



REPUBLIC OF KENYA



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**Kenya Trollies Limited & another v N.K. Brothers & 3 others (Commercial Case 122 of 2001)
[2024] KEHC 14559 (KLR) (Commercial and Tax) (19 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14559 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 122 OF 2001
PM MULWA, J
NOVEMBER 19, 2024**

BETWEEN

KENYA TROLLIES LIMITED 1ST PLAINTIFF

SAILESH SHASHIKANT PATEL 2ND PLAINTIFF

AND

N.K. BROTHERS 1ST DEFENDANT

PREMJI MAVJI KHODA 2ND DEFENDANT

RAMESH MAVJI KHODA 3RD DEFENDANT

PREVIN MAVJI KHODA 4TH DEFENDANT

JUDGMENT

1. The 1st Defendant, is a private construction company incorporated under the *Companies Act*, Cap 486 (Repealed), with the 2nd, 3rd and 4th Defendants, all brothers, as the core shareholders and directors. The 2nd Plaintiff served as the Managing Director and transacted business with the 1st Plaintiff in his capacity.
2. On 15th June 1994, the 1st Plaintiff supplied equipment and machinery to the 1st Defendant. The goods were delivered at its go down in Nairobi and other sites between 15th June 1994 and 6th December 1996. Between 15th June 1994 and 17th August 1995, the 1st Plaintiff advanced money to third parties on behalf of the Defendants. On 30th October 1994, the Plaintiffs advanced the 1st Defendant's director, Govind Mavji Khoda, resident in the United Kingdom, Sterling Pounds 62,500 (Kshs. 7.5 Million) for his and the Defendants' benefit jointly and severally, upon the Defendant's request. All this was on condition that the 1st Defendant would pay for the goods upon delivery or loan on demand and that any outstanding amount would attract interest at 3% per month (36% per annum).



3. However, the Defendants failed to pay for the goods or the money advanced causing the Plaintiffs extensive loss and damage.
4. Due to the indebtedness, the Defendants appointed the 2nd Plaintiff as the managing director of the 1st Defendant in August 1995 to run the company and oversee its operations to make it a profitable business and consequently pay its creditors including the Plaintiffs. However, his efforts were frustrated by the 2nd to 4th Defendants as no efforts were being made to liquidate the money owed to the Plaintiffs. This forced the 2nd Plaintiff to resign two months later through a letter to the Defendants dated October 1995.
5. The Plaintiff claimed that the 2nd – 4th Defendants as directors failed to run the company diligently, negligently and fraudulently misrepresented the company's true state of affairs. This made the Plaintiffs continue to supply goods and advance money to the 1st Defendant which became unable to meet its obligations.
6. Therefore, the Plaintiff filed this suit through a plaint dated 23rd March 2001, later amended on 23rd March 2001 for negligence, misrepresentation and/or fraud. The particulars were using the 1st Defendant's assets to advance their own business and personal interests to the detriment of the 1st Defendant; failing to employ prudent management skills; failing to collect debts owed from third parties; allowing the use of its assets by third parties; advancing liquid assets without approval of shareholders; charging its properties to banks and creating debentures without benefit; failing to call statutory meetings as prescribed in the memorandum and articles of association; converting to their own use cash advanced and goods delivered and transferring company property to third parties.
7. The Plaintiffs claimed that attempting to liquidate part of their claims on 17th July 1995, 27th May 1995 and 7th December 1995 the 1st Defendant drew six cheques totalling Kshs. 90,000,000/-, at Trust Bank Moi Avenue Branch. However, the cheques were dishonoured. Despite demand, the Defendants have failed to pay the debt except for a nominal sum of Kshs. 32,492,650/-.
8. As such, the Plaintiffs seek entry of judgment against the 1st to 4th Defendants for:
 - a) Payment of Kshs. 442,073,421.22.
 - b) Interest at the rate of 36% per annum from the date of filing of suit.
 - c) Costs of this suit on the higher scale.

