Mutahi & another v Gitonga & 3 others (Civil Appeal E031 of 2023)
[2025] KEHC 7789 (KLR) (28 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7789 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CIVIL APPEAL E031 OF 2023

AK NDUNG'U, J

MAY 28, 2025

BETWEEN

PETER KIHARIRI MUTAHI ..... 1ST APPELLANT

JANE WANJIKU WACHIRA ..... 2ND APPELLANT

AND

WERU GITONGA ..... 1ST RESPONDENT

ANNAH MUKAMI NDURURI ..... 2ND RESPONDENT

FORST HILL GENERAL SUPPLIES T/A DUMA MABATI ..... 3RD RESPONDENT

FOREST HILL GENERAL SUPPLIESLIMITED ..... 4TH RESPONDENT

(Appeal from original decree dated 26/09/2023 in Nanyuki
CM Civil Case No. 122 of 2020-Ben Mararo (SPM)

JUDGMENT

1. The Appellants instituted a suit against the Respondents vide a plaint dated 07/12/2020. They averred that in December 2018, the 1st and 2nd Respondents intimated to them that they had acquired an iron steel rolling press machine and in January, 2019, they commenced negotiations with the 1st and 2nd Respondents to invest capital and commence the business and they executed a joint venture agreement (herein referred to as the JVA). That the Appellants were to contribute Kshs.6,250,000/- to the proposed business and upon execution of the JVA, they transferred the said sum to the 1st and 2nd Respondents. After the sale of the first bunch of iron sheets, the Respondents informed them that the proposed company had made a profit of Kshs.2,700,000/- and therefore, the 1st Appellant was entitled to 50% of the profits which was to be injected back to the proposed company for purchase of raw materials. The 1st Appellant was required to send an extra Kshs.500,000/- for the same.

2. That the 1st and 2nd Respondents however did not purchase the raw materials and even cut communication with the Appellants. The Appellants listed the particulars of fraud, illegality, misrepresentation, breach of contract and fiduciary duty. An amicable solution was sought and the Respondents advocate intimated of an audit being undertaken and the Respondents are yet to provide an audit as to the operation of the joint venture agreement. That the sum of money obtained from the Appellants and profits was diverted and invested by the 3rd and 4th Respondents in contravention of the JVA. They prayed for a declaration that the Respondents were in breach of the JVA, that the Respondents were in breach of fiduciary duty, damages for breach of contract and breach of fiduciary duty, sum of Kshs.6,750,000/- paid as capital injection in the JVA, sum of Kshs.2,700,000/- owed to the Appellants as profits in the JVA, interest in prayer 4 and 5 and costs of the suit.

3. The Respondent filed a defence dated 22/11/2020 whereby they denied the averments contained in the plaint and further averred that they were already in the business of rolling mabati and the alleged profit of Kshs.2,700,000/- was not available to the Appellants. That any audit that was to be done was to be joint. They denied the particulars of fraud, illegality, misrepresentation, breach of contract and fiduciary duty.

4. The matter proceeded for hearing with the Appellants calling two witness whereas the 1st Respondent was the sole witness in the defence case.

5. Vide a judgment delivered on 26/09/2023, the trial court dismissed the Appellants case and held that there was no valid joint venture agreement between the 1st Appellant and the 1st Respondent and that the Appellants were at liberty to pursue any amount paid to any of the Respondents before another forum. While dismissing the Appellants' case, the trial court inter alia held that;

> " The said joint venture agreement at the execution section only bears the signature of the 1st Defendant. On his part, the 1st Plaintiff did not sign which means that he did not execute the said agreement for it to be said that the same is/was binding on him. That notwithstanding, the 1st Plaintiff still went ahead to send some money to PW2 in order to give to the 2nd Defendant for the purpose of their business. PW2 stated that she used to receive money from the Plaintiff and she would transfer some to the account of the 2nd Defendant. She testified that at some point, she withdrew cash which she gave to the 2nd Plaintiff. She adduced statements which shows that between 11/02/2019 and 21/01/2020 she transacted Kshs.6,110,000/- which she stated that was handed over to the 2nd Defendant. This evidence by PW2 have not been controverted by 2nd Defendant who chose not to testify. However, I am of the view that the Plaintiff's case is solely based on the said joint venture agreement which is unenforceable. As a matter of fact, the whole case surrounds the said JVA. Since the same is unenforceable, this court will be hesitant to issue prayers that were not placed before it. I am of the view that I cannot rewrite the nature of dispute brought before this court. As such, I would not say more but only to state that the Plaintiffs have not proved their case to the required standard since their case is not supported by the evidence. However, as I have pointed out earlier that Kshs.6,110,000/- was allegedly paid to the 2nd Defendant, the same can only be recovered in another forum but not through this suit."

