



**HFC Limited v Pinakim Africa Limited & another (Commercial Case E790 of 2021)
[2023] KEHC 20806 (KLR) (Commercial and Tax) (16 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 20806 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E790 OF 2021
DO CHEPKWONY, J
MAY 16, 2023**

BETWEEN

HFC LIMITED PLAINTIFF

AND

PINAKIM AFRICA LIMITED 1ST DEFENDANT

HARIMARA IYER GANAPATHI 2ND DEFENDANT

JUDGMENT

1. The Plaintiff brought this action against the Defendants vide a Plaint dated August 30, 2021 in which it seeks Judgment to be entered against the 1st and 2nd Defendants for:-
 - a. Kshs 26,131,250.39.
 - b. Interest on (a) above at the rate of 26% per annum from 12th August, 2021 until payment in full.
 - c. Costs of the suit.
 - d. Any other or further relief that the Honourable Court may deem fit and just to grant.

Clearly the suit arises out of a contract entered into by the parties therein.

2. The brief facts as set out in the Plaint are that vide a Letter of Offer dated August 12, 2020, the 1st Defendant herein, accessed and or secured an invoice discounting loan facility of Kshs 25,000,000/=. The purpose of the said facility was for purposes of financing a contract between the 1st Defendant and Trademark East Africa Limited. The Plaintiff avers that the terms and conditions of the loan



facility provided in the Letter of Offer that the amounts drawn as well as the outstanding loan together with interests and other sums would be repaid within a period of 3 months through a single bullet payment of Kshs 25,987,500. Additionally, it was agreed that the Plaintiff would charge default charge at rate of 13% p.a over and above the interests hereinabove should be 1st Defendant default in repaying the loan facility when it became due. The Plaintiff also avers that on behalf of the 1st Defendant, the 2nd Defendant introduced to the Plaintiff an individual thought to be an official of Trademark East Africa Limited who proceeded to confirm the authenticity of the alleged contract and even issued an irrevocable undertaking to the Plaintiff to channel the contract proceeds through the 1st Defendant account held by the Plaintiff. The 2nd Defendant executed a Deed of Guarantee and Indemnity dated July 30, 2020 guaranteeing to pay the borrowed amount of Kshs 25,000,000/- plus accrued interests upon demand by Plaintiff, thus securing the payment of the loan facility. The Plaintiff avers that it came to learn that the contract documents presented by the Defendants were forgeries and the said Trademark East Africa Company did not have an unsettled invoices owed to the 1st Defendant. The 1st Defendant defaulted in payment as had been agreed, and despite several letters demanding for the loan by the Plaintiff, the Defendants have failed to settle the outstanding debt plus interest and other charges, thereby resulting in the Plaintiff filing this suit.

3. In response thereto, the Defendants filed a defence dated November 5, 2021, denying the Plaintiff's claim in its entirety. And, on a without prejudice basis alleged that the Plaintiff received a commitment from Anar Consulting Limited to be paid any monies that would be outstanding and owing by the Defendants to be Plaintiff and that the Defendants were therefore absolved from liability.
4. The Plaintiff filed a reply to the Defendant's defence dated March 14, 2022, alleging that the Defendants had raised no issue for trial and denied in toto the averments contained in the defence.
5. The matter came up for mention for Case Management on May 16, 2022 and the Court set it down for hearing on July 7, 2022. The Plaintiff's advocate served a hearing Notice to the Defendant's advocate and filed an Affidavit of Service dated May 18, 2022 as evidence of the same.
6. During the above-mentioned hearing, neither the Defendant nor the Defendant's counsel nor any authorized representative attended the hearing despite having been invited by the Plaintiff's counsel.

