Arm Cement PLC (Under Administration) v G.M Kariuki Hardware Limited & another (Civil Suit E549 of 2020) [2022] KEHC 11324 (KLR) (Civ) (19 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11324 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL

CIVIL SUIT E549 OF 2020

JN MULWA, J

MAY 19, 2022

BETWEEN

ARM CEMENT PLC (UNDER ADMINISTRATION .... PLAINTIFF

AND

G.M KARIUKI HARDWARE LIMITED .... 1ST DEFENDANT

PETER MAHU MUTHEE .... 2ND DEFENDANT

JUDGMENT

Introduction

1. Before being placed under Administration, the Plaintiff was engaged in the business of manufacturing among other things, a cement brand known as "Rhino Cement".
2. The 1st Defendant is a hardware store engaged in the business of supply and sale of hardware materials such as cement whilst the 2nd Defendant is a director of the 1st Defendant.

The Plaintiff's Pleadings and case

3. By a Plaint dated 18th December 2020 and amended on 9th February 2021 the Plaintiff seeks judgment against the Defendants jointly and severally for: -
    a. The sum of Kshs 90,002,527.31 together with interest at the Kenya Bankers Reference Rate (KBRR) plus 5% from 1st October 2017 until payment in full.
    b. Costs of the suit.
    c. Interest on (b) above.

d. Any other relief(s) and/or alternative order(s) that the Honourable Court may deem fit and just to grant.

4. The Plaintiff's case is that sometime in the year 2011, the 2nd Defendant approached the Plaintiff with a request to supply the 1st Defendant with cement on credit. The Plaintiff supplied the cement on credit as requested by the 1st Defendant on the understanding that the 1st Defendant would pay for them within the shortest time possible.

5. However, despite acknowledging its indebtedness to the Plaintiff on various occasions, in various correspondence, the 1st Defendant habitually issued numerous cheques which would be returned unpaid. That on diverse dates between the April 2014 and April 2016, the 1st Defendant issued 51 cheques to the Plaintiff, all of which were dishonored upon presentation to the Plaintiff's bankers. This prompted the Plaintiff to seek alternative means of payment of the amount owed from the 1st Defendant. Consequently, the 1st Defendant issued various replacement cheques with instructions to the Plaintiff to bank the same on various dates and made various subsequent payments. Further, vide an email dated 26th January 2015, the 2nd Defendant undertook to sell various properties so as to use the proceeds obtained therefrom in addition to payments received from various government agencies to settle the debt but this did not materialize.

6. On 29th May 2015 and 26th January 2016, the 1st Defendant provided the Plaintiff with a bank guarantees equivalent to Kshs 40 Million from Co-operative Bank of Kenya Limited. Further, vide an Undertaking dated 5th March 2016, the 2nd Defendant undertook to ensure that all cheques issued by the 1st Defendant in favor of the Plaintiff are honoured upon presentation to the bank. The letter was accompanied by twenty-one (21) post-dated cheques Numbers 002011 to 002032 from the 1st Defendant to the Plaintiff totaling Kshs 124,676,506.00, which were all refunded unpaid. In addition, the 2nd Defendant executed a Guarantee and Indemnity dated 9th March 2016 in favor of the Plaintiff for the aforesaid debt which made the 2nd Defendant a principal obligor and/or co-principal debtor to the Plaintiff.

7. By a letter dated 1st March 2017 and an email dated 3rd March 2017, the Plaintiff informed the Defendants that the outstanding sum was Kshs 90,702,529 and requested the Defendants to settle the debt by way of monthly installments of a minimum of Kshs 2,000,000 and secure the debt by charging their land titles to the Plaintiff. Consequently, vide an email dated 20th March 2017, the 2nd Defendant for the umpteenth time acknowledged its indebtedness to the Plaintiff and gave their commitment to settle the amount owed to the Plaintiff. In addition, the 2nd Defendant pledged his title to all that property known as Nyeri/municipality Block I/1306 registered in his name as security with a further offer to pay Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000) towards the liquidation of the outstanding debt.

8. Despite acknowledging the debt and being accommodated by the Plaintiff, the Defendants have severally breached the terms of the Undertaking dated 5th March 2016 and Guarantee and Indemnity dated 9th March 2016 and have made little to no effort to remedy the breach. That as at 1st October 2017 the amount due and owing to the Plaintiff by the Defendants stood at Kshs 90,002,527.31.