6. Being aggrieved by the said judgment, the Appellants lodged this appeal vide a memorandum of appeal dated 09/10/2023 raising the following grounds;

    i. The learned magistrate erred in law and in fact in holding that the joint venture agreement between the parties was invalid and not enforceable.

ii. The learned magistrate erred in holding that the Appellant's case was solely based on the joint venture agreement.

iii. The learned magistrate erred by failing to consider all the evidence on record and testimonies delivered by the Appellants during hearing.

iv. The learned magistrate erred in holding that the Appellants had failed to prove their case to the required standards.

v. The learned magistrate erred in holding that the Appellants were at liberty to pursue any amounts that was paid to any Respondents before another forum.

vi. The learned magistrate erred in dismissing the Appellants' plaint with costs to the Respondents.

7. The appeal was canvassed by way of written submissions. The Appellants' counsel argued that by holding that the joint venture agreement was not enforceable in law for failure by the 1st Appellant to sign the agreement, the trial court failed to assess and appreciate the conduct depicting the real intention of the parties. Reliance was placed on the case of Mamta Peeush Mahajan (suing on behalf of the estate of the late Peeush Premlal Mahajanj vs Yashwant Kumari Mahajan (sued personally and as executrix of the estate and beneficiary of the state of the late Krishan Lal Mahajan (2017) eKLR and RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production) (2010) UKSC14, [45] where the court in the latter case inter alia held that;

> " It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create a legal relation and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations."

8. That the intentions in this case is illustrated by the fact that the parties herein knew each other and their relationship ought to be looked at from a perspective of utmost trust and good faith, there was a meeting of mind as parties were to contribute Kshs.6,250,000/- for the business, the 1st Respondent signed the agreement which was drawn by an advocate, the transaction was executed as the Appellants had already performed their obligations as agreed, there was uncontroverted evidence that 1st Appellant's sister gave the 2nd Respondent Kshs.6,110,000/- and that by the 1st Respondent's own admissions, the Mabati rolling business is still a going concern and is existing to date. That there was an offer in that each party was to pay Kshs.6,250,000/- and the Appellants contributed Kshs.6,110,000/- and therefore, by the conduct of the parties, there was unequivocal intention to create a legal relation. Therefore, by the fact that the transaction was performed on both sides, it is unrealistic to argue that there was no intention to enter into legal relations.

9. He submitted that the 1st Appellant forgot to sign the agreement and the court should appreciate that they live in Denmark and communication was through the sister. The relationship was in good faith and an honest intention as the two parties were married couples turned friends. The terms of engagement were derived from the agreement and Respondents have not contested any part of the agreement save for the execution. That they are old and could have innocently ignored the signing of the agreement with no malicious intention. Reliance was placed on the case of Erick Barasa Makokha & 2 others vs Neema ya Mungu Investment Co Ltd (2021) eKLR where it was observed that the life of unsigned contract is brought into existence by the events succeeding its making or drafting or being entered into, albeit without the execution. That the Appellants could not have intended to cause self-

harm by failing to sign the agreement and could not have committed to pay that much to the venture. They relied on the case of National Bank of Kenya Limited vs Anaj Warehousing Limited (2015) eKLR where the court view was that it cannot be right in law to defeat a clear intention on technical consideration and the court relied on Article 159(2)(d) of *the Constitution*.

10. It is submitted that the ends of justice would demand that the court recognises the intention of both parties to be bound by the JVA. The Appellants urged the court that if it finds that the JVA was invalid, to therefore find that there was an oral agreement between the parties as was held in the case of Trishcon Construction Co. Ltd v Avtar Singh Bahra (2017) Eklr. The Appellants had evidential burden of proof and they proved that there was a JVA and based on that agreement, they injected 6.1 million a fact that was undisputed by the Respondents. Therefore, having proven that the transaction really happened, it was upon the Respondents to proof that if there were any losses made, they ought to have presented evidence to that effect which was not done. The 2nd Respondent did not testify hence PW2's evidence remained uncontroverted. He submitted that the learned magistrate erred by referring the Appellants to pursue any other amounts that were paid before another forum raising the question which other forum can the parties go to and if they opt to move to any other forum, they shall be guilty of the doctrine of res judicata.

