

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
COMMERCIAL AND TAX DIVISION
CIVIL APPEAL NO. 446 OF 2013

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| PAUL SOURABH | | 1ST PLAINTIFF |
| TEDD MOYA | | 2ND PLAINTIFF |
| VERSUS | | |
| DAMODARA VILAS VIJAYAN | | 1ST DEFENDANT |
| SHEELA DAMODARA VIJAYAN | | 2ND DEFENDANT |
| KALATHIL RADHAKRISHNAN VIMAL | | 3RD DEFENDANT |
| AND | | |
| SILENT VALLEY CREAMERIES LTD | | INTERESTED PARTY |

JUDGEMENT

1. By Amended Plaint dated 10 February 2020, the Plaintiffs herein commenced proceedings against the Defendants, jointly and severally, seeking the following reliefs:
 - (i) Special Damages in the sum of Kshs 23,300,000/=;
 - (ii) General Damages for misrepresentation;
 - (iii) An order for the Defendants to render true and proper accounts together with all the records of the requisite statutory payments for the Interested Party from its incorporation until 2 October 2012;
 - (iv) An order for the Defendants to render true and proper accounts for all income received from the Plaintiffs' customers and other customers, not

- only by themselves but also through their agents, affiliated companies and proxies from 2 October 2012 up to payment in full;
- (v) Further, and in the alternative, an order imposing a lien over all the assets of the non-competition clause from 2 October 2012 up to payment in full;
 - (vi) IN THE ALTERNATIVE, a Declaration that the Defendants have failed and/or refused to perform their obligations under the agreement dated 12 October 2012 and that the Plaintiffs are entitled to a refund of the deposit paid together with any such monies expended on the interested party from 2 October 2012 to date;
 - (vii) Costs of the suit;
 - (viii) Interest on (i) to (iii) above from the date of filing this suit until payment in full at court rates
2. The 1st and 2nd Defendants filed an Amended Defence and Counterclaim dated 16 December 2013 seeking to have the Plaintiffs' suit be dismissed with costs and an order that the Plaintiffs pay the balance of Kshs 5,915,515/= together with interest from the date the last payment fell due until payment in full.
3. The Plaintiffs filed a Reply to Defence and Defence to Counterclaim dated 18 May 2021. Judgement in default was entered against the 3rd Defendant who did not file a Defence.

Brief Background

4. The Interested Party ("*the Company*") is a limited liability company which carried on the business of handling, processing milk and its by-products, particularly cheese. By a Share and Business Purchase Agreement ("*the Agreement*") dated 2 October 2012, the Defendants agreed to sell and the Plaintiffs agreed purchase the Company as a going concern and the Defendants' shares in the Company at the price of Kshs 11 million.

5. The intention of the parties and conditions precedent included:
- (a) To enter into a share subscription and shareholders' arrangement immediately upon execution of the Agreement and payment of the deposit in the sum of Kshs 1 million by the Plaintiffs and the Defendants would hand over the management and possession of the business and transfer/allot all the shares in the Company to the Plaintiff;
 - (b) As part of the due diligence process and for transitional reasons, the Defendants would hold over, train the Plaintiffs in running the cheese business and continue to assist in the management of the Company until the purchase price was paid in full and the Plaintiffs were able to manage and run the business;
 - (c) The Plaintiffs entered into the transaction on the understanding and representation by the Defendants that the quality of the Company was unmatched, the expertise of the Defendants and the senior staff was the most extensive in the country, the business at that moment generated in net profit about Kshs 700,000/= and that the clientele, supply chain and market of the Company were on a rapid incline;
 - (d) An urgent and immediate need by the Defendants, immediate handover while conducting due diligence and a study of the business and the profitability of the business was the main factor that induced the Plaintiffs to pay the consideration and particularly to make the deposits in the manner referred in the Agreement.
6. It was agreed that the Plaintiff would purchase the shares together with all the business of the Company on and with immediate effect together with all the rights and privileges attaching or accruing to the shares after the Completion Date. The Plaintiffs were entitled to receive dividends and distributions declared, paid or made by the Company in respect of the shares

as well as the profits of the business upon execution of the Agreement and payment of the deposit of Kshs 1 million.

