REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 37 OF 2013

ELDO CITY LIMITED…….PLAINTIFF

VERSUS

CORN PRODUCTS KENYA LIMITED……...…….DEFENDANT

EQUIP AGENCIES…….....….…INTERESTED PARTY

JUDGMENT

1. **ELDO CITY LIMITED**, the Plaintiff herein instituted this suit by way of a Plaint dated **1st February 2013** which Plaint was later amended on **6th August 2013** and further on **17th December 2017**. In the further Amended Plaint of **17th December 2018** the Plaintiff seeks the following Orders:-

> **"(e) General damages.**
>
> **(f) Costs of obtaining and renewing the Guarantee.**
>
> **(g) Costs."**

2. The Defendant **CORN PRODUCTS KENYA LIMITED** opposed the suit by way of their Defence dated **22nd August 2013.** The Defendant later filed an Amended Defence and Counter-claim dated **9th November 2015**. In which counterclaim the Defendant sought the following:-

> **"a. The Plaintiff's suit be dismissed with costs.**
>
> **b. Judgment be entered for the Defendant for the sum of Kshs.34,915,590.80 and USD 200,000.**
>
> **c. Interest on (b) above at court rates from 31st March 2013 until payment in full.**
>
> **d. Costs of the Counter-claim with interest thereon from the date of judgment."**

3. The Plaintiff then filed a Reply to Defence and Defence to Counterclaim dated **17th December 2015**. The hearing of the suit commenced before this Court on **5th April 2019**. Each side called one (1) witness in support of their case.

THE EVIDENCE

4. **PW1 DAVID BETT LANG'AT** was a Director of the Plaintiff Company. The witness relied upon his written statement filed on **1st February 2013** as his evidence in chief. **PW1** told the court that during the month of **September 2012** he became aware that the Defendant was seeking bidders to purchase its property known as **Title Number Eldoret Municipality/Block 8/47** together with the buildings and equipment thereon (hereinafter the "**suit property and assets**").

5. Having an interest in purchasing the suit property and assets **PW1** on **3rd September 2001** paid a visit to the site in **Eldoret** where he was shown around the property by a **Mr Richard Turton** a Director of **Ingredion Incorporated USA** a company of which the Defendant was an affiliate. Later the same day **Mr Turton** forwarded to **PW1** by e-mail the requirements for a Bank Guarantee if he wished to place a serious

bid on the suit property and assets. **PW1** was also advised to contact a **Mr Martin Ndungu,** the Defendants finance director.

6. By a letter dated **4th September 2012**, **PW1** placed a formal bid to purchase the suit property and assets through an entity called **DL Group of Companies Limited** in which **PW1** was a director. As a sign of seriousness and commitment to the Plaintiffs bid to purchase the suit property and assets, **PW1** quickly made arrangements to procure an irrevocable guarantee for **USD 2.0 Million** (as was required by the Defendant) from **Transnational Bank**, where **DL Group** of companies held an account. However the Defendant rejected this guarantee. **PW1** then procured a guarantee from **I & M Bank** but the Defendant insisted that the said Guarantee be approved by **CitiBank Ltd**. The Plaintiff in compliance with this requirement obtained the approval from **CitiBank** at an extra cost to itself as the Defendant had to pay **CitiBank** a commission for said approval.

7. The Defendant by a letter dated **18th September 2012** confirmed the guarantee from **CitiBank.** The Plaintiff averred that the Defendant led it to believe that once the required guarantee was in place the entire transaction would be concluded within a period of three (3) months. The Plaintiff was however informed that there were other bidders interested in purchasing the same property. The Plaintiff also sought for certain documentation from the Defendant as part of its due diligence.

8. **PW1** states that the Defendant then forwarded to the Plaintiff a "**Confidentiality Agreement**" dated **3rd October 2012** which the Plaintiff duly executed. Thereafter on **10th October 2015** the Defendant forwarded to the Plaintiff a **Memorandum of Understanding" [MOU]** for review and execution. [See **page 23** of Plaintiff's Bundle of Documents filed on **8th April 2019**]. However, the Defendant raised concern that it was expected to execute the **MOU** without being availed relevant documents to enable it conduct due diligence. The Plaintiff also took issue with a **"non compete"** clause in the **MOU** which read as follows:-

NON COMPETE	Prospective Purchaser will not, for a period of three (3) years, directly or indirectly engage in activities in competition with the business of CP Kenya, or transfer the Assets to or allow use of the Assets by a Third party which intends to use the Assets to compete with the business of CPKenya. Prospective Purchaser will not, at any time, use trademarks or tradenames or other marketing material which could create confusion or which otherwise implies a relationship with CPKenya or its affiliated entities or parent, Ingredion Incorporated. The sale does not include the transfer of any employees. If Prospective Purchaser elects to employ any employees formerly employed by CPKenya, it shall bear all risk and liability in connection with the employment of those individuals, including all liability for future severance or termination payments. Prospective Purchaser shall not, at any time, encourage or permit those employees to disclose or use confidential or proprietary information or the intellectual property of CPKenya in their performance of services for Prospective Purchaser.

9. This Clause provided that the Plaintiff would not for three years engage in activities which were in direct competition with the Defendant and that the Plaintiff would not transfer or allow the use of the suit assets to a third party if said third party intended to use said assets to compete with the Defendant. The Plaintiff termed the above clauses in the **MOU** as unfair onerous and oppressive.

10. **PW1** stated that in response to the concern raised by the Plaintiff, the Defendant through its lawyers **M/s Hamilton Harrison & Mathews**, vide a letter dated **26th October 2012** replied inter alia as follows:-

> **"RE: CORN PRODUCTS KENYA LIMITED AND ELDO CITY LIMITED**
>
> **We act for Corn Products Kenya Limited who have forwarded to us your letter of 10th September and your email of 10th October 2012.**
>
> **For the record we wish to state that no agreement "in principle" or otherwise has been reached with our client regarding the sale of the assets. Our client clearly stated in its correspondence that it was entering into a non-binding arrangement whereby your company, together with others, would be allowed to bid for the assets that are on offer.**
>
> **This intention has remained to date and we wish you to confirm that you are agreeable to proceeding on this basis.**
>
> **Assuming that you are agreeable, we have noted that you wish to seek legal advice regarding the non-binding MOU which was provided to you by our client. Our client has no objection; neither can it object, to you seeking legal advice on the meaning and import of the MOU. <u>However, our client will not accept any material amendments to the MOU as it sets out the basic transaction details which out client is interested in negotiating with a potential purchaser, and was prepared to ensure understanding and alignment on the nature of the deal in which our client would be interested</u>.**
>
> **A definitive sales contract will be provided only after negotiations with a potential purchaser have resulted in mutual agreement on key terms and conditions, including purchase price, liabilities and other key terms of an asset sale.**
>
> **<u>Please also understand that, as this is an asset deal, only limited due diligence will be provided, and no diligence will be provided with regard to the business of our client or any assets which are not the subject of this potential transaction</u>. Although our client is willing to discuss what specific items related to the assets might be provided in diligence, the general scope of diligence is not negotiable."**[own emphasis]

