



**Mworia (Suing on His Own Behalf and as the Legal Representative of the Estate of Gideon Mugambi Mworia-Deceased) v Mpuri Maize Millers Ltd & 3 others (Civil Suit 143 of 2015) [2024] KEHC 3658 (KLR) (Civ) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3658 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL SUIT 143 OF 2015**

**CW MEOLI, J**

**APRIL 11, 2024**

**BETWEEN**

**KIJANA MURIUKI MWORIA (SUING ON HIS OWN BEHALF AND AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GIDEON MUGAMBI MWORIA-DECEASED) ..... PLAINTIFF**

**AND**

**MPURI MAIZE MILLERS LTD ..... 1<sup>ST</sup> DEFENDANT**

**MARGARET KANYUA GITUMA ..... 2<sup>ND</sup> DEFENDANT**

**SILAS GITUMA ..... 3<sup>RD</sup> DEFENDANT**

**JOHN W. MUREITHI GITUMA ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 31.07.2014, amended on 30.04.2018 and further amended on 14.12.2023 (the Further Amended Plaint), Kijana Muriuki Mworia (hereafter the Plaintiff) both on his own behalf and in his capacity as the legal representative of the estate of Gideon Mugambi Mworia (hereafter the deceased plaintiff), sought the following reliefs against Mpuri Maize Millers Ltd, Margaret Kanyua Gituma, Silas Gituma and John W. Mureithi Gituma (hereafter the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants):- the sums of Kshs. 2,503,000/- and Kshs. 2,624,310/- respectively; loss of bargain amounting to Kshs. 60,000,000/-; damages; and costs of the suit. The suit was founded on alleged breach of contract. The deceased plaintiff was initially a co-Plaintiff in the suit before his death.
2. It was pleaded that sometime in February, 2010 both the Plaintiff and the deceased plaintiff entered into an agreement with the 1<sup>st</sup> Defendant, by which the former parties had agreed to buy the property



known as “Un-surveyed Industrial Plot “B” situated at Thika Municipality (the subject property) from the Defendants herein, at a consideration of Kshs. 13,000,000/-. It was further pleaded that pursuant to the sale agreement, the Plaintiff and the deceased plaintiff paid a sum of Kshs. 2,503,000/- to the Defendants.

