



REPUBLIC OF KENYA



**KENYA LAW**

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Shivali Investments Limited & 3 others v Chandaria & 8 others (Civil Suit 560 of 2005)  
[2023] KEHC 1097 (KLR) (Commercial and Tax) (17 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1097 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 560 OF 2005  
A MABEYA, J  
FEBRUARY 17, 2023**

**BETWEEN**

**SHIVALI INVESTMENTS LIMITED ..... 1<sup>ST</sup> PLAINTIFF  
NAVAL HOLDINGS LIMITED ..... 2<sup>ND</sup> PLAINTIFF  
KETTY INVESTMENTS LIMITED ..... 3<sup>RD</sup> PLAINTIFF  
SAAF HOLDINGS LIMITED ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**MAGANLAL MOTICHAND CHANDARIA ..... 1<sup>ST</sup> DEFENDANT  
NISHA DINESH CHANDARIA W/O DINESH MAGANLAL CHANDARIA  
(BEING SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF  
THE LATE DINESH MAGANLAL CHANDARIA) ..... 2<sup>ND</sup> DEFENDANT  
MAHESH MAGANLAL CHANDARIA ..... 3<sup>RD</sup> DEFENDANT  
CONIFERS TRADING LIMITED ..... 4<sup>TH</sup> DEFENDANT  
CHANDARIA HOLDING LIMITED ..... 5<sup>TH</sup> DEFENDANT  
DIMA LIMITED ..... 6<sup>TH</sup> DEFENDANT  
GOLDERA LIMITED ..... 7<sup>TH</sup> DEFENDANT  
KEVIS INVESTMENTS LIMITED ..... 8<sup>TH</sup> DEFENDANT  
GUARDIAN BANK LIMITED ..... 9<sup>TH</sup> DEFENDANT**



## JUDGMENT

1. Vide a further amended plaint dated 25/1/2017, the plaintiffs alleged that on or about 13/10/1999, they entered into a Memorandum of Understanding (“MOU”) with the defendants, subject to a contract, for the sale of 200,000 ordinary shares held by them in Guilders International Bank (“Guilders”) for Kshs.196,000,000/-.
2. Subsequently, on 30/12/1999, the plaintiffs and the defendants executed an Agreement for Sale and Purchase of Shares from Guilders (“the Agreement”), which was a progeny of the MOU.
3. Despite the said transfer, the defendants failed to pay the said sum of Kshs.196,000,000/=. That the 1st, 2nd and 3rd defendants were at all material times the substantial shareholders in the 4th, 5th, 6th, 7th and 8th defendant companies which companies were in turn material shareholders in the 9th defendant.
4. The plaintiff contended that the MOU dated 13/10/1999 became a binding and completed contract between the parties which in any event resulted in an agreement incorporating all the essentials thereof. That the plaintiffs fulfilled their contractual obligation and transferred their shares in the bank but the defendants breached the contract between them.
5. It was further averred that in consideration of the takeover of Guilders by the shareholders of the 9<sup>th</sup> defendant, (“Guardian”) the shareholders of Guilders agreed to allow Guardian to collect all dues from the debtors of Guilders. However, the plaintiffs are unaware of the amounts collected by Guardian on their behalf. That the defendants and Guardian have disposed of some of the securities taken by them and have not accounted for the securities which amount to Ksh.332,000,000/-.
6. It was the plaintiffs’ case that the plaintiffs are guilty of unjust enrichment having obtained the said money in the form of debt repayment and/or proceeds from the sale of tangible securities on account of the plaintiffs and appropriated the same to their benefit. The plaintiffs aver that it is only fair that the defendants account for and restore the said amounts to the plaintiffs with interest as agreed.
7. The plaintiffs prayed for judgment against the defendants jointly and severally for: -
  - “a) The sum of Ksh.196,000,000/- being the consideration price for the sale of 200,000 shares in Guilders International Bank by the Plaintiffs to the Defendants.
  - b) An order and/or directions that the Defendants do render, under oath, true, accurate and comprehensive accounts of the amounts collected and/or received by the Defendants from the Debtors of Guilders International Bank Limited and/or from proceeds of the sale of tangible securities given by the Plaintiffs to the Defendants under the agreements herein.
  - c) An order and/or directions that a forensic audit of the said accounts as well as the appurtenant documents held by the Defendants relating to the amounts collected and/or received by the Defendants from the Debtors of Guilders International Bank Limited and/or from the proceeds of the sale of tangible securities be conducted by a reputable forensic auditor to be agreed upon by the parties and in default to be appointed by this Honourable Court within such duration as this Honourable Court deems just and appropriate.



