



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 606 OF 2005

J K M PLAINTIFF

versus

BISHOP MULANDI.....1ST DEFENDANT

M W.....2ND DEFENDANT

JUDGMENT

The plaintiff J K M filed Thika PMCC No.367 of 1994 against the defendants herein Bishop Mulandi and M W which suit was later transferred to Nairobi HCC 606 of 2005 after the plaintiff claimed that what he was seeking as compensation from the defendants was in excess of Kshs 30,000,000.

On 27th November 1998, Honourable E.O. Awino Senior Resident Magistrate stayed the suit in the lower court for want of jurisdiction and the plaintiff obtained orders of this court to transfer the suit to the High court for hearing and final disposal vide Nairobi HC Misc. Appl. No. 936 of 2004 which orders of transfer were issued by honourable P. Kihara Kariuki J(as he then was).

It is also worth noting that the plaintiff herein did apply and was granted leave of this court vide Nairobi HC Misc App. 533/2004 to sue as a pauper on 9th July 2004 by Honourable Justice Nyamu(as he then was). The plaintiff has therefore all along prosecuted his case as a pauper and as a *prose* litigant. Save for the figures of Kshs 30,000,000 the claim before this court and the Thika court is the same and this court shall consider the Thika suit as the original suit and deem this suit as having been amended to specify the amount received from one, Mr Klaassen of the Netherlands.

The plaintiff however filed a fresh plaint on 19th May 2005. Nonetheless, the claim is the same as what was transferred from Thika PM's court vide his plaint filed in this court on 19th May 2005, and dated the same day. the plaintiff claimed that the 1st defendant Bishop Mulandi received kshs 30,000,000 on his behalf from one Mr C.G. Klaassen of Netherlands between the months of November 1993 and thereafter the 1st defendant who was a Bishop eloped with the plaintiffs wife who is the second defendant taking with her all his household goods after she was promised to be given a share of that money by the 1st defendant.

The household goods were valued at kshs 50,000. The plaintiff prayed that the 1st defendant be ordered to give accounts of the money that he had received on behalf of the plaintiff from Mr C.G. Klaassen of Netherlands. The plaintiff also prayed for general damages to be assessed by the court, costs of the suit

and interest. The plaint is poorly drafted but nonetheless the claim is clear.

Only the 1st defendant filed his defence on 15th March 2006 denying each and every allegations made by the plaintiff against him stating that the suit does not disclose any reasonable cause of action and that the same is statute barred hence it should be struck out with costs.

The plaintiff testified as PW1 on 5th February 2005 to the effect that he is a trained accountant and holder of CPA III. He was a practicing accountant in Thika and retired in 1992/1993 because of a mental sickness but that he had been treated by Doctor Thuo and he is now well enough to follow the proceedings. He stated that he knew both defendants, the 2nd defendant was his wife of more than 7 years and that she is the one who introduced him to the 1st defendant who was her Bishop at Thika Christian Church.

The plaintiff claimed that the 1st defendant went to see him over his daughter J W then schooling at [particulars withheld] Primary School and who was mentally handicapped so the 1st defendant wanted to assess her condition with a view to assisting her get a to a special school in Karatina for the mentally handicapped where he would sponsor her.

That the 1st defendant brought a letter from the said school showing the child's requirement and he asked if the plaintiff could raise half fees and the 1st defendant sponsors half and the plaintiff agreed to the proposal. The plaintiff produced P exhibit 1 copy of the said letter. The plaintiff claimed that he paid to his wife the 2nd defendant half of the kshs 8,800 required for his daughter's admission into the special school and the 1st defendant paid the rest of the money by cheque and his daughter went to the special school. That the 1st defendant then kept visiting him at his accountancy offices in Thika town for friendly discussions on a weekly basis and on 22nd October 1993 the 1st defendant invited the plaintiff to his office and produced a letter which he had received from the Netherlands written by one Mr C.G. Klaassen of Rotterdam which he gave the plaintiff to read and which letter urged the 1st defendant to introduce a person to Klaassen so they could connect and use that person to establish missionary work in Kenya.