3. The Plaintiff pleaded that upon the subsequent inability on the part of the 1<sup>st</sup> Defendant to complete the sale transaction arising from challenges in obtaining a title deed in respect of the subject property, it was agreed between the parties herein that the Plaintiff and the deceased plaintiff would instead purchase shares in the 1<sup>st</sup> Defendant belonging to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, to enable them process the title deed to subject property accordingly. The Plaintiff further pleaded that he and the deceased plaintiff consequently paid a total sum of Kshs. 2,624,310/- towards effecting the necessary changes in the directorship of the 1<sup>st</sup> Defendant, and that thereafter, the Defendants executed the requisite documents pertaining to transfer of their directorship in the 1<sup>st</sup> Defendant.
4. That nevertheless, the Defendants were unable to effect the intended changes in favour of the Plaintiff and the deceased plaintiff, because the subject file went missing from the Companies Registry. That notwithstanding, the Defendants proceeded to process the title deed in respect of the subject property which became known as LR No. 4953/4064 and purportedly sold it to Kenblest Limited who then later sold the said property to Vitafoam Products Limited (the third parties). That in the circumstances, the Plaintiff is entitled to a refund of the earlier paid sums of Kshs. 2,503,000/- and Kshs. 2,624,310/-, in addition to damages for loss of bargain on the subject property, in the sum of Kshs. 60,000,000/-.
5. Upon service of summons, the Defendants entered appearance and initially filed a joint statement of defence dated 29.09.2014 denying liability. The defence statement was later amended on 28.08.2018 to apply solely to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, denying the key averments made in the Further Amended Plaintiff. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants denied the allegations that they ceased to be directors of the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants whilst admitting to the receipt of the sum of Kshs. 2,503,000/-, averred that the said sum was advanced solely to the 3<sup>rd</sup> Defendant.
6. That contrary to the averments made in the Further Amended Plaintiff, the 1<sup>st</sup> Defendant was in the process of transferring the subject property to the Plaintiff and the deceased, when the latter parties insisted on the transfer of shares in the 1<sup>st</sup> Defendant, to them, instead. That both the shares held by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, as well as the title to the subject property, were eventually transferred to the Plaintiff and the deceased plaintiff. That consequently, all relevant transfer/completion documents were handed over to the Plaintiff and the deceased plaintiff and hence the subject property was properly transferred to the purchasers. The aforesaid Defendants therefore disputed the reliefs sought in the Further Amended Plaintiff. Lastly, the Defendants averred that there was a misjoinder of parties since the subject property was at all material times owned by the 1<sup>st</sup> Defendant solely.
7. The record shows that the 3<sup>rd</sup> Defendant subsequently died on 16.10.2014. Be that as it may, by way of the ruling delivered in the matter on 18.09.2017 the court granted leave for the 2<sup>nd</sup> and 4<sup>th</sup> Defendants being the legal representatives of the estate of the 3<sup>rd</sup> Defendant as well as defendants in their own respective capacities, to be substituted in place of the 3<sup>rd</sup> Defendant. Thus, it can be said that the Amended Defence above was in fact filed on behalf of the 2<sup>nd</sup> and 4<sup>th</sup> Defendants both in their individual capacities and on behalf of the estate of the 3<sup>rd</sup> Defendant.
8. At the hearing, the deceased plaintiff who was PW1 adopted his signed witness statement dated 31.07.2014 as his evidence-in-chief and produced his bundle of documents filed on like date as P. Exh. 1-13; his further list and bundle of documents dated 23.09.2015 as P. Exh. 14 and his supplementary list and bundle of documents dated 10.08.2021 as P. Exh 15. It was his evidence that sometime in the



year 2006 he lent some funds to the 3<sup>rd</sup> Defendant to cater for his medical bills, under the agreement that the latter would surrender the subject property as repayment and that he and the Plaintiff would pay the purchase price on the subject property, less the sums owed to him. That he subsequently made various payments towards the subject property, then registered in the name of the 1<sup>st</sup> Defendant, itself under the directorship and shareholding of the remaining Defendants.

9. That said Defendants resigned as shareholders of the 1<sup>st</sup> Defendant and were to transfer their shares in the 1<sup>st</sup> Defendant to him and the Plaintiff (his son). That while in the process of effecting the changes to the 1<sup>st</sup> Defendant, the deceased plaintiff and the Plaintiff learned that the file in respect of the 1<sup>st</sup> Defendant company could not be traced in the Companies Registry and hence no transfer could be undertaken regarding the 1<sup>st</sup> Defendant or on the subject property. The deceased testified that even so, the Defendants subsequently obtained a title to the subject property and sold it to a third party, without his knowledge or consent. Consequently, the deceased plaintiff was entitled to a refund of the sums pleaded in the Further Amended Plaint. Regarding damages for loss of bargain, it was the evidence by the deceased plaintiff that a valuation undertaken on the subject property in the year 2013, returned a value in the sum of Kshs. 100,000,000/-, and hence he was entitled to damages for loss of bargain, as well as damages for breach of contract.
10. During cross-examination, the deceased plaintiff (PW1) testified that the purchase price of the subject property pursuant to the agreement entered into between the relevant parties herein was the sum of Kshs. 13,000,000/- out of which he paid a sum of Kshs. 2,503,000/-, and a further sum of Kshs. 2,624,310/-, the latter intended to cater for the processing of title to the subject property. PW1 further testified that he made further payments towards the agreement but which were not captured in the agreement. He stated that much as the requisite documents were given to him for purposes of registration, he could not effect the necessary changes because the 1<sup>st</sup> Defendant's company file was missing from the Companies Registry. Admitting however that he did not have any supporting documents to that assertion. He further stated that the subject property was sold to a third-party after the lapse of the contractual completion period. Further that the valuation on the said property was undertaken after the filing of the present suit. That the claim in respect of loss of bargain sought is premised on the said valuation report.
11. In re-examination, PW1 testified that pursuant to the sale agreement, he paid 10% of the consideration of Kshs. 13,000,000/- and Kshs. 700,000/- with the balance of Kshs. 11,000,000/- payable thereafter, as agreed between the parties. He further testified that upon lapse of the completion date, none of the Defendants requested him to pay the balance of Kshs. 11,000,000/-. That the Defendants later offered him a separate parcel of land measuring about 12 acres instead, but which he did not consider useful and therefore rejected the offer.
12. Anthony Nganda Nzuve who was PW2 produced the Valuation Report found on the Plaintiff's collective bundle of documents as P. Exh 14A accompanied by a cheque which he tendered as P. Exh.14B, being evidence of payment of his services as the valuer. Under cross-examination, the witness stated that he received instructions on preparation of the report on 23.09.2014 but that he had no knowledge that the matter was in court. He further stated that he compared the value of the subject property against the value of adjacent related properties though these were not set out in the report. That he purely relied on the deed supplied to him, in the absence of undertaking a search thereon. He stated that he valued the subject property at the sum of Kshs. 100,000,000/-. This marked the close of the Plaintiff's case.
13. For the defence case, the 4<sup>th</sup> Defendant (DW1) equally adopted his signed witness statement as his evidence-in-chief and produced the defence bundle of documents dated 10.09.2018 as D. Exh. 1-8. He



