



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CIVIL SUIT NUMBER 6 OF 2019**

ASHA HERSI.....1<sup>ST</sup> PLAINTIFF

MILSTONE CONTRACTORS LIMITED.....2<sup>ND</sup> PLAINTIFF

VERSUS

ECO BANK KENYA LIMITED.....1<sup>ST</sup> DEFENDANT

COUNTY GOVERNMENT OF TRANS NZOIA.....2<sup>ND</sup> DEFENDANT

VALLEY AUCTIONEERS.....3<sup>RD</sup> DEFENDANT

**JUDGEMENT**

This suit between the parties was originally filed as Bungoma ELC 153/2016. The matter proceeded for hearing before Mukunya J (now deceased) but did not deliver the judgment. By order dated 8.4.2019, by consent of the parties Olao J transferred the file to this court for hearing and determination.

The suit transferred was registered as HCC 6/2019 and started de novo.

The plaintiff claims as per the plaint amended on 8.10.2019 against the defendant is captured in Para 9 of the Plaint as:

*1. On or about 23<sup>rd</sup> May 2014, the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant and the 2<sup>nd</sup> plaintiff company entered into a tripartite assignment/domiciliation agreement whereby the 2<sup>nd</sup> plaintiff agreed that the 1<sup>st</sup> defendant to hold, retain and have a lien upon all proceeds or receivables due to the 2<sup>nd</sup> plaintiff from the 2<sup>nd</sup> defendant under tender number CGTN/Q/335/2013-2014 for road maintenance of MATUMBEI WARD. The 2<sup>nd</sup> Plaintiff further authorized the 1<sup>st</sup> defendant to apply without further notice all or any part of such monies in satisfaction of such liabilities that were to arise as a result of the said loan plus any interest, bank charges and commissions that may have accrued. That further under the same agreement the 2<sup>nd</sup> defendant irrevocably undertook to make all payments due to the 2<sup>nd</sup> plaintiff under the above tender into account number 0180015023836201 at ECOBANK LIMITED in the joint names of the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant.*

*2. That pursuant to the loan agreement between the 2<sup>nd</sup> plaintiff and the 1<sup>st</sup> defendant, the 1<sup>st</sup> plaintiff then offered land parcel number EAST BUKUSU/SOUTH KANDUYI.2952 as security for the loan and eventually on 14<sup>th</sup> August 2014 a loan of Kshs 30,000,000/- was advanced to the 2<sup>nd</sup> plaintiff by the 1<sup>st</sup> defendant.*

*3. The plaintiffs aver that despite the clear terms of the tripartite agreement that was entered into by the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant and the 2<sup>nd</sup> plaintiff, the 2<sup>nd</sup> defendant reneged the terms thereof and failed to make payments due to the 2<sup>nd</sup> plaintiff under the said tender into account number 0180015023836201 in the joint names of the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant in satisfaction of the loan plus any interest, bank charges and commissions the 2<sup>nd</sup> plaintiff having completed he works as per the tender.*

*4. The plaintiffs further aver that the 1<sup>st</sup> defendant also despite being aware that payments in satisfaction of the above loan issued to the 2<sup>nd</sup> plaintiff were to be channeled through their joint account aforesaid has instructed the 3<sup>rd</sup> defendant to advertise the suit title an act that is illegal, unlawful and contrary to the domiciliation agreement.*

The Plaintiff therefore prays for the following orders:

**a) A permanent injunction against the 1<sup>st</sup> and 3<sup>rd</sup> defendants, restraining them, their servants, agents, assigns and or whosoever claiming through them from selling, transferring, alienating or in any of the manner dealing with the parcel of land known as EAST BUKUSU/SOUTH KANDUYI.2952.**

**b) An order compelling the 2<sup>nd</sup> defendant to honour the terms of the assignment/domiciliation agreement dated 23<sup>rd</sup> May 2014. Alternatively pay to the plaintiffs kshs 33,000,000.**

**c) General damages against the 1<sup>st</sup> and 2<sup>nd</sup> defendants for breach of the assignment/domiciliation agreement dated 23<sup>rd</sup> May 2014.**

