

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. E255 OF 2019

GULF AFRICAN BANK LIMITED	PLAINTIFF
VERSUS		
BIDQRON LIMITED	1ST DEFENDANT
JANETH BOSIBORI OMWENGA	2ND DEFENDANT
CHRISTINE SYOMBUA KAVOI	3RD DEFENDANT

JUDGEMENT

1. The Plaintiff, a limited liability company duly incorporated under the Companies Act and licensed to carry out the business of banking under the strictures of the Banking Act, instituted this suit by way of a Plaint against the 1st Defendant, alongside its directors and principal guarantors, the 2nd Defendant and 3rd Defendant.
2. By Plaint dated 1 August 2019, the Plaintiff seeks judgement, jointly and severally, against all the Defendants for:
 - (a) Kshs 23,116,052.42 with profit thereon at 13% per annum from 11 July 2019 until payment in full;
 - (b) Costs of the suit.
3. The foundation of the Plaintiff's cause of action is predicated upon an alleged breach of a commercial financing arrangement initially structured as a

Murabaha Local Purchase Order (LPO) Finance facility, which, upon the 1st Defendant's default and subsequent request for accommodation, was restructured into a Tawarruq Finance facility and an accompanying Qard facility. The Plaintiff's central contention is that it faithfully discharged its obligations by advancing the requested capital to facilitate the 1st Defendant's commercial supply contracts, but the Defendants fundamentally breached the repayment covenants.

4. In traversing the Plaintiff's claims, the Defendants filed a joint Statement of Defence dated 16 September 2019, categorically denying any liability to the Plaintiff. The defence presented to this Court is multifaceted and relies on several affirmative assertions. Foremost among these is the contention that the relationship established between the Plaintiff and the 1st Defendant was never that of a traditional lender and borrower, but was instead an overarching Joint Venture agreement wherein the Plaintiff assumed active commercial risks. Building upon this premise, the Defendants argued that the Plaintiff unilaterally selected a third-party supplier, Misk Global Limited, and disbursed the funds directly to this entity without the 1st Defendant ever receiving the capital. The ultimate shield wielded by the Defendants is the common law doctrine of frustration; they averred that the underlying supply tenders awarded by the Kenya Power and Lighting Company (KPLC) and the Rural Electrification Authority (REA) were abruptly suspended and cancelled by the Government of Kenya, thereby rendering the performance of the repayment contract practically and legally impossible.
5. At the trial, the Plaintiff called a single witness, Mr. Lawi Sato, an Advocate of the High Court of Kenya employed as the Plaintiff's legal officer, who testified as PW1. The Defendants equally elected to call a director of the 1st Defendant, testifying as DW1.

The Plaintiff's Case

6. The Plaintiff averred that on or about 15 May 2018, the 1st Defendant formally approached it requesting banking facilities to finance its commercial operations. Following standard credit appraisals, the Plaintiff issued a formal letter of offer dated 15 May 2018, proposing a Murabaha LPO Finance facility up to a maximum principal amount of Kshs 8,513,356.00. This offer was duly executed by the 1st Defendant in its capacity as the principal borrower, with the 2nd and 3rd Defendants co-signing in their capacities as guarantors.

7. As the 1st Defendant's commercial ambitions expanded, a subsequent request for additional capital was made. On 2 July 2018, the parties executed a second, superseding letter of offer that amalgamated the existing facility and introduced an additional Murabaha LPO Finance facility, bringing the total maximum principal amount to Kshs 11,475,350.00. Both letters of offer contained explicit terms and conditions governing the facilities, notably stipulating a repayment tenure of ninety (90) days and providing for default damages in the event of non-payment upon maturity. To secure the Plaintiff's exposure, the 2nd and 3rd Defendants executed a comprehensive Continuing Guarantee and Indemnity dated 2 July 2018, thereby irrevocably undertaking to discharge the 1st Defendant's obligations and liabilities, together with the accrued profit, on a full indemnity basis upon demand.

