



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 450 OF 2013

BELL PACIFIC INTERNATIONAL LIMITED.....PLAINTIFF

-VERSUS-

ECOBANK KENYA LIMITED.....DEFENDANT

JUDGMENT

[1] The Plaintiff, **Bell Pacific International Limited**, filed this suit herein on **18 October 2013**, seeking judgment against the Defendant, **Ecobank Kenya Limited**, in the following respects:

- [a] **The payment of the sum of Kshs. 50,429,100 together with interest thereon at 18.75% per annum;**
- [b] **An order that the Plaintiff is not liable in the sum of Kshs. 34,740,451.82 demanded by the Defendant;**
- [c] **Costs of and incidental to this suit and interest on such costs at court rates;**
- [d] **Any other or further relief as the Court may deem fit to grant.**

[2] The Plaintiff's cause of action is that on or about the **2 February 2009**, it secured a contract from the Ministry of Agriculture for the supply of 10,000 metric tons of Urea Fertilizer at the total price of **USD 3,392,000**, being the equivalent of **Kshs. 266,714,995.20** at the time (the prevailing exchange rate at the time being 78.5 to the Dollar). To enable it service the order, the Plaintiff sought and obtained a Letter of Credit facility dated **28 May 2009** for **USD 2,750,000** in accordance with its suppliers terms and conditions of shipment. The Plaintiff further averred that it was a term of the Letter of Credit that interest would only be applicable if the Defendant funded the Letter of Credit to maturity. It was the Plaintiff's case that in breach of the contract, the Defendant failed and/or refused to issue a Letter of Credit that was acceptable to the supplier, **Diamond Gate General Trading LLC** of Dubai, for the supply of the fertilizer to the Ministry of Agriculture.

[3] It was further the Plaintiff's claim that, after the collapse of its deal with **Diamond Gate General Trading LLC**, it sought from the Defendant a Bank Guarantee to **Kenlet Trade Agency** to facilitate the supply of the aforementioned 10,000 metric tons of urea fertilizer, but that the Defendant again failed to issue an acceptable Bank Guarantee, thereby causing the Plaintiff to suffer loss of business revenue and profit. It was the Plaintiff's contention that the Defendant's failure to issue acceptable Letter of Credit or

Bank Guarantee to its suppliers was an action in bad faith, was fraudulent, oppressive and illegal, and therefore entitles it to a cause of action; hence the suit herein. The Plaintiff also complained that in breach of the contract between the parties, and with intent to defraud it, the Defendant opened an **Overdraft Account No. 01-10200028** in its name and debited it with commissions pertaining to the Letter of Credit aforementioned; and that thereafter the account was converted into a loan account which, as at **12 February 2013** had an alleged debit balance of **Kshs.34,740,451.82**. It is on account of the foregoing that the Plaintiff claims the aforesaid sum of **Kshs. 50,429,100** with interest and costs, as well as an order that it is not liable to pay the sum of **Kshs. 34,740,451.82** aforementioned.

[4] In support of the Plaintiff's case, its Managing Director, **Joseph Wamwayi Odundo (PW1)**, testified herein and stated that the relationship between the Plaintiff and the Defendant started in **January 2009** when the Plaintiff opened a Business Account with the Defendant, being **Account No. 0111200025** for the purpose of doing fertilizer business with the Ministry of Agriculture. This was after the Plaintiff had won a tender for the supply of 10,000 metric tons of Urea Fertilizer to the Ministry of Agriculture and was accordingly issued with a Local Purchase Order to that effect. He further stated that, after due diligence, the Defendant agreed to open a Letter of Credit in favour of the Plaintiff's suppliers, **Diamond Gate General Trading LLC** and proceeded to send a draft of the Letter of Credit to them for verification and confirmation in terms of content.

