Dune Packaging Limited v PVR Rao & another (Commercial Case E958 of 2021) [2025] KEHC 12513 (KLR) (Commercial and Tax) (1 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12513 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E958 OF 2021

JWW MONG'ARE, J

SEPTEMBER 1, 2025

BETWEEN

DUNE PACKAGING LIMITED ..... PLAINTIFF

AND

PVR RAO ..... 1ST DEFENDANT

GENERAL PRINTERS LIMITED ..... 2ND DEFENDANT

JUDGMENT

Introduction and Background

1. This suit was initiated by the Plaintiff ("Dune Packaging") through a plaint dated 8th December 2021 that was later amended on 4th July 2022. It is the Plaintiff's case is that the directors of the 2nd Defendant ("General Printers") approached the Plaintiff on 22nd January 2021, to purchase the company, which was indebted to I&M Bank and NCBA Bank. An offer of Kshs.500 million for the business and assets and Kshs.500 million for the buildings was made, subject to due diligence and that the offer for properties owned by Goodison Two Hundred Twelve Limited was Kshs.500 million (Kshs. 481 million plus VAT credit of Kshs.19 million), later revised to Kshs.472 million as the VAT credit was Kshs.27 million. Dune Packaging contends that this offer was discussed on 16th March 2021 and that General Printers was placed under administration on 23rd March 2021, and the 1st Defendant was appointed administrator ("the Administrator").

2. Dune Packaging states that the earlier offer was presented to the Administrator on 26th March 2021 and it claims that the Administrator indicated he had authority to sell General Printers, its assets, and properties. Dune Packaging claims that it engaged consultants, lawyers, auditors, and engineers for due diligence, and an offer was made to the Administrator on 26th April 2021 where the Administrator accepted the offer of Kshs.345 million plus VAT for the business, assets, stocks, and debtors on 7th May

2021, emphasizing that time was of the essence. That on 12th May 2021, Dune Packaging's lawyers sent the first draft agreement to the advocates representing the Banks and the Administrator and the said advocates responded with comments on 8th June 2021, three weeks after the agreement was sent, despite the urgency.

3. Dune Packaging states that a joint meeting scheduled for 18th June 2021, to review agreements did not happen and that on 28th June 2021, it requested an update from the Bank's and the Administrator's advocates, as they were supposed to circulate meeting minutes and a revised draft. Dune Packaging states that it learned the Administrator had instructed them not to do so and that on 6th July 2021, the Administrator's lawyers sent a new proposal for Kshs.345 million for plant and machinery, with stocks and debtors to be valued separately. That by 9th July 2021, the Administrator, through their lawyers, demanded an additional Kshs.55 million for plant and machinery and Kshs.5 million for debtors, contrary to prior agreements.

4. Dune Packaging claims that between 11th July and 20th July 2021, the Defendants continuously changed terms and proposed unreasonable timelines and that due to the constant changes and perceived deception, Dune Packaging found it impossible to continue with the transaction. It claims that it suffered losses, damages, and loss of projected profits and as such requests the court to enter judgment against the Defendants, jointly and severally, for inter alia special damages of Kshs.218,039,350.00/=.

5. The Defendants opposed the suit through their defence dated 22nd November 2022. The Administrator states that Dune Packaging withdrew their offer to purchase the plant and machinery of General Printers via an email dated 25th July 2021 and he contends that Dune Packaging's suit lacks a reasonable cause against them because General Printers was under administration from 23rd March 2021 and prior negotiations never resulted in a binding contract. That there was no formal written contract between Dune Packaging and General Printers that created binding rights or obligations and although he accepted its offer on 26th April 2021, via a letter dated 7th May 2021, there was no "meeting of minds" to form a contract. He avers that this acceptance was conditional, and Dune Packaging never fulfilled these conditions.

6. The Administrator argues that Dune Packaging's suit is a nullity from ab initio because it was filed on 14th December 2021, while General Printers was already under administration. That at the time of filing, General Printers lacked the capacity to be sued under section 560(1)(d) of the *Insolvency Act* and Dune Packaging did not obtain leave from the insolvency court or consent from the Administrator to file the suit. The Administrator emphasizes that a null act is "incurably bad" and cannot be cured by subsequent actions, including the amendment of the Plaint after the termination of administration and this means both the initial filing of the suit and its amendment are nullities.

