



**Ochieng v EGGM Securities Limited (Commercial Case E133 of 2023)
[2025] KEHC 5296 (KLR) (Commercial and Tax) (28 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5296 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E133 OF 2023
JWW MONG'ARE, J
APRIL 28, 2025**

BETWEEN

JOYCE NANCY AMONDI OCHIENG PLAINTIFF

AND

EGGM SECURITIES LIMITED DEFENDANT

JUDGMENT

1. The Plaintiff's claim as set out in the Plaint dated 24th March, 2023 is that the Defendant received the sum of USD 231,105.00 from her on various dates as the latter had represented that it had the capacity to invest the money offshore in Index Funds for a return in earnings as an authorized online foreign exchange broker. The Plaintiff now claims that the Defendant has not repaid the USD 231,105.00 together with earnings thereon and as such, seeks this sum together with interest at commercial rates from 17th June 2019 in respect to the sum of USD 163,723.00 and from 16th September 2019 in respect to the sum of USD 67,380.00.
2. In response to the suit, the Defendant filed the statement of defence dated 11th May 2023. It avers that it is a non-dealing online foreign exchange broker duly licensed and authorized by the Capital Markets Authority of Kenya (CMA) to provide an execution-only service through internet-based trading platforms that allow clients to access, and trade in, foreign exchange markets. The Defendant states that on 3rd June 2019, the Plaintiff made an application for a trading account on the online foreign exchange trading platform provided by the Defendant and that it proceeded to open a retail trading account for the Plaintiff, namely, Account No. 8XXXXX31. On 17th June 2019, the amount of USD 163,725 was deposited by the Plaintiff into her Trading Account and thereafter on 16th and 17th September 2019, the Plaintiff made three further deposits of USD 6,780, USD 40,000 and USD 20,600 (totaling to USD 67,380) into the Trading Account.



3. The Defendant contends that using the funds deposited by the Plaintiff into the Trading Account, the Plaintiff carried out a total of 1,083 trades during the period between 17th June 2019 and 4th February 2020 and that she made several withdrawals, from the Trading Account, in the sum of USD 83,046.00 and earned a cumulative gross profit of USD 490,787.98. The Defendant admits that the sum of USD 231,105 was remitted to the Plaintiff's Trading Account but reiterates that the said sum was utilized by the Plaintiff to finance the Trades whilst making several withdrawals and incurred a cumulative gross loss of USD 638,886.89.
4. The Defendant denies that it represented to the Plaintiff that it had the capacity to invest money for a return in earnings as an authorized foreign exchange broker and that it received the amount of USD 231,105 to invest on behalf of the Plaintiff in offshore index funds and repay the principal amount together with earnings. The Defendant avers that, to the contrary, the Plaintiff was, at all times material, aware that the Defendant would provide execution-only services; would not offer investment advice to the Plaintiff; and would not trade on behalf of the Plaintiff and that this was acknowledged and agreed to by the Plaintiff.
5. As such, the Defendant states that it was not liable to refund the sum of USD 231,105 together with earnings thereon as alleged and that the insinuation of misrepresentation made against it is calculated to inflict damage to its reputation, standing and integrity, yet the Plaintiff has not provided any particulars of the said misrepresentation or proffered any evidence in support of this extremely serious insinuation. The Defendant thus urges the court to dismiss the suit with costs. The matter was set down for hearing where Plaintiff testified on her own behalf (PW 1). She relied on her witness statement dated 24th March 2023 and produced the Bundle of Documents of the same date (PExhibit 1-3) containing her statements of account for account numbers 010XXXXX9400 and (USD) 87XXXXX9400 operated with Standard Chartered Bank, Moi Avenue Branch, the letter dated 3rd February 2023 from her advocates to the Defendant and the letter dated 17th February 2023 from the Defendant's advocates to the Plaintiff's advocates.
6. On its part, the Defendant presented two witnesses; Issa Rashid, its manager in charge of Risk and Compliance Department (DW1) and Wilson Njeri, its manager in charge of Payments Department. DW1 and DW2 relied on their witness statements dated 11th May 2023 and 5th November 2023 respectively and DW1 also produced the Defendant's Bundle of Documents dated 11th May 2023 (DExhibit 1-15). The documents include a copy of Licence dated 5th February 2018 issued by CMA to the Defendant, Copy of print-out of the home web page of the Defendant, Copy of print-out of the account opening web pages of the Defendant, copy of Account Opening Application Form duly filled by the Plaintiff, Copy of Clients Agreement declared to have been read, understood, and consented to by the Plaintiff on 3rd June 2019, Copy of Order Execution Policy declared to have been read, understood, and consented to by the Plaintiff on 3rd June 2019, Copy of Risk Warning Disclosure Notice declared to have been read, understood, and consented to by the Plaintiff on 3rd June 2019, Copy Address of Self-Certification Declaration made by the Plaintiff on 3rd June 2019, Copy of National Identity Card of the Plaintiff, Bank Account Verification Statement provided by the Plaintiff, Copies of SWIFT Confirmation Messages, Statement of Trading Account No. 8XXXXX31 registered under the Plaintiff for the period between 17th June 2019 and 6th February 2020, Copy of Letter dated 3rd February 2023 from the Plaintiff's advocates, Copy of Letter dated 17th February 2023 from the Defendant's advocates and the Certificate of Electronic Evidence dated 11th May 2023.*
7. Thereafter, the parties were directed to file written submissions which are on record and together with the evidence on record, I will make relevant references to in my analysis and determination below.