said he was the son of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the latter of who is now deceased. He further testified that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were both directors of the 1<sup>st</sup> Defendant, and that the 3<sup>rd</sup> Defendant received the sum of Kshs. 2,500,000/- from the Plaintiff as part payment for the subject property; that due to his deteriorating health, the 3<sup>rd</sup> Defendant could not follow up on the transfer to the deceased plaintiff, and therefore opted to transfer shares in the 1<sup>st</sup> Defendant which was the registered owner of the subject property to the Plaintiff and the deceased plaintiff instead; that consequently, the Defendants executed the requisite documents to effect the transfer, but later learned that directorship of the 1<sup>st</sup> Defendant was never transferred to the Plaintiff and deceased plaintiff. That due to the delay in the transfer process, the 3<sup>rd</sup> deceased Defendant offered the Plaintiff and deceased plaintiff substitute parcels of land which offer was declined. He denied that any further sums of money were paid by the Plaintiff towards the subject property.

14. During cross-examination, the 4<sup>th</sup> Defendant restated that the 3<sup>rd</sup> Defendant acknowledged receipt of the sum of Kshs. 2,500,000/- from the Plaintiff, and that the 3<sup>rd</sup> Defendant offered the Plaintiff the subject property in lieu thereof due to said Defendant's inability to repay the sum, later resorting to transfer of shares in the 1<sup>st</sup> Defendant. He said he could not tell whether the terms of payment of the outstanding purchase price balance of Kshs. 11,000,000/- stipulated in the sale agreement were agreed upon between the parties, adding that he did not know whether the Plaintiff and deceased plaintiff was able to obtain title to the subject property.
15. It was similarly his evidence that by virtue of his position as a shareholder in the 1<sup>st</sup> Defendant, he too executed share transfer documents to the Plaintiff at the request of the 3<sup>rd</sup> Defendant, asserting that all the requisite documents in that regard were signed. He said he could not tell who processed the title to the subject property thereafter. The above testimony was echoed in re-examination, save to add that all shares in the 1<sup>st</sup> Defendant were transferred to the deceased Plaintiff, considered to be a good friend of the deceased 3<sup>rd</sup> Defendant. This marked the close of the defence case.
16. Parties thereafter filed written submissions. On the part of the Plaintiff, his counsel submitted on various issues. He argued regarding the issue of joinder of parties, that by virtue of the fact that the 2<sup>nd</sup> and 4<sup>th</sup> Defendants were at all material times directors of the 1<sup>st</sup> Defendant, they were proper parties to the suit. Moreover, the said Defendants actively participated in the transactions which were the subject matter of the dispute. In so arguing, counsel cited the decision in *Jiang Nan Xiang v Cok Fas-St Company Limited* [2018] eKLR on the principles pertaining to the lifting of corporate veils, and the decision in *National Social Security Fund Board Of Trustee v Ankhan Holding Limited & 2 others* [2006] eKLR on joinder of parties as defendants.
17. Regarding quantum, the Plaintiff's counsel urged the court to award general damages for breach of contract citing *Union Technology Kenya Limited v County Government of Nakuru* [2019] eKLR on the applicable principles. The Plaintiff through his counsel also sought the sum of Kshs.2,624,310/- on the basis of the defendants' admissions, here citing Order 13, Rule 2 of the Civil Procedure Rules, 2010. Counsel further urged the court to award the sum of Kshs. 60,000,000/- for loss of bargain. Citing the decisions rendered in *Catherine Wamuyu Ng'ang'a & another v Kabete Dam Ltd & another-ELC Case No. 12 of 2019* and *Jan & Josh v Equity Bank Ltd-ELC Case No. 32 of 2011* wherein the respective courts awarded damages under a similar head.
18. For the 2<sup>nd</sup> and 4<sup>th</sup> Defendants counsel asserted that the contract in question was entered into between the Plaintiff, the deceased plaintiff and the 1<sup>st</sup> Defendant. Moreover that, the subject property was registered in the name of the 1<sup>st</sup> Defendant company at all material times. That consequently, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants could not be held liable for the acts of the 1<sup>st</sup> Defendant, and were therefore not properly enjoined in the suit.