The Plaintiff Asha Hersi Moghe gave her evidence. She adopted her witness statement dated 15.12.2016 as her evidence in chief. She testified that she is a co-director of Milestone Contractors 2<sup>nd</sup> Plaintiff together with Ahmed Adm Ali. She testified that she the 2<sup>nd</sup> Plaintiff was awarded a tender for road maintenance of roads in Matumbei ward Tender NO. CGTN/Q/335/2013-2014. She approached ECO-BANK the 1<sup>st</sup> defendant for financing. The 1<sup>st</sup> defendant approved the facility of Kshs 30,000,000. She further stated **“that on 23<sup>rd</sup> May 2014, Ecobank Kenya Limited, County Government of Trans Nzoia and the Milestone Contractors Limited entered into a tripartite assignment/domiciliation agreement where by the County Government of Trans Nzoia agreed that Ecobank Kenya Limited to hold, retain and have a lien upon all proceeds or receivables due to Milestone Contractors Limited from the County Government of Trans Nzoia under tender number CGTN/Q/335/2013-2014 for road maintenance of MATUMBEI WARD.**

**That Milestone Contractors Limited further authorized Ecobank Kenya Limited to apply without further notice all or any part of such monies in satisfaction of such liabilities that were to arise as a result of the said loan plus any interest, bank charges and commissions that may have accrued. That further under the same agreement the county government of Trans Nzoia irrevocably undertook to make all payments due to the milestone contractors limited under the above tender into account number 018001502386201 at ECOBANK LIMITED in the joint names of the Ecobank Kenya Limited and the County Government of Trans Nzoia.**

**That pursuant to the loan agreement between Milestone Contractors Limited and Eco bank Kenya Limited, I then offered land parcel number East Bukusu/South Kanduyi/2952 as security for the loan and eventually on 14<sup>th</sup> August 2014 a loan of Kshs 30,000,000/- was advanced to milestone contractors limited by Ecobank Kenya Limited.**

**That despite the clear terms of the tripartite agreement that was entered into by Ecobank Kenya Limited, the county government of Trans Nzoia and milestone contractors limited, the county government of Trans Nzoia reneged the terms thereof and failed to make payments due to Milestone Contractors Limited under the said tender into account number 018001502386201 in the joint names of the Ecobank Kenya Limited and the county government of Trans Nzoia in satisfaction of the loan plus any interest, bank charges and commissions, Milestone contractors Limited having completed the works as per the tender.”**

Upon cross examination by M/s Ratemo for the 1<sup>st</sup> and 3<sup>rd</sup> defendant the witness admitted to have signed the letter of offer and clause 13A dealt with steps to be taken by the 1<sup>st</sup> defendant in event of default. She confirmed too that she has not repaid the loan.

On being cross examined by counsel for 2<sup>nd</sup> defendant, she testified that she was awarded the tender which she accepted by letter of acceptance dated 17.4.2014.

She was then issued with LSO dated 8.4.2014 for Kshs 33,000,000 for road maintenance in Matumbei ward. She signed the contract; and was shown the site. She performed the contract and a completion certificates dated 10.4.2014. She raised an invoice for the same. She testified that a domiciliation agreement between Eco-bank and County Government of Trans nzoia was to be effected after completion. The domiciliation agreement was between herself, Eco bank and County Government of Transzoia and that payment by 2<sup>nd</sup> defendant was to be channeled to an account in the joint names of Eco-bank and County Government of Trans Nzoia.

The 1<sup>st</sup> defendant Eco-Bank Ltd called DW1 Trevor Otieno Omondi the officer in charge credit Department Busia Branch. He adopted his witness statement dated 4<sup>th</sup> May 2017 as his evidence in chief. He testified that the Plaintiff sought financial accommodation from the 1<sup>st</sup> defendant Eco- Bank. The 1<sup>st</sup> defendant agreed and made offer by letter dated 12.6.2014 offering the sum of Kshs 23,000,000. The same was secured by a charge over title E. BUKUSU/S.KANDUYI/2951. The purpose of the facility was to finance the contract NO. CGTN/Q/2013-2014. The sums were disbursed. He further stated that without prejudice to the Bank’s aforesaid right to make demand at any time, it was agreed that the principal sum disbursed under the contract was to be repaid from the contract proceeds remitted to the 2<sup>nd</sup> plaintiffs account within 180 days from the date of disbursement as per assignment agreements however interest was to be serviced monthly.

