



REPUBLIC OF KENYA



**Gulf African Bank Limited v Atticon Limited & 4 others (Commercial Case E086 of 2019)  
[2023] KEHC 18241 (KLR) (Commercial and Tax) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18241 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E086 OF 2019**

**DAS MAJANJA, J**

**MAY 26, 2023**

**BETWEEN**

**GULF AFRICAN BANK LIMITED ..... PLAINTIFF**

**AND**

**ATTICON LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**DOUGLAS KAILANYA ..... 2<sup>ND</sup> DEFENDANT**

**DOROTHY CHEPKURUI ..... 3<sup>RD</sup> DEFENDANT**

**BILLY ODERO ONYANGO ..... 4<sup>TH</sup> DEFENDANT**

**EXPORT PROCESSING ZONES AUTHORITY ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction And Background**

1. By a plaint dated 2<sup>nd</sup> April 2019, the Plaintiff (“the Bank”) filed suit against the Defendants claiming that the 1<sup>st</sup> Defendant (“the Company”) applied for a credit facility from it through a Credit Facility Application Form dated 23<sup>rd</sup> March 2018 and that after the Bank considered the application, it offered a Tawarruq Local Purchase Order Finance Facility of Kshs. 20,000,000.00 on the terms and conditions contained in the Letter of Offer dated 11<sup>th</sup> April 2018 (“the Letter of Offer”).
2. The Plaintiff further claimed that the Letter of Offer was accepted by the Company as the Borrower and signed by 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants as guarantors. The credit facility was to be used to finance the part performance of a construction contract dated 21<sup>st</sup> December 2016 between the Company and the 5<sup>th</sup> Defendant (“EPZA”). The Bank also averred that the facility was secured by, inter-alia, a directors’ joint and several guarantee for Kshs. 20,000,000.00 each and that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants



- executed a joint and several guarantee dated 12<sup>th</sup> April 2018 as the directors of the Company. The Bank added that it was also a condition of the lending contract that the Company would procure an irrevocable undertaking from EPZA undertaking to channel all the proceeds of the construction contract through the Company's account held with the Bank and that EPZA issued an irrevocable undertaking dated 3<sup>rd</sup> April 2018.
3. The Bank went on to state that upon signing the Letter of Offer and complying with the conditions precedent, the Bank disbursed Kshs. 20,000,000.00 to the Company's account on 13<sup>th</sup> April 2018 and that the sum was repayable within six (6) months from the date of disbursement. The Bank now claims that that on 27<sup>th</sup> December 2018, EPZA paid a sum of Kshs. 28,813,554.00, being part of the proceeds of the construction contract, to the Company's account held at Family Bank Limited and that this act of channelling the Kshs. 28,813,554.00 was and remains a breach of an irrevocable undertaking dated 3<sup>rd</sup> April 2018 issued by EPZA to the Bank.
  4. The Bank states that the Company has, in breach of the contract, failed to repay the loan within the six (6) months as agreed or at all thus leaving a balance of Kshs. 21,991,649.53 as at 19<sup>th</sup> February 2019 and that the outstanding amount continues to accrue contractual default damages at the rate of 14% per annum. The Bank further accuses the Company of being in breach of the lending contract and colluding with and causing EPZA to divert the funds from the construction contract and paying them to the Company's account at Family Bank Limited. The Bank also states that under the terms of the joint and several guarantees dated 12<sup>th</sup> April 2018, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants would pay all monies due to the Bank in the event of default by the Company and that they have failed, refused and neglected to pay all monies due thus breaching the contract of guarantee. The Bank thus avers that its cause of action against the Company and the 2<sup>nd</sup> to 4<sup>th</sup> Defendants is for breach of the respective borrowing and guarantee contracts whereas that of EPZA is for breach of the terms of the undertaking issued on 3<sup>rd</sup> April 2018.
  5. The Bank prays for judgment jointly and severally against the Defendants for Kshs. 21,991,649.53 being the total outstanding amount as at 19<sup>th</sup> February 2019, Contractual default damages on this amount at the rate of 14% per annum from 19<sup>th</sup> February 2019 until payment in full and Costs of the suit without interest.
  6. The Company and EPZA responded to the suit by filing statements of defence. The Company also filed a counterclaim. The 2<sup>nd</sup> to 4<sup>th</sup> Defendants neither entered appearance nor filed defence despite being served with the pleadings in the suit.
  7. The Company denied that the 2<sup>nd</sup> to 4<sup>th</sup> Defendants were its directors and stated that there it has never had any contractual, business or banking relationship with the Bank. It states that the Bank's claim is a sham as it is based on documents that were authored and attested to by persons who were neither directors nor representatives of the Company. The Company further states that if the Bank advanced any money, it did so negligently as the 2<sup>nd</sup> to 4<sup>th</sup> Defendants did not have any authority to transact any business on behalf of the Company and that their appointment as directors of the Company was procured through fraud.
  8. The Company states that at all material times its lawful directors have been Emily Nkirote and Franklin Mithika Linturi. That it has never resolved to open a bank account or take a credit facility from the Bank. It asserts that the documents relied on by the Bank to make its case are forgeries hence it was not obliged to comply with the terms of the Letter of Offer and that the Bank's action, if any, lies against the 2<sup>nd</sup> to 4<sup>th</sup> Defendants. The Company accuses the Bank of negligence in the manner it opened the subject bank account at the behest of fraudsters purporting to be directors of the Company and accepting the