11. The Plaintiff complained that from this response it was apparent that although the **MOU** had been forwarded to them for review, the Defendant was clearly not willing to entertain any changes to the document. However the Plaintiff being desirous to proceed with the transaction executed the **MOU** as drafted by the Defendant on **28th November 2012.**

12. It was the evidence of **PW1** that at the point when the Plaintiff executed the **MOU** the guarantee was set to expire on **11th December 2012.** The Plaintiff requested that negotiations proceed without the guarantee being renewed but the Defendant refused to continue with negotiations without a valid guarantee in place. That the Defendant specifically asked that the guarantee be renewed for a further four (4) weeks. The Plaintiff was therefore compelled to renew the guarantee for a further three (3) months to expire on **13th March 2013**. Thereafter the Plaintiff wrote a letter to the Defendant confirming its bid of **USD 3.5 Million** to purchase the suit property and assets.

13. Upon confirming its bid **PW1** states that the Defendant forwarded to the Plaintiff a draft "**Agreement for Sale**" for review. The Plaintiff again raised concern with some of the clauses in the Draft Agreement for sale which it found to be onerous as set out in **paragraph 12** of the **Amended Plaint** dated **17th December 2015** as follows:-

> "i. **Clause 5.3** of the draft agreement stated in part, that no representation, warranty or covenant is being made as to the condition, usability, adequacy, sufficiency or any other matter relating to any of the Purchased Assets.
>
> ii. **Clause 5.4**, that there are no representations or warranties as to the present condition of the Purchased Assets or any part thereof. That the purchaser has inspected the Purchased Assets and agrees that any condition or warranty express, implied, statutory or otherwise as to the description on condition of the Purchased Assets or the fitness for any purpose is hereby excluded.
>
> iii**. Clause 6.2** that "As from the completion date, risk of loss or damage to the Purchased Assets shall pass to the Purchaser and the Purchaser shall assume responsibility for and carry out, perform and discharge all the debts, liabilities and obligations, whether known or unknown, contingent or absolute, director or indirect arising under or in connection with the Purchased Assets, regardless of whether the events giving rise to such obligations or liabilities occurred before or after the completion date (collectively "**obligations**"). The purchaser hereby agrees to release, indemnify and hold vendor and its parent and affiliated entities, and its and their respective officers, directors, employees and agents (collectively, the "**Vendor Parties**"), harmless in full against all claims, costs, demands, losses or liabilities collectively the "**Claims**") incurred by any of the Vendor Parties in respect of any such obligations or the Purchased Assets, whether relating to the time period prior to or after the completion date."
>
> iv**. Clause 7** placed a restriction on the Purchaser not to engage in the business of the manufacture and/or sale of starches and/or sweeteners (Restricted Business) for a period of 3 years from the completion date. The purchased assets were not to be transferred or sold to a third party involved in the Restricted Business. The Defendant provided for a penalty of **USD 1 Million** in the event of breach of the provisions of clause 7.
>
> v. **Clause 11.2**, that the purchaser acknowledges that it has entered into this Agreement on the basis of its own due diligence on the purchased assets.
>
> vi**. Clause 11.3**, that Purchaser admits that it has inspected the Purchased Assets and purchase the purchased Assets with full knowledge of its actual state and condition on the date of this Agreement (and as of the Completion and/or Possession Date) and the Vendor expressly disclaims and negates any express statutory or implied warranties whether of description, physical condition, merchantability, fitness for a particular purpose or otherwise covering the Purchased Assets. The Purchaser, by acquiring the Purchased Assets on an "**as is**" where is, basis hereby waives any claims or rights of indemnification, contribution or recourse it may have against or from the /vendor or any of the vendor Parties with respect to or arising out of the physical condition of the "**Purchased Assets**."

14. The Plaintiff in an attempt to secure some level of protection for itself made comments with respect to the draft Agreement for sale as follows (as per **clause 13** of the **Further Amended Plaint** dated **17th December 2015**)

> i. A valuation report of the Property and Assets to ascertain the determined purchase price if the Defendant held one.
>
> ii. Indicated that it wanted to ascertain the area of the Property and the location of the beacons, and asked for confirmation whether the Defendant could do it. The Plaintiff also asked for a copy of a surveyor's report on the Property and the beacon certificate if the Defendant held them. The Plaintiff indicated that it wished to get an independent surveyor to ascertain the details of the Property and an Engineer to verify the state of the machines and equipment.
>
> iii. Asked that a clause be introduced in the draft to confirm that as the date of the Agreement, the Purchased Assets are fully owned by the Vendor and they are not subject to any encumbrances, lien, mortgage, debenture, sale and leaseback arrangements, claims or any other liability.
>
> iv. That to the extent the Vendor was seeking to be indemnified, then it had an obligation to disclose any existing and potential liabilities that may arise as far as the Purchased Assets are concerned. To that end, the Plaintiff asked for a confirmation from the Defendant that it had complied in all material respects with environmental laws and regulations. The Plaintiff indicated that it was aware that the Defendant had undertaken an excavation on the Property and asked for a copy of the excavation certificate for the particular area of the Property where the excavation was done. The Plaintiff also asked to have copies of any environmental reports held by the Defendant.
>
> v. That the restrictions placed under **clause 7** of the draft amounted to an unfair clause, observing that

a. There should not restriction when the Plaintiff was buying the assets and not the business of the Defendant. That it made no economic sense for the Plaintiff to purchase the machines and not put them to the specific use for which they were made for a period of 3 years.

b. That the restriction was not necessary because machines with the Defendant's Intellectual Property had already been removed.

c. The Plaintiff indicated that it was likely to use for the machines for purposes of milling maize flour and sought to know whether that would fall within the definition of "**Restricted Business**." For purposes of clarity, the Plaintiff suggested that specifically categories of products that would within the definition be provided by the Defendant.

d. Given the views expressed, the Plaintiff felt that the proposal penalty of **USD 1 Million** was unacceptable.

e. If the restriction clause was to be retained, the Plaintiff asked that it be allowed to purchase the land and building only.