9. That due to the Defendants' deliberate actions of issuing cheques knowing they did not have sufficient funds and after several cheques were returned unpaid, the Plaintiff lodged a criminal complaint at Parklands Police Station but the 2nd Defendant quickly negotiated with the Plaintiff for withdrawal of the criminal complaint with an undertaking that they would pay a sum of Kshs. 1,500,000. However, no payment was made since then.

The Defendants' Pleadings and Case

10. The 1st and 2nd Defendants filed a joint Statement of Defence dated 25th January 2021 and amended on 22nd February 2021 wherein they denied the Plaintiff's claim in totality. The Defendants contended that the Guarantee and Indemnity is null, void and unenforceable for reasons that it is not validly executed by two authorized signatories of the Plaintiff Company in the presence of a witness; that the common seal of the Plaintiff Company is not affixed thereon; and that the signature of the 2nd Defendant thereon is not witnessed.

11. Further, it was their case that all the documents herein namely the cheques, purported acknowledgements of debt, emails, Undertaking and Deed of Guarantee and Indemnity are illegal and a nullity as they were procured under force by use of threats, intimidation and arrest which vitiates any purported contract between the parties herein. In addition, it was their case that the documents are also negated by 'the fruit of the poisonous tree' doctrine. They also contended that the letters dated 6th February 2016 and 1st March 2017 are inadmissible in evidence as they were written on "without prejudice" basis. Lastly, it was the Defendants contention that if any goods were delivered to the 1st Defendant by the Plaintiff, then the same were fully paid for and thus the Plaintiff's suit should be dismissed with costs.

The Evidence

12. During the hearing of the matter, the Plaintiff and the Defendants called one witness each.

PW1, Ellam Kweya, the Assistant Credit Controller of the Plaintiff Company adopted his Witness Statement dated 18th December 2020 as his evidence in chief and produced the List and Bundle of Documents save for two letters written on "without prejudice" basis. He reiterated the Plaintiff's position and stated that the 2nd Defendant did not sign the Guarantee and Indemnity under duress.

13. On cross examination by counsel for the Defendants, he stated that the company was placed under administration on 17th August 2018. That the agreement for supply of cement was not in writing but there was a commercial relationship. He confirmed that the 2nd Defendant's signature on the Guarantee was not witnessed. He also noted that a seal of the company was affixed on the document but it faded off with time. Further, he confirmed that the 1st Defendant was indeed supplied with cement and there were LPO's in that regard although they were not filed in court as they were not contested.

14. During re-examination, PW1 stated that an email dated 15th December 2014 from the 2nd Defendant confirms their commercial relationship. In further confirmation of the same, he referred the court to various other emails and letters in their bundle of documents from the 2nd Defendant to the Plaintiff. Further, he stated that the Defendants have never disputed being indebted to the Plaintiff. That the 2nd Defendant only responded when the Plaintiff threatened to report them to the Credit Reference Bureau (CRB).

15. DW1, Peter Muthee, the 2nd Defendant herein and the managing director of the 1st Defendant adopted his Witness Statement dated 2nd June 2021 as part of his evidence in chief. He testified that there was no contractual relationship between them as they bought hardware materials on cash basis. He denied making any LPOs or orders from the Plaintiff Company or receiving and signing any delivery notes since they were cash buyers. He also denied having voluntarily agreed to sign the Guarantee and maintained that it was signed under duress to avoid being arrested by CID officers who accompanied the Plaintiff's officers. Further, he stated that he was given impracticable conditions for payment of the alleged debt and he failed to comply because they did not owe Plaintiff any money. He confirmed

writing an email but denied admitting to owing an alleged sum of over Kshs. 90 million or receiving any reconciliation of the same in the period 2017 – 2019. According to him, the Plaintiff's claim is simply fraudulent.

16. In cross examination, the 2nd Defendant maintained that he had no relationship with the Plaintiff. He also reiterated that they never got cement on credit but on cash basis. He denied issuing bounced cheques and stated that they used to pay in advance then collect the cement thereafter. That the cheques were dishonoured because the Plaintiff was banking them without their instructions. Further, he reiterated that they were not indebted to the Plaintiff at all but confirmed that he had not produced any proof of payments made to the Plaintiff in the form of receipts or their internal records. In addition, he confirmed that he has never disputed or recalled the Guarantee.

