



REPUBLIC OF KENYA



**Ridhwan Trading Company Limited & another v Mbarak & 3 others (Civil Case 26 of 2017) [2026] KEHC 1124 (KLR) (5 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1124 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL CASE 26 OF 2017  
A MABEYA, J  
FEBRUARY 5, 2026**

**BETWEEN**

**RIDHWAN TRADING COMPANY LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**SULEIMAN NOOR OSMAN ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ZARAH OMAR MBARAK ..... 1<sup>ST</sup> DEFENDANT**

**FAMILY BANK KENYA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**OKOTH MARK OKELLO ..... 3<sup>RD</sup> DEFENDANT**

**RICHARD ODHIAMBO OTIENO ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs commenced this suit against the defendants vide a plaint dated 7/11/2017 in which they sought the following reliefs: -
  - a. The sum of Kshs. 23,028,908.20 plus interest at commercial rates.
  - b. Indemnity against all costs, damages and such other consequences preferred by the County Government of Siaya in relation to tender number CGS/SCM/OT/Education/2016-2017/001.
  - c. General Damages.
  - d. Exculpatory damages for fraud.
  - e. Costs of the suit.
  - f. Interest on (a) (c) (d) and (e) above at commercial rates.



- g. Any other or further relief as this Honourable Court may deem appropriate.
2. The plaintiffs' case was that it engaged the 1<sup>st</sup> defendant in business transactions within Nyanza region and consequently, the 2<sup>nd</sup> plaintiff, being a director of the 1<sup>st</sup> plaintiff assigned the 1<sup>st</sup> defendant a specific power of attorney dated 14/11/2016 in relation to dealings regarding the 1<sup>st</sup> plaintiff.
  3. That subsequently, the 1<sup>st</sup> defendant exercising this power of attorney successfully bid and was awarded tender number CGS/SCM/OT/education/2016-17/001 for the construction of a resource centre at Gem Ward by the County Government of Siaya.
  4. That it was a term of the tender that the 1<sup>st</sup> Plaintiff would be paid in phases upon completion of each phase to its bank account at Chase Bank, Eastleigh Branch account number 0XXXXXXXXXX01.
  5. That in exercising her powers under the Power of Attorney donated, the 1<sup>st</sup> defendant undertook supervisory works over the project on a day to day basis whereas the 2<sup>nd</sup> plaintiff regularly visited the project site to confirm the works met the standards and specifications of the tender.
  6. That after finishing the 1<sup>st</sup> phase of the project, the plaintiffs sought payment over the same and it was agreed with the County of Siaya that the 1<sup>st</sup> plaintiff would be paid Kshs. 6,000,000/- for the work done and on the 3/3/2017, it issued the County with a Local Purchase Order for the same amount.
  7. That on follow up over the payment, the 2<sup>nd</sup> plaintiff was informed that Kshs. 2,207,367/- being part of the total local purchase order had been paid to an account with the 2<sup>nd</sup> defendant being account number 0250000335436 at their Kisumu branch, an account the plaintiffs later realized was opened by the 1<sup>st</sup> defendant in the name of the 1<sup>st</sup> plaintiff without the plaintiffs' knowledge, consent or authority.
  8. That the opening of the account by the 1<sup>st</sup> defendant at the 2<sup>nd</sup> defendant's Kisumu branch was done in collusion of the 3<sup>rd</sup> and 4<sup>th</sup> defendant and consequently, the actions of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant were negligent in opening the said account as they flouted the Prudential Rules for opening of corporate bank accounts as set out by the Central Bank of Kenya.
  9. That the 1<sup>st</sup> defendant breached contract and negated her fiduciary duty under the Power of Attorney granted to her by the 2<sup>nd</sup> plaintiff and further her collusion with her co-defendants amounted to fraud.
  10. That as a result of the negligent and fraudulent acts of the defendants, the plaintiffs were exposed to the tune of the entire contract sum as they stood to lose the entire contract sum under the tender and further risk reputational damage and being blacklisted from government tendering should they fail to complete the works with the County Government of Siaya.
  11. The 1<sup>st</sup> defendant filed a defence dated 31/5/2018 in which she denied the plaintiffs' claim and put them to strict proof of the same. She contended that the process was carried out in accordance with the law.
  12. That the 2<sup>nd</sup> Plaintiff gave consent for the opening of the account with the 2<sup>nd</sup> defendant as payments could not be made to its Chase Bank account which was at the time under receivership and further that, as the 1<sup>st</sup> plaintiff had never been registered by IFMIS.
  13. That she did not only undertake supervisory work in managing the project but similarly financed part of the project as the 2<sup>nd</sup> plaintiff was not in a sound financial position to do the same.
  14. That consequently, if there were any negligence, breach or fraud, the same was committed by the plaintiffs who wanted to obtain not only services but money advances without paying for the same.