8. The Plaintiff pleaded that the 1st Defendant suffered a complete failure to honor its repayment obligations within the agreed ninety-day tenure. Facing default, the 1st Defendant initiated a request for the restructuring of the debt via a letter dated 27 September 2018. In an act of commercial accommodation, the Plaintiff agreed to restructure the non-performing facilities. A restructure facility letter was issued on 19 November 2018, which fundamentally altered the architecture of the debt. The restructured agreement provided for a Tawarruq Finance facility up to a maximum principal amount of Kshs 19,988,706.00 to consolidate the outstanding principal, and a separate Qard facility of Kshs 209,599.02 to accommodate the outstanding profit.

9. The salient terms of this restructured arrangement granted the 1st Defendant a further ninety-day tenure, requiring a bullet payment of the principal and profit on the ninetieth day, with the profit payable to the bank fixed at 13.0% per annum for the Tawarruq facility. Despite this restructuring, the 1st Defendant defaulted once again, prompting the Plaintiff, through its legal counsel, to issue formal demand letters dated 22 July 2019 for the outstanding sum of Kshs 23,116,052.42.
10. During the plenary hearing, PW1, Mr. Lawi Sato, adopted his sworn witness statement dated 1 August 2019 and produced the Plaintiff's comprehensive bundle of documents, which were admitted into the record and marked as Plaintiff's Exhibits 1 through 6. In his testimony-in-chief, PW1 elucidated that the Plaintiff operates strictly as a Shari'ah-compliant financial institution. Accordingly, the Bank is prohibited by Islamic jurisprudence from charging conventional interest, commonly known as Riba. Instead, the Bank utilizes trade-based financing models that permit the charging of a predefined profit margin, which in this specific transaction was contractually fixed at 13% per annum.
11. Under cross-examination, PW1 provided critical clarifications regarding the mechanics of the disbursement and the Bank's due diligence protocols. He confirmed that the facilities advanced to the 1st Defendant were unsecured loans, specifically tailored for LPO financing, meaning the primary comfort relied upon by the Bank was the anticipated cash flow from the government tenders rather than tangible collateral. When probed on the disbursement mechanics, PW1 testified that on 17 May 2018, an initial amount of Kshs 8,513,356.00 was credited directly to the 1st Defendant's operational account held with the Plaintiff. Following this credit entry, an immediate and corresponding debit entry was executed to transfer the funds to a vendor, Misk Global Limited.
12. Crucially, PW1 emphasized that this vendor transfer was not a unilateral act by the Bank. He testified that the debit was executed pursuant to a formal, written

"Request for Purchase of Assets" drafted on the 1st Defendant's official letterhead and dated 2 July 2018, with an earlier iteration dated 16 May 2018. Counsel for the Defendants rigorously questioned PW1 regarding the bank's relationship with the supplier, Misk Global Limited. PW1 categorically and repeatedly denied any prior knowledge of, or interaction with, Misk Global Limited. He maintained that the supplier was a third party introduced entirely by the 1st Defendant, who presented the supplier's invoice to the bank to trigger the payment mechanics required under the Murabaha structure.

13. On the issue of due diligence, PW1 affirmed that the Plaintiff's credit department conducted standard appraisals based on the 1st Defendant's demonstrated repayment ability, although he conceded he could not personally verify from his records whether the relationship manager had conducted a physical site visit to the Defendants' premises. PW1 concluded his testimony by confirming that the failure to repay the initial disbursements led directly to the subsequent restructuring of the debt into a single Kshs 19 million facility in November 2018.

The Defendants' Case

14. The Defendants' opposition to the Plaintiff's claim was formally mounted through their Joint Statement of Defence, filed on 17 September 2019, which sought to entirely recharacterize the nature of the transaction. The Defendants pleaded that the engagement with the Plaintiff was not a standard banking facility but rather a Joint Venture in which the Plaintiff was an active participant in the execution of the supply tenders. According to the defence, the Plaintiff exercised absolute control over the transaction, including the unilateral selection of the supplier, Misk Global Limited. The Defendants averred that it was a strict condition of the financing that the funds could only be disbursed to the supplier chosen by the Plaintiff, effectively bypassing the 1st Defendant and denying them access to the loan funds.