19. He further contended the Defendants did not dispute receipt of the sum of Kshs. 2,503,000/- from the Plaintiff, and that an offer for refund of the said sum was made by them in good faith and a mitigation measure in lieu of any suit. Concerning the sum of Kshs. 2,624,310/- similarly sought in the suit, counsel contended that no such sum was received by or on behalf of any of the Defendants. That in any event, the subject contract was frustrated by the Plaintiff, through his failure to complete the transfer. The court was therefore urged to find that the claim for breach of contract has not been proved.
20. On quantum, it was counsel's contention that in the absence of supporting evidence, the damages sought in the Further Amended Plaintiff were not awardable here. The decision in *inter alia*, *Joseph Kangethe Irungu v Peter Ng'ang'a Muchoki* [2018] eKLR was cited in that regard.
21. Counsel further contended that the Plaintiff is not entitled to any sums for loss of bargain since no investigations were done on properties adjacent to the subject property, for purposes of comparison of values of properties in that area. It was further argued that the valuation report was an afterthought, having been procured during the pendency of the suit. Consequently, the court was urged to dismiss the suit with costs.
22. In rejoinder, the Plaintiff's counsel through further submissions argued that the Plaintiff is entitled to a refund of all sums pleaded and said to have been paid to the Defendants in respect of the subject property. Counsel further argued the Defendants would not have offered compensating to the Plaintiff and the deceased plaintiff by way of offers of alternative parcels of land if they had not been guilty of breach. Counsel therefore maintained that the claim for breach of contract had been established. Counsel further maintained that where a breach of contract had occurred, the aggrieved party is entitled to damages for loss of bargain, and that the damages sought under that head were reasonable and justified. In closing, counsel for the Plaintiff once again urged the court to find in favour of the Plaintiff, as prayed in the Further Amended Plaintiff.
23. The court, having considered the pleadings, evidence placed before it and the submissions, has established the following as the key issues for determination here:
  - a. Whether there was a misjoinder of parties in the suit;
  - b. Whether the Plaintiff has established the existence of a valid contract between the parties and if so, whether it has been demonstrated that there was a breach thereof, by the Defendants; and
  - c. Whether the Plaintiff is entitled to the reliefs sought in the pleadings
    - a. Whether there was a misjoinder of parties in the suit
24. Objections based on misjoinder were raised by the 2<sup>nd</sup> and 4<sup>th</sup> Defendants in their pleadings and submissions. The said Defendants asserting in that regard that by virtue of the fact that the sale agreement pertaining to the subject property was entered into between the Plaintiff, the deceased plaintiff and the 1<sup>st</sup> Defendant, the said 2<sup>nd</sup> and 4<sup>th</sup> Defendants are not proper parties to the suit, despite standing in the capacity of directors and shareholders of the 1<sup>st</sup> Defendant at all material times. In contrast, the Plaintiff maintained that the 2<sup>nd</sup> and 4<sup>th</sup> Defendants as well as the 3<sup>rd</sup> Defendant now deceased were proper parties in the suit since they participated in the transactions which form the subject matter of the dispute.



