East African Tanners (K) Limited & 2 others v Alpharama Limited (Civil Appeal E111 of 2021) [2025] KEHC 5749 (KLR) (Commercial and Tax) (9 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5749 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E111 OF 2021

BM MUSYOKI, J

MAY 9, 2025

BETWEEN

EAST AFRICAN TANNERS (K) LIMITED ..... 1ST PLAINTIFF

ANUJ M PARMAR ..... 2ND PLAINTIFF

SARASWATI MADHUSUDAN PARMAR ..... 3RD PLAINTIFF

AND

ALPHARAMA LIMITED ..... DEFENDANT

JUDGMENT

1. By amended plaint dated 28-01-2022, the plaintiff prays for the following orders;

    a. A permanent injunction do issue restraining the defendant, by itself, its servants or agents or otherwise from presenting to court by taking out insolvency proceedings against the Plaintiff, advertising in the press or Kenya Gazette or howsoever in any way in respect of a claim Ksh. 19,682,837.15, Ksh. 2,510,000 and USD 113,808.13 or any other sum arising from any other claim the Defendant may have against the Plaintiff in any way whatsoever.

    b. An order striking out the statutory notices dated 16th November, 2020 issued by the Defendant's Advocate seeking to institute insolvency proceedings against the Plaintiffs.

    c. Kshs. 141,993,684.97 and interest thereon at court rates form the date of filing suit until payment in full.

    d. Costs of the suit on an advocate client basis and interest thereon at court rates.

2. The first two prayers are in my opinion misplaced and incompetent. A court of law cannot issue an order of injunction restraining a person from exercising their legal and constitutional rights to

approach a court for whatever remedy they deem to be due to them. The *Insolvency Act* Chapter 53 of the Laws of Kenya provides an elaborate procedure for how any person who seeks to pursue bankruptcy or insolvency against their perceived debtors should approach the court. The law also provides for the process through which any person who disputes the debt in question should defend themselves in the event a creditor initiates insolvency proceedings.

3. If the plaintiffs were of the view that the statutory demand dated 16th November 2020 served upon the 1st defendant was unjustified or that there were not debts due to the defendant, they should have made an application to dismiss the statutory demand under Section 17 of the *Insolvency Act* and Regulations 16 and 17 of the Insolvency Regulations. Based on the position I have taken on this, I will not consider prayer 'a' and 'b' of the amended plaint. That leaves the court with prayers 'c' and 'd'.

4. The plaintiff called two witnesses in support of his claim that is, Anuj Parmar and Sydney Ondari. Anuj (PW1), the 2nd plaintiff and a director of the 1st plaintiff adopted his wetness statement dated 28-01-2022 in which he stated that the parties had been in leather tanning business relationship for 25 years. He added that by an agreement dated 27th March 2005, the 1st plaintiff was to tan raw skin supplied by the defendant into leather and supply the tanned product back to the defendant. The defendant was also to supply associated chemicals on continuous basis. The witness claimed that the rates for the contractual services were to be mutually agreed and would be in force until the time the defendant notified the 1st plaintiff in writing in case of any change. The witness added that the defendant was to assign a leather technician to supervise the production. The agreement could be terminated by either party giving a six months' notice during which period, the parties' obligations would continue.

5. On 1-04-20214, the 1st plaintiff and the defendant executed another agreement with similar terms safe for a few new clauses. Among the new clauses which I consider relevant to the suit was that, the price rate of tanning was fixed at Kshs 27.50 per skin processed into wet-blue tanned skin exclusive of VAT and subject to deductions of withholding tax and other taxes determined by the Kenya Revenue Authority. Further, the plaintiff was not to take up any other tanning contract from any other tanneries including the defendant's competitors.

6. The witness stated further that the defendant breached the agreements by failing to deliver materials and associated chemicals required for the tanning. He added that because of the exclusion clause, the plaintiff could not mitigate the losses by getting supplies from other sources. He also alleged that the defendant unilaterally reduced the prices rate and failed to pay the leather technician. According to the witness, this led to the 1st plaintiff incurring expences on the technicians who it paid. He added that the defendant later started sabotaging the company and orchestrating ways of taking over the 1st plaintiff with intention of liquidating it. The witness concluded by producing documents comprised in the plaintiffs' list of documents dated 26-02-2021 and those in their supplementary list of documents dated 1-02-2022. There were a total of 14 exhibits.

