

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. E003 OF 2021

AVTAR SIGH SURI.....1ST
PLAINTIFF

JASBIR SIGH SURI.....2ND
PLAINTIFF

VERSUS

GRANT THORNTON CONSULTING LTD.....
DEFENDANT

JUDGMENT

1. The Plaintiffs filed a Plaint dated 4th January 2021 seeking judgment against the Defendant for the sum of Kshs. 17,896,500/= together with interest at court rates from March 2018 until payment in full, and costs of the suit.
2. The Plaintiffs’ case is that in the year 2018, they procured the professional services of the Defendant, a tax advisory firm, in connection with Value Added Tax (VAT) and Capital Gains Tax (CGT) obligations that the Kenya Revenue Authority (KRA) had raised against Berkshire Holdings Limited, a company associated with the Plaintiffs. It was their contention that the tax obligation arose from the sale of a property, and upon computation, the Defendant advised that

VAT payable was Kshs. 17,896,500/= and CGT payable was Kshs. 5,000,000/=.

3. Pursuant to this advice, the 1st Plaintiff remitted the said sums to the Defendant for onward transmission to KRA. However, the Defendant allegedly failed to remit the Kshs. 17,896,500/= to KRA and only transmitted the CGT payment. Consequently, the Plaintiffs were compelled to take out a loan facility to settle the VAT obligation, upon which they have been paying interest, and they claim to have suffered loss and damage for which the Defendant is liable.
4. The Defendant filed a Statement of Defence dated 18th March 2021 denying the existence of any agreement with the Plaintiffs in 2018 regarding the VAT payment for Berkshire Holdings. The Defendant contended that its only engagement was in respect of the CGT payment arising from the sale of LR No. 7879/9, as evidenced by a professional undertaking from W & M Co. Advocates. The Defendant further averred that the Plaintiffs failed to produce any KRA payment slips supporting their claim that the Defendant was to remit VAT on their behalf.
5. The Defendant's case was that in respect of the Kshs. 17,896,500/=, the Plaintiffs had instructed it to pay several companies on behalf of Berkshire Holdings and provided proof of such payments. It was the Defendant's position that it acted in good faith, in accordance with the instructions received, and that in the absence of any contract obligating it to pay VAT, it could not be held liable for breach.

Evidence

6. PW1, Jasbir Singh Suri, testified that he is a director of Berkshire Holdings Limited. He adopted his witness statements dated 4th January 2021 and 13th April 2021, together with his list and supplementary lists of documents. He stated that the Plaintiffs' relationship with the Defendant was purely for tax advisory purposes. According to him, the instructions regarding the payment were given during a physical meeting.
7. He testified that the sale price of the property was Kshs. 400 million, with VAT of Kshs. 64 million at 16%. He claimed that the Defendant, as a professional, computed the VAT payable as Kshs. 17 million, but KRA subsequently demanded Kshs. 63 million after payment of CGT. He conceded that while instructions for payment of CGT were documented, those relating to VAT were not, though he stated that there were email correspondences to that effect.
8. He further testified that the Defendant had access to the KRA tax portal, and therefore, any payment slips could only be generated from the portal. He denied having any dealings with companies such as Venke Supplies Ltd or Zecha Trading, which appeared in the Defendant's records, and maintained that he never instructed the Defendant to make payments to any suppliers.
9. DW1, Parag Shah, a practicing accountant and director of the Defendant firm, testified in defence. He adopted his witness statement and bundle of documents dated 18th

March 2021. He confirmed receiving Kshs. 17 million from the Plaintiffs but maintained that the funds were disbursed to beneficiaries as instructed. He stated that the only formal instructions from the Plaintiffs were to process CGT payments under a professional undertaking from W & M Co. Advocates, which was duly honoured, as evidenced by documentation in the Defendant's bundle.

10. During cross-examination, he conceded that there was no written instruction directing payment of the Kshs. 17 Million to suppliers, only verbal communications. He further stated that the letter dated 5th April 2018 addressed to KRA was issued in relation to VAT registration and deregistration, not VAT payment, and that by that date, CGT had already been settled.

