

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION

HCCOMMM NO. E212 OF 2022

SUNDIP KUMAR JAGDISHROY PATEL.....PLAINTIFF

-VERSUS-

GRACE SARAPAY WAKHUNGU.....DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit against the defendant vide a plaint dated 10th June 2022 seeking judgment for special damages in the sum of Kshs.179,530,246.50 with interest at Court rates of 12% per annum from 5th July 2017 and costs of the suit with interest at Court rates from date of filing suit.
2. The plaintiff's case is that in 2004 he was introduced to the defendant by mutual friends, after which the defendant approached him for financial assistance to finance a government tender. That he allegedly advanced various sums of money to the defendant on different occasions, which were formalized through several Agreements. The plaintiff contended that the defendant undertook to repay the loans within agreed periods and at agreed interest rates but continually defaulted, repeatedly promising payment and seeking extensions without repaying any portion of the debt.
3. The plaintiff stated that sometime in 2012, the defendant was charged by the Ethics and Anti-Corruption Commission in relation to maize import supplies to the National Cereals and Produce Board through a company known as Erad Supplies & General Contractors Limited. He claimed that since he was

concerned about the defendant's ability to repay the outstanding sums, he demanded payment, leading to negotiations that culminated in a written Agreement dated 3rd May 2017. He contended that in that Agreement, the defendant acknowledged owing him Kshs.179,530,246.50 and undertook to repay part of the amount being Kshs.90,530,246.65, by specified instalments between May 2017 and January 2018, with the balance of Kshs.89,000,000/= to be paid from the Erad Supplies account upon conclusion of a related Court case, or otherwise from her own sources if not paid by 30th January 2018.

4. The plaintiff asserted that he accepted and endorsed the said Agreement, which was witnessed by a third party. He averred that in addition, the defendant later issued a handwritten letter dated 9th June 2017 apologizing for failing to adhere to the payment terms. He stated that despite continued assurances, including confirmation in May 2022 that payment would be made, the defendant failed to settle the debt. The plaintiff relied on Section 24 of the Limitation of Actions Act and asserted that the written acknowledgment revives and legitimizes the claim.
5. In opposition to the plaintiff's suit, the defendant filed a statement of defence dated 19th July 2022 denying all the averments in the plaintiff's plaint. The defendant admitted to having been introduced to the plaintiff in 2004 by mutual friends. She asserted that there is no letter of credit or letter of offer evidencing the alleged loan from the plaintiff. While admitting to have been charged in 2012 by the Ethics & Anti-corruption Commission, she explained that the contract for the supply of white maize to the National Cereals and Produce Board through Erad Supplies & General Contractors Limited was frustrated by supervening events beyond her control. The defendant outlined that in 2009, an arbitration dispute arose between Erad Supplies General Contractors Limited and the said Board concerning storage costs incurred by Chelsea Freight. She

stated that an Arbitral Award dated 19th March 2013 granted Erad Supplies & General Contractors Limited Kshs.297,086,505.00 for storage charges, which was subsequently adopted as a Judgment of the High Court.

6. The defendant stated that criminal proceedings were later instituted against her and two others in **Republic v Grace Sarapay Wakhungu & 2 others** before the Milimani Chief Magistrates Court, on allegations that the invoice forming the basis of the arbitration claim was fraudulent, and she was ultimately convicted. She maintained that she does not owe the plaintiff Kshs.179,530,246.50. She contended that Section 24 of the Limitation of Actions Act does not apply to contractual claims such as the present one. She denied the jurisdiction of the Court and indicated her intention to raise a Preliminary Objection on the ground that the suit is statute-barred under Section 4(1)(a) of the Limitation of Actions Act.
7. This matter proceeded to hearing, wherein the plaintiff testified in support of his case. The defendant also testified in support of her case.

PLAINTIFF'S CASE.

8. Mr. Sundip Jagdishroy Patel testified as PW1. He adopted his witness statement filed on 10th June 2022 and a further witness statement dated 27th March 2024, as his evidence in chief, and produced the documents in the plaintiff's list and bundle of documents as plaintiff exhibit Nos. 1 to 4. Mr. Patel testified that he was introduced to the defendant by mutual friends in 2004, following which the latter sought financial assistance from him to finance a government tender. That as a result, they executed a Joint Venture Agreement dated 15th August 2004, pursuant to which he advanced various sums of money to the defendant on different occasions under written Agreements. He further testified that the defendant undertook to repay the amounts advanced within agreed timelines

and at agreed interest rates. He stated that she persistently defaulted on her obligations, repeatedly promising to settle the debt and seeking extension but failed to repay any part of the sums advanced.

