Elmax Petroleum Limited v Arm Cement Plc (Civil Appeal E432 of 2024)
[2025] KEHC 16352 (KLR) (Civ) (12 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16352 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E432 OF 2024

AC MRIMA, J

NOVEMBER 12, 2025

BETWEEN

ELMAX PETROLEUM LIMITED ..... APPELLANT

AND

ARM CEMENT PLC ..... RESPONDENT

(Being an appeal from the judgement of Hon. A. Nyoike (Senior Principal Magistrate) delivered on 14th March 2024 in Nairobi CMCC No. E11067 of 2021)

JUDGMENT

The Background:

1. Through the plaint dated 13th September 2021, Arm Cement PLC, the Respondent herein, sued Elmax Petroleum Limited, the Appellant herein, in Nairobi [Milimani] Chief Magistrates Civil Suit No. E11067 of 2021 [hereinafter referred as 'the suit'] for judgment in the sum of Kshs.11,154,236/55, interest at Court rates from the date of the contra agreement dated 13th September 2017 until payment in full and costs of the suit.

2. It was alleged that on diverse dates between 2016 and 2017, the parties entered into a symbiotic relationship pursuant to a trade custom between themselves, where the Appellant was to supply furnace oil to the Respondent and in turn, the Respondent would supply cement to the Appellant. It was a term of the agreement that the parties would occasionally reconcile their accounts and settle any differences. It is on record that as at 12th September 2017, the Appellant owed the Respondent an outstanding amount of Kshs.21,676,680/14 while the Respondent, on the other hand, owed the Appellant the sum of Kshs.10,522,443/45. Vide a Contra-Agreement dated 13th September 2017, the Respondent's debt was set off against the Appellant's total debt, thereby reducing the debt owed by

the Appellant to the tune of Kshs.11,154,236/55. As the said amount was not settled, the Respondent instituted the suit.

3. The suit was strenuously defended by the Appellant through an Amended Statement of Defence and a Counter-claim dated 8th September 2023. It was the Appellant's case that while it owed the Respondent the sum of Kshs.21,676,680/=, the Appellant was to supply furnace oil and to provide transport services to the Respondent and whose payment, would be set off from the debt. That, having performed its part, the total amount arising from the provision of transport services and supply of furnace oil by the Appellant to the Respondent towards the end of 2017 was Kshs.10,522,443/=, which amount set off the debt the Appellant owed the Respondent. The Appellant argued that the Respondent started experiencing difficulties in sustaining its operations and as such, it was not utilizing as much oil as agreed by the parties. Consequently, the contract was duly frustrated and the Appellant could not continue with the supply of the furnace oil and transport services. In the end, the Appellant prayed for the dismissal of the suit with costs and further prayed for judgment on the counter claim for general damages for breach of contract, interest and costs of the suit.

4. The suit proceeded by way of viva voce evidence where each party called a witness. Several exhibits were produced in evidence. At the close of parties' respective cases, the Court rendered its judgment on 14th March 2024 where the Respondent's case was sustained and the Counter-claim struck out for non-compliance with the law. For clarity, the Court entered judgment for the Respondent as against the Appellant in the following terms: -

    i. Payment of the sum of Kshs.11,154,236.55/=;

    ii. Interest on (I) above at court rates from the date of filing suit until payment in full;

    iii. Costs.

5. It was the above decision that resulted to the instant appeal.

The Appeal:

6. Dissatisfied with the said decision, the Appellant filed a Memorandum of Appeal dated 26th March 2024 and preferred the following grounds: -

    i. That the Honourable Magistrate erred in fact and in law in failing to hold that the agreement between the Appellant and the Respondent for the provision of transport services and supply of furnace oil amounted to a variation of the initial distributorship agreement between the parties as advanced by the Appellant.

    ii. That the Honourable Magistrate erred in fact and in law in failing to make a finding that the contract between the Appellant and the Respondent was frustrated by the Respondent.

    iii. That the Honourable Magistrate erred in law by wrongly invoking the doctrine of estoppel thereby making a finding that the Appellant was estopped from claiming frustration of the contract between the parties herein.

    iv. That the Honourable Magistrate erred in fact and in law in finding that the Respondent had established and proved its case to the required standard.

7. Upon these grounds, the Appellant prayed that the judgment be set aside and instead the suit be dismissed with costs. On directions of this Court, the appeal was canvassed by way of written submissions.

8. Both parties duly filed their respective submissions and referred to several decisions whose gist will be ingrained in the latter part of this decision.

Analysis:

9. This being a first appeal, the role of this Court was discussed in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123, as follows: -

> '...this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.'

10. Additionally, the above role was discussed in Mwanasokoni vs Kenya Bus Service Ltd (1982-88)1KAR 78 and Kiruga vs Kiruga and Another effective that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles In reaching the findings. [See also Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR and Sugut v Jemutai & 3 Others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment].

