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1. *Muaamar Abdulwahab Melhi Al-Aswad v Bait Alsharq Sdn Bhd & Anor [2022] MLJU 3809*

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Muaamar Abdulwahab Melhi Al-Aswad v Bait Alsharq Sdn Bhd & Anor [2022] MLJU 3809

Malayan Law Journal Unreported

SESSIONS COURT (KUALA LUMPUR)

ZULQARNAIN HASSAN SCJ

CIVIL SUIT NO WA-A52NCC-34-01 OF 2021

5 December 2022

*Nor Mohd Syazwan bin Che Hasim (**Syazwan Hasim** & Azeel Eskandar) for the plaintiff.*
Sharon Shakila Gabriel (N Saraswathy Devi) for the defendants.

Zulqarnain Hassan SCJ:

GROUNDS OF JUDGEMENT

BACKGROUND

[1] The plaintiff files an appeal against the judgement of the Court in dismissing the claim and partly allowing the counterclaim after full trial.

[2] The dispute in this case centres around the finding of two different factual versions presented by both, the plaintiff and the defendants. To put it simply, the duty of this Court is to enquire which version to be more probable.
PRAYERS BY THE PLAINTIFF AND THE DEFENDANTS

[3] The plaintiff pleads the following prayers as stated in the statement of claim:

> "30. Wherefore, Plaintiff claims from the First and Second Defendants are as follows:
>
> 30.1 Declaration that the Plaintiff owned 20% of shares in the First Defendant's company;
>
> 30.2 First Defendant shall transfer 20% of its shares to the Plaintiff within fourteen (14) days from the date of judgement;
>
> 30.3 Declaration that the Second Defendant as a director and majority shareholder of the First Defendant entered into an agreement dated 04.11.2013 as an authorized person by the First Defendant and the agreement binds the First Defendant; And/or alternatively;
>
> 30.4 The First Defendant and the Second Defendant shall jointly pay to the Plaintiff a sum of RM200,000.00 being the current shareholding price of 20% which has not been transferred to the Plaintiff;
>
> 30.5 Interest at the rate of 5% per annum from the date of judgment until full settlement;

30.6 Cost between client and solicitor;

30.7 Cost for this claim; and

30.8 Orders or other reliefs which this Honourable Court deems fit and proper."

[4] Meanwhile, in the counterclaim, the defendants pray the following orders:

"30. Wherefore, the Defendants' claim as against the plaintiff:

(a) The sum of RM410,548-00;

(b) Interest calculated at the rate of 5% on the said sum of RM410,548-00 commencing on 1.11.2020 till the date of full judgment and thereafter from the date of judgment to the date of full settlement thereof;

(c) That all documents belonging to D1 taken by the Plaintiff be returned to D1 within 14 days of this Judgment;

(d) Damages for fraud to be assessed by this Honourable Court;

(e) Costs to be paid by the Plaintiff to the Defendants;

(f) Any other reliefs which this Honourable Court deems fit and proper."

FACTS AS CLAIMED

[5] The plaintiff [PW1] and D2 [DW1] are Yemeni citizens.

[6] In 2013, D2 ventured into the trading of perfumes and Oud from the Arab country into Malaysia.

[7] For the above purpose, on 16/04/2013, D1 was officially incorporated. The plaintiff was made the director. The shareholders were D2 dan one Muhammad Muntazar bin Ariff Johar [DW2] with 50% shares respectively.

[8] D2 established a shop located at Bukit Bintang, Kuala Lumpur to carry out the perfume business while the plaintiff and another Yemeni, Abdulaziz Ali Hadi Hassan [PW4] were the employees.

[9] Another Yemeni, Dr Abdullah Musid Ahmad Al Hajjaji [DW3] is the Chairman of the Yemeni Community in Malaysia. DW3 was playing the role as the intermediary to mediate the disputes between both parties.

PARTNERSHIP AGREEMENT

[10] The plaintiff has presented to this Court that there was a Partnership Agreement dated 04/11/2013 entered between D2, the plaintiff and PW4. It was witnesses by PW2 who is the brother of the plaintiff.