[5] It was the Plaintiff's testimony that **Diamond Gate General Trading LLC** made their comments and suggested that some amendments be made by the Defendant before confirmation of the Letter of Credit, but that the amendments were not effected; with the result that **Diamond Gate General Trading LLC** rejected the draft Letter of Credit and cancelled the contract. It was further the evidence of **PW1** that in the foregoing circumstances, the Plaintiff approached another supplier, namely, **Kenlet Trade Agency** for the supply of the 10,000 metric tons of Urea Fertilizer, and that the Defendant was agreeable to furnishing them with a Bank Guarantee, but when a draft was sent to the supplier's bank for confirmation, again corrections were demanded which the Defendant failed to effect; with the result that the Ministry of Agriculture ended up cancelling the contract. **PW1** relied on his written statement dated **7 January 2016** together with the Plaintiff's Bundle of Documents filed therewith in support of the claim.

[6] The Defendant denied its liability herein on the terms set out in the Amended Statement of Defence and Counterclaim filed herein on **30 October 2014**. In particular, the Defendant denied that it breached the contract between the parties or that it failed to issue a Letter of Credit that was acceptable to **Diamond Gate General Trading LLC**, or a Bank Guarantee to **Barclays Bank** as alleged by the Plaintiff. The Defendant further denied that it fraudulently opened an overdraft account in the Plaintiff's name or debited the account with commissions as alleged. According to the Defendant, it agreed to grant the Plaintiff a Letter of Credit facility for **USD 2,750,000** vide the Letter of Offer dated **28 May 2009**; and that it was a term of the agreement that the Plaintiff would pay, *inter alia*, 1% commission on the opening of a Letter of Credit, 1% commission on negotiation of the Letter of Credit and 0.5% commission on settlement as well as commitment fees of 2% upon acceptance of the Letter of Offer.

[7] It was further the contention of the Defendant that pursuant to the said agreement, the Defendant performed its part of the agreement by issuing a Letter of Credit as per the Plaintiff's instructions, in favour of **Habib Bank AG Zurich** of Dubai to the tune of **USD 2,750,000**; and was therefore entitled to charge commission and debit the Plaintiff's account as it did. It further contended that, at the request of the Plaintiff, it issued a Bank Guarantee dated **15 September 2009** in favour of **Barclays Bank of Kenya Limited** for **Kshs. 220,000,000**. Thus, it was the case of the Defendant that as at **3 April 2014**, the Plaintiff was indebted to it to the tune of **Kshs. 34,965,151.82**, which amount has continued to accrue interest at the rate of 23% per annum. Accordingly, the Defendant counterclaimed from the Plaintiff the aforesaid sum of **Kshs. 34,965,151.82** together with interest at 23% per annum from **4 April 2014** until full payment.

[8] The Defendant called one witness in proof of its case, namely **Jack Kimathi (DW1)**, a Legal Officer in charge of the Defendant's Recoveries Section. He adopted his witness statement dated **15 September 2015** and confirmed that the Plaintiff was and still is one of the Defendant's customers, and that the Plaintiff sought and obtained a Letter of Credit facility for **USD 2,750,000** as per the Defendant's Letter

of Offer dated **28 May 2009**, to enable the Plaintiff meet its suppliers terms and conditions of shipment. **DW1** however pointed out that it was a term of the Letter of Offer aforementioned that the Plaintiff would pay commitment fee of 2% upfront together with a drawing fee of 1% upon acceptance of the Letter of Offer. He added that it was also a term of the Letter of Offer that the Plaintiff would pay, among others, a commission of 1% on the opening of the Letter of Credit, 1% commission as negotiation fee and 0.5% commission on settlement.

[9] It was the evidence of **DW1** that, in accordance with the parties' agreement, the Defendant did issue a Letter of Credit to **Habib Bank AG Zurich** dated **3 June 2009** for the sum of **USD 2,750,000** in favour of **Diamond General Trading LLC**, a copy whereof was exhibited at pages 6 to 7 of the Defendant's Bundle of Documents; and that that Letter of Credit was issued as per the instructions given by the Plaintiff in the application form submitted by the Plaintiff. **DW1** testified that the Defendant subsequently received a swift message from its correspondent bank informing it that the beneficiary had returned the original Letter of Credit to them for cancellation; and that upon promptly informing the Plaintiff of this situation, the Plaintiff submitted a letter to the Defendant consenting to the cancellation. He added that the Plaintiff further advised the Defendant that it was in the process of sourcing for a different supplier. Accordingly, **DW1** reiterated the defence posturing that the commissions charged were rightfully and contractually charged at the point of opening of the Letter of Credit.

