



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION - MILIMANI**

**CIVIL SUIT NO. 615 of 2014**

**IRENE WANGUI GITONGA.....PLAINTIFF**

**VERSUS**

**SAMUEL NDUNGU GITAU.....DEFENDANT**

**J U D G M E N T**

1. The Suit in this matter was instituted by the filing of a Plaintiff. The Plaintiff was filed on 23<sup>rd</sup> December 2014. The Plaintiff seeks the following prayers:

- (a) The sum of Kshs. 14,972,400/=
- (b) Interest at the rate of 15% per annum
- (c) Costs of this suit and interest thereon
- (d) Any other relief the court deems fit to grant.

The Summons to Enter Appearance was signed and dated on 23 December 2014.

2. The facts are set out in the Plaintiff. Briefly, it is alleged that the Parties entered into a profit sharing agreement around December 2012 relating to the supply of election materials. The Plaintiff says she loaned the Defendant the sum of Kshs 8,000,000/=. In return the Defendant agreed to repay Kshs 15,000,000/=. It is said that there was a written agreement and that the Defendant wrote some post dated cheques to be banked on their due dates to facilitate payment. They were not banked. The Plaintiff states that was at the request of the Defendant. It is admitted the Defendant made a payment of Kshs 2,000,000/=. It is said that interest was agreed at 15%.

3. On 24<sup>th</sup> June 2015 the Plaintiff brought an Application by “Chamber Summons – a procedure long since abandoned, seeking an order for substituted services of summons on the Defendant by advertisement in any of the local daily newspapers on the grounds that the Defendant’s current location is unknown, all attempts to serve him personally have failed and that the Defendant no longer stays at his residence in Nakuru and Karen, Nairobi, those two areas are separated by about 100 kms. The Order was made and Substituted Service by Advertisement on 22<sup>nd</sup> October 2015. The Return of Service is dated 26<sup>th</sup> October 2015.

4. On 27<sup>th</sup> October 2015, by a Memorandum of Appearance the Defendant entered appearance through

his Advocates Messrs Kamotho, Njomo & Company Advocates. Prior to that and in particular during November 2014, the Defendant had been represented by a law firm called Messrs Chege Wainaina & Co Advocates. The Plaintiff has had the same Advocates throughout.

5. On 30<sup>th</sup> October 2015, that is 3 days after the Memorandum of Appearance and 4 days after the Return of Service, the Plaintiff filed an Application by Notice of Motion for Judgment to be entered for the Plaintiff as prayed in the Plaint. That is the Application now before this Court.

6. The Application is brought under **Order 36 Rule 1(a) and Order 51 Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act**. It is Supported by the Affidavit of the Plaintiff and rests on the following grounds:

(i) The Defendant is truly and justly indebted to the Plaintiff in the sum of Kes 14,972,400/= together with contractual interest at the rate of 15% per annum with effect from 15<sup>th</sup> November 2014 till payment in full.

(ii) The Defendant has no just or reasonable defence to the Plaintiff's Claim

(iii) It is just and equitable that Summary Judgment be entered against the Defendant.

### **LAW AND ROCEDURE**

7. *Order 36 provides:*

*(1) In all suits where a plaintiff seeks judgment for— (a) a liquidated demand with or without interest; or (b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.*

*(2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.*

*(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.*

*[Order 36, rule 2.] Defendant may show cause.*

*2. The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit.*

### **DECISION AND REASONS**

8. The Application is dismissed with costs for the reasons that follow. Firstly, the Plaintiff has alleged in the Plaint which is verified by her Affidavit that there was an Agreement entered into in December 2014. There is no evidence of that Agreement anywhere in the documents. There is correspondence in November 2014 and the Plaint claims interest from November 2014 therefore there is an inconsistency in what is claimed and the case presented to the court as well as the evidence. Secondly, the Plaintiff has served the Summons by alternative service. There is absolutely no evidence before the Court that the actual Plaint, documents and the Application now before the Court was ever served on the Defendant. Thirdly, the quantum claimed in the Plaint is neither justified not supported by evidence. There is no calculation that explains how Kshs 8,000,000 less Kshs 2,000,000/= can turn into Kshs 14,000,000/= or thereabouts during a period of about two years. There is no explanation of what "Election materials" were provided in 2012. The Plaint and therefore the Plaintiff neglects to mention the correspondence relating to payment and variation of the agreement sent by the Defendant's then Advocates.

9. From the above it is clear that on present analysis this is not a clear cut case. It is not clear whether that is due to incomplete preparation or a deliberate intention to mislead. In any event, the failure to serve the Defendant is fatal.

10. Order: Application dismissed with Costs.

Order accordingly,

**FARAH S. M. AMIN**

**JUDGE**

**Signed And Delivered At Nairobi This 15<sup>th</sup> Day Of September 2016**

**In the Presence of:**

**Clerk: Isaiah Otieno**

**Mr Kerongo – for Applicant**

**Miss Chibet - for Respondent**