[11] The Partnership Agreement provides namely the following terms:

1. To establish, a commercial company in Malaysia under the name Bait Alsharq Company to trade in Oud and perfumes, hereinafter referred to as the company.
2. The above partners' ratio in the capital and profits of the company are as follows; D2 as First Party 70% + the plaintiff and PW4 as Second Party 15% + Third Party 15 % respectively).
3. D2 shall assume the responsibility as the general manager of D1 and its financial officer, in addition to following up of all businesses related to the company including formal transactions, clearance of goods and others.
4. The plaintiff and PW4 shall be responsible for operation and sales within the company and they shall deposit the safes proceeds on a daily basis to either the company's manager or the bank, and if there is any delay in the working hours or arranging the company's shop, a day's wage shall be deducted from the salary at the end of the month.
5. The partners, or whoever acting on behalf of one of them, shall meet at the beginning of each Hijri year to evaluate the accounts of the company for the previous year and to agree to the distribution of profits and

determine the budget of the following year and get the same signed by the partners or their representatives.

[12] D2 strongly denies that he had ever attested the Partnership Agreement.

THE MANAGEMENT AGREEMENT

[13] On the other hand, the defendants have presented to the Court that the Management Agreement dated 04/11/2013 was entered into between D2 as the First Party, the plaintiff as the Second Party and PW4 as the Third Party. The Management Agreement was also signed by D2, the plaintiff, and PW4. Their fingerprints are also therein. This Agreement provides the followings:

(a) D2 shall be responsible for setting up a business shop/premise in the name of D1 located in Bukit Bintang to carry out the perfume business in Malaysia;

(b) D2 shall be fully responsible for all costs of the said business/ shop and obtaining the licenses required from Dewan Bandaraya Kuala Lumpur, work permits and all other official documents required to carry out the business activities;

(c) The plaintiff as the 2nd Party shall be an employee responsible for the sales at the said premise/shop and shall be registered as a Director in the Suruhanjaya Syarikat Malaysia [SSM] registration, documents for ease of obtaining a work permit from the Jabatan lmigresen Malaysia;

(d) The plaintiff as the 2nd Party shall be responsible for all sales in the premise/shop including business items, furniture and documents. The same shall be under the full responsibility of the plaintiff as the 2nd Party.

(e) PW4 as the 3rd Party shall be responsible for all sales in the absence of the plaintiff, the 2nd Party.

(f) PW4 as the 3rd Party shall contribute 15% of the capital of the company in the near future to be made a partner in the business at the said shop and in the event, this happens, a separate agreement shall be entered into.

(g) This Management Agreement is made on two (2) sheets of paper and in the event of new matters arising subsequent to this, a new contract for the management of the said shop shall be entered into based on these new matters.

THE PLAINTIFF'S CASE

[14] The plaintiff's claim against the defendants stems from the Partnership Agreement dated 04/11/2013 which the plaintiff claims would give him 15% shares and thereafter in 2005, 20% shares in D1.

[15] The plaintiff claims that the around early 2013, D2 represented to the plaintiff about starting a business with the plaintiff which involved setting up a company. The plaintiff shall become a shareholder in the company. Thereafter a Partnership Agreement dated 04/11/2013 was entered into between the plaintiff, D2 and PW4. The division of capital and profits were 70% for the D2, 15% for the plaintiff and 15% for PW4.

[16] Based on the representations made in early 2013, the plaintiff had been working as Manager of D1.

[17] Sometime in 2015, D2 informed the plaintiff that PW4 was leaving the business and that D1 had paid PW4 a sum of RM100,000-00 being the current value of the purported 15% shares held by PW4.

[18] D2 had increased the plaintiff's shareholding to 20% and D2 shareholding to 80%.

[19] The plaintiff was paid annual profits of 15% for the years 2013, 2014 and 2015 and 20% for the year 2015.

[20] On 20/10/2015, the plaintiff was made a director of D1 and in December 2019, the plaintiff expressed his intention to leave the business and to sell his 20% shares. However, this was rejected by D2.