15. In response to the Plaintiffs above comments on the Draft Agreement for Sale the Defendants lawyers responded vide the e-mail of **18th January 2013** [see **Page 74** of Plaintiff's Bundle of Documents filed on **8th April 2019**] as follows:-

> **"i. The term of the draft agreement for sale were not to be negotiated as the language used was consistent with the language of the MOU.**
>
> **ii. Issue was also taken with the proposed use of the assets by the Plaintiff to process maize flour. The Defendant's lawyers indicated that they would seek the views of the Defendant and then confirm.**
>
> **iii. The Plaintiff was asked to confirm whether it was prepared to drop its request to renegotiate the language of the MOU and accept the non-compete clause as drafted under clause 7 of the draft agreement for sale."**

16. Despite its misgivings the Plaintiff being keen to continue with the transaction communicated to the Defendant that it was ready and willing to sign the Agreement for Sale as drafted and requested for an engrossed copy of the Agreement for execution. However to the Plaintiffs utter surprise the Defendant through its lawyers vide the letter dated **28th January 2013** informed the Plaintiff that they would not be proceeding further with the negotiations giving no reasons for this decision.

17. The Plaintiffs position is that the **MOU** constituted a collateral contract pursuant to which the parties agreed to enter into a formal agreement for the sale of the suit property and assets. The Plaintiff's asserts that the **MOU** constituted a valid and binding contract enforceable by law. That notwithstanding the use of the term "**subject to contract**" by the Defendant in its correspondence and the wording of the non-binding clause in the **MOU** that no binding contractual commitment shall be created by the parties in the absence of execution by the parties of transactions documents, the position changed when the Plaintiff accepted without qualification all the terms of the draft agreement for sale. They contend that the conduct of the parties showed that there was a binding agreement in place.

18. It is further the Plaintiff's contention that once it accepted the terms of the draft agreement for sale, the duty, onus and obligation to finalize the draft agreement for sale for execution was with the Defendant. That the Defendant's purported withdrawal or cessation of negotiations after receipt of the Plaintiff's acceptance of all the terms of the agreement was of no legal effect since all the terms of the transaction had been agreed to, with parties now being of one mind, more so, since it was the parties intention to create legal relations. That the purported withdrawal and cessation was in breach of the **MOU** and general principles of conveyancing. **PW1** states that as far as the Plaintiff was concerned the Draft Agreement for sale superceded the **MOU** and he insists that the Plaintiff was at all times ready and willing to complete the purchase of the suit property and assets on terms already agreed upon. The Defendants position was that once the Plaintiff met all the conditions and terms of the **MOU**, the Defendant was contractually obligated to proceed to finalize the transaction.

19. The Plaintiff later learnt that the suit property and assets had actually been sold to **EQUIP AGENCIES LIMITED** the interested party herein on **24th January 2013**. Hence the present suit.

20. The Defendant also called one (1) witness in support of its case. **DW1 MARTIN NDUNGU KARUKU** was the Finance Director with the Defendant Company. The witness relied on his witness statement dated **22nd August 2013** as well as his further Witness Statement dated **9th November 2015. DW1** confirms that the Defendant was desirous of selling its property known as **Title Number Eldoret Municipality Block 8/47** together with all the buildings and equipment thereon and invited interested parties to bid on the same. **DW1** further confirms that the Defendant required of all interested bidders an irrevocable bank guarantee of **USD.2.0 Million** from **CitiBank** which guarantee the Plaintiff provided. However **DW1** denies that the Plaintiff communicated to the Plaintiff about an exclusive period of three (3) months to conclude the transaction, but insists that it was made clear to the Plaintiff that the **MOU** was only an invitation to bid and that negotiations were not being conducted on an exclusive basis as there were in fact other interested parties.

21. In response to the Plaintiffs allegations that the **MOU** was unfair onerous and oppressive, the Defendant denied this and stated that the document did not create any exclusivity between the parties and did not create any binding contractual commitment as to the proposed transaction and that if the parties elected to proceed with the sale then mutually definitive documentation was to be executed within thirty (30) days.

22. The Defendant stated that it was a term of the **MOU** that neither party would be entitled to specific performance of the document and that having voluntarily executed the said **MOU** the Plaintiff cannot now allege that the same contained terms that were unfair, onerous and oppressive. That the Plaintiff having reviewed the **MOU** and having had the benefit of legal advice executed the same on **28th November**

2012 and therefore was bound by all the terms and conditions contained in the **MOU.**

23. On the Plaintiff's claim that it incurred expenses in the renewal of the bank guarantee, the Defendant counters that the Plaintiff executed the **MOU** just days before the bank guarantee was due to expire and it was necessary to renew the same in order to proceed with the bidding process. That the delay in executing the **MOU** was occasioned by the Plaintiff itself, and the Plaintiff was not entitled to seek preferential treatment in continuing with the bidding process without a valid guarantee in place.

24. **DW1** states that the Plaintiff conducted an on site due diligence visit on **22nd December 2012** and thereafter forwarded its offer of **USD 3.5 Million** to the Defendant. That the Defendant **did not** accept that offer but instead forwarded to the Plaintiffs a Draft Sale Agreement for review with the rider that:-

> **"Subject to the comments we receive our client will consider your clients offer in light of other offers they have received to date."**

This made it abundantly clear that the bid process had **not** been completed and that the Defendant was also considering other offers alongside the Plaintiffs offer.

25. The Defendant avers that the Plaintiff's lawyers vide an email of **15th January 2013** sent their clients comments and sought amendment of the Draft Sale Agreement. Following the Defendant's response reiterating the terms of the Draft Sale Agreement the Plaintiffs again by a letter dated **23rd January 2013** sought further clarification on the Draft Sale Agreement. According to the Defendants this behavior of Plaintiffs made it clear that they were still seeking preferential treatment. Therefore on **24th January 2013** the Defendant accepted the Interested Party's bid and executed a Sale Agreement with said Interested party. That by the time the Plaintiff by its letter of **28th January 2013** indicated its willingness to execute the Draft Sale Agreement the suit property and assets were no longer available for sale. The Defendant did inform the Plaintiff by letter dated **28th January 2013** that it would not be proceeding with negotiations. The Defendants position is that even assuming that there was no contract in place as at **28th January 2013** when the Plaintiff indicated its willingness to execute the Draft Sale Agreement, the Defendant was still entitled to terminate discussions as it had not accepted the Plaintiffs offer and there existed no binding contract between the two capable of enforcement.