That after reading the said letter the plaintiff returned it to the 1st defendant who advised the plaintiff to write an application for help from Mr Klaassen which the plaintiff did, and the said letter was posted. The plaintiff produced as P exhibit 2 a, b and c the handwritten note from Bishop Mulandi, the letter written to Klaassen and certificate of posting. The plaintiff claimed that after posting that letter to Mr Klaassen, the 2nd defendant became complicated alleging that since she had introduced him to Bishop Mulandi, should the money come from Klaassen then she must control it otherwise she would block the money reaching the plaintiff.

According to the plaintiff, Mulandi went to the Netherlands and upon his return, the 2nd defendant was the first to meet him and she invited the plaintiff to go meet the Bishop in his office where the 1st defendant informed him that Mr Klaassen had given him kshs 500,000 which he produced in bale of notes and placed on the table and asked the plaintiff to write a proposal to be send to Klaassen indicating how the plaintiff wished to use the money. That the 1st defendant also revealed to him that the 2nd defendant had complained that the plaintiff had beaten her. That when he returned to his place of work, he met his wife, the 2nd defendant crying alleging that he had beaten her and they both went to Bishop Mulandi who chased them away saying that he would give the money to whoever remained with the children. The plaintiff stated that he went to his work place and gave money to the 2nd defendant to buy more stock for her business but instead she hired a lorry and carted away all the stock from her business and household goods and left him and she recorded a statement at Thika Police Station warning him not to disturb her. He produced P exhibit 3 a note from Thika Police Station. Later the 2nd defendant swore an affidavit (PEX4) stating that she had never been married to anybody and that she was not aware of any money.

That in 1994, the 2nd defendant swore another affidavit denying marriage or any bank account jointly held with the plaintiff. He produced that affidavit as PExhibit 5. The plaintiff also produced P exhibit 6 bank statement with Barclays bank A/C [particulars withheld] in joint names of himself and the 2nd defendant. He also produced house rent receipts for monies paid to their landlord in Thika in the names of the 2nd defendant at Makongeni phase 9 plot [particulars withheld] as P exhibit 7.

He explained that he first filed this suit in Thika but when the damages he was seeking exceeded the pecuniary jurisdiction of that court, he obtained an order transferring it to the High Court.

He urged the court to grant him kshs 30,000.000 to be paid by Bishop Mulandi, who should also be ordered to pay him any monies received from Klaassen on his behalf on a monthly basis which Mulandi did not surrender to the plaintiff. He also urges the court to order Mulandi to produce the foreigner to court for disclosure.

In cross examination by Mr Mboha, the plaintiff admitted that he had mental problems from 1988-1992 but that he had fully recovered although he did not have any documents from a doctor to show that he had fully recovered. He also stated that he did not have any agreement from Mulandi to pay ½ fees for his daughter. He stated that M W was his wife under Kikuyu customary Law. The plaintiff indentified P exhibit 2(a) a note which he conceded did not have Mulandi's name but was emphatic that it was written by Mulandi. He also admitted that P exhibit 2(b) letter to Klaassen did not specify the amount. He also admitted that he did not count the money that Mulandi showed him in a bale and that Mulandi was alone when he showed the plaintiff the said money. He confirmed that the foreigner had never written to him stating that Mulandi had received the money and that he did not have any acknowledgment or an agreement with Mulandi that the latter owed him money. He stated that his wife stole from him but he did not report to the police because she had already reported him to the police who had written to him cautioning him to keep peace and not to disturb her. He stated that he did not have any proof of ownership of those goods his wife had carted away because they were household goods. He also stated that he did not write any letter to the foreigner concerning the issue of money.