15. The Defendants stated that prior to the execution of the financing agreements, the 1st Defendant had successfully bid for and been awarded two significant government tenders: Tender Number REA/2017-2018/NT/017A issued by the Rural Electrification Authority, and Tender Number KPI/9A.3/OT/07/17-18 issued by the Kenya Power and Lighting Company. The sole purpose of the unsecured loan was to finance the procurement of goods required to fulfill these specific LPOs. The gravamen of the defence was that the Government of Kenya unexpectedly suspended and eventually cancelled these tenders. Consequently, the Defendants argued that performance of the contract became impossible, as the supplier—having received the funds from the Plaintiff—was unable to deliver the goods due to the cancellation, and the 1st Defendant was unable to receive the anticipated payments from REA and KPLC. The Defendants asserted that these supervening events frustrated the contract, completely discharging them from any liability for breach.
16. DW1, Christine Syombua Kavoi, adopted her witness statement dated 16 September 2019 and produced the Defendants' bundle of documents, marked as Defendants' Exhibits 1 through 8. However, DW1's oral testimony in Court presented significant and fatal contradictions when compared to the very pleadings and witness statements she had filed. Under cross-examination by the Plaintiff's counsel, DW1 was confronted with the fundamental premise of the suit. When asked about borrowing the funds, she made an explicit admission, stating on the record, "*I do not deny borrowing the money*". She further admitted that she did not repay the sums, though she immediately sought to qualify this by claiming, "*I did not receive the money, I did not see it*".
17. The contradictions in DW1's testimony became particularly glaring when the subject of the supplier, Misk Global Limited, was broached. In her sworn witness statement, DW1 had explicitly deposed that the 1st Defendant approached Misk Global Limited as a manufacturer, explained their lack of funds, and that it was Misk Global Limited who leveraged its long and a good business relationship with Gulf African Bank to introduce the 1st Defendant to

the Plaintiff. Yet, when asked during cross-examination if she knew Misk Global, DW1 astonishingly replied, "*No. I have heard of them today*".

18. Further attempting to distance herself from the transaction, DW1 claimed an inability to understand the English language, asserting that she relied entirely on her lawyer or the 2nd Defendant to read and explain the documents to her. When confronted with the 1st Defendant's letter dated 2 July 2018—a document authored by her own company instructing the bank to pay Misk Global Limited—DW1 merely stated that she did not understand it. Despite her attempts to plead ignorance, DW1 admitted that she personally went to the bank with the 2nd Defendant to open the corporate account, that they signed the offer letters, and that the 2nd Defendant had explained the contents to her. In a final, desperate pivot during re-examination, DW1 altered her narrative entirely, claiming, "*I do not recall opening an account with the Plaintiff. I do not know of any transactions in that account*". She did, however, maintain that the underlying tender with KPLC was postponed or frustrated by the government, preventing the receipt of funds.

Analysis & Determination

19. Having reviewed the pleadings, the oral evidence adduced during the trial, the comprehensive documentary exhibits, and the written submissions, the Court crystallizes the following core legal issues for determination:
- (i) Whether the legal relationship established between the Plaintiff and the 1st Defendant constituted a Joint Venture or a strict Lender-Borrower relationship structured under the principles of Islamic financing;
 - (ii) Whether the direct disbursement of the facility funds to a third-party supplier negated the 1st Defendant's receipt of the loan and discharged its obligation to repay;
 - (iii) Whether the contract between the parties was frustrated by the alleged suspension or cancellation of the government tenders;

- (iv) Whether the 2nd and 3rd Defendants are jointly and severally liable to the Plaintiff under the Continuing Guarantees and Indemnities.
- (v) whether the Plaintiff has successfully discharged its evidentiary burden on a balance of probabilities to warrant the specific reliefs sought in the Plaintiff.

