



**A Jiwa Shamji Limited v Kilimapesa Gold Pty Limited (Civil Suit
E001 of 2023) [2024] KEHC 1016 (KLR) (5 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1016 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CIVIL SUIT E001 OF 2023
F GIKONYO, J
FEBRUARY 5, 2024**

BETWEEN

A JIWA SHAMJI LIMITED PLAINTIFF

AND

KILIMAPESA GOLD PTY LIMITED DEFENDANT

JUDGMENT

1. The plaint dated 11.04.2022 and filed in court on 12.05.2022 seeks against the defendant for orders: -
 - i. That judgment for the individual sums on the unpaid invoices as pleaded in paragraph 14 in the plaint
 - ii. Interest on the individual sums as pleaded in paragraph 14 of the plaint at the rate of 3% per month with effect from their due dates until payment in full.
 - iii. Costs of the suit and interest thereon at court rates until payment in full.
 - iv. Any other relief which this honourable court may deem just and expedient to grant.
2. The defendant filed a defence and counterclaim dated 01.07.2022 praying this court to;
 - a. Dismiss the plaintiff's suit.
 - b. Grant the defendant the sum of Kshs. 42,636,442.23 set out in paragraph 4 of the counterclaim.
 - c. Costs of the suit
 - d. Any other relief the court may deem fit to grant.



Background of the Case.

3. The parties executed an agreement dated, on 10.09.2021 herein referred to as the wheel loader hire agreement. The plaintiff provided the defendant with a wheel loader on hire at a cost of Kshs. 80,000/= per shift on a dry rate (without fuel) plus VAT @ 16% with two shifts per day being night and day shifts.
4. It was a term of the wheel loader agreement that the plaintiff would provide two operators for the two shifts, each of whom was to be paid an allowance of Kshs. 3,000/= per shift per day and Kshs. 6,000/= per operator per shift per day if the defendant decided to work on Sundays and public holidays. It was also provided among others that the defendant would pay a sum of Kshs. 120,000/= plus 16% being mobilization fees for moving the said wheel loader to Lolgorian where the defendant has a site. The plaintiff averred that it delivered the wheel loader to the defendant's site at Lolgorian.
5. The parties herein executed another agreement executed and dated 10.07.2021 herein referred to as the Insta screen hire agreement. The plaintiff provided the defendant with an Insta scree on hire at a cost of Kshs. 60,000/= plus VAT @ 16% per day.
6. It was a term of the Insta screen hire agreement that the defendant would provide the defendant with an operator at a cost of Kshs. 3,000/= per day excluding accommodation which it was the obligation of the defendant to provide. It was also provided among others that the defendant would pay a sum of Kshs. 300,000/= plus 16% being mobilization fees for moving the said Insta screen to Lolgorian where the defendant had a site. The plaintiff avers that it delivered the Insta screen to the defendant's Lolgorian site.
7. Finally, the parties entered into an agreement dated 21.10.2021 herein referred to as the Insta screen sale agreement. The plaintiff sold the said Insta screen to the defendant at a sale price of USD 70,000 plus 16% at the rate of Kshs 112/= per dollar. It was however agreed that the plaintiff would knock off a global sum of USD35,000 from the agreed sale price in settlement of all claims by the defendant against the plaintiff on account of losses on downtimes and resultant charges sustained by the defendant.
8. It was specifically provided that the Insta screen was sold on an as-is-where-is-basis' and that the defendant would assume all operations concerning the Insta screen upon execution of the Insta sale agreement. By dint of clause 3 of the Insta screen sale agreement, it was agreed that the plaintiff would remove all its personnel seconded to the defendant on account of the Insta screen hire agreement thereby effectively terminating the Insta screen hire agreement.
9. It was an express term of the Insta screen sale agreement that the plaintiff would replace 4 motors and 8 rubber mounts without prejudice to the defendant's obligation to make a payment due thereunder. The plaintiff averred that it did deliver to the defendant the 4 motors and 8 rubber mounts on 07.11.2021 and finally on 04.02.2022 in performance of its contractual obligations.
10. By an agreement dated and executed on 30.10.2021 herein referred to as the excavator hire agreement the plaintiff provided the defendant with an excavator on hire at the cost of Kshs. 60,000/= per shift on a dry rate (without fuel) plus VAT @16% for two shifts per day being night and day shifts.
11. The plaintiff averred that it was a term of the general application that in the wheel loader hire agreement, Insta screen hire agreement, and the excavator hire agreement the defendant would supervise the operators seconded to it at its cost and that the plaintiff would not be liable for any mistakes, errors and damage to equipment hired thereunder. It was also generally provided in the said agreements that the defendant would undertake direct supervision of the operation of the hired equipment at all times and that payments for invoices submitted to the defendant would be paid within 30 days of submission.



