

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MILIMANI**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL APPEAL NO. E564 OF 2021**

**JONATHAN WANGARIRIA WAKAHE** ..... **PLAINTIFF**  
**VERSUS**  
**FAULU FLOUR MILLS** ..... **DEFENDANT**

**JUDGEMENT**

1. By Plaint dated 4 May 2021, the Plaintiff commenced these proceedings against the Defendant seeking the following reliefs:
  - (i) The sum of Kshs 25 million together with interest at the rate of 3% for every month from the date when the same became due until payment in full;
  - (ii) Interest on (i) at court rates from the date of filing the suit till payment in full;
  - (iii) Costs of the suit; and
  - (iv) Any other relief that this Honourable Court may deem fit in the circumstances.

**The Plaintiff's Case**

2. The Plaintiff's case is that by an investment agreement dated 4 October 2018, he and the Defendant entered into a contract in which the Plaintiff agreed to invest in the Defendant a sum of Kshs 17 million. It was a term of the contract that the Defendant was to pay the Plaintiff a return of Kshs 510,000/= per month for a period of 60 months, commencing 4 October 2018. The Defendant was to review and revise the interest payable every 2

years as long as the company was operating. It was the Plaintiff's case that the interest rate was never revised.

3. At the hearing, PW1, the Plaintiff, adopted his witness statement dated 4 May 2021 and produced a bundle of documents dated 4 May 2021. PW1's evidence was that he invested a total sum of Kshs 25 million in the Defendant company. This investment was made in two tranches. The first sum of Kshs 17 million was paid on 4 October 2018, while the second tranche was paid pursuant to a second investment Agreement dated 7 April 2020. It was his testimony that the monthly return on his investment was at the rate of 3% per month.
4. PW1 testified that the Defendant made interest payments from November 2018 until July 2020, after which all payments ceased. He stated that despite following up, including writing formal demand letters through his Advocates, the Defendant failed to remit the interest payment or the principal sum, thus prompting the filing of this suit.
5. In support of his claim, the Plaintiff produced the two investment Agreements, the demand letters dated 7 October 2020, email correspondence, his Bank statements showing the initial payments from the Defendant and the subsequent default.

### **The Defendant's Case**

6. The Defendant filed a Statement of Defence dated 10 June 2021, in which it denies the full extent of the claim. While admitting the existence of the investment agreements, the Defendant contends that its ability to meet its obligations was hampered by economic hardships occasioned by the global COVID-19 pandemic, and further disputes the total amount of the capital it received.

7. The Defendant called one witness, DW1, Mr. Maina Kanyua, who adopted his witness statement dated 16 May 2022. The central feature of the defence case was with regard to the amount received by the Plaintiff. In his witness statement, DW1 unequivocally stated, "*We signed investment agreements leading us to receiving his monetary investment to the company totalling Kshs 25 million.*" However, during his oral testimony, DW1 sought to recant this crucial admission. He testified that after reconciling the company's books and discussing the matter with his lawyer, he had determined that the company only received Kshs 15 million from the Plaintiff and not Kshs 25 million as indicated in his statement. He offered no documentary evidence, such as the alleged reconciled accounts, to support this new position.
8. DW1 admitted that the Defendant stopped making payments to the Plaintiff in July 2020. He attributed this failure to the adverse effects of the COVID-19 pandemic, which he testified significantly impacted the company's business operations to the extent that it had to close for 2 years. He further admitted that the principal sum invested by the Plaintiff had not been repaid. DW1 concluded his testimony by expressing willingness to negotiate a payment plan for what he now claimed was an outstanding balance of Kshs 10 million.
9. The Defendant did not file its own documents but sought to rely on the Plaintiff's bank statements to prove that it had made payments.

