



**Dormakaba Limited v Arcitectural Supplies Kenya Limited (Civil Suit 136 of 2020)
[2021] KEHC 210 (KLR) (Commercial and Tax) (10 November 2021) (Judgment)**

Neutral citation: [2021] KEHC 210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 136 OF 2020
JM MATIVO, J
NOVEMBER 10, 2021**

BETWEEN

DORMAKABA LIMITED PLAINTIFF

AND

ARCITECTURAL SUPPLIES KENYA LIMITED DEFENDANT

JUDGMENT

The Plaintiff's claim

1. The Plaintiff's claim against the defendant as enumerated in its Complaint dated 27th July 2019 is for recovery of Kshs. 27, 735,961.45 plus costs and interests being the amount allegedly due and owing from the defendant to the Plaintiff in respect of goods supplied by the Plaintiff to the defendant between the period 2018 and 2019 at the defendant's request and instance. The Plaintiff's case is that the defendant failed to honour its payment obligations and also it failed to honour several promises to pay despite admitting the debt thereby breaching the terms of the contract.

The defense

2. In its amended defense dated 27th July 2020, the defendant denied the Plaintiff's claim and averred that there were good faith negotiations which were not terminated.

The Evidence

3. The Plaintiff's case stands on the evidence of Mr. Bradlee Wolfenden, its General Manager, Africa & Sub-Saharan Africa. He adopted his Witness Statement dated 27th April 2020 and produced the Plaintiff's bundle of documents. His evidence is essentially a replication of the averments in the Complaint, so, it will add no utilitarian value to rehash the same here. It will suffice to state that his evidence is



- that the goods were delivered to the defendant as per the delivery notes at pages 51-73 of the Plaintiff's bundle of documents.
4. Upon cross examination by the defendant's counsel, PW1 stated that he generated the documents which were also signed by the customer, but some were generated by the company's administrator. Upon re-examination, he stated that the Credit Application Form was signed by the defendant and also the delivery notes were also signed. He stated that the defendant admitted the debt in writing.
 5. The defendant's case stands on the evidence of Mr. Yogesh Patel, it's Managing Director. He adopted his witness statement dated 27th May 2021 in which he stated that the Plaintiff's claim has no factual/legal basis, that it is fabricated, false and that the alleged goods were never delivered as alleged. He denied the defendant owes the Plaintiff Kshs. 27,735,961.45. He however stated that there were good faith negotiations on contractual basis which discussions have never been terminated. He denied that the defendant ever breached any contractual obligations as alleged by the Plaintiff.
 6. In his oral evidence in court, Mr. Patel stated that the defendant was buying goods from the Plaintiff, that they used to raise LPO's and they would receive the delivery notes which they would stamp and receive the invoice from the supplier. He testified that the LPO's had an order number. He testified that some LPO's have no numbers, namely the ones appearing at pages 51 and 67 of the Plaintiff's bundle. He stated that only 2 have delivery numbers. He singled out at invoices at pages 86, 87, 88, 90, 92, 98, 104, 109, 116, 123, 125, 134, 138, 139, 145, 148, 149, 150 and 163 as the only ones with LPO's.
 7. Upon cross-examination he stated that the payment period was not fixed but it was based on the contract. He admitted signing the credit application form and stated that it was a term of the agreement that he was to pay in 90 days. He denied breaching the agreement and stated that the discussions they had were to clear the accounts. He attributed the failure to pay to the closure of the Imperial Bank and admitted proposing to pay the debt by instalments of Kshs. 200,000/= per month. He however stated that the accounts were not correct. He admitted that he did not present any document to show that there was a dispute on the accounts. He also stated that he offered the Plaintiff Kshs. 12 million at the Imperial Bank.

