



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

CIVIL CASE NO. 269 OF 2016

UTILITY CAPITAL MANAGEMENT LTD PLAINTIFF

V E R S U S

EKAA AFRIKA LIMITED 1ST DEFENDANT

CHRISTINE OCHIENG OUKO 2ND DEFENDANT

DENNIS MUGO 3RD DEFENDANT

MORRIS WETINDI 4TH DEFENDANT

JUDGMENT

(1) **UTILITY CAPITAL MANAGEMENT LIMITED** (the Plaintiff herein) filed in the High Court the present suit by way of the Amended Plaint dated **15th September 2016** praying for Judgment against the Defendants jointly and severally as follows:-

(a) **An order freezing the funds already paid into the 1st Defendant's Bank account number xxxxxxx held at Equity Bank, Kilimani Branch Nairobi.**

(b) **An order directing the said bank to wire the money to the 1st Defendant's Bank account number xxxxxxx held at Standard Chartered Bank, Harambee Avenue, Branch, Nairobi, which account is controlled by the Plaintiff.**

(c) **In the alternative, for an order directing Equity Bank to wire the money back to the Ministry of Education Science and Technology's account from where the funds had been remitted.**

(d) **Claim amount of USD 380 368.18 together with other Special Damages of USD 4,979.80.**

(e) **General damages.**

(f) **Interest and Costs of this suit.**

(g) **Any other relief the Honourable Court may deem fit and expedite to grant.**

(2) The 1st Defendant **EKAA AFRIKA LIMITED** filed the Statement of Defence dated **17th November 2016**, whilst **CHRISTINE ACHIENG OUKO** (the 2nd Defendant), **DENNIS MUGO** (the 3rd Defendant) and **MORRIS WETINDI** filed a joint Statement of Defence also dated **17th November 2016**. Thereafter the Plaintiff filed a Reply to the Defendants Statement of Defence dated **29th March 2017**.

(3) Hearing of the suit commenced before this Court on **20th January 2020**. The Plaintiff called **one (1)** witness in support of its case whilst the Defendants called **two (2)** witnesses.

THE EVIDENCE

(4) **PW1 JAMES STUART SMITH** was the Director and a shareholder of the Plaintiff Company. The witness relied entirely upon his written Statement dated **2nd September 2019**. **PW1** told the court that the Plaintiff is an investment business domiciled in **MALTA** and is involved in structuring and providing short-term financings and sourcing for investors to supply capital or financing. **PW1** told the Court that the Plaintiffs Country Manager in **Kenya** was one **FREDERICK MUNYI**.

(5) **PW1** went on to state that during the first half of the year **2015**, **EKAA AFRIKA LIMITED**, the 1st Plaintiff herein was awarded a tender by the **Ministry of Education Science and Technology** (hereinafter '**the Ministry**') for the supply of interactive screens at a total cost of **Kshs. 67,496,000/-**. That the Ministry and the 1st Defendant subsequently entered into a supply contract No. **13/2014-2015**, dated **20th March 2015** hereinafter '**the Supply Contract**' for the supply and delivery of the said interactive screens, which **supply contract** was duly executed by both parties.

(6) **PW1** went on to state that their Country Manager **Fredrick Munyi**, introduced the 1st Defendant to the Plaintiff as an entity that was looking for financing to enable it meet its obligations under the said **supply contract** with the Ministry. That pursuant to negotiations, the Plaintiff and the 1st Defendant entered into a **Master Receivables Purchase Agreement** (hereinafter the '**MRPA**') dated **28th October 2015**, by which the Plaintiff undertook to finance the supply and delivery of the interactive screens in consideration for the assignment of the payments due from the Ministry under the **supply contract**. That under the terms of this Agreement and following a Purchase Request from the 1st Defendant, the Plaintiff funded the 1st Defendant in the sum of **USD 380,638.18** to enable it supply the Ministry with the said interactive screens.

(7) **PW1** told the Court that the 2nd Defendant **Christine Achieng Ouko**, the 3rd Defendant **Dennis Mugo** and 4th Defendant **Morris Wetindi** in their capacity as Directors and Shareholders of the 1st Defendant Company entered into a personal Guarantee Agreement whereby they undertook that they would be held personally liable in the event that the 1st Defendant failed to pay or to discharge any of its obligations under the '**MRPA**'.

(8) Under the said '**MRPA**' and in order for the Plaintiff to secure itself, the parties agreed that any payments made to the 1st Defendant in respect of the supply of interactive screens would be paid into a nominated collection account being Account Number **xxxxxxxx** held in the name of the 1st Defendant at **Standard Chartered Bank, Harambee Avenue Branch** (hereinafter '**the Standard Bank Account**'). This account was to be controlled by the Plaintiff.

(9) **PW1** stated that as part of the financing which the Plaintiff provided to the 1st Defendant, the Plaintiff paid import duty for the said goods as well as penalties imposed by the **Kenya Revenue Authority (KRA)** as a result of the investigation conducted by **KRA** into false customs entries made by the 1st Defendant in its efforts to avoid import duties and taxes.

(10) **PW1** testifies that the Plaintiff learnt that the 1st Defendant was paid by the Ministry on **6th July 2016** but that in breach of the '**MRPA**' and in an attempt to defraud the Plaintiff, the 1st Defendant orchestrated for the monies paid by the Ministry to be wired to a different bank account, other than the **Standard Bank Account** over which the Plaintiff had control. That instead at the instance of the 1st Defendant, the monies were wired into an Account Number **xxxxxxxxxxx** held at **Equity Bank Kilimani Branch** an account over which the 1st Defendant had sole control. That this was done contrary to the instructions which had been issued to and acknowledged by the Ministry.