[10] With regard to the Bank Guarantee, it was the evidence of **DW1** that, from a reading of **Clause 7 (a)** and **(b)** of the contract between the Plaintiff and **Kenlet Trading Agency** it was clear that no conditions were attached thereto, and that at no time did the suppliers request the Defendant to correct the Guarantee. He therefore urged the Court to dismiss the Plaintiff's suit with costs and enter judgment in the Defendant's favour in terms of the prayers set out in the Counterclaim.

[11] At the close of the hearing, the parties filed their respective written submissions herein, which were highlighted on **26 October 2016**. I have given those submissions due consideration in the light of the pleadings filed herein and the evidence adduced by the parties; and what emerges therefrom is that the parties are in agreement as to most of the facts herein. There is therefore no dispute that the Plaintiff Company won a tender for the supply of 10,000 metric tons of Urea Fertilizer to the Ministry of Agriculture at a cost of **USD 3,392,000** or **Kshs. 266,714,995.20**. The contract document signed between the Plaintiff and the Ministry of Agriculture, dated **2 February 2009**, is at page 24 to 34 of the Plaintiff's Bundle of Documents. In addition thereto, the Plaintiff was issued with a Local Purchase Order dated **11 June 2009** by the Ministry of Agriculture for **Kshs. 266,714,995.20**, which was also exhibited at page 67 of the Plaintiff's Bundle of Documents.

[12] It is also common ground that, for the Plaintiff to meet its obligations under the contract, it required, a Performance Bond to be issued to the Ministry of Agriculture and a Letter of Credit in favour of the supplier. The Performance Bond was accordingly issued and a copy thereof was exhibited by the Plaintiff at page 41 of the Plaintiff's Bundle of Documents. As for the Letter of Credit, the Plaintiff relied on the Letter of Offer dated **28 May 2009**, by which the Defendant agreed to grant it a Confirmed Irrevocable Letter of Credit Facility for **USD 2,750,000**. It was specified in the said Letter of Offer that the purpose of the Letter of Credit was to enable the Plaintiff supply 10,000 metric tons of Urea Fertilizer to the Ministry of Agriculture as per **LPO No. 8951**. The facility was to be repaid within 60 days from the date of acceptance. That Letter of Offer was duly accepted by the Plaintiff as shown on page 62 of the Plaintiff's Bundle of Documents. In the premises, the following are, in my considered view, the issues that present themselves for determination herein:

[a] Whether the Defendant opened a Letter of Credit to the Plaintiff's supplier, **Diamond Gate General Trading LLC** as agreed; and if not, whether the Plaintiff suffered any loss attributable to the said act of omission;

[b] Whether the Defendant provided a valid Bank Guarantee to **Kenlet Trade Agency**; and if not, whether any liability accrues therefrom;

[c] Whether the Defendant is entitled to the sums claimed by it in the Counterclaim.

[13] On whether the **whether the Defendant opened a Letter of Credit** to the Plaintiff's supplier, **Diamond Gate General Trading LLC**, the parties are in agreement that after the Letter of Offer aforementioned was issued and accepted by the Plaintiff, the Plaintiff put in an application for an Irrevocable Letter of Credit as per pages 8 to 11 of the Plaintiff's Bundle of Documents. Thereupon the Defendant issued the unconfirmed Letter of Credit at pages 18 and 19 of the Defendant's Bundle of Documents. On that basis, the Defendant contended that it fulfilled its obligation and that indeed the Plaintiff admitted in paragraph 5 of its Plaint that it "**sought and obtained**" the Letter of Credit Facility from the Defendant for **USD 2,750,000**.

