



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 141 OF 2011**

**NDUNGU MBUGUA.....PLAINTIFF**

**VERSUS**

**BENSON IRUNGU MBARIA.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced this suit vide a plaint dated 13<sup>th</sup> April 2011 seeking for judgment against the Defendant for: -

- a) *Kshs. 8,684,057;*
- b) *Interest on (a) above from 22<sup>nd</sup> May 2007 at court rates until payment in full; and*
- c) *Costs of this suit plus interest.*

2. The Plaintiff avers that, at all material times he was a shareholding director of; M/s Afrodane industries Limited (herein “the Company”) and held 1521 shares. By an agreement dated 22<sup>nd</sup> February 2006 (herein “the agreement”), he sold to the Defendant all his shares in the Company at a purchase price of; Kshs. 11,118.16 per share totaling Kshs. 16,910,737.

3. The Defendant made the following part payments towards the purchase price of the shares: -

- a) *5<sup>th</sup> January 2008 ..... Kshs. 1,581,770.00;*
- b) *16<sup>th</sup> January 2009 ..... Kshs. 4,154,297.00;*
- c) *5<sup>th</sup> November 2009 ..... Kshs. 460,000.00;*
- d) *9<sup>th</sup> March 2010 ..... Kshs. 900,000.00;*
- e) *13<sup>th</sup> July 2010..... Kshs. 1,200,613.00*
- Total ..... Kshs. 8,296,680.00*

4. However, the Defendant he did not pay the balance of the money, hence the claim for the outstanding sum of; Kshs. 8,614,057.00. The Plaintiff also claims a further Kshs. 70,000, as an agreed refund of monies he advanced to the Company.

5. The Defendant opposed the Plaintiff’s claim by filing an amended statement of defence and counter-claim dated 31<sup>st</sup> July 2012 and argued that, the plaint as drawn, filed and served upon him is, incurably and fatally defective, frivolous, vexatious, devoid of any merit and therefore incompetent. That, he would raise a preliminary objection to be determined in limine, to have the same struck out with costs.

6. However, he admitted executing the subject agreement but denied that, under the agreement, the purchase price per share was permanently and absolutely fixed at; Kshs. 11,118.16 and/or the Plaintiff was entitled to a total sum of; Kshs. 16,910,737.00.

7. He pleaded in the alternative and on a without prejudice basis that, the agreement was for the sale of shares by various shareholders in the Company, at a total cost of; Kshs. 70,000,000, of which, a sum of; Kshs. 35,000,000 was to cover all the estimated liabilities and the balance thereof was the purchase price. That the same has been paid in full in accordance clause 2, of the agreement.

8. Further, the apportionment of; Kshs. 35,000,000, as the purchase price for shares, was not absolute, for apportionment on fixed percentages of shares held by the individual shareholders but was anticipated to be reduced by any further and/or other claims and liabilities, which would arise within one hundred and twenty (120) days from the date of completion.

9. That, he was to handle these claims and/or liabilities, and has discharged them as required by the agreement, as such any blanket claims by the Plaintiff without consideration and/or taking into account the foregoing, is misconceived, misplaced and an abuse of the process.

10. The Defendant further averred that, any payments which have been made to the Plaintiff whether; as part payments, credits or otherwise, were made towards settlement of the purchase price, pursuant to the relevant provisions of the agreement. If at, all there was any outstanding balance from the sale of shares owing to the Plaintiff as alleged, which in any event is denied, then the same have been fully paid and the transaction finally settled between the parties.

11. Finally, the Defendant averred that, he was not privy to any agreement for advancement of monies or otherwise between the Plaintiff and the Company and if at all there was any such agreement, then the Plaintiff's claim should be made against the Company and not him. Even then, the agreement dated 22<sup>nd</sup> February 2006, has Arbitration clause and so the court has no jurisdiction to hear this matter.