15. The 2<sup>nd</sup> defendant filed its defence dated 24/1/2018 wherein it traversed the plaintiffs' claim and stated that the account in its bank was opened and operated with full knowledge of the plaintiffs and that prior to opening the account, it discharged its responsibilities by doing due diligence.
16. The 3<sup>rd</sup> and 4<sup>th</sup> defendant filed a joint defence dated 11/6/2018 in which they denied the allegations of the plaintiffs and put them to strict proof thereof. They further averred that they were not privy to the contract of engagement between the plaintiffs and the 1<sup>st</sup> defendant.
17. That if at all there was any negligence, it was on the part of the plaintiffs who failed to exercise due diligence in their operations by donating power of attorney to a person they did not trust.
18. At the trial, the plaintiff called one witness, Suleiman Osman Noor who testified as Pw1. He adopted his witness statement dated 7/11/2017 which reiterated the averments made in the plaint as his evidence in chief and produced the plaintiff's bundle of documents as PExh 1.
19. In cross-examination, he reiterated that he gave the 1<sup>st</sup> defendant specific power of attorney and that she could receive money on behalf of the company. That the 1<sup>st</sup> defendant was not a director of the company but a broker. That the company was to be paid in phases but on the basis of LPOs. That he was demanding Kshs. 23 million from the defendants which was not the amount in the account opened by the 1<sup>st</sup> defendant where Kshs. 2.2 million was deposited. That the contract was terminated because he did not perform the contract.
20. In re-examination, Pw1 stated that the tender documents provided that the County was to make payments to the plaintiffs Chase Bank accounts and that there were no documents empowering the County to make payments to the 2<sup>nd</sup> defendant.
21. That they did not authorize the 1<sup>st</sup> defendant to open the account with the 2<sup>nd</sup> defendant. That they were demanding Kshs. 23 million as that was the tender amount although they were given an LPO for Kshs. 6 million. That had the County made the payment into their account, they would have continued with the works.
22. Despite service and constant reminders, the defendants did not call any witness in support of their respective cases. They failed to give any version of events that was contrary to what the plaintiffs had alleged and testified on. They never challenged or contradict the testimony of the respondent.
23. It is now settled that where a party fails to call evidence in support of his case, that party's pleadings remain mere statements that are unsubstantiated. See the case of Trust Bank Limited v Paramount Universal Bank Limited & 2 others Nairobi (Milimani) HCCS No 1243 of 2001.
24. In Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others [2012] eKLR, the court stated as follows: -

“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”
25. In Moltex Knitwear limited v Gopitex Knitwear Mills limited Nairobi (Milimani) HCCC No., 834 of 2002, Lessit, J (as she then was) citing the case of Autar Singh Bahra and another v Raju Govindji, HCCC No. 548 of 1998 appreciated that: -

“Although the defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff's case stand unchallenged but also that the claims made by the



Defendant in his Defence and counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

26. However, the mere fact that the defendants did not call evidence in support of their case did not absolve the plaintiffs from proving their claim against them. Indeed, to suggest that the minute a defendant participates in a trial and does not call evidence, a plaintiff’s case is proved, would be an absurdity. See *Margaret Wanjiru Ndirangu & 4 others v Attorney General* [2020] KECA 683 (KLR).

27. In this regard, it is immaterial that the defendants did not call evidence. They were not bound to, so long as they did not admit the claim. That is the law as confirmed in *Dave v Business Machine Ltd* [1974] E.A 69 where the Court held that: -

“Now if an appearance had been entered and the defence filed and if only failure on the Defendant’s part had been failure to appear, either personally or through his advocate on the day the suit was called on for hearing, then I think the plaintiff ought to have been called upon formally to prove his claim, that is to say, to prove everything the burden of proof of which, on the pleadings, lay on him in order to establish his claim. [He did not do so]”.

28. In *Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau* [2016] eKLR, the Court of Appeal held: -

“The suggestion, however, implicit in some of the decisions quoted above, that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff’s case is proved on a balance of probabilities cannot possibly be correct. It is also obvious to us that in some of those decisions the question whether the plaintiff has, in the absence of evidence from the defendant, proved his case on a balance of probabilities, was conflated and confused with the distinct issue of the effect of the defendant’s failure to testify when he had filed a defence and a counter-claim. While the defendant’s failure to testify has fatal consequences for the counter-claim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities ...”.