[21] After working in D1 from 2013 till 2020, the plaintiff suddenly discovered that he was not a shareholder of D1. In Mac 2020 during the Covid 19 lockdown, D1 did not give the plaintiff any allowance and a decision was taken to close the business and the Settlement Agreement dated 05/7/2020 was reached.

THE DEFENDANT'S DEFENCE AND COUNTERCLAIM

[22] It is the pleaded defence that there had never been the Partnership Agreement. The said Partnership Agreement had been fraudulently created by the plaintiff and the only agreement which existed between parties is the Management Agreement**.**

[23] The defendants plead that D2 did not at any time represent to the plaintiff to make the latter a shareholder of D1 or partner in any perfume business with D2.

[24] On or about 2013, the plaintiff was working for another company, Murooj Al-Oud Sdn Bhd. It was the plaintiff who had requested for a job at the D1's company for a higher salary.

[25] The defendants claim that the plaintiff was offered and appointed as the Overseas Product Specialist in D1. The terms of the appointment are as follows:

(a) The plaintiff shall be paid a monthly salary and also commissions for sales of items sold at the D1's shop at No. 134, 2nd Floor, Lot 10, Jalan Bukit Bintang, Kuala Lumpur;

(b) Vide a Management Agreement dated 04/11/2013 entered into between D2 as the 1st Party, the plaintiff as the 2nd Party and PW4 as the 3rd Party, it was inter alia, agreed as follows:

(i) D2 shall be responsible for the setting up a business shop/premise in the name D1 located at Bukit Bintang to carry out the perfume business;

(ii) D2 shall be fully responsible for all costs of the said business/shop premise and obtaining the licenses required from Dewan Bandaraya Kuala Lumpur, work permits and all other official documents required to carry out the business activities;

(iii) The plaintiff as the 2nd Party shall be an employee responsible for the sales at the said premise and shall be registered as a director in the SSM registration documents only for the purpose of obtaining a work permit from the Jabatan lmigresen Malaysia.

(iv) The plaintiff as the 2nd Party shall be responsible for all sales in the premise/shop including business items, furniture and documents. The same shall be under the full responsibility of the plaintiff.

(v) PW4 as the 3rd Party shall be responsible for all sales in the absence of the plaintiff as the 2nd Party.

(vi) PW4 as the 3rd Party shall contribute 15% of the capital of the company in the near future to be made a partner in the business at the said shop and in the event this happens, a separate agreement shall be entered into.

(vii) This contract is made on two (2) sheets of paper and in the event of new matters arising subsequent to this, a new contract for the management of the said shop shall be entered into based on these new matters.

[26] The plaintiff denies the existence and validity of the Management Agreement.

THE SETTLEMENT AGREEMENT

[27] The defendant pleads that at about December 2018, D2 left Malaysia for Ethiopia for business matters. In the meantime, the plaintiff as an employee of D1 had to manage and deal with the shop business in accordance with the Management Agreement dated 04/11/2013.

[28] D2 thereafter had received medical treatment in Germany and thereafter was in Netherlands.

[29] By reason of the Covid 19 Pandemic, D2 was not able to return to Malaysia.

[30] On or about June or July 2020, D2 discovered that the plaintiff had taken or stolen the stocks from the D1' shop totaling RM267,350-55.

[31] As D2 had been overseas, D2 obtained assistance from DW3 to settle the issue.

[32] On 05/7/2020, the Settlement Agreement was reached between D2 and the plaintiff through the intermediary role of DW3.

[33] The Court takes note that tt is an agreed fact that the plaintiff and D2 had entered into a Settlement Agreement.

