



**Ramji & another v Dry Associates Limited (Commercial Cause E088 of 2018)
[2025] KEHC 2258 (KLR) (Commercial and Tax) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2258 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CAUSE E088 OF 2018
MN MWANGI, J
FEBRUARY 28, 2025**

BETWEEN

AREEZ RAMJI 1ST PLAINTIFF

NOORBEGUM RAMJI 2ND PLAINTIFF

AND

DRY ASSOCIATES LIMITED DEFENDANT

JUDGMENT

1. The plaintiffs vide a plaint dated 26th September 2018 instituted this suit against the defendant seeking judgment against it as hereunder -
 - a. Damages for misrepresentation;
 - b. Kshs.17,093,006.85 with interest at 21% from 27th April 2017 until payment in full;
 - c. Interest thereon on (a) & (d); and
 - d. Costs.
2. The plaintiffs' case is that they invested funds in short-term notes through the defendant since May 2013. They contended that an agent from the defendant's company managed their investments and by January 2016, they had invested a total of Kshs.31,981,432.88 in commercial paper issued by Nakumatt Holdings Limited, with maturity dates in May 2016. The plaintiffs claimed that they intended to withdraw their funds upon maturity but they were persuaded by the defendant to reinvest, with assurances that their funds were secured by an insurance policy with APA Insurance Company. Consequently, they reinvested an additional sum of Kshs.35,263,888.31 in May 2016. The plaintiffs stated that by October 2016 concerns arose, thus the plaintiffs requested for proof



of the insurance policy. That thereafter, the defendant responded in November 2016, providing an insurance document from Jubilee Insurance, contradicting its earlier claims about their investments being insured by APA Insurance.

3. The plaintiffs claimed that in November 2016, Nakumatt Holdings Limited experienced financial difficulties. Subsequently, the defendant advised them to roll over their investments, backdated to November 2016, with staggered maturity dates in 2017. The plaintiffs stated that despite multiple assurances, only partial payments were made and by April 2017, the outstanding balance was Kshs.25,818,459.20. The plaintiffs averred that they received a further amount of Kshs.8,725,452.35, leaving Kshs.17,093,006.85 that is due and owing to date. They also averred that despite multiple demands and notices, the defendant failed to refund the said amount, which led them to suffer financial losses.
4. In opposition to the suit, the defendant filed a statement of defence dated 21st February 2020 where it denied all the averments contained in the plaintiffs' plaint. The defendant averred that the plaintiffs independently chose their investments and that payments were to be made directly by Nakumatt Holdings Limited, and not by the defendant. The defendant asserted that the plaintiffs' claims are misdirected, as Nakumatt Holdings Limited is the actual issuer and obligor of the promissory notes. The defendant contended that this suit is an abuse of the Court process, that it is *res judicata*, and an attempt to transfer Nakumatt's debt to an innocent third party. Additionally, the defendant contended that the dispute between the parties herein should be resolved through arbitration as stipulated in the promissory notes and account opening forms.
5. This matter proceeded to hearing where the plaintiff called one witness in support of its case. The defendant also called one witness to ventilate its case.

Plaintiff's Case.

6. Mr. Arez Ramji testified as PW1. He adopted his witness statement dated 26th September 2018 as his evidence in chief. He produced the documents contained in the plaintiffs' bundle of documents dated 26th September 2018 as plaintiffs' exhibit Nos. 1 to 38 and those contained in their supplementary bundle of documents dated 9th September 2020 as plaintiffs' exhibit Nos. 39 to 52.
7. PW1 testified that in May 2013, they begun investing funds with Nakumatt Holdings through Dry Associates Investment Group, with Mr. Pavan Ubhi as their assigned agent who would advise and instruct them on the available investments. He further testified that all their communication and transactions were handled through the said Mr. Pavan and never directly with Nakumatt Holdings. Further, that the said Mr. Pavan advised them on investments and facilitated fund withdrawals when requested. Mr. Ramji stated that some funds were set to mature between January and July 2016 but when they sought to withdraw them, Mr. Pavan initially did not respond but he later assured them that their investment was insured with APA, covering up to 80% of the funds, and advised them to roll over the investment. It was PW1's contention that based on this assurance, they agreed and requested for a copy of the Insurance Policy, which was provided after multiple follow-ups. PW1 produced the said policy as plaintiff exhibit No. 21.
8. PW1 testified that upon reviewing the Insurance Policy provided, he noticed that it was with Jubilee Insurance and not APA as earlier on advised, and due to concerns, he wrote to Mr. Pavan for clarification, who assured him that their funds were insured. Consequently, the plaintiffs rolled over the investment in May 2016, with maturity dates set for 7th & 14th of November 2016. It was PW1's evidence that when the funds matured, Mr. Pavan informed them that he had requested payment from Nakumatt Holdings and since Nakumatt continued advertising for investments, they believed