7. In cross examination, the witness maintained that the defendant breached the term of the agreements which required him to supply skins as a result of which the 1st plaintiff incurred a loss of Kshs 141,993,684.70. He admitted that the agreement dated 21-03-2005 did not contain a fixed quantum of materials which the defendant was supposed to supply and insisted that quality was controlled by the defendant's own technician. He confirmed further that, they could authorize that defendant to reduce the price downwards. He maintained that all the invoices on pages 6 to 234 of the plaintiff's bundle had prices ranging between 28 and 30 shillings. He maintained that the 1st plaintiff incurred loses between 2015 and 2019.

8. The witness admitted that in an agreement dated 24-05-2019 the plaintiffs admitted owing the defendant 248,906 USD as at 31-05-2019. According to the witness, there was an oral undertaking that the defendant would increase production. He stated that the plaintiff had not produced a balance sheet or audited books of account to prove the losses and they were relying on invoices, delivery notes and the trend of production to prove their claim. He also admitted that there was no proof of expences of Kshs 7,566,768.00 the 1st plaintiff claimed to have incurred in paying a leather technician. He also could not show documents in proof of claim for Kshs 3,528.937.75 the plaintiffs alleged comprised illegal deductions. He further admitted that the bundle the plaintiff produced had no delivery notes or production sheets.

9. The witness added that the report prepared by its expert one Bellmac Consulting LLP does not have figures of loss caused by reduced production. He also admitted that the plaintiff was afforded financial facilities by the defendant including working capital and added that they had paid much of it through deductions by the defendant. He claimed that the plaintiff was not able to repay the loan because of low production. He stated further that the financial report was prepared after the suit was filed but denied that the claim of 141,993,684.97 was an afterthought.

10. Sydney Ondari, the plaintiffs" 2nd witness told the court that he was a governance, risk management and compliance consultant. He confirmed authoring report dated 26-01-2022 which was produced as exhibit 15. He was categorical that he could not be conclusively sure of the loss of Kshs 141,993,664.97.

10. He stated in cross examination that the terms of engagement were to review production by the plaintiff between 2012 and 2021. His responsibility was to establish the level of decline in production and the resultant loss to the plaintiff over the said period.

11. His report made reference to an agreement dated 27-03-2005 between the 1st plaintiff and the defendant which did not have clear provision on the level of production but the price was indicated as 27.50. He stated that his report showed that loss of Kshs 128,515,499.22 was occasioned by a reduction in supply of the raw materials. He admitted that the documents that should indicate loss in a company are its audited financial statements which he had referenced in his report but were not produced in court. He stated that the financial reports he had relied on were not audited but he was informed later that they were audited. He however stated that unaudited accounts are acceptable for certain financial purposes like forensic investigations and business decisions. He also stated that financial statements were not the basis for review but he relied on actual production documents which should end up in the financial statement.

12. The defendant called two witnesses two. The first one was Ruth Ndoli Dalizu who stated that she was working in the defendant's human resources department. She relied on her witness statement dated 22-07-2024. She testified that the defendant was claiming Kshs 29,960,615.31 which was arrived at by calculating money it gave to the 1st plaintiff as working capital of Kshs 10,664,981; housing loan of Kshs 11,167,073; limited lock sales of Kshs 1,303,787.13; limited contract tanning of Kshs 3,324,773.13; loan for 2nd plaintiff of 2,510,000.00 and cash to the 2nd plaintiff of Kshs 1,000,000.00. She produced documents comprised in the defendant's list and bundle of documents on pages 1 to 59 of its bundle dated 25-05-2021. The defendant asked for the plaintiffs' suit to be dismissed with costs and judgment be entered for it against the plaintiffs for 29,960,615.31 with interest and costs of the counterclaim.

13. In cross examination, the witness admitted that the agreement between the parties predated her employment but she maintained that she could tell from her interaction with the records of the defendant that funds were advanced to the plaintiffs. She also indicated that she did not have the cheques to prove the disbursements of the money although she confirmed that the disbursements

were through cheques. The witness was however emphatic that the figures were arrived at through an agreement. She also affirmed that the defendant had the biggest share of the leather market but she could not confirm that it controlled 60% of the market.

14. DW1 also admitted that the defendant was the sole supplier of raw materials to the plaintiff and the sole client for finished products. She also stated that the money loaned to the plaintiffs was to be recovered from the output produced by the plaintiffs. She was not aware when the agreement was terminated.