He further testified that the plaintiff was in default and despite indulgence the same was not paid therefore rendering the process of recovery necessary. He confirmed that there was a domiciliation agreement signed by 3 parties. On cross examination he explained that the purpose of the agreement is for the proceeds to be paid to an account for the bank to collect their funds. The account was opened in the Joint names of Eco-bank and county Government of Trans Nzoia. He confirmed that no money has been deposited in the account by county Government of Transzoia the 2<sup>nd</sup> defendant.

The 2<sup>nd</sup> defendant county Government of Trans Nzoia called DW2 Eng. Philip Wanjala Wasike the Chief Officer Infrastructure Development in the County Government of Trans Nzoia. He adopted his witness statement dated 27.9.2017 as evidence in chief. He explained in detail the process of awarding a contract under his department. He explained the process as hereunder.

***“ The process is initiated by the department in this case it was Eng. Wasike. The request is approved and forwarded to Finance Department. If it is confirmed that there is finance, it is forwarded to Supply Chain Department. When an award is issued the contractor will accept the award. He will then be issued with a local service order. After 14 days they must sign an agreement. The Chief Officer is the accounting officer of the Department in this case Transport and Infrastructure Department.”***

He testified that all these steps were not followed by the plaintiff; that the alleged LSO issued to the Plaintiff is invalid as availability of funds was not confirmed and that the alleged LSO was not issued by the 2<sup>nd</sup> defendant from their records. He further testified that there was no letter of handing over of the site nor minutes of the same. He testified that the site was never handed back to the 2<sup>nd</sup> defendant and that this completion certificate given to the plaintiff were not authentic because they do not bear his signature. Finally, he testified that the tender at hand is disputed by the 2<sup>nd</sup> defendant in that in the year 2015, it was deliberated upon by the Public Accounts and Investment Committee which revealed that Roads in Matumbei ward were claimed by various contractors. Further, the roads claimed by the plaintiff were classified as roads without LSOs and therefore there is need for strict proof by the plaintiffs that they indeed carried out the works and to what extent.

On being cross examined by Ocharo for 1<sup>st</sup> and 3<sup>rd</sup> defendant he confirmed that there was an agreement between Eco-bank and County Government of Tans Nzoia but signed by Jamia Wanusi and Mbathi Christopher on behalf of the 2<sup>nd</sup> defendant but he denies knowing them. He however admits such a document as it related to loans would be signed by the Treasury Department of the County Government.

On being cross-examined by Mr. Bwonchiri for the plaintiff testified that in the 2013-2014 Financial year he was the chief officer in the department of Roads and Infrastructure. He agreed that it is procurement Department which issues tender document and that the agreement has a tender number. He stated that the tender was among those audited and the report indicated that it had no LSO. He however did not have the report.

The 2<sup>nd</sup> defendant called DW3 Elyah Wakongora Ndubula who adopted his witness statement dated 27.7.2017 as his evidence in chief. He testified that he is the acting Director of procurement of the 2<sup>nd</sup> Defendant County Government of Trans Nzoia. He explained the process of procurement of goods and services. He testified in this case there is no record of any request for maintenance of roads in Matumbei ward, no tenders were advertised in National Newspaper, no local service orders duly signed and that the LSO produced is not valid as no funds were confirmed to be available. He said the said contract claimed by the plaintiff was subject to deliberation of the public accounts and investment committee which found there were no LSO's to support them.

