

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION**

HCCOMM/E105 OF 2021

**MELITUS OLUOCH ODERO 1ST
PLAINTIFF**

**MILD STEEL ENGINEERING WORKS LIMITED.....2ND
PLAINTIFF**

VERSUS

**PETER MATHEKA NDIVO 1ST
DEFENDANT**

**MUKUYUNI FILLING STATION LIMITED 2ND
DEFENDANT**

JUDGMENT

Introduction

1. This is a derivative and commercial action brought by **Melitus Oluoch Odero (the 1st Plaintiff)** and **Mild Steel Engineering Works Limited**, a company engaged in fabrication, steel works, and engineering services (**the 2nd Plaintiff**) against a co-director, **Peter Matheka Ndivo** (the 1st Defendant), and a third-party corporate entity, **Mukuyuni Filling Station Limited** (the 2nd Defendant).

2. The Plaintiffs' claim, anchored in the Amended Plaint dated 10th November 2023, is that from around 2016 the 1st Defendant engaged in persistent misconduct, including alleged misappropriation of company funds, diversion of client payments, failure to account for monies collected on behalf of the company, interference with supplier payments, destruction of company records, and general neglect of duty.
3. They claim that these actions occasioned financial loss to the 2nd Plaintiff in the sum of Kshs. 34,640,676, arising from unremitted payments, unpaid supplier accounts, mishandled loans, and diverted funds.
4. As against the 2nd Defendant, the Plaintiffs aver that it contracted the 2nd Plaintiff to construct structures at its petrol station, including canopies and storage tanks, and benefited from completed works, but failed to settle an alleged outstanding balance of **Kshs. 10,313,268.**
5. It is alleged that the 1st Defendant, who was a director in both the 2nd Plaintiff and the 2nd Defendant, influenced the withholding of the said payment, thereby frustrating the 2nd Plaintiff's attempts to recover the debt.
6. The Plaintiffs therefore seek recovery of the alleged misappropriated sums from the 1st Defendant, payment of

the alleged contractual balance from the 2nd Defendant, general damages, interest, and costs.

7. The Defendants, through their respective pleadings, denied liability. The 1st Defendant, in his Amended Statement of Defence dated 21 November 2023, asserted that his involvement in the company's affairs was non-financial and that he never handled the monies claimed. He attributed his reduced participation to ill health and rejected the allegations as unsubstantiated.
8. The 1st Defendant also filed a counterclaim asserting entitlement to **6,630 shares** in the 2nd Plaintiff and a beneficial interest in **Plot 12 Block G, Dandora**.
9. The 2nd Defendant, on its part, filed an Amended Defence dated 15 May 2024 denying any indebtedness to the 2nd Plaintiff, asserting that all sums due for services rendered were duly paid in accordance with agreed terms. It produced reconciliations and bank statements to demonstrate full settlement of all valid invoices. It also challenged the Plaintiffs' audit as flawed and contrary to professional accounting standards.
10. The 2nd Defendant further denied any collusion with the 1st Defendant, asserting that it conducted its business

dealings with the 2nd Plaintiff in good faith and in accordance with commercial practice.

11. The matter proceeded to full hearing through oral testimony and documentary evidence. I have carefully considered the pleadings, evidence, and all submissions on record.

Plaintiffs' Evidence

12. The Plaintiffs called two witnesses in support of their case. The 1st Plaintiff, Melitus Oluoch Odero, who testified as PW1, and CPA Patrick Mchama, an auditor who testified as PW2 and produced the Plaintiffs' audit reports.
13. PW1 testified on his own behalf and on behalf of the 2nd Plaintiff, and adopted his witness statement dated 22nd February 2021 as his evidence in chief. He produced the Plaintiffs' bundle of documents, which included correspondence, board minutes, and the auditor's report.
14. He testified that the 2nd Plaintiff was a collaborative venture founded in 1993. He stated that, like the 2nd Defendant, he is a shareholder and director of the 2nd Plaintiff company.

