REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. E255 OF 2023

MFI TECHNOLOGY SOLUTIONS LIMITED.....PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED.....1ST DEFENDANT

STANBIC BANK KENYA LIMITED.....2ND DEFENDANT

INTELLECT DESIGN ARENA LIMITED.....INTERESTED PARTY

JUDGMENT

1. By a plaint dated 7th June 2023, the Plaintiff seeks judgment against the Defendants for:

    i. *The principal sum of USD 1,334,000 with interest;*

    ii. *USD 243,600 in the event that the 2nd Defendant honours the performance guarantee;*

    iii. *Interest on the above sums at court rates until payment; and*

    iv. *Costs and any other relief deemed just.*

2. The Plaintiff is a limited liability company engaged in office automation and related IT solutions. Its claim arises from a contractual relationship concerning the upgrade and maintenance of the 1st Defendant's Core Banking System (CBS). The 1st Defendant and 2nd Defendant are licensed banking institutions. The Interested Party is a software solutions company incorporated in India.

3. The Plaintiff states that following a competitive tendering process, it entered into a Tripartite Software Licence Agreement dated 2nd June 2022 with the 1st Defendant and the Interested Party for the upgrade, enhancement, and maintenance of the CBS at a contract sum of USD 1,334,000, payable 50 percent on execution and 50 per cent within 60 days.

4. On 22nd July 2022 the 1st Defendant proposed a revised payment structure in four instalments of USD 333,500 payable between August and November 2022. The Plaintiff accepted the variation.

5. Despite the commencement of work by the Interested Party, the 1st Defendant failed to honour the revised payment terms. The Interested Party notified both parties on 6th October 2022 that it would suspend deployment due to non-payment.

6. As at 17th April 2023, the 1st Defendant had paid only USD 213,375. The Plaintiff states that it remitted USD 184,000 to

the Kenya Revenue Authority as tax on invoiced sums, notwithstanding the 1st Defendant's breach.

7. The Plaintiff further avers that the 1st Defendant wrongfully invoked the performance guarantee for USD 243,600 on the allegation of breach by the Plaintiff.

8. The Plaintiff contends that the 1st Defendant has willfully refused to pay the outstanding contractual sums and that this Court has jurisdiction to hear the dispute.

9. The 1st Defendant filed a Defence and Counterclaim dated 25th October 2023, contending that the Variation Agreements were voidable due to alleged misrepresentation concerning the licensor. It asserts breach, non-performance, incapacity to deliver an upgrade, and entitlement to restitution of funds paid, as well as damages. It also maintains that the performance guarantee was properly invoked.

10. The 1st Defendant states that it lawfully voided the Variation Agreements by its termination letter of 6th June 2023 and consequently called up the performance guarantee. It avers that the Plaintiff's and the Interested Party's non-performance resulted in operational delays and compelled it to restart the procurement process at additional cost. It seeks restitution of the USD 213,375 paid, reimbursement of Kshs. 982,500 in incurred expenses, general damages, a declaration compelling the 2nd Defendant to honour the on-demand guarantee, interest and costs.

11. The Plaintiff in its Reply to the Defence and Counterclaim dated 5th August 2024, reiterated that the 1st Defendant was the party in breach. It denied misrepresentation, asserting that the 1st Defendant knowingly executed the Variation Agreements and actively engaged the Interested Party in implementation. It sought dismissal of the Defence and Counterclaim.
12. During the hearing, both parties presented witness testimonies, followed by written submissions. The Plaintiff contends that the primary matter is the unpaid license fees and the unlawful call on the performance guarantee, while the 1st Defendant maintains that the contract is void due to misrepresentation.

13. The Plaintiff filed submissions dated 26th June 2025. It submits that the parties have been in a long-standing contractual relationship concerning the 1st Defendant's core banking system since the 2012 Tripartite Agreement, subsequently varied through multiple addenda and culminating in the 2022 tender for upgrade and maintenance. The Plaintiff and the Interested Party were awarded the tender at a total contract value of USD 2,436,000, including licensing fees of USD 1,334,000, implementation fees, and annual maintenance.