On being cross examined by Mr. Ocharo for the 1<sup>st</sup> and 3<sup>rd</sup> defendant, the witness admits he was not in that office in 2014 when the contract was signed. He stated that an LSO is a commitment and is valid when it has been committed. He had not seen the completion certificate as the same is issued by the chief officer. He stated the LSO produced is not signed and he does not know who Jamia Kwanusi is. At the conclusion of the evidence, each party filed written submissions. Mr. Bwonchiri for the plaintiff submitted that it is in dispute that the plaintiff was issued with a tender contract NO. CGTN/Q/355/2013-2014 for Kshs 33,000,000. Counsel submits that the plaintiff completed the assigned work and completion certificate issued. He submits that having completed the work, the 2<sup>nd</sup> defendant should be compelled to pay the sum and same be handled as per the domiciliation agreement dated 23.5.2014 or alternatively pay the sum to the plaintiff.

He submits that the allegations of fraud mentioned by the 2<sup>nd</sup> defendant should not be entertained as no particulars were stated in the 2<sup>nd</sup> defendants defence nor any evidence to the same adduced in court. He referred this court to the decision in **NBI anti-corruption and Economic Crimes Civil Suit No. 6/2018 EACC-VS- Catherine Nkirote & Another (2020) eKLR.**

On the issue of the agreement between 2<sup>nd</sup> Plaintiff and 1<sup>st</sup> defendant Eco-Bank, counsel submitted that the assignment/domiciliation agreement binds the parties who signed it and that the duty to settle the loan advanced to the 2<sup>nd</sup> plaintiff by the 1<sup>st</sup> defendant shifted to the 2<sup>nd</sup> defendant. This therefore shows that the act of advertising for sale the 1<sup>st</sup> plaintiff's property offered as security is unlawful and an order of permanent injunction should issued. Finally counsel submitted that the plaintiff have proved their case against the defendant and should be granted the prayers sought.

Mr. Ocharo for 1<sup>st</sup> and 3<sup>rd</sup> defendant submits that at all material times the Plaintiff was a customer of the 1<sup>st</sup> defendant Eco-Bank. It is not disputed that the plaintiff sought financial accommodation for Kshs 23,00,000. She signed the letter of officer. Clause 3 of the letter of offer specified that payment shall be due and payable within 180 days or at anytime on demand; it also provided for recovery process in the event of default.

On the issue of Domiciliation/Assignment agreement signed by the parties, counsel submitted the agreement was only an undertaking by the County Government of Trans Nzoia (2<sup>nd</sup> defendant) that all proceeds of the contract will be remitted to the borrowers account. This agreement was therefore further security for the financial facility extended and did not relieve the plaintiff of the obligation to pay nor transfer the same to the 2<sup>nd</sup> defendant. Counsel referred this court to the Nigerian decision in **Supreme Court of Nigeria SC 332/209 Julius Bunger Nigeria PLC & Another –v-s Toki Rainbow Community Bank Ltd.**

Mr. Wangila for the 2<sup>nd</sup> defendant submitted that the plaintiff claim against the 2<sup>nd</sup> defendant is premised on a tender awarded by the 2<sup>nd</sup> defendant. Counsel submits that the plaintiff relied on an award by a letter purportedly issued by JT Muhindi. He submitted that the plaintiff did not exhibit the advert for invitation and the tender documents they submitted which are mandatory before a letter of award is made. He submitted that as the 2<sup>nd</sup> defendant did not advertise the tender, did not prepare tender documents, did not issue tender documents to bidders including the plaintiff, no bids were submitted, no tendering and evaluation committee constituted and there was no award by the tender committee, and award signed by an accounting officer, the purported award was invalid. Counsel submitted that the award of tenders is governed by the Public Procurement and Disposal Act 2005 and Regulation made in 2008. He referred this court to the decision in **Narok County Government –vs- Prime Tech Engineers Ltd 2017 eKLR** in support of his submission.

On the Domiciliation/Assignment agreement dated 23.5.2014 counsel submits that 2<sup>nd</sup> defendant did not sign the agreement as there was no contract to form the basis of the agreement. He submits that the person who allegedly signed Mr. Jumia Kwanusu and Mbatia Christopher were not employees of the 2<sup>nd</sup> defendant nor did they have such authority and therefore strangers to the 2<sup>nd</sup> defendant. He submitted that this was the finding of the Ad hoc committee and therefore the 2<sup>nd</sup> defendant is not bound by the domiciliation/assignment agreement.

