



**Mohebi v Hussein (Civil Case E025 of 2021)
[2023] KEHC 19165 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19165 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE E025 OF 2021
DKN MAGARE, J
JUNE 21, 2023**

BETWEEN

MAHDI MOHEBI PLAINTIFF

AND

FAHMI YAHYA HUSSEIN DEFENDANT

JUDGMENT

1. Mahdi Mohebi filed suit against Fahmi Yahya Hussein on 10/3/2021. The Plaintiff is a resident of Afghanistan and Dubai.
2. The Plaintiff is said to have been operating business and they agreed that the defendant would buy the Plaintiff's shares of Business in AED 1, 615,911 as at 12/4/2019 out of which the Defendant paid AED 162,916 leaving 1,452,995 as at 31/1/2020.
3. They state that as at 31/1/2020 the parties reconciled accounts and the Plaintiff undertook to pay AED 1,452,995. The said amount is said to have been acknowledged. The Plaintiff and defendant are both male adults.
4. The Defendant filed defence on 9/4/2021. The Defendant stated that the agreement was entered by mistake. On the time, obligations and rights. He stated that the agreement of 12/4/2019 was supplanted with the agreement of 31/1/2020.
5. The Defendant stated that the company was the sole source of business. The plaintiff was supplying the company merchandise and stopped. The merchandise was in form of spares which was to persist even after 12/4/2019. The plaintiff stopped supply of spare parts. It was common understanding that the plaintiff was to supply.
6. The Defendant stated that there was a mutual mistake making the agreement of 12/4/2019 voidable.



7. The agreement was made on a mutual mistake that there was a partnership when there was not. The Defendant was perpetually out of the country when the plaintiff ran the company. The plaintiff would show up and make business suffer by creating commotion.
8. He stated that Covid-19 was force majeure. The plaintiff's witness Mahram Ali Abadulaha testified. He stated that he was a business associate of the plaintiff. He adopted the statement of the plaintiff and list of documents.
9. The plaintiff did not testify. The witness stated that plaintiff could not come.
10. The witness testified that the goods were supplied to Soobrotech Autoparks (K) Ltd. The plaintiff is said to have resigned.
11. On cross examination he admitted that no money was paid pursuant to the agreement. PW2 stated that he wrote the agreement it was adopted the evidence.
12. DW1 testified and adopted the statement and produced his evidence. The defendant stated that he did not know that the later agreement cancelled the former. The Defendant testified that he knew that stocks were to be continued to be supplied. The only thing that was to be done was resignation of the plaintiff. According to the plaintiff there was a mutual mistake. Submissions were later filed.

Plaintiff's submissions

13. The plaintiff filed submissions on 31/3/2023 which were highlighted on 27/4/2023. The defendant is said to have partnered with Soobrotech Autoparts (K) Ltd. They state that the debt was a debt owed to the plaintiff. It is a claim for money advanced by the plaintiff. The defendant reportedly undertook to pay the debt of AED 1,452,995.
14. They stated that the agreement superseded all other agreements. They deny that there was undue influence, coercion, misrepresentation and warrant.
15. The Plaintiff relied on the case of Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005, where the Court cited a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

“It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence.”

The supporting rationale for this rule is that, since the contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements or terms should not be considered when interpreting that written contract agreement, as the parties had consciously decided to ultimately leave them out of the contract. In other words, one may not use evidence made prior to the written contract to contradict the ultimate contract that has been reduced into writing.