17. It was his further testimony that he was coerced to pledge his property to the Plaintiff for purposes of settling the alleged debt. DW2 also confirmed that he has never sued the Plaintiff regarding the claim because the debt is non-existent. He admitted to writing the letter of 8th February 2017 admitting to owing the Plaintiff Kshs. 83 Million and noted that the said amount has never been paid. Lastly, he insisted that reconciliation is yet to be done.

Issues for Determination

18. The following are the issues for determination:

    a. Whether there existed a commercial relationship between the parties herein under which the Plaintiff supplied the Defendants with cement on credit terms.

    b. Whether the Defendants admitted to owing the Plaintiff.

    c. Validity of the documents submitted in evidence by the Plaintiff.

        i. Whether they were obtained under duress, coercion and intimidation?

        ii. Whether they are vitiated by the doctrine of the fruit of the poisonous tree?

        iii. Whether or not the Deed of Guarantee and Indemnity was properly executed and the effect of the same

    d. Whether the Plaintiff is entitled to the orders sought?

Analysis and Determination

Whether there existed a commercial relationship between the parties herein under which the Plaintiff supplied the Defendants with cement on credit terms?

19. The Plaintiff submitted that there is ample evidence that there existed a commercial relationship between the parties herein whereby it supplied the 1st Defendant with cement on credit terms on the promise that the same would be paid for as soon as possible. The Plaintiff questioned why the 1st Defendant issued cheques in its favor, made an Undertaking and took out Bank Guarantees for Kshs. 40 million which the Plaintiff called in, if at all there was no commercial relationship between them.

20. On the other hand, the Defendants contended that the Plaintiff did not establish on a balance of probabilities that there was a business relationship between them under which the Plaintiff supplied the 1st Defendant with cement on credit terms. They faulted the Plaintiff for failing to produce any documentary evidence before this Court to prove that there existed a written contract in that respect and argued that no such contract can be implied from their business relationship as it never existed.

Further, they argued that the alleged credit terms were not specifically pleaded but rather, the Plaintiff made a blanket allegation without providing particulars of the alleged credit terms and the details of cement supplied such as quantity, price, dates when supplied or details of the persons who purportedly received the cement on behalf of the 1st Defendant.

21. They questioned why the Plaintiff alleged that the 1st Defendant raised several local purchase orders (LPO) but not a single one was produced in evidence to support this allegation. It was also their contention that the Plaintiff failed to adduce delivery notes or packaging notes evidencing supply of the purported cement. They submitted that this was confirmed by DW1 who testified that no cement was supplied to the 1st Defendant on credit as they were cash buyers.

22. It is not in dispute that there was never a written contract between the parties herein for the supply of cement on credit terms. However, I am in agreement with the Plaintiff that there is ample evidence on record to show that the Plaintiff indeed supplied the 1st Defendant with cement on credit terms. The Plaintiff produced in evidence a series of correspondences, both emails and letters, exchanged between the Plaintiff's officers and the 2nd Defendant herein. In most if not all the correspondence from the 2nd Defendant, he admits that they have a business relationship between them and were negotiating a settlement plan for the debt owed on account of the cement supplied to the 1st Defendant. These include emails and letters dated 19/7/2014, 21/7/2014, 31/7/2014, 2/10/2014, 18/11/2014, 15/12/2014, 20/12/2014, 7/1/2015, 26/1/2015, 9/2/2015, 18/2/2015, 26/2/2015, 4/3/2015, 8/2/2015, 5/3/2016, 8/2/2017 and 20/3/2017.

23. For instance, vide the email 7th January 2015 (document 13), the 2nd Defendant noted in part as follows:

> " Good evening Mr Biphin,
>
> I do appreciate the support we have had after having various meetings with you in your office since we got a Cash Flow Hitch in the last quarter of last year 2014. We had an agreement which at some point in December I unfortunately failed on my side when some cheques were returned unpaid. This prompted ARM to stop loading. Subsequently our cash flow deteriorated & this caused many other cheques to return unpaid.
>
> I sincerely hope that you will consider our request & let our business relationship continue as we look forward to a bright year 2015. Any extra bank charges that you may have incurred due to unpaid cheques we will be ready to settle as its our fault."

24. Vide the email dated 26th January 2015 (document 14), the 2nd Defendant duly acknowledged that there was a debt owing to the Plaintiff and offered a settlement proposal. By the same email, the 2nd Defendant wrote in part that:

> " ...My request & proposal is that we start loading from tomorrow at least 100 tons per day & we make sure from Friday on average we are paying you about 1.2m per day for 5 days in a week. As soon as we get the bank funding or funds from sale of land, we are going to pay you all the outstanding in full..."