The submissions

8. Both parties filed written submissions. On behalf of the Plaintiff, it was submitted that it is undisputed that the defendant applied for credit supply and it signed the form dated 3rd October 2012 at pages 2-8 of the Plaintiff's bundle of documents. He argued that as per the Credit Application Form, the credit period was for between 60 and 90 days. He argued that the defendant issued LPO's to the Plaintiff ordering various goods and the goods were duly delivered by the Plaintiff as per the LPOs from pages 9-50 of the Plaintiff's bundle of documents.
9. He also argued that the delivery notes were duly stamped or signed by the defendant's representative at all times as appears in documents in pages 51 to 71 of the Plaintiff's bundle. He also argued that upon delivery of the goods, the defendant was issued with corresponding invoices for the goods delivered as appearing from pages 74 to 196. He submitted that the defendant failed to honour the terms of the credit agreement as shown in the statement from pages 74 to 82. He submitted that the defendant admitted owing the Plaintiff and even sent settlement proposals as evidenced by the correspondences at pages 197- 208 of the Plaintiff's bundle of documents. The Plaintiff cited *Choitram v Nazari*¹ in support of the proposition that admissions can be express or implied [either] on the pleadings or otherwise e.g correspondence. He argued that the defendant admitted the debt in its letter dated 22nd June 2018.

¹ {1984} KLR 237.



10. The Plaintiff submitted that the defendant breached the contract and cited the *Black's Law Dictionary*² which defines a breach of Contract as: -

“a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”

11. The Plaintiff submitted that as per the credit supply agreement, the defendant received goods worth Kshs. 27,735,961.45 but failed to pay for them in time which amounts to a breach of the contract. Lastly, the Plaintiff urged the court to award the costs and cited *Orix Oil (Kenya) Limited v Paul Kabeu & 2 Other*³ which held that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs.

12. On behalf of the defendant, it was submitted that the documents relied upon by the Plaintiff violate the provisions of Section 106(B) (4) of the *Evidence Act*⁴ in that the said documents ought to have been accompanied by a certificate of electronic evidence. It was argued that since PW 1 was not the maker of the documents, he cannot produce them.

13. The defendant also submitted that DW1 outlined the procurement procedure at the defendant's company, and that the only invoices supported by LPO's and conforming with the Order Numbers are those at pages 67, 86, 87, 90, 92, 98, 104, 109, 116, 123, 125, 127, 134, 138, 139, 145, 148, 150 and 163 of the Plaintiffs Bundle. The defendant argued that the documents at Pages 83, 84, 85, 88, 89, 91, 93, 94, 95, 96, 97, 99, 100, 101, 102, and 196 of the Plaintiff's Bundle are not supported by LPO's or corresponding delivery notes to show the Order and receipt of the goods. It submitted that courts of law act on hard evidence not sympathy or speculation and absence of LPO's and stamped delivery notes or evidence of receipt of the goods shows the Plaintiff is inviting this court to speculate as to whether the supplies were made.

14. The defendant cited *Cross on Evidence*⁵ that the party who bears the burden of proof must discharge it by adducing evidence sufficient to justify consideration of a particular issue. The defendant also cited section 107 of the *Evidence Act*⁶ and argued that whoever alleges a fact must prove it and this being a civil case, the degree of proof is on a balance of probabilities. Also cited is *Bridgestone Pty Ltd v Smith & Associates Far East Ltd*⁷ which held that "the court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him."

² 9th Edition, Page 213.

³ {2014} e KLR.

⁴ Cap 80, Laws of Kenya.

⁵ Colin Taper, *Cross on Evidence*, 8th Edition, Butter Worths Publishers, 1995 at 156.

⁶ Cap 80, Laws of Kenya.

⁷ {2007} 4 SLR R 855 at 59.



15. The defendant also cited *Davis Contractors Ltd v Fareham UDC*⁸ which held that frustration occurs whenever the law recognizes that without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. Buttressed by the said decision, the defendant submitted that the collapse of the Imperial Bank frustrated the contract between the Plaintiff and the defendant such that defendant's contractual obligation became incapable of being performed. It argued that the defendant fell short of proving its case to the required degree and relied on *GAS Kenya Limited v Amber Enterprises Limited*.⁹
16. In response to the defendant's submissions, the Plaintiff filed supplementary submissions dated 13th June 2021. It argued that during the hearing of the defendant's case, the defendant's witness acknowledged indebtedness to the Plaintiff to the tune of Kshs. 10,000,000 and further claimed that invoice numbering did not correspond to the LPO numbers and that only the delivery notes that were stamped were valid while those signed and dated were not valid. It submitted that the LPO's were generated by the defendant and the numbering of the LPO's is based on their internal sequence while the invoices were generated by the Plaintiff and the numbering of the orders is also based on its internal sequence.
17. The Plaintiff argued that all the delivery notes were either stamped or signed by the defendant's stores officer and that at no point did the defendant dispute the authenticity or validity of the delivery notes during the period. It argued that as of 29th May 2019, the defendant proposed to settle an outstanding amount of Kshs 12 million through its deposits in Imperial Bank and subsequent to the proposal, the Plaintiff continued supplying the defendant with goods. It argued that the defendant made proposals to settle the outstanding debt and at no point did it dispute the reconciliation of the figures.
18. The Plaintiff cited *Benson Kang'ara t/a Pinkstone Enterprises v Nairobi City County*¹⁰ in which court addressing a substantially similar dispute stated as follows: -