Analysis

16. The burden of proof is on the plaintiff. Sections 107, 108 and 109 of the Evidence Act, provides as doth:-

“ 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.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

17. It is familiar Rule of law that no parole evidence is admissible to contradict, vary or alter the terms of a deed or anynay written instrument, for the Rule applies as well as deeds as to contracts in writing. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR*, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth: -

“ Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”

18. As it stands this is not a rule of interpretation but of law and means that the interpretation of a document must be found in the document itself. The court of appeal in *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited [supra]* stated as doth: -

“The rule of exclusion of negotiations prior to entry of a contract as well as the parole evidence rule are subject to a number of exceptions. For instance, evidence of surrounding circumstances will be admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible to more than one meaning, but not to contradict the language of the contract when it has a plain meaning. Extrinsic evidence of terms additional to those contained in the written document will be admitted if it is shown that the document was not intended to express the entire agreement between the parties. If the parties intend their contract to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement. In *Gillepsie Bros. & Co. v Cheney, Eggar & Co. (1896) 2QB 59* Lord Russell C.J. expressed this as follows;

“...although when the parties arrive at a definite written contract the implication or presumption is very strong (sic) and such contract is intended to contain all



the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement.”

19. They also rely on other authorities of the Court of Appeal, most of the authorities are binding on this Court.
20. The plaintiff has special knowledge on how the highly convoluted documents were arrived at. The documentations are hearsay in so far as Mariam Ali Asadulah was concerned. He never participated in the matter except for testimony. He has no power of attorney or any letter. He has no connection whatsoever with the Plaintiff. The Plaintiff himself, though alive, or so I believe, did not bother to testify. He was too important to attend our courts.
21. I disregard his evidence as totally useless. Such testimony does not even fall within admissible hearsay. It is not even hearsay. It is pure charlatanism. I have tried to have the relationship between the person who entered the Plaintiff's shoes and the plaintiff, I cannot find any. It is the duty of the plaintiff to prove its case. Unlike companies that act through their officers, individual have no such luxury. In the case of Simion Nyachae =vs= Lazarous Ratemo Musa (2007) eKLR, Justice Mohamed Warsame, as he then was stated as doth: -

“In my view a representative witness cannot maintain or continue the action instigated by a party, so that the party can achieve or derive some substantial benefits/rights. It is for the plaintiff to prove the publication was meant to injure and has actually injured his reputation if he wants the intervention of the court.

It is my decision that it is the legal duty of litigants to prove the allegations set down in their pleadings. And it would be unreasonable for PW1 to attest to the contents of a plaint filed by the plaintiff, simply because he was given power of attorney by the plaintiff. Once a party expresses a case of defamation, he is expected to show in detail the statement was against his character, dignity and reputation.”

22. The case herein is a classical case of champerty. The witness, PW 1 who had no previous interest in the suit, as a bounty hunter, apparently has an agreement with the plaintiff, so it appears to finance the law suit with a view to sharing the proceeds, should the suit succeed. The claim by the witness, Pw1 is void ad initial.
23. In Ahmednadir Abdikadir & Co Advocates v National Bank of Kenya Limited [2006] eKLR, the court, Fred A Ochieng J, as then he was, stated as doth: -

“In that regard, it is important to re-echo herein the effects of the illegality upon a contract. In Patel V Singh (No. 2) [1987] KLR 585, the appellate court held as follows, quoting with approval from Devlin L.J. in Archbolds (Freightage) LTD vs Spanglett Ltd [1961] 1 Q.B. 374 at 388.

“The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having the intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent the plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had



no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.”

24. In my view, a representative witness cannot maintain or continue the action or continue the action by a party, so that the party can achieve or derive some substantial a benefits or rights.
25. Secondly, the plaintiff did not testify on his claim. The relation of a partnership is personal and cannot be litigated upon by any other persons. The witness who testified was a total stranger. He did not even pretend to have power of attorney. Consequently, the plaintiff died not tender evidence in support of this case. The witness indicated that the plaintiff was in Afghanistan.
26. Given the nature and amount claimed surely, he will have spared a few AEDs to fly into the country or just/AEDs to buy credit and join the Teams link. I got an impression that the witness is a bounty hunter pursuing stale claims.
27. The business that was trading was Soobrutech Autospare (K) Ltd. The agreement written by the parties, the parties were described as working in partnership in Soobrutech Auto Spark (K) Ltd. The agreement on 12/4/2019 was never supplanted by any agreement. The agreement of 31/1/2020, is without consideration. It is based on nothing.
28. The parties are agreed that supply was made to the company. Though registered in the sole name of the Defendant, the company is not the Defendant. The defendant did not derive a single benefit from the agreement. The plaintiff, stopped supply to the company but still expects some profits.
29. If a company or partnership folds, it is not one partner to refund the other. It is the partners to share profits and losses. Losses secondary to covid-19 should and must be absorbed by the business not the defendant. It is not even the plaintiff to absorb the costs.
30. In *Protus Opwora Wabwoto v Ken Manda & 2 Others* [2020] eKLR, the Court, S.N. Riechi, had this to say:-

