



REPUBLIC OF KENYA



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Shah & 4 others v Rabadiya & 5 others (Civil Suit 347 of 2018)
[2023] KEHC 20962 (KLR) (Commercial and Tax) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20962 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 347 OF 2018
EC MWITA, J
JULY 28, 2023

BETWEEN

MAHENDRAKUMAR MANEK SHAH 1ST PLAINTIFF
AVNISHKUMAR MANEK SHAH 2ND PLAINTIFF
MAHESHKUMAR CHHAGANLAL SHAH 3RD PLAINTIFF
YATIN CHHAGANLAL SHAH 4TH PLAINTIFF
ROOSHAB AVNISH SHAH 5TH PLAINTIFF

AND

SHIVJI MEGHJI RABADIYA 1ST DEFENDANT
KARSAN MEGHJI RABADIYA 2ND DEFENDANT
KESHRA MEGHJI RABADIYA 3RD DEFENDANT
NARAN MEGHJI RABADIYA 4TH DEFENDANT
HANSABEN KESHRA 5TH DEFENDANT
RAJESH BHIMJI KABARIYA 6TH DEFENDANT

JUDGMENT

1. This suit was heard by Muigai J up to conclusion. The Judge was, however, transferred before writing the judgment. That is how the file ended up to me for purposes of writing the judgment, based on the evidence on record, which I now deliver.



Plaintiffs' case

2. The plaintiffs filed this suit against the defendants, seeking Kshs. 28,335,000.00, being the purchase price for shares they sold and transferred to the defendants, plus compound interest at 15% p. a. from the completion date until payment in full, and costs of the suit.
3. The plaintiffs averred that they jointly and severally entered into a share purchase agreement with the defendants on 5th September 2017 for sale of their entire shareholding in Hexagon Agencies Limited (the company), for Kshs. 28,335,000.
4. The 1st plaintiff sold 10,000 shares for Ksh. 5,66,700 to the 1st defendant, the same number of shares and amount to the 2nd defendant and 3, 501 shares for Kshs. 1,984,016.70 to the 3rd defendant.
5. The 2nd plaintiff sold 6,499 shares for Kshs. 3,684,983.30 to the 3rd defendant; 10,000 shares for Kshs. 5,66,700 to the 4th defendant; 5000 shares for Kshs. 2,833, to the 5th defendant and 1,501 shares for Kshs. 850,616.70 to the 1st defendant.
6. The 3rd plaintiff sold 1,500 shares for Kshs. 850, 050 to the 6th defendant, the 4th plaintiff sold 1,000 shares for Kshs. 566,700 to the 6th defendant, while the 5th plaintiff sold 999 shares for Kshs. 566, 133 to the 6th defendant.
7. The defendants were to pay the purchase price jointly and severally in two instalments of Kshs. 11,535,000 and Kshs. 12,600,000 on or before 90 days and 180 days respectively, from the date of the agreement. In case of delay, the amount would attract compound interest at 15% p. a.
8. The defendants further agreed to advance Kshs. 13,724,165.10 to the company to enable the company repay liabilities and discharge the shares for purposes of effecting transfer of those shares to the defendants.
9. The plaintiffs delivered completion documents on 5th September 2017 to the parties' advocates, (Messrs. Sobhag H. Shah & G. V. Goswami Advocates). The shares were subsequently transferred to the defendants and the defendants took over the management the company. The defendants however refused to pay the purchase price for the shares.

Evidence

10. The 1st plaintiff, (Mr. Mahendra, 2nd plaintiff (Mr. Avnish) and Chief Inspector Daniel Gutu (C I Gutu), testified on behalf of the plaintiffs. Mr. Mahendra adopted his witness statement and produced the plaintiffs' bundle of documents as exhibits.
11. Mr. Mahendra testified that the company was incorporated in 1981 to carry on the business of selling spare parts for heavy European commercial vehicles and transportation of petroleum products. In September 2017, the plaintiffs signed an agreement to purchase shares in the company following the defendants' offer made in April 2017.
12. Mr. Mahendra stated that he was responsible for receiving payments for the purchase price and that they provided all documents, including account statements and final audited accounts for the years 2013, 2014, 2015 and 2016 to the defendants, but the defendants did not pay.
13. In cross examination, Mr. Mahendra admitted receiving Kshs. 13,724,165.10 from the defendants on behalf of the company for purposes of clearing the company's liabilities.