From the Pleadings, the evidence and submissions the issues that commend themselves for determination as between the plaintiff and the 2<sup>nd</sup> defendant County Government of Trans-Nzoia are:

1. Was there a contract between the 2<sup>nd</sup> plaintiff and 2<sup>nd</sup> defendant for road maintenance at Mutumbei ward?
2. What were the terms of the contract?
3. Did the plaintiff perform the contract?
4. If 3 is in the affirmative is the 2<sup>nd</sup> defendant liable to pay?

The 1<sup>st</sup> Plaintiff in her evidence stated that the tender for maintenance of roads in Mutumbei ward was advertised. She applied for the same by filling the bid documents. She received a letter of offer dated 8.4.2014. she accepted the offer by letter dated 17.4.2014. She thereafter signed the contract. But did not produce it. She was shown the site and took over the same. She embarked on the work and completed the same. She was issued with a local service order for Kshs 33,000,000 dated 8.4.2014. On completion of the work she invited the client who then caused her to be issued with completion certificates. She thereafter raised an invoice for payment on 8.8.2014 as requested before the completion of work as the 2<sup>nd</sup> defendant wanted it before the closure of the Financial Year before the completion of the work.

The plaintiff contention therefore is that there was an offer by 2<sup>nd</sup> defendant, acceptance by 2<sup>nd</sup> plaintiff and therefore there was an enforceable contract between them.

The 2<sup>nd</sup> defendant's evidence by Eng Philip Wanjala is that there was no contract entered between the 2<sup>nd</sup> plaintiff and the 2<sup>nd</sup> defendant as the procedures stipulated in the public procurement & Disposal act were not shown to have been followed by 2<sup>nd</sup> defendant; that the documents relied on by the plaintiff were made by person's without authority of the 2<sup>nd</sup> defendant.

Its trite law that a contract consist of three fundamental elements, 1. Offer 2.acceptance and 3 consideration. In **William Muthee Muthami -vs- Bank of Baroda (2014) ECLR the Court of Appeal** stated:

***“In the law of contract, the aggrieved party to an agreement must in addition prove that there as an offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.”***

In this case the plaintiff produced a letter of offer from the defendant dated 8.4.2014 which as in the following terms.

**County Government of Trans Nzoia**

**P.O Box 4211-30200**

**KITALE**

**8.4.2014**

**To:**

**Ms. Milestone Contractors.**

**P.O Box**

**Kitale**

**RE: TENDER NAME: ROAD MAINTENANCE OF RAODS IN MATUMBEI WARD TENDER NUMBER: CGTN/Q/335/2013-2014 ROAD LENGTH : KM**

***This is to notify that the contract/s stated below under the above mentioned tender have been awarded to you at a contract sum of 33,000,000 (thirty three million shilling) only. MIN. NO. 15/17/CTC/2013/14***

**a) Heavy bush clearing**

**b) Heavy grading**

c) *Culvert installation*

d) *Gravel patching*

e) *Ditch cleaning.*

1. *Please acknowledge receipt of this letter of notification signifying your acceptance.*

2. *The contract/contracts shall be signed by the parties within 30 days of the date of this letter but not earlier than 14 days from the date of the letter.*

3. *You may contact the roads engineer, public works on the subject matter of this letter of notification of award.*

*J.T Muindi*

**FOR: COUNTY SECRETARY**

**CC. Executive Member,**

***Public Work & Infrastructure***

***Chief Finance Officer***

***Internal Auditor***

The 2<sup>nd</sup> plaintiff by letter dated 17<sup>th</sup> April 2014 accepted the offer stating:

**MILESTONE CONTRACTORS LIMITED**

**GENERAL CONTRACTORS**

**P.O BOX 235-50200**

**BUNGOMA**

**17<sup>TH</sup>, April, 2014**

***The County Secretary***

***County Government of Trans Nzoia***

**P.O Box 4211-30200**

**KITALE**

***Dear sir,***

**RE: ROAD MAINTENANCE IN MATUMBEI WARD;**

**TENDER NO. CGTN/Q/335/2013-2014**

**ACCEPTANCE**

***We acknowledge receipt of the NOTIFICATION OF AWARD ref. CGTN/PRO/NOT.AW/2014 for the above named project with tanks.***

***We unconditionally accept the award and look forward to executing the works in accordance with the contract.***

***Thank you***

**ASHA HERSI MOGHE**

**DIRECTOR.**

From the two documents there as clear offer, acceptance and consideration indicated. The nature and extent of work to be done is also detailed. The minutes of the committee awarding the tender are indicated s Min No. 15/17/CTC/2013/14.

From the foregoing I am satisfied that there was a contract between the 2<sup>nd</sup> plaintiff and 2<sup>nd</sup> defendant County Government of Trans-Nzoia for Road maintenance of roads in Matumbei word tender NO. CGTN/Q/335/2013-2014.

The terms of the contract were clearly stated in the letter of offer dated 8.4.2014 which explained the scope of work to be

- a) Heavy bush clearing.
- b) Heavy grading
- c) Culvert installation
- d) Ditch clearing.

This was the scope of work to be done by the plaintiff.

The consideration for the work was also indicated in the letter of officer/notification to be the contract sum of kshs 33,000,000 (Thirty three million only). This was accepted by the plaintiff by letter dated 17.4.2014. The contract sum was further confirmed by the 2<sup>nd</sup> defendants commitment to pay the sum by the Local Service order dated 8.4.2014 issued to the 2<sup>nd</sup> plaintiff.

Did the 2<sup>nd</sup> plaintiff perform its part of the contract of routine maintenance of roads in Matumbei ward as per the tender/contract?

PW 1 Asha Moghe in her evidence testified that after the award of tender and acceptance, she was shown the site which as handed over to her. The 2<sup>nd</sup> plaintiff performed the work as required and upon completion was issued with completion certificate copies which she annexed in her bundle of documents page 75-112 of the bundle. They were 37 in No. and indicated the roads, the activity, estimated quantity on bills of quantities (BOQ) and the actual measurement on the ground. The same were signed by 2<sup>nd</sup> defendant officials from procurement, Roads Inspection audit and confirmed by the contractor. She therefore states that this was evidence of satisfactory completion of the work under the contract.

Eng. Philip Wasike who testified for the 2<sup>nd</sup> defendant testified that the alleged completion certificate are not authentic because they do not bear his signature which is a mandatory requirement. Further he contends that they only bear signatures without the names of the officers who purportedly signed.

The completion certificate issued certified that the activities indicated in the certificate were satisfactorily completed. Completion certificate is a document from the client to the contractor that the contractor has completed his contractual obligations and can hand over the works to the client. Eng. Wasike in his evidence does not dispute that the certificates on the face of it emanated from the 2<sup>nd</sup> defendant. What he disputes is that the same were not authentic because they were not signed by him.

On perusal of the document's, it is signed by 3 signatories one from Procurement, the Roads Inspector and another from Audits. This witnesses while disowning those signatures and saying the people who signed were not authorized, he tendered no evidence to support his claim. When he alleges that they are not authentic he needs to prove the same as the burden in law rests on him to establish on the balance of probability that the same were not from the 2<sup>nd</sup> defendant and were not authentic. A serious allegation of forgery needs much more than a mere statement from a witness, to establish.

I am therefore satisfied on the strength of the 37 completion certificate issued, that the 2<sup>nd</sup> defendant did perform the activities which were identified to be done by the 2<sup>nd</sup> plaintiff and were satisfactorily completed.

Having found above that the 2<sup>nd</sup> plaintiff satisfactorily completed the works of the contract, the 2<sup>nd</sup> defendant duty is to pay the sum of the contract to the plaintiff.