“In company law, once registration of a company has been successfully completed a legal person separate from its Members is created. With the formation of the company the new entity acquires a veil of incorporation that completely separates the members’ from being held responsible for the liabilities of the company which they have subscribed to. This veil of incorporation blocks the members from being held liable for acts of the company. This principle was set out in the old English case of *Salmon and Salmon & Co. ltd* (1897) AC 22. The effect of this is that the there is a fictional veil between the company and its members, protecting them from being personally liable for the companies debts and obligations.”
31. In the *Salmon and Salmon & Co. ltd* (supra), the house of lords recognized the separate legal and corporate personality of a company. Surprisingly, the company is not party to the suit. The parties are assuming their debts out here. I was actually surprised that the agreements in its mickey mouse form had been drawn by an advocate. It flies in the face of separate legal personality.
32. More surprisingly, there was no consideration for the agreement. The defendant was already the sole director of the company who half he was buying. The claim looks like a classic case of money laundering. The agreement is not a genuine one but a fathom.
33. Thirdly notwithstanding the foregoing, the agreement on 12/4/2019 was for sale of shares. I heard the Defendant and believed him. There was a mutual mistake on the nature of the agreement. The



plaintiff was selling nonexistent shares. The mistake was mutual given that the company has dealt with was a limited liability company. It is not enough to brandish an agreement, in particular one without consideration. It was the duty of the plaintiff to specifically plead and prove his case. There was no evidence on what the Defendant received.

34. There has been no transfer of shares to the Defendant. He was thus paying for what he already owns, or hot air. I am surprised that PW2 could write an agreement of that nature, that smacks of mistakes and lack of proper advice to parties.
35. Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another [2014] eKLR, Visram, Koome & Odek, JJ.A) as then they were stated as follows regarding consideration,

“(18) From the minutes of the special general meeting held on 30th August 2000, it is clear that the 1st respondent was not capable of giving its members loan facilities to purchase the suit property. Further the letter that repudiated the agreement also clearly indicates that the 1st respondent was not capable of meeting its promise on account of lack finances due to drought and crop failure. The appellant did not prove the lack of finances was due to the 1st respondent’s actions or omission. There was also no evidence at all adduced by the appellant to prove the claim for damages. In view of the foresaid we are in agreement with the Judge’s findings that the defence that the agreement was frustrated as a result of lack of finances consequently discharging the appellant and the 1st respondent from meeting the promises which at the time of repudiation had not been performed was legally sound. See also Halsbury’s Laws of England, Vol. 9(1), 4th Edition at paragraph 909 & Chitty on Contracts, Vol. 1, General Principles, 28th Edition paragraph 24-069.

(19) Based on the foregoing, we find the agreement was not capable of being enforced through specific performance, and for that reason the claim for damages would have no basis, although no evidenced was adduced to support it. This is because specific performance is based on the existence of a valid and enforceable contract. As regards the appeal against the 2nd respondent, the record shows that a notice withdrawing the appeal against the 2nd respondent was filed by the appellant on 3rd February, 2005. This Court on 26th October, 2005 pursuant to the said notice marked the appeal against the 2nd respondent as withdrawn with no orders as to costs, thus nothing turns on the appeal against the 2nd respondent.”