25. Order 1 of the Civil Procedure Rules provides for the joinder of parties as defendants. Order 1, Rules 3,5 and 6 of the Civil Procedure Rules (CPR) stipulate that:

“3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise...

5. It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him. 6. The plaintiff may at his option join as parties to the same suit all or any of the persons severally, or jointly and severally liable, on any one contract, including parties to bills of exchange and promissory notes. 7. Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.”

26. Regarding misjoinder and non-joinder of parties Order 1, Rule 9 of the said Rules, states that:

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

27. Returning to the facts of this case, the claim herein is founded on alleged breach of contract. There is no dispute that all the four (4) Defendants herein were in one manner or other active participants in the transactions giving rise to the suit. The sale agreement (P. Exhibit 1) in respect of the subject property was entered into between the 1<sup>st</sup> Defendant on the one part, and the Plaintiff and deceased plaintiff on the other part. In the material period, the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants were directors and shareholders of the 1<sup>st</sup> Defendant and were sued in such a capacity. There was no dispute that acting as such, they executed several documents in respect of the company, all intended to transfer certain interests to the Plaintiff and the deceased plaintiff.

28. Consequently, the court is not persuaded that the objection regarding misjoinder in respect of the 2<sup>nd</sup> and 4<sup>th</sup> Defendants is well taken. Although it is true that in law, the company is a distinct legal entity from its directors, this objection ought to have been raised at the earliest opportunity. For now, and at this stage, the roles and liability, if any, of all the defendants will be determined upon a full examination of the evidence.

b. Whether the Plaintiff has established the existence of a valid contract between the parties and if so, whether it has been demonstrated that there was a breach thereof, by the Defendants

29. In addressing this issue, the court must first determine whether the requisite elements of a contract have been demonstrated here, before dealing with in the question of breach. In *Charles Mwirigi Miriti versus Thananga Tea Growers Sacco Limited and Another* (2014) eKLR the Court of Appeal succinctly pronounced that the three essential elements giving rise to a valid contract are: offer, acceptance, and consideration. This position was restated in *William Muthee Muthami v Bank of Baroda* (2014) eKLR



where the same Court reasoned that for a contract to be valid under the law of contract, it must be proved that there was offer, acceptance and consideration, as follows:

“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.”

30. The Court of Appeal in *Ali Abid Mohammed versus Kenya Shell & Company Limited* (2017) eKLR reasoned that a contract can be inferred from the conduct of the parties and need not be set out in writing, (except of course where such requirement is prescribed by law):

“It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See *Timoney and King v King* 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per liter and for a certain period of time.”