Defence

9. The Defendants filed a Defence dated 26th February 2001. They asserted that the Plaintiffs disclose no reasonable cause of action. On without prejudice basis, the Defendants denied the entire claim and all the particulars of alleged negligence, misrepresentation and fraud. It was averred that if any goods were supplied or monies advanced, they were for the benefit of the 1st Defendant and not the 2nd to 4th Defendants. It was also averred that the supply of goods and loan advanced were at the behest of the 2nd Plaintiff who had taken control of the 1st Defendant's affairs. They denied knowledge of the supply and put the Plaintiffs to strict proof. They also denied agreeing to pay interest of 3% per month. They again denied that they requested the Plaintiffs to advance monies to themselves, Mr. Khoda or any third parties. They further denied that they frustrated the 2nd Plaintiff in any way.
10. The Defendants admitted that the 1st Plaintiff was appointed as the managing director of the 1st Defendant. They stated that in consideration for the appointment, there would be infusion of capital,



machinery and goods to enable the 1st Defendant become viable and the Plaintiffs would receive 15% of the gross profits of the 1st Defendant.

11. The Defendants averred that as a result of meetings held in 1996, accounts were taken and settled between the parties when it was ascertained and confirmed that up to 1996 the Plaintiffs had been paid Kshs. 52,442,650/- and that the balance owing was Kshs. 49,700,000/- taking into account the contribution of the Plaintiffs to the business by the input of cash, machinery, equipment and goods when it was mutually agreed and confirmed that the said sum of Kshs. 49,700,000/- would be paid making a total of Kshs. 102,142,650/- and that the said balance has now been paid in full.

Reply to Defence

12. The Plaintiffs filed a reply to defence dated 13th March 2001, reiterating the Plaintiffs' case. They denied that the Defendants paid them Kshs. 52,442,650/- or any monies at all. They averred that no accounts have been taken, settled and paid. They asserted that the suit is not misconceived and is tenable in law.

Evidence

13. The hearing commenced on 18th February 2004 before Hon. Azangalala J. (as he then was) and proceeded partly before Hon. Kamau J. (as she then was), Hon. Sewe J., Hon. Odero J. and Hon. Mwita J. The Plaintiffs called two witnesses, Sailesh Shashikant Patel (Mr. Patel) the 2nd Plaintiff and director of the 1st Plaintiff, as Pw1 and David Munyagia Mbugu (Mr. Mbugu) as Pw2.
14. During exam in chief, Mr. Patel mostly reiterated the Plaintiffs' case as per the plaint. He produced the bundle of invoices and delivery notes, marked as Plaintiffs' Exhibits 1(a) to (k). He also produced a copy of the agreement on interest payment, marked as Plaintiffs' Exhibit 2. He indicated that on the 2nd to 4th Defendants instructions, he lent money to WADU Insurance Broker, Intra Africa – Insurance Company, K. B. Sangham and Joe Nasebe.
15. Mr. Patel mentioned that he was appointed as the managing director of the 1st Defendant on 3rd August 1995 but resigned through a letter dated 31st October 1995 because he was not given any power or business to handle. He maintained that the Defendants owe him Kshs. 139,869,652.30/- and that the amount in the plaint of Kshs. 442,073,421/- includes interest which was worked out by his accountant.
16. On cross examination, he indicated that he and his wife are the shareholders and directors of the 1st Plaintiff with 75% and 25% shares held respectively. He also indicated that out of the sums claimed, Kshs. 95,957,704.80/- and Kshs. 14,461,747.80 was owed to the 1st Plaintiff while Kshs. 11,277,200 and Kshs. 18,200,000/- was owed to him in his capacity. He admitted that the sums are not reflected in the annual returns. He also admitted that he has not paid tax on the amounts.
17. Mr. Patel acknowledged that he did not avail the original Invoices Nos. 16391, 16929 and 18176. He was firm that he paid Value Added Tax but admitted that he did not avail the returns. He confirmed that he received Kshs. 32,492,650/- and that the balance due to him was Kshs. 68,800,000/-.
18. Mr. Patel confirmed that the 1st Plaintiff supplied goods to the 1st Defendant while he was the managing director some of which were not paid for and that he nonetheless extended credit. He again confirmed that after his resignation, more goods were supplied despite claiming that the 2nd to 4th Defendants misrepresented the status of the company to him. He also confirmed that the 1st Defendant is a company which carries on business through its directors and officers and that therefore the goods were for the benefit of the 1st Defendant. He admitted that no goods were supplied to the 2nd – 4th Defendants.