11. In rejoinder, the Respondents' counsel submitted that the agreement was between the Appellants and Duma Mabati (Incorp) and the agreement stated that,

'upon completion of incorporation, Duma Mabati Ltd(incorp) shall be structured as follows...'

12. Meaning that Duma Mabati (incorp) had not been incorporated at the time of entering into the agreement. Therefore, Duma Mabati did not exist in law and could not have formed part of the agreement. Further, the agreement was signed by one party as the Appellants did not sign hence the agreement was incomplete and unenforceable in law. That failure to sign meant that the Appellants were not privy to the agreement and cannot purport to enforce the same hence the trial court correctly held that the agreement was unenforceable in law.

13. He argued that the trial court further correctly held that the JVA formed the very basis of the Appellant's suit since their prayers in the plaint were based on the averments contained in the plaint. There were no averments formed outside the purported joint venture agreement and it is trite law that parties are bound by their pleadings. That the learned magistrate considered the evidence by the parties hence his analysis on the evidence was exhaustive and cannot be faulted. Further, the Appellants prayed for Kshs.6,750,000/- and it is clear that the amount, if any, was given to a party which was not a signatory to the JVA as the Appellants and the 2nd Respondent did not sign the JVA and therefore, the same was not enforceable.

14. In respect to prayer for Kshs.2,700,000/-, counsel submitted that the evidence of the Appellants was that no audit had been done before filing the suit and there was no way therefore of determining the actual profit. That one Grace Muthoni Rufus testified that she had nothing to show that the money was transferred to the 2nd Defendant. Therefore, the 2nd Defendant having not signed the JVA, she was not bound by it. The issue therefore can only be decided in a different suit between the Appellants, PW2 and the 2nd Respondent as there was no evidence linking the 1st Respondent at all. That the Appellants suit before the trial court was frivolous and vexatious hence the award of costs was proper. They urged the court to dismiss the appeal with costs to the Respondent.

15. This being a first appeal, am alive to the duty of this court as an appellate court which were well enunciated in the case of Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123 in the following terms:

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

16. As seen earlier, the Appellants' suit was dismissed by the trial court on account that the JVA was not signed by the 1st Appellant hence it was not binding on him and was therefore unenforceable. The trial court even after having found that there was evidence of payment of Kshs.6,110,000/- to the 2nd Respondent, which evidence was not controverted by the 2nd Respondent, went ahead and held that the Appellants had not proved their case on account that their case was not supported by evidence. The court further directed the Appellants to file the claim for the money paid in another forum.

17. As to whether there was a valid agreement between the parties, it is not in dispute that there is a JVA dated 30/01/2019 between the 1st Appellant and the 1st Respondent. The JVA was signed by the 1st Respondent but the 1st Appellant did not sign. It is on this basis that the trial court dismissed the Appellants' claim.

18. The question therefore is whether there was a valid agreement between the parties. The court in Erick Barasa Makokha & 2 others v Neema Ya Mungu Investment Co Ltd [2021] eKLR as quoted by the Appellants held that;

> " What, then, is the effect in law of an unsigned contract? Is it enforceable? The life of an unsigned contract is brought into existence by the events succeeding its making or drafting or being entered into, albeit without the execution. The court in, Reveille Independent LLC vs. Anotech International (UK) Ltd [2016] EWCA Civ 443 (Elias, Underhill LJJ & Cranston J), said as follows, with respect to the effect of an unsigned agreement:
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> "... a draft agreement can have contractual force, although the parties do not comply with a requirement that to be binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicates this, albeit a court will not reach this conclusion lightly."

19. In Lawrence Mukora Miniu T/A Dynamite Civil Electrical Contractors v Kamandura Tarambana Water Development Society [2016] eKLR the court held that;

> " The fact that the defendant may not have signed the document called "Contract for Supply and Installation of Domestic Water Meters?, does not mean that the defendant had not executed a binding contract. In this case, there is correspondence exchanged between the parties, making it clear that the parties had clearly identified the nature and scope of work to be undertaken; the cost of the work to be undertaken and the period during which the contract was to be performed. Thereafter, the plaintiff performed some work in accordance

with the terms of the contract. In the event, I find that there was indeed a contract between the parties, and also that there had already been part-performance of the said contract. I further find, on the basis of concurrence between the parties, that the defendant has paid a substantial portion of the contractual sum."