26. In support of the counterclaim dated **9th November 2015** the evidence of **DW1** was that on **24th January 2013** the Defendant and the Interested Party entered into an Agreement for sale of the suit property and assets which Sale Agreement was to be concluded within thirty (30) days whereupon the Defendant was expected to hand over possession of the property and assets to the Interested Party and relinquish all rights and liabilities over the same.

27. That the Plaintiff vide an application filed in court on **1st February 2014,** sought for an injunction restraining the Defendant from alienating, transferring, selling or disposing of the property and assets. The injunction was granted ex parte in the first instance on **4th February 2013** and after hearing the parties the same was ordered to remain in force pending determination of the suit. However as a condition the Plaintiff was to furnish an undertaking as to damages which it did and the same is dated **27th February 2013** and filed in Court on **1st March 2013** to the effect that "**in the event that the interim injunction is granted by the Respondent succeeds at trial, and the Respondent suffers damage as a result of the interim injunction having been in place, then the Applicant will abide by any order which this Honourable Court may make for payment of damages to the Respondent."**

28. The Defendant being dissatisfied with the order granting the injunction preferred an appeal which was heard and judgment delivered on **24th October 2014.** The Appeal was allowed and the injunction was set aside.

29. The Defendant states that it had ceased operations on the suit property and that as a result of the injunction it was compelled to continue incurring expenses relating to the security and maintenance of the property to ensure that the same did not waste away. That said expenses would not have been incurred had it completed the sale and purchase of as contemplated under the Agreement with the Interested Party. The Defendant particularized the expense it incurred as follows;

ITEM	**PERIOD**	**COST(KSH)**
Security costs	March 2013-December 2014	28,278,294.00
Electricity Supply	March 2013-December 2014	2,960,453.80
Water and Sewerage Services	March 2013-December 2014	1,589,093.00
Staff costs for employee retained solely for the property book keeping	March 2013-December 2014	2,087,750.00

30. The Defendant averred that the assets that were the subject of the sale were left lying idle and un-serviced by reason of the injunction and depreciated in value at a rate of **Ksh.764,444** per month and that as a result the Defendant was compelled to discount the price of the assets by **USD200,000** when it eventually was able to complete the sale to the Interested Party.

31. Upon conclusion of oral hearing parties were invited to file their written submissions. The Plaintiff filed its written submissions on **27th September 2019** whilst the Defendant filed its submissions on **21st November 2019.**

32. The Interested Party **Equip Agencies Limited** decided not to participate in the proceedings because as their Advocate **Mr Kibet** on **15th July 2019** indicated to the court the Further Amended Plaint dated **17th December 2017** contained no specific claim as against the Interested Party. Accordingly the Interested Party would have been reduced to a mere spectator in the trial hence its decision not to participate. As such the Interested Party filed no submissions in this matter.

ANALYSIS AND DETERMINATION

33. I have carefully considered the evidence on record, the submissions filed by both parties and the relevant law. In civil cases the burden lies on the party alleging the existence of a particular fact or set of facts to prove the same. This principle is encapsulated in **Section 107** of the **Evidence Act Cap 80** which provides as follows:-

> **"107 Burden of Proof**
>
> **(1) 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 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."**

34. In **Gichinga Kibutha V Caroline Nduku [2018] eKLR**, the Court stated:-

> **"It is therefore, settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue."**

35. In my view the following are the issues arising for determination in this suit:-

> i. Was there a valid and enforceable Agreement for Sale between the parties?
>
> ii. Did the Defendant breach the terms of the Memorandum of Understanding?
>
> iii. Is the Plaintiff entitled to the reliefs sought?
>
> iv. Is there merit in the Defendants Counter-claim?

i. Was there a Valid Agreement for sale between the Plaintiff and the Defendant?

36. It is not in dispute that following an application dated **1st February 2013** filed by the Plaintiff the High Court granted a temporary injunction against the Defendant in the following terms:-

> **"THAT pending the hearing and final determination of this suit a temporary order of injunction do issue restraining the Defendant whether by itself or its servants, agents or otherwise howsoever from alienating, transferring, selling or disposing the suit assets being the equipment and related assets listed under the second schedule of the draft Agreement for sale exchanged between the parties and the property known as Title No.Eldoret Municipality/Block 8/47 to any other party than the Plaintiff."**

37. Being aggrieved by those injunctive orders the Defendant challenged the same in the Court of Appeal vide **Civil Appeal No.18 of 2014**. The Court of Appeal allowed the appeal and ordered inter alia **THAT**

> **"2 The Order of Honourable Mr Justice Mabeya granted on 21st day of June 2015 be and is hereby set aside and substituted with an order for dismissal of the 1st Respondent's application dated the 1st February 2013."**

38. In its decision the Court of appeal in setting aside the temporary orders of injunction issued by **Hon Justice Alfred Mabeya** noted inter alia that there already existed an enforceable contract between the Defendant and the Interested Party. The position of the Court of Appeal was that an award of damages would suffice as adequate compensation in the event that the Plaintiff succeeded at trial.

39. I note that in its Further Amended Plaint dated **17th December 2015** the Plaintiff abandoned its prayers seeking a declaration that a valid binding and enforceable contract in law existed between the parties. The Plaintiff also abandoned its prayer seeking orders for specific performance of said contract. In its written submissions filed on **27th September 2019**, the Plaintiff did concede that in light of the decision of the Court of Appeal in **Civil appeal No.18 of 2014 CORN PRODUCTS LIMITED –VS- ELDO CITY LIMITED and EQUIP AGENCIES LIMITED** this matter was no longer open for pursuit. On this basis, I find that no valid, binding and enforceable contract existed in law between the Plaintiff and the Defendant.

ii. Did the Defendant breach the terms of the Memorandum of Understanding?

40. It is not in dispute that the Plaintiff expressed a desire to purchase from the Defendant the suit property and assets. In furtherance of this the parties executed the Memorandum of Understanding dated **28th November 2012**. The Plaintiff submits that the Defendant breached the terms of that **MOU** in the following ways:-

a Failing to allow due diligence within the defined scope of the **MOU.**

b. Failing to evaluate the Plaintiffs bid.

c. Failing to notify the Plaintiff that the suit property and assets had been sold to a third party.

d. Invoking the confidentiality clause with intent to frustrate the Plaintiff's bid.

