

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MILIMANI**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL SUIT NO. E375 OF 2019**

**I & M BANK LIMITED** ..... **PLAINTIFF**  
**VERSUS**  
**BUZEKI ENTERPRISES LIMITED** ..... **DEFENDANT**

**JUDGEMENT**

1. This matter involves a substantial commercial dispute centred upon the enforcement of a negotiable instrument—specifically, a Promissory Note—and the legal intricacies surrounding the assignment of debts within the Kenyan banking sector. The Plaintiff, a reputable financial institution duly licensed under the Banking Act, approaches this Court seeking the recovery of a liquidated sum of KES 864,758,278/=, alongside accrued interest and costs.
2. The Plaintiff commenced these proceedings against the Defendant, seeking judgement against the Defendant as follows:
  - (i) Kshs 864,758,278/= and interest thereon at the Plaintiff's commercial rates from 18 October 2019 until payment in full;
  - (ii) Costs of the suit
3. The Plaintiff's case is that by promissory note dated 2 August 2016 from the Defendant to RT (East Africa) Ltd and maturing on 2 August 2016, the Defendant agreed to pay to RT (East Africa) Ltd the principal sum of Ksh 864,758,278/=. By promissory note dated 21 October 2016 from the Defendant

to RT (East Africa) Ltd and maturing on 30 November 2016, the Defendant agreed to pay to RT (East Africa) Ltd the principal sum of Ksh 864,758,278/=. The Plaintiff asserts its rights as a holder for value and assignee, contending that the Defendant has defaulted on its unconditional promise to pay the principal sum upon maturity.

4. The Defendant resists the claim with vigor, raising fundamental questions regarding the doctrine of privity of contract, the admissibility of oral conditions precedent in written contracts, and the procedural validity of debt assignment without the debtor's express consent. The Defendant alleges that the underlying transaction—a purchase of trucks—was subject to an oral condition that payment would only be made upon the sale of a specific asset known as Taru Ranch, a condition which has admittedly not materialized.
5. The matter proceeded to a full hearing where oral and documentary evidence was adduced. The Plaintiff called one witness, Mr. Lakshminarayanapuram Sivaramakrishnan (PW1), its Head of Business Development. The Defendant called its Director, Mr. Zedekiah Kiprop Bundotich (DW1). Following the close of the evidentiary phase, both parties filed comprehensive written submissions, which this Court has meticulously examined alongside the record.

### **Brief Background**

6. It is common ground that the Defendant, a logistics and transport company, entered into a commercial arrangement with RT (East Africa) Limited for the purchase of heavy commercial vehicles. Specifically, the transaction involved the supply of over 100 trailers and trucks. The aggregate purchase price for these assets was agreed at KES 864,758,278.
7. To settle this purchase price, the Defendant executed two Promissory Notes in favor of RT: Promissory Note dated 2 August 2016, which instrument promised to pay the principal sum on a fixed date. While the physical note indicates a due date of 15 September 2016, the Plaintiff's pleadings suggest a maturity of 2

August 2016. However, this note is not the primary subject of the present recovery, having been superseded or related to the earlier phase of the transaction.

8. The Promissory Note dated 21 October 2016 is the suit instrument. By this note, the Defendant unconditionally promised to pay RT (East Africa) Limited the sum of KES 864,758,278 on a fixed maturity date of 30 November 2016.
9. RT (East Africa) Limited was a customer of the Plaintiff bank and enjoyed credit facilities secured by various debentures. The evidence led by PW1 indicates that the trucks sold to the Defendant were, in fact, assets subject to the Bank's debenture charge. To facilitate the financing of its operations and ostensibly to service its own indebtedness to the Bank, RT sought to discount the Promissory Note issued by the Defendant.
10. On 24 October 2016, three days after the execution of the second Promissory Note, RT (as Assignor) and the Plaintiff (as Assignee) executed a Deed of Assignment—specifically titled "Assignment of Promissory Note". The terms of this assignment were explicit. The Assignor assigned the Note to the Assignee as continuing collateral security for the payment of all monies and liabilities due to the Bank (defined as the "Indebtedness"). The instrument purported to assign the Note and all monies accruing thereon to the use of the Assignee forever, subject to a proviso for re-assignment upon repayment of the underlying debt by RT. The Agreement expressly authorized the Plaintiff to sue for and recover the monies owing under the Note in its own name or in the name of the Assignor, without the necessity of the Assignor being a party to such discharge.
11. PW1 testified that upon execution of this assignment, the Plaintiff discounted the note—effectively advancing value to RT in reliance on the Defendant's promise to pay.