12. The Defendant reiterated in the counter claim aver that, he entered into the agreement with the Plaintiff and others for the purchase of their shares in the Company, as more particularly described in the agreement. The sale included the purchase of; all furniture, equipment, fixtures and fittings and the premises being; all those parcels of land known as Escarpment/Kinari Block 1/3071, Escarpment/Kinari/Block 1/1463 and Escarpment/Kinari Block 1/3069, upon which the Company's milk processing plant is situated ,and all improvements made thereon, all at a total sum of; Kshs. 70,000,000.

13. That the agreement provided that, the purchase of the shares, furniture, equipment and the land parcels was done on the basic and fundamental understanding that, they would be sold and transferred free from any encumbrances, liens, burdens and/or any other hindrances. That, upon the purchase and execution of all the relevant transfer documents, and completion sale of shares transaction, he expended a substantial sum of money amounting to millions of shillings in developing and/or improving the company, the milk processing plant and all those parcels of lands to enable the furthering of his business interests.

14. However, subsequent to the full discharge of his obligations under the agreement, the Company received a; forest land eviction notice dated; 2<sup>nd</sup> August 2005 (herein "the eviction notice"), from the Ministry of Environment and Natural Resources, requiring it to vacate all those subject parcels. He avers that, he only agreed to enter into the agreement for sale of shares and transfer of all the parcels of land, on the representation and understanding by the Plaintiff and the other shareholders that; the parcels of land were de-gazetted as forest land vide; Legal Notice No. 10 of the Kenya Subsidiary Legislation of 1988. That in the absence of de-gazettement, the agreement is unconscionable.

15. Further, the sum of Kshs. 70,000,000.00, was only payable in consideration, upon him acquiring all the shares and existing legal and valid rights of title and ownership over the Company's moveable and immoveable assets; including all those parcels of land. Thus, in view of the eviction notice, the agreement lacks sufficient consideration or any consideration at all, it is incapable of cognition in law, in terms of both monetary and economic value. As such, it is void ab initio and therefore amenable to rescission.

16. He argued that, as a result of the all foregoing, he has lost colossal amounts of money in terms of developing and upgrading the company, substantial loss and damages and prays for judgment against the Plaintiff for: -

*a) A declaration that the agreement for sale dated 22<sup>nd</sup> February 2006 is null, void and unenforceable for all intents and purposes and therefore rescinded;*

*b) A declaration that the agreement for sale dated 22<sup>nd</sup> February 2005, is rescinded and pursuant thereto an order requiring the Plaintiff to refund all the monies paid to him as consideration in the said agreement;*

*c) An order be issued directing the Plaintiff to refund to the Defendant a sum of Kshs. 8,296,680.00 being the amount paid by the Defendant to the Plaintiff in respect of the said agreement together with interests thereon at commercial rates from the date of payment until payment in full;*

*d) General damages;*

*e) Any such other and/or further relief that this Honourable Court may deem fit and appropriate to grant in the circumstances.*

17. However, the Plaintiff filed a defence to the counterclaim and a reply to defence dated 1<sup>st</sup> October 2012 and averred that, he was not party to the alleged eviction notice and did not make any representation in respect of the property. Further, there was lawful consideration and the agreement is not null and void.

18. The case proceeded to a full hearing. The Plaintiff adopted and relied on a witness statement dated 18<sup>th</sup> July 2018 and a list of documents dated 20<sup>th</sup> September 2016. He testified that, in the month of; March 1999, the parties herein; incorporated the Company; Afrodane Industries Limited, with the aim of doing a business of processing fresh milk. Being an Architect by profession, he designed a factory for the company, as his contribution towards capital and assets of the company. The Defendant on his part, transferred two parcels of

land namely; Escarpment/Kinale Block 1 /30069 and Block 1/3070, as his contribution towards the capital and assets of the company. The factory was constructed on the said parcels of land.

19. As the company required funds to construct the factory, other persons were invited to purchase shares in the Company and as at 22<sup>nd</sup> February 2006, the shareholding of the Company was as follows: -

a) Benson Mbaria	1716
b) Ndung'u Mbugua	1521
c) Peter Kinyanjui	706
d) Pylis Ng'ang'a	295
e) Wanjau Kirimi	268
f) Stanley Mbugua Githongo	246
g) Daniel Joseph Njagi	112

20. That, subsequently the Defendant purchased the other Shareholders' shares and Company business as aforesaid. The vendors executed transfer of shares documents and resigned as directors and he is no longer a shareholder of the Company. That, two other directors; Peter Kinyanjui and Daniel Joseph Gathaiya Njagi were also not paid the purchase price of their shares and have filed a suit; HCCC No. 142 of 2011 and CMCC No. 1001 of 2011, respectively.