“The defendant did not call any witness but raised issues of discrepancies in the dates of the invoices and references in the delivery notes. On these issues, I have closely looked at the LPOs, delivery notes and invoices and the documents correspond to each other in material particulars. The LPO's are issued by the defendant and signed by at least two officers while the delivery notes have acknowledgement of delivery of the goods. I am therefore satisfied that the errors pointed out by counsel for the defendant are minor and do not detract from the claim as a whole.

The defendant's defence is a bare denial. The defendant did not give evidence that goods were not delivered or any other grounds which would invalidate the terms of the contracts as evidenced by the documents produced in evidence.”

⁸ {1956} A.C.

⁹ {2020} e KLR.

¹⁰ {2019} e KLR.



19. The Plaintiff also cited *Kabuto Contractors Limited V Karuri Civil Engineering (K) Limited*¹¹ in which the court declined a similar argument stating: -

“Secondly the defendant denies indebtedness on the basis that delivery notes 02630 and 02631 were not signed for by its authorized agent of the defendant. That the authorized agent of the defendant is Mr. Njoroge Solomon. I find that the defendant contention herein before to be unattainable. I so find because the said Mr. Njoroge Solomon did not swear an affidavit to deny that the signature appearing on the aforesaid delivery notes was not his signature. Further the deponent of the affidavit in reply fails to state who had informed him that the signature is not one of Njoroge Solomon and if that information is first hand information the deponent fails to so state.

Thirdly the defendant denies the authenticity of various delivery notes but fails to state what aspect of those delivery notes is not authentic. The defendant through the deponent of the replying affidavit states that it had previously complained of the lack of authenticity of those delivery notes but fails to state whether that complaint was in writing or oral. One would expect such complaint to be in writing; accordingly for that contention to raise a triable issue against the plaintiff’s claim it would be necessary for concrete evidence to be shown relating to the lack of authenticity of the delivery notes and prove to be produced of that complaint.”

20. Regarding the argument that the contract was frustrated by the collapse of the Imperial Bank, the Plaintiff submitted that the agreement between the parties was a credit supply agreement and Imperial Bank Limited was not a party to it, and that it was only after the defendant’s default that it proposed to assign to the Plaintiff its deposits held by the collapsed Imperial Bank on the understanding that the moneys would be released to the Plaintiff within 3 months, but this did not materialize. It submitted that the attempt to settle the outstanding debt using the deposits in Imperial Bank cannot therefore be defined as frustration, and that the breach occurred long before the collapse of Imperial Bank and the proposal to assign funds was also made after the collapse of the bank. To buttress his argument, he cited *Halsbury’s Laws of England*¹²:-

“As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law’s insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event

¹¹ {2005} e KLR.

¹² Vol. 9(1), 4th Edition at paragraph 897.



or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea.”