14. Mr. AvnishKumar, also adopted his witness statement as his evidence in chief. He stated that the agreement was for sale of shares in the company at an agreed price of Kshs. 28,335, 000. If payment delayed, the amount would attract compound interest at 15% per annum. He stated that they transferred shares and handed over the documents and premises to the defendants.
15. In cross examination, Mr. Avnishkumar stated that the price of Kshs. 28,335,000 included stock but the defendants had not paid event though they (plaintiffs) vacated the premises and handed over to the defendants.
16. CI Gutu, a forensic document examiner and a certified handwriting analyst working at Forensic Document Examination Section of Directorate of Criminal Investigation, relied on the forensic document examination report Ref No. CID/ORG/8/3/1/222/2019 in the plaintiffs' supplementary bundle of documents.
17. CI Gutu testified that on 19th February 2019 Mureithi Givole advocates filed a complaint regarding the letter of offer dated 8th June 2017 at DCI, Industrial Area. On 1st March 2019, he received the letter which was marked as A1 and A2. On 4th March 2019, he examined and compared the logo on A1 with the logo on known documents from Hexagon Limited marked B1 and concluded that the logo on A1 was forged. He also examined and compared the stamp impression on A2 with the stamp impressions on B2, and concluded that the stamp impression on A1 was forged.
18. He further examined and compared the signatures on the letter of offer with the specimen signatures on the document marked C1-C3 (specimen signatures of Mr. Mahendra Kumar Shah) and D1-D3 (specimen signatures of Avnish Kumar Manesh Shah) and concluded that the signatures were made by the same author.
19. In cross-examination, CI Gutu admitted that he did not go for physical examination as he was receiving information from the investigating officer. He also admitted that did not know about the company details and the five directors. He further stated that he was not aware that a company can have two logos.

Submissions

20. The plaintiffs submitted through written submissions, that the relationship between the parties was governed by the share purchase agreement dated 5th September 2017. According to the plaintiffs, the validity of the agreement was not in dispute since the defendants also relied on the same agreement. Both Mr. Shivji Rabadiya and Patel Kiritbhai confirmed that the defendants agreed on the terms of the agreement and executed the agreement on their own free will.
21. The plaintiffs denied the defendant's contention that the sale included stock. The plaintiff argued that the defendants were misleading the court to avoid fulfilling their part of the bargain.
22. Relying on the forensic report produced by C I Gutu, the plaintiffs urged the court to strike out the alleged letter of offer dated 8th June 2017 because it was a forgery and did not reflect the intention of the parties.
23. The plaintiffs relied on National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd and another (Civil Appeal No. 95 of 1999) [2001] eKLR, to argue that parties are bound by the terms and conditions of their contract; Mamta Peeush Mahajan [suing on behalf of the estate of the late Peeush Premlal Mahajan] Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan] (Civil Case No. 571 of 2015) [2017] eKLR, that once the defendants' signatures are proved or admitted, the plaintiff discharges the burden and the burden shifts to the defendants to prove fraud, misrepresentation, illegality or duress.



24. The plaintiffs further relied on *John Onyancha Zurwe v Oreti Atinde* (Civil Appeal No. 217 of 2003) [2009] eKLR, that where the intention of the parties has been reduced into writing, it is generally not permissible to adduce extrinsic evidence.
25. The plaintiffs again relied on *Five Forty Aviation Limited v Erwan Lanoe* (Civil Appeal No. 55 of 2016) [2019] eKLR, that the law cannot relieve or allow a party to escape from a bad bargain; and *Potgieter v Stumberg and another* (No. 2) [1972] EA 370, that the court ascertains the intention of the parties from the terms of the contract, the conduct of the parties and the circumstances of the case.
26. The plaintiff cited sections 2 and 21 of The *Valuers Act*, to contend that the evidence of Mr. Wambua (DW3) was unreliable and his report is void and inadmissible because he is neither a qualified nor a registered valuer. The valuation report also lacked probative value, is one-sided and is subject to bias. Mr. Wambua could not also recall when valuation took place, who allowed him access the premises and the persons who were present.
27. The plaintiffs further relied on section 48 (1) of *Evidence Act*, for the position that opinions on a point of law or science are admissible if made by skilled persons who are experts. Reliance was also placed on *David Musyimi Ndeti T/A Oasis Mineral Water Company v Safepak Ltd* (Civil Appeal No. 159 of 2004) [2005] eKLR, that while the court must give due respect to the opinion of experts, it is entitled to reject that opinion on proper and cogent basis, considering it along all other available evidence.
28. The plaintiffs again relied on *Nelson Wainuku Maina v Republic* (Criminal Appeal No. 31 of 2012) [2016] eKLR, for the argument that an expert report prepared by unqualified person should not be admitted or relied upon by the court.
29. The plaintiffs urged the court to allow the suit with costs and dismiss the counterclaim with costs.