[14] However, the evidence adduced herein shows that upon receipt of the draft Letter of Credit for confirmation, the beneficiary, **Diamond Gate General Traders LLC** suggested certain corrections thereon. The supplier's letter dated **5 June 2009**, at page **63** of the Plaintiff's Bundle of Documents reads as follows in part:

"We make reference to your letter dated 3rd June 2009 together with copy of the draft LC, awaiting transmission. We had forwarded [to] the same to [the] our bankers in Dubai, to peruse and advice for amendments. The following are list of amendments requested for:

1) CLAUSE M49: CONFIRMATION INSTRUCTIONS; **CONFIRM**

2) CLAUSE 46A: Item 2 - Full set of clean shipped on board BL made out to the order (**delete the words "dated not later than 13th Aug"**)

Item 5 - To Read as ...Inspection Certificate issued by SGS **confirming that the inspection has been carried out at the port of loading, indicating the quality & quantity of the shipment. (No need for 47A Clause 3 ... which will be a repetition).**

Item 6-Certificate of Origin **issued by any European Chamber of Commerce indicating that the goods are of European origin**

3) CLAUSE 47A - Delete ... Insurance not covered by buyer.

4) CLAUSE 78- Reimbursement clause mentioned is **applicable for sight LC's only. This should be changed accordingly for Usance LC's**

Kindly also note that the LC should be advised to:

Emirates Bank International,

Al Souk Branch, P.O. Box 11954, DUBAI, U.A.E (Swift Code: EBILAEAD)

Beneficiary: **DIAMOND GATE GENERAL TRADING LLC**,

Beneficiary Account No: 0055-038793-010..."

[15] A follow up letter by **Diamond Gate General Traders LLC**, dated **9 June 2009** (at page 65 of the Plaintiff's Bundle of Documents) was written after feedback from their bankers; and it reiterated the contents of the letter of **5 June 2009**. It was the Plaintiff's evidence that it brought the contents of the two letters aforementioned to the attention of the Defendant for their further action, but that the Defendant declined to act thereon. Hence the supplier was constrained to cancel the transaction as shown in their letter of **15 June 2009**, in which it was stated thus:

"We have been informed by our Dubai office that the requested amendments have not been received at the counters of Emirates Bank International, Dubai till today. The bank has also said that they have conducted due diligence on the companies & correspondents/banks involved in the transaction and consequently they have declined to issue a back-to-back

Letter of Credit in favour of the manufacturer. Had the amendments been effected in time, the bank in Dubai would not have taken this position.

Further, the manufacturer has also conveyed to us that they cannot hold the goods for us any longer, as we are yet to confirm to them receipt of a workable letter of credit at our bank in Dubai.

In view of the above, we regret to inform you that we are unable to proceed with the transaction..."

[16] It is noteworthy that all the three letters from **Diamond Gate General Trading LLC** were addressed to the **PW1** and although it was his contention that the Defendant failed/refused to give a corrected Letter of Credit despite several requests, there appears to be no documentary proof thereof; which appears to be uncharacteristic of the Plaintiff, granted the number of correspondence it exchanged with both the Ministry of Agriculture and the Defendant. What was exhibited was a letter dated **22 June 2009** to the Defendant,(at page 12 of the Defendant's Bundle of Documents) in which the Plaintiff stated thus:

"We would like to inform you that after our first supplier's insistency that we change the letter of credit from user Letter of Credit to CONFIRMED Letter of Credit, we had no alternative but to go for a second option since that is not how we had agreed earlier. As a result of this we would like the Letter of Credit cancelled, I am travelling to inspect the products in two ports to avoid any further inconveniences. I will therefore advice the bank on the name of the supplier who will satisfy me..."

[17] Moreover, in his evidence before the Court, **PW1** stated thus in this connection:

"...Subsequently the supplier cancelled the supply. Upon cancellation I approached the Defendant Bank and notified it of the cancellation to enable me go to another supplier. I approached another supplier, Kenlet Trade Agency. Kenlet then wrote the letter dated 23 July 2009 to Barclays Bank setting out the terms of the bank Guarantee..."