12. The maturity date of 30 November 2016 passed without payment being effected by the Defendant. The Plaintiff contends that despite the note being due and payable, the Defendant failed to honour its obligation. Consequently, the Plaintiff instituted this suit to recover the principal sum.
  
13. The Defendant's narrative, introduced primarily during the trial through DW1, differs significantly regarding the nature of the obligation. DW1 testified that the issuance of the Promissory Notes was not intended to create an immediate or absolute liability. Instead, he averred that the payment for the trucks was strictly contingent upon the sale of a property known as Taru Ranch (L.R. No. 12860), located in Kwale County. DW1 claimed that he and a director of RT, one Mr. Rajinder Singh, had a mutual interest in this land and had agreed orally that the truck payments would be sourced exclusively from the Defendant's share of the proceeds of the land sale. Since the land had not been sold, the Defendant argued the debt had not crystallized.

### **Plaintiff's Case**

14. The Plaintiff's case is founded on the principles of commercial certainty and the statutory protections afforded to holders of negotiable instruments.
  
15. The Plaintiff submitted that the Promissory Note is a complete and valid contract in itself. He relied heavily on Section 84 of the Bills of Exchange Act, arguing that the instrument contains an unconditional promise to pay a sum certain at a fixed time. The Plaintiff contended that any evidence attempting to introduce a condition (the land sale) constitutes an impermissible attempt to vary a written contract by oral evidence, contrary to Section 98 of the Evidence Act.
  
16. The Plaintiff argued that by discounting the note for RT, it gave value and thus became a holder for value under Section 27 of the Bills of Exchange Act. This status entitles it to enforce payment against the maker (Defendant) regardless of the state of accounts between the Defendant and RT.

17. The Plaintiff maintained that the Assignment Agreement dated 24 October 2016 was valid and effective. Counsel dismissed the Defendant's argument regarding lack of consent, asserting that the assignment of a debt or benefit of a contract does not require the debtor's consent, distinguishing it from novation.
18. Crucially, the Plaintiff attacked the Defendant's reliance on the Taru Ranch story. Counsel pointed out that the Statement of Defence filed in 2019 made absolutely no mention of this land transaction or oral condition. The introduction of this narrative in witness statements years later, they argued, was an ambush and a violation of the rules of pleadings.
19. PW1, Mr. Sivaramakrishnan, was steadfast in cross-examination. He admitted that the Bank had no direct contract for the supply of goods with the Defendant but maintained that the contractual relationship arose from the assignment of the negotiable instrument. He confirmed that the assignment was a bilateral agreement between RT and the Bank, to which the Defendant was not a signatory, but insisted that as a negotiable instrument, the note's transferability was inherent.

### **The Defendant's Case**

20. The Defendant's defence is an appeal to the equitable jurisdiction of the Court, asking it to look beyond the form of the instrument to the substance of the commercial understanding between the parties.
21. The Defendant framed its case around the lack of privity and the conditional nature of the contract. The Defendant submitted that the Plaintiff, being a stranger to the original agreement between RT and the Defendant, could not enforce terms that were subject to unfulfilled conditions.
22. The Defence argued that the obligation to pay was subject to a condition precedent: the sale of Taru Ranch. Until this event occurred, no debt was due.

Counsel urged the Court to apply Proviso (iii) to Section 98 of the Evidence Act, which permits oral evidence to prove a condition precedent.

