Kenya Knitting & Weaving Mills Ltd v Mohamed Madhani & Co Advocates (Civil Suit 247 of 2007) [2024] KEHC 5797 (KLR) (13 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5797 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 247 OF 2007

CW MEOLI, J

MAY 13, 2024

BETWEEN

KENYA KNITTING & WEAVING MILLS LTD ..... PLAINTIFF

AND

MOHAMED MADHANI & CO ADVOCATES ..... RESPONDENT

JUDGMENT

1. Kenya Knitting & Weaving Mills Limited (hereafter the Plaintiff) filed an originating summons dated 06.03.2007 expressed to be brought pursuant to Order LII Rule 4 (now) Order 52 Rule 4 of the Civil Procedure Rules (CPR) seeking that Mohamed Madhani t/a Mohamed Madhani & Co. Advocates (hereafter the Defendant) do pay the Plaintiff the sum of Kshs. 30,010,832.10/- together with interest thereon at the rate of 23.5% per annum from 01.03.2007 until payment in full; and that cost of the suit be borne by Defendant.

2. Shortly, thereafter the Defendant filed an application dated 18.05.2007 seeking inter alia that the Court be pleased to order that the sum of Kshs. 8,588,736/- deposited with the Defendant be paid into Court or otherwise disposed of as the Court may direct. The motion was withdrawn on 05.05.2008. Afterwards, the Defendant proceeded to institute Third Party proceeding as against Mr. Shiraz Gulam Hussein Magan (hereafter the Third Party), pursuant to leave granted by Waweru, J. on 26.07.2013. The Third Party in turn entered appearance on 30.08.2013, and on 30.11.2015, moved the Court vide a motion dated 27.11.2015 seeking the release of the monies held by the Defendant being (a) Kshs. 10,000,000/- to the Plaintiff and (b) the balance of the monies held by the Defendant to the Third Party. Thuranira, J, on 13.07.2017 dismissed the motion with costs.

3. More recently, the Defendant filed a motion dated 19.01.2022 seeking inter alia that the Court be pleased to vary the consent order recorded before Mabeya, J on 02.06.2015 by directing that the sum of money held by the Defendant as of the said date be deposited in Court, pending hearing and determination of the suit. And in the alternative to the foregoing, dismissal of the suit for want of

prosecution. On 25.01.2023, the parties appeared before Mulwa, J in respect of the forestated motion, and upon the Court hearing respective counsel, ordered as follows that;

> " 1. Hearing of the O.S by way of viva voce evidence on the 28.03.2023 in open Court before any Judge in the Civil Division, save before Justice Visram Aleem, J. who is related to one of the parties and Judge Mulwa J.N who will be on leave.
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> 2. The sum of Kshs. 12 million held by the Defendant shall be deposited in an interest earning account in the joint names of the parties advocates on record within 30 days of the order.
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> 3. Leave is granted to the parties to file further affidavits if necessary, all within 21 days and exchange." (sic)

4. Subsequently, the parties appeared before this Court on 28.03.2023, 03.05.2023 and 04.07.2023. From representations made by counsel, on these occasions, a consensus emerged between the Plaintiff and Defendant that the sole issue for determination in the suit revolved around interest payable, given that the principal sum had already been paid out to the Plaintiff. However, the Third Party, despite concurring on the issue of interest maintained that there was an issue of liability and /or other issues that ought to be concurrently determined by the Court as well. Noting the age of the suit, the Court accorded the parties opportunity to further narrow down the issues outstanding and mode of canvasing them. However, as of 12.10.2023 when the parties appeared, only the Plaintiff and Defendant had agreed on how to proceed having filed a statement of agreed facts and agreed list of issues for determination.

5. The Court on the latter date reiterating its earlier directions, proceeded to further direct as follows; -

> " a) The trial on the liability between the Defendant and Third Party will be conducted simultaneously with the trial between the Plaintiff and Defendant.
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> b) For this purpose, the Defendant and Third Party are to file their list of issues within 7 days.
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> c) Trial of liability between the three parties shall be by way of affidavits already filed and written submissions.
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> d) .....
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> e) .....
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> f) ....." (sic)

6. To contextualize the dispute, it is useful to set out the various pleadings and affidavit material of the parties. The grounds on the face of the Plaintiff's Originating Summons (OS) are amplified in the supporting affidavit dated 06.03.2007, supplementary affidavit dated 19.07.2007 and further affidavit dated 12.02.2015, all sworn by Kamal Joshi, described as a director of the Plaintiff, duly authorized and competent to depose. The gist of his deposition is that pursuant to an agreement for sale in respect of landed property known as LR No. 548/V/MN, Mombasa (hereafter suit property) for the sum of Kshs. 28,000,000/-, a deposit of Kshs. 2,800,000/- was paid to the Defendant on 22.06.2006 to be held as a stakeholder pending completion of the transaction. He goes on to depose that the balance of the purchase price amounting to Kshs. 25,200,000/- was paid to the Defendant on 17.07.2006 and was

to be similarly held by the Defendant until the transfer of the suit property in favour of the purchaser had been registered. Following which the monies were to be released to the Plaintiff.

7. That on 06.10.2006 the purchaser's advocate notified the Defendant that the purchase price could be released to the Plaintiff. Further, he deposed that out of the total of the purchase price, the Plaintiff had authorized the Defendant to pay the sum of Kshs. 1,439,895/- while the Defendant was entitled to retain a further sum of Kshs. 504,484/- in respect of its fees and tax, having acted on behalf of the Plaintiff in the transaction. He further avers that the Defendant refused to release the net proceeds of the sale transaction, and consequently, the Plaintiff was unable to pay off a loan and overdraft obtained from its bankers and an interest rate of 23,5% per annum had been levied. That the Defendant was legally obligated to pay the Plaintiff the net proceeds of the sale transaction being Kshs. 30,010,832.10/- with interest thereon at a rate of 23.5% per annum from the date the sums were received by the Defendant being 01.03.2007 until payment in full.

8. He further asserts that at the very least, if the Defendant thought it necessary to obtain "specific" instructions from the Plaintiff to deposit the purchase price in an interest earning account, it ought to have sought those instructions from the Plaintiff and having failed to do so, the Defendant cannot rely on its own default to deny the Plaintiff its entitlement to interest. In conclusion, he equally acknowledges receiving payment from the Defendant of Kshs. 15,904,704/- (cheque dated 22.04.2009) and Kshs. 4,883,240/- (cheque dated 21.04.2009) on 23.04.2009 on a without prejudice basis regarding the Plaintiff's claim for interest on the amount paid, the unpaid balance and interest thereon.

9. The Third Party in opposition to the third-party notice filed a replying affidavit dated 17.09.2014. The gist of his depositions was that indeed both he and the Defendant executed a Deed of Guarantee and Indemnity which was, however, issued more than three years after the commencement of the instant suit. On the understanding that he would appoint an advocate of his choice to defend the suit. That in blatant breach of the said express provision in the Deed of Guarantee and Indemnity, concerning appointment of counsel of his choice, the Defendant sometime in 2011 replaced his earlier appointed advocate without consulting him. He asserts that the said change of advocates affected the very substratum of the Deed of Guarantee and Indemnity given that he had implicit faith in his preferred counsel, who was already acting in the matter as of 12.06.2007. That because of the foregoing, the said Deed of Guarantee and Indemnity was rendered null and void by the actions of the Defendant and he thus stands fully discharged from the same. Therefore, he is not liable to the Defendant firm as Third Party and ought to be discharged from the proceedings.