Analysis and Determination

8. In making this determination, I am guided by the fact that the standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107 (1) and (2) of the Evidence Act (Chapter 80 of the Laws of Kenya) which provides that “whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist” and that “When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person”. In *Miller .V. Minister Of Pensions 1947 ALL E.R 372*, Lord Denning aptly summarized the application of the standard in the following terms:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case is which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”
9. The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Limited* [2019] KECA 1058 (KLR) simply put it that ‘Courts will make a finding based on which party’s version of the story is more believable.’ From the parties’ submissions, the court is being called upon to determine whether the Plaintiff is entitled to the USD 23,105.00 plus interest that it claims from the Defendant. From the evidence, it is not in dispute that on 17th June 2019 and 16th September 2019, the Defendant received, in its Segregated Clients’ Account, a sum of USD 163,725 and USD 46,780 respectively from the Plaintiff’s bank account. The Plaintiff testified that she remitted this money to the Defendant with the expectation that the Defendant would invest the money for her and pay her back the principal sum. However, she admitted that she did not have any document in evidence with such terms neither did she present any evidence of any such representation made to her by the Defendant or its agent. The Plaintiff actually stated that she was to get back the USD 231,105 with a return, based on a discussion she had with an individual whose name she apparently forgot and based on documents not before the court.
10. If anything, the Plaintiff admitted that she signed the Address Self Certification Declaration on 3rd July 2019 confirming that she had read, understood and agreed to be bound by the Defendant’s Client Agreement, Summary Order Execution Policy, Conflicts of Interest Policy and Privacy Policy documents. By signing the said Declaration, it is presumed that the Plaintiff was aware that the Defendant is a Non-Dealing Online Forex Broker, that it is an execution-only service that does not provide investment advice or management services. It is therefore obvious that the Defendant could not invest the said sums remitted to it by the Plaintiff. On the contrary, the Plaintiff admitted that she conducted and completed various trades on the Defendant’s platform as evidenced by the remittance advices produced by the Defendant. She admitted that she used to receive some money from the Defendant and made withdrawals of the same and that some of the money was reinvested/re-traded by her on the Defendant’s platform.
11. Further, whereas the Plaintiff denied ever visiting the Defendant’s website and opening a trading account, she admitted that the information on the Account Opening Form belonged to her and that she was the one who duly filled, signed and furnished the Defendant with the Address Self-Certificate



Declaration and copies of her National Identity Card and Excerpt of her Bank Account Statement. The Plaintiff did not also rebut the Defendant's evidence that very prospective client who wished to open a trading account on any of the Defendant's two online foreign exchange trading platforms must visit the Defendant's website, either directly or through an introduction link. This lends credence to the contention that it is the Plaintiff herself who visited the Defendant's platform, opened an account with it and remitted money to her trading account which she used to trade on various occasions. It appears that the only reason why the Plaintiff decided to file the present case was because she experienced losses from the trades. She must not have fully appreciated the Defendant's disclaimer that the subject trades are complex leveraged products which carry a high level of risk and can result in losses that exceed one's initial investment. The Defendant even recommended that one seeks professional advice before investing.

12. Whereas I empathize with the Plaintiff's loss in the trades she undertook, I find that the loss is not attributable to the Defendant. No evidence has been led of negligence, misconduct, misrepresentation or system failures to have been reasons that directly caused the Plaintiff's loss of money in the trades. A trading platform such as that provided by the Defendant cannot be held liable for losses incurred by clients as a result of market fluctuations or poor trading decisions, as these are inherent risks of trading, typically outlined in user agreements such as those produced by the Defendant in this case. As the Plaintiff's loss was not caused by the Defendant's negligence, fraud or misrepresentation but the Plaintiff's own actions, it follows that no liability can arise in this case.

Conclusion and Disposition

13. In conclusion, it is my finding that the Plaintiff's has not proved her case to the required standard on a balance of probabilities, and hold that the Plaintiff's suit has no merit. The same is therefore dismissed with costs to the Defendant.
14. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Ogaki holding brief Mr. Havi for the Plaintiff.
2. Mr. Langat for the Defendant.
3. Amos - Court Assistant

