



National Bank of Kenya Limited v Eco Bank Kenya Limited & another (Civil Appeal E341 of 2020) [2023] KECA 520 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 520 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E341 OF 2020
HA OMONDI, PM GACHOKA & KI LAIBUTA, JJA
MAY 12, 2023**

BETWEEN

NATIONAL BANK OF KENYA LIMITED APPELLANT

AND

ECO BANK KENYA LIMITED 1ST RESPONDENT

PESA PRINT LIMITED 2ND RESPONDENT

(Being an appeal against the Judgment and Decree of the High Court of Kenya at Nairobi Commercial and Admiralty Division (G. Nzioka, J.) dated 2nd September, 2020 in H.C.C.C E335 of 2019)

JUDGMENT

1. National Bank of Kenya Limited, the appellant, prefers this appeal against the Judgment and Decree of the High Court of Kenya at Nairobi delivered by G. L. Nzioka, J. on 2nd September 2020 in HCCC No. 335 of 2019 allowing the 1st respondent's Originating Summons in which it asked the trial court determines whether the appellant ought to be compelled to pay the 1st respondent a sum of USD 3,681,924.64 together with interest at the rate of 13% p.a. until payment in full, being proceeds of a tax invoice issued by the 2nd respondent to the 1st respondent; and whether the appellant should be restrained from paying any monies due under the said tax invoice to any other person and/or bank account other than the 2nd respondent's specified account held in the 1st respondent's Fortis Branch; it also prayed that the appellant be compelled to meet the costs of the suit.
2. The events leading to this appeal begun when the appellant, (who was the defendant in the High Court suit) got awarded a contract by the National Transport and Safety Authority (NTSA) to undertake and supply delivery installation and maintenance of second generation smart card driving licenses and associated services under tender No. NTSA.ICB/014/2014- 2015. The appellant engaged the



- 2nd respondent (the interested party in the High Court) to perform the contract as per the project agreement dated 30th March 2017.
3. The 1st respondent (being the plaintiff in the High Court), by a letter dated 6th December 2017, agreed to advance the 2nd respondent an invoice discounting facility of USD 3,500,000 to be utilized as working capital against invoice No.00229 issued by the 2nd respondent, and payable by the appellant. The 2nd respondent then executed an assignment agreement in favor of the 1st respondent assigning all dues under the contract with the appellant to the 1st respondent.
 4. The 2nd respondent then gave notice of the assignment dated 27th November 2017 to the appellant, requiring the appellant to pay all proceeds under invoice No.00229 to the 1st respondent. The appellant acknowledged receipt of the notice of assignment and informed the respondent that it had not received funds from NTSA, upon which its obligation to remit the funds would arise.
 5. It was the 1st respondent's case that the appellant unilaterally varied the terms of the assignment and acknowledgement by alleging that payment was subject to receipt of funds from NTSA; that it had not acceded to the variation, and that payment ought to have been made in accordance with the terms of assignment.
 6. The appellant, on the other hand, insisted that payment was subject to receipt of funds from NTSA and, with a view to come to an agreement, the appellant and the 1st respondent's managing directors held a meeting and agreed that afresh financial guarantee be issued, and the appellant issued the 1st respondent with a new guarantee dated 29th January 2019 for approval.
 7. The appellant maintained that upon the issuance of a new guarantee, its obligation on payment was limited to 7(seven) days from the date of receipt of funds from November 2018. Further, that payment on invoice No.00229 had not been made by NTSA, and that the payment of USD 1,408,000 was made on invoice No.00235, and that the amount of Kshs.100,000.00 offered to be made to the 1st respondent was made out of that amount as a courtesy due to delay in payment of invoice No.00229.
 8. The 2nd respondent, though not taking any position in the issues raised by the 1st respondent, urged the trial court to find that the provision in the loan agreement, which authorized the appellant to levy additional interest known as default interest as a penalty for default in repayment, was illegal, unknown in law, and violated section 33B of the [Banking Act](#).
 9. The appellant's contention was that the parties engaged in out of court settlement on the matter; and deliberated on a consent to compromise the suit, but that the consent was not executed due to unreasonable terms introduced by the 1st respondent.
 10. By a judgment dated 2nd September 2020, the trial court, having carefully considered the parties' pleadings, testimony, and evidence on record, allowed the 1st respondent's Originating Summons, thus compelling the appellant to pay the sum USD 3,681,924,64.00 but also held that the 1st respondent could not claim interest which had not been provided for in the deed of assigns or otherwise.
 11. Allowing the Originating Summons, the learned Judge found that the notice of assignment dated 27th November 2017 at clause 2 did not expressly state that the payment was to be made upon receipt of funds by NTSA. The learned Judge also pointed out that the notice of assignment required to be read



in light of the letter of offer which spelt out the terms of engagement between the appellant and the 1st respondent. The said letter expressly stated:

“...that payment would be made within a period of 150 days from the date of receipt of the invoice by National Bank of Kenya Limited...”