7. In any case, the Administrator restates that the Letter of Acceptance dated 7th May 2021 was not unconditional and was subject to several conditions, including: Assets were to be sold "as-is-where-is", Stock was to be bought at cost price, Sale was subject to a formal purchase/sale agreement, Dune Packaging was to draft the agreement by 15th May 2021, and execute it by the end of May 2021, Sale was subject to approval from the Competition Authority of Kenya (CAK), Costs of repair/rehabilitation would only be reimbursed if the transaction was not approved by CAK and after the agreement was executed, Dune Packaging was to obtain "All Risks" insurance after signing the agreement, each party was to bear its own legal costs and time was of the essence.

8. The Defendants aver that Dune Packaging signed and returned the acceptance letter on 8th May 2021, signifying their acceptance of these conditions and the Administrator clarifies that the Kshs.345 million offer was for machinery only, and other movable assets, including stock, were to be paid for

separately at a mutually agreed price at the time of takeover. The Administrator argues that Dune Packaging's claim for consultation fees, server restarting costs, and petroleum diesel is not provided for in the acceptance letter and that these costs were only reimbursable under Clause 6 of the acceptance letter if the transaction was not approved by the CAK and after the agreement's execution. That Legal fees were not payable by the Defendants as Clause 9 stipulated that each party would bear its own costs and that the claim for Kshs.196 million in speculative lost profits is untenable as there was no formal written contract to warrant such compensation.

9. The matter was set down for hearing where Dune Packaging's Managing Director and Chief Executive Officer, Rohin Chandaria testified on its behalf (PW 1). He relied on his witness statement dated 8th December 2021, List and Bundle of Documents of the same date (PExhibit 1-10) and Further List and Bundle of Documents dated 8th May 2024(PExhibit 11-40). The documents in PExhibit 1-10 include a Letter dated 21st January 2021 from Dune Packaging to the Board of Directors General Printers, a Letter dated 26th January 2021 to I & M Bank from General Printers on Acceptance of Dune Packaging offer in favour of General Printers, a Letter dated 1st February 2021 from Dune Packaging to the Board of Directors General Printers, a Letter dated 12th February 2021 to the Directors Dune Packaging from General Printer, a Letter dated 17th February 2021 from Dune Packaging to Board of Directors General Printers, a Letter dated 16th March 2021 from Dune Packaging to Board of Directors General Printers, a Letter dated 26th April 2021 from Dune Packaging to the Administrator, a Letter from General Printers to Dune Packaging dated 7th May 2021, Emails exchanged between Mr. Nirav A. Nathani & the Administrator and Information Memorandum from General Printers dated 1st July 2021.

10. The documents in PExhibit 11-40 include: ABC Bank - customer transaction slip for account number 012xxxxxxx for Kshs.270,459.43/= dated 24th June 2021, Proforma invoice for Kshs.270,459.43/= dated 25th March 2021, Invoice from Unifilters Kenya Limited for Kshs.143,666.00/= dated 15th June 2021, Invoice from Unifilters Kenya Limited for Kshs.151,960.00/= dated 15th June 2021, Invoice from Vista Management Consultants for Kshs. 2,012,600/= dated 28th February 2021, Invoice from Vista Management Consultants for Kshs.1,319,500/= dated 31st January 2021, Invoice from Vista Management Consultants for Kshs.2,369,880/= dated 31st March 2021, Invoice from Vista Management Consultants for Kshs.1,380,980/= dated 30th April 2021, Invoice from Vista Management Consultants for Kshs.903,640/= dated 31st May 2021, Invoice from Vista Management Consultants for Kshs.2,004,480/= dated 30th June 2021, Invoice from Vista Management Consultants for Kshs.1,244,680/= dated 31st July 2021, Invoice from Broadway Petroleum for Kshs.462,500/=, Invoice from Broadway Petroleum for Kshs.474,500/= invoice no. 27113, Invoice from Broadway Petroleum for Kshs.474,500/= invoice no. 27095 dated 3rd March 2021, Invoice from Broadway Petroleum for Kshs.200,800/= dated 13th March 2021, Invoice from Broadway Petroleum for Kshs.506,000/= invoice no. 28065, Invoice from Bowmans (Coulson Harney LLP) for Kshs.2,228,058.40/= dated 30th April, 2021, Invoice from NBMA Advocates LLP for Kshs.1,744,912.00/= dated 7th July 2021, Invoice from NBMA Advocates LLP for Kshs. 2,322,320.00/= dated 30th July 2021, Invoice from NBMA Advocates LLP for Kshs.1,740,000.00/= dated 16th August 2021, Dune flexibles summary of IS, BS and CF for the years 2021, 2022 and 2023, Dune flexibles projected Income Statements for the year 2021 (June - December), Dune flexibles projected Income Statements for the year 2022, Dune flexibles projected Income Statements for the year 2023, Dune flexibles projected Balance Sheet for the year 2021 (June - December), Dune flexibles projected Balance Sheet for the year 2022, Dune flexibles projected Balance Sheet for the year 2023, Dune flexibles projected cash flow for the year 2021 (June – December), Dune flexibles projected cash flow for the year 2022 and Dune flexibles projected cash flow for the year 2023

