



REPUBLIC OF KENYA



**Patel v Bhalla t/a Taibjee and Bhalla Advocates LLP (Civil Case E006 of 2023)
[2024] KEHC 11984 (KLR) (Commercial and Tax) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11984 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E006 OF 2023
PM MULWA, J
OCTOBER 3, 2024**

BETWEEN

PRAMILABEN CHANDRAKANT PATEL PLAINTIFF

AND

**AZIM TAIBJE & MADHAV BHALLA T/A TAIBJEE AND BHALLA ADVOCATES
LLP DEFENDANT**

JUDGMENT

Introduction

1. The plaintiff is the widow of the late Chandrakant Shantilal Maganlal Patel who together with the plaintiff was a director/shareholder of a company called Foam Plastics Limited. By an Agreement for Sale of Shares dated 17th July 2020, the plaintiff sold her 65,000 issued shares in the Company to Premji Valji Pindoria and Jitendra Valji Mulji for a consideration of Kshs. 147,500,000.00. In that transaction, the parties were jointly represented by the defendant who drew up the sale agreement. The plaintiff received a sum of Kshs. 142,500,000.00 as part of the consideration and the balance of Kshs. 5,000,000.00 was retained by the defendant to cater for any contingencies.
2. The plaintiff has now approached the court by way of an Originating Summons dated 22nd December 2022 made under Sections 1A and 1B of the *Civil Procedure Act* and Order 37 Rule 1, 2 and 3 of the *Civil Procedure Rules* claiming that all contingencies were settled by her but the defendant (Advocates) are reluctant to release the balance of the purchase price being Kshs. 5,000,000.00 plus accrued interest and there is no justifiable reason why they are holding this balance.
3. The plaintiff urges the court to determine the questions inter alia; whether the defendant has any legal right to hold the sum of Kshs. 5,000,000.00 plus accrued interest being part of the purchase price;



whether it should be compelled to furnish an account of the accrued interest from the said balance of Kshs. 5,000,000.00 and whether an order should issue to compel them to release the said sum.

4. The application is supported by affidavits sworn by the plaintiff on 22nd December 2022 and 14th July 2023. It is opposed by the defendant through the affidavits sworn on 3rd February 2023 and 23rd August 2023 by Madhav Bhalla, a partner in the Advocates' firm and on 7th February 2023 by Premji Valji Pindoria.
5. The defendant contends that not all contingencies were catered for and that a third party is also laying claim to the subject shares and they accuse the plaintiff of breach of warranty. As such, the defendant states that it would be prudent to continue holding onto the said balance as a lien against damages that could foreseeably flow from the alleged breach and pending hearing and determination of the suit between the purchasers and the third party.
6. The parties have supplemented their arguments by filing written submissions which are on record and I have had the chance to look at them alongside the parties' pleadings.

Analysis and determination

7. Even though the defendant raised an objection that the matter is bound by the doctrine of exhaustion and that the operating documents makes it mandatory to refer any dispute arising from it to an arbitrator, I note that they have substantively responded to the suit, thus acquiescing and submitting to the jurisdiction of the court to determine the matter (see the Court of Appeal decisions of *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* [2001] eKLR and *Charles Njogu Lofty v Bedouin Enterprises Ltd* [2005] eKLR).
8. Whereas the parties agree that the defendant was to hold the Kshs. 5,000,000.00 for any contingencies, the Agreement for Sale of Shares between the plaintiff and the purchasers does not state what these "contingencies" are.
9. The defendant submit that the term contingent refers to a future event or circumstance which is possible but cannot be predicted with certainty. On her part, the plaintiff directed the court to the defendant's letter dated 15th July 2022 annexed in her deposition of 22nd December 2022 where at para. 3 the it stated that the Kshs. 5,000,000.00 was "...for purposes of underwriting the veracity of the Company's status and solvency, preceding the eventual registration of the shares and land ownership in favour of the purchasers." As such, the plaintiff submits that this sum was only to be held preceding the eventual registration of the shares.
10. From the aforementioned correspondence by the defendant, I am inclined to agree with the plaintiff that the Kshs. 5,000,000.00 was only to cater for contingencies before and not after the registration of the shares and land ownership in favour of the purchasers. I am in further agreement with the plaintiff's submissions that Premji Valji Pindoria in his deposition of 7th February 2023 admits that the retained money was to cater for contingencies prior to the sale to him.
11. Additionally, there is no evidence that the said sum was to be held indefinitely or until the hearing and determination of the suit between the purchasers and the third party which was filed after the conclusion of the transaction. In any event, according to the plaintiff the said suit has since been dismissed for want of prosecution and the fact that the purchasers have filed an appeal does not mean that the matter has not been concluded as contended by the defendant. Once a matter has been dismissed for want of prosecution, the same stands so dismissed unless reinstated by an order of the court. Therefore, the defendant cannot rely on a dismissed suit to hold on to the Kshs. 5,000,000.00.



12. Having found that the defendant was only to hold the Kshs. 5,000,000.00 preceding the registration of shares and land ownership in favour of the purchasers and the suit in which it was continuing to hold the said sum having been dismissed, it is my finding that the defendant has no legal right to continue holding this sum.
13. I noted that the defendant stated in its correspondences to the Advocate for the plaintiff that the money was in an interest-earning account. There is therefore no reason to continue holding onto the accrued interest, and that an account of the accrued interest ought to be furnished to the plaintiff.

Final Orders

14. The upshot of my above findings is that the plaintiff's Originating Summons dated 22nd December 2022 is merited and is allowed in the following terms:
 - a. An order be and is hereby issued compelling the defendant to furnish the plaintiff with an account of the accrued interest from the withheld amount of Kshs. 5,000,000.00 within 30 days from the date herein.
 - b. An order be and is hereby issued compelling the defendant to release to the plaintiff the sum of Kshs. 5,000,000.00 together with the accrued interest accounted for above within the same period.
 - c. The defendant shall pay the plaintiff costs of this suit.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF OCTOBER 2024.

P. MULWA

JUDGE

In the presence of:

Mr. Karuga for plaintiff

N/A for defendant

Court Assistant: Carlos