(11) **PW1** contends that the diversion by the 1st Defendant of the monies paid by the Ministry was illegal, fraudulent, irregular and unlawful and was designed to unlawfully deprive the Plaintiff of its lawful dues under the '**MRPA**' and the relevant laws of Kenya, thereby causing loss, and denying the Plaintiff the fruits of its business. **PW1** further stated that the Plaintiff incurred additional expenses of **USD 4,979.80** being demurrage and delivery costs of **USD 4,000** plus transit insurance costs of **USD 979.80**.

(12) **PW1** stated that on **28th October 2015**, the 4th Defendant **MORRIS WETINDI** entered into a consent with the Plaintiff by which consent the Defendants were to refund the sum of **Kshs. 13,651,742.80** being part payment of the Receivables. That additionally the Defendants under the consent undertook to make good all the Plaintiff's losses and costs. **PW1** further states that the Plaintiff has incurred substantial legal and other costs in pursuing recovery of the monies due to them and has suffered the opportunity costs of being deprived of the use of its capital for over **three (3) years**. That therefore under the '**MRPA**' which provided for late repayment of financing, the amount now due from the 1st Defendant to the Plaintiff is in excess of **USD 700,000**. Hence the present suit.

(13) **DW1 DENNIS MWENDA MUGO** was the 3rd Defendant in the suit. He told the Court that he was a Director of **EKAA AFRIKA LIMITED** (the 1st Defendant Company). **DW1** relied entirely upon his written Statement dated **25th February 2020**. **DW1** confirms that the 1st Defendant won a contract for supply of Smart Boards to all National School in Kenya which contract was worth **Kshs. 67,496,000/-**. **DW1** claims that the 1st Defendant being unable to finance the cost of importing the said Smart Boards into the country sought for financing from **EQUITY BANK** which offered them a short-term loan of **Kshs. 34,650,000/-**. That when these funds were released **DW1** wired a sum of **USD 295,000** to the supplier in **China** to enable production to commence.

(14) **DW1** stated that the total cost of the contract was **USD 389,250**, thus the 1st Defendant remained with a deficit of **USD 93,600**. That through the 4th Defendant they then approached **Utility Capital Management Limited** (the Plaintiff) seeking financing to cover the deficit due to the manufacturer as well as to cover logistics and transport from the **Port of Mombasa** to the end user. That however to their great relief the Plaintiff offered to pay the full invoice amount of **Kshs. 67,496,000/-** to the manufacturer.

(15) **DW1** went on to state that they signed an Agreement being the **Master Receivables Purchase Agreement** and the Plaintiff asked for

Kshs. 1,000,000/- as commitment which the 1st Defendant duly paid. **DW1** insists that the Plaintiff through their Country Manager **Frederick Munyi** were fully aware of the fact that the 1st Defendant had secured a loan with **Equity Bank**.

(16) **DW1** told the Court that the Plaintiff insisted on paying the amount of **Kshs. 67,496,000/-** into the **Standard Bank Account** which account the Defendants had no access to. He asserts that the Plaintiff only made one payment of **USD 108,816** to the supplier and **did not pay** the **USD 389,250** which had been agreed on. That the balance in the **Standard Bank Account** of **USD 222,250** was refunded back to the Plaintiff, therefore the 1st Defendant derived no benefit at all from the Agreement.

(17) **DW1** claims that under the terms of their Agreement with the Ministry each tenderer was to indicate where payment was to be made and that at the time the only bank details which were acknowledged by the Ministry through the **IFMIS** System was the 1st Defendants Account No. **xxxxxxxxxxxxx** held at **Equity Bank Kilimani Branch**. That a last minute attempt to change the receiving bank account to the **Standard Bank Account** controlled by the Plaintiff, did not go through as the **IFMIS** System failed to acknowledge that account, which failure could not be blamed on the Defendants as they had no control over the Government **IFMIS** Systems. Thus according to **DW1** the funds from the Ministry were infact wired to the correct account.

(18) **DW1** went on to state that the Defendants later learnt that only **30%** of the purchase price was actually paid to the manufacturer in **China** as the balance of **70%** was wired back to the Plaintiff on **15th April 2016**. As such the Defendants allege that Plaintiff defaulted on the agreement that they would cover all the payments due to the manufacturer. **DW1** further alleges that the Plaintiff interfered in the contractual relations between the Ministry and the 1st Defendant by visiting the Ministry without notifying the Defendants and antagonizing government officers. **DW1** claims that as the result of said interference by the Plaintiff the 1st Defendants **supply contract** with the Ministry was cancelled vide the letter dated **4th April 2016**. That the 1st Defendant had to lobby to have the **supply contract** reinstated and that the said contract was eventually reinstated through a memo dated **27th June 2016**.

(19) That upon reinstatement of the 1st Defendants **supply contract** with the Ministry the Plaintiff demanded that the 4th Defendant write to the Ministry to change the account details to the **Standard Bank Account**. The Defendants complied with this request vide their letter dated **29th June 2016**.

(20) **DW1** denies that the 1st Defendant received payment for the goods on **2nd July 2016** and states that the payment voucher was not signed until **4th July 2016**. He however concedes that payment was received by the 1st Defendant on **6th July 2016** which payment was wired to the Defendants **Equity Bank Account** in line with the details acknowledged by the **IFMIS** System at the Ministry. That upon receiving the money **Equity Bank** immediately deducted the sum of **Kshs. 44,077,053.00** being the amount due to the Bank on account of the loan which had earlier been advanced to the Defendant. **DW1** asserts that all this information was conveyed to **Frederick Munyi** the Country Manager for the Plaintiff who promised to contact the Plaintiff to arrange a discussion on the way forward. Instead to the utter shock of the Defendants their **Equity Bank** Account was frozen following an application made in Court by the Plaintiff.