The second limb of these proceeding is between the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff against the 1<sup>st</sup> defendant (Eco Bank Ltd) and 3<sup>rd</sup> defendant (Valley Auctioneers.) The Plaintiff in respect of the 1<sup>st</sup> defendant seeks an order of ***permanent injunction against the 1<sup>st</sup> and 3<sup>rd</sup> defendants, restraining them, their servants, agents, assigns and or whosoever claiming through them form selling, transferring, alienating or in any of the manner dealing with the parcel of land known as EAST BUKUSU/SOUTH KANDUYI.2952.***

The plaintiff claim against the 1<sup>st</sup> defendant is that the 1<sup>st</sup> plaintiff Asha Hersi Morghe is the owner of Land Parcel NO. E. Bukusu/South Kanduyi/2952. That on 8<sup>th</sup> April 2014 she was awarded a tender by 2<sup>nd</sup> defendant County Government of Trans Nzoia. She approached the 1<sup>st</sup> defendant Eco Bank for a loan facility of 30,000,000 to enable her undertake the tender awarded by 2<sup>nd</sup> defendant. On 23.5.2014 the 2<sup>nd</sup> plaintiff entered into a tripartite agreement between 2<sup>nd</sup> plaintiff, 1<sup>st</sup> defendant Eco bank and 2<sup>nd</sup> County Government of Trans Nzoia where the 2<sup>nd</sup> defendant undertook to pay the proceeds of the 2<sup>nd</sup> plaintiff tender awards to account NO. 018001502386201 Eco Bank Ltd which was opened in the joint names of the 1<sup>st</sup> defendant.

Eco Bank Ltd and 2<sup>nd</sup> defendant county Government of Trans Nzoia. The 1<sup>st</sup> plaintiff offered as security for the loan her parcel NO.

E.BUKUSU/S.KANDUYI/2952. The 1<sup>st</sup> and 2<sup>nd</sup> defendant defaulted on the loan and the 1<sup>st</sup> defendant instructed the 3<sup>rd</sup> defendant Valley Auctioneers to auction the said parcel of land to recover the loan.

The 1<sup>st</sup> defendant called Trevox Oyiuno Omondi who confirmed that the 1<sup>st</sup> defendant indeed granted the Plaintiff a loan and 1<sup>st</sup> Plaintiff offered her parcel of land as security. They also entered into an assignment/Domiciliation agreement with the 2<sup>nd</sup> defendant. The said loan was not serviced or paid, and they therefore commenced recovery process. He testified that the domiciliation agreement was for the bank to collect money from a preferred account which was in the joint names of Eco bank and County Government of Trans Nzoia

From the evidence of both PW1 Asha Hersi Morghe and DW2 Trevor Otieno, I find that it is not disputed that the 2<sup>nd</sup> plaintiff secured a loan from the 1<sup>st</sup> defendant Eco bank. The purpose of the loan was to execute the tender awarded by the 2<sup>nd</sup> defendant to the 2<sup>nd</sup> plaintiff. As a form of further security for the repayment, the 2<sup>nd</sup> defendant entered into a domiciliation/assignment agreement date stamped 2.3.2014. the agreement stated:

**Ecobank**

**The Pan African Bank**

**LPO/CONTRACT FINANCING PRODUCT PROGRAM**

**Between**

**MILESTONE CONTRACTORS LIMITED**

**And**

**COUNTY GOVERNMENT OF TRANS NZOIA**

**And**

**Ecobank Kenya Limited**

**P.O Box 49584-00100**

**NAIROBI**

**ASSIGNMENT/DOMICILLIATION AGREEMENT**

**FOR VALUE RECEIVED** under the loan facility granted to us by Ecobank Kenya Limited, We Milestone Contractors Limited, P.O Box 235, Bungoma, Kenya do **HEREBY ASSIGN TO YOU** and **AGREE** that you shall hold, retain and have a lien upon all proceeds or receivables due to us from County Government of Trans Nzoia under the Tender number; CGTN/Q/335/2013-2014 for road maintenance of Matumbei ward. We further authorize you without further notice to us to apply all or any part of such monies as you may think fit in satisfaction of such liabilities that may arise as a result of the said loan plus any interest bank charges and commissions that may have accrued.