20. In the South African case of Hubener NO and Others v H J Pepler & P J Human Share Block t/a Ridge Royal and Others (9026/2022P) [2023] ZAKZPHC 151 (25 October 2023) the judge observed thus;

> " The only contract between the parties is the unsigned copy of the original that was presented by the appellants. It is a valid and binding agreement, in my view, since the parties' relationship was governed by it from 2008 to date. There is no doubt that they had and still have the intention to be bound by it. The unsigned copy of Agreement of Use and Occupation is declared a true reflection of the content of the agreement concluded between the first respondent and Steven William Hubener in 2008."

21. What can be inferred from the above cases is that if one party has not signed the contract, that party's acceptance is inferred from performance under the contract, in part or in full, and that party becomes bound. This was well observed by the Court of Appeals of Georgia in Cooper v. G.E. Constr. Co., 116 Ga. App. 690, 158 S.E.2d 305 (1967) that-:

> " The object of securing signatures of the parties to a written contract is, of course, to take it out of the Statute of Frauds and to afford mutuality so that it may be enforced. Aspironal Laboratories v. Rosenblatt, 34 Ga. App. 255 (2) (129 SE 140); Robinson v. Belcher, 37 Ga. App. 412 (140 SE 412). But this is not the only manner of obtaining mutuality. If one of the parties has not signed, his acceptance is inferred from a performance under the contract, in part or in full, and he becomes bound....It is axiomatic that performance, whether in part or in full, relieves an oral contract from the operation of the Statute of Frauds. Code § 20-402. And part performance will satisfy the requisites both of mutuality and of the Statute of Frauds. Friedlander v. Schloss Bros. & Co., supra. Certainly, if not already so, the obligations of G. E. Construction Company as contained in the contract as amended became binding when it subsequently furnished the consideration by performing what it conceived to be its obligations under them. Fontaine v. Baxley, 90 Ga. 416, 425 (17 SE 1015); Hall v. Wingate, 159 Ga. 630 (1c) (126 SE 796). This is a principle of long standing. See Jernigan, Lawrence & Co. v. Wimberly, 1 Ga. 220."

22. From a recap of the evidence adduced at the trial court, the 1st Appellant PW1 stated that he met the 1st Respondent and his wife in December 2018 who informed him that they had imported a mabati rolling machine from China and they agreed that they join the venture. The agreement was done and he contributed through his sister, PW2 according to the agreement. In June, they came back to Kenya and found a consignment from China and sold it. They made Kshs.2.7 million and he was therefore entitled to Kshs.1.35 million according to the agreement. They decided to reinvest the profits but they did not hear from the Respondents again. He tried to communicate but the 1st Respondent said he had no right to disturb anyone. He did not receive any profits. That Duma Mabati is owned by Forest Hill Supply limited and the directors are the 1st and 2nd Respondents. That the Appellants do not appear as directors.

23. PW2, the 1st Appellant's sister testified that she gave the 2nd Respondent money in cash on two occasions and did several transfers to the 2nd Respondent ABSA bank account. Her brother and the Respondents were in mabati business.

24. The 1st Respondent filed a written statement on 04/02/2021. In the said statement, he stated that the Appellants and the 1st and 2nd Respondent intended to enter into a joint venture to manufacture mabati and they agreed that the Appellants and the 1st and 2nd Appellants would contribute 50% to the venture amounting to Kshs.6,250,000/- each. That it was agreed that since the 1st and 2nd Respondents had an existing business, the Appellants were to contribute the said money in cash. That the Appellants however contributed Kshs.4,260,000/- and they were to contribute a further Kshs.500,000/- to buy materials. That the intended company Duma Mabati was not incorporated and soon thereafter, the Appellants sought to terminate the agreement. That the profit of Kshs.2,700,000/- was made by the existing business and therefore, the Appellants are not entitled to the same at all. The Appellants failed to acknowledge the cost of doing business and that is why they insisted on an audit to be done. That no contract exited between them as the Appellants did not honour their part of the bargain.

25. It is clear from the evidence that 1st Respondent acknowledges that the Appellants performed their part of the bargain though he claimed that part payment was made. Further, there is a letter dated 30/03/2020 addressed to the Appellants by the Respondents' advocate acknowledging that there was an agreement to form a company known as Duma Mabati Ltd (Incorp). It also acknowledged that the Respondents had already applied the initial investment value for the intended purpose as per the agreement and urged for an audit to be done.