12. It is noteworthy that the letter of offer did not state that payment was to be made after receipt of payment by NTSA.
13. The learned Judge also noted that the letters dated 19th April 2018 and 14th June 2018 seeking extension of time did not alter the appellant's obligation to make payment upon receipt of invoice No.00229, but on the duration of payment; and that the contents of both letters were to the effect that delay in payment was as a result of the time taken to process the invoice and receipt of payment by the procuring entity, and not that the appellant had committed itself to pay upon receipt of funds by NTSA.
14. The trial court further noted that, by the letter (new guarantee) dated 29th January 2019, the appellant acknowledged liability to pay the 1st respondent within 7(seven) days from the date of receipt of funds under the invoice from NTSA, which payment was still not made; and, further, that there was no proof that this new guarantee was executed by the parties. As regards the consent filed in court by the 2nd respondent, the trial court took note that it was not executed by the parties and, therefore, the original notice of assignment was still binding on the parties. Consequently, the learned Judge held that, in the absence of any further mutual extension of the payment period of 150 days, the appellant's liability under the deed of assignment had arisen.
15. Aggrieved by the decision of the trial court, the appellant filed its memorandum of appeal challenging the judgment of the High Court on 10 grounds of appeal that, namely; that the learned Judge: misconstrued the import and meaning of the term "Receivables" as used in the Deed of Assignment of Receivables between the respondents and as acknowledged by the appellant in the acknowledgement of notice issued by the appellant; failed to find that the appellant's obligation to pay the receivables due to the 1st respondent only arose once it received the receivables under the invoice; made a contradictory order allowing prayer (a) of the Originating Summons dated 3rd October 2019, which prayer included an interest component, when she had expressly found and held that the 1st respondent could not claim interest not provided for in the Deed of Assignment; in ordering the appellant to pay the 1st respondent USD 3,681,924.64 (as prayed in prayer (a) of the Originating Summons) without taking into account the fact that out of this amount, USD 1,484,055 had been admittedly paid to the 1st respondent; misconstrued the import of the Deed of Assignment of Receivables and the Assigned Agreements in so far as who the primary obligor with a duty to settle the debt owed to the 1st respondent was concerned; failed to find that upon a true and correct interpretation of the 2nd respondent's Credit Facility Agreement with the 1st respondent and the Deed of Assignment of Receivables on one hand against the Acknowledgement of Notice of Assignment issued by the 1st respondent on the other, that the 2nd respondent was the primary obligor to settle the debt owed to the 1st respondent; reached an improper decision that effectively discharged the primary obligor, i.e, the 2nd respondent, and substituting it for the appellant without any consideration passing between the appellant and the 2nd respondent; erroneously failed to find and hold that since the appellant had not received the payment from the National Transport and Safety Authority ("NTSA") under the main contract, the obligation to pay the 2nd respondent on Invoice No. 00229 had not arisen and, consequently, that the obligation to pay the 1st respondent under the Deed of Assignment of Receivables and the Acknowledgment of Notice of Assignment could not have crystallized; erroneously accorded the 2nd respondent and the 1st respondent a right to payment of Invoice No. 00229 before the appellant had received payment from the NTSA