Defence

30. The defendants filed a statement of defence and counterclaim. They averred that the sale was to include stocks as at 25th May 2017, slow moving stock, running stock, shelving and partitions and office equipment.
31. The defendants stated that the total valuation of the shares was Kshs. 5,000,000 and the agreed valuation of the stock was Kshs. 23,335,00 subject to valuation. The sum of Kshs. 23,335,000 was to be apportioned to the plaintiffs proportionate to their shareholding and the value of the stock was also to be paid to the plaintiffs in the similar manner.
32. The defendants further stated that they advanced a loan of Kshs. 13,724,165 to the plaintiffs which was to be repaid within 7 months with interest at 15% per annum.
33. The defendants averred that since the nominal share capital of the company was Kshs. 5,000,000 divided into Kshs. 50,000 ordinary shares of Kshs. 100, each, the 1st plaintiff had 23,501 shares which would make Kshs. 2,350,100; the 2nd plaintiff 23,000 shares were equivalent to Kshs. 2,300,000; the 3rd plaintiff's 1,500 shares were equivalent to 150,000; the 4th plaintiff's 1,500 shares were equivalent to Kshs. 150,000 and the 5th plaintiff's 999 shares were equivalent to Kshs. 99,900.
34. The defendants stated that the sum of Kshs. 28,335,000 was the cost of the shares (Kshs. 5,000,000) and the approximate value of the stock (Kshs. 23,335,000). After valuation, it was revealed that available stock was Kshs. 38,703,335 and dead stock was Kshs. 22,000,000, leaving available stock of Kshs. 16,703,335.



35. The defendants raised a counterclaim against the plaintiffs jointly and severally for Kshs. 14,240,681 with interest at 15% p.a, release of documents; namely; audited accounts for the years 2015 and 2016; audited accounts up to 31st August 2017; minute books, secretarial files and other records of the company; a letter from the company auditors confirming the KRA Tax account which had brought forward Tax losses account with KRA and the company's tax compliance certificate.
36. The defendants maintained that the agreement of 5th September 2017 was preceded by a letter of offer dated 8th June 2017 through which they had offered to purchase shares and stock in the company as a going concern. This was because the defendants were also running BBC Auto Spares Limited which had a similar object of dealing in motor vehicle spare parts as the company.
37. The defendants averred that the value of the shares was Kshs. 5,000,000 and there had not been increase in the nominal share capital to support the claim for Kshs. 28,335,000. The sale included stock as at 25th May 2017 estimated to be worth Kshs. 23,335,000, but subject to valuation. Upon valuation, the value of available stock was assessed to be Kshs. 16,703,335.
38. The defendants maintained that they advanced the plaintiffs a loan of Kshs. 14,240,681 which was to be repaid within seven months with interest at the rate of 15% p. a. which was, however, not repaid. The defendants maintained that the plaintiffs did not deliver completion documents and were still operating the company's bank accounts and using the company's work permits and letterheads.
39. The defendants stated that the plaintiffs had registered another company, Hexagon Safety and Hardware Limited and had convinced clients that Hexagon (whose shares were being sold) had closed down.