The Legal Nature of the Relationship

20. The foundational pillar of the Defendants' case is the assertion that the transaction was a Joint Venture rather than a conventional loan agreement. The Defendants forcefully submitted that the Plaintiff acted as an active partner, controlling the supplier and the transaction mechanics, thereby assuming the commercial risks associated with the underlying tenders.
21. This assertion demands a rigorous legal examination of the documentary evidence against the established jurisprudential framework of Islamic Banking as recognized under Kenyan law. The banking sector in Kenya, regulated primarily by the Banking Act and the Central Bank of Kenya Act, permits licensed institutions to offer Shari'ah-compliant financial products. The defining characteristic of Islamic finance is the strict prohibition against the charging or payment of interest (*Riba*). To circumvent this prohibition while maintaining commercial viability, Islamic banks utilize asset-backed, trade-based, or equity-sharing structures.
22. The documentary evidence before the Court, specifically the initial letters of offer dated 15 May 2018 and 2 July 2018, explicitly title the agreements as a "Murabaha Local Purchase Order Finance facility". A *Murabaha* transaction is fundamentally a form of cost-plus financing. It is a trade-based model of deferred payment sale utilized extensively for working capital and trade financing. The structure involves the financier purchasing an asset identified by the client from a third-party supplier, and subsequently selling that asset to the

client at an agreed, predetermined mark-up. The profit element replaces the conventional concept of interest and compensates the bank for the brief assumption of risk during the transfer of ownership.

23. Crucially, a *Murabaha* contract is not a joint venture. In Islamic finance, a true joint venture or equity partnership is termed *Musharaka* or *Mudaraba*, wherein both parties contribute capital or labour and share in the profits and losses of the enterprise according to predetermined ratios. The documents executed by the parties in this suit contain absolutely no provisions indicating a sharing of profits and losses from the KPLC and REA tenders, nor do they confer upon the Plaintiff any equity stake, voting rights, or managerial control over the 1st Defendant's operations.
24. When the 1st Defendant defaulted on the initial *Murabaha* facility, the debt was restructured via the 19 November 2018 letter into a "Tawarruq Finance facility" and a "Qard facility". *Tawarruq* is a financing mechanism where a customer buys an asset from a bank on deferred payment terms and immediately sells it to a third party for cash, effectively generating working capital while complying with Shari'ah principles. Again, this is a debtor-creditor arrangement, not a partnership.
25. The assertion by the Defendants that the arrangement was a joint venture demonstrates a profound mischaracterization of the contracts they voluntarily executed. In ***KCB Bank Kenya Limited v Charingcross Communication Agency & Another* [2025] KEHC 12291 (KLR)**, the Court dealt with a similar dispute involving a *Murabaha* financing agreement where the borrower attempted to evade liability following a default. The Court firmly held that where offer letters and *Murabaha* agreements are duly signed by authorized agents, it evidences a clear meeting of the minds and voluntary acceptance of terms, creating a legally binding contract that must be honoured.

26. This Court operates on the bedrock principle of commercial certainty. Parties are strictly bound by the explicit terms of the written contracts they execute. The attempt by the Defendants to unilaterally re-characterize a highly specific, heavily documented *Murabaha* and *Tawarruq* financing facility into an undocumented, amorphous Joint Venture in order to escape liability is legally untenable. The relationship between the Plaintiff and the 1st Defendant was strictly that of a financier and a borrower within a recognized Islamic banking paradigm, governed exclusively by the express terms of the executed offer letters.

Disbursement of Funds, Privity, and the Parol Evidence Rule

27. The Defendants argued with great vigor that because the funds were paid directly to Misk Global Limited, they did not receive the money in their pockets and are, therefore, absolved of any obligation to repay. DW1 testified that the Plaintiff unilaterally selected the supplier and transferred the funds without the 1st Defendant's active receipt or authorization.
28. This argument collapses when subjected to factual scrutiny and legal principles. Factually, the mechanics of a *Murabaha* transaction necessitate that the financier pays the supplier directly to acquire the asset before selling it to the client. The direct disbursement to the supplier is not an anomaly; it is the defining operational feature of the product.
29. More critically, the Plaintiff produced irrefutable documentary evidence in the form of two "Written Requests for Purchase of Assets" dated 16 May 2018 and 2 July 2018. These critical documents, printed on the 1st Defendant's official letterhead and signed by its authorized signatories, contain explicit, written instructions to the Plaintiff bank. Clause 3 of the request explicitly states: "*We hereby request you to purchase the Assets set out in Part A of the Schedule hereto from the Supplier(s)...*" Clause 4 specifically directs the Plaintiff to pay the cost price to the account of "MISK GLOBAL".

