



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 552 OF 2014

EDWIN NG'ONG'A K'OGWEPLAINTIFF

VERSUS

DAVID OKOTH & MICHAEL KADENGE T/A

AFROGAINS EAST AFRICADEFENDANT

JUDGMENT OF THE COURT

INTRODUCTION

1. Through the Plaintiff filed in Court on 27th November, 2014 the plaintiff prays for Shs. 19,200,000, interest thereon at court rates and costs against defendants.
2. The Plaintiff's suit is based on allegations that the plaintiff advanced a sum of Kshs. 10 million as loan to the Defendants on 27th December, 2012. The said amount was to be repaid with interests of Shs. 600,000 per month for 2 months since the loan was to be repaid in two months. The Defendant has refused or neglected to pay the same leading to the present suit.
3. The Defendant did not file a defence to the suit and so judgment was entered for the plaintiff as claimed in the Plaintiff for lack of defence, but the same was later set aside and the Defendant given the opportunity to file a defence. The defendant then filed their joint defence on 4th December, 2015.
4. In their defence, the defendants deny the allegations in the Plaintiff. They deny that the plaintiff advanced them a loan of Kshs. 10 million and aver that the said money was given to them by the plaintiff pursuant to a joint venture agreement with the plaintiff, and that in deed the said amount was the plaintiff's contribution to the joint venture investment with **Agrograins East Africa** wherein the profits and losses were to be shared as agreed. The defendants deny that there was any profits payable, or that there was any particular mode of payment, but admit having paid back Shs. 3,700,000 not as loan repayment but towards re-aligning the joint venture business.

THE PLAINTIFF'S CASE

5. The plaintiff was the sole witness in his case. He adopted his Witness Statement and Bundle of Documents. The plaintiff testified that on or about 27th December, 2012, the Plaintiff and the Defendant entered into a loan agreement. The Plaintiff at the request and instance of the Defendant advanced the Defendant a sum of Kshs. 10,000,000/= which sum was transferred by

way of RTGS remittance to the Defendant's bank account and acknowledged by the Defendants (**Page 1 of Plaintiff's Index of Documents**). The alleged terms of the agreement were that the Defendant would repay the loan amount together with the agreed interest on or before February, 2013 being a sum of Kshs. 600,000/= for the month of January, 2013 and Kshs. 600,000/= for the month of February, 2013 together with the principal sum all totaling to Kshs. 11,200,000/= (**Paragraph 4 of the Plaintiff's Witness Statement**). In part payment of the debt, the Defendants paid a sum of Kshs. 3,400,000/= and the balance thereof has not been paid to date. The Plaintiff testified that the principal amount continues to accrue interest at the rate of 6% per month which sum had accumulated to a total amount of Kshs. 19,200,000/= at the time of filing the suit. The Plaintiff further testified that vide a letter dated 10th July, 2013 (**Page 2-3 of the Plaintiff's Index of Documents**) the Plaintiff demanded the payment of the said accumulated amount from the Defendants. The Defendants in reply vide a letter dated 18th July, 2013 (**Page 4 of the plaintiff's Index of Documents**) acknowledged the indebtedness and further highlighted various reasons why they had not paid the amount outstanding. The plaintiff further testified that the Defendant vide the said letter promised to compensate the Plaintiff for the amount outstanding. However, the said promise has not been honoured to date. As a result of breach of the contract by the Defendant, the Plaintiff has suffered loss of income and damage as particularized in the Plaint.

DEFENDANT'S CASE

6. The Defendants sole witness was **David Otieno Okoth**. He adopted his witness statement and the defendant's Bundle. The witness testified that there was no agreement to advance a loan as alleged by the plaintiff. He however, acknowledged the receipt of Shs. 10 million given by the plaintiff not as loan but as part of the plaintiff's investment in a joint venture business. The witness explained that his attempt to pay back part of that money was not in acknowledgment of the loan but to attempt to restore his relationship with the plaintiff with whom he had a long time relationship of business and family. There was no payment plan for the said money but only for share of profits.
7. In cross examination, however, the witness admitted that he was under an obligation to pay the said money to the plaintiff and that the said money was due to the plaintiff. So far the witness admitted repayments Shs 3.4 million. The witness further testified in cross examination that he and his partner signed the letter dated 18th July, 2013 voluntarily. The witness also admitted in cross examination that the plaintiff was entitled to the Shs. 10 million, and since he has already paid Shs. 3.4 million, the balance he is willing to pay is Shs. 6.6 million.
8. In further cross examination the defendant's witness admitted that the plaintiff was entitled to some share of the profits for the use of the plaintiff Shs. 10 million. However, the witness was unsure what such profits would be since the business did not make any profits.
9. In re-examination the witness testified that he would wish to repay the said money, but that the business did not take off. The money was used in the purchase of grain, but the business failed.

SUBMISSIONS

10. Parties filed submission which I have considered. I raise the following issues for determination.
 - i) *Whether the defendant was given Shs. 10 million by the plaintiff as loan*
 - ii) *If yes, whether the same was to be repaid with interest.*
11. Arising from the evidence of the defence witness, it is no longer necessary to find whether or not the said Shs. 10 million was given and for what purpose. The sole defence witness has admitted receiving the money.

Moreover, he has admitted that the plaintiff is entitled to be repaid that money, and that he has already repaid Shs. 3.4 million leaving a balance of Shs. 6.6 million which he is willing to repay. His only problem is that since the business for which the money was given did not take off he does not know how to assess any profits to be repaid. So it is the finding of this court that the

plaintiff is entitled to a refund of Shs. 10 million and that out of that Shs. 3.4 million has already been paid by the Defendant.

12. On the second issue of interests, the plaintiff demands payment of 6% per month, while the defendants deny that any interests should be paid. The finding of this court on the issue is that parties agreed that interest of Shs. 1,200,000= would be paid for two months during which the agreement was to subsist. That did not happen since the defendant did not honour that. The finding of this court is that for the said two months the agreed interest of Shs. 1,200,000= shall be paid. However, this court notes that once the defendant acknowledged the receipt of the said Shs. 10 million, the defendants cannot deny that the same was to be paid with interests.

This court does not buy the defence idea of joint venture. There may have been a venture, but there was no evidence that the plaintiff was part of it. It is the finding of this court that the plaintiff was entitled to profit on his money. However, because both parties agree that they have been good friends and close business associates, the interest rates should not be punitive but should be sufficient enough to acknowledge the cost of money. This court has a very wide discretion in awarding or refusing to award interest. In acknowledging the nature of the relationship between the parties, and also noting that the defendant's business did not take off, this court hereby awards interest at the rate of 10% per annum, in addition to interests already awarded of Shs. 1,200,000= for the first two (2) months of the loan period.

13. In the upshot, judgment is hereby entered for the plaintiff against the defendant in the following terms;

a) Shs. 6,600,000=

b) Shs. 1,200,000= being interest for the first two months of the loan period.

c) Interest of 10% per annum on the initial Shs. 10 million on reducing balance commencing from 1st April, 2013 until payment in full.

d) Costs of the suit.

That is the judgment of the court.

E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JULY, 2016

LADY JUSTICE G. NZIOKA

JUDGE

Present