



Mimos Consortium Limited v HFC Limited (Formerly Housing Finance Company of Kenya Limited); Quintech Construction Limited (Interested Party); HFC Limited (Plaintiff to the Counterclaim); Quintech Construction Limited & 3 others (Defendant to the Counterclaim) (Commercial Case 208 of 2016) [2024] KEHC 14560 (KLR) (Commercial and Tax) (19 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14560 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 208 OF 2016
PM MULWA, J
NOVEMBER 19, 2024**

BETWEEN

MIMOS CONSORTIUM LIMITED PLAINTIFF

AND

HFC LIMITED (FORMERLY HOUSING FINANCE COMPANY OF KENYA LIMITED) DEFENDANT

AND

QUINTECH CONSTRUCTION LIMITED INTERESTED PARTY

AND

HFC LIMITED PLAINTIFF TO THE COUNTERCLAIM

AND

QUINTECH CONSTRUCTION LIMITED DEFENDANT TO THE COUNTERCLAIM

JOTHAM GITONGA KURIA DEFENDANT TO THE COUNTERCLAIM

RACHAEL WAIRIMU MACHARIA . DEFENDANT TO THE COUNTERCLAIM

MIMOS CONSTRUCTION LIMITED DEFENDANT TO THE COUNTERCLAIM



JUDGMENT

1. Through a plaint dated 10th May 2016, subsequently amended on 24th August 2016, the Plaintiff, Mimos Construction Limited (Mimos) seeks entry of judgment against the defendant, HFC Limited (HFC), for:
 - a. A declaration that the Defendant's action to hold on to the original Title for Plot No. Thika Municipality Block 8/183 is unlawful.
 - b. A declaration that the Defendant's action to freeze the Plaintiff's Bank A/c No. CA 704-0XXXX44 at the Defendant's Thika Branch is unlawful.
 - c. An order of permanent injunction restraining the Defendant whether by itself, agent, servant and/ or officer from interfering with the Plaintiff's use of original Title document for Plot No. Thika Municipality Block 8/183.
 - d. An order of permanent injunction restraining the Defendant whether by itself, agent, servant and/ or officer from curtailing, preventing and/ or interfering with the Plaintiff's access to Bank A/c No. CA 704-0XXXX44.
 - e. The sum of Kshs. 112,421,941.95.
 - f. Costs of this suit.
 - g. Interest on (e) above at court's rate.
 - h. Any other relief this Honourable court may deem fit to grant.

Background

2. Mimos is the registered proprietor of all that property known as Title No. Thika Municipality Block 8/183 (the suit property). In September 2013, it sought Kshs. 160,000,000.00 from HFC for purposes of constructing 42 apartments on the suit property. HFC accepted the request through a letter of offer dated 20th September 2013 which set out the conditions for the loan, as follows:
 - a. Loan tenure: 24 months
 - b. Charge over Title Plot No. Thika Mun/Block/8/183 Thika.
 - c. Sponsor's equity: Injection of Kshs. 41M into the projectKshs. 25M upfront and balance to be evidenced as works on site and sundry costs prior to disbursement.
3. Mimos could not meet the condition on Sponsor's equity despite handing over the original title for the suit property. HFC proceeded with charging the suit property for Kshs. 160,000,000.00 but no drawdown was made due to Mimos's inability to inject Kshs. 41,000,000.00 into the project.
4. Mimos requested HFC to discharge the charge and release the original title deed to no avail. It later discovered that HFC was held the title on the basis of a purported loan of Kshs. 25,000,000.00 advanced to the interested party, Quintech Construction Limited, (Quintech), the 1st Defendant in the Counterclaim.



5. Mimos denied being a party to any arrangement between the HFC and Quintech that would justify the holding of the title. It claimed that due to the holding of the title, it has been unable to get financing from another institution thus frustrating the intended construction. HFC proceeded to freeze its Bank A/c No. CA 704-0XXXX44. According to it, HFC's actions were illegal and unjustified.