### **Submissions**

10. At the close of the hearing, the parties filed their respective submissions. The Plaintiff argued that the evidence on record overwhelmingly established the existence of two valid investment agreements for a total of Kshs 25 million and that the Defendant had breached its obligations thereunder. It was submitted that that DW1's attempt to orally resile from his witness statement was an act of approbating and reprobating which the Court should disregard. The Plaintiff urged the Court to uphold the sanctity of the contract, citing the Court of Appeal decision in ***Hussamudin Gulamhussein Pothiwalla***,

***Administrator, Trustee and Executor of the Estate of Gulamhussein Ebrahim Pothiwalla vs Kidogo Basi Housing Cooperative Society Limited and 31 Others, Civil Appeal No. 330 of 2003.***

11. The Defendant contended that the agreement were defective, ambiguous and unenforceable. It was argued that the first agreement contained a glaring inconsistency between the amount in figures and the amount in words, while the second agreement was unsigned. The Defendant urged the Court to accept DW1's oral testimony that only Kshs 15 million was received, and based on a schedule of payments totalling Kshs 5,290,000/=, submitted that the outstanding balance was Kshs 9, 710,000/=.

**Analysis & Determination**

12. I have considered the pleadings, the evidence adduced and the rival submissions. The following issues lend themselves for determination:
- (i) Whether there exist valid and enforceable investment agreements between the Plaintiff and Defendant;
  - (ii) Whether the Plaintiff has proved his case on a balance of probabilities;
  - (iii) Who should bear the costs of the suit.
13. On the issue of the validity and enforceability of the agreements, the Defendant has strenuously challenged the same. The first agreement dated 4 October 2018 is challenged on the ground of ambiguity, while the second dated 7 April 2020 is challenged for being unsigned.
14. In its recitals, the first agreement states that the investment sum is Kshs "Seventeen Million Kenya Shillings Only (Kshs 17,000,000/-)". However, Clause 1 of the operative part of the Agreement states that the principal sum is "Kshs 17,000,00, Kshs Six Million Kenya Shillings only". This is a patent ambiguity. The primary duty of the Court in interpreting a contract is to ascertain and give effect to the true intention of the parties. Where there is an

ambiguity, the Court may look at the conduct of the parties and the internal consistence of the document itself to resolve it. The *parole* evidence rule, which generally precludes the admission of extrinsic evidence to vary a written contract, does not bar evidence intended to resolve an ambiguity.

15. In this case, Clause 3 of the same agreement provides for a monthly return of Kshs 510,000/=-, which is stated to be 3% of the principal. A simple calculation confirms that Ksh 510,000 is exactly 3% of Kshs 17 million. It is now 3% of Kshs 6 million. This internal mathematical consistency is a powerful indicator of the parties' true intention. Furthermore, and more tellingly, DW1 in his witness statement admitted receiving a total sum of Kshs 25 million, a sum which logically incorporate the Kshs 17 million from the first agreement. The Defendant's attempt to rely on what is clearly a scrivener's error is an act of bad faith that undermines its credibility. I, therefore, find that the true agreed sum under the first agreement was Kshs 17 million.
16. As for the second agreement, it is common ground that it is unsigned. The Defendant argues that this renders it unenforceable. However, under the law of contract, a contract need not be in writing to be enforceable, unless specifically required by statute, such as in transactions for the disposition of an interest in land. The present agreement does not fall into that category. The critical question is whether there was a meeting of minds and whether the parties acted on the agreement. The Plaintiff avers that he advanced Kshs 8 million, and the Defendant, in its witness statement, admitted receiving a total of Kshs 25 million. This admission, although later disowned by DW1, is irrefutable evidence that the Defendant received and accepted the benefit of the second agreement. A party cannot accept the full benefit of an agreement and then seek to avoid its obligations by citing a lack of formality.
17. Before proceeding, I must say something about the credibility of the Defendant's witness. DW1 adopted his witness statement dated 16 May

2022 as his evidence in chief. A witness statement, once adopted, becomes evidence before the Court and carries the same weight as oral testimony given on oath. In that statement, DW1 made a clear and unequivocal admission that the Defendant received Kshs 25 million from the Plaintiff. However, from the witness box, DW1 disowned this fundamental part of his sworn statement, claiming that the actual amount was only Kshs 15 million. His justification for this volte-face was a vague assertion that the error was discovered after a “discussion with our lawyer” and a reconciliation of books. He produced no evidence whatsoever to substantiate this claim. He did not produce the alleged reconciled accounts, nor did he file an amended witness statement to formally correct the record before the hearing.