(21) Regarding the present suit and claim by the Plaintiff against the Defendants **DW1** in his written statement contended as follows:-

“(i) The claim for USD 380,368.18 is untenable and the Plaintiff never proved that they incurred this sum on account of the 1st Defendant.

(ii) The claim for USD 4,979.80 special damages was not proved in the manner envisaged by law.

(iii) There can be no general damages recovered on a claim for breach of contract.

(iv) For the reasons aforesaid it has not been proved that the orders for freezing of accounts as well as transfer of the funds from Equity Bank to Standard Chartered Bank are deserving.”

DW1 therefore urged the Court to dismiss the Plaintiffs suit in its entirety and award the costs of the same to the Defendants.

(22) **DW2 MORRIS WETINDI** was the 4th Defendant. He told the Court that he was a Director of **EKAA AFRIKA LIMITED** together with the 1st Defendant. **DW2** relied entirely upon his Witness Statement dated **28th February 2020** in which he fully associated himself with the Statement and evidence of **Dennis Mwenda Mugo (DW1)** who was a Co-Director of the Company. **DW2** stated that he personally secured Franchise rights in **East Africa** for **EKAA LIMITED** from a Company based in **China** involved in the manufacture of digital smart solutions for global supply. **DW2** confirms that the 1st Defendant participated in and won a tender to supply Smart Boards to all national schools in Kenya which contract was worth **Kshs. 67,496,000/-**.

(23) **DW2** confirms that the Defendants secured short-term financing from **EQUITY BANK** worth **Kshs. 34,650,000/-** and once the loan was disbursed the Defendants wired the sum of **USD 295,000** to the manufacturer in **China** to enable production to commence. That since they had a deficit of **USD 94,250** to meet the total production cost, he approached an old school mate **Frederick Munyi** who as the Country Manager of the Plaintiff assured **DW2** that the Plaintiff would pay the full invoice amount to the manufacturer.

(24) **DW2** confirms that he on behalf of the 1st Defendant signed the **Master Receivables Purchase Agreement (MRPA)** with the Plaintiff but asserts that the Plaintiff breached the said Agreement as they did not wire the **70%** balance due to the manufacturer as agreed. **DW2** further asserts that the reason why the 1st Defendant incurred losses was because the loan which they had obtained from **Equity Bank** accrued interest of **Kshs. 9,806,053.00** due to the failure by the Plaintiff to remit the agreed monies to the 1st Defendants Account.

(25) According to **DW2** the Freeze Order obtained by the Plaintiff on the Defendants Account as well as the Plaintiffs interference with their business caused the 1st Defendant a cumulative loss of business as follows:-

Year	Total Sales – Kshs.
2013	817,450.00
2014	8,710,250.00
2015	11,311,800.00
2016	67,496,000.00
2017	-
2018	-
2019	-
2020	-

That the Defendant additionally suffered losses resulting from the closure of their offices and auctioning of their equipment.

(26) **DW1** asserts that the Plaintiff **did not** pay the monies to the manufacturer as per the **MRPA** and that the Plaintiff in instituting this suit is intent on perpetrating a fraud against the 1st Defendant. Further that the Plaintiff on **15th April 2016** withdrew an amount of **USD 222,250.00** from the **Standard Bank Account** without the Defendants knowledge and/or consent. He states the Plaintiffs claims lack foundation as they are themselves the cause of the losses they claim to have incurred. **DW2** urges the Court to dismiss this suit in its entirety with costs.

(27) The record indicates that on the **11th October 2018** a consent dated the **9th October 2018** was entered into between the parties herein which consent provided inter alia as follows:-

“a) That the Defendants herein acknowledge that the Plaintiff is the legal and beneficial owner of the receivables financed under the Master Receivables Purchase Agreement dated the 28th October 2015 supplied to the Ministry of Education Science and Technology under Contract No. xxxxxxxx dated March, 2015 and personally guaranteed by the 2nd to 4th Defendants;

b) That in partial settlement of this suit, the sum of Kshs. 13,651,742.80 being part payment for the receivables, wired by the Ministry of Education Science and Technology to the 1st Defendant’s Bank Account Number xxxxxxxx held at Equity Bank, Kilimani Branch be transferred to bank account number xxxxxxxx held at Standard Chartered Bank, Harambee Avenue Branch, Nairobi which is controlled by the Plaintiff;

c) That the 1st, 2nd and 4th Defendants will execute such documents and take all necessary action as shall be required of them by the Plaintiff to secure payment of the balance of funds due to the Plaintiff in respect of the Master Receivables Purchase Agreement dated the 28th October, 2015 between the Plaintiff and Defendant.”

(28) The position of the consent is unclear as on the **25th March 2019**, parties indicated to the **Hon. Deputy Registrar** that they had hit a snag and the Court directed for filing of witness statements and directed that the matter be mentioned for purposes of fixing a hearing date.

ANALYSIS AND DETERMINATION

(29) I have carefully considered the material placed before the Court, the evidence adduced before the Court as well as the written submissions filed by all the parties. The **Evidence Act**, places the burden of proof of any fact on the person who wishes to rely on the same. **Section 107 of the Evidence Act Cap 80, Laws of Kenya** provides as follows:-

“Burden of proof

(1) Whoever desires any Court to give Judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

(30) The following are the issues which arise for determination in this case:-

- (a) Whether there existed a valid and enforceable contract between the Plaintiff and the 1st Defendants.
- (b) If so whether there has been a breach of said contract.
- (c) Whether the Plaintiff is entitled to its claim for **USD 380,368.18** together with the claim for Special Damages of **USD 4,979**.