19. Mr. Patel maintained that interest claimed to be due from the 2nd to 4th Defendants was in respect of money advanced to them. He acknowledged that the loan was issued to Mr. Khoda on 30th October 1994 and that some of the goods were supplied over 6 years prior to 30th January 2001 when this suit was filed.
20. Mr. Patel further acknowledged that the cheques were not banked except the last cheque for Kshs. 2,000,000/-, because he was asked not to bank them. He clarified that the statement that cheques were presented was a mistake. He abandoned his claim for Kshs. 90,000,000/- for the cheques were dishonoured as they were not presented. He acknowledged that he did not know how the interest had been calculated. He denied that he agreed to be given 15% profits in consideration for his appointment as managing director. He also denied that there was a meeting held to negotiate the payments due. However, he acknowledged payment of Kshs. 32,492,650/-.
21. Mr. Patel admitted that he had no proof that the 2nd to 4th Defendants converted the goods. He also acknowledged that the payment of Kshs. 32,492,650/- was not taken into account when computing interest.
22. In re-examination, Mr. Patel explained that he did not avail the original invoices as they were issued to the Defendants upon delivery of the goods. He maintained that the cheques were not dishonoured, clarifying that the Bank refused to pay and returned them. He indicated that he continued to supply goods after his resignation due to good relations.
23. Mr. Mbugu, a Certified Public Accountant and Auditor, was the Audit Manager of Kigo Njenga at the time he prepared the report. He stated that was engaged by the Plaintiffs to prepare an audit report on the basis of the documents that were presented before this Court. He was hired as an expert and therefore his report is independent. The interest was worked up to end of November 2014. He produced the report dated 21st November 2014, filed in Court on 25th November 2014, marked as Plaintiff Exhibit 3.
24. On cross-examination, Mr. Mbugu acknowledged that the audit report was not dated and does not indicate the period which the accrued interest was charged. He also acknowledged that item 3 in the audit report does not provide the particulars about their sources.
25. Mr. Mbugu confirmed that item 4 contains claims for 1994 and 1995, 6 years before the suit was filed in 2001. He also confirmed that he calculated the interest on the outstanding principal amount. He stated that he was not given the figures of any payments made but admitted that if payments were made, the interest would come down as the principal would be reduced.
26. Mr. Mbugu admitted that he did not audit any amounts advanced to other people. He further confirmed that he had no details of the goods supplied.
27. In re-examination, Mr. Mbugu mentioned that the dates of the invoices are indicated in para. 1 of the report, with the last date as 29th July 2001. He also confirmed that six years from the last invoice would be 29th July 2001. He maintained that he could not make any deductions as there was no indication that the Defendants had made any payments. He asserted that his mandate was to analyse the documents filed in Court, not the history of the matter and that his figures were correct and in line with his findings.
28. The Defendants called one witness, Rajesh Rathod (Mr. Rathod) the 1st Defendant's Chief Executive Officer and former accounts clerk, as Dw1. He adopted his witness statement dated 8th October 2018 as his evidence. He produced the Defendants' primary and supplementary bundle of documents both dated 10th April 2015, which were marked as Defendants exhibits 1-28.