10. In response to the Third-Party's affidavit, through a supplementary affidavit dated 14.11.2014, Mohamed Ali Kassamali Madhani, who describes himself as a partner in the Defendant firm, swore that the Third Party was engaged in the Defendant firm as a consultant vide an agreement dated 12.12.2002, having left the firm of Sharpley Barret & Company Advocates, the firm at the time handling various matters on behalf of the Plaintiff. That the sale of the suit property was personally handled by the Third Party and the latter only used the Defendant's name to draw up documents relating to the transaction that later gave rise to the present suit. He reiterates that nobody else from the Defendant firm handled the matter. And that following the filing of the OS, the Defendant firm held discussions with the Third Party on 30.07.2010, as a result of which the Third Party agreed to execute a Deed of Guarantee and Indemnity, in which he undertook to indemnify him and the Defendant firm against all actions, liability, costs and expenses arising from the suit or any other transaction involving the Plaintiff. That the Third Party was enjoined herein on the premise of the Deed of Guarantee & Indemnity.

11. Asserting that the Deed of Guarantee & Indemnity contained no condition regarding appointment of an advocate by the Third Party to defend this matter, he stated that the only condition was that the

Defendant firm allowed the Third Party to exclusively handle and continue to handle all matters he was handling which had not been concluded. Therefore, the Third-Party cannot purport to vitiate the Deed of Guarantee & Indemnity based on an extraneous issue. Disputing the Third-Party allegation on appointment of counsel of own choice by the Third Party, he asserted that the Defendant could not consent to such an arrangement as the Plaintiff's claim directly affected the Defendant, thus the necessity to appoint an advocate trusted by it to handle the matter on its behalf. He maintained that the Defendant had a constitutional right to appoint counsel of its own choice, which right was never waived. That since the Deed of Guarantee and Indemnity was unequivocal, the Third-Party is bound by the terms thereof and cannot vary the same at his own convenience or unilaterally.

12. The Defendant meanwhile opposed the Plaintiff's originating summons vide a replying affidavit dated 15.04.2015 equally deposed by Mohamed Ali Kassamali Madhani. Restating his earlier deposition in his rejoinder dated 14.11.2014, he stated that as of 15.04.2015 the Plaintiff had been paid a total sum of Kshs. 22,227,839/- which together with Kshs. 12,000,000/- being held by the Defendant at the time, due to ongoing negotiations between the Plaintiff and the Third Party, constitutes more than the principal received on behalf of the Plaintiff. That the Defendant has at no time had any interest in the said monies save for the fact that there is a dispute between the Third-Party and the Plaintiff. And that the Defendant merely held the said monies in a fiduciary capacity in trust until the dispute between the said parties was amicably resolved. Therefore, given the Third Party's role in the sale of the suit property, the proper party whom the Plaintiff ought to direct its claim is the Third Party. Equally the judgment and any other order arising from the suit ought to be directed at the Third Party who personally handled the Plaintiff's matter and stood to benefit therefrom.

13. In a brief rejoinder by way of a second further affidavit deposed on 27.03.2023, Kamal Joshi stated that based on various payments made by the Defendant thus far, the latter owed Plaintiff Kshs. 5,277,677/- in respect of the principal sum and Kshs. 34,406,308/- in interest up to 27.03.2023 and that the Plaintiff claims further interest on the said remaining principle sum at the rate of 23.5% per annum from 28.03.2023 until payment in full

14. Directions were taken to dispose of the Originating Summons by way of written submissions. However, at this juncture imperative to note that pursuant to directions issued on 28.03.2023 and confirmed by this Court on 12.10.2023, the Plaintiff and Defendant filed a joint statement of agreed facts and agreed list of issues to be determined by the Court dated 11.10.2023. The statement of agreed facts encompassed the following; -

> "(1) The Defendant acted as the Plaintiff's advocate in the transaction involving the sale of the Plaintiff's property known as LR. No. 548/V/MN, Mombasa;
>
> (2) The Defendant received the following payments for an on behalf of the Plaintiff in respect of the purchase price payable to the Plaintiff in respect of the said sale – (a) the deposit of Kshs. 2,800,000/- was received by the Defendant on 22.06.2006, and (b) the balance of the purchase price amounting to Kshs. 25,200,000/- was received by the Defendant on 17.07.2006;
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> (3) The payment from and out of the funds held by the Defendant were authorized by the Plaintiff were – (a) Kshs. 439,895/- paid on 16.08.2006 for stamp duty, land rent and rates, and (b) Kshs. 1,000,000/- paid on 09.10.2006 to Ketan Shah; and

(4) The Defendant has since made the following payments to the Plaintiff – (a) Kshs. 15,904,704/- paid on 24.04.2009, (b) Kshs. 4,883,240/- paid on 04.05.2009 & (c) Kshs. 5,500,000/- paid on 26.04.2023."

15. The agreed issues to be determined between the Plaintiff and Defendant, were itemized as hereunder; -

(1) Whether interest is payable on the principal sum of money that was held by the Defendant as a stakeholder?

(2) If the answer to the above is in the affirmative, what is the rate at which the Defendant is liable to pay interest to the Plaintiff on the funds held by the Defendant as stakeholder?

(3) When did the Defendant cease being a stakeholder in respect of the funds held by him?

(4) Is the Defendant liable to pay interest to the Plaintiff on the funds held by him from the date the Defendant ceased to be a stakeholder?

(5) If the answer to 4 above is affirmative, what is the rate at which the Defendant is liable to pay interest to the Plaintiff on the funds held by the Defendant from the date the Defendant ceased to be a stakeholder?

(6) What should be adopted in calculating interest?

(7) For what period is the interest payable?

(8) Whether the amount paid by the Defendant on 24.04.2009 and 04.05.2009 respectively ought to be factored during the calculation of interest and what was the effect of the said payments as far as the computation of interest is concerned?

(9) Who should bear the costs and interest thereon? (sic)

16. Counsel for the Plaintiff opened his submissions by restating the pertinent events. He proceeded to argue that in view of Mr. Madhani's depositions and the Defendant's subsequent release of funds, it is now no longer in dispute that the Defendant had no legal justification or reason to withhold the Plaintiff's funds as it had earlier done. Addressing the first agreed issue concerning interest on the funds held by the Defendant as a stakeholder, counsel reiterating the affidavit in support of the OS , called to aid Section 80 of the *Advocates Act*, Rule 3 of the Advocate (Deposit Interest) Rules, the decision in Kim Jong Kyu v Housing Finance Co. Ltd & 2 Others [2015] eKLR, Mea Limited v Echuka Farm Limited & 2 Others [2007] eKLR and the English case in Alghussein Establishment v Eton College [1991] 1 ALL ER 267. To contend that the Defendant's role as a stakeholder does not absolve it from the duties and liability prescribed to it by statute. That by dint of the terms in the sale agreement concerning deposit and completion, the Defendant had an express duty, under Rule 3 above, to take instructions from the Plaintiff on investment of those funds in an interest earning account or deposit. It was further argued that having failed to do so, the Plaintiff cannot benefit from its own breach of duty by arguing that no interest is payable on those funds while they were being held by the Defendant as a stakeholder.

