



**Paramount Bank Limited v Business Partners International Kenya SME Fund (Civil Appeal E017 of 2022) [2023] KEHC 3644 (KLR) (Commercial and Tax) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3644 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E017 OF 2022  
DAS MAJANJA, J  
APRIL 28, 2023**

**BETWEEN**

**PARAMOUNT BANK LIMITED ..... APPELLANT**

**AND**

**BUSINESS PARTNERS INTERNATIONAL KENYA SME FUND RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. E. M. Kagoni, PM dated 7th February 2022 at Nairobi Magistrates Court, Milimani in CMCC No. 131 of 2018)*

**JUDGMENT**

1. This is an appeal against a judgment of the Subordinate Court holding the Appellant in breach of the undertaking dated March 29, 2017 and directing it to pay the Respondent, Kshs 2,896,672.95 with interest thereon at 14% p.a. from September 25, 2017 until payment in full.
2. Before the Subordinate Court, the Respondent sued the Appellant, Avohealth EPZ Limited and Nathan Loyd Ndungu, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively, claiming Kshs 2,896,672,95 with interest thereon at 14% p.a from September 25, 2017 until payment in full. The Respondent's case set out in the plaint dated January 16, 2018 was as follows. The Respondent advanced Avohealth certain credit facilities secured by a property offered by Ndungu. When Avohealth defaulted and the Respondent threatened to exercise its statutory power of sale in respect of security, Avohealth approached the Appellant to take over the facilities.
3. On March 29, 2017, the Appellant through a Guarantee and Professional Undertaking ("the Undertaking") took over the credit facilities advanced to Avohealth by the Respondent. The Respondent averred that on July 4, 2017, the Appellant paid it Kshs 24,902,215.00 which amount was insufficient to cover Avohealth's indebtedness which stood at Kshs 27,339,189.72. The Respondent averred that on October 19, 2018, it served the Appellant with a notice of default and demanded



payment of Kshs 2,436,974.74 being the unpaid amount as at July 4, 2017. It also demanded Kshs 2,896,672.95 from Avohealth and Ndungu on account of agreements between.

4. In its Defence dated February 14, 2018, the Appellant denied the Respondent's claim and averred that it performed its obligations under the Guarantee and Undertaking. The Respondent admitted that it took over the credit facilities advanced by the Respondent to Avohealth but subject to the maximum principal of Kshs 24,305,563.25 and interest on the principal at the rate of 14% pa. as provided in the Guarantee and Undertaking. The Appellant, through the Undertaking, requested for all necessary documents but the Respondent did not immediately release them until May 18, 2017, a period of 48 days hence it was not to blame for any wrongdoing and was not liable for interest. That it paid Kshs 24,902,215.00 on July 4, 2017 as the full amount which it calculated on the basis of the aggregate amount and applicable interest excluding the 48-day delay occasioned by the Respondent.
5. At the hearing, the Respondent called its Country Manager, Michael Muthengi (PW 1) as its witness while the Appellant called its Credit Manager, Michael Titus Ritho (DW 1), as its witness. After considering the pleadings, testimony and parties' written submissions, the trial magistrate concluded that the Appellant was liable to pay Kshs 2,896,672.95 as demanded by the Respondent.
6. In coming to this conclusion, the trial magistrate accepted PW 1's admission that there had been a delay of 48 days in releasing of documents which was a condition precedent for payment of the redemption amount to the Respondent and that the documents were released on May 16, 2017 to the Appellant's advocates' firm. While the trial magistrate accepted that the Appellant calculated the amount owed for the 48-day period and paid over the amount to the Respondent, he held that this was contrary to Clause 3 of the Undertaking which states that,

“That prior to the payment of the Redemption Amount, we shall confirm the balance from yourselves for the purposes of taking into account the accrued interest thereon as at the date of payment.”