Submissions

11. Upon conclusion of the hearing, the parties filed written submissions. The Plaintiffs' submissions are dated 14th April 2025, while those of the Defendant are dated 20th April 2025.
12. The Plaintiffs submitted that they have the necessary *locus standi* to institute the suit in their personal capacity, noting that the funds in question were remitted by the 1st Plaintiff and not by Berkshire Holdings Limited. They argued that the issue of locus standi was not raised in the pleadings and cannot therefore be introduced at the submission stage. They maintained that it was undisputed that the funds were remitted to the Defendant, and that the Defendant's failure

to transmit the VAT payment to KRA rendered it liable for the loss and consequential damages suffered by the Plaintiffs.

13. The Defendant on its part submitted that the Plaintiffs failed to prove that they had instructed the Defendant to remit VAT to KRA, or that the amount of Kshs. 17,896,500/= represented VAT on a property valued at Kshs. 400 million. It was argued that VAT on such a transaction would amount to Kshs. 64 million, and therefore the alleged figure was inconsistent with the applicable rate.

14. The Defendant further submitted that upon the evidential burden shifting, it produced bank transfer documents showing that the sum was disbursed to third-party entities linked to Berkshire Holdings in line with prior dealings. As tax experts, the Defendant maintained that the transaction related to CGT, not VAT, and that there were no express or implied instructions to remit VAT to KRA.

15. It was their position that all tax payments were ordinarily effected through professional undertakings from the Plaintiffs' advocates, and no such undertaking existed in this instance.

Analysis and determination

16. Having considered the pleadings, the oral and documentary evidence adduced, and the rival submissions, the following issues arise for determination:

- i. Whether the Plaintiffs have locus standi to institute this suit;*

- ii. *Whether there existed a contractual or fiduciary obligation between the Plaintiffs and the Defendant to remit VAT to KRA;*
- iii. *Whether the Plaintiffs have proved, on a balance of probabilities, that the Defendant received Kshs. 17,896,500/= for onward transmission to KRA and failed to do so; and*
- iv. *Whether the Plaintiffs are entitled to the reliefs sought.*

On locus standi

17. The Defendant raised the issue of *locus standi*, contending that the funds in dispute belonged to Berkshire Holdings Limited and therefore the Plaintiffs, being its directors, could not bring the suit in their individual capacities.
18. The Plaintiffs, on the other hand, submitted that the money in issue was personally remitted by the 1st Plaintiff from his own account to the Defendant, and that the suit is a recovery claim for funds entrusted to the Defendant for a specific purpose which was not fulfilled.
19. The Court notes that the Defendant did not raise the question of *locus standi* in its Statement of Defence. It is trite law that parties are bound by their pleadings. In **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR**, the Court of Appeal held that: “A party is bound by its

pleadings and cannot raise new issues not pleaded unless by amendment.”

20. In the present case, the evidence shows that the remittance of Kshs. 17,896,500/= was made by the 1st Plaintiff directly to the Defendant. The Defendant itself acknowledged receipt of the funds. Accordingly, the Plaintiffs have sufficient locus to institute this claim in their personal capacities as the parties who parted with the funds.

On the Existence of a Contract or Instruction to Pay

VAT

21. The Plaintiffs alleged that the Defendant was instructed to remit both VAT and CGT on behalf of Berkshire Holdings Limited. It is not in dispute that the Defendant was engaged as a tax advisory firm and that it indeed remitted CGT of Kshs. 5,000,000/= to KRA. The controversy, therefore, centers on whether there was a similar instruction to remit VAT amounting to Kshs. 17,896,500/=.
22. The Defendant maintained that no such instructions existed and that the only contractual engagement was in relation to CGT. The Defendant further contended that the sum of Kshs. 17,896,500/= was applied towards payments to various suppliers on behalf of Berkshire Holdings, pursuant to alleged instructions from the company's directors. However, the Defendant did not produce any written proof of such instructions from the Plaintiffs or the directors of Berkshire Holdings Limited. No board resolution, email

correspondence, or acknowledgment from the supposed beneficiaries was tendered in evidence.

23. The law governing proof of contractual obligations is well settled. **Section 107(1) of the Evidence Act, Cap 80**, provides that:

“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.”

24. This principle was reiterated in **Springboard Capital Limited v Njenga & another (Civil Appeal No. 14 of 2024) [2024] KEHC 7013 (KLR)**, where the Court held that he who alleges must prove.