17. Concerning the second agreed issue on rate of interest payable on funds held as stakeholder, counsel anchored his submissions on the Court of Appeal decision in British American Investments Company (K) Limited v Njomaitha Investments & Another [2018] eKLR and the case of Nelson Andayi Havi t/a Havi & Company Advocates v Jane Muthoni Njage t/a Njage & Company Advocates [2015] eKLR . In support of the submission that since there was no express agreement on the rate of interest payable, this Court ought to find that the interest rate payable by the Defendant during the stake holding period

is the rate specified in the sale agreement in respect of the suit property. Therefore, the interest rate applicable in the instant matter as captured in the agreement is 24% per annum.

18. On the third agreed issue, on when the Defendant's stake holder role terminated, counsel relied on Clause 3 of the sale agreement to submit that upon notification and receipt of a copy of the duly stamped and registered transfer from the purchaser's advocate on 26.09.2006, the Defendant was obligated to immediately release the funds held as stake holder as such the termination crystallized on forestated date.

19. Submitting on the fourth agreed issue, concerning the Defendant's liability to pay interest as of the date of termination of the stake holder period, counsel argued that the Plaintiff had prior to filing the instant suit accorded the Defendant every opportunity to resolve the matter amicably by releasing the funds it held as stake holder. However, the Defendant obstinately refused to do so, and based on the discord between the Defendant and Third Party, the former is attempting to avoid obvious liability to the Plaintiff by transferring it to the Third Party.

20. Besides, the eventual release of Kshs. 26,287,944/- by the Defendant after filing of suit amounts to an unequivocal admission by the Defendant that it had no right to withhold the funds in the first place. Therefore, the Defendant's assertion that the Plaintiff ought to direct its claim to the Third Party is baseless as the former's liability to pay interest on funds held attached as of 26.09.2006. The decisions in Christopher Musyoka Musau v N.P.G Warren & 7 Others [2012] eKLR, Nderi & Kiingati Advocates v Kiruti & Company Advocates [2021] eKLR and Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited [2015] eKLR were relied on in this regard.

21. Addressing the fifth issue on interest payable at the end of the stake holder period, counsel relied on the decision in Finejet Limited v Five Forty Aviation Limited [2012] eKLR and the Plaintiff's affidavit material to contend that the Defendant was aware at all material times of the Plaintiff's liability to Diamond Trust Bank Kenya (DTBK) to pay interest on its banking facilities at the rate of 23.5% per annum. It was further submitted that the Plaintiff made it abundantly clear through various correspondence that it expected to receive interest on the purchase price. Therefore, the Defendant's liability to restore the Plaintiff to the position it would have been had the subject funds not been wrongfully withheld by the Defendant necessarily entails the latter paying interest at the same rate of 23.5% borne by the Plaintiff in respect of its facility to DTBK consequent to the Defendant's withholding of the stakeholder funds. Contemporaneously, addressing the sixth, seventh and eighth agreed issues, counsel submitted that the amount payable by the Defendant as of filing of submissions inclusive of the principal and interest calculated on simple interest basis is Kshs. 97,558,470/- and further interest at the rate of 23.5% would continue to accrue on the principle sum of Kshs. 23,287,274.30 from 05.12.2023 until payment in full.

22. Regarding costs of the suit and interest thereon, counsel cited the decision in Stanley Kaunga Nkaricha v Meru Teachers College & Another [2016] eKLR and Julius Ingosi Taliani v Ngisa Ronald Moraa t/a Morara Ngisa & Co. Advocates [2021] eKLR to argue that given that demand before action was made, there is no reason to deprive the Plaintiff of its costs in respect of the suit. The Court was further urged to award the Plaintiff interest on costs at the rate of 14% per annum from the date of filing suit until payment in full as provided in Section 27 of the CPA. In conclusion the Plaintiff's counsel prayed for judgement against the Defendant in the sum of Kshs. 97,558,470.40/- plus further interest on the principal balance of 23,287,274.30 at 23.5% per annum from 05.12.2023 until payment in full and costs of the suit on an advocate/client basis together with interest thereon at the Court's rate of 14% per annum from the date of filing suit until payment in full.

23. On the part of the Defendant, counsel, after restating the Defendant's affidavit material and in response to the Plaintiff's submissions concerning interest in the funds held as a stakeholder, contended as follows. That it was a pertinent fact that at all material times the Plaintiff was a client of the Third Party and despite holding the funds in respect of the transaction as a stakeholder, the Defendant had no claim thereto. Further that, pursuant to Clause A and B of the Deed of Guarantee & Indemnity, the Third Party was liable to settle the interest payable on the amounts withheld by the Defendant in the periods in contention.

24. Submitting on the second and fifth agreed issue concerning the rate of interest, counsel cited the provisions of Section 26 of the CPA to submit that the rate to be applied on such interest ought to be applied at Court rates which is 6% per annum, as opposed to the rate of 23.5% per annum pleaded by the Plaintiff. Further submitting concerning the rate of interest applicable prior to filing of the suit and during pendency of the suit, he argued that the interest rate applicable is 14% per annum. Here, relying on the decisions in Alba Petroleum Limited -vs- Total Marketing Kenya Limited [2019] eKLR and Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 others [2018] eKLR.

25. Disputing the proposed interest rate of 23.5% urged by the Plaintiff, counsel referenced the material relied on by the Plaintiff as follows. First, having defaulted on its loan obligations with DTBK, the interest rate levied at 23.5% comprised the normal lending rate of 13.5% and the default rate of 10% per annum. Secondly, the interest rate of 13.5% in February 2006 applied prior to the consummation of the transaction in question that was completed in October 2006. Therefore the Plaintiff could not use the said rate of 23.5% which was inclusive of the default rate of 10%.

26. Placing reliance on the decisions in Macharia Mwangi Maina & 87 others –vs- Davidson Mwangi Kagiri [2014] eKLR and Alghussein (supra), counsel asserted that the Plaintiff cannot purport to take advantage of his own default on its banking facility that occurred before the subject transaction was consummated by claiming the additional default rate of 10% . Or be heard to argue that the delay in releasing the purchase price caused him losses to the extent of being unable to service its loan with DTBK. In the alternative and without prejudice to his earlier submissions, counsel asserted that if the Court were to find merit in the correspondence from DTBK as relied on by the Plaintiff, the prevailing interest rate ought to be 13.5% per annum if not the court rate of 14%. The decision in Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited [2015] eKLR was called to aid on the issue.

27. Concerning the third agreed issue, regarding when the Defendant ceased being a stake holder in respect of the funds it held, it was summarily argued that as of the consent order of 02.06.2015 by Mabeya, J, directing that the funds held by the Defendant be deposited in a joint interest earning account to be opened in the name of the Plaintiff and Third Party, it ceased being a stake holder. That the said order was to mitigate any loss to the Plaintiff and Third Party and that despite numerous requests for bank account details for purposes of compliance neither party furnished the requested information. It was further asserted that despite a similar order being subsequently made by Ombija, J, on 29.09.2015 there was no compliance, and therefore cessation crystallized on 02.06.2015.

28. On the fourth issue, regarding the Defendant's liability to pay interest as at the termination of the stake holder period, it was argued that the Plaintiff is prevented from any such relief from this Court , being guilty of disobeying Court orders and by reason non-compliance with the order issued on 02.06.2015 and re-issued on 29.09.2015. Rendering the Plaintiff disentitled to the discretionary relief by way of an award on interest after the former date. Because a party cannot be allowed to benefit from and/or take advantage of their own wrongs.

