

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO 582 OF 2012

PRAVINCHANDRA JAMNADAS KAKAD.....PLAINTIFF

VERSUS

LUCAS OLUOCH MUMIA.....DEFENDANT

JUDGMENT

INTRODUCTION

1. By a Plaintiff dated and filed on 7th December 2012, the Plaintiff sought the following reliefs against the Defendant:-

- 1. The principal sum of Kshs 206,926,300/= as more particularly set out in paragraph 3 hereinabove together with interest thereon at court rates until payment in full.**
- 2. Costs of this suit together with interest thereon at such rate and for such period as this Honourable court may deem fit.**
- 3. Any such and further relief as this Honourable court may deem fit to grant.**

2. On 18th February 2013, the firms of M/S Omwoyo, Momanyi Gichuki & Co Advocates and M/S Ombeta & Company filed a Consent dated 15th February 2013 in which it was agreed that the former firm would take over conduct of the defence case from the latter firm of advocates. The Defendant also filed its Statement of Defence and List of Witnesses dated 15th February 2013 on 18th February 2013.

3. The Defendant's advocates had also filed a Notice of Motion application dated 15th February and filed on 18th February in which they had sought the following orders:-

- 1. THAT this application be certified as urgent and the same admitted for hearing and the application be heard *ex-parte* in the first instance.**
- 2. THAT the firm of M/S Omwoyo, Momanyi Gichuki & Company Advocates be allowed to come on record for the Defendant/Applicant in place of M/S Ombeta & Associates.**
- 3. THAT the Honourable court be pleased to set aside the *ex-parte* judgment entered against the Defendant/Applicant on the 7th day of February 2013.**
- 4. THAT the Defendant be allowed to file his defence out of time.**

4. The said application was to set aside interlocutory judgment that had been entered on 2nd April 2013 when the aforesaid application was pending hearing and determination. On 9th July 2013, the Deputy Registrar High Court Milimani Law Courts Civil Division declined to execute the decree as had been sought by the Plaintiff on the ground that the aforesaid application was yet to be heard and determined.

5. The Ruling of the aforesaid application was eventually delivered by Aburili J on 13th July 2015. She set aside the interlocutory judgment and granted the Defendant leave to file Defence within fourteen (14) days from the date of the said Ruling and awarded the Plaintiff thrown away costs in the sum of Kshs 50,000/=. The Plaintiff's Reply to Defence dated 6th August was filed on 11th August 2015. The Plaintiff's Witness Statements and Bundle of Documents were both dated 2nd June 2016 and filed on 7th June 2016.

6. The matter was certified as having been ready for trial whereupon the suit was fixed for hearing on 17th May 2017. The matter was adjourned as the Defendant's advocates had refused to accept service of the Hearing Notice on the ground that they were changing their firm name. Notably, the firm of M/S Anyango Githogori & Company Advocates for the Defendant filed a Notice of Change of Advocates dated 17th February on 18th February 2014.

7. Subsequent hearing notices were sent to the Defendant's advocates culminating in the Hearing Notice of 12th April 2018 which was sent to them and to the Defendant personally by way of registered mail. This was evidenced by the Affidavit of Service of Lila Koki Kyalo that was sworn on 27th April 2018 and filed on 4th May 2018. However, neither the Defendant nor his advocate attended court on 30th May 2018 when the matter had been fixed for hearing.

8. Having been satisfied that the Defendant and his counsel had been served with the Hearing Notice of 12th April 2018 and that they failed to attend court on 30th May 2018, this court proceeded to hear the Plaintiff's evidence in the absence of the Defendant and/or his advocates.

9. Only the Plaintiff (hereinafter referred to as "PW 1") testified in support of his case. His Written Submissions were dated 20th June 2018 and filed on 22nd June 2018.

LEGAL ANALYSIS

10. Both the Plaintiff and the Defendant did not appear to have agreed on a joint Statement of Agreed Issues. The Plaintiff's Statement of Agreed Issues dated 17th October 2016 was filed on 19th October 2015. In his Written Submissions, he listed the following issues as those that had been placed before this court for determination:-

- i. Whether the Defendant sought and obtained funds from the Plaintiff to be utilized in his activities.**
- ii. Whether the Plaintiff released the amount of Kshs 206,926,300/= to the Defendant.**
- iii. Whether the Defendant induced the Plaintiff to release the said funds via making false allegations and representations.**
- iv. Whether the plaintiff disclosed a reasonable cause of action.**
- v. Whether the Plaintiff deserved the orders sought.**
- vi. Who should bear the costs of this suit.**

11. The Plaintiff's adopted his Witness Statement as his evidence. His case was that in 2004, through false misrepresentations of the Defendant that he was owed a sum of Kshs 210,000,000/= by Central Bank of Kenya (CBK), he released to the Defendant a sum of Kshs 206,926,300/=. The Defendant issued him with several cheques in repayment of the said sum but he requested him not to bank the same until he (the Defendant) got authority from CBK.

12. The Plaintiff said that later he came to learn that the said cheques had been forgeries and that the Defendant had been charged with the offence of forgery on almost similar circumstances as his. He adduced in evidence, copies of cheques and Bank Statements from Fidelity Bank showing the various amounts that he made to the Defendant. He also tendered in evidence copies of cheques for various amounts from the Defendant to him.