When questioned by the court, the plaintiff stated that he lodged a complaint at Thika Police Station and to the chief after his wife took away the belongings but that he did not file for divorce. Further, he stated that his children visit him although the one who went to the special school died after the 2nd defendant deserted the matrimonial home.

The defendants did not call any evidence and closed their case. Both parties filed written submissions with the defendants filing first and the plaintiff responding thereto.

The defendants submissions as filed on 25th February 2015 urged this court to dismiss the plaintiffs suit with costs as the plaintiff had not proved his case against the defendants on a balance of probabilities.

In their view, the plaintiff did not prove that the 1st defendant received kshs 50,000,000 on his behalf from the foreigner and it was not clear how he arrived at that astronomical figure. Further, that there was no evidence that the 1st defendant had received any money from C.G. Klaassen and or even corresponded with the alleged foreigner.

In addition, it was contended by the defendants that the alleged taking away of the plaintiff's household goods by his estranged wife valued at kshs 50,000 was not proved as no inventory or receipts were produced to proof ownership of the said items.

The plaintiff filed his submission on 10th March 2015. He submitted that it was erroneous for the defence counsel to allege in their submission that the plaintiff had claimed for an astronomical figure for kshs 50 million which was never pleaded anywhere, as he had asked for kshs 30 million.

The plaintiff maintained that he had proved the existence of a relationship of husband and wife with the

2nd defendant as he had produced bank statements with Barclays bank A/C [particulars withheld] wherein the two were joint account holders and that one of his daughters with the 2nd defendant A W was named after his mother in accordance with Kikuyu customary law and that the other one W obtained her identity card in his name.

The plaintiff urged the court to disregard the defendants' written submissions as they are full of falsehoods and exaggerations.

He urged the court to find that the 1st defendant had received money from C.G. Klaassen of Netherlands in the sum of kshs 500,000 on his behalf as it was the plaintiff who had send an application to the said foreigner Mr Klaassen asking for the money, which he believes the 1st defendant used to entice the plaintiff's wife-the 2nd defendant away.

He submitted that he could not have been expected to count the money which he was shown by the 1st defendant or even sign an acknowledgement as the 1st defendant was the one to deal with the foreigner on behalf of the plaintiff. The plaintiff charged that the 1st defendant being a Bishop should have mediated to reconcile the plaintiff with the 2nd defendant instead of keeping them apart. He urged the court to order the 1st defendant to produce the foreigner to court for the court to know who that person was.

He also urged the court to enter judgment for the plaintiff against the 1st defendant for causing a separation between the plaintiff and his wife the 2nd defendant. He also prayed for costs of the suit and interest.

The parties did not frame any issues for determination by the court. None of them relied on any decided cases or statutory provisions of the law. However, pursuant to order 15 Rule 2 of the Civil Procedure Rules, the court may frame issues from all or any of the following materials:

- a. *Allegations made on oath by the parties or by persons present on their behalf, or made by the advocates of such parties;*
- b. *Allegations made in the pleading or in answers to interrogatories delivered in this suit;*
- c. *The contents of documents produced by either party.*

From the particulars contained in the plaint and defence and the oral evidence adduced by the plaintiff and the parties respective submissions as filed and exchanged, these are the issues for determination:

1. Whether on the evidence available on record, the plaintiff proved his case against the defendants on a balance of probabilities.
2. What orders should this court make.
3. Who should bear the costs of the suit.

On the first issue, it is trite law that the burden of proof lies with the person who alleges the existence of a fact. See Section 107 of the Evidence Act. In this case, the plaintiff alleges in his plaint that the 1st defendant forced the plaintiff's wife who was the 2nd defendant to flee with property worth kshs 50,000.

Further, that the 1st defendant received over kshs 30 million from C.G. Klaassen of Netherlands on his behalf and has refused to hand over the said money to the plaintiff and or account for it to the plaintiff. The plaintiff therefore urged this court to order the defendants to return his household goods or their value in the sum of kshs 50,000/- and secondly, to order the defendant to pay him over kshs 30,000.00 received from Mr C.G. Klaassen. He also sought for general damages.