14. A performance guarantee of USD 243,600 was issued as required. The 1st Defendant later requested to stagger the licence fee payments into four instalments of USD 333,500

between August and November 2022, a proposal which the Plaintiff and Interested Party accepted. The Plaintiff avers that the 1st Defendant immediately defaulted on these revised terms and ultimately abandoned all payment obligations. Only USD 213,375 was ever paid against the required USD 1,334,000.

15. Despite its own admitted non-payment, the 1st Defendant proceeded to call up the performance guarantee on 6th June 2023, prompting the present suit after the Plaintiff's attempt to restrain the guarantee was dismissed by the late Majanja J. The 2nd Defendant was subsequently struck out of the proceedings.

16. On the merits, the Plaintiff contends that the only dispute before the Court is the unpaid licence fees and the unlawful recall of the guarantee; implementation fees and annual maintenance are not contested. The Plaintiff disputes the 1st Defendant's assertion that the contract is void due to the Interested Party's change of name, arguing that the 1st Defendant expressly approved and executed the 2022 Variations naming Intellect Design Arena Limited as licensor. The 1st Defendant is therefore estopped from denying the identity or authority of a party with whom it knowingly contracted.

17. The Plaintiff maintains that breach of contract lies squarely with the 1st Defendant, whose continued non-payment violated agreed contractual terms and rendered

termination unlawful. The Plaintiff further submits that allegations of flawed procurement, lack of due diligence, and shortcomings in the product walkthrough are unsupported, immaterial, and an afterthought raised only after the 1st Defendant defaulted. It notes that the 1st Defendant continues to use the core banking software despite non-payment, which constitutes both contractual and regulatory breach.

18. The Plaintiff argues that no cause of action has been established against it, as all concerns about technical performance were addressed between the 1st Defendant and the Interested Party, and the upgrade phase had been suspended pending payment. The counterclaim, including demands for alleged training costs, is said to be unproven and amounts to unjust enrichment.

19. In conclusion, the Plaintiff asserts that it has demonstrated breach by the 1st Defendant and entitlement to the sums claimed, including the licence fee and recovery of the performance guarantee. It prays for judgment as sought in the Plaint and for dismissal of the counterclaim with costs.

20. The 1st Defendant filed submissions dated 29th July 2025. The 1st Defendant submits that the dispute arises from Variation Agreements executed on 3rd June 2022 for the upgrade of its Core Banking System. It contends that the Plaintiff and the Interested Party misrepresented the licensor's identity, introducing Intellect Design Arena Limited

(India) in place of Intellect Design Arena FZ LLC (Dubai)**,** the original licensor in the 2012 agreements. It argues that this amounted to material non-disclosure, rendering the Variation Agreements voidable at its option.

21. The Defendant maintains that the procurement process required contracting only with the successful tenderer (Intellect Design Arena FZ LLC), and that no evidence was produced to show that the Indian entity was an affiliate, assignee, or authorized representative. It therefore asserts that the Variation Agreements lacked mutual consent of all original contracting parties and were properly terminated.

22. On performance, the Defendant argues that the Plaintiff fundamentally breached the contract by failing to deliver an upgrade capable of meeting the Bank's operational requirements. Multiple product walkthroughs were conducted, yet out of 74 critical items, only five were successfully demonstrated. The Defendant submits that this evidenced incapacity to perform, justifying termination on 6th June 2023.

23. The Defendant further submits that license fees were not payable because no upgrade or license capable of use was ever delivered. It argues that the Plaintiff cannot claim payment for non-existent deliverables and that partial payments previously made were gratuitous in light of the Plaintiff's non-performance.

24. Regarding the performance guarantee, the Defendant asserts that it lawfully invoked the guarantee, which was autonomous and payable on demand. It cites the earlier ruling of Majanja J., which declined injunctive relief and affirmed the independence of the guarantee instrument. Payment by the 2nd Defendant followed, and the 1st Defendant maintains that the recall was proper.

