REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

COMM CASE NO. E493 OF 2020

BETWEEN

JOE CARVALHO.....1ST PLAINTIFF

SUSAN SCULL-CARVALHO.....2ND PLAINTIFF

AND

DRY ASSOCIATES LIMITED.....DEFENDANT

JUDGMENT

Introduction and Background

1. By a Plaint dated 24th November 2020, the Plaintiffs state that they engaged the Defendant as their Investments Broker around February 2012 and the Defendant's role was limited to confirming the terms of investment between the investor and the issuer. The Plaintiffs aver that they invested a total of Kshs.85,000,000.00/= in *Nakumatt Holdings Limited (Nakumatt)* Notes, that is, Kshs.45,000,000.00/= on a 6-month Short-Term Note and Kshs.40,000,000.00/= on a 2-year Medium-Term Note and that

these investments were made based on representations from the Defendant's Senior Investment analyst, Ms. PU that the principal sum was guaranteed to an extent of 80% and was apparently “a better deal than any bank fixed deposit.” Further, that a draft sample note shown to the Plaintiffs also stated the principal was "guaranteed (upto 80%...)" through *Jubilee Insurance Company Limited* and reinsured by *Ocean Reinsurance Company Limited.*

2. The Plaintiffs state that the Defendant, who maintained the register of Note-holders, was fully aware of which investors were insured and which were not and that the Defendant's legal counsel eventually confirmed in an email dated 24th June 2019, that the Notes were not insured, contradicting previous representations that the principal sum was insured. The Plaintiffs accuse the Defendant of fraudulent misrepresentation as Ms. PU, represented that the principal sum was insured yet the Notes were not insured, and the Defendant was fully aware of this falsity, the false representations were made with the intention of influencing the Plaintiffs to invest in the *Nakumatt* Notes, the Plaintiffs relied on the representation that the investment was guaranteed but that the Defendant knew, or did not care to know whether the representation was false. The

Plaintiffs state that they have suffered material loss as a result, especially since *Nakumatt* is currently under liquidation.

3. The Plaintiffs state that they are entitled to pre-filing interest on the principal sums lost as a statutory right under sections **32H, 32J, and 32K** of the ***Capital Markets Act(Chapter 485A of the Laws of Kenya)*** which holds a person liable for damages for inducing the purchase of securities by false or misleading statements and that the pecuniary loss includes the principal sums and the interest that was to be earned at the rates pledged in the commercial papers. They also claim post-filing and post-judgment interest at commercial compounded rates previously applicable to the investment, as compensation for the Defendant's wrongdoing which the court has discretion to award at a fixed rate. The Plaintiffs conclude that they have proved their case on the required balance and they pray for judgment as requested in the Plaint as follows:-

A. Of the Short Term Notes:

i. Kshs. 51,490,410.97/- being the principal amount.

ii. Kshs. 2,233,284.66/- being interest on (i) up to 20th of January 2018.

iii. Interest on (i) and (ii) at the rate of 16% from January 2018 till payment in full.

B. Of the Long Term Note:

i. ***Kshs.40,000,000/- being the principal amount.***
ii. ***Kshs.3,614,246.58/- being the unpaid matured investment.***
iii. ***Kshs.1,462,646.96/- being the interest on (i) and (ii) up to 20th January 2018***
iv. ***Interest on (i), (ii) and (iii) at the rate of 20% from 20th January 2018 till payment in full.***

C. Damages for fraudulent and negligent misrepresentation

D. Interest.

E. Costs of this suit.

4. In response to the suit, the Defendant relied on the Statement of Defence dated 8th February 2021. It vehemently denies any obligation to pay the Plaintiffs and argues that the contractual debt is solely owed by *Nakumatt*, the issuer and obligor of the Notes and that the Plaintiffs are Noteholders of Nakumatt, not creditors of the Defendant whose role was strictly limited to that of a broker or placement agent. The Defendant states that it presented a range of investment options to the Plaintiffs, who made independent investment decisions. It denies providing "advice" or making recommendations, characterizing its input as mere "suggestions" The Defendant also strenuously denies making any fraudulent or

negligent misrepresentations to induce the Plaintiffs' investments and specifically denies promising or guaranteeing an 80% insurance cover for the investment. The Defence relies on disclaimer clauses in the offering documents which state that the Defendant is not a principal, does not hold funds, and accepts no responsibility for repayment by the issuer and that investors must rely on their own examination and seek independent advice. The Defendant notes that the Plaintiffs expressly indemnified the Defendant against claims arising from its role by signing the account opening forms.