15. He further stated that the board had verbally agreed to appoint the 1st Defendant as the **Managing Director**, and that in this capacity, the 1st Defendant was entrusted with the day-to-day operations, including the collection of debts, management of the site works, and oversight of the company's financial health.
16. According to PW1, from 2016, the 1st Defendant began to avoid meetings, refused to account for funds, and withheld financial records.
17. PW1 alleged specific financial improprieties against the 1st Defendant, including;
 - i. South Sudan transactions in 2013 (sale of storage tanks, pipes, and valves), allegedly yielding Kshs. 22,040,000, purportedly not remitted.
 - ii. Supplier payments allegedly received, but diverted (Afritech - General Supplies Ltd Kshs. 900,000; Insteel Limited - Kshs. 225,300).
 - iii. Personal benefit to the 1st Defendant (payments for Truck KCD 487Q and fabrication by the company of a 10,000-litre tanker worth Kshs. 420,000), for which the 1st Defendant never reimbursed the company.
18. The Plaintiffs further testified that the 1st Defendant failed to remit payments from various clients, failed to pay suppliers,

thereby exposing the company to disputes and loss of goodwill, and that he willfully destroyed company financial records to conceal his actions.

19. PW1 stated that the 1st Defendant's dual role, as director of both the 2nd Plaintiff and the 2nd Defendant, contributed to the withheld payment of Kshs. 10,313,268 owed for work completed.

20. The witness averred that the 1st Defendant was repeatedly asked through board communications to account for the funds, but consistently failed or refused to do so.

21. PW2, CPA Patrick Mchama (PW2), an Auditor, testified and produced an audit report dated 22nd December 2020, which formed the basis for the claims against both Defendants.

22. According to PW2, his analysis revealed multiple unreconciled transactions and missing records, leading to a conclusion that the 1st Defendant was responsible for the loss.

23. He stated that several client payments were unaccounted for; Supplier payments entrusted to the 1st Defendant were not made; Funds collected by the 1st Defendant were not deposited into the company's accounts, and the financial records were missing or destroyed for key periods.

24. The auditor concluded that the 1st Defendant bore responsibility for the unexplained variances and missing funds amounting to **Kshs. 34,640,676.**

25. Regarding the claim against the 2nd Defendant, PW2 testified that the 2nd Defendant owed the 2nd Plaintiff **Kshs. 10,313,268** for works performed. He stated that his review of delivery notes, invoices, and job records showed this amount as the outstanding debtor balance.

26. The Plaintiffs, therefore, urged the Court to:

- i. Order the 1st Defendant to refund Kshs 34,640,676 being the misappropriated funds;
- ii. Order the 2nd Defendant to pay Kshs 10,313,268 for services rendered; and
- iii. Award general damages, interest, and costs of the suit.

1st Defendant's Evidence

27. The 1st defendant, in support of his case, called two witnesses. **Mr. Peter Matheka Ndivo (DW1)**, the 1st Defendant himself, and Jonathan Mulei Kyengo (DW2), an auditor.

28. The 1st Defendant (**DW1**) adopted his written statement dated 13 April 2021 as his evidence in chief, and produced a bundle of documents to rebut the allegations of fraud and to support his counterclaim.

29. He testified that the 2nd Plaintiff was a collaborative effort among four directors and denied the existence of any formal or verbal agreement appointing him as the **Managing Director**. He stated that all directors were actively engaged in the affairs of the company and that his specific role was primarily focused on sourcing for work and marketing, rather than the internal administration of funds or the keeping of books of accounts.

30. DW1 further stated that he was never in charge of the company's financial statements or the operation of its bank accounts. He challenged the Plaintiffs to produce any board minutes, employment contract, or bank mandate that designated him as the sole or primary person responsible for the company's financial oversight.

31. DW1 produced medical records and testified that he suffered a **stroke in 2019**, which led to prolonged hospitalizations at **Aga Khan Hospital** and **Nairobi Hospital**. He told the court that his absence from the company's premises for 48 months was a direct result of his physical and mental inability to work,

rather than a deliberate attempt to evade responsibility or conceal fraud.

32. Regarding the Audit Report dated 21st December 2020, DW1 dismissed it as a cheap fabrication created by the Plaintiffs to facilitate his unlawful removal from the company. He stated that he had no knowledge of the alleged **Kshs 22,040,000/-** from South Sudan, asserting that such large-scale transactions would have been handled by the board collectively.

33. DW1 further denied receiving any cash payments from debtors as alleged by the Plaintiffs, stating that all payments were typically made directly to the company's accounts or handled by the accounting department.

34. He stated that, contrary to the allegation by the Plaintiffs, he never destroyed or withheld company records, restating that he had been away for four years due to illness, and that the records remained within the control of the 1st Plaintiff.

35. Regarding his proprietary interest in the 2nd Plaintiff, DW1 asserted that despite the current dispute, he remains a lawful shareholder and director. He produced documents to show that he is entitled to 6,630 shares in the 2nd Plaintiff company, as well as a proportionate share of the land in Dandora known as Plot 12 Block G, which he claims was

acquired through the joint efforts and resources of the directors during the company's subsistence.