23. The Defendant contended that the assignment of the note effectively transferred obligations and created a new relationship, which amounts to novation. Under the law of contract, novation requires the consent of all parties (RT, Bank, and Defendant). Since the Defendant neither knew of nor consented to the assignment, it argued the transfer was void against it.
24. The Defendant attacked the consideration provided by the Bank for the assignment. It argued that the credit facilities referenced by PW1 were pre-existing and thus insufficient to support the new contract of assignment under general contract law principles.
25. The Defendant referenced Civil Suit No. E134 of 2018, a separate suit involving RT and the Defendant, and argued that the current proceedings were an abuse of court process or *sub judice*, alleging collusion between RT and the Bank to recover the same sum twice.
26. DW1, Mr. Bundotich, admitted signing the note but characterized it as a bookkeeping entry for RT's internal accounts rather than a binding financial instrument. He candidly admitted during cross-examination that the Taru Ranch arrangement was not pleaded in his filed Defence, a concession the Plaintiff relies upon heavily. He further admitted that if the land were sold today, he would still be obligated to pay RT, thereby acknowledging the validity of the debt, if not the current creditor.

### **Analysis & Determination**

27. Having scrutinized the pleadings, the evidence on record, and the rival submissions, I distill the following issues for determination:

- a) Whether the instrument dated 21 October 2016 constitutes a valid Promissory Note under the Bills of Exchange Act, specifically regarding the requirement of an unconditional promise;
- b) Whether the Defendant is precluded by the Parol Evidence Rule and the doctrine of Departure from Pleadings from relying on the alleged oral condition precedent regarding the sale of Taru Ranch;
- c) Whether the transaction between RT (East Africa) Limited and the Plaintiff constituted a valid Assignment or a Novation, and whether the Defendant's consent was a prerequisite for enforceability;
- d) Whether the Plaintiff qualifies as a Holder for Value entitled to enforce the instrument against the Defendant;
- e) Whether the suit is *sub judice* or constitutes an abuse of court process in light of Civil Suit No. E134 of 2018.

#### The Legal Character of the Instrument

28. The primary document upon which this suit is founded is the Promissory Note. Its legal character is the threshold question. If it is a valid negotiable instrument, it confers specific statutory rights upon the holder that supersede ordinary contractual defences.

29. Section 84(1) of the Bills of Exchange Act provides the statutory definition:

*A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.*

30. I have examined the instrument produced in evidence. It contains the following text:

*"21.10.2016... days after date I/We promise to pay M/S R.T. (EAST AFRICA) LTD. order at the sum of Shs. Eight Hundred Sixty Four Million... Due Date 30.11.2016... For value received".*

31. On its face, the document is pristine. It contains no reference to Taru Ranch, no reference to a land sale, and no contingencies. It promises payment on a fixed future time, 30 November 2016.
32. The Defendant argues that the unconditional nature is vitiated by the underlying oral understanding. This argument fundamentally misunderstands the law of negotiable instruments. The unconditionality required by Section 84 refers to the text of the instrument itself. If courts were to permit extrinsic, unwritten conditions to retroactively render a written promissory note conditional, the negotiability of such instruments would be destroyed. They would cease to function as cash equivalents in commerce.
33. In ***Amos Karisa Tuva v Republic [2004] eKLR***, the Court emphasized that the validity of a promissory note is determined strictly by the four corners of the instrument under Section 84. Generally, words importing a condition must appear on the note itself to destroy its negotiability.
34. I find that the instrument sued upon meets all the statutory criteria of a Promissory Note. It is an unconditional promise in writing. The maker engaged to pay a sum certain (KES 864,758,278) at a fixed time.

#### The Parol Evidence Rule and Departure from Pleadings

35. The Defendant's primary defence is the existence of an oral agreement that payment was contingent on the sale of Taru Ranch. This defence faces two formidable legal barriers: the Parol Evidence Rule and the rule against Departure from pleadings.