21. The Defendant supported his case by literally reiterating the averments in the defence, save to state that, by a letter dated 7<sup>th</sup> February 2006, to the managing director of the company he offered to buy all the shares in the Company and purchased the same a total cost of; Kshs. 70,000,00. The proposal was acknowledged by the company as per its minutes of a meeting held on 15<sup>th</sup> February 2006. As a result, he subsequently acquired not only the 4,864 shares in the company but the whole Company's business and assets.

22. The parties filed their final submissions wherein the Plaintiff invited the court to determine the following issues: -

- a) *Whether the purchase price of; Kshs. 70,000,000 for purchase of the shares, included the shares held by the defendant;*
- b) *What was the sale price for each share?*
- c) *Whether the agreement dated 22<sup>nd</sup> February 2006 is enforceable and if not, whether it should be rescinded. If the agreement is rescinded whether the defendant is entitled to a refund of a sum of; Kshs. 8,296,680;*
- d) *Whether the defendant is liable to pay to the plaintiff and other vendors the purchase price under the agreement dated 22<sup>nd</sup> February 2006. If so how much is the defendant liable to pay to the plaintiff.*

23. The Defendant too submitted and invited the court to consider the following agreed issues: -

- a) *Whether the Plaintiff's suit is incurably and fatally defective, frivolous, vexatious and devoid of merit?*
- b) *What were the terms of the agreement dated 22<sup>nd</sup> February 2006?*
- c) *Did the Defendant fully discharge his obligations under the agreement dated 22<sup>nd</sup> February 2006?*
- d) *Is the Plaintiff entitled to special damages of Kshs. 8,614,057 being the balance of the purchase price?*
- e) *What was the relationship between the parties and M/S Afrodane Industries Ltd and whether the Plaintiff is obligated to refund to the Plaintiff the sum of Kshs. 70,000 advanced to the said Company by the Plaintiff?*
- f) *What orders should be made on costs?*

24. I have considered the evidence in total and the supporting documents alongside the submissions tendered and I find that the following issues have arisen for determination: -

- a) *Whether there is a valid contract between the parties;*
- b) *If so, what are the terms and conditions thereof;*
- c) *Did each party perform its contractual obligation or did any party breach the contract;*

d) Has each party proved its case on the required standard and/or should the court grant the prayers sought by either party; and

e) Who bear the costs?

25. I have considered the evidence adduced and I find that, there is no dispute that, the Plaintiff and the Defendant were shareholders and/or directors in a company known as; Afrodane Limited. On 2<sup>nd</sup> February 2006, Shareholders held a meeting to discuss inter alia, the sale of shares to enable the restructuring of the company. There was a heated discussion on the value of the shares and/or company business and eventually it was agreed and settled at about Kshs 140,000,000.

26. The follow up meeting was held 6<sup>th</sup> February 2006, and it was resolved that, the Company's assets be sold at Kshs. 70,000,000 and any of the shareholders was at liberty to bid. By a letter dated 7<sup>th</sup> February 2006, the Defendant wrote to the Managing Director of the Company offering to buy all the shares in the Company. The letter states in part as follows;

*"I am hereby writing an offer to purchase all Shares held by all Afrodane Directors for Kenya Shillings Seventy Million (Kshs. 70,000,000.00) only."*

27. On 15<sup>th</sup> February 2006, the shareholding held a meeting and resolved to sale "the business and assets of the company" to the Defendant at a total sum of; Kshs. 70,000,000. It was further agreed that, the Defendant be given one-year grace period to pay the vendors or shareholders. The minutes of that meeting states as follows: -