7. It was further agreed that the all-inclusive purchase price of Kshs 11 million would be paid as follows:
 - (a) A deposit of Kshs 1 million immediately upon execution of the Agreement;
 - (b) The balance of Kshs 10 million would be paid in equal monthly instalments of Kshs 500,000/- together with further two lumpsum payments of Kshs 2 million and Kshs 4 million be made within October 2021 and then after 3 months respectively until payment in full;
 - (c) The equal monthly instalments of Kshs 500,000/= to be made to the Defendants' nominated account.
8. It is common ground that the Plaintiffs paid the initial deposit of Kshs 1 million and further sum of Kshs 2 million, bringing the total consideration paid to Kshs 3 million. The balance of Kshs 8 million remains unpaid, forming the basis of the counterclaim.
9. The transaction was structured such that the Defendants would hand over the company as a going concern effective 1 October 2012. Crucially, Clause 1 of the Agreement mandated the Defendants to provide transitional support and training to the Plaintiffs. To facilitate this, the 3rd Defendant stayed on as a transitional manager.
10. The relationship between the parties deteriorated rapidly within months of the takeover. The Plaintiffs allege that they discovered the Company was not the thriving enterprise represented by the Defendants. They claim the Defendants had inflated the profitability, concealed liabilities, and that the machinery was decrepit. Matters came to a head in January 2013 when the

3rd Defendant left the country for India, allegedly taking with him vital company records and leaving the Plaintiffs to navigate a financial minefield.

11. Conversely, the Defendants maintain that they handed over a profitable entity with a robust supply chain. They contend that the Plaintiffs' difficulties arose from their own mismanagement and inexperience in the dairy sector. The 1st Defendant testified that the missing records were actually stolen from his vehicle on 30 December 2012 during a stop at Thomson Falls, an event he reported to the Police.

Analysis & Determination

12. The parties filed an Agreed List of Issues dated 2 June 2021 comprising 18 points. These issues have been consolidated and rephrased into issues for determination:

- (i) Whether the Agreement contained Conditions Precedent and Warranties that were breached by the Defendants;
- (ii) Whether the Defendants committed fraudulent misrepresentation inducing the Plaintiffs to enter into the contract;
- (iii) Whether the Plaintiffs have strictly proved their claim for special damages amounting to Kshs. 23,300,000/=;
- (iv) Whether the Defendants are entitled to the Counterclaim for the balance of the purchase price and whether the Plaintiffs are entitled to set-off;
- (v) What are the appropriate reliefs regarding interest and costs?

Conditions Precedent and Breach of Warranties

13. The sanctity of contracts is a foundational principle of Kenyan commercial law, embodied in the maxim *pacta sunt servanda*. Parties are bound by the terms of the agreements they voluntarily enter into. The Agreement herein contained specific conditions precedent under Clause 1 and Warranties under Clause 10. Clause 1 required the Defendants to, *inter alia*, hand over management and possession of the business,

transfer/allot all shares to the Purchasers, hold over and train the Purchasers in running the cheese business and assist in management until the full purchase price was paid.

14. Clause 10 contained warranties where the Defendants affirmed that the Company had no undisclosed liabilities or abnormal contracts, the Company was not in default of any statutory obligations, the tax returns were correct and not in dispute and all necessary records and books would be delivered to the Purchasers.
15. A central pillar of the Plaintiffs' case is the Defendants' failure to hand over the Company's books of account, tax records, and statutory files. The 1st Defendant (DW1) admitted in his testimony and in his letter to the police that as of 30 December 2012—three months after the handover date—he was still in possession of the Company's Purchase Invoices, Sales Invoices, and VAT Files, which he claims were stolen from his car at Thomson Falls.
16. This admission is damning. Under Clause 5(vii) of the Agreement, the Defendants undertook to release all records, books and returns to the Plaintiffs immediately upon execution of the Agreement in October 2012. The retention of original primary documents by the Vendor three months post-completion is a flagrant breach of this warranty.
17. The Defendants rely on a Police Abstract dated 31 December 2012 to excuse the non-production of these documents. While I accept that a report was made, the circumstances surrounding the loss are legally precarious for the Defendants. The loss of these documents crippled the Plaintiffs' ability to verify the historical performance of the company and to defend against tax assessments.