41. The Plaintiff alleges that the Defendant did not allow it to undertake limited due diligence as provided for in the **MOU**. The Defendant on the other hand contends that due diligence was limited by the **MOU** to viewing assets because the Plaintiff was only purchasing the assets. The Defendant cited the clause in the **MOU** headed **LIMITED DILIGENCE** which provided as follows:-

LIMITED DILIGENCE	Prospective Purchaser shall be allowed a period of fifteen (15) business days from the date of execution of this **MOU**, or such other time period mutually agreed, within which **to engage in limited due diligence with regard to the Assets**. All such diligence must be agreed in advance by the Parties and shall be limited in scope. **It is acknowledge that this is an asset sale, and not the sale of a business**, and diligence will not include any information or documents related to the business of **CPKenya** or any assets or liabilities which are not the subject of this **MOU**. **On site diligence shall be limited to visual observation, and shall be subject to Seller's access protocols**.[own emphasis]

42. On issue (b) the Plaintiff alleges that the Defendant was obliged to consider and evaluate its bid alongside other bids received. That the Defendant failed to evaluate its bid as required as proved by the fact that whereas the Plaintiff indicated its willingness to execute the Agreement for Sale on **28th January 2013** by that date the Defendant had already sold off the suit property and assets to the Interested Party on **24th January 2014.** The Plaintiff alleges that the Defendant failed to notify it that the property had already been sold. The Plaintiff submitted that this failure to notify it of the sale to a third party breached the **NON-EXCLUSIVE** clause of the **MOU** which stipulated that if the Plaintiff pulled out of the bid it was required to notify the Defendant. According to the Plaintiff this clause placed a similar obligation upon the Defendant.

43. The Defendant countered that under the **MOU** it was under no obligation to evaluate the Plaintiff's bid. The Defendant asserts that the Plaintiff was beaten to the finish line by the Interested Party and that in any event the Defendant had made it clear to the Plaintiff that it was in discussion with other bidders hence the **NON-EXCLUSIVE** Clause of the **MOU**. On notification of the failure of the Plaintiff's bid the Defendants position was that whilst it had an obligation to so notify the Plaintiff the **MOU** only spoke of "**prompt notification**" without defining the term. That in any event having accepted the Interested Party's bid on **24th January 2013** and having informed the Plaintiff of the failure of its bid on **28th January 2013,** there was no delay given that **26th** and **27th January** fell on a weekend.

44. The Plaintiff faults the Defendant for having invoked the confidentiality clause when faced with an injunction and declining to reveal how much the Interested Party paid for the suit property and assets. The sale price was redacted in the Sale Agreement dated **24th January 2013.** See page 84 of Plaintiff Bundle of Documents filed on **8th April 2019**) This was done notwithstanding the fact that the purchase and transfer documents had already been lodged in the Lands Registry on **29th January 2013**. **DW1** later revealed that the Interested Party paid **USD 3.2 Million** for the property.

45. On this issue the Defendant submits that having executed the confidentiality agreement and the **MOU** without reservations the Plaintiff cannot now be heard to complain about the same.

46. The Defendant in opposing the entire suit submitted that the **MOU** expressly excluded the institution of legal proceedings and that the present suit was nothing had an attempt by the Plaintiff to re-write the contract between the parties. The Defendant urges the court to give full effect to the terms of the **MOU** which it submits were plain, obvious and unambiguous. The Defendants position is that the **MOU** was not intended to create any contractual relationship between the parties and such relationship could only have been created upon the execution by both parties of a final Sale Agreement which did not happen.

47. The Defendant further submits that the **MOU** was explicit that it had no binding effect on parties. That the Defendant was permitted to engage other prospective purchasers; and that either party was permitted to terminate the **MOU** with no legal consequences at all. The **NON BINDING** Clause of the **MOU** provided as follows;

NON-BINDING	**No binding contractual commitment as to the Proposed Transaction shall be created or inferred absent execution by both parties of final Transaction documents,** except for the obligations of the Parties set forth above under "**Confidentiality**" and **"Non Exclusive,"** which obligations shall be binding and enforceable on the Parties. This **MOU** does not and is not intended to create or impose any binding obligation to continue discussions with the other or to engage in the Proposed Transaction or any other transaction or future business relationship, or any fiduciary or other duty of any kind on either party with regard to the proposed transaction or any other transaction or future business relationship. Either party may decide at any time, in its sole discretion and for any reason, to terminate discussions with the other and such party shall not be liable for any expenses, costs or losses incurred by the other party arising from such termination. **Neither party shall be entitled to specific performance of any of the terms of any draft documents or any verbal**

	discussions, or to damages or other compensation of any sort from the other, in the event that either party elects to terminate discussions with the other. Neither party may reasonably rely on any promises inconsistent with this section, and this "**Nonbinding**" section supersedes any conflicting language herein or any different interpretations under Kenyan law (which shall be the governing law of the **MOU**) or **US** law.[own emphasis]

48. The Defendant submitted that these clauses which were acceptable to the parties from the onset, should be viewed in light of the legal principles that parties are free to contract. That parties are the best judges of their commercial affairs and should they elect to include any clause in their contract, the court should ensure such clauses are enforced. The Defendant relied upon the case of **Kenfreight (E.A.) Limited Vs. Benson K. Nguti (2016) eKLR,** where it was held as follows:-

> **….It was premised on the concept of freedom to contract, the underpinning of "*laissez faire*" economic theory- that the pursuit of self-interest leads to the prosperity of the whole society; that individuals possess general freedom to choose with whom to contract, whether to contract or not and on what terms to contract. They are equally free to decide on the mode of terminating the contract. Accordingly, courts and legislatures exercised restraint and avoided to interfere with those arrangements in obedience of the power of the parties to structure their relationship freely. This belief assumed that in this relationship parties were equal and competent to choose the terms upon which they would be bound."**[own emphasis]

49. The Defendant finally submits that the purpose of the **MOU** was to facilitate non- binding negotiations between the parties. The Defendant denies the Plaintiffs allegation that the **MOU** was a tool of oppression and points out that the Plaintiff had the benefit of legal advice before executing the document. Finally the Defendant urged the court to dismiss the Plaintiffs suit in its entirety and award costs to the Defendant.