*"In the meeting held on Wednesday the 15<sup>th</sup> February 2006 at Mr. Mbaria's Boardroom on Lungalunga Road Nairobi, the members of; Afrodane Industries Ltd ,Resolved to Sell the Business and Assets of the Company to Mr. Benson Irungu Mbaria for Kenya Shillings Seventy Million (Kshs 70,000,000/=) as per his bid offered to the Company and presented to the members that day, and that liabilities of the Company are included in the Price."*

28. It is noteworthy that, the resolution made was for the sale of the "business and assets of the company" and not just shares. Therefore, any arguments contrary to the resolution is untenable. Be that as it were, a resolution was passed on 22<sup>nd</sup> February 2006, approving the shares held by each director as stated in the plaint and the sale thereof to the Defendant. The parties then executed an agreement to that effect dated the same date of 22<sup>nd</sup> February, 2006. In my considered opinion, the basic elements of the contract of offer and acceptance had been met. The rest was payment of consideration and performance.

29. Indeed, the said agreement is the basis of the dispute herein and in particular the issue of consideration. In that regard it suffices to note that, clause 2 thereof states: -

*"2. The consideration for the said sale is Kenya Shillings Seventy Million (Kshs. 70,000,000/-) hereinafter called "the consideration") less Kshs. 35,000,000/- (read Kenya Shillings Thirty-Five Million) being estimated liabilities. However, any other claims or liabilities that may arise within 120 days from the completion date will be added to the liability account and will be settled by the vendors on pro rata basis."*

30. As can be seen clearly, the total consideration cost was Kshs 70,000,000 distributed as indicated under that clause. The amount payable for all the shares sold was Kshs. 35,000,000. I however, note that, the agreement does not state the price per each share.

31. Be that as it may, pursuant to the execution of the agreement, the transfer documents were executed on 22<sup>nd</sup> February 2006 and shares transferred to the Defendant even before the full payment was made. It is in evidence that, on 25<sup>th</sup> February 2006, effectively all the assets of the company were handed over to the Company which then assumed all the Company liabilities.

32. The transfer documents lodged with the Registrar General, reveal the following information; the transferor is indicated as the Plaintiff; Ndirangu Mbugua and the transferee is Afrodane Industrial Limited. The shares transferred are indicated as 1521 ordinary shares and the date of transfer is indicated as 22<sup>nd</sup> February 2006. The Form D to the collector of stamps indicate that; the value of "one ordinary or preferential share on 22<sup>nd</sup> February 2006 is Kshs. 11,118.16. That value is authenticated by the signature of the Auditor of the Company.

33. The sale was to be completed by 31<sup>st</sup> March 2006 or on any other transfer of marketable securities. Similarly, all the vendors resigned on the same date from the board of the company and from encumbrances with effect from 1<sup>st</sup> March 2006,

34. The question that arises is whether, the Defendant paid the purchase price in compliance with the agreement. It is not in dispute that the Defendant did not pay the Plaintiff the total purchase price as evidenced by the several correspondences produced herein. In particular, the Defendant by a letter dated 1<sup>st</sup> December 2009, acknowledges paying the Plaintiff the total sum of Kshs, 8,296,680.

35. The reasons the Defendant advances for failure to pay the total purchase price was that the agreement is vitiated on the basis of material non-disclosure, fraud and misrepresentation by the other directors and in particular; non-disclosure of the material fact that there was a land eviction notice.

36. The Defendant submitted that, clause one (1) and two (2) of the agreement provides that:

*"(1) The Vendor shall sell and the Purchaser shall purchase the Shares free from all charges or liens or any encumbrances and*

with all, rights (including but not limited to all rights of dividend) attaching to the shares with effect from the 1<sup>st</sup> day of March Two Thousand and Six which sale shall include the furniture fittings and equipment particulars whereof are set out in the Sixth Schedule”.