29. Upon cross-examination, Mr. Rathod admitted that the cheques drawn in favour of ‘YOURSELF’, were signed by him, the 4th Defendant and two other signatories. He also admitted that they were neither signed by the 2nd Plaintiff nor acknowledged by the Plaintiffs.
30. In re-examination, Mr. Rathod stated that cheques are required to be signed by three directors. He was firm that the cheques showed who was to be paid and that the cheques cleared according to the statement. He contended that the Plaintiffs did not produce bank statements to show that the money was not paid. Mr. Rathod stated that the 2nd Plaintiff was not a director for three months as claimed as he resigned on 23rd February 1998. He clarified that the instant claim is not only related to the NSSF building. He also mentioned that the 2nd and 3rd Defendants passed away on 11th January 2012 and have not been substituted.

Submissions

31. The Plaintiffs and Defendants filed written submissions dated 10th June 2022 and 21st November 2022 respectively.

Analysis and Determination

32. I have considered the plaint, the defence, the evidence, the parties’ respective documents, submissions and authorities. The issues for determination are whether the suit should be struck out for lack of authority by the 1st Plaintiff company to file the suit on its behalf; whether the suit has abated against the 2nd and 3rd Defendants (now deceased) whether the Plaintiffs’ claims which were accrued 6 years before the filing of this suit are time-barred; and whether the Plaintiffs have proven their case against the Defendants and whether they are entitled to the reliefs sought.
33. The first issue is whether the suit should be struck out for lack of authority by the 1st Plaintiff to file the suit on its behalf. The Defendants submitted that the 2nd Plaintiff admitted in cross-examination that though he and his wife were the Directors of the 1st Plaintiff, he did not have authority to file the present suit and no authority was presented before this Court of any minutes or resolution giving him authority to institute these proceedings on behalf of the 1st Plaintiff.
34. Order 4 rule 1(4) of the Civil Procedure Rules provides as follows:

“ 1

- (4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”

35. The Court of Appeal in *Spire Bank Limited v Land Registrar & 2 others* [2019] KECA 530 (KLR), observed that:

“So that it was sufficient for the authorized person to depone that he or she was duly authorized, but in the event of a complaint that such person was unauthorized, it was up to the disputing party to demonstrate with evidence that the deponent did not have the requisite authority, the onus being on the party making the allegation to prove it. A bare statement that the plaintiff or applicant was not authorized would not be sufficient.

It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on



its behalf...The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized."

36. Accordingly, I find that there was no evidence produced by the Defendants to demonstrate that the 2nd Plaintiff was unauthorized to file this suit on behalf of the 1st Plaintiff. Therefore, it was sufficient for the 2nd Plaintiff to depose in the verifying affidavit that he was duly authorized.
37. The next issue is whether the suit has abated against the 2nd and 3rd Defendants (now deceased). I note that the 2nd and 3rd Defendants passed away on 11th January 2012 and have not been substituted. Order 24 Rule 4 of the Civil Procedure Rules requires a plaintiff to apply for substitution of a deceased defendant by applying for his legal representative to be made a party within one year from the date of death or the suit abates against the deceased defendant. Accordingly, the suit has abated as against the 2nd and 3rd Defendants. However, there is no abatement of the suit since the Plaintiffs' cause of action survived and the suit proceeded against the surviving 1st and 4th Defendants (See Order 24 Rule 2 of the Civil Procedure Rules).
38. I now move to the issues of whether the Plaintiffs' claims which were accrued 6 years before the filing of this suit are time-barred; whether the Plaintiffs have proven their case against the Defendants and whether they are entitled to the reliefs sought.
39. The Plaintiffs' claim is founded on negligence, misrepresentation and/or fraud. The particulars were inducing the plaintiffs to continue supplying goods, equipment and machinery and to advance cash to the 1st Defendant when they knew or ought to have known that the 1st Defendant was insolvent; using the 1st Defendant's assets to advance their own business and personal interests to the detriment of the 1st Defendant; failing to employ prudent management skills; failing to collect debts owed from third parties; allowing the use of its assets by third parties; advancing liquid assets without approval of shareholders; charging its properties to banks and creating debentures without benefit; failing to call statutory meetings as prescribed in the memorandum and articles of association; converting to their own use cash advanced and goods delivered and transferring company property to third parties.
40. The standard of proof in civil claims is on a balance of probabilities. The successful party is the one who persuades the court that his claim is more probable. However, the burden of proof is on the Plaintiffs.
41. Section 107 of the [Evidence Act](#) provides that:
- " 107.
- (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."
42. As earlier mentioned, the Plaintiffs' claim is founded on negligence, misrepresentation and/ or fraud. To prove negligence, the Plaintiffs are required to establish four elements, duty of care, breach of duty of care, causation between the negligent action and the injury cause and harm or injury.