36. Section 97 of the Evidence Act codifies the common law rule that where the terms of a contract are reduced to writing, the document itself is the exclusive evidence of those terms. Section 98 further mandates that no evidence of any oral agreement shall be admitted to contradict, vary, add to, or subtract from the written terms.
37. The Defendant seeks refuge in Proviso (iii) to Section 98, which allows evidence of *"any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract"*.
38. However, the application of this proviso is not without limits. Kenyan courts, following English precedents such as ***Angell v Duke (1875)***, have consistently held that a condition precedent cannot be proved by oral evidence if it is inconsistent with the written terms. Oral evidence is inadmissible to prove an agreement that contradicts the express terms of a bill of exchange or promissory note regarding the time of payment.
39. In the present case, the Promissory Note specifies a fixed due date: 30 November 2016. The alleged oral condition posits that payment is due only upon the sale of land, an uncertain future event. These two terms are legally repugnant to each other. One asserts liability at a specific time; the other asserts liability at an indefinite time. To admit the oral evidence would be to convert a note payable at a fixed time into a note payable on a contingency. Section 11(2) of the Bills of Exchange Act explicitly states that an instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.
40. Therefore, relying on section 98 of the Evidence Act, I hold that the oral evidence regarding Taru Ranch is inadmissible for the purpose of contradicting the express maturity date of the note. The written instrument must prevail.

41. Even if the evidence were admissible, the Defendant is shackled by its own pleadings. Order 2 Rule 4 of the Civil Procedure Rules requires a party to plead all material facts upon which they rely. During cross-examination, DW1 candidly admitted that the issue of the land transaction and the agreement to pay from its proceeds was not mentioned in the Statement of Defence. This factual narrative appeared for the first time in the Witness Statement filed on the eve of the trial.
42. The law on this is settled. In ***Galaxy Paints Co. Ltd v Falcon Guards Ltd*** 2 EA 385, the Court of Appeal held:
- "The issues for determination in a suit generally flow from the pleadings and unless pleadings are amended... the court would have no jurisdiction to determine issues not arising from the pleadings."*
43. A party cannot be allowed to succeed on a case not set up in their pleadings, as this causes a failure of justice and denies the opposing party fair notice. By springing the Taru Ranch defence at the trial stage, the Defendant engaged in litigation by ambush. The Plaintiff had no opportunity to investigate the status of the ranch, the alleged agreement with Rajinder Singh, or to call rebuttal evidence during discovery.
44. Consequently, I find that the defence regarding the conditional sale of Taru Ranch constitutes an impermissible departure from pleadings. It is an unpleaded issue that this Court cannot properly entertain. The Defence fails on this procedural ground alone.

#### Assignment vs. Novation and the Necessity of Consent

45. The Defendant submits that the transfer of the note to the Plaintiff was void because the Defendant did not consent to it. This argument rests on the

distinction between Assignment and Novation, a distinction often litigated in banking disputes.

46. This involves the extinguishment of an existing contract and the creation of a new one. It typically involves the transfer of obligations. Because a new contract is formed, the consent of all parties (including the debtor) is required. (See ***Commerce Bank Limited v Kukopesha Limited [2008] eKLR*** ).
47. This involves the transfer of rights or benefits (such as the right to receive payment). Under Section 3(1) of the Law of Contract Act, which imports English common law, and the principles of equity, a creditor is generally free to assign a debt to a third party without the debtor's consent, provided notice is given to the debtor to perfect the assignment.
48. The transaction between RT and the Plaintiff was an assignment of the Promissory Note. It transferred the right to receive KES 864 million. It did not transfer any obligations of RT to the Plaintiff, nor did it impose new burdens on the Defendant, who was already liable to pay that sum. The Assignment Deed is explicit: "The Assignor assigned the Note... to the use of the Assignee forever." This is language of assignment, not novation.
49. Crucially, the subject matter is a Promissory Note. By its very nature and definition under Section 84, a promissory note is a negotiable instrument. It is payable to order or to bearer. By issuing a note payable to order, the Defendant gave advance consent to RT to transfer the instrument to third parties. Section 31(1) of the Bills of Exchange Act provides that a bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill. This negotiation requires no further consent from the maker.
50. The Defendant's argument that consent was needed because of the special relationship fails because the instrument itself contained no restriction on

transfer. The Defendant unleashed a negotiable instrument into the market; it cannot now complain that the instrument was negotiated.