- d) The amount found payable by the Defendants to the Plaintiffs on account of recoveries made in loans in excess of “Deficit in Net Worth” and/or from the proceeds of the sale of the tangible securities given by the Plaintiffs to the Defendants under the agreements herein.
  - e) An inquiry into the amount collected by the Defendants from the Debtors of Guilders International Bank Limited in respect of the collection made by Guardian Bank Limited for which purposes this Honourable Court be pleased to appoint a receiver to inquire into such collection, and after ascertainment thereof by the receiver for payment thereof to the Plaintiffs.
  - f) Interest on Kshs.196,000,000/- as per the Memorandum of Understanding from 31st December 2001 until payment in full.
  - g) Interest of amount recovered and recoverable by Guardian Bank Limited on behalf of Guilders International Bank Limited.
  - h) Discharge and return of the securities specified in the Memorandum of Understanding.
  - i) Costs of the suit.
  - j) Any other further alternative relief that this court might deem fit to grant.”
8. The defendants jointly filed a further amended defence and amended counterclaim dated 5/6/2017. They contended that the MOU was ‘subject to contract. That the consideration of Kshs.196,000,000/- was based on net worth of the bank as at 31/12/1998. That the plaintiffs would provide to the 1st to 8th defendants warranties and tangible securities worth Kshs.380,000,000/- together with personal guarantees for any deterioration in the value of the assets of Guilders or the increase in the existing liabilities which however, they failed to provide.
  9. The defence set out the salient provisions of the MOU and the Agreement dated 30/12/1999. They contended that the shares of the 1st to 4th plaintiff in Guilders were transferred to Guardian pursuant to the terms of the Agreement and not the MOU. That after the 1st to 4th plaintiff transferred their said shares, Guilders was wholly a subsidiary of Guardian and thereafter the 1st to 4th plaintiff had no interest in the business of Guilders and no right to receive any money recovered by Guilders.
  10. It was contended that the plaintiffs’ claim for breach of contract was brought outside the 6 year period and was therefore statute barred. They denied that there was any sum due to any of the plaintiffs.
  11. In their counterclaim, the defendants asserted that they discovered that the plaintiffs had misrepresented facts in the agreement which the plaintiffs relied upon to sign the same. The particulars were said to be; misrepresenting the true value of Guilders as at 31/12/1998 and the true value of the total loan portfolio that was recoverable and performing.
  12. Premised on the foregoing misrepresentations, the defendants claimed that they had suffered loss and damage and prayed for the dismissal of the suit and for the following: -
    - a) The sum of Ksh.799,895,388/- being the debit balance in the Defendants’ Memorandum Account.
    - b) Interest in (a) above at the rate of 22% p.a compounded monthly.



c) Costs of the main suit and the counterclaim.