29. Responding to the Plaintiff's submissions on the sixth, seventh and eighth agreed issues, counsel called to aid the decision in Midrock Water Drilling Co Limited -vs- National Water Conservation and Pipeline Corporation [2020] eKLR to assert that the Court ought to adopt the simple interest method (the nominal rate method) for the sole reason that the Plaintiff failed to specifically plead compound interest. As to the period which ought to be covered in the event this Court is inclined to award interest, counsel particularized the period as – (i) October 2006 to 24.04.2009 in respect of the payment of Kshs. 15,904,704/-, (ii) 24.04.2009 to 04.05.2009 in respect of the payment of Kshs. 4,883,240/- & (iii) 30.04.2009 until 02.06.2005 when this Court issued an order for opening of a joint interest earning account by the Plaintiff and Third Party. On whether the amounts of Kshs 15,904,704/= and Kshs 4,883,240/= ought to be factored in the calculation of interest, it was summarily asserted that the said sums ought to be factored in reducing the principal amount.

30. Contemporaneously, submitting on the question of costs and third-party proceedings, counsel posited that the Deed of Guarantee and Indemnity did not contain any condition or provision whatsoever on the issue of the Third Party being allowed to appoint an Advocate of his choice to defend the instant suit, whereas the only condition attached thereto has not been assailed by the Third Party as having been breached.

31. While calling to aid the dicta espoused in National Bank of Kenya Ltd –vs- Pipeplastic Samkolit (K) Ltd & another [2002] eKLR, counsel maintained that the Third Party has not impeached the Deed of Guarantee and Indemnity for coercion, fraud or undue influence and the Court ought to deem it as validly executed and therefore binding upon the Third Party. It was further contended that indemnity took the form and nature of a Professional Undertaking given by an Advocate in the course of discharging his obligations, hence binding and enforceable. The decision in Waruhiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited [2016] eKLR was cited in the latter regard.

32. Counsel reiterated that the Defendant is not liable to the Plaintiff and that liability any liability established ought to be borne by the Third party by virtue of the Deed of Guarantee and Indemnity. In conclusion, it was submitted that without prejudice to the Defendant's related submissions, if any interest is to be found payable to the Plaintiff, then the same ought to be calculated at the rate of 13.5% per annum or at the Court rate of 14% per annum on simple interest and accruing up to 02.06.2015.

33. On the part of the Third-Party, counsel began by contending that the Defendant's action of replacing the firm originally acting on behalf of the Defendant had the effect of committing a fundamental breach of the Deed of Guarantee and Indemnity. He further submitted that to the best of the Third-Party's knowledge, the Defendant is holding Kshs. 16,000,000/- in its account being monies owed to the Defendant by the Plaintiff in bills totaling Kshs. 2,108,945/-. Counsel went on to contend that the Deed of Guarantee and Indemnity is invalid for two main reasons :- (a) It was obtained by deceit and fraud, for reasons that it was executed three (3) years after the instant proceedings had been instituted and followed immediately thereafter by the replacement of counsel on record in the matter and motion seeking to have the Third Party's affidavits, initially filed on behalf of the Defendant, expunged; (b) the Defendant having abandoned the defence initially filed in response to the suit, validated the Plaintiff's claim in obvious breach of the Deed of Guarantee and Indemnity. He concluded by citing the decisions in Mea Limited (supra) and Alghussein (supra) to argue that the Defendant cannot circumvent its own part under the contract while equally applying to obtain benefit from the decision.

34. In rejoinder to the Defendant's and Third-Party's submission, counsel for the Plaintiff argued that the Defendant is not entitled to refer to or rely on the replying affidavit dated 12.06.2007 deposed by the Third-Party, given that it was expunged from the record; secondly, during the pendency of the suit, the cumulative sum of Kshs. 26,287,994/- paid over by the Defendant, was never agreed upon

and or specified as constituting a credit towards the principal claimed by the Plaintiff; thirdly, the Plaintiff was at all material times a client of the Defendant and not exclusively of the Third-Party, the Defendant firm having acted for the Plaintiff in the sale transaction received the proceeds of the sale; fourthly, it is untrue that the Defendant had no control over the said monies which were held in the Defendant's account from which it released the sum of Kshs. 26,287,994/- during the pendency of the suit; and fifthly, the Plaintiff was not a party to the Deed of Guarantee and Indemnity and its claim is exclusively against the Defendant and not the Third Party. Therefore, in the event of any decision the Defendant may claim indemnity against Third Party, which fact cannot affect or vitiate in any manner the Defendant's liability regarding interest.

35. It was further reiterated that the Plaintiff must be compensated by an award of interest commensurate with the loss suffered upon being deprived of its funds. That the Defendant ceased being a stakeholder on 26.09.2006 upon receipt of the balance of the purchase price and not 02.06.2015 when a consent was record before this Court. Counsel contending that it was the Third Party, enjoined by the Plaintiff, who resisted performance of the consent order dated 02.06.2015 and even attempted to review the same. Hence, the Plaintiff cannot be held responsible and or penalized for the Third Party's actions. In conclusion, it was submitted that the Third Party cannot assert being owed fees while the Defendant has unequivocally stated that is not owed any fees by the Plaintiff. The Court was urged to allow the suit as prayed.

36. The Third Party further filed submissions in rejoinder to the Defendant's rejoinder. Challenging the competency of the Originating Summons against the reliefs sought by the Plaintiff, counsel relied on Order 36 of the CPR, the decisions in Kenya Commercial Bank Ltd v Osebe [1982] eKLR, General Tools & Electrical Equipment v Oriental Commercial Bank Ltd [2009] eKLR, Alloysius Muthiani Kivusyu v William Mwanzia & Another [2008] eKLR and New Types Enterprises Limited v Kenya Achand Insurance Co. (1988) KLR 380. In making the submission that the Court has been approached to determine a very specific question without the expense of bringing an action in the usual way while the provisions relied on do not enable the Court to determine the varied issues arising, including the Plaintiff quest for interest.

37. It was further argued that from the Plaintiff's evidence and submissions, it has equally sought interest for the period prior to filing of the OS as of 23.06.2006, contrary to the pleaded date of 01.03.2007, which ought to have been done by way of suit and not by way of an OS. That for interest to be awarded there must be an adjudged principal sum; that the amount of Kshs. 30,010,832/- was compromised by the Defendant to the tune of Kshs. 26,287,944/-, and hence there is no principal adjudged sum within the meaning of Section 26 of the CPA upon which the Court may award interest.

38. The Court has considered the pleadings, voluminous affidavits in evidence as well as the lengthy submissions of the respective parties. The record of proceedings herein speaks for itself as to contestation by the respective parties from inception to the present. However, as earlier noted, the key protagonists in the suit, the Plaintiff and Defendant, filed an agreed list of issues for this Court's consideration. At the heart of the issues is the question of interest, and upon which the respective parties have vehemently advanced their respective stances through their affidavit material and submissions. The Plaintiff's OS is brought under the provisions of Order 52 Rule 4 of the CPR which provides that;-

    (1) Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for—

        (a) the delivery by the advocate of a cash account;

        (b) the payment or delivery up by the advocate of money or securities;

(c) the delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant;

(d) the payment into or lodging in court of any such money or securities;

(e) the delivery up of papers and documents to which the client is entitled.