51. I hold that the transfer of the rights under the Promissory Note to the Plaintiff was a valid assignment/negotiation. The consent of the Defendant was not a legal prerequisite for the validity of this transfer.

#### Holder for Value and Consideration

52. The Defendant attacks the assignment on the ground of lack of consideration, arguing that the Plaintiff gave no value to RT, or that any value given was "past consideration."

53. Section 27(1) of the Bills of Exchange Act defines valuable consideration as:

*(a) Any consideration sufficient to support a simple contract; (b) An antecedent debt or liability.*

54. This statutory definition provides a complete answer to the Defendant's submission. Even if the credit facilities were advanced to RT before the assignment, the Act expressly recognizes this as valid consideration for a bill or note.

55. Furthermore, PW1 testified that the bank discounted the note. Discounting is a fundamental banking practice where a bank purchases a debt instrument for less than its face value, providing immediate liquidity to the creditor (RT) in exchange for the right to collect the full value at maturity. This act of discounting constitutes fresh and valuable consideration.

56. Section 30(1) of the Act creates a presumption:

*Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.*

57. The burden was on the Defendant to prove total failure of consideration. The Defendant offered no evidence to rebut the presumption or to disprove the existence of the banking facilities enjoyed by RT. The Defendant's assertion that the Plaintiff did not prove the exact quantum of the facilities is immaterial; legally, any value is sufficient to support the holder status.
58. I find that the Plaintiff is a holder for value under Section 27(2) of the Bills of Exchange Act. As such, it is entitled to enforce the bill against the Defendant.

#### Sub Judice and Abuse of Process

59. The Defendant argued that the existence of Civil Suit No. E134 of 2018 (*Randon S.A. Implementors Eparticipacoes v RT (East Africa) Limited*) bars this suit under the doctrine of *sub judice*.
60. To sustain a plea of *sub judice*, the matter in issue in the subsequent suit must be directly and substantially in issue in the previous suit between the same parties or parties under whom they claim. The Plaintiff is not the plaintiff in E134 of 2018. The cause of action in E134 appears to relate to the underlying supply contract disputes between Randon S.A. and RT. The present suit is a distinct claim on a negotiable instrument by a holder for value.
61. In ***Kenya Commercial Bank Ltd v Osebe [1982] KLR***, the Court of Appeal held that the *sub judice* rule is not a blanket bar; strict identity of issues and parties must be shown. The Defendant failed to adduce pleadings from E134 to demonstrate that the specific issue of the enforceability of this assigned note by this Bank was being adjudicated there. The allegation of fraud or collusion between the Bank and RT in filing separate suits is equally unproven. A bank has an independent right to pursue its security, distinct from its customer's contractual disputes.

62. Therefore, I dismiss the objection regarding abuse of process.
63. Having found the Defendant liable on the Promissory Note, the Plaintiff is entitled to judgment.
64. The Plaintiff prayed for interest at commercial rates. However, no contract was produced between the Plaintiff and Defendant stipulating a specific penalty interest rate. The relationship is based on the statutory instrument. In the absence of an agreed rate in the instrument itself, Section 57 of the Bills of Exchange Act allows for damages in the form of interest. Guided by the precedent in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd eKLR*, which cautions courts against rewriting contracts or imposing unproven rates, I am inclined to award interest at court rates.
65. In conclusion, judgement is hereby entered for the Plaintiff against the Defendant for the principal sum of KES 864,758,278/=. The said sum shall attract interest at court rates from the date of filing of the suit until payment in full.
66. The Defendant shall bear 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: N/A  
For the Defendant: Mr Otieno  
Court Assistant: Lucy Mwangi