36. He concluded his evidence by stating that the Plaintiffs' suit was a witch-hunt designed to deprive him of his hard-earned investment in the company at a time when he was most vulnerable due to ill health.

37. DW1 also denied the Plaintiffs' allegation that he influenced the 2nd Defendant not to pay the alleged Kshs. 10,313,268, stating that he had no power over the 2nd Defendant's financial decisions.

38. **DW2, Jonathan Mulei Kyengo**, an auditor engaged by the company on consultancy basis, testified that he had previously reviewed the company's records, including VAT/PAYE compliance and debtor/creditor balances. He provided professional comments on the allegations raised in the special audit report of 21 December 2020.

39. Mr. Kyengo stated that the alleged Kshs 22,040,000 Aggreko tank disposal figure was merely a quotation, whereas the actual sale was for Kshs 4,871,188, supported by valid offer-and-acceptance documents. No evidence showed misappropriation by the 1st Defendant.

40. On the hire-purchase liability and the Weston Solutions fabrication job, DW2 stated that the supporting records were

incomplete, lacked essential accounting features, or conflicted with the company's books, making the allegations questionable. He found similar weaknesses in claims relating to Afritech, Insteel, Rupingazi Service Station, and KBM 776P, noting lack of proof that the 1st Defendant had received or mishandled any funds.

41. His conclusion was that most allegations against the 1st Defendant were unsupported, inconsistent with the accounts he had earlier reviewed, or based on inadequate documentation.

2nd Defendant's Evidence

42. The 2nd Defendant, Mukuyuni Filling Station Ltd, called two witnesses: one of its directors, **Mr. Moses Mwendwa (DW3)**, who adopted his written witness statement dated 20 August 2024 as his evidence in chief. The 2nd Defendant also relied on the testimony of **Mr. Kabui Simon (DW4)**, an auditor.

43. Mr. Mwendwa testified that while there was a commercial relationship between the 2nd Plaintiff and the 2nd Defendant for the construction of petrol stations and canopies, the figures quoted by the Plaintiffs were gross exaggerations. He informed the court that the 2nd Defendant operated on a

strict system of invoicing and that no payments were made without corresponding VAT-compliant invoices.

44. It was his testimony that the total value of invoices actually raised by the 2nd Plaintiff amounted to Kshs. 6,068,464, and that it made payments totalling Kshs. 6,038,542, the difference being Kshs. 29,922, was withheld by the 2nd Defendant due to faulty goods that had been delivered and were not accepted.

45. The witness emphasized that payment was never made on the basis of delivery notes, asserting that delivery notes merely acknowledged delivery and were not payment instruments. It was his testimony that the Plaintiffs' auditor had aggregated both invoices and delivery notes to reach the figure of Kshs. 10,313,268. He testified that this approach was contrary to normal accounting practice and to the parties' established payment procedure.

46. They denied any collusion with the 1st Defendant. He testified that the 2nd Defendant made payments purely on the basis of verified invoices and that the 1st Defendant did not influence or interfere with their decisions. It was asserted that the 2nd Defendant had no outstanding indebtedness to the Plaintiffs, and the claim was therefore unfounded.

47. **Mr. Kabui Simon**, an Auditor called by the 2nd Defendant, stated that he was instructed by the 2nd Defendant to analyse the Plaintiffs' auditor's report dated 22nd December 2020. He adopted his own audit report, which reached markedly different conclusions from those of the Plaintiffs' auditors.

48. Mr. Kabui explained that upon analysing the Plaintiffs' documents, he separated the delivery notes from the invoices and established that: Actual invoices totalled Kshs. 6,068,464; Delivery notes, which are not invoices, totalled Kshs. 5,812,494. According to him, the Plaintiffs' auditors incorrectly combined these two categories to arrive at the figure of Kshs. 10,313,268.

49. The witness described the Plaintiffs' audit methodology as defective and contrary to generally accepted accounting standards, asserting that a delivery note merely confirms the delivery of goods and is not a request for payment, nor does it create a debt, and therefore cannot be used as evidence of money owed. He maintained that, under proper accounting, the 2nd Defendant could only be liable for amounts appearing on invoices.

50. Mr. Kabui also stated several payments made by the 2nd Defendant between **2001 and 2011**, totalling **Kshs. 4,470,852** were not included in the Plaintiffs' audit report,

resulting in a distorted and inflated representation of the alleged debt.