In this case, it was incumbent upon the plaintiff to prove that the items which the 2nd defendant allegedly took away belonged to him and that kshs 50,000/- was their estimated value. The plaintiff

testified that the 2nd defendant was his customary law wife. He produced evidence of the two operating a joint bank account with Barclays bank, Thika and acknowledgment receipts for rent remitted to their landlord in Thika issued in her name. He claims that he used to give her money to pay rent for the family. He also produced exhibit 3 a notice from OCS Thika Police Station to him to keep peace following a complaint by his unnamed wife. The note is dated 5th January 1994. The plaintiff also produced two affidavits sworn by the 2nd defendant denying that she was ever married to the plaintiff or to any other person.

The 2nd defendant nevertheless did not file any defence in this case and neither did she give evidence as a witness. The defence filed by the 1st defendant on 15th March 2006 only covered the 1st defendant.

Assuming that the 2nd defendant was married to the plaintiff since his evidence on their customary law marriage was not controverted, this court finds that the plaintiff failed to discharge the burden of proving that the 2nd defendant was forced out of her matrimonial home by the 1st defendant. This court also finds that there was no proof that the 2nd defendant took away the plaintiff's household goods valued at kshs 50,000/-

The plaintiff stated that he did not report to the police the fact of his household goods being stolen by the 2nd defendant because the 2nd defendant had already reported him to the police and he was ordered to keep peace.

In my view, the plaintiff should have made a theft report for action to be taken against the 2nd defendant if he believed that his property had been stolen by his wife especially after she swore an affidavit denying that she had never been married to him at the material time.

In addition, household goods are tangible assets. In his plaint and testimony, he did not specify the alleged household goods that his wife was forced by the 1st defendant to run away with and or their respective values. That being the case, this court is unable to find any evidence proving the act of the 2nd defendant taking away household goods belonging to the plaintiff.

There is then the question of the foreigner from Netherlands, a Mr Klaassen having sent to the plaintiff over kshs 30,000,000 through the 1st defendant, which money the 1st defendant is said to have used to entice away the plaintiff's wife, and which sum of money was inclusive of the initial kshs 500,000/- received by the 1st defendant and shown to the plaintiff in bundles. With utmost respect to the plaintiff, this was a wild claim reminiscent of the plaintiff chasing an untamed goose.

There was no evidence to prove that the 1st defendant was under any contractual duty to receive any money from C.G.Klaassen from Netherlands on behalf of the plaintiff. In my view, the plaintiff must have been suffering from some form of insane delusions or hallucinations when at the time of instituting this suit in Thika Court and its eventual transfer to this court. This is not to say that he is of unsound mind, as he prosecuted his case very well and impressed this court as a very intelligent person. The plaintiff nonetheless admitted in cross examination and on being questioned by the court that he suffered a mental disease but that he had now recovered. This court highly doubts that the plaintiff had fully recovered from the mental breakdown when he instituted this suit and if at all he had recovered, he did not avail the doctor's medical report to demonstrate his actual mental state as at the time he filed this suit in 1994. In my view, the plaintiff still suffers from some disturbance of the mind. In his P exhibit 2, a letter written to the foreigner on 22nd October 1993 he admitted at page 2 paragraph 1 that ***"from early 1988 I was affected mentally by a certain disease and the disease that have been treated by doctors in Thika Town and have not released me complitly (sic) and the disease that have spoiled my ways of earning."***

It is in the said letter to the foreigner that he mentioned that he had been introduced to Klaassen by Bishop Mulandi to explain his problems and seek help and even provided his bank account with

Standard Chartered Bank account No. [particulars withheld] where money could be channeled.