Evidence

40. The defendants called Shivji Meghji Rapadiya (Mr. Rapadiya), Patel Kalpesh Kiritbhai (Mr. Kiritbhai) and Darius Wambua (Mr.Wambua) as witnesses.
41. Mr. Rapadiya adopted his witness statement and produced the defendants' list of documents as exhibits. Mr. Rapadiya confirmed that he and the other defendants signed the agreement, but without the benefit of counsel as the documents were sent to BBC Auto Spares Ltd. He also stated that he did not know the advocate who prepared the agreement and did not meet him before signing the agreement.
42. Mr. Rapadiya testified that he signed the agreement based on trust as the plaintiffs were his friends for 10 years prior to signing the agreement. He confirmed that the advocate issued the letter dated 11th October 2017, but he did not understand it since it was in English.
43. Mr. Rapadiya further testified that the valuation of the company was done by Velper Radiant Business Systems and Logistics on 2nd February 2018 and the report was made on 18th March 2019. He stated that the plaintiffs were not present during valuation despite invitation; the valuation established that the value of the stock for sale to be Kshs. 16,703,335 hence the sum due to the plaintiffs was Kshs. 2,462,654 which the plaintiffs declined.
44. Mr. Kiritbhai also adopted his witness statement as his evidence in chief. He stated that he was a manager at BBC Auto Spares Ltd and admitted that he witnessed the agreement which was voluntarily signed by the defendants without coercion. Mr. Kiritbhai again admitted that he attended two negotiation meetings that were held by representatives of the plaintiffs and defendants.



45. Mr. Kiritbhai confirmed that the defendants were to advance Kshs. 13,724,165 to the plaintiffs which was to be repaid in 7 months with interest at 15% p.a. Mr. Kiritbhai could not, however, tell whether or not the plaintiffs had settled the debt. He could not also recall if parties had agreed on Kshs. 23,335,000 as the approximate value of stock.
46. Mr. Wambua, stated that he was an assessor and registered general insurance practitioner working with Radiant Business Systems and Logistics. They were instructed by BBC Auto Spares Limited to conduct physical audit of the company's stock at a shop in Industrial Area. He relied on the certificate of proficiency in the defendants' exhibits and produced a valuation report dated 8th June 2018. The report was on assessment of motor vehicle spare parts, equipment and accessories as at 6th June 2017.
47. Mr. Wambua admitted that he was not a registered valuer; that BBC Auto Spares Ltd was not a party to the suit; that he did not know the purpose of the valuation; and that the report did not contain a list of the items assessed.
48. Mr. Wambua stated that he conducted physical audit from 6th June 2017 to 8th June 2017 and compiled the report on 8th June 2017. During the exercise, he was given access to the premises by Rabadiya; that he did not know the plaintiffs and that he was not aware that the defendants had not taken over the business at the time of he conducted the valuation.

Submissions

49. The defendants submitted through written submissions, that the sale of shares for Kshs. 28,335,000 as contained in agreement was an unconscionable bargain calling on the court's interference. According to the defendants, the agreement was unconscionable because there was manifest disadvantage and lack of independent legal advice on their part.
50. The defendants relied on *Elson Plastics of (K) Limited v National Water Conservation and Pipeline Corporation* (Civil Suit No. 641 of 2009) [2014] eKLR and *Pawlowski, M. Unconscionability as a Unifying Concept in Equity* (2001) on unconscionable contract.
51. The defendants again relied on *Denning Law Journal*, 16, p. 79; *Halsbury's Laws of England Volume 22* (2012) 5th Edition at Paragraph 298; *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221 at 233 and *Kenya Commercial Finance Company Ltd v Kipng'eno Arap Ngeny & another* (Civil Appeal No. 100 of 2001) [2002] eKLR on the point.
52. The defendants argued that considering that the nominal share capital of the company was Kshs. 5,000,000 and the business was sold as a going concern, the sale of shares only for that amount did not make business sense. The defendants relied on the letter of offer dated 8th June 2017 to argue that the sale was inclusive of stock subject to valuation.
53. The defendants took the view, that in interpreting commercial contracts, the court ought to generally favour a commercially sensible construction or business common sense. The defendants relied on *Rainy Sky S. A. and others (Appellants) v Kookmin Bank (Respondent)*; *Homburg Houtimport BV v Agrosin Private Ltd: The Starsin* [2004] 1 AC 715, para 10; *Chart Brook Ltd v Persimmon Homes Ltd* (2009) UKHL 38; *Pinnacle Projects Limited v Presbyterian Church of East Africa & another* [2020] eKLR.
54. The defendants maintained that the plaintiffs did not discharged the burden of proof with regard to the claim that the letter of offer was a forgery. They pointed out that CI Gutu admitted in cross examination that the letter of offer was furnished to him by the plaintiffs; that the company's letterhead



could be modified; that he only considered the letter head for 2018 and not 2017 and that any other director of the company could have signed for the director on A1 & B1.