50. It is trite law that a contract voluntarily entered into will bind the contracting parties. It is further trite that court will not re-write contracts between parties. In **NATIONAL BANK OF KENYA LTD –VS- PIPELASTIC SAMKOLIT (K) LTD [2002] E.A** it was held:-

> **"A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion fraud or undue influence are pleaded and proved….. "** [own emphasis]

51. Similarly the Court of Appeal in the case of **Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR** stated as follows:-

> **"**The position in law with regard to the binding nature of a contract executed willingly by the parties has now followed a well beaten path**.** In **National Bank of Kenya Ltd versus Pipe Plastic Samkolit (K) Ltd & another [2011] eKLR**, the **Court** was categorical that:
>
> > ***"It is clear beyond para adventure , that save for those special cases where equity might be prepared to relieve party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."***
>
> The Court in **Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR,** after reviewing case law on the subject reiterated as follows:
>
> > ***"We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved."***

52. Accordingly I find that the Plaintiff is bound by the terms of the **MOU** and having voluntarily executed the same, the Plaintiff cannot now ask the court to relieve it from those terms of said **MOU** that it does not agree with. **PW1** under cross – examination conceded that the **MOU** was only to facilitate negotiations between the parties. **PW1** stated as follows:-

> **"This MOU was to enable us to transact the business at hand. It was to help facilitate negotiations. The end result of the negotiations was an Agreement of which a draft was sent to me. The Draft Agreement was not eventually executed…."**[own emphasis]

53. It is not in any doubt that the Plaintiff had reservations concerning certain clauses and terms of both the Confidentiality Agreement as well as the **MOU**. The Plaintiff even raised these concerns with the Defendant. However, despite its misgiving the Plaintiff still went ahead, with the benefit of legal advice to execute both documents. The Plaintiff cannot now seek to run away from documents it had voluntarily executed.

54. I agree with the Defendant that under the terms of the **MOU** negotiations between the Plaintiff and the Defendant were of a non-binding nature. Either party was free to terminate said negotiations at any point without legal consequences. The **MOU** further by the **NON BINDING** clause provided that an aggrieved party would not be entitled to specific performance or damages. That Clause provided as follows:-

> **"Either party may decide at any time, in its sole discretion and for any reason, to terminate discussions with the other and such party shall not be liable for any expenses, costs or losses incurred by the other party arising from such termination. Neither party shall be entitled to specific performance of any draft documents or any verbal discussions or to damages or other compensation of any sort from the other in the event that either party elects to terminate discussions with the other."**

55. By Prayer (f) of the Plaint the Plaintiff sought to claim for the costs incurred in obtaining and renewing the Guarantee of **USD 2.0**

Million. PW1 relying on the ledger Account and Account Statement produced in the Plaintiff's further List of Documents filed on **11th July 2019** stated that the costs incurred by the Plaintiff in obtaining and renewing the guarantee of **USD 2.0 Million** totalled **Kshs.2,372,008.97** which is the amount the Plaintiff now claims from the Defendant as a refund. However the **MOU** was very specific on this issue vide the clause headed **CONSIDERATION** which provided as follows:-

CONSIDERATION	The form of consideration payable in the transaction to be 100% cash, payable at Closing. The purchase price and payment shall be in **U.S** dollars. Prospective Purchaser has, prior to execution of this **MOU**, provided seller with a financial guarantee, in a form and from a financial institution acceptable to Seller, in the amount of **U.S** dollars **$2,000,000** to support its obligations in connection with the Potential Transaction, and this guarantee shall remain in full force and effect until payment in full of the purchase price at closing. **Prospective Purchaser shall bear all costs incurred in connection with this guarantee or any financing which it obtains in order to proceed with the Potential Transaction**.[own emphasis]

56. Likewise the Clause headed **"TRANSACTION EXPENSES"** provided that:-

> **"Each of the Parties will bear its own expenses, including attorney's fees, relating to the negotiation, diligence and documentation of the proposed transaction."**

Indeed **PW1** under cross-examination confirmed that

> **"Under the heading "consideration" I was to bear all costs incurred in connection with the guarantee."**

Having executed the **MOU** the Plaintiff cannot now claim the costs of securing the Guarantee from the Plaintiff.

57. Based on the foregoing the Plaintiffs entire claim must fail. The Plaintiff signed away its right to legal recourse on **28th November 2012** when it executed the **MOU**. This court cannot and will not re-write the terms of the contract between the parties. The court is only mandated to enforce said contract.

58. Similarly the Plaintiff's claim for general damages is not tenable as it is a general rule that damages are not recoverable in cases of alleged breach of contract. In **KENYA TOURISM DEVELOPMENT CORPORATION –VS- SUNDOWNER LODGE LTD 2018 eKLR**, the Court of Appeal held as follows:-

> **"We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In DHARAMSHI Vs. KARSAN [1974] EA , the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so it would be."[own emphasis]**

COUNTERCLAIM

59. The Defendant filed a Counterclaim dated **9th November 2015** in which they sought judgment against the Plaintiff in the sum of **Kshs.34,915,590.00** and **USD 200,000.00** plus interest at court rates as well as costs of the counterclaim. The Defendant submits that vide ruling delivered on **21st June 2013**, the High Court granted an interim inunction in favour of the Plaintiff. The said injunction was conditional upon the Plaintiff furnishing an undertaking as to damages. That accordingly the Plaintiff furnished the undertaking dated **27th February 2013** and the same was filed in Court on **1st March 2013**.

60. The Defendant submits that although the interim injunction was later set aside by the Court of Appeal in its ruling of **24th October 2014**, during the pendency of the injunction from **4th February 2013** to **24th October 2014** it was unable to complete the sale of the suit property and assets to the Interested Party. The Defendant further submits that even subsequent to the setting aside of the injunctive orders by the Court of Appeal, it still took a period of time to complete the sale transaction due to changes in tax regimes and the depreciation of the assets on the property. For this the Defendant contends it is entitled to be indemnified for any loss it suffered as a consequence of said injunction.

61. The Defendants position is that an undertaking as to damages exists to indemnify a party from the effects of an injunctive order made in favour of the opposite party. The Defendant relied on the case of **CHATUR RADIO SERVICE –VS- PRONOGRAM LIMITED [1994] eKLR,** in which the Court of Appeal held thus:-

> **The undertaking as to damages applies in all cases where the Court at the hearing determines that the plaintiff is not entitled to an interlocutory injunction. At that stage, the defendant becomes entitled on the plaintiff's undertaking, to an inquiry as to the damages sustained by him by reason of that injunction the purpose of which is to facilitate his obtaining full compensation for all the injury caused to him by the granting of such injunction. Unless therefore there are special circumstances to the contrary, whenever the undertaking as to damages is given by the plaintiff in an application for an interlocutory injunction, and the plaintiff ultimately fails on merits, the defendant will be granted an inquiry as to the**

damages occasioned to him by the grant of such injunction. [own emphasis]

62. The Plaintiff counters that it was the conduct of the Defendant in failing to disclose to the Plaintiff that the suit property and assets had been sold which led to the filing of present suit. That the Defendant withheld crucial information being the purchase price paid by the Interested Party and this the Defendant ought not be allowed to benefit from its own wrongful conduct through an award of damages in its favour.