9. PW1 stated that sometime in 2012, the defendant was charged by the Ethics and Anti-Corruption Commission in connection with maize import supplies to the National Cereals and Produce Board through Erad Supplies, and that owing to concerns about her capacity to repay the outstanding sums, he demanded payment, prompting negotiations that culminated in a written Agreement dated 3rd May 2017. According to PW1, the defendant acknowledged in that Agreement that she owed him Kshs.179,530,246.50 and undertook to settle Kshs.90,530,246.65 by way of instalments between May 2017 and January 2018, with the remaining balance of Kshs.89,000,000/= to be paid from the Erad Supplies account upon determination of a related Court case, or alternatively, from her personal sources if not paid by 30th January 2018. He further stated that the acknowledgment was endorsed on 5th May 2017 and witnessed by Boniface Kimeu.
10. Mr. Patel testified that the said Agreement was accompanied by a handwritten letter dated 9th June 2017, in which the defendant expressed remorse for failing to comply with the agreed repayment terms. He stated that to the best of his knowledge, the defendant received payment from the National Cereals and Produce Board. He maintained that despite making repeated amicable demands and receiving assurances from the defendant, including confirmation as late as May 2022 through phone calls and text messages that payment would be effected by 20th May 2022, no payment was ever made. Mr. Patel denied being a Director of Erad Supplies and asserted that the defendant does not dispute the authenticity of the acknowledgment dated 5th May 2017, but she is instead raising extraneous matters in an attempt to mislead the Court.

11. In cross-examination, PW1 maintained that he advanced money to the defendant, stating that from 2004 he gave her Kshs.26,000,000/= for Erad Supplies, though he conceded that he had no documentary evidence before the Court to support this claim. He further testified that in 2004 and 2005 he advanced Kshs.30,000,000/= to the defendant and asserted that he gave her money every year. He stated that he later became aware that he had six years within which to claim the monies advanced. PW1 contended that the parties herein had a Payment Agreement which superseded and reinforced earlier Agreements, although he did not produce the alleged prior Agreements, claiming they were kept in his office.
12. It was PW1's evidence that the final Agreement was executed in his office without the presence of an Advocate but in the presence of a witness, Boniface. He explained that reference was made to Erad Supplies in the Agreement because payments had begun to be facilitated through that entity, with the defendant separately undertaking to repay the personal loans she owed him, which she acknowledged in writing together with specific repayment dates. He asserted that the repayment dates of 5th May 2017 to 30th January 2018, indicated in the said Agreement, were proposed by the defendant herself. He confirmed that he had testified in the related criminal case involving Erad Supplies and the defendant, where he stated that he had advanced Kshs.10,000,000/= to the defendant.
13. PW1 also stated that the aforesaid monies were advanced through his company, Kapu Limited, which is not a party to this suit. Referring to plaintiff's exhibit No. 3, a handwritten letter dated 9th June 2017, Mr. Patel stated that it made reference to the Agreement of 3rd May 2017, although he admitted that the letter did not expressly cite that Agreement. He confirmed that the letter was delivered to him by Boniface Musau, but he did not personally see the

defendant write it, and that he was not a handwriting expert. He however asserted that Boniface witnessed the defendant writing the letter dated 9th June 2017.

14. In re-examination, PW1 testified that the Agreement dated 3rd May 2017 was executed by both himself and the defendant and was witnessed. He stated that he had prior dealings with the defendant and that she had previously issued him with cheques bearing her signature. He further testified that the handwritten letter dated 9th June 2017 was delivered to him by Boniface after the defendant had defaulted on repayment of the monies advanced. PW1 added that he did not recall **HCCC No. 31 of 2013**, which he indicated had been filed after Erad Supplies failed to make payment.

DEFENDANT'S CASE.