55. The defendants posited that the production of the agreement was improper because it was not produced by the advocate who drew it since he was deceased; that they signed the agreement without independent legal advice because the 1st plaintiff took the agreement to their shop for signature and advised them to sign it; that they could not read and understand the agreement before signing it because they did not know English well; and that they only signed the agreement based on trust due to the long friendship between 1st plaintiff and 1st defendant.
56. The defendants asserted that the company stock was left with the plaintiffs after completion and that the plaintiffs did not subject the stock to open market valuation. The defendants maintained that they advanced a loan of Kshs. 13,724,165 to the plaintiffs which had not been disputed and relied on the Funds Transfer Form in their exhibits. This document was, however, not traced on record.

Determination

57. I have considered the evidence, exhibits produced, arguments by parties as well as the decisions relied on. The issues that arises for determination are whether the agreement entered into by the parties was for sale of shares only or with stock, whether the plaintiffs performed their part of the bargain and whether the defendants' counterclaim should succeed.

Agreement

58. Parties are in agreement that they entered into an agreement dated 5th September 2017. There is, however, disagreement on what the agreement related to. According to the plaintiffs, the agreement was for sale of their shareholding only in the company whose price was agreed at Kshs. 28,335,000.
59. The defendant's contention was that they purchased the company as a going concern, which meant they bought both shares and stock. The defendants relied on some letter of offer dated 8th June 2017 to support their argument that the purchase was inclusive of stock, subject to valuation, but the plaintiffs maintained that the letter was a forgery.
60. I have read the agreement dated 5th September 2017. Clause 1 (h) (i) states that "subject as herein after mentioned" the plaintiffs, as vendors, agreed to sell and transfer to the defendants, as purchasers, their entire shareholding in the company at the price of Kshs. 28,335,000 as per the plaintiffs' shareholding.
61. The agreement further stated that, notwithstanding the apportionment of the total purchase price of Kshs. 28,335,000, the responsibility of the payment of the total purchase price by the defendants was joint and several.
62. Clause 1(k) again stated that in consideration of the transfer of the entire issued shareholding of the plaintiffs to the defendants, the defendants were to advance to the company Kshs. 13,724,165/10 for purposes of repayment and discharge of by the company liabilities.
63. Further down, at clause 1(a) after the words "Now This Agreement Witnesseth", the plaintiffs agreed to sell their shareholding and the defendants agreed to purchase the entire issued shareholding of the plaintiffs in the company at Kshs. 28,335,000.
64. At clause 3, the agreement stated that the purchase price of Kshs. 28,335,000 was to be paid to MahendraKumar Manek Shah (the 1st plaintiff) on behalf of the plaintiffs. The clause went on to state the amount for each of the plaintiffs according to their shareholding.



65. There is no clause in the agreement which stated that the sale was for shares and stock in the company. The defendants did not lead credible evidence to prove that the sale included stock in the company or that the sale of shares was subject to the valuation of either shares or the stock.
66. The defendants relied on a letter dated 8th June 2017 to support their argument that they had offered to buy shares and stock subject to valuation. I have perused the letter and note that thought the letter was purportedly signed for a director, the name of the director who purportedly authored that letter was not mentioned. In any case, the letter was disowned by the plaintiffs that it was a forgery.
67. Even if the letter was to be found to have not been a forgery, the agreement having been reduced into writing, contained the terms upon which parties agreed to transact. Any other argument that the terms were in the contentious letter of offer, which terms were not captured into the contract the parties freely executed, would be of no probative value in the face of the duly executed contract.
68. I have read through the agreement and I find no single clause that referred to the sale of stock in the company. All the clauses, including the completion clause, were on the sale of shares. The executed share transfers were to be delivered to the advocates, Messrs. Sobhag H. Shah & Goswami Advocates and the completion date was set to be the 5th September 2017.
69. The defendants also argued that the sale of shares for Kshs. 28,335,000 without stocks would be an unconscionable bargain because there was manifest disadvantage and lack of independent legal advice on their part. They relied on the decision in *Elson Plastics of (K) Limited v National Water Conservation and Pipeline Corporation (supra)*, to support the position that the agreement was unconscionable. I note that this decision was dealing with penalty interest and not the purchase price, as is the case here.
70. According to Black's Law Dictionary, 9th Edition, unconscionable contract is defined thus:

[A] bargain is said to be unconscionable in an action at law if it was "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.
71. The agreement was negotiated between the parties and the price for the shares agreed. The defendants were business people and knew what they were getting into. The agreement was drawn by a firm of advocates that parties must have agreed on, and were free to seek advice before sealing the contract.
72. Once the parties executed the contract, they were bound by the terms of that contract. The defendants could not come back and allege that the agreement was unconscionable when they were called upon to performed their bargain under the contract.
73. In *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) limited (Civil Appeal No 95 of 1999)*; [2001] eKLR, the Court of Appeal held that "a court of law cannot re-write a contract between the par ties. The parties are bound by the terms of their contract unless coercion, fraud and undue influence are pleaded and proved."
74. In this case, Mr. Rabadiya testified that he signed the agreement based on trust because he was a friend of the plaintiffs for over 10 years prior to the signing the agreement. The defendants again appeared to argue that they did not understand English well.
75. The evidence of Mr. Rabadiya is contrary to that of Mr. Kiritbhai who admitted that he witnessed the signing of the agreement by the defendants which was done voluntarily and without coercion. Mr. Kiritbhai further admitted that he had attended negotiation meetings between representatives of the



plaintiffs and the defendants. he did not say that parties did not agree on the sale of shares for price in the agreement.

76. Whether or not the defendants understood English well is neither here nor there in so far the terms of the agreement were concerned. The defendants did not demonstrate that they did not understand English language to the extent that they could not have understood the terms of the contract they were entering into. Where the defendants alleged that they did not understand English language well, it was upon them to demonstrate to the satisfaction of the court that this was the case. It was not enough to allege without proof.
77. The argument that the defendants executed the agreement on trust because they were long-time friends with the plaintiffs would not in, my view, assist them either. Parties were not contracting as friends but as business people. They were engaged in a serious business of buying and selling shares in a company. They must have understood what they were doing and had to bear the consequences of their actions, including whether the purchase made good business sense or not.
78. In This respect, I am persuaded by the holding in *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA), where Supreme Court of Appeal (Brand JA) stated:

"[27]...although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty."
79. In *Brisley v Drotzky* (432/2000) [2002] ZASCA 35 (28 March 2002), the same court stated that "one must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness."
80. Further, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13 (15 March 2012), the court stated that "Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used."
81. These decisions demonstrate one thing; that what one considers to be individual sense of reasonableness, fairness or businesslike, should not be the basis for intervening in contractual relationships and hold lawful contracts to be unenforceable. Parties are bound by the terms of their contract and courts should enforce terms of those contracts, unless there are lawful reasons for not doing so.
82. The defendants alleged misrepresentation on the part of the plaintiffs but I am unable to trace any act that would amount to misrepresentation. The terms of the contract were clear and the plaintiffs acted as was required of them. I find and hold that the agreement entered into by the parties was for sale of shares in the company and not for shares and stock.

Whether plaintiffs performed obligations

83. The next issue is whether the plaintiffs performed their obligations under the contract. The plaintiff argued that they did perform their obligations under the contract and handed over executed transfer



forms and other completion documents to the defendants but the defendants had not paid the purchase price.

84. According to the 1st plaintiff, they provided all documents, including account statements and final audited accounts for the years 2013, 2014, 2015 and 2016 to the defendants as had been agreed, but the defendants did not pay.
85. I have perused the documents produced by parties. The plaintiffs produced copies of share transfers forms duly executed in favour of the defendants on 5th September 2017 which was the completion date.
86. There is also a resolution of the board of directors of the company made on 5th September 2017, where directors of the then company resigned and new directors appointed. The 1st and 2nd defendants (Mr. Shivji Meghji Rabadiya and Mr. Karsna Meghji Rabadiya) confirmed on behalf of the defendants that they would appoint a company secretary.
87. It was also resolved that as soon as share transfers forms were stamped, Messrs Sobhag H Shah & V. Goswami Advocates would give them to the 1st defendant (Mr. Shivji Meghji Rabadiya), who would be responsible for filing with the company registry Forms CR 7 for change of directors, CR 11 for change of company secretary, CR 16 for change of location of the company and other necessary forms for transfer of shares in the company.
88. In the letter dated 11th October 2017 addressed to the 1st defendant, Messrs Sobhag H. Shah Goswami Advocates forwarded completion documents to him. These included, original share transfer forms for the shares dully stamped together with respective original share certificates to enable him liaise with their company secretary for purposes of filing of necessary returns and issuing of new share certificates.
89. From the documents, it is clear that the plaintiffs gave all the agreed documents, thus performed their obligations under the contract. It was up to the defendants to do the rest upon receiving those documents.
90. It follows that the plaintiffs having forwarded the completion documents to the defendants through Messrs Sobhag H. Shah Goswami advocates, the plaintiffs discharged their obligations under the contract and there was nothing more required of them.

