

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**COMM CASE NO. E158 OF 2023**

**BETWEEN**

**AWIL ABDIRAHMAN**

**ABDULLE.....PLAINTIFF**

**AND**

**JAVA HOUSE LIMITED.....1<sup>ST</sup>**

**THIRD PARTY**

**KUKITO LIMITED.....2<sup>ND</sup> THIRD**

**PARTY**

**DERRICK VAN HOUTEN.....3<sup>RD</sup>**

**DEFENDANT**

**KISS COSMETICS LIMITED.....4<sup>TH</sup>**

**DEFENDANT**

**JUDGMENT**

**Introduction and Background**

1. By a Plaint dated 6<sup>th</sup> April 2023, the Plaintiff states that he is the registered owner of the property Title No. CIS MARA/OLELESWA/13541 in Narok where he operates a petrol station; *OLA ENERGIES* and that sometime in May 2021, an agent representing the 1<sup>st</sup> Third Party

(JAVA) approached him about opening a coffee shop on his premises. That the 3<sup>rd</sup> Defendant (VAN HOUTEN) confirmed this interest and JAVA's Head of Property approved the project, and the Plaintiff agreed to fund renovations to meet their specifications.

2. The Plaintiff states that a six-year lease agreement was signed on 6<sup>th</sup> December 2021, with a monthly rent of Kshs.350,000.00/= and that between November 2021 and August 2022, the Plaintiff made multiple payments totaling Kshs.13,295,000.00/= to VAN HOUTEN as these funds were requested for various purposes including renovation deposits, contractor payments, purchase of coffee beans for JAVA and purchase of kitchen equipment for the 2<sup>nd</sup> Third Party (KUKITO). The Plaintiff further claims that he spent Kshs.23,467,609.00/= directly on contractors for demolition, renovation, and branding of his premises to suit the Defendants' requirements.
3. The Plaintiff avers that despite the lease and these expenditures, JAVA never paid any rent and on 19<sup>th</sup> October 2022, the Plaintiff received a notice terminating the lease, citing the project as "not commercially viable". The Plaintiff alleges that a promised refund of Kshs.6,350,000.00/= by VAN HOUTEN in October 2022 never materialized and that the equipment and coffee paid for were

never supplied. It is at this point it dawned on the Plaintiff that he had been conned by the Third Parties and the Defendants and there was no intention by the Defendants from the onset to set up their restaurant in the premises. The Plaintiff claims fraud for reasons of the Third Parties and Defendants' failure to pay rent for over 10 months, terminating the lease without providing the required 3 months' rent in lieu, obtaining money for equipment and coffee that was never supplied, making false representations about their intention to start the business solely to extract money from the Plaintiff and causing the Plaintiff to incur massive renovation expenses with no genuine intent to operate.

4. As such, the Plaintiff seeks various reliefs from the court against the Third Parties and the Defendants including Kshs.5,684,000.00/= being unpaid rent, Kshs.23,467,609.00/= being money spent on construction and renovations, Kshs.13,295,000.00/= being money paid directly to VAN HOUTEN for fees, signage, marketing, IT, and equipment, Kshs.3,450,000.00/= pursuant to a finance agreement with the 4<sup>th</sup> Defendant (KISS COSMETICS), Kshs.30,000,000.00/= being general damages for loss of business opportunities, Interest and costs of the suit.

5. During the course of these proceedings, the Plaintiff withdrew his case against JAVA and KUKITO, maintaining his case against VAN HOUTEN and KISS COSMETICS("the Defendants"). The Defendants opposed the suit through the Amended Statement of Defence and Counterclaim dated 16<sup>th</sup> October 2024 and Statement of Defence dated 27<sup>th</sup> July 2023. VAN HOUTEN seeks to have the suit against him struck out, arguing that the corporate veil protects him as he was acting for Java, not personally and he invokes the legal principle *Ex turpi causa non oritur actio*, suggesting the Plaintiff's payments were a bribe and thus the court should not assist him.
6. VAN HOUTEN denies introducing himself as an agent or making promises about the restaurant but he admits to the Head of Property's visit as averred by the Plaintiff. He also vaguely admits there "may have been" a lease but provides no details and impliedly admits receiving money into his personal account but claims the money was for "other personal ventures, gifts, charity, or friends" and was not for JAVA contractors, renovations, or equipment as averred by the Plaintiff. He states that the Plaintiff has not provided sufficient proof of the purpose or destination of the funds and further denies all knowledge of the coffee purchase financing and the equipment supply agreement.