13. At the trial the plaintiffs called 3 witnesses. PW1 was Rajendra Sanghani who adopted his witness statement as his evidence in chief. He testified that the MOU was superseded by the sale agreement but it was as good as the agreement of sale signed on 30/12/1999. That the purchase price of Ksh.196 million was subject to adjustment arising out of undisclosed liabilities as of 31/12/2001 which was the cut-off date.
14. He stated that one of the prayers in the plaint was an audit in order to know what was collected and what was not. That the MOU was binding on the parties. That the consideration of Kshs.196 million was based on the audited accounts of the bank approved by the Central Bank. That the plaintiffs provided sufficient securities to secure undisclosed securities and that the defendants did not rescind the agreement between the parties.
15. PW2 was Vimlesh Kumar Shuklah. He was a former employee at Guardian Bank and the Chandaria Group of Companies. He testified that he encountered the transaction involving Guilders in August 1999. That Chandaria Group of Companies sent him to Guilders Bank to examine the documents. He produced his due diligence report at page 108 of the plaintiff's exhibit.
16. He participated in the drafting of the MOU. That the defendants were given the opportunity to carry out due diligence and examine the books and that is how he came up with the due diligence report. That the plaintiffs provided securities of Ksh.380 million plus personal guarantees of the directors that would cover any net deficit fund as of 31/12/2001.
17. He testified that the Memorandum of Accounts were books kept by the purchaser with an opening entry of Ksh.196 million as the purchase consideration and if any undisclosed liability would be found or a shortfall in a performing loan it was to be debited therein. If a non-performing loan became performing, the amount recovered was to be credited in the books. That the memorandum account indicated how the purchase price went up and down and was not an actual bank account.
18. He admitted that he was not a professional auditor but could evaluate the transaction based on the MOU. That whether or not a debt was recovered before the cut-off date or after could only be determined by Guardian as it was the one in possession of the banking transactions.
19. PW3, Nicodemus Munywoki, a Certified Public Accountant prepared a report in respect of this case. The same was filed on 25/9/2014 and was adopted as his evidence.
20. DW1 was Narayanamurthy Sabesan, the Chief Executive Officer of Guardian. He testified that the plaintiffs warranted the loan portfolio to the extent of Kshs. 678 million as recoverable and performing and the cut-off date to determine this was 31/12/2001.
21. He admitted that no money had been paid to the plaintiffs in accordance with the MOU.
22. DW2 was Joy Vipin Bhatt, a Certified Public Accountant filed reports dated 31/1/2014 and 25/6/2015, respectively. He testified that Kshs.678,000,000/- was the amount warranted by the plaintiffs as recoverable by the cut-off date. However, the bank only recovered a net amount of Kshs.243,000,000/-. That there was a shortfall of Kshs.434,000,000/- which left a shortfall to be transferred to the Vendor's Memorandum Account of Kshs.238,947,335/-.
23. The plaintiffs' case and Dw1 was heard by Kasango J. This Court only took the evidence of Dw2. The Court has considered the entire record together with the parties' submissions.



24. The issues for determination are; whether the plaintiff's claim is statute barred, whether the Memorandum of Understanding ("the MOU") dated 13/10/1999 was a binding contract, whether the defendants breached their obligation to pay the purchase price of Ksh.196 million, whether the defendants are entitled to the amount claimed in the counterclaim and whether the defendants' counterclaim is merited.
25. The first issue is whether the plaintiffs' claim is statute barred. The defendants contended that the claim was time barred as it was brought after 6 years. That under the Limitations of Actions Act, Cap 22, actions founded on contract may not be brought after the end of 6 years from the date on which the cause of action occurred.
26. The plaintiffs submitted that the suit was filed in 2005 even though the plaint was later amended in 2017. That no new cause of action was introduced.
27. From the evidence on record, the cause of action in this suit arose on 31/12/1999. The suit was filed in December, 2005 well within the 6 years limit in the Limitations of Actions Act. Although the plaint was later amended, it did not introduce any new cause of action and in any event, such amendment dated back to the date of the suit. That issue is determined in the negative.
28. The second issue was whether the MOU dated 13/10/1999 was a binding contract. Some of the salient provisions of the MOU and the Sale Agreement included:
  - a. Clause 2 of the MOU and clause 3 of the Sale Agreement dated 30/12/1999 provided that; the sale of 200,000 shares in Guilders would be for a consideration Kshs.196,000,000/- being the net asset value of the bank as at 31/12/1998 as per the audited balance sheet of the bank as at that date.
  - b. Clause 6 of the sale agreement provided that the said purchase price would be paid in 10 monthly equal instalments on the last day of each successive calendar year starting from 31/12/2001 or such other dates as may be approved by the parties in writing.
  - c. Clause 7 of the sale agreement provided, inter alia, that the defendants as purchasers would be afforded the opportunity to carry out due diligence and examine the books of the Bank, including the loan portfolio, securities held, charges created, licences etc as it shall require; that the plaintiffs warranted that the total loan portfolio of the Bank as at 31/12/1998 was Kshs.829,543,000/- and that out of this, Kshs.678,074,000/- was the recoverable and performing loans. That in the event that it is determined that any part of the loan portfolio classified as recoverable and performing is in fact non-performing and not recoverable after all reasonable avenues to recover the same have been exhausted, then in such event, the sums found to be irrecoverable by the cut off date would be deducted from the consideration, the cut off date was 31/12/2001.
  - d. Clause 7(1)(iv) provided that the undisclosed liabilities affecting the bank not disclosed on the transaction date would be debited to the Vendor's Memorandum Account. Further, the plaintiff's would provide securities of Kshs.380,000,000/- to the defendants to secure such undisclosed liabilities.
29. The plaintiffs submitted that the MOU was a legally binding agreement between the parties while the defendants submitted that it was 'subject to contract' and was therefore not legally binding.