15. Pamidhmukkala Venkata Sambasiva Rao was the defendant's second witness. He relied on his statement dated 26-05-2021 and further statement dated 8-03-2022. He confirmed the evidence produced by DW1. He denied that the defendant breached the agreement by lowering prices and insisted that they paid as per the agreement. He also denied that the defendant undersupplied raw materials and made reference to several invoices contained in the defendant's bundle. He also stated that the plaintiff did not have capacity to employ a technical manager and the defendant referred one at the request of the 1st plaintiff but the 1st plaintiff was supposed to pay him. He stated further that the defendant had paid all the invoices raised by the 1st plaintiff.

16. He was cross examined by Mr. Waigwa for the plaintiffs and stated that he was directly involved in daily financial affairs of the defendant. He also played a role in advancing loans to the plaintiffs because they required financial support. He stated that repayment of the advances was not depended on profits. He made reference to agreement dated 18-08-2011 at page 246 of the plaintiff's bundle and the schedule of payment on page 237 of the same bundle. He denied that the defendant forcefully took back a generator they had given the plaintiff in order to cripple its business and added that the same was voluntarily returned because the plaintiff could not pay for it.

17. He also denied that the defendant rejected any tanned leather and stated that the only rejection was of raw leather which was of low quality and insisted that they stopped supplying materials when the plaintiff refused to accept the amount of the outstanding loans.

18. At the end of the hearing, the parties filed written submissions which I have carefully read. I have also gone through the documents produced by the parties in this matter. I discern from the same that there is no dispute that there existed agreement between the parties as testified by the witnesses. There is also no dispute that the plaintiff was loaned money by the defendant for various purposes related to the business the two were engaged in. There are only three issues which are; who between the parties breached the contract; what damages did the innocent party suffer and who should pay the costs of the suit and the counter claim.

19. I have already held that I will not go into the prayers for injunction and striking out of the statutory demand dated 16th November 2020. I have also noted that in the entire amended plaint which contains 29 paragraphs, the 2nd and 3rd plaintiffs are mentioned in paragraph *2* only which simply describes them and gives their address of service. None of the other 28 paragraphs makes any claim of right or breach of rights or duty against the two plaintiffs by the defendant. None of prayers in the plaint is seeking orders against the defendant in favour of the 2nd and 3rd plaintiffs. The plaint does not describe or disclose in what capacity the two plaintiffs were filing the suit against the defendant. In the circumstances, I do not see any cause of action the two plaintiffs have against the defendant and their suit is hereby dismissed with costs to the defendant.

20. On the first issue, the plaintiff submits that the defendant breached the agreement in two ways. The first one is by reducing supply of raw materials thereby affecting the production. The plaintiff claimed that the supply was reduced drastically from 2014 to 2019 thereby affecting its output. This matter concerns three agreements. None of the three agreements had provision for the minimum quantity the

defendant was supposed to supply or the plaintiff to produce. The agreements dated 27th March 2005 and 1-04-2014 provided that the quantity shall be mutually agreed. I have not seen any correspondence or complaint from either of the parties in respect of failure by the other to meet the threshold of production. I have considered the evidence of the parties and the documents produced and I am not convinced that the reduction in production if any, was caused by the defendant's failure to supply raw materials.

21. The other area the plaintiff claims the defendant breached the contract was in lowering the prices. The agreement dated 27-03-2005 did not provide for a minimum price per skin although it authorised the defendant to refix contractual amount downwards in case the quality standards were not met while the one dated 1-04-2014 provided that the price per skin would be Kshs 27.50. The evidence produced before court shows and it was confirmed by the plaintiff's witnesses that the invoices which were plaintiff's exhibit 4 appearing on pages 6 to 234 of the plaintiff's trial bundle were all for between 28/= and 30/= per tanned skin. None of the invoices is pending for settlement meaning that the defendant was paying as per or above the agreed minimum price. There is also the agreement dated 24th March 2019, in which the parties mutually agreed to reduce the cost of unit to 25.50 shillings. There is no evidence that the defendant ever went below this fixed amount or that the plaintiff raised an invoice which was rejected on the strength of dispute on the prices.