5. The suit is argued to be premature because the Plaintiffs have not shown they made a formal demand for payment from *Nakumatt* as the true obligor and there is no evidence *Nakumatt* has refused to pay, so the alleged loss has not crystallized. The Defendants urge that updates on insurance were a courtesy, not an obligation and it was not responsible for securing insurance. It denies a specific telephone conversation alleged by the Plaintiffs and reiterates that any suggestions from employees were not binding advice.

6. The Defendant states that payments were to be made directly from *Nakumatt* to the Plaintiffs, and the Defendants never held the funds and it argues the suit is an abuse of process, attempting to

wrongfully transfer *Nakumatt's* debt to an innocent third party and that if *Nakumatt* paid, the suit would instantly collapse. The Defendant further claims the suit is time-barred under the ***Limitation of Actions Act*** and warns that holding the Defendant liable could lead to unjust enrichment as the debt to *Nakumatt* would still exist. For these reasons, the Defendant urges the court to dismiss the Plaint in its entirety and award it costs.

7. When the matter was set down for hearing, the 1st Plaintiff testified on behalf of the Plaintiffs (PW 1) and produced the Bundle of Documents dated 24th November 2020(PExhibit 1-32) whereas the Defendant called its Finance Officer, George Otieno Kenya (DW 1) who produced the Bundle of Documents dated 12th February 2021(DExhibit 1-34). Thereafter, the parties were directed to file written submissions which I have considered together with the evidence on record and I will make relevant references to the same in my analysis and

   determination below.

Analysis and Determination

8. In making this determination, the court is guided by the fact that the standard of proof in civil cases is on a balance of probabilities and that the burden of proof is on the party alleging the existence of a fact which they want the Court to believe. This is anchored in **section 107 (1) and (2)** of the ***Evidence Act(Chapter 80 of the Laws of Kenya)*** which 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"* and that ***"****When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person".* In ***Miller .V. Minister Of Pensions*** **1947 ALL E.R 372,** Lord Denning aptly summarised the application of the standard in the following terms:

> *"**That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case is which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)***

convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

9. The Court of Appeal in **James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 (KLR)** simply put it that *'Courts will make a finding based on which party's version of the story is more believable.'*
10. With the above in hindsight, I will now proceed to determine this matter which from the pleadings and submissions calls for determination of the following issues:
    a) *Whether the suit is time barred*
    b) *Whether the Defendant is guilty of fraudulent and negligent misrepresentation*
    c) *Whether the Plaintiffs are entitled to the reliefs sought*

Whether the suit is time barred

11. The Defendant's strongest preliminary argument is that the Plaintiffs' claim is barred by the ***Limitation of Actions Act*** as the suit is fundamentally a contractual claim arising from the brokerage agreement. It contends that the Plaintiffs invested in February 2012, and the suit was filed in November 2020 and that the statutory limitation period for a breach of contract claim is six years

and since the cause of action arose in 2012, the claim is therefore time-barred.

12. The Defendant submits that a claim cannot bypass the time limitation simply by being phrased as "fraudulent misrepresentation" and that to succeed, the Plaintiffs must strictly prove the particulars of fraud and deceit, which the Defendant submits they failed to do. In response, the Plaintiffs submit that a party culpable for misrepresentation loses the benefit of any limitation of liability or exclusion clauses and that the cause of action arose on 24th June 2019, when the Defendant's legal counsel confirmed the Notes were not insured and the suit, filed on 24th November 2020, is well within the three-year limitation period for tortious claims.

13. From the record, I note that the Plaintiffs were apprehensive that the Notes were not insured at least from 13th November 2017 as PW 1 wrote an email urging the Defendant to *"….move the money into an investment that is insured"* (pg.43 of PExhibit 1). However, on 12th January 2018, the Defendant wrote to PW 1 informing him that it was working *"…on the insurance renewal for Nakumatt…"*(pg. 47 of PExhibit 1) which meant and implied that there was an existing insurance coverage of the investment and that what was pending was its renewal. It is also correct that

between January and August 2018, the Defendant, through its email correspondences to the Plaintiff gave an impression that they were pursuing the investments and an insurance claim had been lodged. It is not until 24th June 2019 that the Defendant's counsel confirmed in an email that the Notes were not insured under the insurance policy. A demand letter was then sent on 4th November 2020 and this suit was filed some 20 days later. From this, I am in agreement with the Plaintiffs that the cause of action arose on 24th June 2019 when it was confirmed to them that their investment was not covered under the insurance in respect of Nakumatt's Commercial Paper Programme and therefore, their claim commenced within the timelines set out under **section 4(2)** of the ***Limitations of Actions Act.*** This objection by the Defendant therefore fails.