There is no evidence that the letter which was sent to solicit for the money from Mr C.G. Klaassen which money is alleged to have been misappropriated by the Bishop was responded to by the foreigner. The plaintiff had the said foreigner's telephone number as given to him by Bishop Mulandi (see P exhibit 2) which was [particulars withheld] but there is no evidence that he ever attempted to call that foreigner to inquire on the money. The plaintiff also had the foreigner's address which was Kruipbrem 14 3068 TH Rotterdam The Netherlands.

Nothing prevented the plaintiff from corresponding with the said foreigner directly to inquire about the assistance that the plaintiff had sought from him and or whether the said assistance had been channeled through Bishop Mulandi, the 1st defendant, since the plaintiff had the contacts of the donor.

In my view, this claim by the plaintiff against the 1st defendant is not only farfetched but frivolous, vexatious and an abused of the court process. It is acclaim with no head, tail or feet to stand on. It is a baseless claim and therefore it must fail on all its fours.

This court from the pleadings on record and the general conduct of the plaintiff makes an inference that the plaintiff was not a fit person to file suit at the time he so filed as his mental faculties were not in their proper state. He required a guardian ad litem then since he admitted that he had suffered a mental disease condition which had not left him completely. He also required a legal counsel to counsel him on whether his claim raised any reasonable cause of action.

In my view, this is a claim that was only intended to embarrass the 1st defendant who is said to be a Bishop of a church in Thika.

I find that the plaintiff's claim has not been proved to the standard required in civil cases- on a balance of probabilities that the 1st defendant received monies from an unknown foreigner, a Mr C.G. Klaassen of Netherlands on behalf of the plaintiff and or that the said 1st defendant was to receive such monies from a foreigner on behalf of the plaintiff. As I have stated before, nothing prevented the plaintiff from reporting the matter to the police to investigate what sounds like conversion or extortion. Kshs 30,000,000/- in 1994 was not little money to the Kenyan economy. The plaintiff did not even seek to investigate the 1st defendant's bank account to show whether such monies were being received from outside the country and deposited into a bank account on a monthly basis.

There is also the plaintiff's claim for general damages in paragraph 2 of his plaint. He does not state the damages for what. In his sworn evidence and submission, he does not specify for what purposes he sought general damages. Furthermore, he does not quantify the loss and or the damages that he wished this court to award him.

In paragraph 10 of his submissions, the plaintiff urges the court to enter judgment for orders against the 1st defendant who caused separation between him and the 2nd defendant because of the application (sic) and money. Such claim is unknown in law and equity and therefore this court cannot quantify or award general damages for a claim that does not disclose any cause of action known in law.

This court has also not come across in the pleadings any claim under any established customary law pleaded for either for adultery or wife enticement or other known claim against the 1st defendant. The bare allegations that the 1st defendant caused a separation between the plaintiff and the 2nd defendant which separation only death could bring is unknown in law and is therefore not actionable. In the same breath, this court is unable to find reasons for compelling the 1st defendant to produce the foreigners to court.

Accordingly, I find that the plaintiff has failed to prove his case against the defendants and in this case, it matters not that the defendants did not offer any evidence to controvert the plaintiffs evidence. The

burden of proof did not shift from the plaintiff to the defendants even if the case proceeded by way of formal proof as they had no counterclaim against him.

I therefore make an order dismissing the plaintiff's suit against the defendants.

As to who should bear the costs of the dismissed suit, I note that the plaintiff is an ascertained pauper. He instituted this suit after being declared a pauper by the court on his own application. He drafted pleadings and prosecuted the suit on his own as a *prose* litigant. He admitted to have suffered from a mental disease and being treated for the same. He did not satisfy the court that he had fully recovered from that ailment that he admitted was of the mind as there was no medical report to certify his current mental state or capacity.

There is also no evidence that he is now possessed of any means, leave alone sufficient means to pay costs of this suit which follow the event. For those reasons, the suit is dismissed, but each party shall bear their own costs.

Dated, signed and delivered in open court at Nairobi this 7th day of July, 2015.

R.E. ABURILI

JUDGE