Determination

21. A convenient starting point is to recall that the law of contract gives effect to consensual agreements entered into by individuals in their own interests. Accordingly, remedies granted by the courts are designed to give effect to what was voluntarily undertaken and agreed by the parties. Damages in contract are therefore intended to place the claimant in the same position as he would have been in if the contract had been performed. As early as in 1848 in *Robinson v Harman*¹³ it was held “the rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.”
22. The above statement of the law has been endorsed in numerous judicial pronouncements in literally all jurisdictions to the extent that it is truthful to say that it has attained the remarkable distinction of the force of law. In 2015, it was endorsed in *Bunge SA v Nidera NV (formerly Nidera Handelscompagnie BV)*¹⁴ where it was described as the “fundamental principle of the common law of damages.” In *Wertheim v Chicoutimi Pulp Co*,¹⁵ it was described as the “ruling principle.” In *Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No 2)*¹⁶ it was described as the “fundamental basis for assessing damages.”
23. The compensatory nature of damages for breach of contract, and the nature of the loss for which they are designed to compensate, were explained by Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd*:¹⁷

“The contract, however, is just as much the source of secondary obligations as it is of primary obligations ... Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach ...” (p 849)
24. By now it is trite that a contract is the source of primary legal obligations upon each party to it procures that whatever he has promised will be done is done. Leaving aside the comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to “substituted or secondary obligations” on the part of the party in default. Those secondary obligations of the contract breaker arise by implication of law.
25. In a recent decision of this court, I stated that to successfully claim damages, a Plaintiff must show that: (a) a contract exists or existed; (b) the contract was breached by the defendant; and (c) the Plaintiff suffered damage (loss) as a result of the defendant’s breach. The Plaintiff “is not required to establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that

¹³ {1848} 1 Exch 850.

¹⁴ {2015} UKSC 43; [2015] Bus LR 987, para 14.

¹⁵ {1911} AC 301, 307.

¹⁶ {1912} AC 673 at 689.

¹⁷ {1980} AC 827, 848- 849.



the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary course of human affairs, rather than an exercise in metaphysics.¹⁸ A Plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed, will succeed unless the defendant can discharge the onus of proving that there was no such probability. The test to be applied is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the Plaintiff. This implies that the Plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the Plaintiff.

26. In the instant case, the existence of the contract is in dispute. In fact, on record is a Credit Application Form duly signed by the defendant applying for credit facilities from the Plaintiff. The terms of the agreement are not in dispute. The defendant admitted some invoices in court, but disputed some claiming the LPO's had no delivery numbers. The defense filed in court was a general denial. In its evidence in court, the defendant questioned the e-mails admitting the debt. He testified that some goods were never supplied. As the saying goes, in every case only the parties (not the court) know the truth, so, it is always the court which is on trial. The court is on trial because the court is expected to unravel the truth and it must do so with great precision.
27. In civil cases the measure of proof is a preponderance of probabilities. Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other is false. The question to be decided will always be: which of the versions of the particular witnesses is more probable considering all the evidence as well as all the surrounding circumstances of the case. In *Stellenbosch Farmers Winery Group Ltd & Another v Martell & Others*¹⁹ the South African Supreme Court of Appeal explained how a court should resolve factual disputes and ascertain as far as possible, where the truth lies between conflicting factual assertions. It stated: -

“To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's

¹⁸ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) 449.

¹⁹ 2003 (1) SA 11 (SCA) at para 5.



credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equiposed probabilities prevail.”