Whether the Defendant is guilty of fraudulent and negligent misrepresentation

14. From the record, it is not in dispute that as per the Defendant's Terms of Business(pg. 1 of PExhibit 1), the Plaintiffs were the investors, *Nakumatt* was the issuer of the Notes and the Defendant was the broker acting "as an agent putting the investor and the issuer together". The last term therein also provided that the Defendant "does not guarantee a Commercial Paper or Short Term

Note investment in any way". PW 1 confirmed in his testimony that the money they invested went to *Nakumatt* directly and that the Defendant did not hold any of those funds.

15. PW 1 further confirmed that as per Nakumatt's Pricing Supplement (pg. 11 of PExhibit 1), the Notes constituted among others *"unsecured obligations of the issuer*" and that as per PU's email of 3rd April 2017(Pg. 37 of PExhibit 1), she was asking PW 1 to choose the investment options and that the investment decision rested with him. As per the Important Notes indicated on the face of the Notes (Pg. 33 of PExhibit 1), the Note Holders, that is the Plaintiffs, were bound by the conditions therein and that the Register was maintained on behalf of *Nakumatt* by the Defendant. PW 1 also confirmed that the payout was to be done by *Nakumatt* and that as per Clause 6.2 of the Notes' Conditions(pg. 129 of DExhibit 1) , disputes were to be determined by way of arbitration but that the Plaintiffs did not brining any claim against the Defendant.

16. PW 1 also confirmed that as per the Defendant's Account Opening Forms and Acknowledgement (Pg. 24 of DExhibit 1), the Defendant only offered brokerage services and that as per Clause 2.2 of an insured Note (pg.106 of DExhibit 1), the principal sum invested *"….is guaranteed up to 80% of the total program size through Jubilee Insurance Company Limited and 100% reinsured by Ocean*

reinsurance Company Limited" . As per the email from PU of 3rd May 2026(pg. 25 of PExhibit 1), PU suggested that the Plaintiffs invest in Notes where 80% of the principal was guaranteed and PW 1 stated that they proceeded based on this advice and under the presumption that the Notes were insured. PW 1 stated that he read the email disclaimer (pg. 26 of PExhibit 1) where the Defendant disclaimed liability for any loss arising out of the email being sent.

17. PW 1 stated that he was only informed that the Notes were not insured 3 years later and that the Notes kept rolling over as the Defendant was unable to pay and that as per the email of PU of 27th October 2016(pg. 30 of PExhibit 1), the Defendant maintained that the 80% insurance guarantee was still applicable with *Nakumatt*.

18. In his evidence, DW 1 testified that the Defendant's role was included confirming the terms of engagement and the investment with the issuer. He stated that PU advised the Plaintiffs to go for the Nakumatt investment option because the principal was 80% guaranteed and that she followed up with the email of 27th October 2016 stating the 80% is still applicable with *Nakumatt*. He confirmed that the email of 12th January 2018 informed the Plaintiffs that the Defendant was working on the renewal of the insurance and that a renewal meant that the insurance was in

place in the first place. DW 1 confirmed that from the record, the Plaintiffs' investment with Nakumatt was actually not insured. He also admitted that the Defendant kept the Register of Nakumatt's investors and that it also kept the Register of uninsured Notes including that of the Plaintiffs but that on emails, they informed the Plaintiffs that the Notes were insured. DW1 also confirmed that the Defendant had no email or correspondence advising the Plaintiffs that their investments were not insured and that as per PW1's email of 15th May 2018(pg. 58 of PExhibit 1), the Defendant's CEO believed that the Notes were part of the insurance claim that had been submitted to *Mayfair Insurance Company.*