36. Finally, given that the business belongs to a limited liability company, it cannot be decided without the company being party. The company has not assigned its debts to the defendant. The plaintiff also stopped supplying the company. There was no agreement that supply was to cease after the plaintiff resigned. In the circumstances, I agree with the defendant that the agreements were frustrated by the mutual mistake and failure of the plaintiff to supply stock. He cannot quit a business, then expect payment to be from the other shareholder. A partnership is dissolved and parties share profits.
37. The agreement looks like a shylock agreement meant to fork the defendant to underwrite the plaintiff’s losses. The claim is thus unproved.



38. Finally, in *Sapra Studio v Kenya National Properties Ltd* [1985] eKLR, the court of Appeal, Hancox, Nyarangi JJA & Chesoni Ag JA as then they were, stated as doth regarding mistake: -

“The question for our decision really is whether there was a common or mutual mistake which entitles Kenya National to say that there was no contract at all between Sapra and themselves. The learned judge basing himself very largely on the decision in *Bell v Lever Bros* [1932] AC 1, which is set out at length in *Chitty on Contracts* 23rd Edition Volume 1 at pages 95 and 96, held that there was such a mistake, and that it was one of fact, and I quote from that portion of his judgment: -

“The common mistaken assumption of both parties was as to the existence of a fact which formed an essential and integral element of the subject matter of the agreement and I think it was sufficiently fundamental to avoid the contract.”

39. The court proceeded in the case of *Sapra Studio v Kenya National Properties Ltd* [1985] eKLR and quoted a passage, which I relish and adopt as the correct law regarding the mutuality of mistake: -

“It will be observed that the majority of the court in *Solle v Butcher* held that the mistake was clearly one of fact, namely as to whether the identity or character of the flat had changed or not, so as to lead to the result in law that it was within the Acts and the lease was liable to be set aside, that is to say that it was voidable and not void. This is clear from the judgment of Denning LJ (as he then was) at page 1117 of the report, as follows:-

“Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the light of *Bell v Lever Brothers Ltd* (14). The correct interpretation of that case, to my mind, is that once a contract has been made, that is to say, once the parties, whatever their inmost states of mind have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for breach of some condition expressed or implied in it, or for fraud, or on some equitable ground.

Nor do I think the contract in *Nicholson and Venn v Smith Marriott* (18) was void from the beginning. Applying these principles it is clear that here there was a contract. The parties agreed in the same terms on the same subject matter. It is true that the landlord was under a mistake which was to him fundamental. He would not for one moment have considered letting the flat for seven years if it meant that he could only charge £140 a year for it. He made the fundamental mistake of believing that the rent he could charge was not limited to a controlled rent, but, whether it was his own mistake or a mistake common to both him and the tenant, it is not a ground for saying that the lease was from the beginning a nullity. Any other view would lead to remarkable results, for it would mean that in the many cases where the parties mistakenly think the house is outside the Rent Acts when it is really within them, the tenancy would be a nullity, and the tenant would have to go, with the result that tenants would not dare to seek to have their rents reduced to the permitted amounts lest they should be turned out.”

40. In this case, the defendant was able to show that parties were agreeing on a business they both though they owned. In reality it was fully owned by the defendant. The plaintiff made supplies from time to time and then unilaterally stopped, fundamentally frustrating the contract.



41. In the circumstances the defendant succeeds in displacing all evidence purported to be tendered for the plaintiff. The burden of proof remained with the Plaintiff, who chose not to testify. He therefore cooked and served his own goose. He should now eat it.
42. The plaintiff's suit is bereft of merit. I hereby dismiss the same in limine with costs.
43. In exercise of my discretion under Section 27 of the *Civil Procedure Act*, the Defendant is awarded costs of AED (United Arab Emirates Dirham) 14,530 at the exchange rate of 38.17 making Ksh. 554,030.

Determination

44. The plaintiff's suit is bereft of merit and is as such dismissed with costs of Ksh. 552,560. There be 30 days stay of execution on costs.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 21ST DAY OF JUNE, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:**

No appearance for the Plaintiff

Mr. Mwakisha for the Defendant

Court Assistant - Brian

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