12. Under the agreements that ensued on account of the wheel loader hire agreement, the Insta screen hire agreement, the Insta screen sale agreement, and the excavator hire agreement the defendant issued local purchase orders (LPOs) for all invoices submitted to it in acknowledgment of the plaintiff's invoices at the plaintiff's delivery notes and its indebtedness thereon.
13. The plaintiff issued delivery notes and invoices which the defendant acknowledged. Although it was a term of the hire agreement that the defendant would make payment strictly within 30 days of invoicing. The Insta screen sale agreement specifically provided that the 'agreed price' for the Insta screen was 'USD 70,000' and that the defendant would make payment 'no later than 31st October 2021'. And that late payments would attract the interest of 3% per month until payment. The defendant did not make payment within 30 days of delivery of individual invoices for the hire agreements and also failed to pay for the sale of the Insta screen 'not later than 3rd October 2021'. Invoices bore a late payment penal interest of 3% per month on all overdue balances until full payment.
14. The payment of the hire charges for all hired equipment was to be done every 30 days and payments were due on the date of invoicing.
15. The plaintiff issued and served upon the defendant a demand notice dated 17.02.2022 demanding payment of an aggregate sum of Kshs. 21,414,520.32. being the amount due on the aforesaid invoices and interest due thereon charged at the rate of 3% per month on all overdue invoices which amount was due and owing as of 31.01.2022.
16. Vide the letter dated 16.03.2022 the defendant admitted being indebted to the plaintiff but declined to make payments of the demanded amounts purporting the plaintiff was indebted to it in the sum of USD 373,185.49. translating to Kshs. 42,636,442.23 being losses purportedly sustained on account of equipment 'downtimes' between the period 19.07.2021 and 31.10.2021.
17. According to the plaintiff all losses were independently adjusted by the defendant including the cost of spare parts stated to have been fitted onto the Insta screen during the hire period and resultant charges were considered and compromised by way of credit of USD35,000 given to the defendant which was factored in the sale of the aforesaid Insta screen under the Insta screen sale agreement executed on 21.10.2021.
18. The plaintiff demanded payment of monies due under the aforesaid invoices together with interest thereon at the rate of 3% per month as expressly provided for in the said invoices and agreements entered into by the parties until payment in full.
19. The plaintiff upon failure by the defendant to make payment, demanded payment of monies due under the various agreements and when payment was not forthcoming the plaintiff filed the instant suit in which it cited the various invoices it had issued, the defendant's LPOs for goods and services delivered, original amounts payable an interest thereon at the rate of 3% per month
20. The plaintiff referred to pre-suit correspondences between it and the defendant by way of a demand notice dated 17.02.2022 in which an aggregate sum of Kshs. 21,414,520.32 due and owing as of 31.01.2022 was demanded
21. The defendant vide a letter dated 16.03.202 admitted being indebted to the plaintiff and went on;
 - a. To claim that there were unreconciled invoices, the first being invoice no. 72066 for Kshs. 169,128.00 and the second being invoice no. 72067 for Kshs. 545,664.00 making a total of Kshs. 742,792.00



- b. To assert that withholding tax amounting to Kshs. 241,448 had not been deducted from the plaintiff's claim.
- c. To assert that it had suffered losses of Kshs. 42,636,442.23 on account of malfunctioning of the Insta screen between the hire period of 19th July 2021 and 31st October 2021.
- d. To counterclaim that the plaintiff was indebted to it in the sum of Kshs. 20,617,267.23 after factoring in Kshs. 19,198,936/= which was the admitted amount, Kshs. 742,792.00 and withholding deducted tax of Kshs. 241,448 having been considered.

The defence and counterclaim.