[34] The terms of the settlement agreed between the parties are as stated in the Settlement Agreement, which are inter alia as follows:

(a) The plaintiff shall take the stocks at the shop belonging to D1 totaling RM267,350-55 as at the last inventory date, and shall take steps to sell the said stocks either by way of direct sales, warehouse, sales through social media and any other way to sell the stocks at the best price;

(b) The plaintiff shall keep a record of the stocks sold in his possession and care vide invoices which state the amount, type and price of the items sold;

(c) The sale price of all items must be between the range of the minimum cost and maximum cost as stated in the accounts system;

(d) Any sales below the costs can only be done with the consent of D2 first via WhatsApp messaging application stating the particulars of the said items;

(e) The time frame for the sale of the said stocks are six (6) months and at the latest is 31/12/2020;

(f) The plaintiff shall be paid a monthly salary of RM4,000-00 from the direct sales;

(g) The remainder of the sales money shall be banked in forthwith by the plaintiff in the personal account of DW3 who shall hold the monies until 31/12/2020 when the accounts of D1 is settled with D2;

(h) The plaintiff shall keep receipts of the bank transfers for the final taking accounts and shall send a copy of each transfer via WhatsApp messaging application to D2 and also to DW3 as the intermediary; and

(i) The plaintiff upon the signing of the Agreement must handover two visa machines in his possession together with the charging cables and the OHL envelopes to the intermediary who shall handover the same to D2's representative.

[35] The parties including the plaintiff signed the Agreement.

[36] The Court is satisfied that the plaintiff failed to comply with the terms of the said Settlement Agreement. The plaintiff's failure to adhere to the terms is supported and confirmed by DW3 vide his written report dated 24/01/2021 and his letter dated 10/5/2021.

FURTHER REMOVAL OF MONIES, STOCKS AND FURNITURE TOTALLING RM410,458-00

[37] It is the pleaded case of the defendants that the defendants later discovered that the plaintiff had stolen monies, stocks and furniture at the shop premise in Lot 10 worth RM410,458-00.

[38] DW2 had made a police report of this theft vide Dang Wangi Police Report No. THSL/020798/20 against the plaintiff.

PRINCIPLES AND STANDARD OF PROOF

[39] It is trite that the burden lies on the person who asserts a fact. See *section 101* of the *Evidence Act 1950*.

[40] It is trite that the standard of proof in a civil case is neither 100% certainty, nor beyond reasonable doubt as required in a criminal case. See *Lord Denning dalam Miller v. Minister of Pensions* [1947] 2 All ER 372 as follows:

> 'It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.'

[41] See also the Supreme Court in *Mohamad Radhi Yaakob v. PP* [1991] 1 CLJ (Rep) 311 which explained as follows:

> "When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such

presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt."

[42] In this regard, see also *Khu Siong Ming v. Lf Asia Sebor (Sarawak) Sdn. Bhd* [2017] MLJU 73 which held:

"The standard of proof required in this court is on the balance of probability. The Court of Appeal in the case of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2003] CLJ 314 where His Lordship Abdul Hamid Mohamed (JCA) as he was then, at p. 327 held as follows:

"Thus, we can see that the preponderant view is that the Industrial Court, when hearing a claim of unjust dismissal, even where is one of dishonest act, including "theft", is not required to be satisfied beyond reasonable doubt that the employee has "committed the offence", as in a criminal prosecution... ... In our view the passage quoted from Administrative Law by W.R.Wade & C.F. Forsyth offers the clearest statement on the standard of proof required, that is the civil standard based on the balance of probabilities, which is flexible, so that the degree of probability required is proportionate to the nature of gravity of the issue..."

[43] Based on the principles, which version is more probable is the acid test for this Court to determine. In this respect, see the Federal Court in *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v. Kerajaan Malaysia & Ors* [2016] 2 MLJ 1 which explained as follows:

"[13] The standard of proof in civil cases is the legal standard to which a party is required to prove its case, namely on a balance of probabilities. In civil litigation, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. In the case of *Miller v Minister of Pensions* [1947] 2 All ER 372, Lord Denning said the following about the standard of proof in civil cases:

"The … [standard of proof] … is well settled. It must carry a reasonable degree of probability .... if the evidence is such that the tribunal can sa y: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not."

[44] Also see Miller v. Minister of Pensions [supra]:

"…the case must be decided according to the preponderance of probability. If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determine conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not, "the burdenis discharged, but, if the probabilities are equal, it is not."