7. VAN HOUTEN denies any fraud, arguing that terminating a lease for commercial viability is normal business, not a con and he further denies causing any loss, giving false hope, or being party to the lease and its termination clauses. He also states that any renovations were done on the Plaintiff's own property, so he didn't suffer a loss and notes a parallel criminal case exists on the same matter. As such, he urges the court to dismiss the suit against him with costs on a full indemnity basis.
8. In his counterclaim, VAN HOUTEN sues the Plaintiff back, claiming the Plaintiff owes him money. He claims that after their professional dealings began, they became acquainted and started doing personal business together and that there was a separate procurement and/or finance agreement between the Plaintiff and KISS COSMETICS which he was also involved in. That VAN HOUTEN and KISS COSMETICS financed the Plaintiff to the tune of Kshs.19,000,000.00/= on various occasions for this separate venture and thus prays for this amount, General damages for loss of business, costs and interest.
9. On its part, KISS COSMETICS responded to the suit stating that it is a separate legal entity and was not involved in the transactions, agreements, or alleged fraud at the heart of the Plaintiff's case. It

seeks to have the entire suit against it struck out at *in limine* on grounds that the same is frivolous, vexatious, and an abuse of court process, that the claim for joint and several liability is misplaced, as the alleged actions were between the Plaintiff and JAVA & KUKITO. It contends that the principle of a separate legal personality protects it and that it cannot be held liable for actions of VAN HOUTEN allegedly undertook in his capacity as CEO of another company, JAVA. KISS COSMETICS repeatedly states it is a stranger to the allegations in the Plaint including the lease agreement and all related negotiations, the requests for and receipts of money for renovations, contractors, coffee, or equipment and the promises to refund money, all particulars of alleged fraud

10. KISS COSMETICS denies the allegation that the company, through VAN HOUTEN approached the Plaintiff for financing and that it states that it operates via board resolutions, implying no such authorization was given. It denies the coffee purchase financing agreement and profit-sharing arrangement and also notes there is a related criminal case against Van Houten. It also invokes the doctrine of *Ex turpi causa non oritur actio*, arguing that if the Plaintiff's payments were a bribe, the court should not assist him as the cause of action arises from his own dishonorable act. KISS COSMETIC prays that the

suit against it be dismissed in its entirety, with full indemnity costs awarded against the Plaintiff.

11. The Plaintiff responded to the counterclaim through his defence dated 23<sup>rd</sup> October 2024. The Plaintiff categorically denies VAN HOUTEN'S claim for Kshs.19,000,000.00/= and frames the alleged finance agreement as part of the same fraudulent scheme he initially sued over. He admits VAN HOUTEN approached him as CEO of Java, but adds it was VAN HOUTEN'S agent who first made the introduction and he further admits there was a discussion about a finance agreement involving KISS COSMETICS, but states he was to be the financier for KISS COSMETICS, not the recipient of funds.

12. The Plaintiff claims VAN HOUTEN represented himself as the link between JAVA, KUKITO, and KISS COSMETICS and the Plaintiff and reiterates that the business was discontinued and that this was a well hatched plan to defraud him. The Plaintiff denies that he and VAN HOUTEN became acquaintances who started doing separate business together and describes VAN HOUTEN'S claim for Kshs.19,000,000.00/= as "outrageous" and demands strict proof. For these reasons, the Plaintiff urges the court to dismiss the counterclaim in its entirety and award him costs.