26. In his testimony before the trial court, the 1st Respondent testified that he met the Appellants who requested to join his mabati making business and they joined. Name of the venture was to operate under Duma Mabati which is in existence to date. That he is a director at Duma Mabati and initial parties were the Appellants and the 1st and 2nd Respondents. They were to contribute Kshs.6,250,000/- but the Appellants contributed Kshs.4,600,000/- and he did not contribute any other money. Kshs.4.2 million was transferred to his wife's account. He denied that PW2 gave cash of Kshs.900,000/- thrice. That the 1st Appellant did not finish his contribution. That there was loss that was shared equally and the Appellants were aware of the same.

27. In their submissions before the trial court, the Respondents submitted that the Appellants claimed to have paid the money through 2nd Respondent who was not a signatory to the agreement nor a shareholder. That PW2 was unable to show that the money transferred to the 2nd Respondent's account had any correlation with Duma Mabati which was to carry on the joint venture. That PW1 and PW2 were unable to tally the alleged amount given to the 2nd Respondent. That it is in evidence that Duma Mabati had not been incorporated as a limited company.

28. From the foregoing, none of the parties questioned the validity of the contract. Going by the 1st respondent's testimony, his submissions and statement filed before the trial court and the letter dated 30/03/2020 from his advocate, there was no challenge on the validity of the agreement entered into. The letter dated 30/03/2020 read in part that 'our clients have already applied the so called "initial investment value" for the intended purpose as per the agreement'. The 1st Respondent expressly admitted that he entered into a contract with the 1st Appellant and did not dispute receiving money from the Appellants pursuant to the contract although according to him, the Appellants contributed Kshs.4.2 million which money was deposited in the 2nd Respondent's (his wife's) account.

29. Going by the principles of law enunciated in the case law referred to above, having acknowledged that there was an agreement which was acted upon by the parties, it is my view that there was a valid contract between the parties.

30. The Respondent acknowledged during trial that money was deposited to the 2nd Respondent's (his wife's account), for the purpose of running the business. He however disputed the amount paid

as he testified that the Appellants only deposited Kshs.4.2 million instead of Kshs.6,250,000/- as per the agreement. In the letter dated 30/03/2020, which followed a letter by the Appellants dated 06/03/2020, the Respondents did not dispute the money claimed by the Appellants. I confirm, just as found by the trial court, that evidence abounds that the Respondents received Kshs.6,110,000/- from the Appellants. This evidence was not controverted and the failure of the 2nd Respondent to testify in the matter speaks volumes as to the candidness of the Respondents in this matter and the only logical inference is that her evidence would have been adverse to the Respondent's case.

31. As regards the prayer for damages for breach of contract in the JVA and breach of fiduciary duty as promoters, it is trite law that the purpose of damages for breach of contract is, subject to mitigation of loss, that the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase restitution in integrum. (See Kenya Industrial Estates Ltd Vs Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] EKLR and Kenya Breweries Ltd Vs Natex Distributors Ltd Milimani HCCC No. 704 of 200[2004]eKLR). The measure of damages is in accordance with the rule established in the case of Hadley Vs Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally form the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited Vs Intercom Services Ltd & others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Vs Sisco Muranga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande Vs Kenya Co-operative Creameries Limited, NRB CA Civil Appeal No. 154 of 1992 (UR).

32. The Appellants have not proved such damages and the claim fails.

33. In respect of the claim for Kshs. 2,700,000 arising from profits, the establishment of this fact required evidence by way of a proper audit. The Appellants have not produced such an audit and the claim is bare and unsupported by evidence. In the absence of an audit report or any supportive documentation, prayer 5 in the plaint fails.

34. Upon re-evaluation of the evidence on record, and applying the legal principles set out in the authorities above, am satisfied that on a balance of probability, the appellants proved their claim in respect of prayers 1, 2, 4, 6, and 7 of the plaint.

35. With the result that the appeal succeeds to the extent aforesaid. I set aside the judgement of the trial court and substitute thereof a judgement for the plaintiff in terms;

    1. A declaration be and is hereby issued that the Respondents are in breach of the joint venture agreement dated 30th January 2019.

    2. A declaration be and is hereby issued that the 1st and 2nd Respondent are in breach of the fiduciary duty owed to the 1st and 2nd Plaintiffs as promoters of the proposed company as per the JVA.

    3. That the Appellants are awarded 6,110,000/= paid as capital injection in the JVA

    4. Interest (3) above is allowed at commercial rates from filing suit till payment in full.

    5. The Appellants shall have two third the costs of the appeal.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY 2025.

A.K. NDUNG'U

JUDGE