[45] Also in *Bandari Simma Realty Sdn Bhd & Anor v. Ravichanthiran a/l Ganesan (yang sebelum ini pernah beramal sebagai rakan kongsi Tetuan Ravi, Aida & Partners)* [2021] MLJU 332, the same principle was also explained as follows:

"[53] The term balance of probabilities was described in *Miller v. Minister of Pensions* [1947] 2 All ER 372 as a probability which is not so high as required in a criminal case … more probable than not …

but if the probabilities are equal, it is not discharged'. The standard, therefore, does now allow for any guesswork, speculation, surmises or conjecture, which is acting on amere possibility'. Miller v Minister of Pensions has been assimilated into Malaysian jurisprudence via numerous cases including Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, *Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1.

[54] I found instructive also the case of *Unsung Rasad v Public Prosecutor* [2019] 4 MLJ 448; ; [2019] 1 LNS 662, where the concept of balance of probabilities was explained by Abang Iskandar Abang Hashim JCA (now FCJ), adopting the English case of *Re B (Children)* [2008] UKHL 35: In the celebrated case of *Miller v Minister of Pensions* [1947] 2 All ER 372, Denning J (as he then was) said: If the evidence is such that the tribunal can say 'we think it more probable than not'

> the burden is discharged, but if the probabilities are equal it is not. That would invariably require that party involved having to lead or adduce affirmative evidence to prove his case, as the court shall presume the absence of those circumstances, to reach a level of proof of at least 51% probability against his adverse party. We would cite the English case of *Re B* [2008] UKHL 35, where Lord Hoffman had used a mathematical analogy to illustrate what needed to be proven by a party desirous of having judgement entered in his favour, like so: If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened. (Emphasis added.)"

[46] It is also settled that determining the probability or not is a mental exercise. See the Supreme Court in *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* *[1994] 1 MLJ 312* as follows:

> "It need hardly be emphasized that in order for the court to arrive at a decision that the defence has merits, it must perforce make a reasoned assessment of the justice of the case by forming a professional view of the probable outcome of the case, but this is stating the obvious. It involves a mental process that goes through the mind of a judge when making a decision in any case, weighing the evidence of a litigant against that of another on the facts alleged by a party against those of the other before finally coming to a decision."

FINDINGS BY THE COURT

THE DEFENDANTS' VERSION IS MORE PROBABLE

[47] Applying the above principles, the Court is fully satisfied that the defendants' version is more probable. It has reaches more than 51% probability weight.

THERE IS NO PARTNERSHIP AGREEMENT

[48] The Court is satisfied that the agreement which the parties had entered into was not the Partnership Agreement, but the Management Agreement.

[49] The above finding can be supported from the following credible evidence:

(a) D2 is a reliable witness. D2 did not enter into any Partnership Agreement with the plaintiff and PW4. Rather D2 entered into the Management Agreement;

(b) D2 only saw the purported Partnership Agreement for the first time in this proceeding when the plaintiff filed the present claim against the defendants;

(c) The purported Partnership Agreement dated 04/11/2013 provides that "The partners have agreed to establish a commercial company in Malaysia under the name Bait Alsharq Company." However, as at 04/11/2013, D1 was already incorporated;

(d) There had been no change in the shareholding of D1since 2013.

(e) If the said Partnership Agreement is a genuine agreement, the parties would have definitely acknowledged that D1 was already incorporated as 04/11/2013;

(f) D2 signed both the sheets of the Management Agreement dated 04/11/2013, which was also signed on each sheet by PW4 and the plaintiff;

(g) There is a high probability that the Partnership Agreement had been fraudulently created; and

(h) The Court is satisfied that there is no mention on the purported Partnership Agreement in the Settlement Agreement.

[50] The Court is of the considered opinion that the conduct of the plaintiff shows the following findings:

(a) The plaintiff had taken opportunity when D2 was overseas since 2019;

(b) The plaintiff took advantage of this by first removing stocks worth RM267,350-55 from D1's shop in the hope that D2 did not find out;

(c) The plaintiff did not give the defendants any notice of his purported shares pursuant to the purported Partnership Agreement;

(d) The plaintiff failed to comply with the terms of the Settlement Agreement to sell these stocks and to give an account;

(e) The plaintiff instead, had removed more stocks, furniture, the safe containing all documents belonging to D1; and

(f) Nowhere in the Settlement Agreement is mentioned that the plaintiff is a 20% shareholder of D1's company, a fact which the plaintiff would not have omitted if it is true.