credit facility application made by them and disbursing Kshs. 20,000,000.00 to the illegal account. The Company states that the Bank has attempted to cover up its negligence by conveniently omitting one Joseph Gitonga M'Limbiine from the suit and yet he had also been one of the people who fraudulently procured his directorship into the Company.

9. The Company claims that it has lost Kshs. 21,846,607.25 as a result of the Bank's negligence and that the fraudulent acts of the 2<sup>nd</sup> to 4<sup>th</sup> Defendants' who used the illegal account as a conduit to deprive the Company of revenue amounting to Kshs. 21,846,607.25 paid to it in respect of various services rendered by it to various bodies. The Company claims this amount from the Bank and the 2<sup>nd</sup> to 4<sup>th</sup> Defendants and urges the court to dismiss the suit with costs.
10. EPZA denies issuing an irrevocable undertaking dated 3<sup>rd</sup> April, 2018 to the Bank. It states that it advertised for tender number 03/2016/2017 for the Construction of Precast Concrete Perimeter Wall (Fencing) at Athi River and which tender was awarded to the Company. Following the award, the parties entered into a contract of works on 21<sup>st</sup> December 2016 for the price of Kshs. 165,281 886.60 but that from the Bank's supporting documents, the Company applied for a credit facility on 27<sup>th</sup> March 2018 which was approved and a loan of Kshs. 20,000,000.00 disbursed on 11<sup>th</sup> April 2018. That the Bank requested for a letter of undertaking from EPZA on 20<sup>th</sup> March 2018 and which EPZA responded to the said letter on 3<sup>rd</sup> April 2018. EPZA points out that the Bank requested for a letter of undertaking seven days before the Company applied for the loan of Kshs. 20,000,000.00 from the Bank and that on 27<sup>th</sup> March 2018 the Company, through one 'Belinda Shitsama' issued a power of attorney purporting to appoint the said 'Belinda Shitsama' as the Company's attorney with authority to execute on its behalf any deed or agreement. EPZA states that upon perusal of the Bank's documents, there is no board resolution appointing the aforesaid individual to act on behalf of the Company.
11. EPZA further avers that by the letter dated 3<sup>rd</sup> April 2018, it advised the Bank that as soon as development funds is received from treasury, it would process the payment. That in a letter dated 2<sup>nd</sup> November 2018, the Company wrote a letter to EPZA advising that the authorized representative of the Company was one Emily Nkirote Buntai and who had signed the Contract that was duly entered between EPZA and Company, that all payments in relation to the aforesaid contract be paid to the Company's account held at Family Bank, Kilimani Branch Account Number 046 79. It also advised that Lilian Muge was a fraudster who was attempting to take control of the Company. EPZA adds that the Company also forwarded a CR12 dated 29<sup>th</sup> October 2018 indicating Ms. Emily Nkirote Buntai and Mr. Franklin Mithika Linturi as the directors of the Company.
12. EPZA avers that following instructions from the Company and in compliance with the terms of the service contract dated 21<sup>st</sup> December 2016, it made payment through the Company's account held at Family Bank, Kilimani Branch. EPZA denies colluding with the Company to divert the funds from the construction contract to its account at Family Bank. It states that it acted on instructions of its client and not any other person and that it does not have any no contractual relationship with the Bank. EPZA further states that the purported letter of undertaking dated 3<sup>rd</sup> April 2018 was revoked as soon EPZA received the letter dated 2<sup>nd</sup> November 2018 from the Company. It adds that the Bank should pursue the individuals who guaranteed the credit facility and not EPZA and urges the suit against it be dismissed with costs.
13. The matter was set down for hearing. The Bank called one witness, Lawi Sato, its Senior Legal Officer. The Company called two witnesses, Emily Nkirote Guantai (DW 1) and Joseph Gitonga M'Limbiine (DW 2). EPZA also called one witness, Dennis Kinyua (DW 3), its General Manager, Finance, HR and Administration. In addition to their pleadings, testimony and documents, the parties filed written submissions.