- 22. The defendant generally denied the plaintiff's claim. The plaintiff denied the claim for 16% VAT charged on mobilization fees. The defendant countered that the plaintiff had a duty of care to ensure that the machine it sold (the Insta screen) was in working condition and fit for purpose. the defendant required the plaintiff to prove the hire amount pleaded. The defendant admitted the LPOs on account of the wheel loader hire agreement, the Insta screen hire agreement, the Insta screen sale agreement, and the excavator hire agreement. The defendant contested the interest.
- 23. The defendant lodged a counterclaim in which it claimed the sum of Kshs. 42,636,442.23 on account of revenue losses during the hire period for the Insta screen i.e. 19th July 2021 and 31st October 2021.
- 24. The defendant denied the 16% charged as VAT on mobilization fees.
- 25. The defendant averred that the plaintiff owed the defendant a duty of care to sell a machine that was in a working condition and fit for purpose.
- 26. The defendant denied the hire amounts on the excavator hire agreement and averred that there was no general application of the terms of the agreement as alluded by the plaintiff.
- 27. The defendant admitted contents of paragraph 14 of the plaint relate to the invoices issued to it and the invoice particulars.
- 28. The defendant admitted demand notice dated 17.02.2022 however challenged the legality of the interest rate charged. It also admitted the response to the demand letter dated 16.03.2022.
- 29. The defendant averred that following the hiring of the screen plant from the plaintiff, the agreement for which was entered into July 2021 from 19.07.2021 to 31.10.2021 herein referred to as the hire period. The screening plant ran for a total of 1283.5 hours against a possible 2100hours (the possible running hours were derived by allowing for 4 hours of service and maintenance daily) due to numerous breakdowns which were generally mechanical and electrical faults that the plaintiff was well aware of and should have repaired the same before the delivery of the Insta screen sale agreement on 26.11.2021.
- 30. The defendant insisted that the machine was supposed to operate with two vibro-motor which was never the case as at least one motor was always out for repairs at any given time of the operation, and at times it to operate without any motor causing the defendant to hire casual workers to move the material and as a result of the defendant never benefited from the expected throughput of the machine.
- 31. The defendant averred that it made complaints to the plaintiff on numerous occasions despite all the faults and concerns being made known to the plaintiff at various times through direct communication by the defendant's representative to the plaintiff's director (Mr. Shamji) and through the personnel manning and servicing the machine, no permanent solution was given by the plaintiff.



32. The defendant reiterated that due to the screening plant downtimes caused by faults, the plaintiff would have corrected before putting the machine for hire, and within the allowed 4 hours per day service and maintenance time it suffered a revenue loss amounting to the sum of USD 373185.49 (derived at by calculating the average tonnage processed per hour (tph)- achieved by the equipment in the month and multiplying with the average monthly feed grade into the plant, recovery efficiently and the international monthly average gold selling price) translating to Kshs. 42,636,442.23.

Reply to defence and counterclaim.

33. The plaintiff filed a reply to the defence and counterclaim dated 28.08.2022 and filed on 29.08.2022.
34. The plaintiff contended that it was expressly provided that all payments would be made on a 30-day basis. All interest rates chargeable on overdue accounts were carried on invoices delivered to the defendant and were contractual.
35. That VAT was contractually and statutorily chargeable on all fees charged and income drawn by the plaintiff directly or incidental to the execution of the agreement entered into between the parties.
36. The defendant deducted withholding tax from the charges set out in the plaintiff's invoice acknowledgment of its liability to pay VAT.
37. Defendant vide letter dated 16.03.2021 admitted being indebted to the plaintiff in the sum of Kshs. 19,198,936/=
38. The defendant initially hired the Insta screen well knowing that the same was just as any equipment susceptible to breakdowns.
39. Upon negotiations and agreement all losses incidental upon breakdowns sustained by the Insta screen were mutually adjusted and discounted against the contractual sale price therefore being USD 70,000.
40. The defendant is therefore estopped from claiming the sum of Kshs. 42,636,442.23 purported to be incidental upon losses sustained out of the use of the Insta screen for the period of 19.07.2021 to 21.10.2021 having negotiated the final sale price of the Insta screen and having admitted indebtedness on the same.
41. The plaintiff averred that the defendant's claims are an afterthought first made the claims on 16.03.2022 after a demand notice dated 17.02.2022. The plaintiff denied indebtedness to the defendant in the sum of Kshs. 42,636,442.23 does not disclose the cause of action.

Further, reply to the plaintiff's response dated 28.08.2022

42. The defendant filed on 19.10.2022 further reply to the plaintiff's response dated 28.08.2022
43. The VAT is not charged to fees but is made concerning a taxable supply made by a registered person in Kenya, the importation of taxable goods, and a supply of imported taxable services.
44. The defendant is a registered withholding VAT agent and the law requires it to withhold 2% of the value of taxable supplies. This amount is remitted to the taxing authority every month and upon payment, the client receives a certificate for the amount withheld. The reconciliation is done on the plaintiff's totals of Kshs. 241,448 only- of the withheld amount (these outstanding withheld amounts date back to Jan. 2022. The data was submitted to KRA and payment is yet to be effected since the defendant has an arrangement with KRA to offset VAT returns against the outstanding withholding amounts.