18. Section 119 of the Evidence Act empowers this Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events and human conduct. It is contrary to the common course of business for a vendor to retain the only copies of Sales Invoices and VAT Files long after the business has been sold.
19. In ***Kenya Red Cross v IDS (Suing as the Legal Representative of the Estate of MDR (Deceased) [2020] eKLR***, where the Court held that the withholding or non-production of evidence solely in the possession of one party invites an adverse inference.
20. Consequently, I find that the Defendants breached the warranty to provide records. This breach is not merely technical; it goes to the root of the going concern value of the business. Without records, the goodwill and auditability of the company were severely compromised.
21. Clause 10(d) of the Agreement stated: "*There are no outstanding notices or demands served on the Company in respect of any of its assets.*" However, evidence led during trial, including the statements from Equity Bank and the admission by DW1 under cross-examination, revealed significant undisclosed liabilities. DW1 admitted there was a sum of Kshs. 518,161.00 owing to suppliers at the time of handover. The KRA Ledger provided by the Defendants themselves shows a history of tax arrears, with a balance of over Kshs. 13,000.00 as far back as 2010, and no evidence was adduced to show these were cleared by October 2012.
22. These undisclosed debts constitute a breach of warranty. In ***MDW Holdings Ltd v Norvill EWCA Civ 883***, a persuasive precedent from the UK Court of Appeal regarding share purchase agreements, it was held that the measure of damages for breach of warranty is the difference between the value of the shares as warranted and their true value. In this case, the true value of Silent Valley Creameries was diminished by exactly the amount of the undisclosed debts (Kshs. 518,161.00 + undisclosed tax liabilities).

Fraudulent Misrepresentation

23. The Plaintiffs claim that they were induced to enter the contract by fraudulent representations, specifically, that the business generated a net profit of Kshs. 700,000.00 per month, that the staff were experts, and that the machinery was in good condition.
24. It is trite law in Kenya that fraud must be specifically pleaded and strictly proved. The standard of proof is higher than the ordinary balance of probabilities, though lower than beyond reasonable doubt.
25. In ***Central Kenya Ltd v. Trust Bank Limited & 4 Others [1996] eKLR***, the Court of Appeal held: "*Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.*"
26. Similarly, in ***Vivo Energy Kenya Limited v. Maloba Petrol Station Limited & 3 Others [2014] eKLR***, the Court emphasized that allegations of fraud must be particularized and proved with distinct evidence.
27. The Agreement at Clause 1(d) does indeed state that the business "*presently generates in net profit about Kenya Shillings Seven Hundred Thousand*". This moves the statement from a pre-contractual representation to a contractual term. However, to prove fraud, that the Defendants knew this was false, the Plaintiffs needed to reconstruct the accounts for the period preceding October 2012 to show that the profit was nowhere near that figure.
28. The Plaintiffs failed to produce a forensic audit report or reconstructed accounts. They relied heavily on the fact that they could not make such profits after taking over. However, post-contractual performance is not conclusive proof of pre-contractual fraud. A business may fail under new management for myriad reasons including the change in management style,

which the Defendants alluded to, for example, failing to supply specific customers.

29. While the Defendants' inability to produce the 2012 accounts due to the alleged theft is suspicious, the burden of proving fraud lay on the Plaintiffs. They did not summon the Kenya Revenue Authority to produce the returns filed by the Defendants in 2011/2012. They did not call the suppliers to testify on the volume of milk supplied prior to October 2012 to prove that the production capacity could not support a Kshs 700,000/= profit.
30. In *Derry v Peek (1889) 14 App Cas 337*, applied in *Carvalho & another v Dry Associates Limited [2025] KEHC 18523 (KLR)*, fraud is defined as a false representation made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.
31. Without concrete evidence of the actual figures before the sale, I cannot make a finding of fraud. I can find negligence or breach of warranty, but the high threshold for fraud has not been met.

Special Damages

32. The Plaintiffs have claimed Kshs. 23,300,000/= in special damages. The breakdown is as follows:
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| (i) Overdraft facility: | Kshs. 15,000,000.00. |
| (ii) Unpaid products taken by Defendants: | Kshs. 3,000,000.00. |
| (iii) Unremitted customer payments: | Kshs. 1,000,000.00. |
| (iv) Under-invoicing to affiliates: | Kshs. 2,000,000.00. |
| (v) Personal bills paid: | Kshs. 300,000.00. |
33. It is an established principle of Kenyan law that special damages must be specifically pleaded and strictly proved. This is not a mere technicality; it is a fundamental requirement of justice to prevent parties from being saddled with liability for unverified sums.

34. In ***Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR***, the Court of Appeal was emphatic:

"It is a legal requirement that apart from pleading special damages, they must also be strictly proved with as much particularity as circumstances permit."