14. Since the witnesses testified along the lines I have highlighted above, I do not wish to rehash the same but I will make relevant references in my analysis and as per the agreed issues for determination below.

### **Analysis and Determination**

15. In making this determination, I am guided by the fact that the standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107(1) and (2) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provides that, “whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist” and that “When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person”.

16. As regards the standard of proof, it is well established the in order to succeed, a party must prove its case on a preponderance or balance of probabilities. In *Miller v Minister of Pensions* [1947] ALL ER 372, Lord Denning aptly summarised the application of the standard in the following terms:

That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. 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. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.

The Court of Appeal in *James Muniru Mucheru v National Bank of Kenya Ltd* CA Civil Appeal No 365 of 2017 [2019] eKLR simply put it that, “Courts will make a finding based on which party’s version of the story is more believable.”

17. From the facts I have outlined, there is no dispute that the Bank advanced Kshs. 20,000,000.00 to the Company. The substantial issue is whether the Defendants should pay this amount. The parties have however framed the following issues for determination:

1. Whether the Bank acted negligently in opening and operating account number 090 01 in the name of the Company.
2. Whether the Bank acted negligently in advancing a loan through account number 090 01 in the name of the Company.
3. Whether, in any event, the Bank is entitled to recover Kshs. 21,991,649.53, plus default damages, from the Company.
4. Whether, in any event, the Company is entitled to recover Kshs. 21,846,607.25 from the Bank and 2<sup>nd</sup> to 4<sup>th</sup> Defendants jointly and severally.
5. Whether EPZA issued an irrevocable undertaking to the Bank.
6. If the answer to 5 above is in the affirmative, whether EPZA is liable to the Bank for Kshs. 21,991,649.53, plus default damages, based on its undertaking.
7. Who should bear the costs of the suit and counterclaim.



## Whether the Bank was negligent in opening the subject account

18. It is not in dispute that the Bank opened an account number 090 01 in the name of the Company. However, the Company claims that the Bank was negligent in opening this account as the application form was completed by people who had no authority to transact on behalf the Company. According to the Bank's evidence and testimony, it avers that it conducted proper due diligence and was satisfied that the people who presented themselves as directors of the Company were in fact its directors and that they had the authority to open the account on behalf of the Company.
19. PW 1 confirmed that the subject account was opened on 21<sup>st</sup> March 2018 and that the 2<sup>nd</sup> to 4<sup>th</sup> Defendants presented to it a duly filled account opening form, a board resolution, memos, copies of Identity Cards (IDs) and PIN Certificates. However, PW 1 admitted that the Bank failed to produce the said account opening forms and the supporting documents as part of its evidence.
20. PW 1 also stated that the Bank conducted a physical search at the Companies Registry to confirm that the 2<sup>nd</sup> to 4<sup>th</sup> Defendants together with DW 2 were directors of the Company before opening the account. He however admitted that it did not obtain a CR 12 from the registry to confirm the directorship of the Company. PW 1 further admitted that the Bank did not file, as part of its evidence, any information of the account opening information or the account information showing the signatories and the directors captured by the Bank system. PW 1 also stated that the Bank never obtained any information from Family Bank to confirm that the Company was operating an account there despite the fact that the Credit Facility form states the Company had an account there. He also admitted that according to the board resolution presented to the Bank, the members present at the meeting of 16<sup>th</sup> March 2018 were 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, DW 2 and Hillary Kiplagat but that the account signatories were Maryanne Jebet Langat, Kananu Felista Iruku and Margaret Muthoni Kania. PW 1 admitted that neither of these signatories were directors of the Company.
21. PW 1 recalled that DW 2 had informed the Bank that he never signed any of the documents in the Bank's possession and that in his letter dated 25<sup>th</sup> October 2018, he asked the Bank for, inter alia, account opening documents and that the Bank, in its response dated 29<sup>th</sup> October 2018 asked for time to investigate the matter. PW 1 further stated that the account was frozen, pending investigations but then on 31<sup>st</sup> December 2018, Kshs. 804,470.00 was credited into the account and then Kshs. 800,000.00 was debited therefrom. PW 1 also stated that once the Bank received the letter from DW 2, it did not communicate to the Company the contents as it was investigating who the directors of the Company were.
22. From a consideration of the testimony of PW 1 which I have outlined, I am not satisfied that the Bank conducted proper due diligence on the directorship of the Company. The Bank, as represented by the testimony of PW 1, was still not sure of the Company's directors. PW 1's testimony revealed that the Company never carried out a proper search at the company's registry to confirm the directors of the Company. PW 1's averment that it carried out a physical search by perusing the company register was a mere assertion and was not supported by any other evidence for example, payment of perusal fees. Further, the only way to conduct an official search is to obtain a CR-12 which set out the particulars of the Company, its directors and shareholders. It is well established that an official search being an official document gives the prima facie evidence of the status of a company. I accept what the court stated in *China Young Engineering Company v L. G. Mwacharo T/A Mwacharo Associates and Another* ML HCCC No. 81 of 2011 [2012] eKLR, that:

[W]hen there is a dispute as to directorship and shareholding of a company, the best evidence to be relied on is the updated records from the Registrar of Companies. The registry is meant



to keep records of all Companies and for the purposes of the public to rely on the same as reflecting the true record of any particular company.

23. While the Bank’s position is that a customer must avail certain documents before the account is opened, PW 1 did not produce these documents in court. In the absence of these documents, the court can only conclude that none of the required documents for the account opening were presented to the Bank thus manifesting its lack of proper due diligence. This is consistent with section 112 of the Evidence Act which provides that where specific facts are within the knowledge of a person, the burden of proving or disproving the same lies on that person. Where the person fails to produce the documents, then the court is entitled to make a negative or adverse inference (Kenya Akiba Micro Financing Limited v Ezekiel Chebii and 14 Others [2012] eKLR and Kimotho v Kenya Commercial Bank [2003] 1 EA 108).
24. In support of its claim for negligence, the Company cited the Bank for violating the Central Bank of Kenya Prudential Guidelines, 2013 (“the Prudential Guidelines”). In Equity Bank (Kenya) Limited v Don Ogalloh Riario and Another NRB CA Civil Appeal No. 153 of 2017 [2019] eKLR, the Court of Appeal held that the Prudential Guidelines issued by the Central Bank of Kenya under its statutory mandate have legal force in accordance with the Statutory Instruments Act, 2013. I therefore hold that these Prudential Guidelines provide a standard upon which the Bank’s conduct must be judged.
25. As regards customer identification, the Prudential Guidelines impose on the Bank a duty to know their customers. In particular Clause 5.6 provides, in part, as follows:

#### 5.6 Customer Due Diligence

##### 5.6.1 Know your Customer Requirements

The need for institutions to know their customers is vital for the prevention of money laundering and underpins all other activities.

When a business relationship is being established, the nature of the business that the customer expects to conduct with the institution should be ascertained at the outset to show what might be expected as normal activity. In order to be able to judge whether a transaction is or is not suspicious, institutions need to have a clear understanding of the legitimate business of their customers.

##### 5.6.2 Customer Identification and Verification

In all circumstances, any business entity operating within the financial sector requires basic information on its customers. The nature and extent of this information will vary according to the type of business. It shall also depend on whether the business is being introduced by a financial intermediary and the type of customer involved. An institution should establish to its satisfaction that it is dealing with a person that actually exists. It should identify those persons who are empowered to undertake the transactions, whether on their own behalf or on behalf of others.

When a business relationship is being established, the nature of business that the customer expects to conduct with the institution concerned should be ascertained, so as to determine what might be expected as the customer’s normal activity levels. In order to judge whether a transaction is or is not suspicious, an institution needs to have a clear understanding of the pattern of its customer’s business as its relationship.

##### 5.6.3 When Identity Must Be Verified

An institution must identify its customer in the following circumstances:



- (a) When establishing initial business relations.
- (b) When undertaking occasional or one-off transactions.
- (c) When there is cause to be suspicious.
- (d) When there is doubt about veracity or adequacy of previously obtained customer information.

26. The Bank failed to act in accordance with the Prudential Guidelines. It failed to conduct an official search at the Companies Registry or require the usual documents to confirm the status of the Company. This is amplified by the fact that it even allowed transactions in the subject account even after doubts about the directorship of the Company were brought to its attention. The Bank did not even notice the difference between the Company's directors and signatories and that they never questioned the same.