11. The Administrator testified on behalf of the Defendants (DW 1) where he relied on his witness statement dated 24th July 2024, List and Bundle of Documents dated 23rd July 2024 (DExhibit 1-11) and a Further List and Bundle of Documents dated 3rd October 2023(DExhibit 12-22). The documents include a copy of the Notice of Termination of Administration dated 22nd March 2022, a copy of the Email dated 25th July 2021, copy of the letter of offer dated 26th April 2021, a copy of the Notice of Appointment of Administrator dated 23rd March 2021, a copy of the Affidavit of Statement of Facts dated 23rd March 2021, a copy of the letter Statutory Declaration dated 22nd March 2021, a copy of the Administrator's Consent dated 23rd March 2021, a copy of the Deed of Indemnity 23rd March 2021, a copy of the letter of acceptance dated 7th May 2021, a copy of the email dated 8th May 2021 from the Administrator to Dune Packaging, a copy of the Schedule of Final Offer and Administrators costs, a copy of the email dated 14th July 2021 from Dune Packaging to the Administrator and a copy of the email dated 19th July 2022 from the Administrator to Dune Packaging.

12. After the hearing, the Court directed both parties to supplement their arguments by filing written submissions which are now on record and which together with the pleadings and evidence, I will make relevant references to in my analysis and determination below.

Analysis and Determination

13. As these are civil proceedings, it should not be lost that the court's determination is on a balance of probabilities and is guided by the principle that he who alleges must prove. Denning J., in Miller v Minister of Pensions [1947]2 All ER 372 discussed the burden of proof and he stated as follows:

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

14. The aforementioned position has now been espoused by our superior courts and finds statutory comfort in sections 107 and 108 of the *Evidence Act*(Chapter 80 of the Laws of Kenya) which provide as follows:

> 107. Burden of proof.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. Incidence of burden.
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> (Also see Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] KECA 612 (KLR)

15. From the parties' submissions, the court is being asked to determine the following issues:

a. Whether the Plaintiff's suit violated Section 560 of the *Insolvency Act*.

b. Whether the Plaintiff has the legal standing (locus standi) to institute the suit.

c. Whether there was a valid contract between Dune Packaging and General Printers

d. Whether the Administrator can be held personally liable for actions or omissions performed as an administrator.

e. Whether there was misrepresentation, deception and misinformation.

f. Whether the Defendants' requirement for Dune Packaging to have prior approval from the CAK without an agreement was unreasonable and unlawful.

g. Whether the Plaintiff is entitled to special damages.

Whether the Plaintiff's suit was filed in violation of section 560 of the *Insolvency Act*.

16. The Administrator argues that Dune Packaging's suit is nullity ab initio because it was filed on 14th December 2021, after General had already been placed under administration on 23rd March 2021 and that according to section 560(1)(d) of the *Insolvency Act* legal proceedings against a company under administration can only be initiated or continued with the administrator's consent or the court's approval. That Dune Packaging did not obtain leave from the insolvency court or consent from the Administrator to file this suit and he emphasizes that section 561 of the *Insolvency Act* imposes a moratorium on all legal processes during administration. The Administrator relies on a number of authorities to assert that a suit filed without such leave is incompetent ab initio and incurably defective and they contend that the nullity cannot be cured by an amendment to the Plaint even after the termination of administration, as a void act remains void.