15. The defendant, Ms Grace Sarapy Wakhungu, testified as DWI. She confirmed that she knew the plaintiff, with whom she collaborated with, in 2004. She stated that in that year, she was involved in a tender as a Director of Erad Supplies & General Contractors Limited, which successfully secured a contract to supply maize to the National Cereals and Produce Board. She explained that what they required from the plaintiff was a bid/bond to certify their ability to tender successfully and that they had agreed to share profits from the tender. She indicated that plaintiff subsequently introduced them to I&M Bank, and took responsibility for processing the bid/bond submitted to the National Cereals & Produce Board (NCPB). She acknowledged that the plaintiff paid the bank, though she personally did not consider that necessary, as a witness in the criminal proceedings had indicated that the plaintiff did not pay for the bid/bond. DW1 testified that the plaintiff advanced small sums of money to

Erad Supplies & General Contractors Limited, which were repaid. She denied that the plaintiff ever advanced to her Kshs.26,000,000/= or Kshs.30,000,000/=.

16. She explained that in 2009, an arbitration dispute arose between the companies and NCPB over storage costs for 40,000 metric tonnes of maize, resulting in an award of Kshs.297,086,505.00 to Erad Supplies & General Contractors Limited, of which they had received approximately half. That thereafter, criminal charges were brought against her and two others in **Anti-Corruption Case No. 37 of 2018**, leading to her conviction. She indicated that she was out on bail pending an appeal before the Court of Appeal in **Nairobi Criminal Appeal No. E039 of 2022**. DW1 asserted that at the trial before the Anti-corruption Court, the plaintiff testified as prosecution witness No. 18, and stated that his financial dealings regarding the tender were with Erad Supplies and General Contractors Limited, and that any assistance he provided was through his company, Kapu Kenya Limited, under a Joint Venture Agreement dated 15th August 2004.
17. DW1 maintained that she never received any credit facility from the plaintiff in her personal capacity and that no evidence had been produced to show otherwise. She testified that the plaintiff had previously filed a recovery suit against the company (Erad Supplies & General Contractors Limited) being **Nairobi HCCOMM No. 31 of 2013 – Jagdish Patel v Erad Supplies & General Contractors Limited**. She explained that the Agreement dated 3rd May 2017 was created because the plaintiff's creditors were harassing her, and the plaintiff wanted a letter of comfort to show his creditors that funds were available, but it was not intended for legal purposes. She denied owing the plaintiff the amount claimed and asserted that the Agreement had been entered into out of empathy, given her knowledge of the plaintiff's situation.

18. During cross-examination, DW1 explained that the Joint Venture Agreement between Erad Supplies & General Contractors Limited and Kapu Limited concerned the sharing of profits from the tender with the National Cereals and Produce Board, with Clause 3 specifying that profits and losses would be shared equally, on a 50:50 basis, but no loss was incurred. She confirmed that the Agreement dated 3rd May 2017 does not describe a letter of credit and that the handwritten letter of comfort originated from her. She could not recall whether the mobile number 0736238380 belonged to her, or whether the text messages the plaintiff relied on, in this suit were sent from her. She also stated that she did not claim in her evidence or witness statement that the signature on the handwritten letter was forged or obtained under duress.
19. In re-examination, DW1 testified that their business was not provided with a letter of credit. She confirmed that they made a profit once payment was received following the Arbitral Award. She stated that the 50:50 sharing of profits and losses was stipulated in an Agreement dated 18th August 2004. She clarified that the letter dated 9th June 2017 did not make reference to the Agreement dated 3rd May 2017. While she acknowledged having written a letter of comfort, she denied ever entering into the Agreement dated 3rd May 2017.
20. At the close of the defendant's case, the Court directed parties to file written submissions which were highlighted on 12th November 2025. The plaintiff's submissions were filed on 27th May 2025 by the law firm of Philip Henry Associates, whereas the defendant's submissions were filed by the law firm of Okubasu & Munene Advocates LLP on 21st July 2025.
21. Mr. Philip Wambugu, learned Counsel for the plaintiff submitted that the plaintiff advanced money to the defendant in varying amounts for both personal use and financing a tender with the National Cereals and Produce Board. He

stated that while the defendant admitted receiving some funds for the bid/bond and small amounts which she claimed to have repaid, the plaintiff's position is that no repayments were made. Counsel argued that the Agreement dated 3rd May 2017, was a legally binding acknowledgment of debt, alongside a handwritten apology dated 9th June 2017 and text message confirmations, forming clear documentary proof. He stated that although the defendant denied any personal receipt of loans and claimed the transactions were through her company, Erad Supplies Limited & General Contractors Limited, under a joint venture with Kapu Kenya Limited, she did not produce any evidence of repayment.