Defence and Counterclaim

6. In response, HFC filed a Defence and Counterclaim dated 20th September 2016. It denied Mimos's claim. However, it admitted that Mimos sought but failed to take up the facilities. It claimed that the security sought to be discharged was pledged, among others, to secure advances made to Quintech, also secured by guarantees executed by its directors, the 2nd and 3rd defendants in the Counterclaim. It pointed out that this was a live issue for determination in HCCC 255 of 2015. It put Mimos to strict proof of its claim.
7. In the Counterclaim, HFC averred that on 11th January 2014, Costech Consortium Limited (Costech) appointed Mimos as the project managers of the proposed Mimos Apartments to be constructed on the suit property. It accepted Quintech's bid to construct Mimos Apartments at a cost of Kshs. 150,544,144.00.
8. On 13th March 2014, HFC granted Quintech a short-term facility of Kshs. 25,000,000.00 to be used for working capital requirements. The facility was to be repaid in 8 consecutive instalments by debiting Quintech's account with Kshs. 3,335,088.00.
9. The key provisions of the facility letter were that:
 - a. Clause 4(b) – the Term Loan facility should be paid by debit from the Borrower's account in eight (8) consecutive monthly instalments of approximately Kshs. 3,335,088/- each inclusive of interest and other charges set out herein.
 - b. Clause 5(a) Interest on the short-term loan shall be paid at the Bank's Base Rate (currently at 14% p.a.) plus 3%.
 - c. Clause 9 The facility shall be secured by the following security to be provided:-
 - i. Personal Guarantee from the directors of Quintech Construction Limited;
 - ii. Irrevocable undertaking from Mimos Consortium Limited that they will pay the amount of approximately Kshs. 3,335,088/- monthly or as advised by Housing Finance directly to the loan account of Quintech Construction Limited to clear the loan instalment.
10. The securities were issued and included an irrevocable undertaking by Mimos to service the short-term loan facility at Kshs. 3,335,088.00 by way of 8 monthly instalments. HFC relied on the undertaking by Mimos to advance the facility. In breach, Quintech and Mimos failed to observe the payment obligations and the outstanding loan amount was at Kshs. 33,092,552.64 as at 11th January 2016.
11. HFC sought:
 - a. Dismissal of the original action.
 - b. Judgment in the action by counterclaim against the defendants in the counterclaim, jointly and severally for Kshs. 33,092,552.64; together with interest at the contract rate (14% plus 3%) as from 21st January 2016;



- c. A declaration that as long as the aforesaid amount has not been paid, the Defendant in the Counterclaim has a lawful lien over the security it has for the property known as Thika Municipality Block 8/183.
- d. Costs of this suit and interest thereon at court rates.

Reply to Defence and Defence to Counterclaim by Mimos

12. Mimos filed a reply to defence and a defence to counterclaim dated 28th February 2019, denying the Counterclaim and asserting that it was not privy to the Kshs. 25,000,000.00 loan agreement between HFC and Quintech. It also denied issuing the irrevocable undertaking to service the short-term loan facility. It contended that the obligation to pay squarely lie with Quintech. It further asserted that it did not issue the Title for the suit property to secure the loan advanced to Quintech.

Defence to Counterclaim by Quintech and its directors

13. The 1st – 3rd Defendants in the Counterclaim filed a Statement of Defence to the Counterclaim dated 18th July 2019, amended on 8th June 2021. They denied the Counterclaim. Their case is that the loan facility was to be used for working capital for the erection of 26 four-bedroomed apartments and 16 two-bedroomed apartments which formed the basis for the facility. Mimos undertook to pay the loan through an irrevocable and unconditional undertaking which it duly acknowledged and accepted. In breach, Mimos refused, failed and or neglected to pay the loan, causing Quintech to default.
14. The 1st – 3rd Defendants asserted that they have been wrongly sued they were not in any way liable to pay the loan as the loan facility letter provided that Mimos was to pay.
15. Quintech instituted HCCC 255 of 2015 against Mimos in a bid to recover the amount due to HFC. The issues raised in this suit are live for determination in HCCC 255 of 2015 and are thus sub judice and should be stayed pending the determination of the former suit. Also, the issues raised in the instant suit have been the subject of arbitration and an Arbitral Award issued in favour of Quintech as against Mimos.
16. The 1st – 3rd Defendants prayed that HFC's suit against them be dismissed and that the costs be awarded to them. In the alternative, that the suit be stayed pending hearing and determination of HCCC 255 of 2015.

Evidence

17. The hearing proceeded before Hon. Mativo J. (as he then was). Mimos called its director, Charity Wairimu Mungai (Ms. Mungai) as PW1. She adopted her witness statement dated 29th May 2016, reflective of the Plaint, as her evidence. She also produced the lists and bundles of documents by Mimos dated 10th May 2016, 28th November 2019, 3rd December 2019 and 29th January 2021, which were marked as exhibits.
18. Ms. Mungai denied guaranteeing the loan that was advanced to Quintech. She indicated that she learned of the Kshs. 25,000,000 advanced to Quintech after the filing of this suit. She claimed that she saw the undertaking dated 20th March 2019 signed by the project manager for the first time in December 2020. She stated that the undertaking, which is unclear in scope, was drafted by the quantity surveyor- the project manager who had no authority from Mimos to issue it as the contract was clear on his scope; he was not among the board members. She claimed that she only saw the letter of offer dated 13th March 2014 after it was filed by HFC. As a result of HFC's actions, Mimos was sued by several purchasers.