37. The Defendant relied on the case of; S M K v R H H [2015] eKLR where the Court held that, fraud and material non-disclosure are grounds for vitiating a contract and stated: -

“In (1923) AC 733 (Abram S. S. Co. v. Westville S. S. Co.) it was observed : "In the words of Lord Atkinson 'where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it and refuses to be bound by it, the expression of his election, if justified by the facts terminates the contract, puts the parties 'in status quo ante' and restores things, as between them, to the position in which they stood before the contract was entered into'. The same principle is stated by the Supreme Court in (Central National Bank Ltd. v. United Industrial Bank Ltd.)”

*In some cases, consent induced by false representation may not be free but may nevertheless be real. In such cases, the consent is negated and the transaction is held merely voidable but not void; so that the party misled by the fraud, has the option to treat the transaction either as valid or as altogether void even as against innocent third persons; but the party guilty of fraud is estopped from denying the contract if the party deceived chooses to affirm the transaction. (Vide - Singhal & Subrahmanyam's Indian Contract Act - 2nd Edn. Page 412)”.*

38. However, the Plaintiff referred the court to clause 7 of the agreement that states: -

“(7)The Purchaser being also a shareholder having the opportunity of carrying out his own due diligence of the company acknowledges that he does not enter into this Agreement in reliance wholly or partly on any statement of representation made by or on behalf of the vendors and the company save in so far as such statement or representation is expressly set out in this Agreement.”

39. I have considered the submissions by both parties on that issue and I find that, the Defendant was a shareholder and director of the company, therefore he was privy to all the information within the company. He admitted having sold and or offered the subject parcel of lands to the Company. He was also expected to have conducted due diligence before conducting the sale, therefore he cannot plead ignorance of eviction notice. I agree with the Plaintiff's submission and in particular that, the Defendant admitted in cross examination that, despite the notices in respect of the land from the Ministry of Environment and Natural Resources, he is still operating and running the Company. I therefore, dismiss his argument as untenable.

40. The Defendant also submitted that, there appears to have been a lack of understanding between the parties even as regards the sale agreement itself and particularly the fact that, the Defendant was purchasing the entire Company as well as, how the purchase price was to be divided including division of the liabilities. That, whereas the Plaintiff concedes to including the Defendant in the apportionment of liabilities, he nevertheless asserts that, the Defendant should not have also then shared in the purchase price, which position is illogical, and the upshot, is that clearly, parties lacked consensus ad idem.

41. The Defendant relied on the case of; Purple Rose Trading Company Limited vs Bhanoo Shashikant Jai (2014) eKLR where the court held that; “where there is no meeting of the minds of the contracting parties the contract is incapable of performance”, and the case of; Bell Vs Lever Bros Ltd (1931) ALL ER 1 where it was held that:-

“a mistake of both parties as to the existence of some quality of the subject matter of a contract, which makes the subject matter of the contract without the quality essentially different from the subject matter as it was believed to be, rendered the contract void ab initio”.

42. Similarly, the Defendant relied on the case of; Nebart Njeru Munyi v Nicholas Muriithi Zakaria (2015) eKLR where the Court held that; “it is presumed that, at the time of making a contract the parties are like-minded and that their bargain is motivated by commonality of purpose. However, if a mistake arises in the course of the contract, the court shall determine whether the mistake goes to the root of the agreement and whether it was a mistake of both parties.

43.However, the Plaintiff submitted that, the circumstances of vitiating a contract range from illegality, mistake, failure of consideration, frustration, conflict with public policy to impossibility and the Defendant has not offered any evidence to show that the agreement is either illegal or a nullity in order for the court to declare it as unenforceable. Further, as per the terms and interpretation of the agreement, the Defendant's shares were not part of the shares which were sold, in that the Defendant is not defined or described in the agreement as one of the vendors.

44. That, under the Company law, a sale of shares agreement is distinct from an agreement for sale of assets. A shareholder cannot purport to sell his shares in a company, together with the assets of the Company. Any sale of the assets of the Company must be evinced by an agreement duly executed by the Company as a legal entity.