(31) It is important at this point to note that vide the Ruling delivered by this Court on **22nd September 2017**, prayers (a), (b) and (c) of the Amended Plaint dated **15th September 2016** are now all spent. In that Ruling **Hon. Lady Justice Olga Sewe** ordered that:-

“A freeze order do issue against the Defendant/Respondent’s bank account number xxxxxxxx held at Equity Bank, Kilimani Branch, pending the hearing and determination of this suit; and that the costs of the application be in the cause.”

(a) Existence of a Contract

(32) It is common ground and is conceded by both parties that the Plaintiff and the defendant entered into the **Master Receivables Purchase Agreement** dated **28th October 2015**. A copy of the said Agreement is annexed as **Exhibit 1 (Pages 1-39)** in the Plaintiffs Amended List of Documents filed on **22nd September 2016**. The parties to the Agreement (Contract) are **EKAA AFRIKA LIMITED** (the 1st Defendant herein) on the one hand, **FORFAITING TRADING (BERMUDA) LIMITED**, a Company duly incorporated according to the Laws of **BERMUDA** and **JAMES STUART – SMITH (PW1)**, and on the third part is **UTILITY CAPITAL MANAGEMENT LIMITED** a Company duly incorporated according to the Laws of **MALTA**. The Agreement has been duly executed on behalf of all the parties. **DW2 Morris Wetindi** the Managing Director of the 1st Defendant in his evidence confirmed that he signed the Agreement dated **28th October 2015** on behalf of the 1st Defendant.

(33) The **Form CR 12** of **EKAA Africa Limited** dated **25th July 2014** which was produced as **Exhibit 8** in the Amended Plaintiff List of Documents dated **15th September 2016** listed the Directors – Shareholders of the 1st Defendant. The Directors-Shareholders listed therein are **DAVIS OTIENO OWINO**, **DENNIS MWENDA MUGO** (3rd Defendant), **MORRIS WETINDI ETABALE** (4th Defendant), and **CHRISTINE ACHIENG OUKO** (2nd Defendant).

(34) Also annexed to the Plaintiffs Amended List of Documents at **Pages 40-41** is a Resolution by the Board of Directors of the 1st Defendant resolving unanimously as follows:-

“PASSED ON 20TH OCTOBER 2015

RESOLVED unanimously that:-

- 1. It approves the terms of Master Receivables Purchase Agreement and related documents (together the Transaction Documents) to which it is a party, and the transactions contemplated by the transaction Documents.**
- 2. The Supplier empowers and authorizes any of Morris Wetindi Etabale with Passport Number Bxxxxx, Dennis Mwenda Mugo with Passport Number Axxxxx, or Christine Achieng Ouko with Passport number Axxxxx, to act as the sole duly authorized signatory of the Supplier in rem suam to:-**
 - (i) negotiate, agree and settle the terms of and sign the Transaction Documents and all other deeds, certificates, notices, documents or powers of attorney which may be necessary for the implementation of the Transaction Documents;**
 - (ii) execute the Transaction Documents to which it is a party on its behalf;**
 - (iii) on its behalf, to give, sign and/or dispatch or cause to be given, all documents and notices to be signed and/or dispatched by it under or in connection with the Transaction Documents to which it is a party;**
 - (iv) agree any amendment to any of the Transaction Documents; and**
 - (v) generally do everything that may be necessary or appropriate for the implementation of the Transaction Documents and the Transactions contemplated therein.**
- 3. Any agreement, deeds or documents signed by the authorised Signatories acting under the authority of this resolution, shall conclusively be deemed to be the Transaction Documents authorized by this resolution.**
- 4. To the extent that an Authorised Signatory has already signed the Transaction Documents and/or any other deeds, certificates, notices, documents or powers of attorney which may be necessary for the implementation of the above mentioned agreements on behalf of the Company, his actions in this regard be and are hereby ratified and adopted by the Company.**
- 5. The specimen signatures of the individuals set out in 2 above are set out below.”**

(35) This resolution which authorized the 1st Defendant to enter into contractual arrangements with the Plaintiff is duly signed by the 2nd and 3rd Defendants.

(36) Further vide a **Shareholders' Guarantee** dated **20th October 2015**, pursuant to **Clause 1.1 (53) (c) of the MPRA**, duly signed by all the directors and shareholders of the 1st Defendant, which provided guarantee and indemnity to the Plaintiff, the shareholders (2nd, 3rd, 4th Defendants), all agreed to be personally liable to the Plaintiff in the event of a breach of the terms of the **MRPA**, or in the event of any loss incurred under any transaction under the **MRPA**. (A copy of the Shareholder Guarantee appears as **Exhibit 10** to the Amended Plaintiff List of Documents dated **15th September 2016**).

(37) Similarly through the **Notice of Assignment of Debt** dated **29th June 2016** by the 1st Defendant to the Ministry the 1st Defendant acknowledged that the Plaintiff (on behalf of the Financing Consortium) was to be the beneficial owner of the invoices tendered to the Ministry by the 1st Defendant. The Notice of Assignment of Debt which was signed pursuant to **Clause 4.1 (1) (a)** of the **MRPA** appears as **Exhibit 6** of the Amended Plaintiff List of Documents dated **15th September 2016** and read inter alia as follows:-

“1. We give you notice that by an Agreement dated 28th October 2015 we as legal owner shall be assigning as beneficial owners free from all encumbrances all of our rights, title and interest in and to each invoice to be tendered to you (the invoices) issued in relation to Contract Agreement 13/2014 - 2015 for the supply of 104 EKAA all in one 65inch 4K, 3D and PC interactive media touch screens (the Contract) in favour of the Financing Consortium.

2. We irrevocably and unconditionally authorize and instruct you to pay all such sums becoming due and payable under or by virtue of those invoices to the following account on the Maturity Date.