35. Further, in ***DAVID BAGINE v MARTIN BUNDI [1997] KECA 54 (KLR)*** and ***Hahn v. Singh [1985] KLR 716***, it was held that the degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.
36. The Plaintiffs aver they had to take an overdraft facility to keep the business running. To prove this, the Court expected to see the Letter of Offer from the Bank granting the facility, bank statements showing the drawdown of Kshs. 15 million, evidence of interest payments or penalties. The Plaintiffs produced none of these. The Plaintiff merely asserts the loss.
37. As held in ***C Mehta & Co Limited v Standard Bank Limited [2014] eKLR***, financial losses such as interest or overdraft costs must be substantiated by documentary evidence. A claim of this magnitude cannot be sustained on oral testimony alone.
38. The Plaintiffs allege the Defendants took cheese and ghee. While the Defendants admitted taking some goods, totalling roughly Kshs. 1.5M, discussed under offsets, the Plaintiffs failed to produce delivery notes, signed invoices, or stock ledgers proving the Kshs. 3 million. Under Section 107 of the Evidence Act, he who asserts must prove.
39. The claim for Kshs 2 million for under-invoicing requires a comparative analysis. The Plaintiffs needed to show: "Invoice A to Defendant's company =

Kshs. 100" vs "Invoice B to independent customer for same goods = Kshs. 150." No such comparative documentary evidence was tendered.

40. Regarding the unremitted cash and personal bill, no receipts, petty cash vouchers, or witness statements from the customers who allegedly paid cash to the Defendants were adduced.
41. In short, the Plaintiffs have failed to discharge the burden of strict proof. While they may well have suffered losses, the Court cannot operate on estimates or sympathy. The claim for Kshs. 23,300,000.00 must fail in its entirety for want of evidence.

The Counterclaim

42. The Defendants seek the balance of the purchase price. The agreed price was Kshs. 11 million. The Plaintiffs paid Kshs 3 million. The gross balance was Kshs 8 million.
43. The Defendants, in their Counterclaim and submissions, voluntarily reduced their claim to Kshs. 5,915,515.00. This implies they have applied a credit/set-off of Kshs. 2,084,485.00. The breakdown of this set-off, as gleaned from the documents and submissions, appears to cover goods supplied to Kavitha Investments and Floculture (approx. Kshs. 1.5M) and the supplier debt of Kshs. 518,161.00 admitted by DW1.
44. The Plaintiffs argue that because of the Defendants' breach, they should not pay anything. However, they retained the shares and the business assets. The remedy for breach of warranty is damages, not total rescission unless there is a total failure of consideration. Under Order 21 Rule 17 of the Civil Procedure Rules, this Court can set off the sums found due. Since the Defendants have already conceded the debts they owed to the company, by reducing the claim from Kshs 8 million to Kshs 5.9 million, and since the

Plaintiffs failed to prove any additional specific losses of Kshs 23 million, the logic dictates that the Defendants are entitled to the remaining balance.

45. The Defendants essentially performed a set-off which benefits the Plaintiffs by approximately Kshs. 2.1 million. This adequately compensates the Plaintiffs for the proven breaches, that is the undisclosed supplier debt and goods taken.

Interest and Costs

46. The Defendants seek interest from the date of default, that is January 2013. However, given the Defendants' contributory negligence—specifically the negligent handling of company records which exacerbated this dispute—it would be inequitable to award interest for the entire period of 10+ years. Accordingly, I will award interest only from the date of filing the Amended Defence and Counterclaim, that is 16 December 2013, and at court rates rather than commercial rates, as the relationship had ceased to be purely commercial and became litigious due to mutual breaches.
47. Normally, costs follow the event. However, the Defendants were in breach of the warranty to provide documents. Their carelessness in losing the VAT files and invoices significantly hampered the Plaintiffs' ability to run the business. This conduct merits a departure from the general rule. I order that each party shall bear their own costs of this suit.
48. In the upshot, I enter judgment as follows:
- (i) The Plaintiffs' suit is dismissed in its entirety.
 - (ii) Judgment is entered for the 1st and 2nd Defendants on the Counterclaim against the Plaintiffs, jointly and severally, in the sum of Kshs. 5,915,515.00.

(iii) The said sum of Kshs. 5,915,515.00 shall accrue interest at court rates from 16 December 2013 until payment in full.

(iv) Each party shall bear their own costs of this suit.

Dated and Delivered at Nairobi this 30 day of January 2026

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

Delivered on virtual platform in the presence of:

For Plaintiffs: Mr Otieno h/b Anzala

For 1& 2nd Defendants: Ms Kimuge

For 3rd Defendant: N/A

For Interested Party: N/A

Court Assistant: Lucy Mwangi