45. That the goods must be fit for purpose. The plaintiff conveniently tried to exclude and limit their liability by including exclusion clauses despite knowing the state of goods it delivers to their clients.
46. The minerals industry is heavily capital-intensive thus a high level of trust is placed upon parties to act and transact in good faith. Such clauses show the level of dishonesty on the plaintiff's part. Contractual agreements cannot override statutory obligations. Sections of the same can be rendered unenforceable by its factors to meet statutory standards.
47. The defendant made several communications through phone calls and WhatsApp messages on the state of the machinery supplied. These machines were not fit for purpose and had a total disregard of the Sale of Goods Act and breach of contract. It maintains that the machines did not do their work. The defendant referred to the principle that he who comes to equity must do so with clean hands.

Plaintiff's Case

48. PW1-Hussein Sadrudin Shamji, a director of the plaintiff adopted his witness statement dated 20.04.2022. He produced the documents listed in the list of documents as P Exh 1-52. He stated that before filing- this suit they had some communication with the defendant- and the defendant responded. The defendant claimed unreconciled invoices stated thereto. He delivered invoices the defendant issued LPO to the invoice. invoice no. 72066 and 72067 were delivered and received on 03.12.2021.LPO was issued by the defendant on 10.12.2021 for Kshs. 545,664/= which corresponded to the invoice. The defendant requested the plaintiff company to hire out to them and Insta aggregate screen. A hire-term agreement was entered into. The plaintiff delivered the machine to the defendant's site. They used the machine continuously up to 21st October 2021 when they entered into another agreement to purchase the machine from the plaintiff. It was the same machine the plaintiff hired to the defendant. The plaintiff sold the machine at USD 70,000/= plus VAT. It was mutually agreed that USD35,000 was to go towards hire purchase and USD35,000 was towards the purchase of the machine. At the time, USD -KSHS exchange rate was 112/= which after conversion it came to Kshs. 7,840,000/=. After adding VAT total payable was Kshs. 9,094,400/=. The total sum was invoiced in three invoices; i) no. 71884 for Kshs. 2,039,280, ii) no. 71937 for Kshs. 2,507,920 and iii) no. 71937 for Kshs. 4,547,200. The total invoices sum was Kshs. 9,094,400/=.
49. The plaintiff took possession of the machine on 21.10.2021. The plaintiff sold it on an is basis and condition. The plaintiff did not also give any warrant. The agreement also provided a monthly interest of 3% on all overdue invoices. The issue of loss of hours or downtime was not disclosed. The defendant had used the machine and was willing buyer willing seller status.
50. The plaintiff stated that as of 17.02.2022 total sum outstanding was Kshs. 21,414,520.32. The interest of 3% is from the date the invoice is submitted. The defendant indicated Kshs. 19,1989,936. The unreconcilable amount is Kshs. 714,792. The plaintiff claimed they paid withholding tax on no. 72091, 72024,72010,72013,72080,72083,72037,72039. This is an acknowledgment of work by the plaintiff to the defendant.
51. PW1 testified that there was no agreement on the counterclaim by the defendant. He stated that the machine was working but was a used machine. The downtime was not part of the hire terms. He prayed for judgment against the defendant for all unpaid invoices and interest, the cost of the suit, and any other fit relief.
52. On cross-examination, PW1 stated that the Insta screen was used. He claimed the machine was hired by the defendant and had been serviced. He stated that they agreed on a knockoff of USD 35,000. The losses incurred were taken care of. He stated that motors were delivered and were part of the machines.



- He claimed he did not receive any complaints about his machinery. He however received complaints from his operator. He gave a general reconciliation of accounts but the defendant did not pay.
53. On re-examination, he stated that servicing was part of the hire agreement. The plaintiff serviced it as was necessary and regular. The rate was Kshs. 60,000/= but they billed at Kshs. 45,000 because of the complaints by the defendant on the breakdown of the machine. The concession is to cover those breakdowns.
54. He was not to provide an operation manual. Overdue invoice amount attracts compounded interest every month.

Defendant's Case

55. The witness statements of Francisca Kombo and Innocent Chifamba were produced by consent. The documents set out in the defendant's list of documents filed on 19.10.2022 were also produced as exhibits by consent as D Exh 1-8.