Evidence

7. Christine Wahomi testified as PW1 and adopted her witness statement as evidence in-chief for the Plaintiff's case. She confirmed that there was a Letter of Offer signed on August 12, 2020 between the Plaintiff and the 1st Defendant and a signed indemnity agreement, executed by the 2nd Defendant on July 30, 2020.
8. The Court notes that the Defendants did not call any witnesses to testify in support of their case, nor did they cross-examine the Plaintiff's witness despite having been served with the hearing Notice. The evidence therefore construed to be the Defendants is that which is averred in their defence, which only denied the contents of the Plaintiff and raised no Counter-claim.

Analysis

9. Having listened to the Plaintiff's case in evidence by PW1, I have also read through the witness statement and bundle of documents dated August 30, 2021 which were respectively adopted and produced as Exhibit P1 to 21.



Thus the issues for determination are:-

- a. Whether there was a valid contract between the Plaintiff and the 1st Defendant.
 - b. Whether there was a duty of care owed to the Plaintiff by the 2nd Defendant.
10. In regard to the first issue on whether or not there was a valid contract between the Plaintiff and 1st Defendant, this Honourable Court relies on Section 3(2) of the [Law of Contract Act](#), which explains that:-
- “No suit shall be brought whereby to charge any person upon any other person, to the intent or purpose that such other person may obtain credit, money... unless such representation or assurance is made in writing, signed by the party to be charged therewith”.
11. The Court has noted that the 1st Defendant accepted a Letter of Offer, which was in writing, from the Plaintiff and went on to sign it thereby entering into a legally binding and enforceable agreement with the Plaintiff.
12. Moreover, the 1st Defendant’s act of bringing forth a guarantor shows his willingness to enter into the loan agreement with the Plaintiff, so as to fulfill the Plaintiff’s terms and conditions of the agreement. Be that as it may, that the guarantor has been accused of fraud, the 1st Defendant still owed the Plaintiff good faith and thus may be said to have had all the intention and willingness to be bound by the terms of the loan agreement. As was observed in the Court of Appeal case of [Pius Kimaiyo Langát –vs- Co-operative Bank of Kenya Limited](#) [2017]eKLR, the words and conduct a party must be considered in construing whether or not there is an agreement between parties.
13. In the case of [Ali Abdi Mohamed –vs- Kenya Shell & Company Limited](#) [2017]eKLR, the Court stated:-
- “To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly”.
- The executed agreement between the parties shows the intention to enter into a binding agreement that is enforceable by law.
14. On the second issue, the 2nd Defendant expressly bound himself to be a guarantor when he executed a Deed of Guarantee and Indemnity dated 30th July, 2020 guaranteeing to pay the loan amount plus interest. In this regard, the 2nd Defendant owes the Plaintiff a duty of care regardless of being accused of fraud. He willingly made himself available and went on to sign the indemnity agreement, thereby putting upon himself the obligation to repay the Plaintiff upon default of the 1st Defendant (as was reiterated in the case of [Monda Matundura –vs- National Bank of Kenya Limited](#) [2018]eKLR).

Conclusion

15. Having considered the Plaintiff’s pleadings, evidence and submissions, the Court notes that a mere defence rendered without calling of witnesses, and or cross-examining that Plaintiff on his evidence, makes the Plaintiff’s case stand unchallenged as was stated in the case of [Autar Singh Babra & Another –vs- Raju Govindji](#), HCCC No.548 of 1998.
16. The Plaintiff has produced the documents to prove that there was a contractual relationship between the Defendants and the Plaintiff, which contract the Defendants breached. In light of this, the Defendants ought to pay the Plaintiff and compensate the damage it has been caused by the said breach.



17. The Court hereby finds the Defendants 100% jointly and severally liable for breach of contract and proceeds to enter Judgment against the Defendants in terms of the prayers contained in the Plaint dated August 30, 2020 as follows:-

- a. The Defendants to jointly pay a sum of Kshs 26,131,250.39.
- b. Interest on the sum ordered in (a) from 12th August, 2021 until payment in full.
- c. Costs of the suit.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 16TH DAY OF MAY , 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for and by either party

Court Assistant - Martin