(2) Applications under this rule shall be by originating summons, supported by affidavit, and shall be served on the advocate.

(3) If the advocate alleges that he has a claim for costs the court may make such order for the taxation and payment, or securing the payment, thereof and the protection of the advocate's lien, if any, as the court deems fit.

39. Based on the reliefs sought, the OS appears to be primarily anchored on the provisions Rule 4(1)(b). The objective of proceedings commenced by OS was spelt out by the Court of Appeal in Kibutiri v Kibutiri [1983] eKLR as follows;-

The procedure by way of originating summons is intended:

"to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question."

This was said in Re Giles (2) [1890] 43 Ch D 391, a decision cited with approval by this court's predecessor in Kulsumbhai v Abdulhussein [1957] EA 699. See also Bhari v Khan [1965] EA 94 in which it was held that the scope of an inquiry which could be made on an originating summons and the ability to deal with a contested case was very limited. When it becomes obvious that the issues raise complex and contentious questions of fact and law, a judge should dismiss the summons and leave the parties to pursue their claims by ordinary suit.

See also Kenya Commercial Bank Ltd v Osede[1982] eKLR

40. The foregoing decision is adequate answer to the Third Party's objection that by dint of Section 26 of the CPA the Plaintiff's claim, particularly on interest, ought to have been instituted by way suit and not an OS Summons. Order 52 Rule 4(1)(b) permits a client or his legal personal representative, (in respect of an advocate/client relationship) to move the Court for an order of the payment or delivery up by the advocate of money or securities held. In this instant matter from the agreed issues dated 11.10.2023, it is undisputed that the Defendant firm acted as the Plaintiff's advocate in a transaction involving the sale of the Plaintiff's suit property from which funds were received by the Defendant on behalf of the Plaintiff in respect of the said transaction. Thus, the Plaintiff was at liberty to avail itself of the provisions of Rule 4(1)(b) to move this Court for an order of the payment or delivery up by the advocate of money or securities (if need be).

41. Specifically, the Plaintiff prayed that "the Defendant do pay the Plaintiff the sum of Kshs. 30,010,832.10 together with interest thereon at the rate of 23.5% per annum from 01.03.2007 until payment in full". The objection based on interest as urged by the Third Party was neither here nor there, given that the provisions of the *Advocates Act* as read with Advocate (Accounts) Rules and Advocate (Deposit Interest) Rules, which the Court will address later in this judgment. Therefore, the Plaintiff's originating summons was properly brought and the Third-Party's belated objection to the OS was not well taken.

42. Moving on to the substance of the issues thrown up for consideration, in the view of the court, the Plaintiff's claim succeeds or falls on the question whether interest is payable on the principal sum of money that was received and or held by the Defendant as a stake holder. The events leading to the suit

have been elaborately restated. It is undisputed from the material before the Court that on or about December 2002, the Third Party joined the Defendant's firm as a consultant from the firm of Shapley Barret & Co. Advocates. It appears that while the Third Party was at the latter firm, he was actively representing the Plaintiff in various matters and upon moving to the Defendant firm, the Plaintiff transitioned its business along with the Third Party. It is on the premise of the foregoing that, sometime in 2006, the Plaintiff instructed the Defendant to act as counsel on its behalf in respect of a transaction involving the sale of the suit property wherein the Third Party seemed to be the lead counsel in at the Defendant firm regarding the transaction.

43. In accordance with the sale agreement relating to the transaction in respect of the suit property, the purchase price was the sum of Kshs. 28,000,000/- with Kshs. 2,800,000/- being the deposit and Kshs. 25,200, 000/- being the balance of the purchase price. It is further undisputed pursuant to the statement of agreed facts that the deposit was received on or about the 22.06.2006 while the balance of the purchase price received on or about the 17.07.2006. Clause 3 of the sale agreement expressly provided that; -

> " 3. The purchase price for the property is Kenya Shillings Twenty-eight million (Kshs. 28,000,000/-) will be paid by the purchaser to the vendor's advocates upon the execution hereof to be held by the vendor's advocate as stakeholders pending registration of the transfer of the property in favour of the purchaser. The balance of the purchase price shall be paid to the vendor's advocates on or before the completion date hereinafter mentioned. The deposit and the balance of the purchase price shall be released to the vendor upon receipt by the purchaser's advocates of the duly registered transfer of the property in favour of the purchaser" .

44. Hence, at all material times the Defendant's role as 'stake holder' was to hold and thereafter release the received funds for the sole purpose of facilitation and or completion of the transaction. The Court of Appeal in Mohammed Salim Balala & Another v Tor Allan Safaris Limited [2015] eKLR, stated concerning the role of a stake holder that;-

> " It is common ground that the deposit was made to the Appellants as stakeholders. According to Black's Law dictionary 9th Edn; A stakeholder is defined as:
>
> "A disinterested third party who holds money or property the right to which is disputed between two or more other parties."

It can therefore be safely said that as a stakeholder in this land transaction, the Appellants therefore acted as escrow agents. The same dictionary describes escrow as:

> 1. A legal document or property delivered by a promisor to a third party to be held by the third party for a given amount of time or until the occurrence of a condition, at which time the third party is to hand over the document or property to the promise
> 2. .....
> 3. .....
> 4. The general arrangement under which a legal document or property is delivered to a third person until the occurrence of a condition."

45. Behind the transaction in question herein was an advocate-client relationship, between the Plaintiff and Defendant with the Third-Party being the lead, at the Defendant's firm. The Court of Appeal in Kim Jong Kyu (supra) observed in respect of an advocate-client relationship, that;

> " The appeal relates to an advocate/client relationship created by an order directing decretal sum to be invested in an interest-earning account in the names of the advocates for the parties. Advocates in addition to being professionals, are officers of the court and play a vital role in the administration of justice. In our legal system, the advocate/client relationship has long been recognized as fiduciary relationship in which the client places his or her confidence, faith, reliance and trust in the advocate, whose aid, advice, opinion or protection is sought from time to time. The client gives the advocate significant amount of control over the matter in which the brief relates. With this relationship comes certain duties and responsibilities on the advocate. These duties and responsibilities are provided for in the statute and the rules of conduct as we demonstrate below. The sets of rules that govern the advocates' professional conduct arise out of the duty that they owe to the court, their clients, and fellow advocates".

46. The question for determination at this point is whether interest was applicable on monies held by the Defendant as stakeholder. The *Advocates Act* as read with Advocate (Accounts) Rules and Advocate (Deposit Interest) Rules regulate the handling of client money by an advocate. The Court in Kim Jong Kyu (supra) reiterated this fact when it stated that "In addition, the Advocates (Accounts) Rules and the Advocates (Deposit Interest) Rules draw the permissible limits of dealings with funds received on behalf of and for the benefit of a client. The foregoing emphasizes that an advocate must at all times act in the best interest of his client; that where he is required to invest he must do so prudently and avoid obvious risks and; that failure to account for funds held by an advocate on behalf of a client is in fact a criminal offence."