Plaintiff's Submissions

56. The plaintiff submitted that the principal amounts on all pleaded invoices are due to be paid. The plaintiff argued that the defendant in its schedule dated 19.10.2022 supplied to the court a statement of what it thought to be due to the plaintiff the same was unsubstantiated and should therefore be disregarded.
57. The plaintiff submitted that there is no evidence that the invoices were settled by 31.10. 2021. The plaintiff argued that it therefore follows that interest on the said amounts is payable. The agreement dated 21.10.2021 for the sale of the Insta screen expressly provided for interest on all overdue amounts at the rate of 3.00% per month until payment in full. The said agreement provided that the sum of USD 70,000 was payable immediately upon submission of the invoice but in any event by the 31st of October, 2021. The invoices were an integral part of the agreements and should be construed alongside the principal agreements. The plaintiff argued that it is entitled to the same effective from the date when the same became due. The plaintiff relied Savichem Africa Limited V General Printers Limited [2019] eKLR, Bawazir Glassworks Limited & Another V Asea Brown Boveri Limited [2015] eKLR, Simba Corporation Limited V County Government of Machakos [2021] eKLR, Texplast Industries Limited V Chemilil Sugar Company Limited [2016] eKLR, and Shah Vs Guilders International Bank Limited [2003] KLR
58. The plaintiff submitted that the alternative interest at the court rates be awarded from the date when the individual invoices became due.
59. The plaintiff submitted that the defendant has not tendered evidence to prove its counterclaim. that throughout the so-called hire period the defendant never mentioned the generation of credit notes by the plaintiff. The evidence by Kombo on the generation of credit notes is thus an afterthought. The defendant despite allegations of the Insta screen operating below reasonable times went ahead to purchase the Insta screen. The defendant is estopped from purporting that it suffered any losses. The Insta screen hire agreement provided that the plaintiff shall not be held liable for any mistakes, errors, or damage to equipment. Therefore, the counterclaim runs contrary to what was expressly agreed hence the parties must be left to their bargain. Further the figure of Kshs. 42,636,442.23 was not explained. The report produced by the defendant was an opinion and none of the defence witnesses purported to be experts in the assessment of losses in terms of the value of gold. The plaintiff relied on the case of Palace Investment Ltd Vs Geoffrey Kariuki Mwenda & Another [2015] eKLR



60. The plaintiff submitted that there is a lawful basis for this court to exercise its discretion to award costs to the plaintiff. The plaintiff relied on section 27 of the *Civil Procedure Act*. the defendant insisted on an indemnity for purported loss during the hire period and refused to settle the suit by delaying negotiations hence the plaintiff filed the suit herein.

The Defendant's Submissions

61. The defendant submitted that any denials, proof, and counterclaims are only regarding the Insta screen agreement. The wheel loader and excavator amounts are pending and the plaintiff and the defendant submitted that interest should be capped off. The defendant argued that throughout its engagements with the plaintiff, it requested reconciliation before legal services were engaged. The plaintiff owed the defendant a duty of care to hire a machine that was in working condition and fit for purpose. The plaintiff conveniently tried to exclude and limit their liability by including clauses in its invoices that no complaints whatsoever will be entertained after delivery and goods once received are not returnable despite knowing the state of goods it delivered to its clients. The defendant argued that this in itself does not limit their liability. Further contractual agreements do not override statutory obligations. The defendant relied on the case of *Transmara Sugar Co. Ltd & Another V Ben Kangwaya Ayiamba & Another* [2020] Or Civil Appeal 132 of 2019 & 2 of 020 eKLR.
62. The defendant maintained that it made several communications through phone calls and WhatsApp messages on the state of the machinery supplied. The defendant maintained that the Insta screen worked under capacity. The defendant stated that right from commissioning, the machine started having breakdowns notably vibro motor failures, cracking of the motor sits and screen frame as well as the conveyor belt. The failed components would be taken offsite for repairs where they would take a long time to come back. It would force the crew to operate with one or no vibro motors. In July 2021 the machine managed availability of 39% in August and September 55% and 64% respectively. The reasonable availability for the industry is in the range of at least 85%. The low availability affected the operations and business. The defendant argued that about the Insta screen, the following sums are due (the sums are without interest) i) Kshs. 12,265,456/= hire purchase period less interest, ii) USD 35,000/= sold Insta --screen, and iii) Kshs. 552,000/= worker's allowance (3,000/=) per day per operator from July 2021 to Dec 2021). The defendant submitted that while the plaintiff knocked off USD 35,000 on sale, the same in itself was not enough to cover the losses incurred. considering the Covid pandemic season the sums set out in the invoices in paragraph 14 of the plaint should be reconciled with the counterclaim.
63. The defendant submitted that interest was not contractual about the Insta screen and the plaintiff cannot want to enforce the same. Further for other machinery, wheel loader, and excavator, the same should be capped off. During cross-examination, Mr. Shamji confirmed that indeed there was no provision for interest in the contract for the Insta screen. He added that the amount for hire per day was Kshs. 45,000. He clarified to the court that the issue of interest was not provided for yet in the invoices they went ahead to include interest. The defendant urged this court not to order for payment of interests. The court should consider the down times experienced with the Insta screen which ultimately brought about huge losses, the nature of the industry; very capital intensive, and the period when these contracts were signed and enforced (COVID-19). the defendant relied on the case of *Haraf Traders Limited V Narok County Government* [2022] eKLR.
64. The defendant submitted that it is entitled to the judgment for the counterclaim made on account of losses during the hire period of the Insta screen. The figure provided is on the estimate of revenue losses the same is owing and due. During the hire period, the screen plant ran for a total of 1283.5 hours against the possible 2100 hours due to numerous breakdowns which were general mechanical and