30. Furthermore, the bank statements produced by the Plaintiff unequivocally trace the flow of funds: the facility amounts were first credited to the 1st Defendant's account and immediately debited via a vendor transfer to Misk Global Limited. This electronic trail establishes beyond peradventure that the 1st Defendant had constructive receipt and absolute control over the destination of the funds.
31. Legally, DW1's oral testimony denying knowledge of Misk Global Limited and denying the authorization of the payment is entirely eclipsed by the documentary record. Under section 97 of the Evidence Act where the terms of a contract, grant, or disposition of property have been reduced to the form of a document, no evidence shall be given in proof of the terms of such contract except the document itself. This statutory embodiment of the parol evidence rule bars the admission of extrinsic oral evidence intended to contradict, vary, add to, or subtract from the clear terms of a written agreement.
32. DW1's attempt to disown the documents by claiming an inability to understand the English language, or by attempting to shift the blame to her co-director, the 2nd Defendant, who allegedly explained the documents to her, cannot exculpate the 1st Defendant. In commercial litigation, a party is bound by their signature. In the absence of a specifically pleaded and proven defence of *non est factum*—which requires demonstrating that the document signed was fundamentally different in character from what was intended, due to a lack of understanding not arising from the signer's own negligence—a signatory cannot escape the consequences of the document.
33. The Court, therefore, finds as a fact that the disbursement of funds to Misk Global Limited was executed strictly at the express, written behest of the 1st Defendant. Consequently, the 1st Defendant cannot rely on the direct vendor payment as a shield against its contractual repayment obligations.

The Doctrine of Frustration

34. This brings the Court to the most heavily contested issue in this suit. The Defendants contend that the contract was frustrated because the sole purpose of the loan was to finance LPOs for government tenders issued by KPLC and REA. They argue that because the Government suspended and ultimately cancelled these tenders, performance became impossible, thus frustrating the contract and discharging their liability.
35. The doctrine of frustration is grounded in the common law and statutory frameworks, notably section 2 of the Law of Contract Act, which imports the application of the UK Law Reform (Frustrated Contracts) Act 1943. Frustration in contract law occurs when a supervening, unforeseen event, occurring without the fault of either party, fundamentally alters the nature of the outstanding contractual rights and obligations, rendering further performance impossible, illegal, or radically different from what was originally contemplated by the parties.
36. The threshold for proving frustration is exceptionally high. Mere difficulty, financial hardship, or increased expense will not suffice; it must be proved that the contract was strictly impossible to perform. As established in the seminal English case of ***Davis Contractors Ltd v Fareham UDC AC 696***—a precedent highly persuasive and routinely adopted by Kenyan courts—Lord Radcliffe stated that frustration occurs whenever the law recognizes that a contractual obligation has become incapable of being performed because the circumstances would render it a thing radically different from that which was undertaken. Frustration is not to be lightly invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains.
37. The Court of Appeal extensively analysed the contours of this doctrine in the case of ***Lucy Njeri Njoroge v Kaiyaha Njoroge [2015] eKLR***. In that case, the Court of Appeal emphasized the critical limitation that the frustrating circumstances must arise without the fault of either party. The event relied upon must not be self-induced or a foreseeable consequence of a party's own

actions. Similarly, in ***Charles Muirigi Miriti v Thananga Growers Sacco Limited & Others*** [2014] eKLR, the Court reiterated the multi-factorial approach required to assess frustration, noting that the effect of frustration is to bring the contract to an end automatically and forthwith.

38. To adjudicate the Defendants' reliance on this doctrine, the Court must address both the evidentiary dimension and the substantive legal dimension of their claim.
39. Regarding the evidentiary dimension, it is a trite principle of the law of evidence that he who asserts must prove. Sections 107, 108, and 109 of the Evidence Act place the burden of proof squarely on the party asserting the existence of specific facts. The Defendants asserted as a matter of fact that the Government of Kenya suspended and cancelled the REA and KPLC tenders. However, an examination of the record reveals that the Defendants completely failed to tender a single piece of documentary evidence to substantiate this claim.
40. There was no official gazette notice produced, no letter of cancellation from KPLC, and no directive from REA presented before this Court. On the contrary, the documentary evidence militates entirely against the Defendants' narrative. The Plaintiff produced a letter from KPLC dated 22 August 2018 confirming that KPLC was actively processing the purchase order. An even later letter from KPLC dated 29 March 2019, long after the restructuring of the debt, explicitly confirmed that KPLC was still processing the LPOs and merely requested the 1st Defendant to ensure it possessed a valid performance bond before commencing deliveries.
41. Unsupported defences remain mere allegations. Because the Defendants failed to produce any evidence of the tender cancellation, their assertion remains a naked, unsubstantiated allegation that cannot trigger the doctrine of frustration.