43. Since its quasi-criminal, fraud requires a higher standard of proof than that of a balance of probabilities though below the standard in criminal cases of beyond reasonable doubt. The law is that fraud must be strictly pleaded and proved (See *R.G Patel v Lalji Makanji* [1957] EA 314).
44. In support of their case, the Plaintiffs produced invoices, delivery notes and an interest agreement.
45. From the claims, the particulars and the evidence, I gather that the Plaintiffs' claim is founded on tort. However, there seems to be confusion as the Plaintiffs sought remedies for a claim for breach of contract. The Plaintiffs also produced evidence intended to support the claim for breach of contract.
46. The Plaintiff further argued that the right to initiate a contractual claim accrues on and not before the date of the acknowledgement or the last payment. However, the Defendants submitted that since this suit was filed on 30th January 2001, any claim filed after six years had lapsed is statute-barred.
47. Both the Plaintiffs and the Defendants anchored their claim on Section 4 (1) of the *Limitation of Actions Act* which provides that:

- “ 4. Actions of contract and tort and certain other actions
- (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
- (a) actions founded on contract;...”

48. The Plaintiff went on to argue that its right of action accrued on and not before the date of the acknowledgement or the last payment pursuant to Section 23(3) of the *Limitation of Actions Act*.
49. However, since the Plaintiff's claim is based on tort, the applicable provision is Section 4(2) of the *Limitation of Actions Act*, which provides as follows:

- “(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:
- Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

50. From the pleadings and the evidence, it is my considered view that the cause of action accrued on or about the time when the 2nd Plaintiff resigned as a director on 31st October 1995. He acquired knowledge about any alleged negligence, misrepresentation and or fraud after he had served as the managing director. Therefore, any tortious claim had to have been filed by 31st October 1998 within three years from 31st October 1995. Yet, this suit was instituted on 31st January 2001, hence time-barred.
51. The High Court in *Barclays Bank of Kenya Limited v Mema (Civil Appeal E011 of 2021)* [2021] KEHC 333 (KLR) (Commercial and Tax) (3 December 2021) (Judgment), cautioned that:

“Resolution of the second issue depends on whether the Respondent's cause of action is in tort or contract. This is because, the same set of facts may yield different causes of action for a claimant and it is the duty of the claimant to elect which cause of action it wishes to pursue and plead it accordingly. The difference between the law of tort and that of contract is not merely academic but of real and practical significance. A case grounded on tort is founded on a general duty of care imposed by the law while a case for breach of contract arises from the agreement between the parties (see A. G. Guest, “Tort of Contract” [1961] 3 *University of Malaya Law Review* 191).



I reiterate that a party who wishes to pursue its case, must therefore elect the cause of action it wishes pursue and plead its case accordingly. This is what the court stated in Reuben Kioko Mutyane v Kenya Commercial Bank; Transunion t/a Credit Reference Bureau Africa Limited (Interested Party) that, “That duty of care may also arise both in, contract and tort. It is therefore upon the customer to elect to pursue one or both, taking into account issues of Limitation periods and rules as to remoteness of damages...”

52. In conclusion, and in view of the foregoing, the Plaintiffs’ suit is struck out with costs to the 1st and 4th Defendants.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF NOVEMBER 2024.

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P.M. MULWA

JUDGE

In the presence of:

Mr. Kinyanjui for Plaintiffs

Mr. Were for Defendants

Court Assistant: Carlos