electrical faults that the plaintiff was well aware of. The machine was supposed to work with two vibro-motors but one motor was always out for repairs at any given time of the operation and sometimes none was available causing the defendant to hire casual workers to move the material and as a result, incur additional costs. The plaintiff was supposed to provide the parts as per the contract but they were delivered several months apart as position confirmed by Mr. Shamji.

65. The defendant submitted that it made several complaints to the plaintiff through communication with Mr. Shamji and Mr. Shamji admitted in cross-examination that he was contacted severally. He also confirmed that he believed the concerns affected the defendant.
66. The defendant submitted that due to the screening plant down times caused by faults, the plaintiff would have corrected before putting the machine for hire it thus affected a revenue loss amounting to Kshs. USD 373,185.49 translating to Kshs. 42,636,442.23. The figure was derived by calculating the average tonnage processed per hour (TPH) achieved by the equipment in the month multiplied by the average monthly feed grade into the plant, recovery efficiency, and the international monthly average gold selling price. The total gold processed is 750 tonnage per day (TPD) 350TPD is hard rock and 400TPD artisanal tailings with a gold production target of 1000 ounces per month.
67. The defendant submitted that each party should bear its own costs and requested this court to exercise its discretion and order that each party bear its own costs. The defendant relies on section 27 of the Civil Procedure Act, Jasbir Singh Rai & Others V Tarlochan Rai & Others [2014] Eklr

Analysis And Determination

68. The main issues for determination are;
 - i. Whether the plaintiff is entitled to judgment in the sums set out in the invoices set out in paragraph 14 of its plaint.
 - ii. Whether the interest on overdue invoices is payable as demanded by the plaintiff
 - iii. Whether the defendant is entitled to judgment in the sum of Kshs 42,636,442.23 on account of revenue losses during the hire period for the Insta screen.
 - iv. Who should pay the costs of the plaintiff's suit and the counterclaim?

I. Whether the plaintiff is entitled to judgment in the sums set out in the invoices set out in paragraph 14 of its plaint.

69. At paragraph 14 of the plaint, the plaintiff averred that the defendant reneged on its obligations due under the wheel loader hire agreement, the excavator hire agreement, and the Insta screen sale agreement, and now the defendant is indebted to the plaintiff on account of the unpaid invoices listed thereunder.
70. From the table in paragraph 14 of the plaint, the plaintiff claimed a balance of a total of Kshs. 20,154,516/= due on invoice exclusive of 3% interest per month.
71. The defendant in its schedule dated 19.10.2022 supplied to the court a statement of what it thought to be due to the plaintiff
72. The defendant argued about the Insta screen, that, the following sums are due (the sums are without interest) i) Kshs. 12,265,456/= hire purchase period less interest, ii) USD 35,000/=- sold Insta --screen, and iii) Kshs. 552,000/= worker's allowance (3,000/=) per day per operator from July 2021 to Dec 2021).