25. In the Undertaking dated 5th March 2016 (document 20) given by the 2nd Defendant, he urged the Plaintiff to continue supplying the commodity while they sort out the issue of outstanding debt. He stated that:

> " I kindly request ARM Cement to withdraw the cashing of the bank guarantee as we are 100% committed to pay all the outstanding balance in full within the shortest period. We

also humbly request that we start loading as this will go a long way in enhancing the Rhino cement market coverage in central Kenya…"

26. In an email dated 13th April 2016 (document 24) from the Plaintiff written by one Rakesh Sethi to the 2nd Defendant herein, it is confirmed that the Plaintiff had indeed been supplying the Defendants with cement on credit. The email stated in part that:

> " ..In spite of your long overdue outstanding balance, you requested to restart the cement loading for the reason that you wanted to revive supplies to your customers, we agreed to your request after you Promised that you shall arrange to pay the old overdue outstanding balance and also for the recent loadings…
>
> We considered your request and accepted to start loading.
>
> I regret to inform you that in spite of all the support we have given you, your cheques are still being returned unpaid (bouncing)…"

27. Lastly, in the 2nd Defendant's letter of 8th February 2017 to the Plaintiff (document 25), he stated in part:

> " Re: Proposal For Provision Of Security Kaputel North/908 To Cover Debt Owned Toarm By Gm Kariuki Hardware Ltd.
>
> We refer to the above subject matter,
>
> We are grateful for the good business relationship you have continued to give to our company through extending us distributorship of your products. According to your demand letter we have noted we owe ARM cement about ksh 83m.
>
> Our company has in the last one year experienced financial challenges due to our bank (standard chartered bank of Kenya) failing to renew our accounts trading facilities. Our company has maintained good and honest business relationship with ARM cement in the last over 20 years …"

28. The Defendants did not dispute, disown or object to the production of the foregoing correspondence in evidence by the Plaintiff during trial. Further, they did not provide any evidence of the cash purchases such as receipts, invoices or at all. This therefore aptly demonstrates that there was indeed a business relationship between the Plaintiff and the Defendants which entailed a mutual agreement for supply of cement by the Plaintiff to the 1st Defendant on credit terms. The absence of a written contract in that regard cannot diminish the fact the Defendants herein benefitted from the said arrangement and thus they cannot purport to disown its existence at this point.

Validity of the Deed of Guarantee and Indemnity dated 9th March 2016

a) Duress, coercion, intimidation and threats

29. The Plaintiff submitted that the Defendants' allegations of duress and extortion are mere afterthoughts and of no probative value for failure to plead any specific particulars of duress and extortion but rather alleged duress in passing in paragraphs 5(v) and 14 of the Amended Defence. The issue of extortion was raised only during the defence hearing. Further, it was contended that the criminal complaint by the Plaintiff was not unlawful since issuance of bouncing cheques is a misdemeanor under Section 316A of the *Penal Code* and in any event, that happened almost a year after the execution of the Deed of Guarantee and Indemnity.

30. Additionally, the Plaintiff urged the court to take note of DW1's admission during cross-examination that he never took any action whatsoever such as instituting any legal proceedings before any competent court to seek to vitiate the agreement and recovery of any monies given to the Plaintiff under duress or through extortion. In its view therefore, the defense of duress and extortion are not available to the Defendants as they were not proven at all.

31. Black's Law Dictionary defines duress as follows:

> "Any unlawful threat or coercion used by a person to a manner she or he otherwise would not (or would). [it is] subjecting a person to improper pressure which overcomes his will and coerces him to comply with a demand to which he would not yield if acting as a free agent."

32. In the case of *[Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premlal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan]]()* [2017] eKLR, the court held that

> "By duress is meant the compulsion under which a person acts through fear of personal suffering, as from injury to the body from confinement, actual or threatened: see Halsbury's Law of England 3rd Ed Vol 8 para 146. Duress essentially occurs where a party to contract has coerced the other and exercised domination as to undermine the others independence of decision substantially. It is all about illegitimate or unlawful pressure. Where proven, the related contract is deemed voidable."