25. Consequently, the Defendant submits that the Plaintiff is not entitled to the reliefs sought in the Plaint, namely licence fees and refund of the guarantee, because the Plaintiff neither performed the contract nor demonstrated capacity to do so. It prays that the Plaint be dismissed and that its counterclaim be allowed.

Analysis and determination

26. Having carefully considered the pleadings, testimonies, documentary evidence, and the parties' respective submissions, the following issues arise for determination:

   i. *Whether the Plaintiff or the 1st Defendant breached the contract;*
   ii. *Whether the Variation Agreements dated 3rd June 2022 were valid and enforceable;*
   iii. *Whether the 1st Defendant lawfully invoked Performance Guarantee No. MD2216000004;*
   iv. *Whether the Plaintiff is entitled to the reliefs sought;*
   v. *Whether the 1st Defendant's counterclaim is merited;*

vi. Costs.

Whether the Plaintiff or the 1st Defendant breached the contract

27. The starting point is the well-established principle that courts do not rewrite contracts for parties. The Court of Appeal in **National Bank of Kenya Ltd v Pipeplastic Samkol & Another [2001] eKLR** held that a court's duty is to enforce the contract as written unless vitiated by fraud, coercion, illegality, or mistake.

28. The evidence shows that the 1st Defendant sought revision of the payment terms, which the Plaintiff accepted. This constituted a binding contractual variation, consistent with the Court of Appeal's holding in **Housing Finance Co. of Kenya v Scholastica Nyaguthii Muturi [2020] eKLR**, which affirmed that parties may freely vary their contracts and that such variations are enforceable when supported by consideration or mutual assent.

29. The 1st Defendant admits that it did not pay the instalments as revised. Its internal correspondence candidly acknowledged cash-flow constraints. A party in default cannot rely on its own breach to allege non-performance by the counterparty. This principle was recognized in **Pankaj Transport Co. v Kenya Revenue Authority [2017] eKLR** and is consistent with the equitable maxim that one cannot benefit from one's own wrongdoing, as emphasized in **Little Hills Flora Ltd v Industrial and Commercial Development Corporation [2025] KEHC 6659**.

30. The 1st Defendant's breach went to the root of the contract. Payment of licence fees was a condition precedent to continued implementation. The evidence also shows that suspension of work by the Interested Party was triggered solely by non-payment. In **Bett Kinyanjui v Bank of Africa Kenya Ltd [2018] eKLR**, the Court reiterated that where a party's breach renders performance impossible, liability for non-performance cannot be shifted to the non-breaching party.

31. I therefore find on the evidence, and fortified by the foregoing authorities, that the 1st Defendant was in fundamental breach of its contractual obligations.

Whether the Variation Agreements were valid and enforceable

32. The 1st Defendant contends that the Variation Agreements were voidable due to an alleged misrepresentation regarding the licensor's identity. However, the agreements bear the 1st Defendant's seal and signature of its then Chairman, and no evidence was led to challenge their authenticity. In **Kenya Commercial Bank Ltd v Osebe [1982] KLR**, the Court of Appeal held that a party executing a document is bound by it, absent proof of fraud, misrepresentation, or undue influence.

33. Similarly, in **Hamida Bana v National Bank of Kenya [2017] eKLR**, the Court held that freedom of contract precludes a party from disowning obligations voluntarily undertaken. This mirrors the English principle in **Peekay Intermark Ltd v Australia and New Zealand Banking**

Group Ltd [2006] EWCA Civ 386, where parties were held bound by the documents they signed, regardless of subsequent allegations.

34. Moreover, estoppel arises from the 1st Defendant's conduct. It treated the Interested Party as licensor, engaged with it operationally, participated in product walkthroughs, and communicated with it as the contracting licensor. In **Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR**, the Court of Appeal held that a party who induces another to rely on a representation cannot later resile from it. This doctrine is reinforced by **Central London Property Trust v High Trees House Ltd [1947] KB 130 (Denning J)**, which stands for the general principle that a party is estopped from denying its own representations when relied upon to the detriment of another.