18. A witness who contradicts their own sworn statement under oath without a cogent, verifiable and compelling explanation renders their testimony wholly unreliable. The casual manner in which DW1 attempted to alter a core fact of the case from the witness box demonstrates a disregard for the solemnity of the oath he had taken. The Court is entitled to, and does, draw an adverse inference against the Defendant from this conduct. The Court finds DW1 to be an unreliable witness whose oral testimony on the quantum of investment cannot be believed. Consequently, the Court will rely on his initial admission in his witness statement, which corroborates the Plaintiff's evidence, that the total sum invested was Kshs 25 million.
19. For the foregoing reasons, I find and hold that the two agreements are valid and enforceable, under which the Plaintiff invested a total sum of Kshs 25 million.
20. Having established the principal sum, the next issue is the amount repaid. The Defendant, in its submissions, provided a schedule of payments it claims to have made, which is based on the Plaintiff's Bank statements. I have meticulously examined the said statements provided by the Plaintiff against the Defendant's schedule. I note that from the Bank statement for October

2019, Cheque No. 000089 for Kshs 300,000/= was returned unpaid with the remark "Refer to Drawer". This amount, therefore, cannot be credited as payment made. The total verified sum successfully paid by the Defendant to the Plaintiff is Kshs 4,990,000/=.

21. DW1 admitted that the payments ceased in July 2020. This constitutes a clear and admitted breach of the terms of the agreement. In its defence, the Defendant pleaded economic hardship occasioned by the COVID-19 pandemic as justification for its failure to perform its contractual obligations. This is, in essence, an invocation of the common law doctrine of frustration.
22. The doctrine of frustration is applied very narrowly by the Court. It operates to discharge a contract when a supervening event, which is not the fault of either party, renders the performance of the contract impossible, illegal or radically different from what was contemplated by the parties at the time of contraction. It is not a panacea for a bad bargain or for events that merely make performance more difficult, expensive or onerous.
23. According to **Halsbury's Laws of England (3<sup>rd</sup> Ed)**, volume 8 pages 185 (ii), the **Doctrine of Frustration** para 320:

*"...the doctrine of frustration operates to excuse further performance where (i) 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 foundation of the contract will take place, and (ii) before breach performance becomes impossible or only possible in a very different way to that contemplated without default of either party, and owing to a fundamental change of circumstances beyond the control and original contemplation of the parties.*

*The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration. (emphasis added)*

24. While the COVID-19 pandemic was an unprecedented global event, it did not render the repayment of a monetary debt impossible. It may have created significant commercial hardship for the Defendant's business, but commercial hardship is not a recognized ground for frustration. The Defendant's own witness testified that the business reopened after 2 years, indicating that the disruption was temporary and did not destroy the fundamental basis of the contract. The defence of frustration is, therefore, not available to the Defendant.
25. On the issue of interest, the agreements provide for a return on investment calculated at 3% per month, which translates to an annual rate of 36%. The rate is not disputed, neither is there any claim that the same is unconscionable, unfair or commercially unreasonable. There is no evidence of unequal bargaining power, coercion or fraud. Thus, there is no reason advanced to warrant this Court's interference.
26. In view of the foregoing, I find that the Plaintiff has proved his case on a balance of probabilities. The outstanding principal sum is Kshs 20,010,000 (computed as Kshs 25,000,000 less 4,990,000/=).
27. Therefore, judgement is entered in favour of the Plaintiff against the Defendant as follows:
- (i) The sum of Kshs 20,010,000/=, with interest thereon at the rate of 3% per month from the date of filing this suit until payment in full;
  - (ii) Costs of the suit.

**Dated and Delivered in NAIROBI this 31 day of October 2025**

**HELENE R. NAMISI**  
**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For Plaintiff: Mr. Sikuku h/b Ms. Cheruiyot

For Defendant: N/A

Court Assistant: Lucy Mwangi

Judgement