33. The Court is not convinced that the 2nd Defendant was under duress or was coerced into signing the Deed of Guarantee and Indemnity dated 9th March 2016. Foremost, it is evident that the particulars of duress, intimidation and threats were not specifically pleaded in the Defendants Amended Statement of Defence. Further, I note that the 2nd Defendant never took any action against the Plaintiff for allegedly causing him to guarantee the 1st Defendant's debt against his will. This position is corroborated by DW1's admission during cross-examination that he has never disputed nor recalled the Guarantee since he executed in March 2016. It suffices to add that it beats logic that the 2nd Defendant continued engaging the Plaintiff through various email correspondences regarding the debt owed. Moreover, it is noteworthy that the Plaintiff made the criminal complaint which led to the 2nd Defendant's arrest in 2017 which was long after he had executed the Deed of Guarantee and Indemnity.

    In the premises, the court finds that the 2nd Defendant did not sign the Deed of Guarantee and Indemnity under duress or through threats and intimidation.

Whether the doctrine of the Fruit of the Poisonous Tree is applicable herein

34. This issue is related to the one above. The Defendants contended that the Deed of Guarantee and Indemnity is vitiated by the doctrine of the fruit of the poisonous tree as the Plaintiff intentionally had the 2nd Defendant arrested and forced him to sign the document with the intention of using the same to incriminate him. They submitted that this Court should not be used to endorse illegalities by admitting illegally obtained evidence and relied on the case of *[Kenya Airways Limited v Satwant Singh Flora]()* [2013] eKLR.

35. The Plaintiff on its part submitted that the Defendants have misinterpreted the meaning and applicability of the doctrine of fruit of the poisonous tree and urged the Court to disregard any allegations made in that regard by the Defendants herein.

36. The doctrine of "Fruits of a Poisonous Tree" is used as a bar or exclusion to the use of illegally obtained evidence in a trial. Having established hereinabove that the Defendants did not prove that the 2nd Defendant signed the Guarantee under duress or through threats of arrest, it follows that this defence automatically fails.

Execution and Attestation of the Deed of Guarantee and Indemnity

37. As regards the Deed of Guarantee and Indemnity dated 9th March 2016, it was the Plaintiff's submission that the fact that the 2nd Defendant's signature thereon was not witnessed did not in any way invalidate the document. The Plaintiff urged the court to take into account the intention of the parties in executing the Deed of Indemnity and Guarantee which was to enjoin the 2nd Defendant as a co-principal debtor of the debt owed by the 1st Defendant. Further, it was contended that the Deed of Guarantee and Indemnity provided for express waiver of defenses at Clause 4 of the Agreement which waivers estops the 2nd Defendant from raising the issue of non-conformity.

38. It was the Plaintiff's further submission that being a company, it is subject to the provisions of Section 37(2) of the *Companies Act* which provides that a document is validly executed by a company if it is signed on behalf of the company by two authorized signatories; or by a director of the company in the presence of a witness who attests the signature. In this regard, the Plaintiff asserted that it is not disputed that Manish Mehta executed the Deed of Guarantee and Indemnity for and on behalf of the Plaintiff Company and his signature is witnessed by one Rakesh Sethi who was the General Manager, Sales of the Plaintiff Company at the time of execution. Further, the Plaintiff noted that DW1 acknowledged knowing and having regularly dealt with both Manish Mehta and Rakesh Sethi and no evidence was put forth to show that Manish Mehta was not duly authorized by the Plaintiff Company to execute the aforementioned Deed.

39. In the premises, the Plaintiff submitted that the Defendants' arguments that the Deed should have the common seal of the Plaintiff Company affixed fails as the requirements of Section 37(2) of the *Companies Act* were fully complied with. It was also the Plaintiff's assertion that even if the court was convinced otherwise, the failure to affix the common seal of the Plaintiff Company did not invalidate the Deed of Guarantee and Indemnity as the parties to the agreement intended to be bound by its terms and reliance was placed on the case of *Nakuru Industries Limited v Vinod Shah & 2 others* [2016] eKLR). To the Plaintiff therefore, the claim of invalidity of the Deed of the Guarantee and Indemnity is just an afterthought meant to deceive the court to shield the Defendants from fulfilling their obligations thereunder.