42. Regarding the substantive legal dimension, even if the Court were to assume, for the sake of argument, that the tenders were indeed cancelled by the government, the legal question remains: Does the failure of a third-party commercial contract frustrate an independent financing agreement?
43. The jurisprudence indicates a resounding negative. The Court confronted a remarkably similar legal dilemma in ***Dormakaba Limited v Architectural Supplies Kenya Limited*** [2021] KEHC 210 (KLR). In ***Dormakaba***, the defendant argued that its failure to pay the plaintiff for supplied goods was due to the sudden collapse of Imperial Bank, where the defendant's funds were deposited. The defendant argued this supervening event frustrated the contract. The Honourable Judge decisively rejected this argument, ruling that the contractual obligation to pay was not rendered impossible by the collapse of the bank; rather, financial hardship alone does not constitute frustration.
44. Applying the robust rationale of ***Dormakaba*** to the present dispute, the ***Murabaha*** and ***Tawarruq*** financing agreements between the Plaintiff and the 1st Defendant were legally distinct and severable from the supply contracts between the 1st Defendant and KPLC/REA. The bank advanced capital to facilitate the 1st Defendant's business operations. The commercial risk of executing the tender, managing the supplier (Misk Global Limited), delivering the goods, and securing payment from the government agencies rested entirely on the shoulders of the 1st Defendant. A commercial lender does not guarantee the success of the borrower's enterprise. In ***Standard Chartered Bank Kenya Ltd v Intercom Services Ltd*** eKLR, the Court of Appeal emphasized the distinct legal personality of corporate entities and held that financial losses caused by independent third-party actions (in that case, government prosecution and account freezing) are often too remote to be recoverable from or used as a shield against a bank.
45. The cancellation of the tenders—while undoubtedly a severe financial blow to the 1st Defendant—did not destroy the subject matter of the financing contract,

nor did it render the repayment of the disbursed funds physically or legally impossible. It merely destroyed the 1st Defendant's anticipated source of revenue, rendering repayment highly onerous. Under the strict parameters set out in ***Davis Contractors*** and ***Charles Muirigi Miriti***, mere commercial hardship or the failure of an anticipated revenue stream does not amount to frustration in law.

46. Consequently, the defence of frustration is hereby dismissed in its entirety for a complete lack of evidentiary proof and a fundamental lack of substantive legal merit.

The Liability of the 2nd and 3rd Defendants as Guarantors

47. The Plaintiff seeks to hold the 2nd and 3rd Defendants jointly and severally liable alongside the 1st Defendant on the strength of a Continuing Guarantee and Indemnity executed on 2 July 2018.
48. In commercial law, a contract of guarantee creates a secondary obligation wherein the guarantor promises the creditor to be responsible for the due performance of the principal debtor's obligations. Upon the default of the principal debtor, the guarantor's liability crystallizes immediately and becomes co-extensive with that of the debtor.
49. The Kenyan courts have consistently upheld the sanctity and strict enforceability of personal guarantees in commercial lending, including within Islamic financing structures. In the recent decision of ***KCB Bank Kenya Limited v Charingcross Communication Agency & Another KEHC 12291 (KLR)***, the Court examined a dispute involving a Murabaha financing agreement. The principal debtor defaulted, and the bank pursued the guarantor. Finding that the guarantee documents were duly signed by authorized agents, indicating a clear meeting of the minds and voluntary acceptance of terms, the Court held the guarantor jointly and severally liable for the outstanding debt, emphasizing that agreements must be kept.