22. Counsel submitted that the defence of statute of limitations under Section 4 of the Limitation of Actions Act is inapplicable, as acknowledgments of debt under Section 23(3) of the Act resets the limitation period, including post-expiry acknowledgments, as established in the cases of **Telkom Kenya Limited v Kenya Railways Corporation** [2018] KEHC 8424 (KLR). Mr. Wambugu cited the Court of Appeal case of **National Bank of Kenya Ltd v Devji Bhmji Sanghani & another** [1996] KECA 86 (KLR) and the case of **Vehicle And Equipment Leasing Limited v Commercial Bank of Africa Limited** [2019] KEHC 12242 (KLR), and stated that the defendant's attempt to re-characterize the 3rd May 2017 Agreement as a letter of comfort lacks merit, as case law shows such letters can create binding obligations unless clearly expressed otherwise. In submitting that letters of comfort can constitute admissions enforceable in Court, Mr. Wambugu referred to the case of **Guardian Bank Ltd v Jambo Biscuits Kenya Ltd** [2014] KEHC 1796 (KLR).
23. Regarding the burden of proof, he submitted that under Section 107 of the Evidence Act, it lies with the plaintiff, who has discharged it by producing uncontested documents and credible testimony. He argued that mere denial by a

defendant is insufficient to rebut documentary evidence of debt. On the question of interest, Counsel submitted that the plaintiff seeks interest at Court rates of 12% per annum from 5th May 2017, consistent with Practice Note 1 of 1982, and as confirmed by the Court of Appeal in the case of **Kipchumba v BOG Tambach Teachers Training College** [2023] KECA 802.

24. Mr. Okubasu, learned Counsel for the defendant submitted that the plaintiff has failed to discharge the burden of proof required under Sections 107 & 109 of the Evidence Act, which mandates that a party alleging a legal right or liability must prove the existence of the asserted facts. He argued that the plaintiff claims a loan of Kshs.179,530,246.50 from the defendant, but no documentary evidence such as cheques, bank statements, or contemporaneous transaction records has been produced to show that the defendant personally received the funds. He contended that the plaintiff relied solely on a single letter, purportedly a letter of acknowledgment, which the defendant referred to merely as a letter of comfort lacking an unequivocal admission of debt. He relied on the Court of Appeal case of **Mbuthia Macharia v Annah Mutua Ndwiga & another** [2017] KECA 290 (KLR), and asserted that failure to provide credible evidence renders the plaintiff's claim speculative and unsubstantiated.
25. Counsel maintained that any alleged financial assistance was advanced to the defendant's company, Erad Supplies & General Contractors Ltd, rather than to her personally, consistent with prior litigation in **Nairobi Civil Case 31 of 2013 - Sundip Jagdish Patel v Erad Supplies & General Contractors Ltd** [2013] eKLR. He submitted that the principle of separate corporate personality, established by the Court of Appeal in the case of **Victor Mabachi & another v Nurtun Bates Limited** [2013] KECA 204 (KLR), holds that a company's debts cannot be imposed on Directors or Shareholders absent a Court order lifting the corporate veil. He contended that since the plaintiff has not sought such relief,

any claim against the defendant personally is legally untenable. He asserted that this claim is effectively a re-packaging of the 2013 corporate claim, constituting an abuse of the Court process.

26. Mr. Okubasu referred to the provisions of Section 4(1)(a) of the Limitation of Actions Act and stated that the plaintiff's claim, purportedly arising in 2017, is undermined by his prior 2013 suit, which demonstrates that he acknowledged the debt as due at that time. He relied on the cases of **Mehta v Shah** [1965] EA 321 and **Gathoni v Kenya Co-operative Creameries Limited** [1982] KLR 104, and stated that limitation statutes protect defendants from stale claims and require plaintiffs to exercise diligence. He maintained that the plaintiff's attempt to re-characterize the date of the cause of action to 2017 is an impermissible effort to circumvent statutory limitation. Mr. Okubasu urged this Court to dismiss the suit with costs for being time-barred, frivolous, and an abuse of the Court process, given the plaintiff's failure to provide evidence of the alleged debt, reliance on a mere letter of comfort, and attempt to revive a prior corporate claim.

ANALYSIS AND DETERMINATION.

27. I have considered and analyzed the evidence adduced in line with the pleadings filed, together with the written submissions by Counsel for the parties. The issues that arise for determination are –
- i) Whether this suit is statute-barred under the provisions of Section 4(1) of the Limitation of Actions Act;**
 - ii) Whether the plaintiff has proved his case on a balance of probabilities; and**
 - iii) Whether the plaintiff is entitled to the reliefs sought.**

Whether this suit is statute-barred under the provisions of Section 4(1) of the Limitation of Actions Act.