22. Based on the above, this court holds that there is no evidence to prove that the defendant was in breach of any of the three agreements to the extent of the prices or supply of the raw materials. Actually, no breach of the agreements in any respect has been demonstrated against the defendant

23. Even if I were to find that the defendant breached the agreement, the plaintiff was bound to produce evidence in proof of losses it has pleaded which are to me special damages and attribute the same to the breach of the contract. In proof of the damages, the plaintiff called Sydney Ondari who described himself as a governance, risk management and compliance consultant. He produced a reported dated 12-02-2022. In the report, it is shown that the plaintiff allegedly incurred a loss of profit to the tune of Kshs 128,515,499.22. The witness was clear that he relied on production records for the period between 2012 and 2021.

24. Mr. Ondari admitted that he relied on the plaintiff's unaudited books of accounts. He was also categorical that a loss or profitability of an entity can only be proved through its balance sheets and audited financial statements. The report only gives breakdown of what was projected as profit had the production remained constant from 2012 without the corresponding expences and supporting documents. A look at the report gives impression that the witness prepared it based on the information he was fed with by the plaintiff. In my mind, this report which came after the suit was filed was prepared with a pre-determined outcome since the plaintiff already knew what it wanted to use the report for. While there is nothing wrong with that, such an important expert report prepared in such circumstances must be accompanied by corroborative evidence in order to disabuse a possibility of an afterthought.

25. Profits, loss and income of an enterprise do not start and end with the production costs or the selling price. There must be shown other determining factors like other related costs, taxes, salaries, wages, licences and other inputs related to production of the income. The report at page 11 and 22 to 66 gives figures and breakdowns without justifying where they were picked from. These are the figures for the special damages pleaded by the plaintiff. What DW2 gave us was global estimates and projections without appropriate supporting documents and in my view, this was not sufficient to prove the loss of profits.

26. The plaintiff claims Kshs 7,566,768.00 being the costs of hiring a leather technician. Again, this figure has been flashed to the court through the report by DW2 without any supporting document. The plaintiff claim that the technician was to be paid by the defendant while the defendant maintains that its duty was only to assign a technician who was supposed to be paid by the plaintiff. It is the plaintiff who wanted the court to believe that it spent the above amount of money on the technician and as such the burden was on it to prove that it incurred the expences. I believe it would have been a simple task for the plaintiff to prove these payments in form of payslips, cheques, transfers or vouchers. It is also notable that the technician is not even named.

28. There is also a claim for Kshs 3,528,937.75. Other than giving general statement that there were unexplained deductions, the plaintiff has not pointed to this court a specific deduction under this head. I have not seen any correspondence calling or complaining about the same. The same goes for claim for Kshs 2,382,480.00 for alleged lime loss and partially processed materials rejected by the defendant.

29. In view of what I have stated above, I find that the plaintiff has failed to prove that the defendant breached the contract and the claimed damages have not been proved on a balance of probabilities. Consequently the 1st plaintiff's case against the defendant is hereby dismissed with costs.

30. I now turn to the defendant's counterclaim for a sum of Kshs 30,079,995.74. Of this amount, the defendant states that Kshs 26,450,615.31 was advanced to the 1st plaintiff while Kshs 3,510,000.00 was advance to the 2nd plaintiff. The defendants have leveraged their claims for the amount against the 2nd and 3rd plaintiffs on strength of the personal guarantees the said plaintiffs executed in respect of loans advanced to the 1st plaintiff.

31. The plaintiffs have argued that the personal guarantees dated 18-08-2011 and agreements dated the same date were not stamped and therefore inadmissible in evidence by virtue of Section 19 of the *Stamp Duty Act*. I note that these agreements were produced and admitted in evidence without any objection from the plaintiffs. Actually, the same were produced by the plaintiffs. For the plaintiffs to turn around during submissions and seek to exclude the documents from the evidence is an afterthought and unmeritorious.

32. The agreements produced as the plaintiff's exhibit 5 appearing on pages 236 to 248 of the plaintiffs' bundle appear to me to have an endorsement of stamp duty and revenue stamp while that produced as exhibits 7 appearing on pages 253 to 257 is not executed by the parties. In any event even if the guarantees were to be excluded from evidence, the plaintiffs have admitted through their own pleadings especially paragraphs 19 of the amended plaint that the loans were advanced and they 2nd and 3rd plaintiffs executed personal guarantees. With such pleading the 2nd and 3rd plaintiffs' only way to avoid liability in respect of the loans is to show that they were repaid or that the personal guarantees were withdrawn or discharged.