Bank : Standard Chartered Bank

Branch : Harambee Avenue Nairobi

Account Name : EKAA Africa Limited

Account Number : xxxxxxxxxxxx

Reference : MOE SCHM/xxxxx

SWIFT : SCBLKENXXXX

3. ...”

(38) The Notice of Assignment of Debt was duly executed on behalf of the 1st Defendant and is stamped as having been received by the Ministry on **30th June 2015**. Based on the above I find and hold that there did infact exist a valid and enforceable Agreement (Contract) between the Plaintiff and the 1st Defendant.

(ii) Whether there was a Breach of Contract by either party

Ewan McKendrick in **Contract Law 7th Edition** defined ‘**Breach of Contract**’ as follows:-

“A breach of contract consists of a failure, without lawful excuse, to perform a contractual obligation. The breach can take several forms such as a refusal to perform, defective performance, or late performance. Breach of contract is generally a form of strict liability; that is to say it is not usually necessary to prove fault in order to establish the existence of a breach.”

(39) **DW1** and **DW2** in their evidence explained that the 1st Defendant secured a tender worth **Kshs. 67,496,000/-** for the supply of Smart Boards to all National School in Kenya. A copy of the duly executed **Supply Contract Agreement** between the Ministry and the 1st Defendant appears at **Exhibit – 1** in the Defendants Bundle of Documents filed on **26th February 2020**. The Defence witnesses told the Court that given that the 1st Defendant did not have sufficient funds to enable it honour this **Supply Contract Agreement** with the Ministry, it approached the Plaintiff, a Company involved in providing short term financing and sourcing for investors, for financing to enable the 1st Defendant honour the Supply Agreement. The Plaintiff through the ‘**MRPA**’ agreed to finance the project fully to the tune of **USD 389,250** as per the factory invoice.

(40) It would appear that prior to negotiating the ‘**MRPA**’ with the Plaintiffs the Defendant had sought and obtained from **EQUITY BANK** a short-term loan of **Kshs. 34,650,000/-** in order to finance the same contract for the supply of Smart Boards. **DW1** claimed that as soon as **Equity Bank** approved the loan and disbursed the funds to the Defendant the 1st Defendant wired the sum of **USD 295,000** to the supplier in **China** so that production of the consignment could commence. The Defendants position is that the Plaintiff failed in its obligation to secure the entire sum of **USD 389,250** which failure (or breach) forced the Defendant to seek and secure alternative funding from **Equity Bank**. The Defendant claims that the Plaintiff only wired **USD 108,816** on **2nd December 2015** to clear the outstanding balance owed to the supplier.

(41) A perusal on the ‘**MRPA**’ makes it clear that under said Contract, the Plaintiff was to provide financing for the purchase of the

receivables under the Supply Contract entered into by the 1st Defendant and the Ministry. **Clause 4.2** of the 'MRPA' provided as follows:-

“42(1) The Escrow Agent shall pay on behalf of the Financing Consortium, for each Purchased Receivable, the advance Amount for such Purchased Receivable into each of the Original Suppliers' Accounts in a series of instalments as follows:-

a) On the first instalment dates (as specified in the Purchase Request) and amount upto US\$ 155,000 of the advance Amount (the first instalment).

b) On the first Delivery Date (as specified in the purchase request) against receipt by Utility Capital of the invoice for taxes and or duties issued in Kenya by the relevant authorities in relation to the relevant Product delivered at Mombasa Port pursuant to the relevant contract; and amount of upto US\$ 175,000 of the Advance Amount (the Second Instalment); and

c) On the second delivery date (as specified in the Purchase Request) against receipt by Utility Capital of a copy of the warehouse receipt issued by or on behalf of the Debtor in respect of the Product once delivered to the designated warehouse of the Debtor, an amount equal to US\$ 300,000 of the Advance Amount.”

(42) Through an e-mail dated **26th August 2015**, the 4th Defendant on behalf of the 1st defendant sought for financing from the Plaintiff. Having sought and received a short term loan of **Kshs. 34,000,000/-** from **Equity Bank** and having paid to the supplier a sum of **Kshs. 29,500,000/-** the 1st Defendant remained in deficit to the tune of **Kshs. 67,496,000/-**. It is manifest that the Defendants received and acknowledged the receipt from the Plaintiff of **USD 380,638.18** through the Letter of Acknowledgement dated **7th June 2016** signed by **MORRIS WETINDI** for the 1st Defendant. [See **page 44** of Plaintiffs Amended List of Documents]. That letter reads inter alias as follows:-

“Dear Sir,

We acknowledge that the contract funding provided for the supply of interactive screens to the Kenya Ministry of Education has created a debt of USD 380,368.18 that is due and payable to Utility.

Unfortunately EKAA Africa Limited has not been able to deliver the screens as expected and has therefore tried to sell the screens to other prospective clients. We are currently waiting for firm orders to be confirmed.

In order to repay the funding provided by Utility in full, we therefore commit to ceding any and all orders and subsequent payments to be received to Utility until such time as the amount of USD 380,638.15 is paid to Utility.” [own emphasis]

(43) **DW2** the Managing Director of the 1st Defendant confirms that he wrote and signed this letter dated **7th June 2016**. However **DW2** suggest that this acknowledgement of debt was premised upon certain conditions. He has not stated what these conditions were. Further **DW2** admits that **“the conditions are not included in my letter.”** This Court cannot be expected to recognize and give effect to these phantom conditions which it appears were known to **DW2** alone.