19. Upon cross examination, Ms. Mungai confirmed that she was familiar with the charge document, understood its contents and agreed to be bound by it. She admitted to having agreed to pay the money over the charge but maintained that she did not agree that the charge would stand as security for any other funding.
20. Ms. Mungai admitted that HFC had earlier communicated to Mimos which confirmed that they were authorizing the quantity surveyor to sign the loan. She admitted that the surety or security which she had provided to the bank was for Kshs. 160,000,000.00. In the same breath, she claimed that she did not know what a surety meant.
21. Ms. Mungai also confirmed that the construction work began in July 2014 and that the contractor paid for the materials not Mimos. She further confirmed that by the time the materials were brought to the site, the money had been released by HFC. She admitted that Mimos was supposed to effect payment through the Escrow Account upon signing the certificate. HFC had opened the Escrow Account as per the contract and construction money was in the account.
22. Mimos also called Jackson Wachira Waihenya (Mr. Waihenya), a consultant quantity surveyor with 35 years' experience as PW2. He produced the report at pages 57 to 123. He testified that his company conducted a valuation of the project work done. He also stated that most of the work done had been affected by the weather. He valued the work done at Kshs. 35,989,586.00.
23. Upon cross examination, Mr. Waihenya acknowledged that there were arbitral proceedings concerning the payments due to Quintech for the project work done and that the arbitrator awarded the contractor Kshs. 45,720,680.00.
24. Mr. Waihenya admitted that he participated in the arbitration as an expert witness for Mimos. He confirmed that he attributed the responsibility for losses that he determined in his analysis to the negligence of Quintech and HFC and that HFC bore a greater percentage, even though HFC was not a party. However, he could not confirm the arbitrator's findings in this regard. He also admitted that he did not read the contract between HFC and Mimos and the undertaking by Mimos.
25. HFC called its manager, Floyd Mathias Mutahi (Mr. Mutahi) as DW1. He adopted his witness statement dated 4th December 2019 as his evidence. He also produced HFC's bundle of documents date 3rd December 2019. He indicated that the charge over the suit property has not been discharged and that the discharge of charge was released erroneously to the Advocates. He also indicated that the charge covered obligations to third parties. Quintech's relationship with HFC began after the application for a facility to be advanced by the developer as expected to be funded to start the project.
26. Upon cross-examination Mr. Mutahi maintained that the Title was erroneously released but stated that when the Title was released on 16th June 2016 it was on condition that if the debt was not paid it would be retained. However, he admitted that there was no condition in a letter signed by Belinda Nganga where the plaintiff's advocates were being advised to prepare a discharge. Even though he confirmed that there was a letter dated 27th June 2016 forwarding the amended discharge of charge, he could not confirm that a discharge was released.
27. As regards the offer letter issued to Quintech, Mr. Mutahi admitted that there was no evidence of a loan application by Quintech. He stated that an undertaking was required and that although an undertaking must be executed by the directors, they could nominate those who could sign on their behalf.
28. Quintech called Engineer Jotham Mwangi Kiarie as its witness. He stated that Quintech was awarded the contract for the construction of the Mimos Apartments Thika. The contract dated 3rd February



2014 was signed by him on behalf of Quintech and Wairimu Mungai for Mimos and witnessed by Guthuku Morris, the project manager. He indicated that the cost of the project was 150,544,144.00. As agreed with Mimos, Quintech apply to HFC for the Kshs. 25,000,000.00 needed to start the project and HFC issued it with an offer letter. In the offer letter, one of the requirements was an irrevocable guarantee from Mimos.

29. Mr. Kiarie revealed that the letter of irrevocable undertaking was drafted by the project manager, Morris Githuku, and he delivered it to Wairimu Mungai who signed it. He then returned it to HFC which subsequently disbursed the loan to Quintech's account. He utilized the money to kick-start the project and Mimos and HFC were issued with the certificate.
30. Mr. Kiarie stated that Quintech was not paid due to a disagreement between Mimos and HFC. Due to the non-payment, Quintech filed HCCC 255 of 2015 against Mimos seeking the recovery of the amount due. The matter was referred to arbitration which was concluded by a final award dated 31st July 2018. The award has since been adopted by the Court. However, Quintech has not been paid any amount to date.
31. Upon cross-examination, Mr. Kiarie confirmed that he agreed to be bound by the letter of offer dated 13th March 2014; that the loan was disbursed to Quintech; that the 2nd and 3rd Defendants guaranteed the loan repayment; that the loan has not been repaid and that there is no clause exempting Quintech from paying.
32. Mr. Kiarie also confirmed that he had no documents such as a forwarding letter to show that he delivered the undertaking to HFC; that the letter of irrevocable undertaking dated 20th March 2014 was signed by the project manager, Morris Githuku; that the letter of undertaking by Mimos to HFC's manager was signed by Mimos's directors. He further confirmed that the statements of account produced by HFC were for Quintech. He denied that Mimos was to pay if Quintech did not pay.