Counterclaim.

91. The defendants mounted a counterclaim for Kshs. 14,240,681, completion documents, namely; audited balance sheet of the company for 2015 and 2016; audited accounts up to 31st August 2017; company minute books, secretarial files and other records; auditor's letter confirming KRA tax account and tax compliance certificate.
92. The defendants' argument was that they advanced a loan of Kshs. 13,724,165 to clear the company's debts which, according to the letter of offer dated 8th June 2017, was to be paid in 7 months, but was not paid. The defendants further advanced to the plaintiffs a loan of Kshs. 516,516 making a total of Kshs. 14,240,681.
93. The plaintiffs filed a reply to defence and defence to the counter claim denying the defendants counterclaim. The plaintiffs reiterated their averments in their plaint. Regarding the counterclaim, the plaintiffs stated that the amount of Kshs. 13,724,165 was advanced to the company and denied all the allegations in the counterclaim. They stated that they handed over completion documents and the company to the defendants.



94. I have scrutinized the agreement entered into by parties which is the only basis of the dispute before this court as it formed the basis of the obligations on each side. It is worth of note, that clause 1(k) stated that in consideration of the transfer of the entire issued shareholding of the plaintiffs to the defendants, the defendants were to advance Kshs. 13,724,165/10 to the company for purposes of clearing company's liabilities. Clause 2(1) stated that on execution of the agreement by all parties, the purchasers would advance by way of loan to the company, the sum of Kshs. 13,724,165.10. Clause 2(ii) (a) was on how the company would pay the liabilities.
95. It is, therefore, true that according to the agreement, the money was advanced to the company and not the plaintiffs as individuals. The agreement did not state who was to repay the money so advanced, given that in law, the company was an independent entity from its directors and shareholders.
96. The letter of offer the defendants relied on to argue that it committed the plaintiffs to repay the amount was contested by the plaintiffs, and as this court has held, the terms of that letter would not bind the plaintiff if they did not form part of the terms of the agreement. The defendants did not lead evidence to show that the money was to be repaid by the plaintiffs and how.
97. Regarding the documents the defendants sought in the counterclaim, the court has already alluded to the letter dated 11th October 2017 from Messrs Sobhag H. Shah Goswami Advocates to the 1st defendant, (Mr. Shivji Meghji Rabadiya), forwarding completion documents. The documents the defendants wanted in the counterclaim were among those sent to the 1st defendant in that letter.
98. In the premise, the defendants did not prove that the documents were not sent or received by them or that the plaintiffs were to repay the loan said to have been advanced to the company. The defendants did no prove the counterclaim.

Conclusion

99. Having carefully considered the evidence, exhibits and submissions made on behalf of the parties, the conclusion I come to, is that the plaintiffs sold share to the plaintiffs, excluding the stock. The plaintiffs further performed their obligations and forwarded completion documents to the defendants as was required of them under the contract. Despite this, the defendants did not pay the agreed amount.
100. On the other hand, the defendants did not prove their counterclaim against the plaintiffs.

Disposal

101. The plaintiffs suit succeeds and is allowed.
1. Judgment is entered for the plaintiffs against the defendants jointly and severally for Kshs. 28,335,000.
 2. The amount of Kshs. 28,335,000 will attract 15% compound interest from the completion date, 5th September 2017 until payment in full.
 3. costs of the suit to the plaintiffs
 4. The defendants' counterclaim is dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2023.

E C MWITA

JUDGE