30. The defendants relied on clause 2 of the MOU which read:

“Subject to contract, the Purchasers have agreed to purchase and the sellers have agreed to sell all the 200,000 ordinary shares held by the said shareholders for an amount of Ksh.196,000,000 (Kenya Shillings One hundred ninety six Million only) being the net asset value of the Bank as on 31st December 1998 as per the Audited Balance Sheet of the Bank hereinafter referred to as the “purchase price” or “consideration” ...”

31. On the other hand, Clause 17 of the MOU provides: -

“This MOU will remain in force and binding upon both the parties and shall become a forming part to the final sale agreement.”

32. Clause 12 (i) provides: -

“This Agreement shall be binding upon and ensure for the benefit of the successors of the parties.”

12 (iii) states: -

“All of the provisions of this Agreement shall remain in full force and effect notwithstanding Completion (except in so far as they set obligations which have been fully performed at Completion).”

33. From the foregoing, it is clear that although clause 2 made the MOU subject to contract, it formed part of the final Agreement between the parties that was executed on 31/12/1999 and was binding on the parties. That issue is answered in the affirmative.

34. The third issue was whether the defendants breached their obligation to pay the purchase price of Kshs.196 million.

35. It is not in dispute that the purchase price/consideration for the shares in the bank was Kshs.196,000,000/-. However this consideration was subject to clauses 7 and 8.

36. The plaintiffs submitted that the defendants had not paid even a penny of the said purchase price as stipulated in the agreements. On the other hand, the defendants submitted that the obligation to pay the purchase price was subject to a review of clauses 7 and 8 of the Agreement.

37. Clause 7(1)(iii) provided that: -

“In the event that it is determined that any part of the loan portfolio classified as recoverable and performing is in fact non-performing and not recoverable after all avenues to recover the same have been exhausted, then in such event sums found to be irrecoverable by the cut off date shall be deducted from the consideration. The cut off date of establishing this position will be 31st December 2001.”

38. DW2, testified that through his report that he had found that the amount payable to the defendants as of 31/12/2013 was Ksh.827,395,388.00; that the loan portfolio recovered before the cut-off date, 31/12/2001 was only Ksh.261,069,887/-.



39. It is not in dispute that the consideration for the sale of the 200,000 shares in Guilder was KShs.196 million. It is further undisputed that the plaintiffs transferred the said shares to the 9 defendants but the consideration was never remitted by the defendants.
40. The defendants rely on the report filed by DW2, Joy Vipin Bhatt, a Certified Public Accountant who filed reports dated 31/1/2014 and 25/6/2015, respectively. The reports indicated that the consideration was offset by unknown liabilities discovered and the loans which were guaranteed to be recoverable which became unrecoverable and non-performing.
41. Under Clause 7 of the Sale Agreement, it was agreed that the defendants, as purchasers, were to be afforded the opportunity to carry out due diligence and upon discovering that some loans were non-performing and non-recoverable, after all reasonable avenues to recover the same had been exhausted, then in such event the sums found to be irrecoverable by the cut-off date of 31/12/2001 was to be deducted from the consideration.
42. Further, upon discovery of undisclosed liability, the defendants were to first notify the plaintiffs giving them seven days to make good the liability. If the plaintiffs failed to make good the liability, the defendants were then to set off the liability from the Vendors' Memorandum Account or realise the securities provided.
43. From the record, there was no evidence that was led to show that the defendants ever issued any notice to the plaintiffs that any amount had become non-performing. Further, there was no evidence that the defendants had discovered any liabilities that had arisen that they required the plaintiffs to make good. All that was presented was the report of DW2 to try and reconstruct accounts and demonstrate that the Memorandum Account had been depleted as at the cut-off date. Under Clause 16.1 of the sale agreement, a notice issued would be deemed validly served by hand delivery or by fax mail to the addresses supplied. No such notice was produced.
44. It is worth to note that DW2's report was prepared and filed in 2014, 13 years after the cut-off date. The defendants had ample time between 30/12/1999 when the sale agreement was executed until 31/12/2001 to inspect the affairs of the bank, as they were running it, and make all such claims as they were entitled to. The report of DW2 was clearly prepared for the purposes of the present suit.
45. The defendants had the obligation to identify non-performing loans and notify the plaintiffs about them before the cut-off date of 31/12/1999 so that the amounts could be deducted from the consideration through the Memorandum Account. There is no evidence that was led to show that there were any such unrecoverable loans which the defendants took all means to recover and had failed to recover and that they notified the plaintiffs of the same before the cut-off date. Anything done thereafter as DW2 attempted was out of contract and irregular.
46. As for the undisclosed liabilities, the defendants had the obligation to notify the plaintiffs upon discovering them and the obligation to debit those amounts in the Memorandum Account. The plaintiffs provided securities to secure the undisclosed liabilities. There were allegations that the defendants realized or attempted to realize those securities. The defendant did not tender any sufficient evidence to show the status of those securities.
47. The defendants did not properly and transparently notify the plaintiffs of the undisclosed liabilities as stipulated in the agreement. They have also not proved to the Court whether the securities were realised if at all. Surely, if the defendants were indolent, neither the law nor equity can aid them. No one party can reconstruct the contract to the exclusion of the other.