19. The undisputed evidence established on the required balance of probability establishes that:-

    a) That the Defendant had a valid contractual engagement with the Plaintiffs.
    b) The said contractual engagement imposed obligations on the Defendant in the execution of its mandate to the Plaintiffs.
    c) The Defendant invited the Plaintiff to invest and in its contractual terms of engagement with the Plaintiffs undertook to confirm the terms governing the investment opportunities and conditions attaching to the respective notes.

d) The Defendant's Senior Investment analyst Ms. Pavan Ubhi (PU) made specific representations to the Plaintiffs that their investments would benefit from a 80% investment guarantee.

e) The said representations were meant to influence the Plaintiffs to invest in the Nakumatt Commercial Notes.

f) The Defendant kept a Register of Nakumatt's investors and that it also kept the Register of uninsured Notes register of who had invested in the said Commercial Notes.

g) As the Custodian of the Register of Commercial Notes the Defendant knew they had not insured the Plaintiffs investment.

h) The Defendant made a representation to the Plaintiff that their investment had been insured both orally and in writing.

i) The Defendant was fully aware that the representations they made to the Plaintiffs that the investments were guaranteed were false.

j) The Plaintiffs relied on the said representations.

k) The Plaintiffs initiated this suit on account of the fact that as a result of the false representation thereof they had suffered material loss.

20. As submitted by the Defendant, the **8th Ed.** of **Black's Law Dictionary** defines 'fraudulent misrepresentation' as *"A false statement that is known to be false or is made recklessly without knowing or caring whether it is true or false and is intended to*

induce a party to detrimentally rely on it." I am also in agreement with the parties' submissions that over time, case law has settled 6 elements for proof of the tort of fraudulent misrepresentation. (See ***Derry v Peek* (1889) 14 App Cas 337**). The elements are as follows:-

i. *A representation or statement was made by the Defendant.*
ii. *The representation was false.*
iii. *The Defendant knew or did not care to know whether the representation was false.*
iv. *The Plaintiff relied on the representation.*
v. *The representation was made with the intention of influencing the Plaintiff.*
vi. *The Plaintiff suffered a material loss.*

(Also see **Sing'Oei v Busienei [2024] KEHC 402 (KLR)**]

21. Applying the aforementioned elements to the facts in this case, it is clear that the Defendant, through its representative PU, made representations to the Plaintiffs that 80% of their principal investment will be guaranteed if they invested in *Nakumatt's* Commercial Papers/Notes. It is also clear that the Defendant represented to the Plaintiffs that the investment was insured and that they were working on a renewal. It is evidently clear that this representation was false as the investment was admittedly not

insured. It is patently clear that the Defendant knew this representation was false yet enticed the Plaintiff to believe that it was true. Accordingly, I find that the test of fraudulent representation has been established to the required standard for the following reasons.

22. From the PW1's email of 25th May 2018(pg. 62 of PExhibit 1), it was represented

to him that a claim had been lodged with the insurance company and that the Plaintiffs stood to get a sum of around Kshs. 49 million and BM confirmed in an email of 20th August 2018(pg.74 of PExhibit 1) that the Plaintiffs had been included in the claim. By a letter dated 22nd February 2018(pg. 87 of the PExhibit 1), the insurance company stated that the claims were not being admitted under the policy for various reasons, to which the Defendant responded through the letter of 26th April 2018, written by the Notes' Trustee (pg. 89 of PExhibit 1) where they denied the rejection by the insurer and demanded full settlement of the claim. The Defendant knew that the investment could not have been guaranteed and the claim would fail as it knew it had not insured the investment therefore could not sustain the claim for compensation from the insurance company.

23.. It is therefore my finding that the Defendant knew that that the Notes had not been insured yet went ahead and gave a representation to the Plaintiff knowing the same to be untrue that the investments were insured. Suffice to note that the Plaintiff had repeatedly sought a confirmation of the insurance of the investment.

24. In Ramji & another v Dry Associates Limited (Commercial Cause E088 of 2018) [2025] KEHC 2258 (KLR), the facts of which are on all fours with the case before you, the High Court found as follows:-

> *"This Court already found that a representation was made to the plaintiffs by the defendant that the plaintiffs' funds were secured by an insurance policy with APA Insurance Co. Ltd, but later the defendant informed them that the Insurance was provided by Jubilee Insurance and not APA Insurance Co. Ltd. Further, PW1 in his examination in chief testified that in February 2020, he received a call from Ms Hinah of the defendant's firm who informed them that their funds were not insured, and advised them to roll over the investment again in November 2016, staggering the maturity dates into five separate investments to facilitate payment by Nakumatt Holdings. This is evident from the email dated 8th March 2017 from the plaintiffs to the defendant and the response thereto, produced as plaintiffs' exhibit Nos. 49 & 40. From the said evidence, it*

is my finding that the representations made by the defendant were false and it did not care whether or not it was false, as its agent by the name Mr. Pavan Urbhi, continued assuring the plaintiffs that their funds were insured thus safe, despite being fully aware that the said funds were not insured."