their funds were secure. PW1 stated that contrary to the foregoing, in February 2020, he received a call from one 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. PW1 stated that was an attempt to mitigate the misrepresentation Mr. Pavan had made regarding the insurance coverage.

9. During cross-examination, PW1 clarified that they were not claiming any money from the defendant for the period between 2013 and 2014. He testified that they never communicated directly with Nakumatt Holdings, even after 2017 when Ms Hinah and Mr. Sameer took over from Mr. Pavan as their agent. He stated that by 2016, they had funds invested in Nakumatt, with Kshs.20,500,000/= and Kshs.11,400,000/= due to mature in January 2016, which they rolled over to May 2016. He confirmed that in April 2016, he requested for a withdrawal and followed up with emails, but Mr. Pavan assured him that their funds were safe under a new insurance policy with APA.
10. PW1 stated that Mr. Pavan instructed him to place their funds under the new policy. However, on 1st November 2016, instead of the promised APA policy, Mr. Pavan sent them an insurance policy from Jubilee Insurance. PW1 asserted that according to the account opening form dated 15th January 2016, the defendant's role was to confirm the terms of the principal. He confirmed that they never paid investment funds to Dry Associates Ltd (defendant), as they made payments directly to Nakumatt Holdings, which also processed their withdrawals. He maintained that based on the defendant's advice, they made five staggered roll overs.
11. In re-examination, PW1 confirmed that the insurance policy lists the insured's address as that of the defendant. PW1 stated that the plaintiffs were not signatories to the policy. He further testified that in as much as Clause 20 refers to facility documentation between the defendant and Nakumatt Holdings, they had not seen any executed Agreement between them. He maintained that their funds invested in January 2016 were set to mature in May 2016, but when they requested for withdrawal to reinvest elsewhere, Nakumatt Holdings delayed payment. Thereafter, Mr. Pavan informed them of a new insurance policy and assured them that their funds would be covered under it.

Defendant's Case.

12. Mr. Ben Ngugi Mamicha testified as DWI. He adopted his witness statement dated 27th April 2022 as his evidence in chief. He then produced the documents contained in the defendant's bundle of documents dated 12th August 2020 as defendant's exhibit Nos. 1 to 7. He testified that the defendant only acted as a broker and placement agent, and that the plaintiffs independently chose their investments, as acknowledged in the duly signed account opening forms. He further testified that all investments were made directly with Nakumatt Holdings Limited. Further, that the private placement memorandum and promissory notes outlined investment risks, and investors were responsible for their own due diligence. He contended that the defendant had no role in handling investment funds and was indemnified against claims by the plaintiffs under Clause 3(d) of the promissory notes. According to Mr. Ngugi, Clause 36 thereof exempted the defendant from liability.
13. He stated that any financial obligations rested solely with Nakumatt Holdings Limited as the Issuer and Obligor since payments were to be made directly to the plaintiffs by Nakumatt Holdings Limited, and promissory notes could not be broken or recalled before maturity. He expressed the view that the plaintiffs' grievance stems from Nakumatt Holdings Limited's failure to pay matured amounts, and not on any wrongdoing by the defendant. He contended that the plaintiffs had not demonstrated efforts to recover funds from either Nakumatt Holdings Limited or its Administrator. Mr. Ngugi stated that any claims regarding insurance have not been substantiated and asserted that this suit