Submissions

33. Mimos filed written submissions and a list and bundle of authorities both dated 4th February 2022. HFC filed written submissions dated 21st June 2022. The interested party and the 1st - 3rd Defendants in the counterclaim filed written submissions dated 21st March 2022.

Analysis and Determination

34. I have considered the pleadings, the evidence, the submissions and authorities. The issues for determination are whether the matter is sub judice; whether Mimos and HFC have proved their respective claims and whether they are entitled to the orders sought.

Whether the matter is Sub Judice

35. On the first issue, Quintech asserted that the issues raised in this suit are live for determination in HCCC 255 of 2015 and are thus sub judice and should be stayed pending the determination of the former suit. It also asserted that the issues raised in the instant suit have been the subject of arbitration and an Arbitral Award issued in favour of Quintech as against Mimos.
36. Quintech produced an arbitral award dated 31st July 2018 in respect of an arbitration instituted by it against Mimos seeking payment of Kshs. 59,128,171.00 for work done for the construction of the apartments on the suit property and interest charged by HFC of Kshs. 9,607,086.32. The Arbitrator, Mr. Emmanuel O. Odhiambo found that Quintech was entitled to Kshs. 45,720,681.50 (being the value of work done of Kshs. 28,705,549.21 and interest on unpaid work done of Kshs. 17,015,132.50).



However, he found that the issue on interest charged by HFC on the loan to Quintech was before the Court and beyond jurisdiction of the arbitration.

37. During trial, Quintech's witness confirmed that HCCC 255 of 2015 was referred to arbitration and that the arbitral award has since been adopted by the Court.

38. Therefore, the plea of res sub judice does not lie.

Whether Mimos and HFC have proved their respective claims and whether they are entitled to the orders sought

39. It is not disputed that Mimos is the registered proprietor of the suit property; that Mimos approached HFC for a loan facility of Kshs. 160,000,000/- for purposes of constructing 42 apartments on the suit property; that the suit property was charged to secure a loan of Kshs. 160,000,000.00; that the loan was never disbursed to Mimos; that HFC released part of the completion documents to Mimos's Advocates on 16th June 2016 other than the discharge document.

40. It is also not disputed that Mimos engaged Quintech to construct the apartments; that Quintech issued a certificate of payment for the work done; that a dispute arose over payment of the certificate issued by the interested party; that the dispute was referred to arbitration pursuant to orders issued in HCCC No. 255 of 2015: Quintech Construction Company Limited v Mimos Consortium Limited and finally resolved by the Arbitral Tribunal on 31st July 2018 in favour of Quintech.

41. The contested issue is whether Mimos guaranteed the loan by HFC to Quintech through an irrevocable undertaking and whether HFC is entitled to continue holding security over the suit property.

Was Mimos a surety for Quintech's Debt?

42. Mimos submitted that it is not liable to pay for the Kshs. 25,000,000 loan advanced to Quintech, claiming that it was not privy to the loan transaction. It denied that it authorized Mr. Morris Githuku to sign the undertaking. It claimed that if it were to be bound, the same ought to have been signed by its directors or a duly authorized officer as confirmed by Mr. Mutahi. It pointed out that the impugned irrevocable undertaking was not signed by its directors nor was it shown that the project manager, Mr. Morris Githuku was given the power of attorney to sign on its behalf. It also submitted that from the wording of the undertaking, the project manager gave the undertaking in his own capacity, not capable of binding it.

43. HFC relied on the Rule in Turquand's case as applied in Bougainville Estate Limited v Kenya Deposit Insurance Corporation (sued in their capacity as Receiver Managers of Imperial Bank Limited (In Receivership) & 3 others [2017] eKLR to argue that Mimos is bound by the letter of undertaking signed by the project manager who had the ostensible or apparent authority, even though the Board of Directors has not endowed him with actual authority. Both HFC and Quintech highlighted that Mimos has not complained against the project manager, sued him or reported him to the police for acting without authority.