25. It is fundamental to note that the Defendant kept the record of all the insured and uninsured notes s and therefore had an obligation to render true testimony which they did not.
26. The representation to the Plaintiffs that the principle sum was 80% guaranteed is fraudulent and I so find.
27. Having established that the Defendant maintained the register of Note-holders and was fully aware of which investors were insured and which were not it was under a fiduciary duty to be candid to the Plaintiffs and to render true account which it did not, to the contrary it knowingly misrepresented facts to the Plaintiffs knowing the same to be untrue.
28. I note that Section 32H of the Capital Markets Act (Cap 485A) Laws of Kenya ("CMA Act"), provides that where a person induces a person to subscribe for or purchase securities by making or publishing any statement that is false, misleading or deceptive or conceals material facts is guilty of an offence.

29. I further note that under S. 32J of the Capital Markets Act (Cap 485A)A person who, directly or indirectly, for the purpose of inducing the subscription for, sale or purchase of securities by another person of any company, or of any other listed securities, or makes any statement which is, at the time and in light of the circumstances in which it is made, false or misleading with respect to any material fact and which that person knows or reasonably ought to know is false or misleading; or statement which is, by reason of the omission of a material fact, rendered false or misleading and which that person knows or ought to know is rendered false or misleading by reason of omission of that fact, also commits an offence.
30. In this case having established on a balance of probability that the Defendant falsely induced the Plaintiff to invest on the basis that their investment was guaranteed when it knew the same was not insured therefore not guaranteed breached their contractual and fiduciary duty to the Plaintiff occasioning financial loss to the Plaintiffs and is liable to pay the Plaintiffs the Pecuniary loss incurred, which in this case has been particularized in paragraph 25 as the respective principle sums, and the interest that was to be earned on the said sums at the rates pledged in the respective commercial papers the

Defendant induced the Plaintiffs to purchase through blatant misrepresentation.

31. Further, by the provisions of Section 32K of the Capital Markets Act in addition to being convicted for above cited acts, a person found to be guilty is liable in an action by a person who has sustained pecuniary loss as a result of having purchased or sold securities at a price affected by the act or transaction which comprises or is the subject of the offence, to an action for damages in respect of the loss concerned. In this case the Plaintiff having established that it incurred a loss is therefore entitled to compensation.

Conclusion and Disposition

32. In the upshot, the court finds that the Plaintiffs has fulfilled all the necessary elements to justify a claim of fraudulent or negligent misrepresentation against the Defendant and accordingly, the Plaintiffs' suit is hereby allowed as prayed.

33. Having established that the Defendant falsely represented facts knowing the

same to be false, I find that the same entitles the Plaintiffs to damages under Section 32 of the CMA Act which I proceed to award.

34. Judgement is therefore entered for the Plaintiffs against the Defendant as below:-

A. Of the Short-Term Notes:

i) Kshs. 51,490,410.97/- being the principal amount.

ii) Kshs.2,233,284.66/- being interest on (i) up to 20th of January 2018.

iii) Interest on (i) and (ii) at the rate of 16% from January 2018 till payment in full.

B. Of the Long-Term Note:

iv) Kshs.40,000,000/- being the principal amount.

v) Kshs.3,614,246.58/- being the unpaid matured investment.

vi) Kshs.1,462,646.96/- being the interest on (i) and (ii) up to 20th January 2018.

vii) Interest on (iv) (v) and (vi) at the rate of 20% from 20th January 2018 till payment in6 full.

C. Damages. I decline the award for damages on account of the fact that the interest award covers the loss suffered from the date of investment until payment in full.

D. Costs of this suit are awarded to the Plaintiffs.

DATED SIGNED and DELIVERED virtually at NAIROBI this 4th DAY of DECEMBER 2025

.....

J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF:-

1. Mr. for the Plaintiff.
2. Mr. for the Defendant.
3. Ivan- Court Assistant