47. Rule 2 of the Advocate (Accounts) Rules defines "client account" as a current or deposit account at a bank or with a building society or a financial institution (as defined in the *Banking Act* (Cap. 488)) in the name of the advocate but in the title of which either the word "client" or the word "trust" appears. On the other hand, "client's money" is defined as money held or received by an advocate on account of a person for whom he is acting in relation to the holding or receipt of such money either as an advocate or, in connexion with his practice as an advocate as agent, bailee, trustee, stakeholder or in any other capacity, and includes— (a) money held or received by an advocate by way of deposit against fees to be earned or disbursements to be incurred; and (b) money held or received as or on account of a trustee, whether or not the advocate is sole trustee or trustee with others, but does not include— (i) money to which the only person entitled is the advocate himself, or in the case of a firm of advocates, one or more of the partners in the firm; nor (ii) money held or received by an advocate in payment of or on account of an agreed fee in any matter.

48. Consequently, the funds received by the Defendant would for all intents and purposes be categorized as client money. Rule 4 of the Advocate (Accounts) Rules goes on to provide that subject to rule 8, an advocate shall without delay pay into a client account all client's money held or received by him. The forestated provision ought to be read along aside Rule 2 and 4 of the Advocate (Deposit Interest) Rules that provides (2) except as provided by these Rules an advocate is not liable by virtue of the relationship between advocate and client to account to any client for interest received by the advocate on moneys deposited in a client account being moneys received or held for or on account of his clients generally (3)..... (4) an advocate is liable to account to a client for interest received on moneys deposited in a client account where the moneys are deposited in a separate designated account.

49. The Plaintiff made heavy weather of Rule 3 which states that when an advocate holds or receives for or on account of a client money on which, having regard to all the circumstances (including the amount and the length of time for which the money is likely to be held), interest ought in fairness to the client to be earned for him, the advocate shall take instructions from the client concerning the investment of that money. And reading the Rule alongside Section 80 of the *Advocates Act*, counsel has asserted that the Defendant ought have taken instructions on the investment of the funds in its possession and in default , the applicable rate of interest was 23.5%. However, it is the Court's considered view that in the circumstances of this case, the Defendant had no obligation to invest the funds and or account for interest while he was holding the same as a stake holder which comprised client money held in a client account.

50. Secondly, it is also apparent from the material before the Court that there was no specific agreement or instruction on deposit of the funds held by the Defendant and chargeable interest. Thirdly, upon conclusion of the transaction it appears that a dispute arose between the Plaintiff and the Defendant via the Third Party as the latter sought to recover what appears to be fees owed from funds held by the Defendant. Fourthly, notwithstanding the provisions of Rule 3 of the Advocate (Deposit Interest) Rules, the Plaintiff's claim on interest on the funds held has gradually progressed from 18%, 23.5%. and 24%.

51. In light of the foregoing, and upon consideration and review of the correspondences (annexure marked KJ1) attached to Plaintiff's affidavit dated 27.03.2023, it is the court's finding that there was no obligation on the Defendant to investment the client money held as stake holder up until the letter dated 11.12.2006. By the letter by Mr. Madhani, written to the Plaintiff amid the ongoing dispute in respect of the funds, it was stated that;-

> " Subsequent to our meeting, we have seen the documents on file with regard to all the matters mentioned in the Fee Note. This position, is exactly as heretofore outlined to you by Mr. Magan of our firm."
>
> To enable you seek counsel who would advise as to the way forward we are doing the following; -
>
> 1. We are forthwith paying to Mr. Magan the sum of Kshs. 4,883,240/-
> 2. The balance of the monies amounting to Kshs. 21,189,665 we are putting in an escrow account for a period of thirty (30) days from the date hereof.
> 3. This account will earn interest at the rate of 5% per annum from 13th December 2006. It will be with our bankers namely, Diamond Trust Bank Kenya Limited. The purpose of putting the monies in the escrow account have been explained to you and we do not see the necessity of going into it all over again". (sic)

52. Despite the contents of the above letter, it is an agreed fact that the amount of Kshs. 4,883,240/- was not paid out to the Third Party but was eventually remitted to the Plaintiff on or about 04.05.2006. Under Rule 4 of the Advocate (Deposit Interest) Rules, as of 13.12.2006 the Plaintiff was entitled to interest on the sum of Kshs. 21,189, 665/- that was moved to a "separate designated account" at the rate of 5%. See also Rule 5 of the Advocate (Deposit Interest) Rules. Nevertheless, there is no indication whether the escrow account was wound up by the Defendant upon the lapse of the 30 days (on or about 13.01.2007).

53. That said, the Plaintiff's claim on interest at 23.5% appears unjustified because the facility it was servicing with DTBK had no bearing on the Advocate/Client Agreement/ relationship in respect of

the sale of the suit property. Neither did the Plaintiff's correspondence insistence on release of funds with interest aid the matter. The Plaintiff's argument that the interest rate applicable ought to be 24% as provided for in the sale agreement equally does not fly as the special condition in the sale agreement on interest was only binding upon the vendor and purchaser, to the suit property, and not the Plaintiff and Defendant in their capacity of an advocate – client relationship.

54. Equally, the facts in the case of Nelson Andayi Havi (supra) do not aid the Plaintiff's argument, as the decision related to enforcement of a professional undertaking between advocates. Thus, in this instance reason would dictate that the only applicable rate of interest on funds held would be as provided under Section 26 of the CPA. On this aspect, the Court draws guidance from the decision of the Court of Appeal in CFC Stanbic Limited v John Maina Githaiga & Another [2013] eKLR, wherein the superior Court addressing the question of interest rate not specifically provided for by contracting parties observed that:-

> " Sections 26 and 27 of the *Civil Procedure Act*, [CPA], lay down the law relating to the grant of interest and the setting of effective dates thereof. The said provisions provide that the court has a wide discretion to grant interest and to determine the effective dates of payment of such interests.
>
> In Shah v Guilders International Bank Ltd, [2003] KLR, the Court of Appeal regarding S 26 (1) of the CPA held:
>
> "This section, in our understanding, confers upon the court the discretion to award and fix the rate of interest to cover three stages, namely:
>
> (1) the period before the suit is filed;
>
> (2) the period from the date the suit is filed to the date when the court gives its judgment; and
>
> (3) from the date of judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion, fix.
>
> We further understand these provisions to be applicable only where the parties to a dispute have not, by their agreement, fixed the rate of interest payable. If by their agreement the parties have fixed the rate of interest payable, then the court has not discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent."
>
> Accordingly, the High Court should in its discretion award and fix the rate of interest payable.
>
> Regarding the issue of the commercial rate of interest applicable and the total amount of interest payable this could only, in our view, be proved with evidence. From the record, the respondent did not produce any documentary evidence to show the contractual rate of interest applicable. Accordingly, the interest payable would, therefore, be discretionary as provided for by S 26 of the CPA and subject to evidence produced to support the claim..."

55. In the court's considered view, despite the soured relationship between the Defendant and Third Party, culminating in the execution of the Deed of Guarantee and Indemnity, the Defendant had no justifiable reason to withhold the proceeds of the purchase price of the suit property upon execution. Curiously, at all material times the Defendant firm was on record in the transaction and despite the dispute on fees that ensued between the Third Party and the Plaintiff, the Defendant was not entitled to keep holding the funds upon receipt of the full purchase price, and confirmation of registration

by the purchaser and or authorization to release the purchase price on 06.10.2006 (See;- letter dated 06.10.2006 in annexure marked KJ1 in affidavit dated 27.03.2023). It further seems that the Defendant and Third Party were of the same mind until the Deed of Guarantee & Indemnity was executed.