44. In a civil claim, the standard of proof is that of on a balance of probabilities. That is, the claimant must persuade the court that his claim is more probable.



45. Sections 107 to 110 of the *Evidence Act* provide as follows:-

“Section 107. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts

- (1) exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
110. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.”

46. In this case, Mimos denied that the project manager had the authority to sign the irrevocable undertaking through which it undertook to pay the loan granted to Quintech. However, from the record, HFC produced a letter of award of contract for the construction of the proposed Mimos Apartments Thika issued by Costech Consortium Ltd to Quintech. I note that the letter is signed by Githuku Morris for Costech Consortium, the Project Managers and authorised by Wairimu Mungai, Mimos’s Director.
47. HFC also produced the irrevocable undertaking dated 20th March 2014. It also produced the board resolution adopted on 5th February 2014 and signed by Mimos Director Wairimu Mungai and its project manager Morris Githuku. I note that the undertaking was signed by Morris Githuku, the project manager for Mimos. I also note that annexed to the undertaking, was another undertaking signed by the Plaintiff’s director, to HFC’s Manager.
48. Other than a mere denial, Mimos did not controvert the evidence produced by HFC. Mimos also did not contest the letter of undertaking to HFC’s manager, annexed to the irrevocable undertaking dated 20th March 2014, signed by its directors issued on its letterhead. Mimos further did not contest the board resolution adopted on 5th February 2014 and signed by Mimos Director Wairimu Mungai and its project manager Morris Githuku, also on its letterhead.
49. Mimos argued that the contract revised on 13th July 2013 and executed between Mimos and Quintech does not give the Project Manager authority to make any financial commitment on its behalf.
50. Still, the record confirms that Mr. Morris Githuku was the project manager for Mimos. The record also confirms that Mr. Githuku witnessed the letter of award of contract to Quintech on behalf of Mimos. Therefore, he was not a stranger nor was there any evidence that Mimos had either complained, reported him to the police or filed any civil action against him for his actions.
51. According to the Rule in *Truquand’s* case any third party may enforce a contract against a company if the obligations arising there under were assumed by the company or an officer thereof with ostensible



authority. This was captured by the Court, in *Elgon Road Development Co Limited v Centre for Development Consult Limited* [2017] eKLR, as follows:

“ 8. The position under *Turquand’s* rule is that under the Law of Contract, any third party may enforce a contract against a company if the obligations arising there under were assumed by the company or an officer thereof with ostensible authority. In the dispute before this court, one Daiga Muriithi, Chief liaison officer of the appellant met with the respondent’s director, discussed and agreed on the terms set out in the letter dated 11th March 2008. The learned Resident Magistrate has explained in detail how she invoked the doctrine enunciated in *Turquand’s* case. In common law, the law provides that a person dealing with a company, assuming that he or she is acting in good faith and without knowledge of any irregularity need not inquire about the formalities involving the internal proceedings of the company. It would appear, the chief liaison officer was acting as an agent of the appellant and thus his actions as an agent binds the principal. The act of viewing the premises and agreeing to accept the offer made by the respondent resulted in the respondent’s representative acting in good faith. I find that *Turquand’s* rule applies to this case, therefore the learned Resident Magistrate’s decision cannot be faulted. I find and hold that the appellant was therefore bound by the agreement whether or not the directors later on did not like the premises.”

52. Accordingly, I find that the Rule in *Turquand’s* case applies in this case and that Mimos is bound by the irrevocable undertaking dated 20th March 2014.

53. Quintech submitted and, from my reading, I agree, that by the irrevocable undertaking dated 20th March 2014, Mimos became a surety, responsible for payment of the loan on behalf of Quintech. The terms of the undertaking were that if the offer was actualized and money disbursed to CA 704 -00XXX66, Mimos undertook to make the payment of 3,335,088.00 in eight subsequent payments.

54. On the whole, I find that Mimos has not proven its claim to the required standard. Its case is dismissed with costs. I find that HFC has proved its counterclaim to the required standard. I order that judgment is entered for HFC against Mimos, Quintech and the 2nd and 3rd Defendants in the counterclaim jointly and severally for:

- a. Kshs. 33,092,552.64; together with interest at the contract rate (14% plus 3%) as from 21st January 2016.
- b. A declaration that as long as the aforesaid amount has not been paid, HFC has a lawful lien over the security it has for the property known as Thika Municipality Block 8/183.
- c. Costs of this suit and interest thereon at court rates.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF NOVEMBER 2024.

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P. MULWA

JUDGE

In the presence of:



Mr. Oduyo for plaintiff

Ms. Mutisya h/b for Ogude for defendant

Court Assistant: Carlos