11. Based on the above guidance and having perused the record, parties' submissions and the decisions referred thereto, the two issues that arise for this Court's determination are whether the doctrine of frustration applies in the instant case and, if not, then whether the suit was proved. To that end, this Court will re-look at the said aspects, starting with the applicability of the doctrine of frustration.

Whether the doctrine of frustration is applicable in this matter:

12. The doctrine of frustration is fairly well-settled in our jurisprudence. The Supreme Court of Kenya in Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology (Petition E001 of 2024) [2024] KESC 74 (KLR) (6 December 2024) (Judgment) discussed the application of the doctrine of frustration as follows: -

> 71. In summary, the doctrine of frustration releases parties from their contractual obligations when an unforeseen event fundamentally alters the nature of the contract, rendering further performance impossible or significantly different from the original agreement. Key principles include limitation to narrow circumstances, and reliance on events beyond the control or fault of the invoking party, the effect of bringing the contract to an end forthwith, without more and automatically. The final principle is the effect of fully discharging the parties from further liability under the contract from the moment the frustrating event occurs. Though accepted in civil law jurisdictions, the concept of partial discharge has been rejected in common law jurisdictions. This finds footing in the treatise Treitel on the Law of Contract, 11th edition para 50-07 it stated that:"...the contract is either frustrated or remains in force. There is no such concept as partial or temporary discharge frustration on account of partial or temporary impossibility...the concept of partial discharge in English law is restricted to obligations which are severable, whether in point of time or otherwise"
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> As a matter of logic, the doctrine of frustration operates to discharge a contract, bringing it to an immediate and definitive end. Once the doctrine is applied, the contract cannot be deemed

suspended or temporarily inoperative; it is terminated entirely unless the parties expressly agree to revive it through a subsequent agreement.

72. These are the principles that the Courts have applied time and again when asked to consider the plea of applying the doctrine of frustration. However, the doctrine of frustration is not absolute. The alleging party must prove that the frustrating event occurred without their fault or contribution. Self-induced frustration, where the event results from the party's own actions or breach, cannot be relied upon to terminate a contract.

13. The Court of Appeal also rendered itself in Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another [2014] eKLR as follows: -

(16) This now leads us to the issue of whether the agreement was genuinely frustrated." In Halsbury's Laws of England, Vol. 9(1), 4th Edition at paragraph 897: -

As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) 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 basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea.

14. In the English case of Davis Contractors Ltd -vs- Farehum U.D.C, (1956) A.C 696, Lord Radcliffe at page. 729 had the following to say: -

> ...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. "Non haec in foedera veni". It was not what I promised to do".

15. The Court of Appeal in Kenya in Billey Oluoch Okun Orinda v Ayub Muthee M'igweta & 2 others [2017] eKLR (Waki, Nambuye & Kiage, JJA), in discussing the incidence of frustration held as under: -

> ... it is our finding that the trial Court was in error in treating the contract as having been nullified on account of frustration and making an order for refund of the purchase price only. As we understand it, frustration, even where one is pleaded and proved, does not render a contract null and void. The supervening event simply makes the further performance

of a valid contract impossible and releases the parties from further obligations under the contract.

16. This Court will now apply the above principles and guidance to this matter. There is no doubt that the parties initially entered into an agreement where each was to supply some commodity to the other and thereafter offset their respective debts. The issue is whether the contract was frustrated by the Respondent's dwindling business thereby making the Appellant not to accordingly deliver the agreed commodity. This Court has carefully reviewed the evidence on record alongside the documents produced. The Appellant had been clear on the balance arrived at after the reconciliation and undertook to settle it through a Contra-Agreement. At one point, it sought for indulgence as it was in the process of disposing its parcel of land.

17. Going by the principles enunciated in the above decisions and by juxtaposing the same to the facts of this case, it is apparent that the doctrine of frustration does not apply in this case. I say so because by the time the Respondent was placed under administration in September 2018, the Appellant had ceased to supply the furnace oil and offer the agreed transport way back in September 2017; a whole year ago. Therefore, the Respondent's placement under administration could not have been the cause for the Appellant's failure to settle the agreed debt a year before the said event.

18. Deriving from the foregoing, this Court now finds and hold that the trial Court did not err in finding that the doctrine of frustration did not apply to the case at hand.

Whether the suit was proved:

21. Having found that the Appellant's defence failed, there is no other bar to the Appellant satisfying what has been due and payable to the Respondent. In other words, the suit was appropriately proved and the trial Court's judgment remains sound and anchored in law.

Disposition:

22. In consideration of the above, the following final orders do hereby issue: -

    (a) The appeal is hereby dismissed.

    (b) Costs to the Respondent.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF NOVEMBER, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

No appearance for the Appellant.

Miss Mabango, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.