28. The defendant's case is that that the plaintiff's claim is barred by limitation under Section 4(1)(a) of the Limitation of Actions Act, which states that –

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;*
- b) actions to enforce a recognizance;*
- c) actions to enforce an award;*
- d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;*
- e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.*

29. The import of the foregoing provisions is that an action for the recovery of any debt shall not be brought after the expiry of six (6) years from the date on which the cause of action accrued. The defendant contended that the plaintiff's prior suit, **HCCOMM No. 31 of 2013**, demonstrates that the plaintiff was aware of the debt at that time, and that the present suit constitutes a mere attempt to circumvent the Statute.

30. The plaintiff on the other hand relied on Section 23(3) of the Limitation of Actions Act, which provides 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 therefor 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.

31. From the above provisions, it is evident that a written acknowledgment of a debt by the debtor effectively resets the limitation period. The plaintiff claimed that the defendant's written acknowledgment dated 3rd May 2017, together with the handwritten letter dated 9th June 2017 and text message confirmations in May 2022, constitute an acknowledgment of the debt, thereby reviving the claim.
32. In the case of **Telkom Kenya Limited v Kenya Railways Corporation** (supra), the Court therein adopted the decision in **Shire v Thabiti Finance Company Limited** [2002] 1 EA 279, and stated that -

The decision in Shire (supra) is binding upon this court. I am also convinced with the reasoning and would agree with it wholly. An acknowledgement in the absence of a contrary provision in the statute gives an already barred action a new birthday. The action is revived de novo. The acknowledgement need not be made when the time is running. It may be made after expiry of time and will still suit the purposes of Section 23 of Limitations of Actions Act.

33. Further, the Court of Appeal in the case of **Nicholas Mahihu Muriithi v Barclays Bank Kenya Limited** [2018] KECA 606 (KLR), in addressing the

import of the provisions of Section 23(3) of the Limitation of Actions Act held that –

See Afrofreight Forwarders Limited V African Linear Agencies, Civil Appeal No.25 of 2007, where this Court in dealing with the issue of limitation relying on section 23(3) of the Limitation of Actions Act, held that the suit was not time barred, based on the date of acknowledgement of indebtedness by the debtor which was within the limitation period of 6 years.

The appellant acknowledged his indebtedness on 3rd October 1996 when time began to run. Debits were made from the appellant's prestige account on 23rd October 2006 which was 20 days later to set off the debt. This was well within the limitation period as was rightly observed by the learned Judge.

There is authority for saying that every time interest is debited on a defaulting borrower's account, a new cause of action arises. In the case of Shire V. Thabiti Finance [2000] LLR 1455 (CAK), this Court stressed that the effect of acknowledgment of a debt is to give rise to "fresh accrual of the right of action" in computation of limitation; that, "[These words] leave no doubt that the legislature intended that any acknowledgement or part-payment not only extends the limitation period but also revives an otherwise statute-barred action falling within that provision."

34. From the evidence adduced, the 3rd May 2017 Agreement and the subsequent 9th June 2017 handwritten letter by the defendant were executed after the lapse of six (6) years from the date when the sums were allegedly advanced to the defendant by the plaintiff. It was PW1's testimony that the defendant

acknowledged owing him the sum of Kshs.179,530,246.50 and undertook to repay Kshs.90,530,246.65 in specified instalments between May 2017 and January 2018, with the balance to be paid from Erad Supplies & General Contractors Limited's account or alternatively, from her personal sources. Even though the defendant disputes having entered into the 3rd May 2017 Agreement, she neither disputes nor alleges that the 9th June 2017 handwritten letter was written by herself, nor does she claim that it was forged or obtained under duress.

35. In light of the above, this Court finds that on the basis that the evidence may establish the Agreement dated 3rd May 2017 and the defendant's 9th June 2017 handwritten letter constitute a valid acknowledgment of debt, a fact which can only be ascertained after a careful consideration of the evidence adduced by the parties herein, Section 23(3) applies, and the limitation period would be reset from the date of the acknowledgment.
36. Consequently, I am satisfied that before evaluating the evidence adduced by the parties herein, it cannot be said at this juncture that the plaintiff's claim is barred by limitation under Section 4(1)(a) of the Limitation of Actions Act.

Whether the plaintiff has proved his case on a balance of probabilities.