(44) Additionally in an Affidavit dated **7th July 2016** sworn by **DAVIS OTIENO OWINO**, a Director of the 1st Defendant the receipt by the Defendant of this sum of **USD 380,638.18** is acknowledged as having been received from the Plaintiff. At paragraph **(4)** of the said Affidavit it is stated as follows:-

“4. THAT pursuant to the aforementioned agreement EKAA AFRIKA LIMITED (hereinafter referred to as EKAA) obtained USD 380,368.18 from the Financial Consortium aforementioned to be used for the acquisition of interactive screens to be supplied [to] the Ministry of Education Science and Technology.” [own emphasis]

(45) The Defendants further attempted to disown their Letter of Acknowledgement dated **7th June 2016** claiming that the Plaintiff **coerced** the 4th Defendant into committing to refund the money by threatening to instruct clearing agents **not** to release the goods. That said threats were issued by the Plaintiff in full knowledge that any delays in release of the goods could amount to a breach of the **supply contract** with the **Ministry**. This allegation however does not fly since the goods were released from clearing in **March 2016** whilst the Letter of Acknowledgement was written in **June 2016 two (2) months after** the said goods had been released.

(46) **DW2** in his evidence concedes that the sum of **USD 380,638.18** was indeed deposited by the Plaintiff into the Settlement Collection Account held at **Standard Chartered Bank**, which account the Plaintiff was a sole signatory. However the Defendants alleges that the supplier only received **USD 108,816** on **2nd December 2015**. They claim that the Plaintiffs later paid out to some unknown un-named party the monies which had been deposited into the **Standard Bank Account**.

(47) A look at the Bank Statements for the **Standard Bank Account** for the period **21st November 2015** to **30th April 2016** reveals that the Plaintiff made the following deposits into that Collection Account-

(a) USD 60,000 on 21st November 2015.

(b) USD 60,000.00 on 23rd November 2015

(c) USD 515,726.53 on 24th February 2016

TOTAL **USD 635,726.53**

(48) From the above it is manifest that the Plaintiff fulfilled its obligation under the 'MRPA'. The Plaintiff cannot be blamed and / or penalized for the actions of the Defendant in seeking financing with **Equity Bank** in addition to the financing sought from the Plaintiff. The Defendant sought for two different sources of financing in respect of the same contract. This does not absolve the Defendant of their obligation to honour their contract with the Plaintiff. Once the Plaintiff indicated its willingness to finance the entire project and upon signing the 'MRPA' the Defendants ought to have moved to cancel its arrangement with **Equity Bank**, or should have moved to immediately refund to **Equity Bank** what was due to it under the loan arrangement.

(49) The allegation made by the Defendants that the funds which were deposited into the Collection Account at **Standard Bank** were later paid out by the Plaintiffs (who was the sole signatory to said account) to persons other than the Supplier has no basis. It is trite law that he who alleges must prove. Despite having made such an allegation and despite the claim by **DW4** that the Plaintiff withdrew a sum of **USD 222,250.00** from the **Standard Bank Account** without the Defendants knowledge and / or consent, the Plaintiff have **not** filed a counter claim as against the Plaintiff in respect of the alleged fraudulent dealings by the Plaintiff.

(50) From the material available it is clear that as of **26th August 2015**, the 1st Defendant had a deficit in respect of the supply Contract of approximately **Kshs. 32,846,000/-**. There is no evidence that the 1st Defendant sourced and obtained this amount of this deficit from a third entity (financier). It is common ground that the receivables (the interactive screens) were supplied and did eventually arrive at the **Mombasa Port in Kenya** in **July of 2016** as confirmed by **DW1**. I find that the only way these receivables were financed was through use of the funds provided by the Plaintiff. Accordingly I am satisfied that the Plaintiff fulfilled its obligations under the 'MRPA.' I therefore find and hold that the evidence adduced by the Plaintiff proves that they funded the 1st Defendant to the tune of **USD 380,638.18** for the purchase of interactive screens for supply to the Ministry, thereby fulfilling its obligations under the 'MRPA'.

(51) The Defendant claims that due to the failure of the Plaintiff to finance the **USD 380,638.18**, they were forced to turn to **Equity Bank** for a facility of **USD 295,000** which was disbursed on **25th June 2015**. That on **2nd December 2015** the Plaintiff financed only **USD 108,816**. However the evidence available does not support the Defendants position. The fact is that the Defendants first engaged **Equity Bank** on **26th May 2015** seeking a loan of **Kshs. 34,650,000**, which amount was transferred to them on **18th December 2015**. On the other hand the Plaintiff was only approached by the Defendants on **26th August 2015**, way **after** they had negotiated the loan with **Equity Bank**. In the circumstances the Defendants cannot claim that their approach to **Equity Bank** resulted from the Plaintiffs failure to provide the required funds. It is manifest that having full knowledge of its facility with **Equity Bank** and its attendant obligations thereto, the 1st Defendant proceeded to engage the Plaintiff and proceeded to sign the 'MRPA' which Agreement included Clauses **10** on 'Undertakings and Covenants'.

(52) The Plaintiff contends that the 1st defendant breached the 'MRPA' by wiring the payment received from the Ministry to its **Equity Bank Account** rather than having the said payment wired to the **Standard Bank Account** as had been agreed. On their part the Defendants contend that it was the Plaintiff who breached the 'MRPA' causing the 1st Defendant to incur interest of **Kshs. 9,806,053/-**. As stated earlier the Defendant did not file any Counter-Claim for this amount.

(53) **Clause 10.1** of the **MRPA** provided as follows:-

"The supplier hereby agrees and undertakes:-

10.1 not to create or attempt to create any security over any Purchased Receivable and not to cede assign or transfer or attempt to cede assign or transfer any Purchased Receivable other than in favour of the Financing Consortium.