27. A bank has a duty to exercise reasonable diligence and take the necessary precautions by making proper inquiries to ensure that the holders of accounts are not imposters. In *Kenya Grange Vehide Industries Ltd v Southern Credit Banking Corporation Limited* [2014] eKLR, the court found the bank guilty of negligence for failing to take proper precautions, "so as to ensure that the holders (signatories) to the said account were legally who they said they were." Likewise, in *Beyond Kenya Limited and Another v Gulf African Bank Kenya Limited* ML HCCC No. 158 of 2009 [2019] eKLR, the court held that the bank, "failed to comply with mandatory provisions, requiring a bank to verify the identity of a customer when establishing initial business relations". In such instances, the onus to show the absence of negligence falls on the bank as was stated by the Court of Appeal in *Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 others* NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR that:

The onus of establishing circumstances showing absence of negligence is on the banker. It is a matter of defence, and does not give a substantive cause of action. The extent of inquiry must be measured by what in the circumstances a fair minded banker paying due regard to the exigencies of banking business in relation to the person depositing the cheque would consider it prudent to do in order to protect the interest of the true owner and each case must depend on its own circumstances.

28. In this case, a prudent banker, following the Prudential Guidelines, would have called for the CR-12, proper identification documents and other documents to confirm the identity of the directors of the Company. From the totality of evidence, I hold that the Bank was negligent when it failed to take proper precautions so as to ensure that the persons who claimed to have authority to open the said account were legally the directors of the Company and on this position I am in agreement with the Company.

### **Whether the Bank was negligent in advancing a loan through the subject account**

29. The Bank stated that it advanced a loan to the Company on the strength of an application presented on behalf of the Company by the 2<sup>nd</sup> to 4<sup>th</sup> Defendants and DW 2. I have already found that the Bank failed to ascertain whether these individuals who applied for the facility were the bona fide directors of the Company when the account was opened.

30. In the credit application form, the Bank required the Company to supply several documents before the loan was advanced. These include the Memorandum and Articles of Association, the Certificate of Incorporation, the audited accounts for the preceding three years, certificate of the registration, copies of the ID of owners/directors, VAT registration certificates, PIN Certificate for the Owners, Current



financial statements, statement of all bank accounts for the preceding 12 months, copy of lease, Income/Tax returns for the preceding 12 months. Although the credit application form produced in court shows that the documents were obtained, they were not produced in court. PW 1 also admitted that the Bank never obtained annual returns for the preceding two years filed with the Registrar Companies along with the filing receipts. As I stated, failure to produce these documents in court supports the inference that the 2<sup>nd</sup> to 4<sup>th</sup> Defendants did not provide them to the Bank. Had the Bank insisted on these documents, it is likely that the loan would not have been advanced. PW 1 further admitted that the Bank did not verify whether the person who signed the credit application form as the Company secretary, was actually a registered Company Secretary. He also admitted that DW 2 had informed the Bank that he did not sign the Letter of Offer.

31. PW 1 further admitted that in as much as the loan facility was to facilitate part performance of the contract between the Company and EPZA, which contract was for a period 12 months beginning 10<sup>th</sup> January 2017, the loan was disbursed after the contract had already determined. All this evidence supports the finding that the Bank failed to conduct due diligence as on the applicants of the loan. It caused the account to be opened without sanction from the lawful and bona directors of the Company and then went ahead to disburse the loan through that account to facilitate a contract that had already lapsed. I answer the issue framed in the affirmative. The Bank was negligent in disbursing the loan.

**Whether, in any event, the Bank is entitled to recover Kshs. 21,991,649.53, plus default damages, from the Company.**

32. Since the Bank was negligent in making unauthorised advances to the Company, it cannot recover the amount advanced to the Company. It can only recover the money from the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants who purported to execute guarantees in favour of the Bank and who ultimately benefitted from the money paid to the Company. Since they neither entered appearance or filed defence, the case against them is uncontroverted.