- attempts to shift Nakumatt Holdings Limited's debt onto them. He urged this Court to refer this matter to arbitration as per the Agreements between the parties herein.
14. On being cross-examined, DW1 confirmed that he joined the defendant in 2021 and reviewed documents from both parties, including Nakumatt Holdings' file. He referred to an email sent in May 2016 which referred to a phone call between Mr. Pavan and the 1st plaintiff, where Mr. Pavan confirmed that the plaintiffs' funds were insured by APA. He admitted that the defendant's file contained confirmation that the funds were insured by Jubilee Insurance. He asserted that while some investors had insurance reflected in their promissory notes and/or account opening forms, no such notation appeared for the plaintiffs' investments from May to November 2017. DW1 stated that the plaintiffs' email of 29th April 2016 requesting for redemption of funds did not signify an intention to end the relationship. DW1 testified that promissory notes were issued in November 2016 but were backdated to align with the maturity dates.
 15. In re-examination, DW1 confirmed that before joining the defendant, there were attempts to bring Mr. Pavan to testify. DW1 contended that the defendant's role was to connect investors with Nakumatt Holdings Limited, which functioned successfully for three years until Nakumatt's collapse. He further testified that Nakumatt Holdings Limited independently decided to insure funds with Jubilee Insurance. He asserted that there was no formal request to close the plaintiffs' accounts.
 16. At the close of the defendant's case, the Court directed parties to file written submissions. The plaintiff's submissions were filed on 4th June 2024 by the law firm of Wandabwa Advocates. On perusal of the Court record, I note that the defendant's Counsel did not file any written submissions despite being given several opportunities to do so.
 17. Mr. Wandabwa, learned Counsel for the plaintiff relied on inter alia, on the case of Rift Valley Products Limited v Plexus Cotton Limited [2020] eKLR and Ruto & another v Yego (sued as Legal Representative of the Estate of Sally Cherutich) & 4 others Environmental and Land Case 322 of 2018 [2023] KEELC 17755 (KLR), and submitted that the defendant's failure to call key witnesses, such as Mr. Pavan Ubhi and Ms Hinah Hirji, should be construed against it. He further submitted that the defendant selectively produced documents, thus implying that crucial evidence such as the insurance of promissory notes, was omitted.
 18. He referred to the case of Phillip Kipyegon Singoei v Laban Kipkemboi Busienei [2024] eKLR, and submitted that the defendant's employee, Mr. Pavan, falsely assured the plaintiffs that their investments were insured, influencing their decision to continue investing in Nakumatt Holdings Limited. Counsel cited the case of Alfred Kioko Muteti v Timothy Miheso & another [2015] eKLR, and asserted that the defendant is liable for its employee's actions.
 19. Mr. Wandabwa contended that in as much as the defendant claims that they only provided investment options, that there was no contractual requirement for insurance, and that the suit herein is premature since Nakumatt Holdings is in liquidation, the defendant actively promoted Nakumatt's investment as being insured, thereby making the defendant liable. He submitted that this suit is not res judicata since Nakumatt's insolvency proceedings did not address the issue of misrepresentation. Mr. Wandabwa urged that the plaintiffs have met the burden of proof to warrant being granted the orders sought herein.

Analysis And Determination.

20. After considering and analyzing the evidence adduced in line with the pleadings filed, as well as the written submissions filed by Counsel for the plaintiffs, the issue that arises for determination is whether



the plaintiffs have made out a case to warrant being granted damages for misrepresentation and the other prayers sought in the plaint.

21. Before determining the main issue in dispute, I will first address the issue of whether or not this matter ought to have been referred to arbitration for determination, as was proposed by DW1. Reference of disputes to arbitration is provided for under Section 6(1) of the Arbitration Act which states that –

A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds -

- a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
- b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

22. In this case, there is neither an allegation nor proof that the defendant filed an application pursuant to the said provisions of the law immediately after it entered appearance and before it filed any other pleadings in this suit seeking to have the dispute herein referred to arbitration. It is therefore my finding that by failing to seek referral of this dispute to arbitration before filing any other pleadings in this suit, the defendant acknowledged this Court's jurisdiction to hear and determine this matter and is therefore estopped at this late stage from seeking referral of the same to arbitration and/or claiming that this dispute ought to have been resolved through arbitration.

