



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Suit 438 of 2009

THAMMO HOLDINGS LIMITED.....PLAINTIFF

VERSUS

TIMOTHY MWANIKI MURIITHI.....DEFENDANT

JUDGMENT

1. The Plaintiff commenced the suit in this matter at the through a Complaint dated 17th June 2009 and filed on 18th September 2009. In the Complaint, the plaintiff prays for special damages in the sum of Kenya shillings Five Million Five Hundred Thousand only (Kshs. 5,500,000/-) together with costs of the suit and interest thereon at court rates.
2. Upon service of summons, the Defendant entered appearance and filed a statement of defence dated 17th September 2009 and filed on 18th September 2009.
3. The Plaintiff's case is that sometime in July 2008, the Plaintiff upon an oral agreement advanced to the Defendant a loan of Kshs. Four Million (Kshs. 4,000,000/-) on the understanding that the Defendant would repay the stated principal sum together with interest in the sum of Kshs. 1,500,000/-. In pursuance of the agreement, the Defendant issued to the Plaintiff cheque numbers 000125 and 000126 for the sums of Kshs. 4,000,000/- and Kshs. 1,500,000/- respectively in full settlement of the contractual debt. However, the two cheques were dishonoured upon presentation to Standard Chartered Bank Moi Avenue Branch due to lack of funds. The Plaintiff thereafter issued demand notices to the Defendant to pay, which demands elicited no response from the Defendant.
4. In his Statement of Defence filed on 18th September 2009, the Defendant denies having borrowed the stated sum of money and contends that no prudent businessman would lend such a sum of money without any written agreement. The Defendant avers further that the only reason he issued the two cheques with the Plaintiff is that he intended to invest in the Plaintiff's business and the Plaintiff was at all times advised not to bank the cheques until such a time that the Defendant gave him instructions to bank.
5. The Defendant did not file any pre-trial documentation nor take any other step in the matter upon filing his defence. Hearing of this matter proceeded *ex parte* with the Plaintiff calling one witness, Ms. Ruth Wanjiru Kairu.
6. In her evidence, Ms. Kairu testified that she works for the Plaintiff as an accountant and was aware of the oral agreement entered into in July 2008 between the Plaintiff's Chairman and the Defendant. Under that agreement, the Defendant was advanced a loan of Kshs. 4,000,000/- which he was supposed to pay with interest of Kshs. 1.5 Million. The money was duly advanced to the Defendant. The Defendant attempted to repay the money through Standard Chartered Bank Limited through cheque No. 125 for

Kshs. 4,000,000/- and No. 126 for Kshs. 1,500,000/- issued in the name of Thammo Holdings Limited but which were dishonoured. As of date, the Defendant had not repaid the loan in spite of several demand letters issued to him by the Plaintiff. The Plaintiff was therefore seeking judgment for the sum of Kshs. 5.5 Million together with interest and costs.

7. I have carefully considered the pleadings, the affidavit evidence on record and the oral evidence of the Plaintiff. I have also considered the written submissions by counsel for the Plaintiff.

8. As stated above, this matter proceeded *ex parte*, the Defendant having failed to participate in the pre-trial procedures as well as at the hearing of the suit.

9. From the material placed before me, while I agree with the Defendant's contention that it is somewhat strange that a loan of Kshs. 4,000,000/- can be advanced through an oral agreement, it is also true that a contract can be made orally, as asserted by the Plaintiff. In the same vein, I am unable to verify the Defendant's claim that the cheques he issued to the Plaintiff were meant to be for investment purposes and not for loan repayment. This is because the Defendant did not tender any evidence to controvert the Plaintiff's case that he was indeed advanced a sum of Kshs. 4,000,000/- payable with interest of Kshs. 1,500,000/-. I have further cited several letters and correspondence written by the Plaintiff to the Defendant and which capture the circumstances under which the advance was made as well as the cordial relationship that the parties enjoyed. I am therefore left with little choice but to tilt the balance in favour of the Plaintiff's case in the absence of any contrary evidence from the Defendant.

10. In any case, it is trite law that a dishonoured cheque is an admission of liability on the part of the issuer. Section 43 of the Bills of Exchange Act, cap 27 gives the payee an immediate right of recourse against the drawer of a cheque that is dishonoured. The Plaintiff in that sense acquired an immediate right of recourse against the Defendant for the recovery of the said monies the moment the cheques were dishonoured, and it matters little the purpose for which the cheques had been issued in the first place. In the circumstances the Defendant has himself to blame for not placing before this court evidence showing that there was no consideration in favour of the Plaintiff for which the cheques were issued and that the cheques were meant for investment with the Plaintiff.

11. In the circumstances, and in the light of the Plaintiff's evidence in this case being wholly uncontroverted, I am satisfied that on a balance of probability, the Plaintiff has proved its case as against the Defendant.

12. I am therefore inclined to enter judgment in favour of the Plaintiff as prayed in the Plaintiff, as I hereby do. I further award costs of this suit to the Plaintiff. These shall be the orders of the court.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 11TH DAY OF OCTOBER 2012.

**J.M. MUTAVA
JUDGE**