48. The view the Court takes is that since the first instalment of Kshs. 19.6 million was due by the end of one year after 31/12/2001, the defendants were obligated to have raised all these alleged claims about the non-recoverable loans and show the effort take to recover the same before the cut-off date. They should have also shown how undisclosed liabilities arose and demanded the making good of the same within 7 days. None of this happened. This was a time bound contract. The unrecoverable loans should have been raised, notified the plaintiffs and debited the Memorandum Account by the cut-off date.
49. It would be re-writing the contract between the parties to allow one of them extend obligations of the others and benefits for itself beyond the agreed time. The cut-off date was supposed to be extended in writing by both parties. It was not. Any purported sale or disposal of the securities offered by the plaintiff at anytime after the cut-off date was outside the terms of the contract irregular, null and void.
50. There is nothing in the MOU or Agreement to show that the defendants were entitled to keep the consideration of Kshs. 196 Million and also the securities valued at Kshs. 380 Million over and above the 200,000 shares they had brought after the cut-off date. They were only entitled to do if the recoverable loans became unrecoverable before the cut-off date as well as they discovered undisclosed liabilities within the same period. Further, upon such recovery they were supposed to show the effort undertaken to recover the said loans and also give notice to the plaintiffs to make good the liabilities. None of these happened and or was proved at the trial.
51. In view thereof, it would be unconscionable to permit the defendants to retain the shares of 200,000 sold to them, the sum of Kshs. 196 Million and the securities of Kshs. 380 Million offered by the plaintiffs.
52. The upshot is that the plaintiffs transferred 200,000 shares in Guilders and gave full control of the bank to the plaintiffs. To-date they have not received any part of that consideration. A receipt of payment of Kshs.180,000,000 was never honoured by the defendants. The defendants allege that the consideration was offset against the undisclosed liabilities and non-performing loans that were discovered. That was never proved.
53. I find that the defendants are in breach of the terms of the MOU and the Sale Agreement. They are liable to pay the plaintiffs the sum of Kshs.196,000,000/- as consideration for the shares they received from the plaintiffs. It would be extremely unconscionable to allow them to keep the shares, the consideration of Kshs. 196 Million and not account for the securities valued at Kshs. 380 Million, it will be unlawful enrichment.
54. On the counter-claim, the same fails flat having found that there was no evidence that; there was any recoverable loans that became unrecoverable as at the cut-off date, no notice of the same nor demand was ever made. Even if there was, that was not communicated to the plaintiffs as required under the MOU and the Agreement for purposes of debiting the Memorandum Account. The claim fails.
55. In the premises, I find that the plaintiffs have proved their case to the required standard. I enter judgment for the plaintiffs against the defendants, jointly and severally, for: -
- a. The sum of Kshs.196,000,000/- being the consideration price for the sale of 200,000 shares in Guilders International Bank together with interest at 12%pa thereon as per the MOU as follows:-
    - i. Kshs. 19.6 Million from 1/1/2002
    - ii. Kshs. 39.2 Million from 1/1/2003
    - iii. Kshs. 58.8 Million from 1/1/2004



- iv. Kshs. 78.4 Million from 1/1/2005
  - v. Kshs. 98 Million from 1/1/2006
  - vi. Kshs. 117.6 Million from 1/1/2007
  - vii. Kshs. 137.2 Million from 1/1/2008
  - viii. Kshs. 156.8 Million from 1/1/2009
  - ix. Kshs. 176.4 Million from 1/1/2010
  - x. Kshs. 196 Million from 1/1/2011 to date
- b. Discharge and return of the securities specified in the MOU to the plaintiffs in default pay their value at the time they were submitted.
  - c. Costs of the suit.

It is so decreed.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