28. The lesson which emerges from the above dicta is that where versions collide, the three aspects of credibility, reliability and probability are intermixed, and all three must be examined. This endeavor is not to be equated with box-ticking but to underscore the breadth of the field to be covered. The focal point of the exercise remains to find the truth.
29. Starting then with credibility, this court had the benefit of hearing the parties first hand. This court has the benefit of not only hearing the parties orally, but also relating the evidence to the pleadings, affidavits, witnesses’ statements, documents produced and the submissions. It sits in a vantage position to assess the probabilities as they manifest within the circumstances prevailing, and as they apply to the particular witnesses. Of course, the Plaintiff bears the burden of proof. The Plaintiff’s witness testified that the defendant signed the Credit Application Form. This evidence was not disputed. He testified that the defendant issues LPO’s. This was not contested. The defendant’s case is that some LPO’s do not bear delivery numbers.
30. However, there several e-mail correspondences from the defendant admitting the debt including a proposal to pay by instalments. For example, on 30th November 2019, the defendant offered to pay KShs. 200,000/= per month with effect from January 2020. At this point there was no mention of the LPO’s without delivery numbers. In addition, the defendant assigned its funds held by the Imperial Bank to the tune of KShs. 12,000,00/= to the Plaintiff and committed itself in writing vide a letter dated 20th May 2019 stating that when the funds are made available, the same will be paid to the Plaintiff’s account.
31. The various e-mail communication and the aforesaid letter from the defendant amount to a clear admission of the indebtedness. The defendant filed a defence which is a mere denial. It never disputed the LPO’s in the defence nor did it dispute the admission. The defendant is now seeking to introduce unpleaded issues by way of submissions. To this extent, its oral evidence departs from the pleadings. A party is bound by its pleadings. The issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage, to treat unpleaded issues as having been fully investigated.
32. Back to the question of the defendant’s admission, as was held in *Choitram v Nazari* (supra), “admissions have to be plain and obvious because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.” As was held in *Guardian Bank Limited v Jambo Biscuits Kenya Limited*²⁰ the admission must be very clear and unequivocal on a plain perusal of the admission. It is not one which requires copious interpretations or material to discern but it must be plainly and readily discernible. The test is that of a reasonable bystander to the question whether there was an admission of facts. In the instant case, properly construed, it is clear that the defendant admitted the debt.
33. The defendant in a bid to run away from the admission argues that the e-mails relied upon were not properly produced in evidence since they are electronic documents and that the witness who produced the same is not the author. This argument is attractive. However, it collapses not on one but several fronts. One, the e-mails emanate from the defendant. The defendant never disputed authoring them. Even during his evidence, the defendant’s witness who incidentally authored the e-mails did not dispute

²⁰ {2014} e KLR.



writing the e-mails. Two, this issue was not pleaded in the defence, but it was introduced through submissions. Three, the bundle of documents was served long before the trial, and the defendant never raised objections or indicated they will call the author. Four, no objection was raised in court when the documents were formally produced in evidence. It follows that the attempt to dispute the documents is an afterthought. Five, other than the e-mails, there is a letter dated 20th May 2019 written by the defendant proposing to assign to the Plaintiff Kshs. 12 million stuck in the collapsed Imperial Bank. Six, the said letter was written by the Yogesh Patel, DW1. He did not dispute said letter or the e-mails.

34. Testing the credibility of the defendant's evidence, the several issues raised in the above paragraph come to mind. Why is the defendant departing from its written statement of defence. Are the issues raised an afterthought? True, the defendant offered to pay the debt. It discussed settlement and even admits the discussions were never terminated. What is the probative value of the e-mail communication relied upon by the Plaintiff authored by the defendant's key witness who did not disown them but wants the Plaintiff to produce a certificate to prove his own undisputed e-mails? As we search for answers to the above questions, and also as we ponder the question of credibility, we have to bear in mind the question of reliability. The answer is simple. The defendant's evidence is examined in the context of all the evidence is totally unreliable.
35. Turning to question of probabilities, where there are two mutually destructive stories, the party bearing the onus of proof can only succeed if he satisfies the court on a preponderance of probabilities that his version is true, accurate, and therefore acceptable, and the other version advanced by the other party is therefore false or mistaken and falls to be rejected. In deciding, whether that evidence is true or not, the court will weigh up and test the respective parties' allegations against the general probabilities. The inherent probability or improbability of an event is a matter to be taken into account when the evidence is assessed. When assessing the probabilities, a court will bear in mind that the more serious the allegation, the more cogent will be the evidence required. As Lord Denning held in *Miller v Minister of Pensions*²¹ "The...{standard of proof}...is well settled. It must carry a reasonable degree of probability...if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'
36. In almost every legal proceeding, the parties are required to adhere to important rules known as evidentiary standards and burdens of proof. These rules determine which party is responsible for putting forth enough evidence to either prove or defeat a particular claim and the amount of evidence necessary to accomplish that goal. To meet this standard, the defendant was required to do much more. One, it ought to have clearly pleaded in its defense the issues it sought to introduce by way of submissions. The attempt to dispute its own the e-mail correspondence is unconvincing. The defendant's attempt to dispute some invoices at this late hour smacks of bad faith. A written document disputing the invoices if at all they were disputed during the discussions the defendant admits they had could have assisted.
37. The defendant now seeks refuge in the doctrine of frustration of contract. I am not aware of any wholly satisfactory definition of frustration of contract. It is sufficient to quote two judicial statements. The first is that "frustration may be defined as the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement."²² The second is that "frustration

²¹ {1947} 2 ALL ER 372.