25. In the present case, while the Plaintiffs did not produce a formal written instruction explicitly directing the Defendant to remit VAT, the contemporaneous email correspondences between the parties provide persuasive circumstantial evidence of such an understanding. In particular, the email dated 15th February 2018 from Parag Shah to Jasbir Suri, produced at page 75 of the Plaintiff bundle of documents, refers to the need to register for VAT, procure an ETR machine, account for the sale transaction of Kshs. 398 million plus VAT, raise an ETR for Kshs. 400 million, file VAT returns for both sales and purchases, and subsequently deregister once the returns were filed. These exchanges clearly demonstrate that VAT remittance was contemplated

and that the Defendant was involved in advising and facilitating that process.

26. From the foregoing, the court is satisfied that the Defendant was not merely a passive tax advisor but an active participant in the tax compliance process for Berkshire Holdings Limited. Having accepted and received the sum of Kshs. 17,896,500/= expressly designated for tax remittance, the Defendant assumed a fiduciary duty to ensure that the said funds were applied strictly for that purpose. The law imposes upon professionals such as accountants and tax agents a duty of trust and good faith in the handling of client funds.
27. Section 42(1) of the Tax Procedures Act, 2015 provides that a tax representative shall be answerable for doing all such acts as are required to be done by the taxpayer in matters of tax compliance, and is personally liable for any tax that remains unpaid by reason of their neglect, default, or breach of duty. While the Defendant was not an appointed tax representative in the statutory sense, by accepting money for remittance to KRA, it undertook a similar responsibility to act faithfully and with due care.
28. Once money is entrusted to a professional for a defined purpose, that professional holds it in a quasi-trust capacity and must account strictly for its use. Fiduciary duty arises where one party places trust and confidence in another in circumstances where that trust is reasonably relied upon.

29. The Defendant's explanation that the funds were paid to "suppliers" allegedly linked to Berkshire Holdings is unsupported by any documentary proof of authorization by the Plaintiff. No written instructions by the Plaintiff to pay the supplier were produced to corroborate the alleged payments. Moreover, the Defendant did not call any of the purported recipient companies to testify or verify the transactions.
30. The Court therefore finds that the Defendant's conduct in receiving the sum of Kshs. 17,896,500/= for tax remittance and failing to apply it for that purpose or to account for it amounted to a breach of fiduciary duty and professional negligence. The Defendant's duty of care extended beyond mere advisory services; it encompassed the proper handling, remittance, and accounting of client funds.
31. In **Kenya Women Microfinance Bank Limited v Martha Wangari Kamau [2021] eKLR**, the Court observed that professionals who hold client money for a specific purpose are under an obligation to use it only for that purpose, and failure to do so renders them personally liable for restitution and damages. That principle applies squarely in the present case.
32. This Court reiterates that professional accountability is the bedrock of trust in commercial and tax advisory practice. Clients rely on the integrity, diligence, and expertise of professionals who receive and handle funds on their behalf.

The Defendant's failure to account for money specifically remitted for tax purposes not only occasioned financial loss to the Plaintiffs but also undermined public confidence in the sanctity of professional undertakings. This Court cannot countenance such conduct. Professionals entrusted with client funds must be held to the highest standards of transparency and fiduciary responsibility

33. Consequently, I find that the Plaintiffs have, on a balance of probabilities, proved that the Defendant received the sum of Kshs. 17,896,500/= for onward remittance to the Kenya Revenue Authority as VAT and that the Defendant failed to do so. The Defendant is therefore liable to refund the said sum to the Plaintiffs together with interest thereon.

34. On the issue of interest, Section 26(1) of the Civil Procedure Act, Cap 21, grants the court discretion to award interest at such rate as it deems reasonable. Given that the Plaintiffs were compelled to take out a loan to settle the VAT obligation and have paid interest thereon since 2018, I find it just to award interest at court rates from March 2018 until payment in full.

35. In the result, judgment is entered for the Plaintiffs against the Defendant as follows:

- i. Kshs. 17,896,500/= being the amount received by the Defendant and not remitted to KRA.***
- ii. Interest at court rates from March 2018 until payment in full.***
- iii. Costs of the suit are awarded to the Plaintiffs.***

It is so ordered.

JUDGMENT delivered virtually, dated and signed at **NAIROBI**

This **16th** day of **October** 2025.

P.M. MULWA

JUDGE

In the presence of:

Ms. Kendi for Plaintiffs

Ms. Mutua h/b for Mr. Omamo for Defendant

Court Assistant: *Carlos*