In the premises, the contention by the Defendant that the Plaintiff never issued it with specific instructions in respect of the proposed amendments to the Letter of Credit before its cancellation by the Plaintiff appears to be credible and uncontroverted.

[18] In the case of the Letter of Credit issued by the Ministry of Agriculture to the Defendant, the documents exhibited at pages 45, 46, 47, 48, and 50 of the Plaintiff's Bundle of Documents confirm that the Defendant first received a draft, and that upon scrutiny thereof it made certain suggestions; and that it was after the corrections were effected that the final document was transmitted in the form of the Letter of Credit dated **18 March 2009** at page 49 of the Plaintiff's Bundle of Documents. In the same vein, I would agree with the Plaintiff that what was sent by the Defendant to the Plaintiff's supplier, **Diamond Gate General Trading LLC** was a draft, for the scrutiny and confirmation by the supplier and its bankers. Indeed the letters dated **5 June 2009**, **9 June 2009** and **15 June 2009** at pages 63, 65 and 66 of the Plaintiff's Bundle of Documents confirm as much. To the extent therefore that there was no confirmation, it cannot be said that there was a valid Letter of Credit properly so called.

[19] More importantly the whole purpose of the facility was to assist the Plaintiff in its bid to import fertilizer for supply to the Ministry of Agriculture. The draft Letter of Credit having been rejected by the supplier, it cannot, by any stretch of imagination, be said that the Defendant issued a valid Letter of Credit in accordance with its Letter of Offer dated **28 May 2009** as negotiated and agreed by the parties.

[20] As to **whether the Defendant provided an acceptable Bank Guarantee to Kenlet Trade Agency**; the Plaintiff adduced evidence to the effect that after **Diamond Gate General Trading LLC** rejected the draft Letter of Credit as tendered by the Defendant and cancelled the contract, it approached **Kenlet Trade Agency** for to supply the same 10,000 metric tons of Urea Fertilizer as the latter was agreeable to taking a Bank Guarantee. The parties agreement was reduced to writing, in the form of the contract dated

18 July 2009 at pages **70** to **81** of the Plaintiff's Bundle of Documents. There is no dispute that the Plaintiff sought facilitation from the Defendant and a draft Guarantee was prepared and sent to **Kenlet Trade Agency**, which document was exhibited by the Defence at page **6** and **7** of the Defendant's Bundle of Documents. It was confirmed via SWIFT as per pages **18** and **19** of the Defendant's Bundle of Documents.

[21] However, it is also common ground that **Barclays Bank of Kenya Limited** did promptly decline the Guarantee as per the document at page **17** of the Defendant's Bundle of Documents, indicating that the wording was not acceptable. That SWIFT message reads:

"YOUR MT760 DATED 15/09/09 REFERS, PLEASE NOTE THAT WE ARE UNABLE TO ACT ON IT AS GUARANTEE WORDING IS NOT ACCEPTABLE TO US. NOTE THAT WE HAVE CLOSED OUR BOOKS ON THE SAME..."

Again, the Plaintiff was left in the lurch in respect of its contract with the Ministry of Agriculture and it was not long before the Ministry of Agriculture expressed their impatience vide the letter dated **30 September 2009** thus:

"This is in reference to a Bank Guarantee issued by your Bankers in favour of your suppliers for the above captioned product at your request. Considering that the contract for importation of the product has unduly been delayed by yourselves, you are requested to furnish us with shipping documents in respect of this contract within (7) seven working days i.e 9th October, 2009 failure to which the government will consider appropriate measures including cancellation of the contract."

[22] That the contract was cancelled is not in dispute, granted that the Plaintiff's evidence in this respect has not been controverted by the Defendant. It is noteworthy that the SWIFT message aforementioned was sent directly to the Defendant, yet there is no indication that it took steps to ameliorate the situation, in spite of the Plaintiff's pleas as contained in the letters exhibited at pages **83** to **88** and **91** to **93** of the Plaintiff's Bundle of Documents. Nevertheless, it was the argument of the Defendant that since the Plaintiff's claim was premised on the Letter of Credit, it cannot be heard to rely on the Bank Guarantee, on the ground that there are no pleadings in that respect in the Plaintiff's Complaint. Counsel for the Defendant, in his submissions, relied on the principle that a party is bound by his pleadings.