²² *Cricklewood Property and Investment Trust Ltd v Leighton's investment Trust Ltd* {1945} A.C. 221, 228, Viscount Simon L.C.



occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.”²³

38. From the above definitions, it is clear that the circumstances cited by the defendant do not fall within the definition of frustration. The supply agreement was not frustrated. The defendant breached it. It promised to pay. It was unable. It offered to pay by assigning its funds held by a collapsed bank. This was not a term of the agreement, but a repayment proposal.
39. It will be seen that the question whether frustration has occurred turns in large measure upon the degree to which the supervening event has defeated the parties’ reasonable expectations of performance, founded on the contract. The agreement between the parties was not founded on the defendant money held in its Bank. The agreement between the parties was not founded on the liquidity of the defendant’s Bank. It’s important to note that not all disappointments lead to frustration. Financial hardship to a party is not enough nor is it a ground to invoke the doctrine of frustration. Frustration occurs only where the supervening event is such that the substance of the obligation, considered as a whole, cannot be performed or the event has effected such a change in the significance of the obligation that what has been undertaken would, if performed, be a different thing from that contracted for. In the instant case, the contract had been performed and what was pending is payment.
40. Thus, in *Davis Contractors Ltd v Fareham U.D.C.* (supra, note 23) the House of Lords considered a contract to build houses for a fixed price within 6 months. Owing to an unexpected shortage of skilled labour the job was greatly delayed. It took not 6 but 22 months, through no fault of the builder. The builder claimed that the shortage of labour had frustrated the contract. The House of Lords held that it had not. As Lord Reid put it, the most that could be said was that the delay was greater in degree than was to be expected; the job proved to be more onerous but it never became a job of a different kind from that contemplated in the contract.
41. Frustration does not depend upon an election by a party to determine the contract by reason of the frustrating event. Indeed, it occurs even if all the parties are unaware of the frustrating event. Thus, if a contract is frustrated by a subsequent law which prohibits the performance of the contract, the contract is frustrated immediately the law takes effect. Frustration is not deferred until the parties, or any of them, becomes aware that performance of the contract has become illegal.
42. A party cannot rely upon an event he himself has brought about as a frustrating event²⁴ nor can inability to pay a debt attributed to the defendant’s liquidity problems be a frustrating event. A Canadian case on appeal to the Privy Council is an example. The contract was for the charter of the St Cuthbert, a fishing trawler fitted with an otter trawl and usable only with an otter trawl. The use of an otter trawl was an offence unless under a government licence. The charterer had four other trawlers with otter trawls. The government would give the charterer licences for only three trawlers. The charterer nominated three of its other trawlers and licences were given for them. There being no licence for the St Cuthbert, the charterer claimed that the contract was frustrated. The claim failed because the want of a licence was the result of the deliberate act of the charterer.²⁵
43. From my analysis of the issues discussed above, it is my finding that the Plaintiff has established its claim to the required standard. Damages for breach of contract are in that sense a substitute for performance.

²³ *Davis Contractors Ltd v Fareham U.D.C.* {1956} A.C. 696, 729, Lord Radcliffe.

²⁴ *Bank Line Ltd v Arthur Capel & Co.* {1919} A.C. 435, 452.

²⁵ *Maritime National Fish Ltd v Ocean Trawlers Ltd* {1935} A.C. 524.



That is why they are generally regarded as an adequate remedy. The courts will not prevent self-interested breaches of contract where the interests of the innocent party can be adequately protected by an award of damages. Nor will the courts award damages designed to deprive the contract breaker of any profit he may have made as a consequence of his failure in performance. The court's function is confined to enforcing either the primary obligation to perform, or the contract breaker's secondary obligation to pay damages as a substitute for performance.

44. Accordingly, I find for the Plaintiff and enter judgment in favour of the Plaintiff against the defendant for Kshs. 27,735,961.45 plus costs of the suit. The said sums shall attract interests at court rates from date of filing suit and date of taxation respectively. It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI VIA E-MAIL THIS 10TH DAY OF NOVEMBER 2021

JOHN M. MATIVO

JUDGE