31. Having established so, it is apparent from the pleadings and evidence tendered by the respective parties in the present suit, that at the onset, the deceased plaintiff and the deceased 3<sup>rd</sup> Defendant, then ailing, entered into an informal friendly arrangement by which the former advanced some money to the latter to assist him cater for his medical expenses. The funds advanced were to be refunded at a future unspecified date. The 2<sup>nd</sup> and 4<sup>th</sup> Defendants admitted that the deceased 3<sup>rd</sup> Defendant received an approximate sum of Kshs. 2,503,000/- pursuant to the said arrangement.
32. It is also apparent from the pleadings and material tendered that the deceased 3<sup>rd</sup> Defendant was unable to make refunds, which fact gave rise to the sale agreement entered into between the 1<sup>st</sup> Defendant on the one part and the Plaintiff and deceased plaintiff on the other part, for the purchase of the subject property. This is evidenced in the undated sale agreement bearing the year 2010, tendered as P. Exh. 1 which shows that the subject property was to be sold to the Plaintiff and the deceased plaintiff at a consideration of Kshs. 13,000,000/-. Clause 3.2 of the agreement provided that prior to the agreement, the 1<sup>st</sup> Defendant had received a sum of Kshs. 1,300,000/- and that upon execution thereof, the purchasers would be required to pay a further sum of Kshs. 700,000/-. Clause 5.2 further provided that the balance of Kshs. 11,000,000/- would be paid in a manner to be agreed upon between the parties.
33. Additionally, the Plaintiff tendered a copy of an acknowledgment deed dated 17.06.2010 as P. Exh.2 indicating the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' acknowledgement of receipt of the sum of Kshs. 2,503,000/- from the deceased plaintiff, as part payment of the purchase of the subject property. This deed contains a breakdown of the aforementioned sum. So far, the evidence tendered supports the averments made by the respective parties.
34. The Plaintiff tendered various documentation to show that subsequently, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants agreed to transfer their shares and directorship in the 1<sup>st</sup> Defendant, to the Plaintiff and deceased plaintiff in furtherance of the sale agreement. Among the documents tendered are a share transfer agreement (P. Exh. 3) indicating the Defendants' willingness to sell their respective shares to the Plaintiff and deceased at a consideration of Kshs. 13,000,000/-, on terms relatively similar to those set out in the sale agreement. The share transfer agreement also contained a clause (Clause 1.3) indicating that the subject property was the sole asset belonging to the 1<sup>st</sup> Defendant. Moreover, under Clause



- 1.9, provision was made that the transfer of the shares would constitute a transfer of the interest in the subject property.
35. In addition, the Plaintiff produced share transfer deeds dated 31.03.2010 from the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants (P. Exh. 4); a special resolution from the Board of Directors of the 1<sup>st</sup> Defendant and minutes dated 17.03.2010 (P. Exh. 5) indicating that with effect from the said date, the Plaintiff and the deceased had been appointed as directors and shareholders of the 1<sup>st</sup> Defendant; statutory declarations sworn by the 2<sup>nd</sup> and 4<sup>th</sup> Defendants (P. Exh. 6 and 7); and a notification of change of directors of the 1<sup>st</sup> Defendant, lodged with the Registrar of Companies (P. Exh. 8).
  36. From the court's consideration of the above exhibits which replicate the exhibits tendered by the 2<sup>nd</sup> and 4<sup>th</sup> Defendants, it is apparent that the same collectively support the pleadings and averments by the 2<sup>nd</sup> and 4<sup>th</sup> Defendants, that by a series of agreements containing the ingredients of offer, acceptance and consideration, and therefore constituting a valid contract, not disputed by the parties were entered into and subsisted between the parties at all material times.
  37. Having laid out the foundation of the contract between the relevant parties, the court will answer the question whether a breach thereof has been established by the Plaintiff. For starters, it is a matter of general legal principle that in claims founded on alleged breach of contract, the particulars thereof ought to be set out in the plaint. The Further Amended Plaint does not plead the particulars of the alleged breach. In the absence of such particulars, the court faced difficulty in ascertaining the exact acts of commission or omission alleged on the part of the Defendants that purportedly resulted in breach of the contract, as alleged by the plaintiffs.
  38. Nevertheless, upon reviewing the entire evidence tendered, the court found no credible proof of assertions by the deceased plaintiff that the breach of contract was occasioned by the Defendants. As seen from the foregoing review of the undisputed documentary evidence, the Defendants had pursuant to the various executed agreements taken steps to execute the requisite transfer documents (see P.Exh. 3-8) to enable the Plaintiff and the deceased plaintiff effect the necessary transfers in their favour, both in respect of shares in the 1<sup>st</sup> Defendant, and ultimately title to the subject property. These transfers extended to interest in the subject property, which was the property of the 1<sup>st</sup> Defendant.
  39. The sequence and contents of the agreements and transfers appear to support the testimony of DW1 that owing to challenges experienced by the deceased 3<sup>rd</sup> Defendant in repaying sums lent to him by the deceased plaintiff, he opted initially to settle the advanced sums by selling the subject property to the deceased plaintiff and the Plaintiff (being his son), and further that due to delays in effecting the said transaction, the deceased 3<sup>rd</sup> Defendant eventually agreed to transfer the directorship and shareholding in the 1<sup>st</sup> Defendant to the said parties. The latter was intended to transfer the interest in the subject property to the Plaintiff and deceased plaintiff. It is also noteworthy that all relevant agreements and requisite transfers were executed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, as well as the Plaintiff and the deceased plaintiff. All this despite the fact that the deceased Plaintiff by his own admission had only paid the sum of Kshs. 2,503,000/- towards the purchase price.
  40. In recounting the challenges faced in registering or transferring directorship of the 1<sup>st</sup> Defendant and/or ownership of the subject property in his name, the deceased plaintiff asserted that the file in respect of the 1<sup>st</sup> Defendant went missing from the Companies Registry. No evidence was tendered to prove that the Defendants had a hand in the disappearance or mischief pertaining to the said file. Nor did the deceased plaintiff demonstrate to this court that he was at the material time possessed of adequate funds to pay the balance of the purchase price, namely, Kshs. 11,000,000/-. Moreover, allegations that