Whether the plaintiffs have made out a case to warrant being granted damages for misrepresentation and the other prayers sought in the plaint.

23. The plaintiffs' case is that they had invested in short-term notes through the defendant since 2013 and had a total of Kshs.31,981,432.88 invested in Nakumatt Holdings Limited by January 2016. When they attempted to withdraw their funds, they were assured by the defendant's agent, one Mr. Pavan Ubhi, that their investments were insured by APA Insurance, and they were persuaded to reinvest an additional amount of Kshs.35,263,888.31. The plaintiffs stated that when they later requested for proof of the insurance, they were sent a policy for Jubilee Insurance instead of APA, which raised concerns. They further stated that in November 2016, Nakumatt Holdings Limited faced financial difficulties, and despite repeated assurances and roll overs of the investment, only partial payments were made, leaving an outstanding balance of Kshs.17,093,006.85 as at April 2017, which amounts are still due and owing.
24. The defendant on the other hand contended that the plaintiffs independently chose their investments, and all payments were to be made directly by Nakumatt Holdings Limited, and not by the defendant. The defendant therefore argued that this suit was an attempt to transfer Nakumatt's debt to it.
25. The plaintiffs do not dispute that in as much as the defendant through its employees managed their investments and advised them on where to invest, payments were to be made directly by Nakumatt Holdings Limited, and not by the defendant. It is further not disputed that the plaintiffs had invested through the defendant since 2013, but only started experiencing problems with pay outs in 2016.
26. It is worthy of note from the evidence adduced by the plaintiffs that vide an email sent to the defendant on 29th April 2016 (plaintiffs' exhibit No. 1), the 1st plaintiff (PW1) instructed the defendant to process the amounts that were maturing on 6th May 2016 to Diamond Trust (Bank). It is however evident from the email sent by PW1 on 7th May 2016 (plaintiffs' exhibit No. 2) to the defendant, that the instructions



contained in the email of 29th April 2016 were not complied with. On perusal of the pleadings filed by the plaintiffs and the evidence of PW1, it is evident that the plaintiffs' position is that their decision to reinvest the funds that matured on 6th May 2016 was informed by, and based on the defendant's advice that their funds were secured by an insurance policy with APA Insurance Co. Ltd.

27. From the record, the only evidence that has been adduced to this effect is an email sent by the 1st plaintiff to the defendant dated 17th May 2016 (plaintiffs' exhibit No. 6) referring to a discussion between PW1 and Mr. Pavan and instructions to roll over the said funds in the new APA insured program, and a further email sent on 18th May 2016 (plaintiffs' exhibit No. 7) where PW1 informed the defendant that they had sent Kshs.1,800,000/= to Nakumatt, to be placed in the new insured program. I note that in the same email, PW1 requested for copies of the insurance documents, which were shared several months later, with the plaintiffs vide an email sent on 2nd November 2016. It is however not in contestation that the insurance policy documents that were sent to the plaintiffs were from Jubilee Insurance and not APA Insurance Co. Ltd. Consequently, PW1 in an email sent to the defendant on 3rd November 2016 (plaintiffs' exhibit No. 22) asked the defendant to confirm whether the plaintiffs' sums were part of the insured figure. In response thereto, the defendant confirmed that the plaintiffs' investments fell under the insurance guarantee with Jubilee Insurance.
28. From the evidence adduced and the correspondence between PW1 and Mr. Pavan, I am persuaded that the plaintiffs were actually made to believe that their funds were secured by an insurance policy with APA Insurance Co. Ltd. The plaintiffs then reinvested in Nakumatt Holdings an additional Kshs.35,263,888.31 in May 2016 based on the said misrepresentation.
29. In the case of *Sing'oei v Busienei* [2024] KEHC 402 (KLR), cited by the plaintiffs herein, the Court in determining the question of misrepresentation stated as hereunder –

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.
30. It is not disputed that Mr. Pavan Ubhi was employed by the defendant and was the defendant's agent. It then follows that Mr. Pavan's actions carried out in the course of his employment with the defendant were authorized by the defendant, and carried out on its behalf. In the premise, I find that any representations made to the plaintiffs by Mr. Pavan Ubhi false or otherwise were made by the defendant herein.
31. 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.