29. Having the aforementioned in mind, this court has carefully considered the pleadings as well as the evidence presented. The only issue for determination is whether the plaintiffs proved their case to warrant grant of the orders sought.

30. The law is settled, that, he who alleges must prove. Section 107 of the *Evidence Act* (cap 80) of the laws of Kenya provides: -

- “1) 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.
- 2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

31. The plaintiffs sought the sum of Kshs. 23,028,908.20, being the entire sum for the tender number CGS/SCM/OT/EDUCATION/2016-2017/001 awarded by Siaya County.

32. However, in their own testimony, the 1<sup>st</sup> plaintiff who testified as Pw1 agreed that the project was to be undertaken in phases and that payment would be made upon completion of each phase. That



- upon completion of phase 1, it was agreed between themselves and the County Government of Siaya that they would be paid Kshs. 6,000,000/-. That the county disbursed only Kshs. 2,207,367/- to the account opened by the 1<sup>st</sup> defendant. That consequently they did not proceed with the project as the County did not disburse further funds.
33. From the evidence adduced it is evident that the only monies disbursed by the County Government of Siaya over the project was Kshs. 2,207,367/- under a Local Service Order for Kshs. 6,000,000/-. That subsequently the County terminated the contract following the plaintiffs' failure to proceed and complete the tender.
  34. It is not clear why the plaintiffs failed to proceed with the tender and pursue its grievance with the 1<sup>st</sup> defendant separately. After all, if there was any breach at all at that point, the same was between the plaintiffs and the 1<sup>st</sup> defendant, a contract privy to them exclusive of the County of Siaya. It cannot therefore be said that the plaintiffs were entitled to the full tender sum of Kshs. 23,028,908.20 when they were the ones in breach of the tender contract.
  35. The plaintiffs' allegations of negligence against the defendants were not challenged in evidence. But the plaintiffs needed to prove them against each defendant specifically. Further, on fraud, the same is defined Black's Law Dictionary, 9<sup>th</sup> Edition, at page 131, as "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment".
  36. This definition highlights the two essential elements of fraud; a deliberate misrepresentation or concealment, and an intention to deceive, leading to detrimental reliance by the other party. Both elements must be established for a claim of fraud to succeed.
  37. The burden of proof in fraud claims is notably higher than that required in ordinary civil proceedings. In *Railal Gordhanbhai Patel v Lalji Makanji*, [1957] EA 314, the court held that although the standard falls below that of proof beyond reasonable doubt, it is above the ordinary balance of probabilities.
  38. Allegations of fraud must be proved with clarity, precision, and cogency. Further guidance on the pleading and proof of fraud is found in *Vijay Morjaria v Nansingh Madhusingh Darbar & another*, [2000] eKLR, where Tunoi JA stated:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."
  39. In this instance, it is evident that the allegations of fraud on the part of the defendants was not distinctly proved and instead this Court was left to infer the same from the facts. Accordingly, I find that the elements of fraud by the defendants have not been proved to the required standard.
  40. Be that as it may, it is clear that the Plaintiffs were entitled to the LPO amount of Kshs.6,000,000/- as they had completed the works for phase 1. That they failed to continue with the contract because to sum of Kshs. 2,207,367/- paid by the County was diverted by the 1<sup>st</sup> defendant. However, the plaintiffs were not able to show that the documents presented by the 1<sup>st</sup> defendant, under the power of attorney donated by the 1<sup>st</sup> plaintiff, could not or should not have been relied upon by the 2<sup>nd</sup> defendant bank.
  41. In view of the foregoing, I find that the plaintiffs have partially proved their case against the 1<sup>st</sup> defendant for Kshs.6,000,000/-. Judgment is therefore entered against the 1<sup>st</sup> defendant in the sum



of Kshs. 6,000,000/- with interest from the date of this judgment until payment in full. Costs of the suit are awarded to the plaintiffs against the 1<sup>st</sup> defendant.

42. The case against the other defendants was not proved and is therefore dismissed without any order as to costs as they never appeared at the trial.

It is so decreed.

**DATED AND DELIVERED AT KISUMU THIS 5<sup>TH</sup> DAY OF FEBRUARY, 2026.**

**A. MABEYA, FCI Arb**

**JUDGE**