**Whether the Company is entitled to recover Kshs. 21,846,607.25 from the Bank and the 2<sup>nd</sup> to 4<sup>th</sup> Defendants**

33. The Company seeks to recover Kshs. 21,846,607.25 from the Bank being proceeds from different entities legitimately belonging to the Company but appropriated by the 2<sup>nd</sup> to 4<sup>th</sup> Defendants who were running the account. These amounts include Kshs. 15,300,000.00 paid by Jubilee Insurance Company Limited on 17<sup>th</sup> May 2018, Kshs. 3,616,992.00 and Kshs. 2,125,145.20 paid by the Ministry of Interior Co-ordination of the National Government on 18<sup>th</sup> May 2018 and 2<sup>nd</sup> July 2018 respectively and Kshs. 804,570.00 paid by the Ministry of Defence on 31<sup>st</sup> December 2018. PW 1, in his testimony, confirmed that these sums were received by the Company through the said subject account held by the Bank and the statement of account produced by the Bank confirms as much.
34. Having found that the Bank was negligent in the manner that it allowed the subject account to be opened and the loan to be disbursed, I hold that it is liable for the loss to the Company as a result of allowing imposters to run the account. I agree with the Company that the Bank failed to take any reasonable steps to stop the fraudulent transactions even after it was notified. I also find that the 2<sup>nd</sup> to 4<sup>th</sup> Defendants fraudulently held themselves out as directors of the Company and also aided in the loss by the Company.
35. I therefore hold that the Company is entitled to recover Kshs. 21,846,607.25 from the Bank and the 2<sup>nd</sup> to 4<sup>th</sup> Defendants jointly and severally.



## Whether EPZA issued an irrevocable undertaking to the Bank

36. The Bank's case is that EPZA issued an irrevocable undertaking dated 3<sup>rd</sup> April 2018 undertaking to channel all the proceeds of the construction contract through the Company's account held with the Bank. EPZA, does not dispute that it wrote to the Bank on 3<sup>rd</sup> April 2018 but then states that the said letter was not an undertaking but a letter acknowledging receipt of instructions. In order to give the said letter its full meaning and context, I will reproduce the same below:

3<sup>rd</sup> April 2018

The Managing Director,

Gulf African Bank Limited

PO Box 43683-00100

Nairobi

Dear.....

RE: Request For Undertaking To Gulf African Bank

Your letter of 20<sup>th</sup> March 2018 on the above subject refers

This is to acknowledge receipt of your irrevocable instructions that all your payment be made to the following account

Bank name: Gulf African Bank Ltd

Account No.....

We would like to confirm that the payment certificates in relation to ongoing works under the following contract between Export Processing Zone Authority and Atticon Limited will be processed as soon as we are in receipt of Development Funds from the National Treasury:

EPZA Tender No:.....

Please do not hesitate to contact the undersigned for any clarifications

Yours

Signed\*

Chief Executive Officer

37. A cursory look at the letter I have reproduced above shows that that there no promise by EPZA that it will channel funds to the said account as has been advanced by the Bank. EPZA only acknowledged receipt of instructions and promised that payment certificates will be processed once it is in receipt of funds from the National Treasury. Guided by the law concerning professional undertakings as explained in *Arthur K. Igeria t/a Igeria & Co. Advocates v Michael Ndaiga* NRB CA Civil Appeal No. 51 of 2008 [2017] eKLR I accept that an undertaking must satisfy three conditions. First, an undertaking must be clear in its terms and there must be no dubiety or ambiguity as to what has been undertaken. Second, what is undertaken must be capable of being performed and third, that if the undertaking is contingent on the happening or occurrence of an event, such event has occurred or happened. I find and hold that the letter of 3<sup>rd</sup> April 2018 was not unequivocal about channelling funds to the Company's account held by the Bank and does not meet the requirements of an undertaking which this court can enforce.



38. In any case, the Company later on followed up with a letter withdrawing its earlier instructions to EPZA. EPZA cannot be faulted for acting on these instructions. I return a negative answer to this issue and hold that EPZA is not liable to pay the Bank Kshs. 21,991,649.53, plus default damages based on this letter as the same was not an undertaking.

### **Disposition**

39. For these reasons, I now make the following dispositive orders;
- a. The Plaintiff's suit against the Defendants is dismissed with costs to the 1<sup>st</sup> and 5<sup>th</sup> Defendant.
  - b. The 1<sup>st</sup> Defendant's counterclaim is allowed on terms that judgment is entered for the 1<sup>st</sup> Defendant against the Plaintiff, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants jointly and severally for the sum of Kshs. 21,846,607.25 with interest at court rates from the date of filing suit until payment in full.
  - c. The Plaintiffs and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants shall bear the costs of the 1<sup>st</sup> Defendant's counterclaim.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY 2023.**

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Mr Kongere instructed by Muriu Mungai and Company Advocates for the Plaintiff.

Mr Karanja instructed by Muthomi and Karanja Advocates for the 1<sup>st</sup> Defendant

Mr Odoyo instructed by Kipkenda and Company Advocates for the 5<sup>th</sup> Defendant.