50. Similarly, in the instant case, the 2nd and 3rd Defendants executed the Continuing Guarantee and Indemnity, expressly and unequivocally binding themselves to discharge the 1st Defendant's liabilities on a full indemnity basis. The execution of this critical document is not in dispute; DW1 explicitly admitted during cross-examination that she and the 2nd Defendant went to the bank, opened the corporate account, and signed the requisite offer letters and security documents.
51. As the 1st Defendant is found to be in egregious breach of its repayment obligations under the restructured *Tawarruq* and *Qard* facilities, the liability of the 2nd and 3rd Defendants is consequently triggered. The Court finds no legal impediment, equitable defence, or procedural flaw that would bar the enforcement of the guarantee. The 2nd and 3rd Defendants are, therefore, held to be jointly and severally liable to the Plaintiff for the entire sum claimed.

Discharge of the Evidentiary Burden and Reliefs

52. A plaintiff must adduce evidence that carries a reasonable degree of probability to prove its case. Where a plaintiff adduces credible, uncontroverted documentary evidence, and the defendant fails to provide substantive rebuttal evidence, the plaintiff is deemed to have successfully discharged its burden.
53. In the matter before me, the Plaintiff has meticulously documented the inception of the financial relationship, the explicit written instructions from the 1st Defendant to disburse funds to Misk Global Limited, the subsequent default, the desperate restructuring of the debt via the November 2018 letter, and the final legal demand for payment. The Plaintiff's witness, PW1, provided coherent, professional testimony that aligned seamlessly with the incontrovertible documentary record.
54. Conversely, the Defendants' case was marred by internal contradictions, uncorroborated allegations, and a complete dearth of supporting

documentation. The Defendants' reliance on unproved claims of a joint venture, an alleged unilateral selection of the supplier by the bank, and an unverified government tender cancellation fell woefully short of the required evidentiary threshold. DW1's testimony was largely evasive, occasionally absurd, and openly contradicted the very documents she herself admitted to signing on behalf of the company.

55. The Plaintiff has, therefore, established, on a balance of probabilities, that it advanced the sum of Kshs 19,988,706.00 and Kshs 209,599.02 to the 1st Defendant under the restructured November 2018 agreement, that the 1st Defendant defaulted on repayment, and that the total outstanding balance, inclusive of the agreed profit margin and default damages as of 11 July 2019, stood at Kshs 23,116,052.42.
56. Regarding the Plaintiff's claim for a profit at the rate of 13% per annum from 11 July 2019 until payment in full, the Court notes that this is the specific contractual rate agreed upon in the *Tawarruq* Finance facility. In Islamic financing, such a fixed profit margin is legally recognized and enforceable as the contractual return on the facility. It serves the equivalent commercial function as interest in conventional banking, without violating *Shari'ah* principles against *Riba*. While Kenyan courts have recently demonstrated a willingness to strike down unconscionable interest rates—such as the 36% per annum invalidated by the Court of Appeal in ***Dhiman v Shah KECA 1264 (KLR)***—the 13% profit margin levied by the Plaintiff in this commercial transaction is eminently reasonable, standard within the banking sector, and legally enforceable. The Court finds this claim fully justified.
57. In conclusion, the sanctity of commercial contracts remains a fundamental cornerstone of economic stability and the rule of law. When commercial entities engage financial institutions, negotiate terms, and execute binding agreements to facilitate their enterprise, they must be held strictly to the consequences of those agreements. The attempt to utilize the common law doctrine of frustration

as an escape hatch for mere commercial misfortune, particularly when completely devoid of evidentiary backing, cannot and will not be countenanced by this Court. The Plaintiff has conclusively proved its case against the Defendants.

58. Accordingly, the Court enters judgment in favor of the Plaintiff and against the Defendants, jointly and severally, in the following terms:

- (a) Judgment is hereby entered for the Plaintiff in the liquidated sum of Kshs 23,116,052.42.
- (b) The said principal sum shall attract the agreed contractual profit rate of 13% per annum calculated from 11 July 2019 until the date of payment in full.
- (c) The Plaintiff is awarded the costs of this suit.

Dated and Delivered at Nairobi this 13 day of February 2026

**HELENE R. NAMISI
JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For the Plaintiff: Mr Kimani
For the Defendants: Mr Obadop h/b Mr Ndungu
Court Assistant: Lucy Mwangi