35. The alleged licensor discrepancy was not only within the 1st Defendant's knowledge but explicitly incorporated into the executed contractual instruments. No evidence of mistake of identity, fraudulent inducement, or statutory illegality was led to void the agreement. The defence therefore collapses.

36. I therefore hold that the Variation Agreements dated 3rd June 2022 were valid, binding, and enforceable.

Whether the 1st Defendant lawfully invoked the performance guarantee

47. The nature of performance guarantees is well established. They are autonomous instruments separate from

the underlying contract. In **Kenya Commercial Bank v Suntra Investment Bank [2015] eKLR**, the Court affirmed the independence principle, drawing analogy to letters of credit. The English courts have consistently applied the same principle in **Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] QB 159**, where performance guarantees were held to be payable on demand absent fraud.

48. The Plaintiff previously sought injunctive relief against the invocation of the guarantee, but the application was dismissed by Majanja J., reaffirming the autonomy of the guarantee. However, autonomy does not preclude restitution where the underlying call is shown to be wrongful. This was recognized in **Universal Traders SA v Kenya Pipeline Company Ltd [2014] eKLR**, where the Court of Appeal held that even though a bank must honour an on-demand guarantee, the beneficiary may be liable in restitution if the demand was not justified.

49. The 1st Defendant's call was premised on alleged non-performance. Yet the evidence demonstrates that non-performance, if any, was directly attributable to the 1st Defendant's non-payment. A beneficiary cannot rely on the consequences of its own breach to justify a call on a guarantee. The call was therefore substantively unjustified.

Whether the Plaintiff is entitled to the reliefs sought

50. The licence fee of USD 1,334,000 was contractually due. The 1st Defendant's argument that the licence fee was not

payable because the upgrade was not delivered cannot stand, because performance was suspended only after the 1st Defendant failed to pay. Under the doctrine of prevention, a party may not rely on the failure of a condition where that failure was caused by its own breach. This doctrine was articulated in **Robinson v Harman (1848) 1 Exch 850**, **Stocznia Gdanska SA v Latvian Shipping Co [2002] EWCA Civ 889**, and applied locally in **Nairobi ELC No. 769 of 2012, Erick Otieno Omollo v Lutheran World Federation [2016] eKLR**, holding that one cannot deny payment for work it prevented from being completed.

51. I therefore find the Plaintiff entitled to the sum of USD 1,334,000 less USD 213,375 already paid. The call on the guarantee was wrongful, and the Plaintiff is entitled to restitution of USD 243,600.

Whether the 1st Defendant's counterclaim is merited

57. The counterclaim alleges breach, non-performance, misrepresentation, and defective procurement. However, no expert evidence, no technical audit report, and no procurement review decision were adduced to substantiate these assertions.

58. The allegation that the licensor was improperly changed is contradicted by the 1st Defendant's own signed and sealed documentation. The allegation of non-performance was equally refuted by the Plaintiff, who demonstrated that work was suspended due solely to non-payment.

59. The 1st Defendant produced no technical expert report, no audit, and no independent verification to demonstrate incapacity or incompetence on the part of the Plaintiff or the Interested Party.

60. The burden of proof under sections 107–109 of the Evidence Act rested on the 1st Defendant. It failed to discharge it.

61. Accordingly, the counterclaim fails in its entirety.

Disposition

62. In light of the foregoing analysis, judgment is entered as follows:

i. Judgment is entered for the Plaintiff against the 1st Defendant for USD 1,334,000, less USD 213,375 already paid.

ii. Judgment is entered for the Plaintiff for USD 243,600, being the performance guarantee wrongfully called up.

iii. The sums in (a) and (b) above shall attract interest at court rates from the date of filing suit until payment in full.

iv. The 1st Defendant's counterclaim is dismissed with costs.

v. The Plaintiff shall have the costs of the suit.

JUDGMENT delivered virtually, dated and signed at **NAIROBI**

This **11th** day of **December** 2025.

P.M. MULWA

JUDGE

In the presence of:

Mr. Kisigwa for Plaintiff

Mr. Gacuca Mwangi for 1st Defendant

Court Assistant*: Carlos*