33. The 1st plaintiff's witnesses admitted during cross examination that the 1st plaintiff and the defendant entered into an agreement on 24-05-2019 which showed that the plaintiff owed the defendant USD 248,908.00 as at that date. I have seen the agreement which appears on page 54 of the defendant's bundle and which was produced as defendant's exhibit 26. The agreement was between the 1st plaintiff and the defendant and in the circumstances, the 2nd and 3rd plaintiffs cannot be held personally responsible for liability arising therefrom except to the extent of the guarantee they gave on 18-08-2011. The emails exchanged between the parties do not make it conclusive or clear that any of the loans was advanced to the 2nd and 3rd plaintiff in their person capacities.

34. In view of the above, the Kshs 3,510,000.00 said to have been advanced to the 2nd plaintiff in tranches of Kshs 2,510,000.00 and Kshs 1,000,000.00 have not been proved. The Kshs 2,510,000.00 is said to have been done through RTGS transfer and I would have expected documents to that effect to be produced but none has been shown to the court. The 2nd plaintiff denied in his defence to counterclaim that the monies were advanced to him and without proof or admission of the same, this court has no basis to find in favour of the defendant.

35. This leaves us with what was admitted in the agreement dated 24th May 2019 between the 1st plaintiff and the defendant as outstanding loan. In my view, once this agreement was entered into, the same superseded the previous negotiations and reconciliations. The personal guarantees signed by the 2nd and 3rd plaintiffs on 18-08-2011 were limited to USD 125,000.00. There is no evidence that the guarantee was withdrawn, spent or satisfied as the agreement dated 24th May 2019 was a continuation of the same loans and it acknowledged that the guaranteed loans were still outstanding. This court must therefore take it that the guarantees were still in force and in operation past the agreement. Parties are bound by their pleadings and the 2nd and 3rd plaintiffs could not deny what he had positively stated in their plaint through the reply to defence and defence to the counterclaim. Since the 2nd and 3rd plaintiff pleaded having guaranteed the loans to the 1st plaintiff to the tune of USD 125,000.00, they cannot run away from it.

36. I discerned from statements of accounts produced as exhibit 27 and appearing on pages 55, 56 ad 57 of the defendant's trial bundle were split to five accounts. These statements show that the 1st plaintiff owed Kshs 2,002,803.30 as tanning contract dues; Kshs 11,085,938.61 as loan for working capital; Kshs 1,303,787.13 as local sales debt; Kshs 2,510,000.00 as transfer to the 2nd plaintiff and USD 113,808.10 (Kshs 12,177,466.70) as what is referred to as USD loan. There is no statement for Kshs 1,000,000.00 said to have been given to the 2nd plaintiff in cash. I note that in its witness statement, the defendant's witness gave equivalent of USD 113,808.10 in Kenya shillings as 12,177,466.70 meaning that he used conversion rate of Kshs 170/= to one USD which I will use in determining the extent of the 2nd and 3rd plaintiffs' personal guarantees since the claim has been pleaded in Kenyan currency. This means that since I have held that each of the two plaintiffs is liable to the extent of USD 125,000.00 each of them is liable to the extent of Kshs 13,375,000.00.

37. I have already held that the defendant has failed to prove advance of Kshs 3,510,000.00 to the 2nd plaintiff. In that regard, the counterclaim only succeeds as against the 1st plaintiff for a sum of Kshs 26,569,995.70 out of which the 2nd and 3rd plaintiffs shall each be jointly and severally liable with 1st plaintiff for Kshs 13,375,000.00.

38. In conclusion I enter judgment in the following terms;

    1. The 1st, 2nd and 3rd plaintiffs' suit against the defendant is dismissed in its entirety with costs to the defendant.

    2. Judgement is hereby entered for the defendant against the 1st plaintiff only for a sum of Kshs 26,569,995.70.

    3. In addition to 2 above judgement is entered for the defendant against all the plaintiffs jointly and severally for Kshs 13,194,995.70.

    4. For avoidance of doubt, the defendant shall not be entitled to recover from the plaintiffs a principal sum of more than 26,569,995.70 collectively.

5. The above amounts shall attract interest at court rates from the date of filing the counterclaim until payment in full.

6. The plaintiffs shall pay the costs of the counterclaim in ratio of their liability in 2 and 3 above.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Kioko holding brief for Mr. Waigwa for the plaintiffs and Mr. Bundotich for the defendant