And we, County Government of trans Nzoia **IRREVOCABLY UNDERTAKE** to make all payments due to Milestone Contractors Limited under our said Tenders into Account NO. 0180015023836201 at **ECOBANK KENYA LIMITED** in the joint names of **ECOBANK KENYA LIMITED** and County Government of Trans Nzoia.

Dated the.....day of.....2014

**Milestone Contractors Limited**

Name: 1. ASHA HERSI MOGHE (signed)

2. AHMED ADAM ALI (signed)

**County Government of Trans Nzoia**

**Authorized signatories**

Name: 1. AS JAMIN KWANOSOM (signed)

2. MBATI CHRISTOPHER (Signed)

**Ecobank Kenya Limited**

**Authorized Signatory**

**Name: 1. PAUL OUMA (signed)**

**2. DICKSON LANOGWA (signed)**

The 2<sup>nd</sup> Plaintiff argument if I understand her correctly is that the 2<sup>nd</sup> plaintiff tripartite the domiciliation/assignment agreement signed by the 2<sup>nd</sup> plaintiff, Milestone, 1<sup>st</sup> defendant Ecobank and 2<sup>nd</sup> defendant County Government of Tranz-Nzoia was an assigned of the debt to the 2<sup>nd</sup> defendant and that in the event of default it is the 2<sup>nd</sup> defendant to be liable to the debt. That is not the correct interpretation of a domiciliation agreement. It is not an assignment of debt.

In supreme court of Nigeria in SC 332/2009; Julius Berger Nigeria Plc. & Anor. Vs. Toki Rainbow Community Bank Ltd. State:

**“.....Naturally, the first step to take would be to understand what those concepts; “domiciliation arrangement and assignment mean”**

***There is a dearth of case law on domiciliation arrangements, but Oguntande, ACA [as he then was], in Peter Tiwell [Nig.] Ltd V. Inland Bank, while expounding on the difference between domiciliation arrangement and contract of guarantee” stated:***

***A bank, who insists and accepts a domiciliation arrangement, only thereby reduces its risk and has an assurance that the third party, who has agreed to domicile the payment due to a customer with customer’s bank will not pay the money directly to the customer. A domiciliation arrangement does not specify when the payment will be made, and the arrangement does not release the debtor/customer from its primary obligation to pay back the loan to the bank at the agreed time. It does not make the person agreeing to domicile the payment with the borrowers bank a party to the loan agreement such that the bank cannot sue him on the agreement, as he would under a contract of guarantee. It was therefore not a defence.”***

Indeed the 2<sup>nd</sup> defendant under the agreement was bound to pay all payments to the 2<sup>nd</sup> plaintiff to the account jointly opened in the name of Eco bank Ltd and County Government of Trans- Nzoia.

After considering all the evidence and submissions this court makes the following orders.

- 1. Judgment be and is hereby entered for 2<sup>nd</sup> plaintiff Milestone Contractors Ltd against the 2<sup>nd</sup> defendant County Government of Trans-nzoia for the sum of kshs 33,000,00 (Thirsty three million shillings) plus interest at court rates form date of filing suit.**
- 2. That the said decretal sum to be paid to account No. 0180015023836201 at EcoBank Kenya Ltd which account is in the names of Eco-Bank Ltd and County Government of Trans Nzoia as per the agreement Domiciliation/Assignment agreement between them.**
- 3. That pending the payment of the decretal sum by the 2<sup>nd</sup> defendant into the said account for satisfaction of 1<sup>st</sup> defendant loan advance to plaintiff, the 1<sup>st</sup> defendant is restrained from selling, transferring, alienating or auctioning the plaintiff land parcel NO. E.BUKUSU/SOUTH KANDUYI/2952.**
- 4. The 2<sup>nd</sup> defendant will bear the costs of this suit.**

**Dated and delivered** at Bungoma this 3<sup>rd</sup> day of **June**, 2021.

**S.N RIECHI**

**JUDGE**