40. On the other hand, the Defendant's reiterated that the Deed of Guarantee and Indemnity is null, void and or unenforceable since it was not signed by a Director of the Plaintiff Company in the presence of a witness as required under Section 37 the *Companies Act*. They contended that this fact was admitted by PW1 on cross-examination when he stated that Manish Mehta who had signed the Purported Deed of Guarantee and Indemnity was not a Director of the Plaintiff Company and had no written authority to sign the purported Guarantee on behalf of the Plaintiff Company. Additionally, they contended that Guarantee was void as the signature of Manish Mehta was neither witnessed by any witness on behalf of the plaintiff Company nor stamped or sealed with the seal of the Plaintiff Company.

41. Moreover, they argued that the Deed of Guarantee and Indemnity is defective, null, void and enforceable since the 2nd Defendant's purported signature thereon is not witnessed by a witness. They noted that DW1 explained to the Court that the reason his signature was not witnessed is because he was not given a chance to involve another person from the 1st Defendant Company or access his Advocates for proper advice.

42. The Court has seen the Deed of Guarantee and Indemnity dated 9th March 2016 executed by the 2nd Defendant and an officer of the Plaintiff herein. It is evident that the 2nd Defendant's signature thereon was not attested to by any witness. Further, it is evident that Manish Mehta executed the document on behalf of the Plaintiff and it is clearly indicated that he was duly authorized to do so. Notable also is that one cannot tell from looking at the document whether the common seal of the Plaintiff company was affixed to the document. However, the Plaintiff's contention that the said Manish's signature was witnessed by R.S (Rakesh Sethi, a manager of the company who's initials appear at the bottom of every page of the Guarantee was not controverted by the Defendants.

43. Further, DW1 did not deny that he never raised any issue regarding the execution and attestation of the Deed of Guarantee with the Plaintiff or otherwise at any point before the suit was filed. What this means is that the Defence is no doubt an afterthought and a red herring being raised after the 1st Defendant has benefited from the cement supplied to it on credit by the Plaintiff.

44. I find useful guidance in *Al-Jalal Enterprises Limited v Gulf African Bank Limited* [2014] eKLR, Ogola J. cited the case of *Mrao Ltd v First American Bank* [2003] eKLR where Kwach's J.A rendered on similar issues, to the above effect

I am also persuaded by the case of *Noor Begum Fazal (suing as a holder of power of attorney in favour of Nadra Hussein Fazal) v Diamond Trust Bank* [2015] eKLR, where the court stated:-

> "The court thus found itself in agreement with the Defendant that the new assertion of the invalidity of the Charges was merely an afterthought as the Plaintiff ought to have demonstrated that she had raised the issue previously or at all the material times she had sought to stop the sale of the subject property by way of public auction…

45. Having held that the alleged invalidity of the Deed of Guarantee and Indemnity was a mere afterthought which this court cannot countenance, it follows that the 2nd Defendant is bound by the terms of Guarantee. Clause 4.4 of the Deed provides that:

> "Waiver Of Defences
>
> The obligations of the Guarantor under this agreement will not be affected by an act, omission, matter or thing which, but for this provision, would reduce, release or prejudice any of his obligations under this Agreement (whether or not known to it or the Creditor) including:
>
> 4 Any non-presentation or non-observance of any formality or other requirement in respect of any instrument or any failure to realize the full value of any security"

46. The above Clause expressly precludes the 2nd Defendant as the Guarantor from challenging the Deed of Guarantee and Indemnity on the basis of non-compliance with any formalities. This court therefore finds the 2nd Defendant is bound by terms of the contract between it and the Plaintiff and the court cannot rewrite the said terms unless coercion, fraud or undue influence are proven. In *National Bank of Kenya Ltd v Pipeplastic Samkolit & Another* [2001] eKLR, the Court stated thus:-

> "A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah, JA in the case of Fina Bank Limited vs. Spares & Industries Limited (Civil Appeal No. 51 of 2000) (unreported):

"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."

47. For the foregoing reasons, it is my considered view that there is nothing to invalidate the Deed of Guarantee and Indemnity dated 9th March 2016.

Whether the Defendants breached the Undertaking dated 5th March 2016 and the Deed of Guarantee dated 9th March 2016 and whether the Defendants admitted to owing the Plaintiff?