[23] It is noteworthy however that while cancelling the Letter of Credit, **PW1** did indicate, in the Plaintiff's letter dated **22 June 2009** (at page 12 of the Defendant's Bundle of Documents) that alternative arrangements were being made in place of the Letter of Credit, which was how the Bank Guarantee was resorted to. Indeed, **DW1** in his evidence explicitly admitted in cross-examination that:

"The Receiving Bank rejected our LC because our LC was unconfirmed...We did not settle the LC and we never deducted any money for settlement...At page 6 of the Defendant's Bundle of Documents is the Guarantee we sent out to Barclays Bank. I have not seen the request, but there must have been a written request to the Bank. This was in an effort to salvage the situation. The Bank Guarantee was informed by the Counter Guarantee given on 7/2/2009 by the Plaintiff..."

[24] There can be no doubt therefore that the Bank Guarantee was intertwined with the failed Letter of Credit transaction. Indeed reliance was admittedly placed on a Counter Guarantee offered by the Plaintiff on **7 February 2009** (see pages **43** and **44** of the Plaintiff's Bundle of Documents) which Counter Guarantee was offered at the inception of the Letter of Credit transaction. But more importantly, is the fact that at paragraph 11 of the Plaintiff's Complaint, it was specifically pleaded thus:

"The Plaintiff sought from the Defendant a Bank Guarantee for 10,000 Metric Tons of Urea to KENLET TRADE AGENCY ON 7.7.2009 but the Defendant failed to issue an acceptable Bank Guarantee resulting in the plaintiff suffering loss of business revenue and profit."

The contention by the Defence Counsel that the aspect of the Bank Guarantee was not pleaded cannot be true and is therefore untenable. There is credible evidence that the said Guarantee was rejected by **Barclays Bank of Kenya Limited** for being improperly worded and that the rejection was the direct cause of the cancellation of the subject contract by the Ministry of Agriculture. Accordingly, the Defendant would, in my view, be liable to the Plaintiff on account thereof.

[25] As to whether the Plaintiff suffered any loss in the transaction, it cannot be disputed that the subject contract was indeed cancelled. The Plaintiff contended that, as a result of the cancellation, it suffered special damage in terms of lost profits in the sum of **Kshs. 50,429,100**, and as was pleaded in Paragraph 8 of the Plaint, this sum was the difference between the LPO price of **USD 3,392,000** (or **Kshs. 266,714,995.20**) and the purchase price of **USD 2,750,000**. I note that there was an interchange of the prices both in the Plaint and the Plaintiff's written submissions, which is not material, granted that the Contract/LPO price is clearly set out in the Notification of Award dated **23 January 2009** (page 24 of the Plaintiff's Bundle of Documents), in the Performance Bond dated **28 January 2009** (at page **28** of the Plaintiff's Bundle of Documents), in the Plaintiff's Proforma Invoice dated **3 February 2009** (at page **29** of the Plaintiff's Bundle of Documents), in the Counter Guarantee (at page **30** of the Plaintiff's Bundle of Documents) as well as at page 2 of the Contract, to be **USD 3,392,000** (page **11** of the Plaintiff's Bundle of Documents). The same figure as converted appears in the **LPO** dated **11 June 2009** (at page **67** and **68** of the Plaintiff's Bundle of Documents).

[26] There is no gainsaying however that the sum pleaded is what would have accrued had the transaction been followed through to completion, which did not happen. The purpose of an award of damages was well explicated in the case of **Hadley vs Baxendale [1843-60] All ER 465** thus:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

[27] I have thus considered and adopted the method adopted in **Le Monde Foods Limited vs ABN Amro Bank NV HCCC No. 3144 of 1995** in which the Court awarded the Plaintiff special damages in similar circumstances on the basis of;

[a] The value of the LC

[b] Cost of the goods imported

[c] Gross Margin less expenses, such as insurance, LC charges as well as clearing and forwarding expenses.

