stated herein and the fact that if any money was advanced it was advanced and repaid and any outstanding money if any, is the basis of alleged interest which the plaintiff had no legal basis in law to charge. Therefore, I dismiss his case for lack of adequate evidence and/or proof of the claim.

52. I shall now consider the Counterclaim, first and foremost, in my considered opinion, it is an afterthought having been filed only after the defendants were sued and indeed there was no demand for the same. Secondly, the defendants allege that there was no consideration in relation to the agreements relied on, how can they claim overpayment? Thirdly, the 2nd defendant does not dispute he signed the agreements, if so how can he argue he overpaid when generally he agreed to the terms therein. Even then the defendants have not given a clear account on how they arrived at the figure of Kshs.1,513,244/=. In that regard, I find the claim not supported by evidence and I accordingly dismiss it.

53. Finally as none of the parties has succeeded in its claim, the costs shall follow the event and in that case, I order that each party meet its own costs. It is so ordered.

Dated, delivered and signed in an open court on this 1st day of November 2019.

GRACE L. NZIOKA

JUDGE

In the presence of

Ms. Awour holding brief Mr. Kirimi for the plaintiff

Mr. Simiyu for the defendants

Dennis, the Court Assistant