Surgilinks Limited v Njimia Pharmaceuticals Limited (Commercial Case E112 of 2023) [2025] KEHC 10056 (KLR) (Commercial and Tax) (10 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10056 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E112 OF 2023

PM MULWA, J

JULY 10, 2025

BETWEEN

SURGILINKS LIMITED ..... PLAINTIFF

AND

NJIMIA PHARMACEUTICALS LIMITED ..... DEFENDANT

JUDGMENT

1. It is common ground that between 23rd February 2012 and 29th January 2021, the Plaintiff sold and delivered various pharmaceutical supplies (goods) to the Defendant at its request, totaling Kshs. 22,077,882.74 and it was an express and/or implied term of the contract that payment for the goods would be made within sixty (60) days from the date of delivery. However, the Defendant did not make these payments as expected prompting the Plaintiff to file the present suit seeking inter alia the sum of Kshs. 22,077,882.74 due as of 1st February 2022 and interest on this amount at 3% per month from the respective due dates of the invoices until full payment. On 24th August 2023, the Court ruled in favor of the Plaintiff for the Kshs. 22,077,882.74, based on the Defendant's own admission, and issued directives for a hearing on the issue of interest.

2. At the hearing, the Plaintiff presented one witness, Paul Metho (PW 1) who adopted his witness statement dated 22nd February 2023 and produced the Bundles of Documents dated 20th March 2023 (PExh. 1-8) and 6th September 2023 (PExh. 9) to support the Plaintiff's case. The Defendant closed its case without calling any witnesses or producing any evidence and afterwards, the Court directed both parties to file written submissions which are now on record and which together with the pleadings and evidence, I will make relevant references to in my analysis and determination below.

Analysis and determination.

3. In making this determination, I am guided by the fact that the standard of proof in civil cases is on a balance of probabilities 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* (Cap. 80 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 is 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."

4. 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 Defendant 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)].

5. However, even though the Defendant 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 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 main issue is whether the Plaintiff is entitled to interest on the overdue accounts, and if so, to what extent? The Plaintiff states that every invoice indicated a 3% monthly interest surcharge on overdue accounts, with tabulation beginning from each invoice date and that the Defendant was given 60 days from the invoice date to settle the invoice, after which interest would be calculated. He further testified that the accounting system used to generate invoices automatically calculates interest when prompted. During cross-examination, PW1 clarified that invoices not received by the Defendant were credit notes issued for returned goods and that for returned goods and similar transactions with credit notes, no interest was charged on those specific invoices. PW1 confirmed that there were several reconciliation meetings where the invoices presented in court were never disputed and that all invoices were annexed for the Defendant's consideration on the date of debt acknowledgement, and the Defendant confirmed them to be in order.

7. As such, the Plaintiff submits that the supply contracts, as evidenced in the invoices and delivery notes, expressly stipulated that payments were due within 60 days from the invoice date, and a monthly interest of 3% would be charged on all overdue accounts. That the invoices and delivery notes produced consistently state these "Terms and Conditions of Sale" which include: "Payment terms: Strictly 60 days from date of invoice" and "Monthly interest of 3% will be charged on all overdue accounts". The Plaintiff states that the Defendant undeniably received the goods and signed the accompanying delivery notes, credit notes were issued for any returned goods and that since the Defendant did not plead undue influence, coercion, or fraud regarding the invoices and delivery notes, it cannot claim the interest charged by the Plaintiff is unconscionable. The Plaintiff states that the parties are bound by the express provisions of their undisputed agreements, and the Defendant understood the consequences of its default and that courts do not rewrite contracts and parties are bound by their terms unless coercion, fraud, or undue influence are proven.

8. The Plaintiff states that the parties unequivocally agreed to a 3% monthly interest on all overdue invoices, and the Plaintiff submits that the Court should uphold this agreement and order the Defendant to pay the outstanding interest. It submits that as of 1st July 2024, the interest payable was Kshs. 28,630,641.10, and this amount continues to attract monthly interest of 3% and is being sought by the Plaintiff.

9. On its part, the Defendant states that PW1 could not clarify if the interest began accruing from the date the invoice was prepared or stamped and that during cross-examination, several issues with the invoices emerged: Some invoices in the Plaintiff's bundles billed other companies, such as Medina Nairobi, PW1 could not explain when interest accrual started (invoice preparation date vis a vis Defendant's staff stamping date), some invoices lacked dates (e.g., invoices 138-141), invoices marked "reversed" (meaning goods were not delivered and bills not raised) were included in the Plaintiff's claim bundle (e.g., invoice No. 115), PW1 confirmed some goods were returned, but this was not reflected in the claim and that some writings on stamped documents appeared freshly written.