48. The Plaintiff reiterated that the Defendants' own correspondences are ample and clear evidence of a breach of their obligations under the agreements between the parties herein and thus they should be held to their bargain. The Plaintiff submitted that the Undertaking dated 5th March 2016 was confirmed as valid by DW1 during cross-examination. It was asserted that the Undertaking duly formed a contract between the 1st Defendant and the Plaintiff as the 1st Defendant made an offer which was accepted by the Plaintiff and which was accompanied by consideration of 21 cheques for various amounts. Further, that the wording of the Undertaking, at paragraph 2 thereof, clearly evidences the intention of the parties to be bound by the terms of the Undertaking and to have the outstanding debt liquidated in the shortest time possible. As regards the Deed of Guarantee and Indemnity, the Plaintiff reiterated that through the same, 2nd Defendant was a co-principal debtor and has breached the terms thereunder by failing to liquidate the outstanding debt.

49. Further, it was the Plaintiff's submission that the Defendants have through the aforementioned correspondences between themselves and the Plaintiff expressly admitted their indebtedness to the Plaintiff. It argued that the admissions have been reinforced by the issuance of cheques, an Undertaking and the execution of the Deed of Guarantee and Indemnity between the Plaintiff and the 2nd Defendant. The Plaintiff also held the view that the admissions satisfy the requirements set out in the case of *Choitram v Nazari* (1984) KLR 237).

50. Indeed, there is ample evidence on the record that the 2nd Defendant failed to honour the above promise made to the Plaintiff in the above undertaking. Out of the twenty (21) post-dated cheques that accompanied the Undertaking, only two (2) cheques Nos. 002011 and 002012 amounting to Kshs. 1,000,000/= were cashed while the rest were returned unpaid. As a consequence, on 16th March 2016, the Plaintiff called up bank two bank guarantees totaling Kshs. 40 Million which had been issued by the Defendants bankers, Co-operative Bank, on 29th May 2015 and 26th January 2016. This evidenced by the email dated 17th March 2016 from one Alois Ngure of Co-operative Bank to the 2nd Defendant herein. I am therefore satisfied that the Defendants breached the terms of the Undertaking dated 5th March 2016.

51. As regards the Deed of Guarantee and Indemnity, Clauses 2.1 and 2.2 thereof provide that:

1. 1 Guarantee

   The Guarantor (as a principal obligor and not merely as a surety) irrevocably and unconditionally:

2. 1.1. binds itself as guarantor and co-principal debtor, in solidum, for and guarantees to the Creditor the full, complete and punctual payment and performance by the Company of all the Guaranteed Obligations;

3. 1.2 undertakes to the Creditor that, whenever the Company fails to pay any amount of the Guaranteed Obligations when due or otherwise payable, the Guarantor shall immediately on

demand by the Creditor pay that amount as if it were the principal obligor in respect of that amount;

4. 1.2 indemnifies the Creditor against, and undertakes to pay immediately on demand, any cost, loss or liability suffered by the Creditor if any Guaranteed Obligation is or becomes unenforceable, invalid or illegal. The amount of the cost, loss or liability to which this indemnity applies will be equal to the amount the Creditor would be otherwise be entitled to recover.

5. 2 Continuing guarantee

This guarantee is a continuing guarantee and will extend to the ultimate balance of all the Guaranteed Obligations, regardless of any immediate payment or discharge in whole or in part."

52. From the above provisions, it is clearly evident that by agreeing to guarantee the debt owed to the Plaintiff by the 1st Defendant, the 2nd Defendant conscientiously agreed to become a co-principal debtor of the Plaintiff with an equal principal obligation to pay any outstanding sums promptly upon demand. The evidence on record which has been highlighted hereinabove clearly proves that the 2nd Defendant has never honoured his obligations under the Guarantee and Indemnity despite several demands and reminders by the Plaintiff. It therefore goes without saying that the 2nd Defendant breached the terms of the Deed of Guarantee and Indemnity.

53. As regards whether the Defendants admitted to being indebted to the Plaintiff, my perusal of the evidence tendered by the Plaintiff leaves no doubt in my mind that this was indeed the case. There are several emails and letters from the 2nd Defendant to the Plaintiff in which he clearly admits that there is an outstanding sum owed to the Plaintiff and even attempts to negotiate settlement by giving various proposals which never came to fruition. These correspondences were not disowned by the Defendants save for two emails which were allegedly written on 'without prejudice' basis. In the premises, I hold the view that the Defendants admitted that they are actually indebted to the Plaintiff.

How much do the Defendants owe the Plaintiff?