For the reason that the goods were not shipped, no payments were made by the Plaintiff for insurance or towards the clearing charges. In its written submissions, the Plaintiff proposed the following formula:

The Contract price - Kshs. 266,714,995.20

The cost of import - Kshs. 216,012,100.00

Profit - Kshs. 50,702,895.20

[28] The Plaintiff has disputed the Defendant's claim herein for the LC charges; but would have otherwise paid **Kshs. 16,324,058.30** as at **24 May 2010** when the letter at page 94 of the Plaintiff's Bundle of Documents was written. In the premises, there is a good basis for holding, as I do, that the Plaintiff would not be entitled to the gross profit of **Kshs. 50,702,895.20**. I would thus reduce the same by the aforesaid sum of **Kshs. 16,324,058.30**, that it would have otherwise paid as the cost of the facility. Thus, I

would find and hold that the Defendant is liable to pay the Plaintiff special damages of **Kshs.34,378,836.90** for breach of contract.

[29] As to whether the Defendant is entitled to the sum of **Kshs. 34,965,151.82** prayed for in its Counterclaim, it was pleaded that the Defendant granted the Plaintiff a Letter of Credit facility, and that it was a term thereof that the Plaintiff would pay 1% commission on opening of the Letter of Credit, 1% as negotiation fee and 0.5% on settlement. It was further the contention of the Defendant that there was a commitment fee of 2% that was payable upfront; and that these costs and commissions were debited into the Plaintiff's account number **10200028**, such that by **3 April 2014**, the Plaintiff was indebted to the Defendant to the tune of **Kshs. 34,965,151.82**. This is the amount that the Defendant asked for in its Counterclaim together with interest at 23% per annum from **4 April 2014** until full payment.

[30] In the witness statement of **DW1**, he reiterated the Defence's posturing that the commissions **"...were rightfully and contractually charged"** at the point of opening of the Letter of Credit; and that the Letter of Credit was rightfully converted to an overdraft facility upon maturity of the acceptance. Statements of the Plaintiff's Account Numbers **CA-01-10200028** and **0010015007815401** were tendered in evidence at pages **24** to **29** of the Defendant's Bundle of Documents. However, having found herein above that the draft Letter of Credit was rejected by the Beneficiary's Bank after the suggested corrections were not carried, nothing would turn on that transaction. Neither the Plaintiff nor the Defendant can base any claim thereon. It has the effect of being null and void, and it is now trite that no rights or obligations can accrue therefrom such a document. As was observed thus by **Denning LJ** in **Macfoy Vs United Africa Company Limited [1961]3 ALLER 1169:**

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

[31] It was for this reason that the parties re-strategized in favour of a Bank Guarantee; but which also did not work out due to no fault of the Plaintiff's. Indeed, no explanation was given as to why the Bank Guarantee, which was said to be improperly worded, could not be swiftly corrected by the Defendant. Thus, I would be of the same mind as **Mbaluto, J** in **the Le Monde Foods Limited case** (supra) that:

"...The Defendant for no good reason simply failed and/or refused to honour its obligations under the contract. For that reason, the defendant is liable to the plaintiff for any loss consequent upon that act..."

[32] A second reason why the Defendant's counterclaim cannot stand is well stated by **Lord Diplock** in **Cheall vs Association of Professional Executive Clerical and Computer Staff [1983] 1 All ER** that:

"This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely upon an event brought about by his own breach of contract as having terminated a contract by frustration is often expressed on broad language as "A man cannot be permitted to take advantage of his own wrong."

It is on the basis of the foregoing that I find the Defendant's counterclaim untenable. The same is hereby dismissed with costs.

[33] In the result, I find the Plaintiff's claim meritorious and judgment is hereby entered in its favour in the sum of **Kshs.34,378,836.90** together with interest thereon at Court rates from **18 October 2013** when the suit was filed until payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF FEBRUARY 2017

OLGA SEWE

JUDGE