



**Malhotra v Almasi Limited & 2 others (Commercial Case E124 of 2022)
[2025] KEHC 2750 (KLR) (Commercial and Tax) (10 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E124 OF 2022
JWW MONG'ARE, J
MARCH 10, 2025**

BETWEEN

PERMOD MALHOTRA PLAINTIFF

AND

ALMASI LIMITED 1ST DEFENDANT

FRANCIS MBURU 2ND DEFENDANT

MARK MBURU 3RD DEFENDANT

JUDGMENT

1. The Plaintiff's case as set out in the Complaint dated 31st March 2022 is that the parties entered into a Deed of Acknowledgment of Debt dated 26th May 2021 ('the Deed') under which the 1st Defendant agreed to pay Kshs.2,000,000.00/= on or before 26th July 2021 and Kshs.22,420,000.00/= on or before 26th May 2022 and in the event of failure to pay any installments, an interest rate of 3% per annum would accrue and it would be compounded monthly until payment is received in full. The Plaintiff claims that the Deed was guaranteed by the 2nd and 3rd Defendants. When the 1st Defendant failed to remit the first installment as required and the 2nd and 3rd Defendants failed to honour their guarantee, the Plaintiff filed this suit seeking against the Defendants, jointly and severally for the first installment of Kshs.2,000,000.00/= and the second installment of Kshs.22,420,000.00/= together with interest at 3% from 26th July 2021 until payment in full.
2. The Defendants filed their Defence dated 3rd June 2022 denying the contents of the Complaint and in particular that they are indebted to the Plaintiff as alleged or at all. The Defendants contend that the 1st Defendant did not authorize the 2nd and 3rd Defendants to execute the Deed and therefore the Deed is not binding upon it. As such, the Defendants urge the court to dismiss the suit against them.



3. When the matter was set down for hearing, the Plaintiff testified on his own behalf (PW 1) relying on his witness statement dated 10th March 2022 and produced his List and Bundle of Documents dated 31st March 2022 (PExhibit 1-3) which contains the Deed, Demand Letters dated 15th October 2021 addressed to the 2nd and 3rd Defendants and an Extract of Messrs. Hamilton Harrison & Mathews' delivery book. The Defendants closed their case and defense without calling any witness or producing any evidence. Thereafter, the parties were directed to file written submissions which are on record and together with the evidence on record, I will make relevant references to in my analysis and determination below.

Analysis and Determination:-

4. 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 the burden of proof lies on that person". In *Miller.V. Minister of Pensions 1947 ALL E.R 372*, Lord Denning aptly summarized 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."

5. The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 (KLR)* simply put it that 'Courts will make a finding based on which party's version of the story is more believable.' As stated, the Defendants filed a defence but they did not call any witness or produce any evidence. This means that the Plaintiff's case remains unchallenged (See *Avtar Singh Bahra & Amarjit Kaur Bahra v Raju Govindji Ganatra T/A Sweetbite Manufacturers [2001] KEHC 375 (KLR)*) and *Motex Knitwear Limited v Gopitex Knitwear Mills Limited [2009] KEHC 4017 (KLR)*). However, even though the Defendants failed to challenge the Plaintiff's case, the latter still has a duty to prove its case on a balance of probabilities, as is required by law. This was so held by the Court of Appeal in *Karugi & another v Kabiya & 3 others [1983] KECA 38 (KLR)* where it was stated that, "The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof". Likewise, failure by a defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard hence in *Gichinga Kibutha v Caroline Nduku [2018] KEELC 3981 (KLR)* the Court held that, "It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest."
6. With the above in hindsight, I will now proceed to determine this matter which from the parties' submissions, the court is being called to determine the following issues:



1. Whether the Defendants executed the Deed acknowledging that they owed the Plaintiff the outstanding debt.
 2. Whether the Defendants failed to pay the outstanding debt in accordance with the Deed.
 3. Whether the Plaintiff has proved his case against the Defendants.
 4. Who is entitled to the costs of the suit.
Whether the Defendants executed the Deed acknowledging that they owed the Plaintiff the outstanding debt
7. From the Plaintiff's testimony and evidence produced, it is uncontroverted that the Deed was between the parties and it was executed by them in the presence of a witness, Dr. AM. In the Deed, the 1st Defendant is the Lessee whereas the 2nd and 3rd Defendants are guarantors and the 1st Defendant acknowledges that it is indebted to the Plaintiff for the sum of Kshs.24,000,000.00/= being outstanding rent and costs of redecorating and repairing the premises that were let by the Plaintiff to the 1st Defendant. I have therefore little difficulty in concluding that the Defendants executed the Deed acknowledging that they owed the Plaintiff the sum of Kshs.24,000,000.00/= and that the Deed is thus valid and binding upon them.
- Whether the Defendants failed to pay the outstanding debt in accordance with the Deed
8. As the Deed was duly executed by the Defendants and the same being valid and binding upon them, they were obliged to satisfy their obligations therein. As per Clause 2.2 and 2.3 of the Deed, the 1st Defendant agreed to pay the outstanding debt in the following manner; Kshs.2,000,000.00/= was to be paid on or before 26th July 2021 and Kshs.22,420,000.00/= was to be paid on or before 26th May 2022 and in the event of failure to pay any installments, an interest rate of 3% per annum would accrue and it would be compounded monthly until payment is received in full. Clause 1.3 of the Deed provides that the 2nd and 3rd Defendants, as guarantors, would pay the outstanding debt in the event the 1st Defendant failed to do so. The Plaintiff has maintained that the Defendants have failed to pay the outstanding debt as aforementioned and the Defendants have not presented any evidence to the contrary and in response to the Plaintiff's demands for settlement.
 9. It is therefore my finding that the Defendants failed to pay the outstanding debt in accordance with the Deed.

Whether the Plaintiff has proved his case against the Defendants

10. Being that the Plaintiff has produced evidence that has not been denied that the Defendants executed the Deed and that they have failed to pay the outstanding debt as per the said Deed, I find that the Plaintiff has proved his case against the Defendants and he is entitled to the prayers sought in his plaint.

Conclusion and Disposition:-

11. In conclusion, it is my finding that the court should issue the following dispositive orders:-
 - a. Judgment be and is hereby entered for the Plaintiff against the Defendants jointly and severally for:
 - i. Kshs.2,000,000.00/= together with interest at the rate of 3% per annum compounded monthly from 26th July 2021 until payment in full



ii. Kshs.22,420,000.00/= together with interest at the rate of 3% per annum compounded monthly from 26th May 2022

b. The Plaintiff is awarded costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF MARCH 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Ms. Kimani holding brief for Mr. Makori for the Plaintiff.

Mr. Musyoka holding brief for Dr. Okubasu for the Defendants.

Amos - Court Assistant