73. The defendant admitted that it is indebted to the plaintiff in respect of the invoices.
74. From the evidence adduced, the plaintiff has proved on a balance of probabilities the sums stated in the invoices set out in paragraph 14 of the plaint. The total balance due on the invoices is Kshs. 20,154,516/= and accordingly, the plaintiff is entitled to judgment thereto. Judgment is accordingly entered for the plaintiff against the defendant.

II. Whether the interest on overdue invoices is payable as demanded by the plaintiff

75. The plaintiff submitted that there is no evidence that the invoices were settled by 31.10. 2021. The plaintiff argued that it therefore follows that interest on the said amounts is payable.
76. The plaintiff submitted that the alternative interest at the court rates be awarded from the date when the individual invoices became due.
77. The defendant submitted that the wheel loader and excavator amounts are pending.
78. The defendant submitted that interest was not contractual in respect of the Insta screen and the plaintiff cannot want to enforce the same. Further, they urged that, for other machinery, wheel loader, and excavator, the same should be capped off. The defendant urged this court not to order for payment of interests.
79. During re-examination, Mr. Shamji stated that overdue invoice amount attracts compound interest every month.
80. This court has perused the agreements and invoices relied on by the plaintiff which have been admitted by the defendant save for interest. The parties herein entered into an agreement dated 21.10.2021 for the sale of the Insta screen. The agreement at paragraph 1 provided that the invoices stated in the agreement shall be due immediately upon receipt; not later than 31st October 2021. Thereafter, monthly interest of 3.00% per month will be charged upon overdue invoices. The standard withholding taxes shall apply. Invoice No.s 71937 and 71993 have been cited among the balances due.
81. This court notes that the Insta screen sale agreement contained a clause that expressly provided that a monthly interest would be charged on overdue invoices at the rate of 3% per month. This court finds the interest of 3% per month is applicable to invoices No.s 71937 and 71993 whose overdue balance amounts to Kshs. 5,514,200/=. Both invoices were due on 22/10/2021. And, interest on the said amount will run from 22.10.2021 till payment in full.
82. The wheel loader hire agreement, the Insta screen hire agreement, and the excavator hire agreement did not have any clause on interest on overdue invoices.
83. The overdue sum in respect of the wheel loader hire agreement, the Insta screen hire agreement, and the excavator hire agreement will be subject to interest at court rates from the date of filing of this suit till payment in full.

III. Whether the defendant is entitled to judgment in the sum of Kshs 42,636,442.23 on account of revenue losses during the hire period for the Insta screen

84. In paragraph 4 of the counterclaim, the defendant averred that despite all the faults and concerns being made known to the plaintiff at various times through direct communication by the defendant's representatives to the plaintiff's director (Mr. Shamji) and through the personnel manning and servicing the machine, no permanent solution was given by the plaintiff.



85. The defendant submitted that the plaintiff owed the defendant a duty of care to hire out a machine that was in working condition and fit for purpose. The plaintiff conveniently tried to exclude and limit their liability by including clauses in its invoices that no complaints whatsoever will be entertained after delivery and goods once received are not returnable despite knowing the state of goods it delivered to its clients. The defendant argued that this in itself does not limit their liability. The defendant argued further that, contractual agreements do not override statutory obligations.
86. The defendant maintained that it made several communications through phone calls and WhatsApp messages on the state of the machinery supplied. The defendant maintained that the Insta screen worked under capacity. The defendant stated that right from commissioning, the machine started having breakdowns notably vibro motor failures, cracking of the motor sits and screen frame as well as the conveyor belt. According to the defendant, the failed components would be taken offsite for repairs where they would take a long time to come back. It would force the crew to operate with one or no vibro motors. In July 2021 the machine managed availability of 39% in August and September 55% and 64% respectively. The reasonable availability for the industry is in the range of at least 85%. The low availability affected the operations and business. The defendant argued that about the Insta screen, the following sums are due (the sums are without interest) i) Kshs. 12,265,456/= hire purchase period less interest, ii) USD 35,000/=- sold Insta --screen, and iii) Kshs. 552,000/= worker's allowance (3,000/=) per day per operator from July 2021 to Dec 2021). The defendant submitted that while the plaintiff knocked off USD 35,000 on sale, the same in itself was not enough to cover the losses incurred. considering the covid pandemic season the sums set out in the invoices in paragraph 14 of the plaint should be reconciled with the counterclaim.
87. The defendant submitted that it is entitled to the judgment for the counterclaim made on account of losses during the hire period of the Insta screen. The figure provided is on the estimate of revenue losses the same is owing and due. During the hire period, the screen plant ran for a total of 1283.5 hours against the possible 2100 hours due to numerous breakdowns which were general mechanical and electrical faults that the plaintiff was well aware of. The machine was supposed to work with two vibro -motors but one motor was always out for repairs at any given time of the operation and sometimes none was available causing the defendant to hire casual workers to move the material and as a result, incur additional costs. The plaintiff was supposed to provide the parts as per the contract but they were delivered several months apart as position confirmed by Mr. Shamji.
88. The defendant submitted that it made several complaints to the plaintiff through communication with Mr. Shamji and Mr. Shamji admitted in cross-examination that he was contacted severally. He also confirmed that he believed the concerns affected the defendant.
89. The defendant submitted that due to the screening plant down times caused by faults, the plaintiff would have corrected before putting the machine for hire it thus affected a revenue loss amounting to Kshs. USD 373,185.49 translating to Kshs. 42,636,442.23. The figure was derived by calculating the average tonnage processed per hour (TPH) achieved by the equipment in the month multiplied by the average monthly feed grade into the plant, recovery efficiency, and the international monthly average gold selling price. The total gold processed is 750 tonnage per day (TPD) 350TPD is hard rock and 400TPD artisanal tailings with a gold production target of 1000 ounces per month.
90. The plaintiff submitted that the defendant has not tendered evidence to prove its counterclaim. The plaintiff argued that throughout the so-called hire period, the defendant never mentioned the generation of credit notes by the plaintiff. The plaintiff branded the evidence by Kombo on the generation of credit notes to be an afterthought. The defendant despite allegations of the Insta screen operating below reasonable times went ahead to purchase the Insta screen. The defendant is estopped