10. The Defendant submits that the claimed interest rate is "draconian," "exorbitantly high," and "punitive in nature," exceeding the principal amount by more than double and still accruing. That this is particularly concerning given the Defendant's difficult financial position, of which the Plaintiff is aware and that while parties are bound by their agreements, terms should apply in accordance with the law, and courts should intervene if terms are "unfair, unconscionable and oppressive" to protect the parties' and public interest. The Defendant highlights the "in duplum" rule, which has been consistently applied by courts which reiterated the application of section 44A of the *Banking Act* (Cap. 488 Laws of Kenya) that limits the maximum recoverable amount by a banking institution on a non-performing loan to the principal owing when the loan becomes non-performing, Interest, in accordance with the contract, not exceeding the principal owing when the loan becomes non-performing and Expenses incurred in recovery.

11. The Defendant states that the rationale for the "in duplum" rule is to safeguard against "injustice, oppression or exploitation" and that courts have often found exorbitantly high interest rates to be unconscionable, unfair, or oppressive, emphasizing that a debt should not be a "money minting scheme". The Defendant contends that the Plaintiff's rates are unfair, especially given the discrepancies in the invoices highlighted during the trial, that the Defendant is actively liquidating the debt, but the continuously accruing interest leads to a "perpetual state of debt" and "unjust enrichment" for the Plaintiff, who would receive more than three times the value of the goods supplied.

12. As such, the Defendant submits that given that the Plaintiff's witness testified that interest was calculated on invoices marred with discrepancies, it urges the court, in its judicial discretion, to recalculate the interest owed in accordance with Civil Procedure Rules.

13. From the evidence and submissions above, the Defendant does not dispute that it accepted the terms indicated in the Plaintiff's invoice that 'Monthly interest of 3% will be charged on all overdue accounts' meaning that a valid contract existed between the parties in respect of the interest payable. In its evidence, the Plaintiff produced statements of the outstanding invoices and copies of various invoices which admittedly remained unpaid. Whereas the Defendant attempted to challenge the same through its submissions, I note that this challenge is of little or no consequence as the same could only be mounted through rebuttal evidence in pleadings. In any case, I find that the issues raised by the Defendant about the invoices were clarified by the Plaintiff's witness during re-examination and the inconsistencies raised are not sufficient to dislodge the Plaintiff's claim that interest is payable on the outstanding invoices.

14. As to the interest amount due, it was not substantially challenged that the outstanding invoices as at 11th November 2022 was Kshs. 21,039,989.34 and that this sum attracted interest at the rate of 3% per month. PW1 stated that the total interest payable on these invoices as at the date of giving testimony was Kshs. 21,630,641.32. I would therefore be inclined to award this amount as the interest payable and that the same continues to accrue from 11th July 2024 to until the invoices are paid.

15. On the Defendant's reliance on the in duplum rule, I am persuaded by the decision of the late Majanja J., in Momentum Credit Limited v Kabuiya [2022] KEHC 13705 (KLR) that this rule, which is anchored under section 44 of the *Banking Act* is only applicable to entities that qualify as "financial institutions" under the *Banking Act*. In order to qualify as a financial institution, the entity must accept money on deposit from members of the public and employ that money or part of it for lending or investment as contemplated under the *Banking Act*. This is not the case herein as the parties did not anchor their agreement under the *Banking Act* and the Plaintiff is not a financial institution within the context of the said Act to be bound by the said rule.

16. As such, section 44 did not apply to the relationship between the parties and I come to conclusion that the rate of interest in the circumstances is governed by contractual provisions which as I have found, are not disputed.

Conclusion and disposition.

17. In the upshot, I allow the Plaintiff's suit by entering judgment as follows:

a. Interest of Kshs. 21,630,641.32 as at 11th July 2024 is awarded on the sum of Kshs. 22,077,882.74 and that interest will continue to accrue on the principal sum at a rate of 3% per month until full payment.

b. The Plaintiff is awarded costs of the suit.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF JULY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Ms. Sila for Plaintiff

Ms. Nini h/b for Mr. Maina for Defendant

Court Assistant: Carlos