The trial magistrate therefore concluded that,

“The 1<sup>st</sup> Defendant having failed to confirm the said balance as they undertook cannot at this juncture refuse to the Plaintiff's prayer for payment of the disputed sum. The purpose of such clause was to prevent such issues. However, having failed to keep its own undertaking the 1<sup>st</sup> Defendant is estopped from pleading the defence of 48 days. In terms of protecting its interest, the 1<sup>st</sup> Defendant has one job. Simply confirming the redemption amount under Clause 3.”

This is the finding that has precipitated this appeal.

7. The Appellant's case is set out in the Memorandum of Appeal dated February 21, 2022. The parties' advocates made brief oral submissions and reiterated the arguments and submissions made before the trial court.
8. The thrust of the appeal is that the trial magistrate erred in law and in fact in holding that the Appellant was liable for breach of the Undertaking dated March 29, 2017. The Appellant contends that the trial magistrate erred in fact and in law by holding that prior to payment of the redemption amount, the Appellant ought to have confirmed the balance from the Respondent for purposes of taking into account the accrued interest and that since the Appellant failed to confirm the balance due, the Appellant could not raise the defence of unjust enrichment. The Appellant complains that the trial magistrate erred in holding that the Respondent was entitled to interest for 48 days it inequitably held



on the requisite documents yet he had held that this would amount to unjust enrichment. It attacks the award by the trial court of KShs 2,896,672.95 with interest as unjustifiable, exorbitant and exaggerated.

9. The Appellant argues that the delay in releasing the documents was inordinate given that the time was of the essence under the Undertaking. It cites the case of *Elijah Mbatia v Madinvest Company Limited* [2018] eKLR where the court held that in a contract where time is of the essence, a party who fails to act within a reasonable time breaches the contract. In its view, the 48-day delay was unreasonable in the circumstances because all the documents had been executed and ready for registration. It also cites *P. N. Gichobo Ngugi v County Government of Laikipia and another* [2017] eKLR in which the court, citing *Alghusein Establishment v Elton College* [1991] 1 All ER 267 and *Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] 1 All ER, held that the party who has committed breach cannot benefit from its own violation of the contract. The Appellant also cites the case of *Samuel Kamau Macharia v Kenya Commercial Bank Limited and another* [2003] eKLR where the Supreme Court held that it would be intolerable to permit unjust enrichment where a party retained a benefit it was not entitled to.
10. The Respondent's case is that the Appellant is bound by the Undertaking and by failing to adhere to it strictly, it was fully liable. It cites *Jane Elizabeth Gitiri Waroga v John Dryden Kimothi* [2019] eKLR for the proposition that parties to a contract are bound by their contractual obligations and that having entered into the agreement at arm's length, they cannot run away from their obligations. The Respondent submits that at no time did the Appellant communicate the issue of delay to it hence the action to claim delay in order to avoid its obligations is an afterthought.
11. In resolving this appeal, I am guided by the fact that this is a first appeal. The court is enjoined by the provisions of section 78 of the *Civil Procedure Act* to evaluate and examine the Subordinate Court record and the evidence presented before it in order to arrive at its own conclusion making an allowance for the fact that it did not hear or see the witnesses (see *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123).
12. From evidence on record, the Appellant's advocates gave their undertaking contained in the letter dated March 29, 2017 wherein they called for the security documents. It is also not in dispute that the Respondent's advocate's delivered the documents on May 16, 2017. This is the period of 48 days for which the Respondent claimed interest. PW 1 admitted in cross-examination that there was delay in releasing the document although he stated that he did not know who was to blame for this. I hold that the responsibility to release the documents expeditiously fell squarely on the Respondent who had the responsibility to release them to the Appellant before it could be paid given that Clause 8 of the Undertaking provided that,

“Time shall be of essence in respect of all your obligation.”

I therefore agree with the trial magistrate that to burden the Appellant with interest as a result of the Respondent's delay would amount to unjust enrichment.