51. On the basis of his findings, the witness concluded that the 2nd Defendant had fully discharged all legitimate financial obligations to the 2nd Plaintiff and did not owe any additional sums.

The Parties' Submissions

52. At the close of the hearing, the Court gave directions on the filing of submissions. All parties filed detailed written submissions, which the Court has carefully considered alongside the pleadings and evidence on record.

53. The Plaintiffs filed their submissions dated 15 October 2025 through the firm of **Angaya & Company Advocates**, asserting that they have established a prima facie case against both Defendants and are therefore entitled to the prayers sought in the Amended Plaint. The 1st Defendant, for breach of fiduciary duty and misappropriation; and the 2nd Defendant, for unpaid invoices.

54. On the alleged breach of fiduciary duty by the 1st Defendant, the Plaintiffs submitted that as a director and *de facto* Managing Director, the 1st Defendant owed the 2nd Plaintiff a

duty of care, trust, and transparency under Section 143 of the Companies Act. They argue that his failure to account for Kshs 34,640,676/- is a gross violation of these duties.

55. Citing, among others, **Regal (Hastings) Ltd v Gulliver [1942] 1 All ER 378**; and, **Kenya Anti-Corruption Commission v Stanley Mombo Amuti [2015] eKLR**, the Plaintiffs underscored the strict fiduciary obligations imposed on directors and the duty to account for company funds.

56. Regarding fraud, the Plaintiffs submitted that they had specifically pleaded and proved fraud, meeting the required standard of proof above a balance of probabilities, by providing detailed particulars of the transactions and relying on the auditor's report and supporting documentation.

57. They assert that the 1st Defendant's long absence (48 months) and the subsequent audit findings create a presumption of financial impropriety. They maintained that the 1st Defendant's casual dismissal of the audit report as baseless during the February 2021 board meeting is evidence of his bad faith.

58. On the claim against the 2nd Defendant, the Plaintiffs submitted that the works were completed as per the 2nd Defendant's wishes, but the 1st Defendant used his influence at Mukuyuni Filling Station Ltd (2nd Defendant) to withhold

payments of Kshs 10,313,268/-, constituting a collusive effort to defraud the 2nd Plaintiff.

59. The Plaintiffs rebutted the Counterclaim and urged the court to dismiss the 1st Defendant's counterclaim for shares and land, arguing that his conduct has caused the company such immense loss that he has forfeited any equitable right to further assets.

60. The 1st Defendant, represented by Njuguna Kimani Nduhiu & Co. Advocates, filed submissions dated 17th November 2025, denying all allegations of fraud or financial involvement and asserting that the Plaintiffs have produced no evidence linking him personally to the alleged funds. He relied on medical incapacity and challenged the heightened standard of proof in fraud cases.

61. On the alleged fraud, it was submitted on behalf of the 1st Defendant that, contrary to the requirement in law that fraud must be specifically pleaded and strictly proved, the Plaintiffs had failed to produce cogent evidence linking him to any fraudulent act, and that the allegations were general, speculative, and unsupported by documentary proof.

62. The 1st Defendant placed reliance on the principles enunciated in Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] KECA 816 (KLR) to stress the heightened standard of proof required in fraud claims. He

maintained that the Plaintiffs have failed to provide a single primary document (such as a bank statement or signed receipt) directly linking him to the alleged misappropriation of funds.

63. In support of his counterclaim, the 1st Defendant submitted that his 6,630 shares and interest in the Dandora property are vested rights that cannot be extinguished by unproven allegations of misconduct. It was further his submission that he is entitled to a share in Plot 12 Block G, allegedly purchased during his tenure, and damages for the mental stress suffered due to the Plaintiffs' actions.

64. He therefore urged the Court to dismiss the suit and to allow his defence, including his claim to entitlement to shares and company property.

65. The 2nd Defendant, on its part, filed submissions dated 3rd November 2025 and argued that the Plaintiffs' claim rested on defective audit methodology and that it had fully settled all valid invoices. They maintained that the Plaintiffs' claim for **Kshs 10,313,268/-** is based on delivery notes, which do not constitute invoices or proof of debt.

66. The 2nd Defendant further submitted that the cause of action is time-barred, the alleged works and last payments having

occurred between 2013 and 2016. They argue this 2021 suit violates the six-year limit under the Limitation of Actions Act.

67. Finally, the 2nd Defendant asserted that the Plaintiffs did not adduce any evidence of collusion between the 1st and 2nd Defendants, characterizing the 2nd Plaintiff's claim as an attempt to use the court to settle internal directorial disputes.