the Defendants subsequently effected transfer to third parties were not supported by solid evidence such as official searches. Where is evidence of breach by the Defendants?

41. In the court's estimation of the evidence of the Plaintiff, no act of commission or omission has been established on the part of the Defendants amounting to breach of contract. On the contrary and based on the admissions by the deceased plaintiff in his testimony, it would seem that the completion of the contract failed on account of external factors beyond the control of the parties herein, more akin to frustration, if the deceased plaintiff is believed, than breach of the contract.
42. The doctrine of frustration is defined under the Black's Law Dictionary 10<sup>th</sup> Edition at page 785 as:  

“The doctrine that if a party's principal purpose is substantially frustrated, by unanticipated changed circumstances, that party's duties are discharged and the contract is considered terminated.”
43. The Court of Appeal in *Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another* (supra) stated that :

“This now leads us to the issue of whether the agreement was genuinely frustrated.

In Halsbury's Laws of England, Vol. 9(1), 4th Edition at paragraph 897:-

“As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea.”

In the case of:- *Davis Contractors LTD -vs- Farehum U.D.C.*, (1956) A.C 696, Lord Radcliffe at page. 729 held:

“...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. “Non haec in foedera veni”. It was not what I promised to do”.

See also the Court of Appeal decision in *Lucy Njeri Njoroge v Kaiyahe Njoroge*, CA No. 161 of 2002 [2015] eKLR.



44. Consequently, the court finds that the Plaintiffs' allegation of breach of contract has not been proved.

c. Whether the Plaintiff is entitled to the reliefs sought in the pleadings

45. Having found that breach of contract was not proved, the related reliefs ought to fail in toto. Nevertheless, the fact that the deceased 3<sup>rd</sup> Defendant had received a sum of Kshs. 2,503,000/- from the deceased plaintiff, was admitted in the evidence of the 4<sup>th</sup> Defendant and echoed in the defence submissions. It is undisputed that this sum has not been repaid to the plaintiffs, the sale agreement in respect of the subject property having failed. In the premises, the Plaintiff is entitled to a refund of the admitted sums.

46. In the circumstances, judgment will be entered for the Plaintiff against the 2<sup>nd</sup> and 4<sup>th</sup> Defendants in their capacity as the representatives of the estate of the deceased 3<sup>rd</sup> Defendant, in the sum of Kshs. 2,503,000/- with interest at court rates from the date of this judgment until payment in full. The Plaintiff's suit has succeeded to this extent only. Given the circumstances giving rise to the suit, and the demise of the key protagonists during the pendency of this suit, the court will order that the parties shall bear their own costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 11<sup>TH</sup> DAY

**OF APRIL 2024.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**For the Plaintiff: Mr. Karani**

**For the Respondent: Mr. Gikunda**

**C/A: Erick**

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