54. The Plaintiff stated that the Account Statement tendered in evidence, and whose receipt DW1 Confirmed during cross-examination, showed the sum of Kshs. 122,826,906.15/= together with the respective Invoice Numbers and dates. The sum of Kshs.122, 826,906.15 was reduced by the call up of the Bank Guarantees on 17th March 2017 and cheques numbers 002011 and 002012. Further, it was asserted that the Plaintiff further adduced an updated Account Statement showing the 1st Defendant's debt status as of 5th November 2020 to be Kshs. 90,002,527.31. It faulted the Defendants for disputing the debt by claiming it was not due and/or that they had paid and had asked for reconciliation of accounts but never produced an iota of evidence to prove payment of the monies owed or even their own records to demonstrate payment. The aforementioned outstanding amount has further been expressly admitted by the Defendants in their email dated 20th March 2017.

55. Further, the Plaintiff contended that its letter written on 'without prejudice basis' is admissible in evidence as it falls within the exceptions as outlined in *Benjamin Ngua Kimuyu & Another Kenline Agencies Limited & Another* [2005] eKLR given that it does not owe any liability to the Defendants.

56. On the other hand, the Defendants submitted that the purported debt of Kshs. 90,002,527.31 is merely speculative and non-existent as it not particularized in the Amended Plaint and no explanation was given by the Plaintiff in both its pleadings and evidence as to how it arrived at the claimed amount. Further, they urged that no evidence and or bank advice was adduced by the Plaintiff evidencing

that any of the Cheques bounced as alleged. Accordingly, it was the Defendants' submission that the Plaintiff's entire claim herein is doctored by the Plaintiff with an aim of unjustly enriching itself.

57. Be that as it may, the Plaintiff has not produced sufficient evidence to prove that the Defendants owe it the sum of Kshs 90,002,527.31 as claimed. I say so because the Account statement tendered in evidence (document 21) shows that as at 7th March 2016, the outstanding sum was Kshs. 122,826,906.15. On 16th March 2017, the Plaintiff called in bank guarantees totaling Kshs. 40,000,000.00. Further, the Plaintiff encashed 2 of the 21 post-dated cheques that accompanied the Undertaking dated 5th March 2016. These were cheques Nos. 002011 and 002012 amounting to Kshs. 1,000,000.00. This means that the outstanding balance as at the end of March 2016 was Kshs. 81,826,906.15.

58. The Plaintiff has produced in evidence an updated Account statement as at 5th November 2020 document (document 28). The said statement shows that the opening balance of the 1st Defendant's account with the Plaintiff as at 23rd June 2016 was Kshs. 93,571,102.31. This was just four months after the outstanding sum had been reduced to Kshs. 81,826,906.15 as highlighted in the preceding paragraph.

59. What I see from the updated account statement is that the Defendants attempted to liquidate the outstanding amount by making deposits amounting to Kshs. 3,566,575.00. If this amount is subtracted from the sum of Kshs. 81,826,906.15 which has been duly proven, it means that the amount owed by the Defendants is Kshs. 78,260,331.15.

Interest

60. On the issue of interest, it was the Plaintiff's contention that the same is provided for in Clause 9.7 of the Deed of Guarantee and Indemnity which stipulates that interest shall be charged at a rate equal to the Kenya Banks' Reference Rate (KBRR) plus 5%. The said Clause 9.7 provides as follows:

> " 7 If the Guarantor fails to pay any amount payable by it under this Agreement on its due date, interest will accrue on the overdue amount from the due date to (and including) the date of actual payment, at a rate equal to the KBRR plus 5 per cent. Any interest accruing under this is immediately payable on demand by the Creditor. Interest (if unpaid) on an overdue amount will be compounded with that overdue amount at the end of each month, but will remain immediately due and payable. For the purposes of this Clause, KBRR means the three month Kenya Bank Rate"

61. The parties herein are bound by the terms of their agreement and the court cannot rewrite the same as the allegations of coercion in the procurement of the Deed of Guarantee and Indemnity were not proved by the Defendant.

Conclusion

62. For the foregoing reasons, I find that the Plaintiff has proved its case against the Defendants jointly and severally on a balance of probabilities.

63. Accordingly:

    a. Judgment is entered for the Plaintiff against the Defendants jointly and severally for the sum of Kshs. 78,260,331.15 together with interest at the Kenya Bankers Reference Rate (KBRR) plus 5% from 1st October 2017 up to the date of this Judgment, and at court rates thereafter, until payment in full.

b. The Plaintiff is awarded the costs of the suit.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY 2022.

J. N. MULWA

JUDGE