13. The Plaintiff submitted that his Bank Statements showed that he had paid the Defendant the sum of Kshs 206,26,300/= and that the Defendant had given to him cheques purportedly drawn by the CBK to pay him back the aforesaid monies. It was therefore his argument that he had therefore discharged his burden of proof as envisaged by Section 107 of the Evidence Act Cap 80 that the Defendant did in fact obtain the said monies from him by misrepresentation.

14. This court carefully perused the two (2) Statements in pp 16-24 of the Plaintiff's Exhibit "P" and noted that there were several payments amounting to Kshs 121,465,000/= and Kshs 57,896,300/= respectively. The Account Number was shown as Account Number 112-2489.

15. The total of the cheques that the Plaintiff contended he had given to the Defendant amounted to Kshs 7,470,220/=. The computation was as follows:-

Date	Cheque No	Amount Kshs
8/12/04	522264	1,000,000/=
10/9/04	512973	100,000/=
25/11/04	522210	350,000/=
30/11/04	522227	200,000/=
28/9/04	515144	700,000/=
24/9/04	515131	200,000/=
31/5/04	505392	220,000/=

10/12/04	522274	250,000/=
14/9/04	512994	200,000/=
15/9/04	515101	230,000/=
15/4/04	501653	50,000/=
8/6/04	510809	50,000/=
19/4/04	501664	100,000/=
23/7/04	510863	200,000/=
25/11/04	522210	350,000/=
3/8/04	510895	200,000/=
30/7/04	510888	50,000/=
17/9/04	515111	200,000/=
14/10/04	519202	300,000/=
10/8/04	512921	520,000/=
9/7/04	510813	100,000/=
18/6/04	508356	250,000/=
9/6/04	508316	200,000/=
8/6/04	510809	50,000/=
21/9/04	515122	400,000/=
30/9/04	515152	800,000/=
	Total	7,230,000/=

16. It appeared to this court that there was a disparity between the sum that the Plaintiff had claimed in his suit, the amount showed in his Statements and the amount showed in the actual cheques that he presented to this court. In view of this disparity which the Plaintiff did not explain, this court was not satisfied that he had released the sum of Kshs 206,926,300/= to the Defendant as he had contended.

17. From the Plaintiff's evidence, it was also not possible to establish if the Defendant utilised monies he allegedly obtained from the Plaintiff for his activities. The cheques may have been drawn in his name but that was not necessarily to say that the monies were utilised in his business.

18. On the question as to whether or not the Defendant induced the Plaintiff to release monies to him by making false allegations and representations, it was the view of this court that the Defendant ought to have called a witness (es) from CBK to confirm that the letters the Plaintiff was purportedly given by the Defendant and he relied upon were forgeries. In addition, the said witnesses(es) could have confirmed the contents of his letter dated 1st September 2005 addressed to CBK authorising it to release the sum of Kshs 210,000,000/= to Fidelity

Bank and Kshs 140,000,000/= to Commercial Bank of Kenya.

19. It was the considered opinion of this court that this evidence was crucial as the date on the cheques the Plaintiff indicated he had given to the Defendant were in the year 2004. It was therefore important for him to have shown the nexus of the letter of 1st September 2005 and the several cheques that he purportedly gave to the Defendant.

20. If the payments were made to the Defendant as was contended in the letter of Fidelity Bank dated 9th August 2008, nothing would have been easier than for the Plaintiff to have called a witness(es) from Fidelity Bank to corroborate his evidence.

21. Notably, the Legal Manager Fidelity Bank James Oyuke signed his Witness Statement on 2nd June 2016. It was not clear why he was not called as a witness. His failure to attend court to testify meant that his Witness Statement was worthless as it could only become evidence once he had taken oath and adopted the same as his Examination-in- Chief.

22. The onus was also on the Plaintiff to demonstrate that his claim was not time barred. This was because the agreement between him and the Defendant was in 2004 and he filed his suit eight (8) years later in 2012. He ought to have demonstrated that there were acknowledgments of the debt by the Defendant at least by 2006 so as to have brought his claim within the limitation of suits founded on contract.

23. Appreciably, Section 4(1)(a) of the Limitations of Actions Act Cap 22 (Laws of Kenya) provides as follows:-

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued:-

(a) actions founded on contract;

24. Section 23(3) of the Limitations of Actions Act stipulates that:-

“Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:

Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt.

25. Accordingly, having perused the oral and documentary evidence that was adduced by the Plaintiff, his Written Submissions and the case law that he relied upon, this court came to the firm conclusion that although the veracity or otherwise his evidence was not tested through cross-examination, he did not prove on a balance of probabilities that he was entitled to the prayers sought. His evidence had unexplained and gaping gaps. He failed to set out his case step by step and the court had to do it itself to unearth the merits or otherwise of his case

DISPOSITION

26. For the foregoing reasons, the upshot of this court’s decision was that the Plaintiff’s suit that was filed on 7th February 2012 was not merited and the same is hereby dismissed.

27. As the Defendant did not attend court to defend himself, there will be no order as to costs. Each party shall bear its own costs.

28. It is so ordered

DATED and DELIVERED at NAIROBI this 18th day of October 2018

J. KAMAU

JUDGE