PARTNERSHIP AGREEMENT IS FRAUDULENT

[51] The Court also finds that based on direct and indirect evidence taken as whole, the purported Partnership Agreement is a fraudulent agreement.

[52] The Court accepts the following D2's evidence:

(a) The plaintiff had removed all of D1 documents including the Management Agreement dated 04/11/2013, all official documents belonging to D1;

(b) None of the pages in the Partnership Agreement were initialed by anyone except for the last page;

(c) The Partnership Agreement only arose for the 1st time in this claim after the plaintiff had taken stocks worth RM267,335-00 belonging to D2 and taking steps to make sure that D2 did not find out about this action by sending the claim to the wrong addresses;

(d) Clause 1 of the Partnership Agreement is a material term as it speaks of the intention of the parties to set up D1 which means that as at 04/11/2013, D1 had not yet in existence. However, documentary evidence from SSM shows that D1 was only incorporated on 16/4/2013, that is about seven (7) months before the Agreement purportedly entered.

[53] To further aggravate the matter, the Partnership Agreement does not state the consideration of each parties for the formation of this purported partnership.

[54] The Court also finds that PW4's purported contribution of RM26,000- 00 to RM27,000-00 towards the capital of the partnership is not proven by any cogent evidence and remains as bare statement.

[55] PW4 testified that PW4 had received RM112,000-00 being his 15% share in D1 when PW4 left D1 but there is not a shred of evidence that such payments were ever made to or received by PW4.

[56] The Court also finds that no documents produced to show that a meeting pursuant to Clause 10 of the Partnership Agreement was held to discuss the sale of PW4's shares.

[57] The Court is also satisfied that no documents to show that the sum of RM112,000-00 was paid by D1 to PW4 and no documents tendered by PW4 that he had received RM112,000-00 from D1.

PLAINTIFF'S WITNESSES ARE NOT A CREDIBLE WITNESS

[58] The Court has carefully scrutinized and assessed the plaintiff's witnesses.

[59] The Court is satisfied that the all the plaintiff witnesses including the plaintiff himself are not credible witnesses. Their testimonies are not consistent with documentary evidence.

[60] This Court is satisfied that there is no document adduced to prove that payments were made by D1 to the plaintiff as claimed and no reliable evidence ie bank statement is produced to show that the plaintiff had received annual profits from D1.

[61] This Court is also satisfied that there is no document produced by the plaintiff giving notice to D2 expressing his intention to leave the business.

[62] The plaintiff was receiving not an allowance, but a monthly salary of RM6,000-00 per month. The Settlement

Agreement dated 05/7/2020 was entered into because the plaintiff had removed stocks worth RM267,355-00 from D1 shop without the consent of D2.

THE MANAGEMENT AGREEMENT EXISTS

[63] It is the factual finding by this Court that the Management Agreement does exist.

[64] The Surrounding circumstances, facts, incorporation documents of D1 including all contemporaneous documents show that the agreement which existed and entered into between the parties is the Management Agreement.

DEFENDANTS WITNESSES ARE CREDIBLE

[65] It is the factual finding by the Court that the defendants' witnesses including D2 are credible and safe to rely on. Their version is consistent with the contemporaneous documents.

[66] With regards to D2, D2's evidence is corroborated by DW2 and DW3.

[67] D2 is consistent throughout and his evidence is supported by reliably contemporaneous documentary evidence.

[68] D2's claim on the money transfer into the plaintiff's account are supported with bank statements.

OTHER FINDINGS

[69] Considering the evidence in totality, the Court also finds the followings.

(a) The plaintiff was made a director in 20/10/2015 for the purposes of obtaining a work permit. The Court accepts the evidence of D2 on the issue as it is also supported with documentary evidence ie search with SSM;

(b) The plaintiff failed to comply with the terms of the Settlement Agreement; and

(c) No representations as claimed by the plaintiff was made by D2 to the former.