17. Without belaboring so much, I note that the Administrator raised this issue in his application dated 22nd November 2022 that sought to strike out the suit and a ruling on the same was issued by the court on 10th July 2023. As the court has already pronounced itself on the issue, it follows that the same cannot be revisited by the Administrator as he has done herein. He ought to have appealed against the said ruling if at all he was aggrieved and/or dissatisfied. In any case, since he participated in the hearing of the merits of the suit, I find that no prejudice has been occasioned upon him or General Printers. This finding is also tied to the second issue of whether Dune Packaging had the requisite locus to institute this suit and I hold that the same is moot in light of the court's ruling of 10th July 2023 and the Administrator's participation in these proceedings.

Whether there was a valid contract between Dune Packaging and General Printers

18. The Administrator asserts that there was no binding contract and that although he accepted the Plaintiff's offer dated 26th April 2021, through a letter of acceptance dated 7th May 2021, this acceptance was conditional and not unequivocal or absolute. That the acceptance was predicated on several conditions that were never fulfilled by the Plaintiff. The Administrator contends that there was no "meeting of minds" as the terms were imprecise and uncertain, particularly regarding the price as Kshs.345 million was for machinery only, not inclusive of stock as alleged by the Plaintiff and the requirement for a separate agreement for purchase/sale of assets. Further, that the Plaintiff also withdrew its offer via an email dated 25th July 2021.

19. On its part, Dune Packaging does not dispute that even though it prepared and presented an offer to the Administrator through its letter of 26th April 2021 for the purchase of assets belonging to General

Printers, the same was never consummated due to what Dune Packaging refers to as the "shifting of goal posts" by the Administrator. Going through the letter of acceptance dated 7th May 2021 by the Administrator, I am inclined to agree that the acceptance was conditional upon Dune Packaging fulfilling a number of conditions set out on the face of the letter. The conditional acceptance of Dune Packaging's offer by the Administrator is evident at the last paragraph of the letter where he informs Dune Packaging to ".....return to us a copy of this letter in significance of your acceptance" meaning that Dune Packaging had to accept the terms and conditions outlined therein for the Administrator to accept its offer. Dune Packaging also expressly withdrew the offer through its email of 25th July 2021 signaling the collapse of the negotiations. For there to be a valid and enforceable contract, there has to be an offer, acceptance, intention for a contractual relationship and consideration. In this case, there were only offers and counter-offers with no agreement on terms and consideration meaning there was no valid and enforceable contract between the parties.

Whether the Administrator can be held personally liable for actions or omissions performed as an administrator

20. The Administrator has submitted that as an administrator, he acted as an agent of General Printers and that under section 614 of the *Insolvency Act*, an administrator is discharged from liability for acts or omissions performed in that capacity once the administration ends. This is indeed correct as subsections (1) and (4) provide that "If the appointment of a person as the administrator of a company ends (for whatever reason), the administrator is discharged from liability in respect of all acts done or omitted to be done as administrator" and that "A discharge—(a) applies to liability accrued before the discharge takes effect; Thus, it can stated that an administrator is generally not personally liable for the discharge of their functions. However, my reading of the *Insolvency Act* informs me that this immunity is not absolute and that it is expected that an administrator acts in good faith, without fraudulent intent or gross negligence, that their actions must fall within the statutory powers and duties outlined in the Act and that they must comply with the procedural requirements of the Act, otherwise, the court can intervene as provided by inter alia sections 591 and 592 of the Act.

21. Dune Packaging accused the Administrator of misrepresentation, deception and misinformation. Specifically, it highlights the letter of offer dated 7th May 2021, where the Administrator stated that if the transaction was withdrawn after Dune Packaging spent funds on repair/rehabilitation, the costs would be reimbursed upon verification. Relying on this, Dune Packaging states that it used its funds to rehabilitate the plant, however, after rehabilitation, the Administrator refused or neglected to reimburse these costs. Furthermore, Dune Packaging claims that the Defendants repeatedly misrepresented their ability to sell the company, plant, and machinery, continuously shifting offers and introducing skewed terms to make compliance impossible, despite initially accepting the offer. That due to this alleged misrepresentation and deception, Dune Packaging suffered significant loss and damages, as evidenced in its amended Plaint and it therefore requests the court to find the Defendants liable for misrepresentation and deception, which resulted in substantial loss and damage.

22. I have gone through the impugned letter of 7th May 2021 and to be able to appreciate the counter-offer presented by the Defendants, I will reproduce the same below:

> GPL Flexibles
>
> Africa's packaging professionals
>
> Dune Packaging Limited
>
> PO Box 45310 GPL 00100

Nairobi Kenya

May 07, 2021

For the attention of Mr. Rohin J Chandaria

Dear Sirs

Proposed purchase of the assets of general printers limited (Under Administration)

We refer to your letter dated 26th April 2021 for purchase of the assets belonging to General Printers Limited (under Administration) [GPL] and the subsequent discussions we had in our offices today.