45. The Plaintiff relied on the case of; Nasir Ibrahim Ali & 2 Others V. Kamlesh Mansukhlal Danji Pattni (1998)eKLR, the Court of Appeal in a dissenting judgment of; Hon. Justice Evans Gicheru JA (as he then was), cited the Companies Act and Palmer's Company Law as follows:-

“In Paragraph 34-01 of Chapter 34 of Palmer's Company Law, Volume 1 at Page 332, it is stated that: -

*“A share in a Company is the expression of a proprietary relationship: the shareholder is the proportionate owner of the company but does not own the Company’s assets which belong to the Company as a separate and independent legal entity.”*

*Indeed, it is a right to a specified amount of the share capital of a Company. Section 15(sic) of the Companies Act, Chapter 486 of the Laws of Kenya provides that: -*

*“75. The shares or other interest of any member in a company shall be moveable property transferable in manner provided by the articles of the Company.”*

*It would seem that the proportionate ownership of a Company by a shareholder expressed as a proprietary relationship in the Company and measured by a right to a specified amount of the share capital of a Company is moveable property and transferable in accordance with the provisions of the articles of the Company. Section 16(2) of the Companies Act Supra, provides that:*

46. In my considered opinion the terms and conditions of the agreement entered into herein are clear. The Defendant was not selling his shares to the company. The vendors are clearly identifiable in the minutes held by the shareholders and neither does he plead that he too is entitled to the sum of Kshs 35, 000,000 set aside for the purchase of the Company shares. Even if he was to be paid, that does not negate his liability to pay the other directors. Therefore, the argument that the contract was negated due to lack of consensus ad idem has no foundation.

47. The other issues closely related to violation of the contract, that the defendant raised is the issue relating to the amount payable and who was to meet the liabilities. That the agreement that, further any other claims or liabilities that may arise within 120 days from the completion date will be added to the liability account and will be settled by the vendors on pro rata basis. The Defendant argues that out of the Kshs. 70,000,000 payable, Kshs. 43,691,931.65 was used to pay the company’s debts and/or liabilities leaving a balance of Kshs. 26,308,068.35.

48. However, I find that it was expressly agreed by the parties that the amount of liabilities would be Kshs. 35,000,000. There is no evidence that further the liabilities were identified within the period of one hundred (120) days but assuming it did, there is no evidence the parties discussed it and agreed on it. But even further, it is noteworthy that the shares were transferred to the Defendant the same date the agreement was made and transfer documents were signed thereafter as stated herein and generally passed with all accruing liability.

49. However, of great importance is the Defendant’s argument that the price of each individual unit was not agreed on. That argument is defeated by the evidence herein. There is evidence that, the defendant paid the sum of; Kshs. 337,647, as duty to; Kenya Revenue Authority in the transfer of the Plaintiff’s shares. That is evident from the receipt issued by; KRA and Form D; Certificate of Transfer of Certain Marketable Securities. The documents he lodged for transfer of the Plaintiffs shares shows that, he stated the purchase price for each as; Kshs. 11,118.16. How is it possible that he can deny the stated value of Kshs. 11,816.16?

50. Therefore, based on that figure, I find that the Plaintiff is entitled to a sum of; Kshs. 16,910,721.36 made up of, a total of 1571 x 11,816.16 less the amount Kshs. 8,296,680, which gives a balance of Kshs. 8,614,041.36. I therefore award the Plaintiff that amount.

51. I have considered the prayers in the counter claim and dismiss all of them. I have held the agreement entered into by the parties is valid and enforceable, therefore the declaratory prayers are disallowed. The judgment in favour of the Plaintiff negates the prayer for refund of the amount already paid. Finally, the prayer for general damages cannot be allowed, as the Defendant did not pay the purchase price within one (1) year and neither has he paid it to date. Therefore, it is the Plaintiff who should be awarded damages for breach of contract albeit there is no prayer for the same.

52. The upshot is that, I enter Judgment for the plaintiff in the sum of Kshs. 8,614,041.36 plus interest at court rates from the date of filing the suit to payment in full. I also award the plaintiff the costs of the suit. The entire counter claim is dismissed.

53. It is so ordered.

**Dated, delivered and signed on this 29<sup>th</sup> day of April 2020.**

**G.L. NZIOKA**

**JUDGE**

In the presence of;

Delivered by email

.....for the plaintiff

.....for the defendant

.....Court Assistant