Analysis and Determination

68. I have duly considered the pleadings, evidence, and submissions by the parties. The following three main issues crystallize for determination;

- i. Whether the Plaintiffs proved that the 1st Defendant breached fiduciary duties or misappropriated company funds.
- ii. Whether the 2nd Defendant is liable for Kshs. 10,313,268.
- iii. Whether the 1st Defendant's counterclaim is merited.

On the Alleged Fraud and Breach of Fiduciary Duty

69. The governing provisions on burden of proof are found in sections 107-109 of the Evidence Act Cap. 80 Laws of Kenya, which requires a party alleging to prove by cogent evidence, and that evidentiary burden shifts only once a prima facie case is laid. In particular, the provisions states that:

“107. (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.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

70. The Court of Appeal in the locus classicus case of **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, addressed the burden of proof as follows:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

71. In Abdul v Mokuu [2025] KEHC 4105 (KLR), the Court clarified that the burden of proof is neither on the Plaintiff nor the Defendant but on the party that alleges specific matters. It is on the party who alleges. The Court, citing the decision in **Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** stated that:

“As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides

the burden lies in that person who would fail if no evidence at all were given as either side.”

72. The Court of Appeal in Patrick Lumumba Kimuyu v Prime Fuels (K) Limited [2018] KECA 198 (KLR) affirmed that the burden remains on the claimant unless shifted by credible evidence. The Court stated:

“Except where expressly provided under statute, the burden of proof in civil cases is always cast on the party who alleges (see. Sections 107-109 of the Evidence Act Cap 80 Laws of Kenya). It is for the party that alleges a fact to be true to prove the existence and veracity of that fact. This is under the basic principle of Evidence that ‘he who asserts must prove’ (see. **Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010 [2013] eKLR**).

73. In this case, the Plaintiffs alleged misappropriation by the 1st Defendant of various sums forming a total of Kshs. 34,640,676, including: Kshs. 22,040,000 (South Sudan transaction), Kshs. 900,000 (Afritech), Kshs. 225,300 (Insteel), and Kshs. 300,000 (Rupingazi).

74. The Plaintiffs relied heavily on a special audit conducted from incomplete records. The auditor (PW2) conceded that he

reconstructed the records using what was available, which was incomplete.

75. While audits can assist in uncovering irregularities, they are secondary evidence dependent on the integrity of underlying documents. In **Atlantic Limited v Echken Agencies Limited (Civil Appeal E107 of 2021) [2023] KEHC 19409 (KLR) (26 June 2023) (Judgment)**, the court emphasized that primary documents - bank statements, receipts, vouchers - are the best evidence of financial transactions. The Court stated that:

“Primary evidence is the best type of evidence. It is called the best evidence rule. Therefore, a party in any proceedings should endeavor, at all times, to rely on primary evidence...”

76. The Plaintiffs did not place before the Court any bank statements showing the 1st Defendant receiving funds, no acknowledgments or receipts signed by him were produced, and no board resolution appointing him Managing Director was exhibited. Further, no bank mandate showing he controlled the accounts was tendered.

77. In **James Gacheru Kariuki v Equity Bank Ltd [2018] eKLR**, the court held that corporate responsibilities must be proved through formal instruments, not assumptions.

78. Further, the Court notes from the Plaintiff's audit report and the pleadings that the Plaintiffs relied on an Audit Report to allege fraud on the part of the 1st Defendant. It is trite law that allegations of fraud must be pleaded with particularity and proven to a standard higher than a mere balance of probabilities, though not necessarily beyond reasonable doubt. As held in **Central Bank of Kenya v. Ethuro & another [2018] eKLR**, fraud is a serious allegation that requires "shining clarity" in its proof.

79. Similarly, in **Arthi Highway Developers Limited v West End Butchery Limited & 6 Others [2015] eKLR**, the Court of Appeal held that fraud is a serious accusation, and that particulars of fraud must be set out distinctly and proved with cogent evidence.

80. Here, although serious allegations were made against the 1st Defendant, Plaintiffs allege fraud in the handling of funds totalling Kshs. 34,640,676, the 1st Defendant countered that he was never the Managing Director in a formal sense and that his 48-month absence was due to a stroke, a claim supported by medical history from Aga Khan Hospital. The 1st Defendant correctly submitted that the Plaintiffs failed to produce a board minute or an employment contract designating him as the sole custodian of the company's finances.