56. A consequence of the foregoing being that despite the crystallization and or apparent cessation of the stake holder role by the Defendant upon occurrence of either the prescribed events in respect of the transaction, the monies held as stake holder (and by extension held as client monies) could not attract interest. Because it must have been held in the Defendant's client account. Thus, following the ensuing dispute as to fees and or other payments between Plaintiff, Third Party and by extension the Defendant, it is only when the latter transferred the sum of Kshs. 21,189, 665/- to a "separate designated account" at the rate of 5% for 30 days on or about 13.12.2006, that the Plaintiff became entitled to interest. The totality of the foregoing answers the agreed issue (1), (2) and (3) between the Plaintiff and Defendant.

57. In addressing agreed issues (4), (5), (6), (7) & (8), both the Plaintiff and Defendant have advanced divergent arguments which have been duly considered. The Court has addressed itself to the Defendant's liability to pay interest on the funds held when liability attaches and the rate of interest at which the said liability attaches.

58. From the statement of agreed facts and affidavit material, the following can be deduced in respect of the funds in question; - (1) the purchase price of the suit property was Kshs. 28,000,000/- which was duly received by the Defendant; (2) the authorized deductions/payments by the Plaintiff on the purchase price was a total of Kshs. 1,944,379/- (comprising of stamp duty, money to Ketan Shah & Defendant's legal fees) thereby entitling the Plaintiff to Kshs. 26,055,621/- upon confirmation of registration by the purchaser and or authorization to release the purchase price on 06.10.2006; (3) on 13.12.2006 the sum of Kshs. 21,189, 665/- was transferred to a "separate designated account" at the rate of 5% for 30 days thereby leaving a balance of Kshs. 4,865,956/-, which seemed to be still in the possession of the Defendant; (4) the sum of Kshs. 15,904.704/- was paid on 24.04.2009, Kshs. 4,883,240/- was paid on 04.05.2009 & Kshs. 5,500,000/- was paid on 26.04.2023 bringing the total amount received by the Plaintiff to Kshs. 26,287,944/-, an excess of Kshs. 232,323/- on the principal sum due to the Plaintiff from the proceeds of the sale of the suit property.

59. It is relevant here that the Defendant as of 13.12.2006 was alive to the question of possible investment of the Plaintiff's funds and or his fiduciary obligation to the Plaintiff on funds held. These facts automatically entitling the Plaintiff to interest on the funds. As to calculation of interest, both the Plaintiff and Defendant seemed to agree on the simple interest method. However, from its submissions, Plaintiff appeared to be equally pressing for compound interest thus contradicting himself on the issue. The Court will take due guidance on the issue from the decision Court of appeal in Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2019] eKLR wherein it Kantai JA stated that;-

> " It has been held in various cases by this Court that the question of when interest will apply and whether the same be simple interest or compound interest is a question at the discretion of the trial court. In Omega Enterprises Limited v Eldoret Sirikwa Hotel Limited & Others C.A. No. 235 of 2001 (ur) this Court stated on those issues:
>
> "The question of interest as regards the date from which it should be paid, the rates thereof as well as whether the same should be on compound or simple basis, is essentially a matter for the discretion of the court and unless the discretion is exercised wrongly an appellate court would not interfere with the (decision of the trial court)."

60. He went on to stated that; -

On the issue of whether interest be simple or compound it was held in the case of Sempra Metals Limited v Inland Revenue Commissioners [2007] UKHL 34 by the English House of Lords cited with approval by this Court in the Ajay Shah (supra) case that a court has the jurisdiction to award compound interest in its exercise of equitable jurisdiction. In National Bank of Greece SA v Pinios Shipping Company No. 1 [1990] 1 AC 637 it was noted that custom and trade usage with regards to calculation of compound interest as part of a bank's practice may be applicable.

In the persuasive case of Pacific Playground Holdings Limited v Endeavour Developments Limited (2002), 28 C.P.C. (5th) 85, 2002 BCSC 1491, Wilson, J in quoting with approval the ruling of Major, J in Bank of America Canada v Mutual Trust Company [2002] 2 SCR 601 held:

> " There seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of wrong the plaintiff would have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also."

Major, J, of the Supreme Court of Canada argued in that case that equitable principles allow for interest to be calculated on a compound basis where fairness concerns dictate it. He therefore held:

> " Simple interest and compound interest each measure the time value of the initial sum of money, the principal. The difference is that compound interest reflects the time-value component to interest payments while simple interest does not. Interest owed today but paid in the future will have decreased in value in the interim just as the dollar example described in paras. 21-22. Compound interest compensates a lender for the decrease in value of all money which is due but as yet unpaid because unpaid interest is treated as unpaid principal. Simple interest makes an artificial distinction between money owed as principal and money owed as interest. Compound interest treats a dollar as a dollar and is therefore a more precise measure of the value of possessing money for a period of time. Compound interest is the norm in the banking and financial systems in Canada and the Western world and is the standard practice of both the appellant and the respondent .... Where the parties have earlier agreed on a compound rate of interest, or there are circumstances warranting it, it seems fair that a court has the power to award compound post judgment interest as damages to enable the plaintiff to be fully compensated when the award is finally paid."

61. In the result, the Court while applying itself to the facts herein and dicta in CFC Stanbic Limited (supra) and the above pronouncement by Kantai, JA., is persuaded that the justice of the matter would lies in calculating interest by the simple interest method. The interest payable on the funds withheld by the Defendant being calculated as follows;-

a. Principal Amount due to Plaintiff as of 06.10.2006

   Kshs. 26,055,621/-.

b. Principal Amount settled as at 26.04.2023

   Kshs. 26,287,994/-

c. Amount in excess paid on Principal Amount due to Plaintiff as at 06.10.2006

   Kshs. 232,323/-

d. Total Accrued Interest on Principal Amount on reducing balance due; -

   Accrued Interest on Kshs. 21,189,665/- from 13.12.2006 to 13.01.2007 at the rate of 5%.

Accrued Interest on Kshs. 4,865,956/- from 13.12.2006 to 13.01.2007at rate of 6% (court rate).

Accrued Interest on Kshs. 26,055,621/-from 13.01.2007 to 24.04.2009 at rate of 6% (court rate).

Accrued Interest on Kshs. 10,150,917/- from 24.04.2009 to 04.05.2009 at rate of 6% (court rate).

Accrued Interest on Kshs. 5,267,677/- from 04.05.2009 to 26.04.2023 at court rate of 6%.

e. Total Interest Amount due to Plaintiff:

Total of (d) less (c)

62. The Court will now deal with agreed issue (9) between and Plaintiff, Defendant and by extension the Third Party herein. On the part of the Defendant, counsel summarily argued that at all material times the Plaintiff was a client of Third Party and despite holding the funds in respect of the transaction as a stake holder it had no claim thereto , and pursuant to Clause A and B of the Deed of Guarantee & Indemnity, the Third Party is liable to settle the interest payable on the amounts withheld by the Defendant in the period in contention.

63. The Third Party's response was that the Defendant's act of replacing the firm originally acting on behalf of the Defendant constituted a fundamental breach of the Deed of Guarantee and Indemnity with the Third Party. He further assailed the Deed of Guarantee and Indemnity on grounds that it was obtained by deceit and fraud. The Plaintiff waded into the dispute between the latter parties by arguing that at all material times it was a client of the Defendant and not exclusively of the Third Party. Because it was the Defendant firm that acted for the Plaintiff in the sale transaction whose proceeds were eventually received by the Defendant firm. Moreover that, the Plaintiff was not privy to the Deed of Guarantee and Indemnity as its claim is exclusively against the Defendant and not the Third Party. Therefore, in the event of any decision the Defendant may claim an indemnity against Third-Party.