63. In **MUMIAS SUGAR COMPANY LIMITED –VS- OPTION TWO LIMITED & Another [2014] eKLR, Hon Justice Gikonyo** held as follows:-

> **Undertaking as to damages is not aimed at giving any comfort to or to sooth a party or to dilute the effect of a court order; it serves much more defined legal purposes, which are two-fold: 1) To offer protection in and entitle the party against whom the interlocutory order is issued to claim for damages for injury suffered by the order should the court eventually find that the interlocutory order ought not to have been issued in the first place; 2) To enable the court to do justice to such party who has been injured by an order which had been wrongly issued. The misadventure of the judge in issuing the offending order may be as a result of the judge not knowing all the facts of the case or having been misled or restricted by the affidavit evidence before him or by the powerful arguments of counsel. See what the court said in CHATUR RADIO SERVICES v PHONOGRAM LIMITED that:**
>
> > **'"The object in insisting upon an undertaking as to damages is that if by misadventure through the judge not knowing all the facts, such as being misled by the affidavit evidence before him or by the arguments of counsel, and injunction is granted on an interlocutory application which ought not to have been granted, then the defendant is entitled to some remedy in damages; thus, the defendant becomes protected against the damage he may suffer by the wrongful issue of the injunction so that the whole purpose of that injunction, which is to preserve matters in status quo until the issue to be investigated in the suit can finally be disposed of, is not rendered nugatory. Save therefore in exceptional circumstances, an undertaking as to damages is required when an interlocutory injunction is granted in order that the court granting such injunction may be able to do justice if the injunction was wrongly granted."** [own emphasis]

64. Further in the **CHATUR RADIO SERVICE Vs PHONOGRAM LIMITED** [supra] the court added as follows;

> **Compliance with an undertaking as to damages necessarily involves an investigation as to the damages sustained by the defendant on account of wrongful grant of an interlocutory injunction. Such investigation is no less than a judicial examination and determination of the issue of the damages the defendant is entitled to. Indeed, it is in effect an interlocutory trial of that issue. On the establishment and assessment of such damages, the plaintiff who gave the undertaking is enjoined to comply therewith. This, I think is what is contemplated by the words in order XXXIX rule 2(2) of the Rules that the Court may by order grant a temporary injunction on such terms inter alia "as to an inquiry as to damages" as it thinks fit: for upon such term, the plaintiff who is seeking the injunction is undertaking to submit wholly to the power of the court granting such injunction to adjudicate on the issue of the damages sustained by the defendant by reason of an improper grant of the injunction. That, as is evident from what I have attempted to outline above, is what an undertaking as to damages is all about and the non-compliance with it is enforceable by the Court granting the injunction by attachment and/or committal under sub-rules (3) and (4) of the rule mentioned above.** [own emphasis]

65. The undertaking which the Plaintiff furnished in this matter which was dated **27th February 2013** provided as follows:-

> **"In the event that the interim injunction is granted but the Respondent succeeds at trial and the Respondent suffers damage as a result of the interim injunction having been in place, then the Applicant will abide by any order which this Honourable Court may make for payment of damages to the Respondent."**

66. From the above wording of the undertaking it is manifest that an award of damages to the Defendant was not to be dependent on whether or not the Defendant was to blame for the filing of the suit as the Plaintiff has submitted. Rather the award of damages to the Defendant would depend on whether or not the Plaintiff succeeded at the trial of the suit and whether the Defendant would be able to demonstrate that it suffered damages as a result of the said interim injunction. Well the Plaintiffs suit has failed and as such it is necessary to consider what if any damage the Defendant has suffered as a result of said injunction.

67. The damages which the Defendant seeks were tabulated as follows:-

Security costs	Ksh.28,278,294.00
Electricity Supply	Ksh.2,960,453.80
Water and Sewerage Services	Ksh.1,589,093.00
Staff costs for employee retained solely for the property book keeping	Ksh.2,087,750.00
Discount for sale	USD200,000.00

68. The Plaintiff opposes all these claims being made by the Defendant. The Plaintiff submits that the Defendant has not presented any evidence to prove its claim that the Interested party demanded a discount of **USD 200,000** or at all, thus on this limb no loss has been demonstrated.

69. With respect to the Defendants claim of **Kshs.28,278,294.00** for security costs, the Plaintiff submits that this too has not been proved as the Defendant produced only invoices issued by **KK Security Services** but did not demonstrate that this amount had actually been paid to the security firm. On electricity costs being claimed by the Defendant the Plaintiff's position is that only the bills which arose during the pendency of the injunction ought to be considered. It submits that the following bills should not be considered

a. Bill of Ksh.214,272.76 dated 31st March 2013

b. Bill for Ksh.188,379.31 dated 7th April 2013

c. Bill for Ksh.172,539.14 dated 28th June 2013

70. The Defendant further submits that for the bill of **Ksh.190,235.50** dated **19th August 2013** no proof has been tendered that said Bill was ever paid as only the invoice was produced. That that leaves the sum of **Ksh.825,335.39** as legitimate and proper.

71. On the question of Water bills the Plaintiff submits that the bills prior to **June 2013** should be excluded from consideration that is the bills for **February, March, April and May 2013**. And that since there was no water bill for months of **March, April** and **May** then taking the average consumption for six months, the Bill would amount to **Ksh.190,976.00** monthly. The Plaintiff points out that the water bill for the period from **June** to **September 2014** was paid by the Interested Party and not the Defendant, therefore the liability would then be for the months of **July** and **August 2013** in the sum of **Ksh.381,952.00** only.

72. On Staff costs, the Plaintiff submits that costs outside the injunction period should not be considered. That those are items **1,2,3, 4** and **21, 22** amounting to **Ksh.534,500**. That when that amount is deducted from the claimed amount it leaves **Ksh.1,553,250.00**.

73. Finally the Plaintiff submits that the only claim the Defendant has probably proved are as follows:-

a. Electricity –Ksh.2,108,118.41

b. Water – Ksh.381,952.00

c. Staff costs –Ksh.1,553,250.00

d. Total - **Ksh.4,043,320.41**

74. The Defendant on the other hand challenges the figures cited by the Plaintiff and submits as follows. On the claim of water bills the Defendant submits that all the amounts claimed were payable during the period that the injunction was in force. That it is immaterial whether it was the Defendant or another party who paid the relevant water bills.

75. Regarding staff costs claimed at **Kshs.2,087,750.00** the Defendant submits that the Plaintiff has already conceded that under this heading an amount of **Kshs.1,553,250.00** was payable. The Defendant reiterates its position that notwithstanding the setting aside of the injunctive orders in **October 2014** all expenses incurred in the months of November and **December 2014** are claimable as it took time for the Defendant to re-engage with the Interested party and to finalize the sale. That had the injunction not been issued then these expenses would not have been incurred.