10.2"

(54) The above Clause meant that the financing sought and obtained from **Equity Bank** was precluded by the **MRPA** as part of the financing for the contract. The Defendants **did not** at the time of executing the **MRPA** make any mention of the existence of a facility with **Equity Bank**, thus the loan taken from **Equity Bank** cannot be used by the Defendants to undermine the **MRPA**. In other words the **Equity Bank** loan had no relevance to the Defendants obligations under the **MRPA**.

(55) It is not in dispute that the Ministry did make payment to the 1st Defendant in respect of the supply contract and that said payments were made on **6th July 2016** to the **Equity Bank Account** over which the Defendants had control. There is evidence that vide a letter dated **29th June 2016** the 1st Defendant instructed the Ministry to make payments to the **Standard Bank Account**. **Clauses 7:1, 8:2, 8:3 and 10:5** of the 'MRPA' provide inter alia that:-

"7 Payments

7.1 Place and time:

(1) All payments by the Supplier under this Agreement are to be made, and the Supplier shall procure that all payments to be made by the Debtor, pursuant to the transaction Documents shall be made for value on the due date thereof into the Settlement collection account or the Financing Account, as the case may be, as directed by Utility Capital, using the relevant invoice number as reference which is the subject of the Purchase Receivable." [own emphasis]

“8. Settlement Collection Account

8.2 the Escrow Agent shall have sole signing rights on the Settlement Collection Account for disbursing monies.

8.3 The Settlement Collection Account will be used to collect all payments made by the debtor to the Financing Consortium in respect of Purchased Receivables into the Settlement Account. [own emphasis]

(56) It is manifest that by receiving and accepting the payments to the **Equity Bank Account** the 1st Defendant breached the above Clauses of the ‘MRPA’. In his evidence **DW1 Dennis Mugo** acknowledged that the ‘MRPA’ provided that payment was to be made into the **Standard Bank Account**. **DW1** further confirms that payment was effected on **6th June 2016** into the **Equity Bank Account No. xxxxxxxxxx**. Under cross-examination **DW1** states as follows:-

“... The money was to be paid into the account of EKAA Africa Limited held at Standard Chartered Bank, Harambee Avenue. This is the account over which the Plaintiffs had full control

When the money became due the funds were not paid into the Standard Bank account. The money was paid into the Equity Bank Account over which the Plaintiff had no control [own emphasis]

The **Equity Bank** account was **not** the **Settlement Collection Account** under the terms of the **MRPA**.

(57) In the Affidavit of **DAVIS OTIENO OWINO** a Director of the 1st Defendant dated **9th July 2016** (page 50-51 of the Amended Plaintiff List of Documents dated **15th September 2016**), it is clearly acknowledges that monies were paid into the wrong bank account.

In said Affidavit it is deponed that:-

“9. ... I swear this Affidavit to affirm that the monies owed to the Financial Consortium ought to have been paid into account number 0102044685300 held at Standard Chartered Bank, Harambee Avenue Branch in the name of EKAA and not to account number xxxxxxxxxx held at Equity Bank, Kilimani Branch.”

This is a clear admission that the money went to the wrong account.

(58) The Defendants claim that the payments were so made due to the mode of operation of the **IFMIS** System is not tenable as **Clause 10.5** addresses this eventuality, by providing that:-

“10.5 if any monies in respect of a Purchased Receivable are paid by the Debtor to the Supplier and not into the Settlement Collection Account to transfer, promptly upon becoming aware of this, such monies (in the currency of receipt) to the Settlement Collection Account.” [own emphasis]

Therefore by facilitating and accepting payment into the **Equity Bank Account**, and by failing to immediately transfer said payment to the Collection Account under the **MRPA**, the Defendants breached the terms of the **MRPA**.

Merits of Plaintiffs Claim

(59) The Plaintiff in its Amended Plaint dated **15th September 2016** particularized the claims of fraud and bad faith by the 1st Defendant in **paragraph 11** as follows:-

“PARTICULARS OF 1ST DEFENDANT’S FRAUD AND BAD FAITH

- a) Acknowledging indebtedness of USD 380,638.18 to the Plaintiff and agreeing on a mode of payment for the same then reneging on the payment.**
- b) Directing payment of monies owed to a different bank account from that to be controlled by the Plaintiff, as had been agreed by the parties to secure the repayment.**
- c) Failing to honour the agreement entered into with the Plaintiff in a bid to defraud the Plaintiff of the monies advanced to finance the acquisition of the interactive screens for supply to the Ministry of Education Science and Technology.”**

(60) The Plaintiff further particularized the breaches by the 2nd, 3rd and 4th Defendants of their Guarantees under **paragraph 13** of the Plaint as follows:-

“PARTICULARS OF 2ND TO 4TH DEFENDANTS’ BREACH OF GUARANTEE

- a) Failure to punctually pay and discharge all the obligations of the 1st Defendant under or in connection with the Master Receivables Purchase Agreement;**

b) Despite notice as per the guarantee, failure to immediately pay or discharge the obligations of the 1st Defendant to the Plaintiff when they became due;

c) Failure to indemnify the Plaintiff against the costs, loss and liability incurred by the 1st Defendant's non-payment of obligations under the Master Receivables Purchase Agreement."

(61) Clause 1.1 (23) of the MRPA made the 2nd, 3rd and 4th Defendants personally liable for any breach of contract by the 1st Defendant. Clause 1.1 (23) defines the term Guarantee as follows:-

"Guarantee means the guarantee entered or to be entered into between Utility Capital and the shareholders (Guarantors) of the Suppliers in terms of which the Guarantors guarantee the due, proper and punctual performance by the supplier of its obligations under this Agreement."

Clause 1.1 (53) of the MRPA provided that the suppliers (1st Defendants) were under an obligation "to deliver personal guarantees in the name of each of the Directors."