13. At the hearing, the Plaintiff testified on his own behalf (PW 1) relying on his witness statement dated 14<sup>th</sup> April 2023 and producing the Bundle of Documents dated 15<sup>th</sup> November 2023 (PExhibit 1-12). The Defendants did not present any witness or produce any document. Thereafter, the Plaintiff was directed to file written submissions but the same had not yet been filed by the time I was penning this judgment. In any event, I have considered the Plaintiff's pleadings and evidence on record and I will be analyzing and determining the same below.

#### **Analysis and Determination**

14. 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.”*

15. 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.’* As stated, the Defendants filed defences and a counterclaim but they did not call any witness or produce any evidence. This means that the Plaintiff’s case remains unchallenged (See **Avtar Singh Bahra & Amarjit Kaur Bahra v Raju Govindji Ganatra T/A Sweetbite Manufacturers [2001] KEHC 375 (KLR)**] and **Motex Knitwear Limited v**

**Gopitex Knitwear Mills Limited [2009] KEHC 4017 (KLR)].**

However, even though the Defendants failed to challenge the Plaintiff's case, the latter still has a duty to prove his case on a balance of probabilities as is required by law. This was held by the Court of Appeal in **Karugi & another v Kabiya & 3 others [1983] KECA 38 (KLR)** where it was stated that, *"The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof"*. Likewise, failure by a defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard hence in **Gichinga Kibutha v Caroline Nduku [2018] KEELC 3981 (KLR)** the Court held that, *"It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest."*

16. From his evidence, the Plaintiff testified that he was seeking from the Defendants inter alia Kshs.23,467,609.00/= being monies spent on construction and renovations, Kshs.13,495,000.00/= paid to Van Houten and Kshs.3,450,000.00/= paid to Kiss Cosmetics. These sums are in the nature of special damages which must be

both specifically pleaded and strictly proved, before they can be awarded by the Court. A party claiming special damages must demonstrate that they actually made the payments before compensation is permitted. A natural corollary of this has been that the courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. In this regard, our courts have held that only a receipt or invoices endorsed with the word "Paid" meets the test (see **Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited [2015] KECA 822 (KLR)**).

17. The Plaintiff produced receipts (PExhibit 4) which I have perused and the same indicate that VAN HOUTEN was paid a total of Kshs.6,840,000.00/= from my tabulation and that this is what has been proven to be monies paid for the construction and renovations and payments to VAN HOUTEN. The Plaintiff also produced the Finance Agreement (PExhibit 6) which indicates that the Plaintiff, as the Financier, was "...willing to fund KISS COSMETICS LIMITED up to a sum of **Kenya Shillings Two Million Six Hundred Twenty Five Thousand (Kshs.2,625,000.00/=)** for purchase of Seventy Five (75) bags of coffee payment having been made prior to execution thereof". I also find this to be proof that

the Plaintiff paid KISS COSMETICS a sum of Kshs.2,625,000.00/=.

Therefore, the Plaintiff's suit in respect of the pleaded sums succeeds but only to the extent of Kshs.9,465,000.00/=.

I also find that he is entitled to interest at court rates from the date of this judgment until payment in full and costs of this suit as he has largely been successful in prosecuting it. The rest of the claims by the Plaintiff are hereby dismissed for want of proof. The 3<sup>rd</sup> Defendant's Amended counterclaim dated 16<sup>th</sup> October 2024 is also dismissed.

**Conclusion and Disposition**

18. In the upshot, the Plaintiff's suit is allowed and judgment is entered for the Plaintiff against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants jointly and severally as follows:

- 1) Kshs.9,465,000.00/= together with interest at the court rate of 12% per annum from the date of this judgment until payment in full.**
- 2) Costs of the suit.**

**DATED SIGNED and DELIVERED virtually this 12<sup>TH</sup> DAY OF  
FEBRUARY 2026**

.....  
**J.W.W. MONGARE**

## **JUDGE**

### **IN THE PRESENCE OF**

1. Mr. Awil Abdirahaman Abdule the Plaintiff in person.
2. N/A for the Defendants.
3. Amos - Court Assistant

ORIGINAL