from purporting that it suffered any losses. The Insta screen hire agreement provided that the plaintiff shall not be held liable for any mistakes, errors, or damage to equipment. Therefore, the counterclaim runs contrary to what was expressly agreed hence the parties must be left to their bargain. Further the figure of Kshs. 42,636,442.23 was not explained. The report produced by the defendant was an opinion and none of the defence witnesses purported to be experts in the assessment of losses in terms of the value of gold.

91. This court has perused the Insta screen sale agreement and noted that Clause 5 of the said agreement provides that the Insta screen was sold on 'as is where is' condition and at clause 6, the plaintiff did not give any warranty/ guarantee towards the operation of the said plant. Furthermore, the parties herein have admitted that there was a knockoff of USD 35,000 which was to cater for all claims by the defendant against the plaintiff on account of losses on downtimes and resultant charges incurred by the defendant.
92. From the evidence adduced in court, it is safe to conclude that, at the time of the sale of the Insta screen, the defendant was aware of the operational problems of the Insta screen. A knockoff sum was also agreed to cater for any losses the defendant may have suffered. But, two things are startling. The defendant, who was using the said equipment, now seems to say that, it was not able to quantify the extent and effect of the downtimes and breakdowns of the Insta screen at the time of the purchase of the equipment. Until after the demand to sue, the defendant did not see the need to communicate in writing the full extent and effect of the downtimes and breakdowns of the equipment. The defendant now says the downtimes and breakdowns of the equipment, were frequent, far reaching on operations and costly to their business in the sum of equivalent of over Kshs. 42 million. In the circumstances, the conclusion by the plaintiff that these claims are afterthoughts is sustainable.
93. The defendant bears the burden of proof of the allegations in the counter-claim on a balance of probabilities. The defendant did not substantiate or prove their claim on a balance of probabilities. The counter claim is dismissed.

Of VAT

94. Before closing, parties introduced the matter of VAT. But, on quite deficient material and arguments. The issue was also not presented as essential issue for determination by the court. Tax matters and law are specialised, and require focused interrogation by the parties and the court in order to make an informed decision. Tax matters are not to be decided 'by the way', or 'in passing'.

Costs

95. The plaintiff informed the court that it had attempted out of court settlement of this claim but was frustrated on numerous occasions by the defendant. The plaintiff nonetheless, accept to give amicable settlement another shot. Again, the matter was not settled.
96. In the circumstances of this case and the conduct of the defendant, the court awards the plaintiff, costs of the suit and the counter claim.
97. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS
ONLINE APPLICATION THIS ...5TH ...DAY OF ...FEBRUARY..., 2024**

.....

HON. F. GIKONYO M.



JUDGE

In the presence of:

C/A – Mr. Leken

Plaintiff – Mr. Mulisa H/B for M/s Kebungo - Present

Defendant – M/s. Atim - Present