32. From the evidence adduced and documents produced as exhibits by PW1, the plaintiffs demonstrated that they had requested a pay out of their investment but when they were informed that their funds were insured thus safe, it led them to make a decision to re-invest their money. I therefore conclude that the representation made by the defendant was made with the intention of influencing the plaintiffs. Earlier on in this ruling I found that the plaintiffs indeed relied on the said representation and reinvested an additional Kshs.35,263,888.31 with Nakumatt Holdings Limited in May 2016, out of which the plaintiffs have only been paid Kshs.18,170,881.50 leaving a balance of Kshs.17,093,006.85 that is due and owing to date. I am persuaded that the plaintiffs suffered a material loss due to reliance on the said representation.
33. Accordingly, this Court finds that the plaintiffs have on a balance of probabilities proved all the elements of misrepresentation as against the defendant.
34. I now have to determine whether the plaintiffs are entitled to general damages as a result of my finding above. It is noteworthy that the plaintiffs neither alleged nor demonstrated what loss they suffered as a result of them relying on the defendant's misrepresentation, save for the Kshs.17,093,006.85 that is yet to be paid back to them. The Court in *Moses Gakuru Thuo & another v Kenya National Assurance Co.* [2001] Ltd & Another [2011] eKLR relied on Chitty On Contract 28th Edition Vo. 1 at pages 363-364 and succinctly laid out the principles to be considered in a claim for damages for fraudulent misrepresentation as follows -

Measure of Damages for fraudulent misrepresentation:

The proper measure of damages for fraudulent misrepresentation was discussed by the Court of appeal in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 - It was held that damages for fraud were not the same as damages for breach of contract in that they were not designed to place the innocent party in the position he would have been in if the representation had been true, but to put him in the position he would have been in if the representation had not been made... This means that where a person is induced by fraud to buy some property, the proper measure of damages is prima facie the difference between the price paid and the fair value of the property. In *Doyle v Olby (Ironmongers) Ltd*. It was held that in cases of fraud the plaintiff was entitled to damages for any such loss which flowed from the defendant's fraud, even if the loss could not have been foreseen by the latter. Thus, the claimant may recover not only the difference between the price and the value of what he received but also the expenditure wasted in reliance on the contract and compensation for other opportunities passed over in reliance on it.

35. Bearing in mind the above extract, and the evidence adduced by the plaintiffs herein, this is not a case where general damages ought to be granted so as to put the plaintiffs in the position they would have been in, if the representation had not been made, as compensation can easily be achieved by ordering the defendant to pay the plaintiffs the sum that is due and owing to them.
36. In the premise, it is my finding that the plaintiffs are entitled to the claim of Kshs.17,093,006.85 that is yet to be paid to them, with interest at 21% from 27th April 2017 until payment in full, the said amount



being the balance of the sum they re-invested in Nakumatt Holdings Limited on the strength of the defendant's misrepresentation.

37. The upshot is that the plaintiffs' suit against the defendant is merited. Section 27 of the *Civil Procedure Act* provides that costs follow the event. The plaintiffs having succeeded in this suit are awarded costs.

38. The final orders are -

i. That the defendant shall pay the plaintiffs Kshs.17,093,006.85 with interest at 21% from 27th April 2017 until payment in full; and

ii. Costs of the suit are hereby awarded to the plaintiffs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF FEBRUARY 2025.

Judgment delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Oundo h/b for Mr. Wandabwa for the plaintiff

Ms Macharia for the defendant

Ms Lucy Njeru - Court Assistant.

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