(62) The said Directors did proceed to sign the **Shareholders Guarantee Agreement** dated 28th October 2015. The said Guarantee appears at pages 54-67 of the Plaintiffs Amended List of Documents. The Guarantee is duly signed at page 66 by the 2nd, 3rd and 4th Defendants. None of the Defendants have denied signing said Guarantee. This Guarantee bound the 2nd, 3rd and 4th Defendants in terms of **Clause 3.0** of the MRPA which read as follows:-

"3.0 Guarantee and indemnity

3.1 Each Guarantor hereby, jointly and severally, irrevocably and unconditionally:

(1) guarantees to Utility Capital the punctual payment and discharge of all Obligations from time to time incurred by the Supplier under or in connection with the Master Receivables Purchase Agreement;

(2) undertakes with Utility Capital that, whenever the Supplier does not pay or discharge any of those Obligations when they become due for payment or discharge, it will immediately on demand do so itself, as if it were the principal obligor; and

(3) agrees with Utility Capital that if, for any reason, any amount claimed by Utility Capital under this Clause 3 is not recoverable on the basis of a guarantee, it will be liable as a principal debtor and primary obligor to indemnify Utility Capital against any cost, loss or liability it incurs as a result of the Supplier not paying any amount expressed to be payable by it under the Master Receivables Purchase Agreement on the date when it is expressed to be due; the amount payable by a Guarantor under this indemnity will not exceed the amount it would have had to pay under this Clause 3 if the amount claimed had been recoverable on the basis of a guarantee." [own emphasis]

(63) Based on the above I am satisfied that as a result of this duly signed Guarantee Agreement the 2nd, 3rd and 4th Defendants are personally liable for the performance of the MRPA by the 1st Defendant

Special Damages

(64) It is trite that Special Damages must be specifically pleaded and proved. The Defendants by executing the 'MRPA' agreed to all the terms of the said contract including Clauses 10.1, 10.2 and 10.4. The Defendants claim that they cannot be held liable for the Plaintiffs action in paying the amount due to KRA. That this payment was made without consulting the Defendant thus the Plaintiff cannot claim this amount as Special Damages. Clause 4.2 (b) of the 'MRPA' provided as follows:-

"Payment of Purchase Price

(1) The Escrow Agent shall pay, on behalf of the Financing Consortium, for each Purchased Receivable, the Advance Amount for such Purchased Receivable into each of the Original Suppliers' Accounts in a series of instalments as follows:-

(a) on the First Instalment Date (as specified in the Purchase Request) amounts in respect of (i) product cost, (ii) logistics, (iii) certification by inspection agent in China, and (iv) goods in transit insurance (the First Instalment);

(b) on the First Delivery Date (as specified in the Purchase Request) against both (i) receipt by Utility Capital of the invoice for Taxes and or Duties issued in Kenya by the relevant authorities in relation to the relevant Product delivered at Mombasa Port pursuant to the relevant Contract, and (ii) certification by inspection agent in Kenya, amounts in respect of (i) taxes and duty, (ii) credit insurance, (iii) logistics, (iv) certification by inspection agent (the Second Instalment);

(c) on the Second Delivery Date (as specified in the Purchase Request) against receipt by Utility Capital of a copy of the confirmation from the Debtor of acceptance of the product, an amount in respect of the balance of the product cost (the Third Instalment)" [own emphasis]

(65) Thus it would have been economically disadvantageous for the Plaintiff to fail to pay the amount due to KRA and to await the tax

exemption being sought by the 1st Defendant. The Defendants do not deny that the Plaintiffs paid out this amount of **Kshs. 19,355,054/-** to **KRA**. In the Replying Affidavit dated **19th July 2016** the 4th Defendant concedes that the Plaintiff “**proceeded to the KRA offices in Mombasa and paid duty for the consignment that had landed and was in the course of being cleared.**” This is a clear acknowledgement that the Plaintiff paid the tax due on the consignment.

(66) I am satisfied that the Plaintiff did plead with particularity and did prove its claim for **USD 4,979** as Special Damages. I find that the 1st Defendant breached the Agreement and as such the Plaintiff is entitled to its claim for **USD 380,368.18**. Likewise the 2nd, 3rd and 4th Defendants based on the Guarantees they signed are jointly and severally liable to pay to the Plaintiff this amount of **USD 380,368.18**.

(67) The Plaintiffs have made a claim for General Damages. As a general rule general damages are **not** recoverable in cases of breach of contract. In the case of **KENYA TOURISM DEVELOPMENT CORPORATION –VS- SUNDOWNER LODGE LTD [2018]eKLR** the Court of Appeal held as follows:-

“We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In DHARAMSHI vs. KARSAN [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so it would be. See also SECURICOR (K) vs. BENSON DAVID ONYANGO & ANOR [2008]eKLR. The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent “had suffered serious damages” (sic).”

(68) Finally the Plaintiffs suit succeeds and I enter Judgment in favour of the Plaintiff, against the Defendants jointly and severally for:-

(1) **USD 380,368.18**

(2) **USD 4,979.80** as Special Damages.

(3) Interest on (1) and (2) above at Court rates from the date of filing of this suit until payment in full.

(4) In order to realize the Judgment I hereby direct **Equity Bank Limited** to wire the funds held in the Defendants Account Number xxxxxxxxxxxxxx held at **Kilimani Branch** to **Standard Chartered Bank, Harambee Avenue Account No. xxxxxxxxxxxx**.

(5) The Defendants will pay to the Plaintiff the costs of this suit.

Dated in **Nairobi** this **11TH** day of **AUGUST, 2021**.

.....

MAUREEN A. ODERO

JUDGE