SUBMISSIONS OF THE PLAINTIFF

[70] The plaintiff in his submission contends that the plaintiff was specialized in selling and buying Oud.

[71] The Court finds it hard to agree. No evidence adduced that buying and selling Oud are very difficult and scientific areas which are subjected to assistance from an expert.

[72] To compound the matter further, no evidence is led to satisfy the Court that the plaintiff was a businessman specializing in buying and selling Oud. In fact, it is the plaintiff's own testimony that he was the supervisor whose duty is to manage the shop.

[73] The plaintiff also submits that the plaintiff was the business partner of D1. The Court has considered the submission and finds it without merit. The overall evidence strongly suggests that he was only the employee of D1.

[74] It is also submitted that the plaintiff received annual payments from D1. The Court cannot agree with the argument as there is no reliable evidence adduced to support the claim.

[75] The plaintiff also submits that the Partnership Agreement is valid and enforceable. Having found that it was never in existence in the first place, the Court could not agree with the argument.

[76] The Court also finds it hard to accept that the Partnership Agreement was much earlier verbally entered between the plaintiff and D2 before the written was signed. No reliable documentary evidence ie written notes or email was adduced to support the claim.

[77] The plaintiff also submits that the failure of the defendants to call an expert to rebut the signatures of D2 in the Partnership Agreement is fatal and cited *Zulkifli Musa v. Fauzia Khanom Irshad Ali Khan* [2015] 1 LNS 76. The Court has considered the authority and finds that the facts are materially different.

[78] It is settled law that there need not be an expert to determine the falsity of an agreement. Direct and circumstantial evidence may also assist.

[79] The plaintiff also submits that the failure of D2 to lodge a police report is tantamount to accept the authenticity of his signature in the Partnership Agreement.

[80] The Court is of the considered view that such failure is not a strict implication of an admission. It all depends on the facts and circumstances of a particular case. In relation to the present case, the evidence is clear that D2 strongly denies the existence of the Agreement. More so D2 had been in overseas and only had the first sight of the Agreement when the case is presented.

PARTIAL AMOUNT OF THE COUNTERCLAIM HAS BEEN PROVED

[81] The Court is satisfied that the defendants had suffered the loss.

[82] However, the Court is not satisfied that claimed sum of RM410,548-00 has been sufficiently proved.

[83] It is the considered view of the Court that there is an admission by the plaintiff that he had removed certain stocks totaling to RM267,350-55 from D1's shop and took it to a warehouse. The Court finds support from the Settlement Agreement as it is clearly stated in it. Based on the premise, the Court ordered only the partial amount of RM267,350- 55.

[84] On the other items and stocks ie cash advance, goods delivered to a farm Company, petty cash etc, though the Court is satisfied that the items were removed by the plaintiff, no satisfactory evidence on the amount was adduced. That being the case, the Court awarded nominal amount of RM5,000-00.

CONCLUSION

[85] The Court has considered the evidence not in isolation, but in its entirety.

[86] The Court has considered that there is no rule which says the Court is bound to accept and reject any oral evidence. It all depends on the probability of the evidence.

[87] The Court has also considered the cases cited by the learned solicitor for the plaintiff and finds them distinguishable.

[88] It is the considered view of the Court that the plaintiff has only created doubt and unable to prove its case on the balance of probabilities as required. See the Court of Appeal in *Aiashah binti Ismail & Anor v. Superintendent of Lands and Surveys Kuching Division & Anor* *[2018] MLJU 2149* as follows:

> ".. Also, the evidence of PW2 itself was premised upon hearsay, which she had heard from 'the elders.' In fact her evidence had created uncertainty in respect of the actual size of the claimed NCR land claimed by the Plaintiffs. In other words, her evidence had not surmounted the threshold of proof required of a plaintiff in order that a judgment may be entered in his favour."

[89] As a conclusion, after considering the pleadings, evidence and submission by the parties, on the balance of probabilities, the Court finds that the plaintiff has failed to prove the claim and the defendants have proved the counterclaim in part. Therefore, the plaintiff's claim is dismissed and partial counterclaim with the adjusted sum is allowed, both with costs.