64. The role of the Court in adjudicating a dispute arising between contracting parties is well settled. In the oft-cited decision of National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, the Court held that;-

> " A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties."

65. The pertinent clauses relevant to the issue in the Deed of Guarantee and Indemnity dated 30.07.2010 provided that;-

QUOTE{startQuote "}

NOW THIS DEED WITNESETH as follows:-

A. In consideration of the firm agreeing to lend the consultant, as provided in the agreement, and the consultant continuing to use the firm's name to render professional services involving the consultant's clients, including but not limited to Kenya Knitting & Weaving Mills Limited. The consultant HEREBY COVENANTS with the firm, the consultant or his personal representatives, where the context so admits will at all times hereafter, keep the firm indemnified against all actions proceedings, liability, claims, damages, costs and expenses arising from Nairobi High Court Civil Suit Number 247

of 2007 (O.S) (Kenya Knitting & Weaving Mills Limited v Mohamed Madhani t/a Mohamed Madhani & Company Advocates) or arising from any transaction involving to Kenya Knitting & Weaving Mills Limited with the firm or any other client, where the consultant has personally handled the client's case or transaction ALWAYS on condition that the firm allows the consultant exclusively to handle and continue to handle whether he continues to be engaged as a consultant or otherwise all matter therefore handled by the Consultant and which have to date not be concluded AND exclusively retain all professional fees earned thereon.

B. The consultant further undertakes to indemnify and keep indemnifying the firm or its successors in title and Mohamed Madhani, or his personal representatives or assigns all demands, actions, proceedings, liability, claims, damages, costs and expenses arising from Nairobi High Court Civil Suit Number 247 of 2007 (O.S) (Kenya Knitting & Weaving Mills Limited v Mohamed Madhani t/a Mohamed Madhani & Company Advocates or arising from any transaction involving Kenya Knitting & Weaving Mills Limited with the firm or any other client, where the consultant had personally handled that client's case of transaction.

C. In the event that any final judgment is entered against the firm the consultant shall ensure the same is satisfied within seven (7) days of the said judgment or appeal therefrom and will at all times ensure that the firm is rendered harmless against any attachment as a result of the said judgment.

D. ....." (sic)

66. First, the Third Party's contestation that the Deed of Guarantee and Indemnity was obtained by deceit and fraud was never substantiated through evidence. Nevertheless, based on the dicta in Kibutiri (supra) this was an issue too complex to be considered through the instant OS and could not be entertained at this juncture. Secondly, contrary to assertions by the Third Party, the Deed of Guarantee and Indemnity did not specifically provide that the Third Party was to appoint an advocate of his choice to defend the suit, as such the related asserted breach on the part of the Defendant does not arise.

67. Thirdly, whether the Deed of Guarantee and Indemnity represented a conscionable contract given the timing and obtaining circumstances is debatable. The Court of Appeal while addressing the question of interest and unconscionable contract in Margaret Njeri Muiruri -V- Bank of Baroda (Kenya) Limited (2014) eKLR stated:-

> " It is not for the Court to rewrite a contract for the parties. As this Court held in National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999 "a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract."
>
> Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the/a procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case."

68. As noted earlier, Defendant and the Third Party were apparently reading from the same script up until 2010. Evidently acting in concert, they frustrated and delayed the release process of the funds held by the Defendant. However, it appears that the relationship between them soured around the time of the execution of the Deed of Guarantee and Indemnity. Between 2006 and 2010 the Defendant, with the apparent connivance of the Third Party declined to release the Plaintiff's funds on the premise of

unpaid fees or funds due to the Third Party. However, by July 2010 the Defendant seemingly decided to cut ties with and lay blame at the doorstep of the Third Party.

69. Further, as rightly argued by the counsel for the Plaintiff the latter was at all material times a client of the Defendant and not exclusively of the Third Party, himself associated as a "consultant" but for all intents using the Defendant's trading name. It was admittedly the Defendant firm that acted for the Plaintiff in the sale transaction whose proceeds were received and eventually released by the Defendant firm. In other words, the Defendant had the upper hand so far as the retention and release of the disputed funds was concerned, and the Deed of Guarantee and Indemnity, itself coming so late in the day, could not properly immunize the Defendant from liability.

70. Therefore, the court is wary of the conscionability of the Deed of Guarantee and Indemnity. Faced by circumstances of similar nuance, Kuloba, J (as he then was) in Gabriel Mbui v Mukindia Maranya [1993] eKLR stated in his characteristic pithy style that: -

> "No one can improve his condition by his own wrong. The latin of it is Nemo ex suo delicto meliorem suam conditionem facere potest...it is an ancient dictum of our law, that a person alleging his own infamy is not to be heard. People whose wisdom I cannot profane by making modern comparisons to them abbreviated their wisdom in the saying, Allegans suam turpitudinem non est audiendus.... By which they meant that no one shall be heard in a court of justice to allege his own turpitude as a foundation of a right or claim. No one shall be allowed to set up a claim based on his own wrongdoing. A person cannot take advantage of his own wrong and in equity, the maxim holds good that he who comes into equity must come with clean hands... Null prendra advantage de son tort demesne... meaning no man shall profit by the wrong that he does, and Nullus commodum capere potest de injuria sua propria... which means, no one can gain an advantage by his own wrong."

71. In these circumstances, the Defendant's cause of action as against the Third Party does not appear sustainable.

72. Consequently, the Plaintiff's claim is allowed as outlined in paragraph *61* of this judgment:-

a. Principal Amount due to Plaintiff as of 06.10.2006

   Kshs. 26,055,621/-.

b. Principal Amount settled as at 26.04.2023

   Kshs. 26,287,994/-

c. Amount in excess paid on Principal Amount due to Plaintiff as at 06.10.2006

   Kshs. 232,323/-

d. Total Accrued Interest on Principal Amount on reducing balance due; -

   Accrued Interest on Kshs. 21,189,665/- from 13.12.2006 to 13.01.2007 at the rate of 5%.

   Accrued Interest on Kshs. 4,865,956/- from 13.12.2006 to 13.01.2007at rate of 6% (court rate).

   Accrued Interest on Kshs. 26,055,621/-from 13.01.2007 to 24.04.2009 at rate of 6% (court rate).

   Accrued Interest on Kshs. 10,150,917/- from 24.04.2009 to 04.05.2009 at rate of 6% (court rate).

Accrued Interest on Kshs. 5,267,677/- from 04.05.2009 to 26.04.2023 at court rate of 6%.

e. Total Interest Amount due to Plaintiff:

Total of (d) less (c)

73. Accordingly, an order is hereby issued, directing the Defendant to pay the adjudged interest sums within 45 days of this judgment to the Plaintiff in default of which, further interest at court rates will accrue on the said adjudged sums, until payment in full. The Defendant's claim against the Third Party is hereby dismissed. In view of the facts established and circumstances surrounding the suit, the court will grant the costs of the suit to the Plaintiff as against the Defendant. However, as regards costs between the Defendant and the Third Party, each party will bear its own costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13TH DAY OF MAY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Sarvia

For the Defendant: Mr. Mbugua

Third Party (in person): Mr. Shiraz Magan

C/A: Erick

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