13. The issue in this appeal is whether the Respondent is entitled to interest it demanded merely on the ground that the Appellant failed to confirm the amount due from the Respondent before payment as stated in Clause 3 of the Undertaking. I think not. I agree with the trial magistrate that if the Appellant sought confirmation of the amount due, perhaps this dispute would have been avoided. However, the parties are not bound to agree on the amount due and it would be contrary to the Undertaking to hold that in any event, the Appellant would still be bound to pay what the Respondent demands. Clause 3 must be read in light to other provisions of the Undertaking that provide how the amount due is



calculated. Likewise, the Respondent cannot expect to be rewarded for the delay in forwarding the security documents to the Appellant.

14. I agree with the Respondent that parties are bound by their contractual undertakings to the letter but in this case, the delay, which was admitted by PW 1, could only be attributed to the Respondent. To burden the Appellant with interest on account of its own delay would be inequitable and amount to unjust enrichment.
15. The Appellant also points out that there was no basis to grant the Respondent the amount prayed for in the plaint and that the trial magistrate failed to ascertain whether the interest on the principal sum was Kshs 2,896,672.95. The trial magistrate did not deal with this aspect of the Appellant's defence and submissions bearing in mind that the claim was in the nature of special damages which the Respondent was required to plead and prove (*Hahn v Singh* [1985] KLR 716).
16. As I understand from the Plaint, the sum of Kshs 2,896,672.95 was the amount owed by Avohealth and Ndungu once the Undertaking was fulfilled. I hold that the Appellant did not undertake or guarantee payment of all the amounts from Avohealth and Ndungu or to clear their indebtedness, its only obligation was to pay the agreed maximum amount together with interest thereon. The Respondent elected to withdraw its suit against the other Defendant in the suit hence it waived any claim it had against them.
17. The only amount due from the Appellant after the maximum provided in the Undertaking amount had been paid was the interest thereon. The manner of calculating interest is clear as it was provided for in the Undertaking. It was based on Kshs 24,305,563.25 due as at March 13, 2017 which accrued interest at 14% pa until settlement in full. The amount was settled on July 4, 2017. Thus the period of interest was March 13, 2017 to July 4, 2017.
18. The Appellant therefore submits that interest on Kshs 24,305,563.25 accruing at 14% per annum from March 13, 2017 to July 4, 2017 being 113 days would be Kshs 1,053,454.37 made up as follows: Kshs 24,305,363.25 X 14/100 X 113/365. Thus the amount total due to the Appellant would be required to pay inclusive of interest would be Kshs 25,239,017.52. The Appellant paid Kshs 24,902,215.00 on July 4, 2017 leaving a balance of Kshs 446,802.52 representing the interest for the 48 days. Put it another way, the interest on Kshs 24,305,363.25 for a period of 48 days at 14% p.a. is approximately Kshs 447,485.00. This is the amount that the trial court ought to have awarded the Respondent and not Kshs 2,896,672.00. The Respondent did not explain how this amount was arrived at nor did the magistrate consider it in the Judgment. Had I found the Appellant liable, I would order the Respondent to pay Kshs 447,485.00 being interest on the principal sum from March 13, 2017 to July 4, 2017 being the 48-day period.
19. Having reviewed the evidence, I hold that the trial magistrate erred in holding that the appellant was bound to pay to the respondent for interest claimed by it and occasioned by its own delay and on the ground that the respondent failed to confirm the amount due in accordance with the undertaking. The trial magistrate also erred by awarding the respondent an amount that was not proved to be due under the guarantee and undertaking.
20. For the reasons I have set out above, I allow the appeal on the following terms;
  - a. The Judgment of the Subordinate Court dated February 7, 2022 be and is hereby set aside and is substituted with a judgment dismissing the suit with costs to the Appellant.
  - b. The Respondent shall pay costs of this appeal assessed at Kshs 70,000.00 only.

**SIGNED AT NAIROBI**



**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL 2023.**

**F. MUGAMBI**

**JUDGE**

Court Assistant: Mr M. Onyango.

Mr Mumia instructed by Mwaniki Gacika and Company Advocates for the Appellant.

Mr Mwangi instructed by CM Advocates for the Respondent.