76. It is common ground that the injunction in question was granted by the High court on **4th February 2013** subject to the Plaintiff furnishing an undertaking as to damages. The said undertaking was made on **27th February 2013**. The question that would obviously arise is what was the effective date of said undertaking - was it the date when the High Court allowed the Plaintiff's prayer for interim injunctive orders which would be the date of the Ruling by **Hon Justice Mabeya** being **21st June 2013** or should the effective date, be taken to be the date when the undertaking - was given being **27th February 2013**.

77. It is well settled in law that injunctive orders are granted at the discretion of the court. The fact that the Plaintiff was ready to and did in fact furnish an undertaking would not in any way compel the court to issue the injunctive orders sought. Accordingly, I find that the effective date of the Plaintiffs undertaking is the date when the High Court granted the injunctive orders being **21st June 2013.**

78. The damages being claimed by the Defendant are in the nature of special damages. It is trite law that special damages must not only be pleaded with particularity but must also be specifically proved.

79. In **NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES –VS- SIFA INTERNATIONAL [2016] eKLR**, the court held as follows:-

"It has been stated time without number that special damages must not only be pleaded, they must be specifically or strictly

proved. This court in the case of William Kiplangat Maritim & another –VS- Benson Omwenga Civil Appeal No.180 of 1993 (Nairobi) cited with approval its decision in Coast Bus Service Ltd –Vs Murunga Danyi & 2 others, Civil Appeal No.192 of 1992 (UR) and stated as follows:-

> **"We would restate the position special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of the special damages were to be supplied at the time of trial. If at the time of filing suit the particulars of special damages were not known, then those particulars can be supplied at the time of trial by amending the Plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the Plaint that a litigant will be allowed to proceed to strict proof of those particulars."** [own emphasis]

80. Likewise in **MACHARIA & WANGURU –VS- MURANGA MUNICIPAL COUNCIL 7 ANOTHER [2014] eKLR,** it was held:-

> **"…it is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract."**

81. A look at the Amended Defence and Counter-claim dated **9th November 2015** shows that the Defendant did particularize its claim for special damages under **Clause 39** of their Counterclaim. I will now proceed to analyze the various claims made by the Defendant as special damages. On the claim for **USD 200,000** discount granted to the Interested Party **clause 1.8** of the Agreement for sale between the Defendant and the Interested Party (see **Page 264** of the Defendant's supplementary Bundle of documents filed on **16th November 2015**) indicated that the purchase price agreed upon between the Defendant and the Interested Party was **USD 2,200,000**. The invoice at **Page 286** is for **USD 2,000,000**. This the Defendant claim is sufficient proof of the discount of **USD 200,000** claimed by the Defendant. However, I find that the Defendant did not sufficiently prove this claim. All it was able to demonstrate was that the Interested Party paid the agreed purchase price less **USD 200,000**. This is not proof that a discount was given as alleged. **DW1** under cross-examination admitted thus:-

> **"We have not produced any letter from the Interested Party seeking a discount……the Discount of USD 200,000 is not indicated in this invoice."**

I therefore disallow this claim.

82. With respect to the claim for security costs the Defendant submitted invoices sent to the Defendant by **KK Security** as proof that a contract for supply of security services did in fact exist. However the Defendant has not provided any proof that the said invoices were actually paid. In **TOTAL (KENYA) formerly CALTEX OIL (KENYA) LIMITED –VS- JANE VAMS LIMITED [2015] eKLR**, the Court of Appeal observed as follows:-

> **From the judgment, the respondent produced proforma invoices in support of the claims for the retained petrol station equipment. A proforma invoice is considered a commitment to purchase goods at a specified price. It is not a receipt, and as such cannot attest to the existence of or the acquisition of goods. We consider that a proforma invoice was not satisfactory proof of the respondent's loss, or the replacement value of the respondent's equipment, and the learned judge misdirected himself in finding that the proforma invoices were sufficient proof of special damages for the respondent's equipment supposedly withheld by the appellant.** [own emphasis]

83. Furthermore **DW1** under cross –examination conceded that:-

> **"We have a claim for KK Security Services Ltd. We had a longstanding contract with KK Security. We have not annexed the contract. We have not annexed the payment details for KK Security. I can confirm that they were paid."**

The court will need much more than the word of **PW1** that the invoices from **KK Security** were actually paid as proof that said invoices were indeed paid. Accordingly, I find that invoices alone do not sufficiently prove loss incurred by the Defendant. Therefore this particular claim must also fail.

84. On the claim for electricity costs, I find that any bills paid prior to the effective date of the undertaking being **21st June 2013** cannot be claimed. Further the Bill for **August 2013** was not sufficiently proved as the Defendant availed only an invoice without any proof of payment of the amount of the invoice. The sum conceded to by the Plaintiff under this heading was **Kshs.2,108,114.41**.

85. Regarding the Defendants claim for water bills any amounts falling outside the period of the injunction are not recoverable. Equally the bills paid by the Interested Party cannot be deemed to fall under losses incurred by the Defendant. The amount due under this heading is **Kshs.381,952.00** for the months of **July** and **August 2013** only.

86. On the claim for staff costs the claim falling outside of the period of the injunction are not recoverable. Under this heading the Plaintiff conceded to an amount of **Kshs.1,553,250.00.**

87. Finally, I find that the amount lawfully due to the Defendant as damages is **Kshs.4.043,320.41** made in as follows:-

a. Electricity –Ksh.2,108,118.41

b. Water – Ksh.381,952.00

c. Staff costs –Ksh.1,553,250.00

d. Total - **Ksh.4,043,320.41**

88. Accordingly on the counterclaim I do hereby enter judgment against the Plaintiff in favour of the Defendant for **Kshs.4,043,320.41**. I further award interest on the sum at court rates from the date of this judgment until payment in full. Costs of the Counterclaim are awarded to the Defendant.

CONCLUSION

Finally and in conclusion this court hereby make orders as follows:-

a. The Plaintiffs suit be and is hereby dismissed in its entirety and costs of the suit are awarded to the Defendant.

b. Judgment be and is hereby entered on the counter-claim against the Plaintiff in favour of the Defendant for the sum of **Kshs.4,043,320.41.**

c. Interest be and is hereby awarded on (b) above at court rates from the date of this judgment until payment in full.

d. Costs of the Counter-claim are awarded to the Defendant together with interest thereon from the date of this judgment until payment in full.

It is so ordered.

Dated in Nairobi this 4th day of September 2020.

……..

Justice Maureen A. Odero