81. In the absence of primary documents such as bank mandates showing the 1st Defendant was the sole signatory, coupled with the 1st Defendant's long absence from the company due to illness, factors which are uncontroverted, the Court is not satisfied that the Plaintiffs have met the high threshold of proving that the 1st Defendant personally converted the alleged monies to his own use.

82. Mismanagement may have occurred, but personal liability for fraud requires stricter proof than a contested audit report.

83. While the Court accepts that directors owe fiduciary duties, liability cannot be imposed in the absence of clear evidentiary linkage between the director and the alleged misappropriation. Here, the Plaintiffs did not prove that the funds were entrusted to the 1st Defendant, and that he had custody of records or any duty to maintain them, or that there was any collusion with the 2nd Defendant.

84. In the premises, the Court finds that the Plaintiffs failed to meet the strict evidentiary threshold required for fraud or breach of fiduciary duty. Accordingly, the claim for Kshs. 34,640,676 is not proved.

Whether the 2nd Defendant is liable for the sum of Kshs 10,313,268

85. The Plaintiffs' second claim concerns the alleged outstanding debt of Kshs 10,313,268/- for construction and fabrication works done for the 2nd Defendant. The 2nd Defendant did not contest the existence of a contract with the 2nd Plaintiff, but denied the existence of the debt in the amounts claimed.

86. As already pointed out, **sections 107-109 of the Evidence Act** place the burden squarely on the Plaintiffs. Further, where the claim is for special damages, as is the case herein, the law requires that the claim must not only be specifically pleaded, but must also be strictly proved. See the case of **Hahn v Singh [1985] KLR 716**, where the Court of Appeal reaffirmed the principle.

87. Similarly, in **Kenya Tourist Development Corporation v Sundowner Lodge Ltd [2018] eKLR**, the Court of Appeal emphasized that contractual claims must be supported by clear documentary evidence, including invoices and payment records. The Court was clear that to award anything not proven “would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination.”

88. In this case, the Court notes that the Plaintiffs' figure was largely derived by adding delivery notes to invoices. However, the 2nd Defendant's evidence demonstrated that payment obligations arose only upon issuance of invoices, and not delivery notes.

89. The 2nd Defendant demonstrated that there were valid invoices in the sum of Kshs. 6,068,464, against which a payment of Kshs. 6,038,542, was made, leaving a balance of Kshs. 29,922, which, according to the 2nd Defendant, was attributable to defective goods. All payments were supported by bank statements.

90. The Court agrees with the 2nd Defendant that a delivery note is only evidence of delivery, they do not constitute a demand for payment. Payment obligations arise from agreed contractual documentation, typically invoices.

91. Further, the Plaintiffs did not reconcile the claimed sum of Kshs 10,313,268 with specific unpaid invoices, nor did they demonstrate that the additional sums were contractually due and payable.

92. Accordingly, the Court finds that the Plaintiffs have failed to discharge the evidentiary burden imposed under Sections 107-109 of the Evidence Act. This claim, therefore, fails.

Whether the Counterclaim by the 1st Defendant is merited

93. The 1st Defendant sought a declaration of his entitlement to 6,630 shares and a portion of Plot 12 Block G, Dandora.

94. In Kenyan Company Law, shares are movable property, and the rights of a shareholder are protected under the company's

Articles of Association and the Companies Act. The 1st Plaintiff admitted that the 1st Defendant was a founding director.

95. While the Plaintiffs argued that the 1st Defendant forfeited his shareholding rights in the company by virtue of his conduct, there is no evidence of a formal transmission or transfer of shares as required by Sections 495-498 of the Companies Act, 2015.

96. Equity follows the law. Even if a director is found to have performed poorly, such a failure does not automatically result in the forfeiture of their proprietary interest in the company or its assets without due process. Shareholding is a proprietary right, constitutional, and cannot be taken away through informal board disputes.

97. Consequently, the Court finds that the 1st Defendant remains a legal and beneficial owner of his shares and his proportionate interest in the company's landed assets, as the Plaintiffs provided no legal basis for their deprivation.

Disposition

98. From the foregoing analysis, the Court finds the Plaintiffs' suit to be without merit. The same is hereby dismissed in its entirety with costs to the Defendants.

99. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAIROBI
THIS 9TH DAY OF APRIL 2026**



HON. MR. JUSTICE MOSES ADO
Judge of the High Court

In the presence of: -

C/A - Moses

Esilaba.....for the Plaintiffs

Ndhuiu.....for the 1st Defendant

Chege,.....for the 2nd Defendant