We hereby confirm our acceptance of your offer as outlined below: -

1. The price of Ksh. 345 million (plus VAT).
2. The assets are sold by the Administrator of GPL on "as-is-where-is" basis.
3. In addition, the stock will be bought by you at the cost price as available at the factory.
4. The sale is subject to an agreement for purchase/sale of assets of General Printers Limited (under Administration) as indicated by you. We shall share a draft "Agreement for Purchase/Sale of Assets (Agreement)" by 15th May 2021 and after our scrutiny and amendments, we shall execute the Agreement latest by end-May 2021.
5. The sale is subject to the approval of the "Competition Authority of Kenya".
6. On execution of the Agreement, we shall allow you, the access to the assets for carrying out the repair/rehabilitation works with a express understanding that you will not be able to claim the costs, if the transaction is not approved by the "Competition Authority of Kenya", while we put all our sincere efforts to avoid such incidence. After you spend your funds to repair/rehabilitation and if the transaction is withdrawn the Administrator, the cost shall be reimbursed to you on verifying by documentary proof.
7. You will be required to take appropriate insurance cover covering "ALL RISKS" soon after your signing the Agreement, with an endorsement of GPL's interest to enable you commence your repair/rehabilitation work.
8. The Administrator may allow you to deploy your security in addition to his own deployment, to avoid any future disputes.
9. Each party shall bear its own legal costs.
10. Time is of essence to conclude the transaction at the earliest.

We appreciate if you can sign and return to us a copy of this letter in significance of your acceptance.

Yours faithfully

Signed

A V R Rao

Administrator

General Printers Limited (under Administration)

23. Going through the above letter, I am inclined to agree with the Administrator's position that Dune Packaging's claimed expenses (consultation fees, costs of restarting servers, petroleum diesel, legal fees, generator repair) were not provided for as compensation in this letter, except for repair and rehabilitation costs contingent on the execution of an agreement and non-approval by the CAK which did not materialize. PW 1 admitted the sale was subject to a contract that was never executed and that Dune Packaging's claim for legal fees is explicitly contradicted by Clause 9 of the letter which states that each party shall bear its own legal costs. In any event, Dune Packaging failed to provide actual payment receipts, relying instead on proforma invoices for some claims, which are insufficient proof for special damages (see Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited [2015] KECA 822 (KLR)

24. Regarding the claim for loss of projected profits, I agree that the same is untenable as there was no formal binding contract to warrant such compensation and that Dune Packaging's projected income statements, balance sheets, and cash flow projections for 2022 and 2023 are speculative and insufficient evidence without actual financial statements for the period preceding and following the alleged breach for comparison.

25. It is therefore my finding that Dune Packaging did not meet the conditions of the Defendants' counter-offer and as such, they are not entitled to the sums claimed. I also find that there is no evidence of misrepresentation, deception, and misinformation in the letter by the Administrator. This letter was but a counter-offer and it is a standard part of the negotiation process where one party proposes different terms to reach a mutually acceptable agreement. A counter-offer typically reflects a party's attempt to adjust terms to better align with their interests and that this is a common and expected practice in contract law and negotiations and thus not inherently deceptive.

26. It is for the above reasons that I answer the remaining issues for determination in the negative. There was no misrepresentation, deception and misinformation by the Defendants in their letter of 7th May 2021, their requirement for Dune Packaging to have prior approval from the CAK was not unreasonable and unlawful as it constituted a legitimate negotiation term which Dune Packaging was at liberty to accept or reject or also make a counter-offer. Dune Packaging is also not entitled to the special damages claimed as the said payments sought were not anchored in any agreement and that in any case, it has failed to substantially prove the same through actual receipts.

Conclusion and Disposition

27. In the upshot, I find and hold that the Plaintiff has not proved its suit to the required standard on a balance of probabilities and / or preponderance of evidence and I dismiss the Plaintiff's suit with costs to the Defendants.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2025

.....

J.W.W. MONGARE

JUDGE

In the presence of

1. Mr. Chacha holding brief for Mr. Mogeni for the Plaintiff.

2. Mr. Otieno for the 1st Defendant.

3. Amos- Court Assistant