37. The standard of proof in civil cases is that of a balance of probabilities. In the case of **Miller v Minister of Pensions** [1947] 2 ALL ER 372, the Court of Appeal in England stated as follows-

That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not. Thus, proof on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in

which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

38. The plaintiff's case is that he advanced monies to the defendant to finance a government tender following a Joint Venture Agreement dated 15th August 2004. The defendant in disputing the plaintiff's claim stated that the plaintiff advanced sums of money to her company Erad Supplies & General Contractors Limited and not to her in her personal capacity, therefore this suit cannot be sustained.
39. On perusal of the Joint Venture Agreement annexed to the defendant's list and bundle of documents dated 16th February 2024, it is evident that the said Agreement is between Erad Supplies & General Contracts Limited and Kapu Kenya Limited. It is now well settled that a company is a legal person with a separate and corporate personality from its Directors and Shareholders, thus it can sue and be sued in its own name as was held by Lord Macnaghten in the case of **Salomon v Salomon & Co** [1897] AC 22. In the premise, this Court is of the considered view that if the plaintiff intended to rely on the Joint Venture Agreement dated 15th August 2004, then his company, Kapu Kenya Limited, ought to have filed a suit against the defendant's Company, Erad Supplies & General Contractors Limited.
40. In a bid to demonstrate that the defendant is indebted to him, the plaintiff relied on an Agreement dated 3rd May 2017 and the defendant's handwritten letter dated 9th June 2017. The record shows that although the plaintiff in examination-in-chief maintained that he advanced substantial sums of money to the defendant, he acknowledged during cross-examination that he had no

documentary evidence to prove and/or substantiate these assertions. The defendant on the hand all through her evidence disputed personal receipt of the loans and maintained that any financial assistance was advanced to the company, Erad Supplies & General Contractors Ltd. The defendant disputed entering into the Agreement dated 3rd May 2017, and asserted that her handwritten letter dated 9th June 2017 was merely a comfort letter and did not make reference to the Agreement dated 3rd May 2017.

41. Pursuant to the provisions of Sections 107, 108 & 109 of the Evidence Act, Cap 80 Laws of Kenya, he who alleges must prove. This maxim was extensively discussed by the Court in the case of **Koinange & 13 others v Koinange** [1986] KLR 23 and in **Nyakwana v Ongaro** [2015] KEHC 8440 (KLR), where it was held that -

...As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue.

42. In support of his claim against the defendant, the plaintiff relied on an Agreement dated 3rd May 2017. On perusal of the said Agreement, it shows that the defendant acknowledged owing the plaintiff Kshs.179,530,246.65 and proposed a payment plan on how she intended to repay the plaintiff the said sum. It is however not lost to the Court that all through the defendant's pleadings and evidence she denied having entered into the said Agreement or even having knowledge of its existence. In addition, this Court takes note that although the defendant did not deny writing the handwritten letter dated 9th June 2017, the said letter neither refers to the Agreement dated 3rd May 2017 nor the amount of money that was owed to the plaintiff.

43. Accordingly, this Court is not persuaded that the Agreement dated 3rd May 2017 and the defendant's handwritten letter dated 9th June 2017 were sufficient to prove the plaintiff's claim against the defendant. It is worthy of note that the sums that were allegedly advanced to the defendant by the plaintiff were substantial, and they could not have been transmitted to the defendant in the form of cash and if they were, they ought to have been withdrawn from a certain financial facility. In the circumstances, this Court finds that nothing would have been easier than for the plaintiff to produce documentary proof of the advanced sums such as bank statements, cheques and/or bank receipts. Failure to produce the said documents which the plaintiff in cross-examination acknowledged were in his possession, leaves this Court with no other choice than to infer that they would have been detrimental to the plaintiff's case.
44. In view of the foregoing, I am not persuaded that the plaintiff has established his case against the defendant to the required standard of proof, on a balance of probabilities. In the circumstances, it is my finding that the plaintiff has not made out a case to warrant being granted the reliefs sought herein. The upshot is that the plaintiff's suit against the defendant is devoid of merits.
45. Section 27 of the Civil Procedure Act provides that costs follow the event, therefore the defendant having succeeded, is awarded costs of this suit.
46. In the end the plaintiff's suit is dismissed with costs to the defendant.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 20th day of February 2026. Judgment delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Wambugu for the plaintiff

Ms Naliaka h/b for Dr. Okubasu for the defendant

Ms B. Wokabi - Court Assistant.

ORIGINAL