- under the main contract without any basis in law; and in reached conclusions and findings regarding the appellant's obligation to pay the 1st respondent was against the weight of evidence tendered before court.
16. On the grounds aforesaid, the appellant prays that the appeal be allowed, and that the judgment dated 2nd September 2020 be set aside with the consequence that the Originating Summons dated 3rd October 2019 be dismissed with costs.
 17. The appellant has collapsed the 10 grounds into 3 thematic grounds, namely:
 - i. that the learned Judge, having misconstrued the import and meaning of 'receivables', erred in fact and in law in failing to find and hold that the obligation to pay the 2nd respondent on Invoice No.00229 had crystallized as the appellant had not received payment from NTSA under the project agreement;
 - ii. that the learned Judge erred in fact and law in ordering the appellant to pay the 1st respondent USD 3,681,924.64 (prayer 'a' of the Originating Summons) without taking into account the fact that USD 1,484,055 had admittedly been paid to the 1st respondent); and,
 - iii. that the learned Judge reached the conclusions and findings regarding the appellant's obligation to pay the 1st respondent against the weight of evidence tendered before the court, including the fact that the appellant and the respondent had orally altered the terms of their agreement.
 18. With regard to the first thematic ground that the learned Judge misconstrued the import and meaning of 'Receivables', the appellant contends that the term receivables as defined at Regulation 1(3) of the UK [*Business Contract Terms \(Assignment of Receivables\) Regulation*](#) 2018 (the Regulations) is, 'a right to be paid any amount under a contract for the supply of goods, services or intangible assets'. The appellant refers us to the meaning given under Article 5 (b) of the [*United Nations Convention on the Assignment of Receivables in International Trade*](#), 2001 (the Convention) a future receivable means a receivable that arises after conclusion of the contract of assignment.
 19. It is the appellant's submission that from the various clauses of the deed of assignment, any amounts due to the 1st respondent were in the form of future receivables in terms of the definition provided in the [*Convention*](#) and, as such, any claim by the 1st respondent had not crystallized, and, in any event, was not recoverable until payment was received by NTSA.
 20. According to the appellant, the 2nd respondent could not have assigned more rights to the 1st respondent than it was entitled and, accordingly, the 2nd respondent was only entitled to receive payment once the appellant received payment from NTSA. In addition, the appellant insists that it was a clear term of the project agreement that payment would be made to the 2nd respondent once the appellant received the sums due from NTSA and, in effect, it would increase the appellant's burden to make payment before the amounts were received by the appellant from NTSA.
 21. Under this head, the 1st respondent draws from the definition given in Black's Law Dictionary, that the term 'Receivables' is an accounting term for monetary amount due from a customer. The 1st respondent argues that the letter of offer dated 6th December 2017, clause 2 of Deed of Assignment dated 8th December 2017 and the notice of assignment dated 27th November 2017 unequivocally show that payment to the 1st respondent by the appellant was based on receipt of Invoice No.00229, and not on receipt of payment.



22. The 1st respondent points out that the invoice was received on 7th December 2017 and that, to date, the appellant has refused to pay the said invoice; that by alleging that the 1st respondent's claim had not crystallized, and that payment to the 2nd respondent would only be made once the appellant received the sums due from NTSA, the appellant is unilaterally varying the terms of the notice of assignment and acknowledgement; and that payment should be made in accordance with the terms of the notice of assignment.
23. In addition, the 1st respondent argues that the letter of offer and deed of assignment did not assign to the 1st respondent the contract receivables as claimed by the appellant. To the contrary, what was specifically assigned were the amounts receivable under invoice No.00229; and that, in any event, the 1st respondent was not privy to, and had no interest in, the tender contract.
24. The 1st respondent also submits that the appellant is bound by the doctrine of estoppel, and cannot shift positions confirmed through various correspondence, including acknowledgment of notice of assignment that payment will be done, but not on the basis of payments received from NTSA.
25. In addition to the foregoing the 1st respondent argues that a court cannot rewrite contracts between parties, as the parties are bound by the terms of contract, unless coercion, fraud or undue influence is pleaded and proved. The 1st respondent further disputed the claim that the parties entered into an oral argument for extension of time to settle the subject invoice, and that the letters dated 19th April 2018 and 14th June 2018 seeking extension of time did not alter the appellant's obligation to pay.
26. As to whether the learned Judge erred in ordering the appellant to pay the 1st respondent USD 3,681,924.64 without taking into account the fact that USD 1,484,055 had admittedly been paid to the 1st respondent, it is the appellant's case that the 1st respondent admitted it had received sums of USD 1,484,055, and as such the trial court erred in its judgment in ordering that the 1st respondent be paid USD 3,681,924.64 without deducting the aforesaid amount as it would amount to unjust enrichment.
27. The 1st respondent's response to this ground is not clear. However, the 2nd respondent, by way of a cross-appeal, pokes holes into the judgment, which it describes as ambiguous and open to many interpretations. That the learned Judge ignored the fact that all the amounts sought were towards the payment of the loan facility extended to the 2nd respondent by the 1st respondent under the terms of the contract dated 6th December 2017; and that he also ignored the fact that there were previous significant payments towards the settlement of the facility which were not paid out of the receivables under invoice No.00229.
28. The 2nd respondent argues that, in failing to give an explanation for allowing the entire claim on the sum of USD 3,681,924.64, parties are left wondering whether the sum comprises the outstanding loan amount payable by the 2nd respondent minus the amounts already remitted; or that the outstanding loan amount payable by the 2nd respondent plus the amounts already paid; or that it is just a figure of the amounts that the 1st respondent thought it had been paid under the invoice No.00229 and, which upon payment to the 1st respondent, the 1st and 2nd respondent were to calculate the interest rates and work out on the balances or refunds (if any).
29. The 2nd respondent contends that the pleadings already disclosed that a sum of USD 1,484,054.36 had already been remitted to the 1st respondent towards settlement of the loan before filing of the suit in the High Court; that during the pendency of the suit, the parties recorded a consent in court on 18th November 2019 requiring the 2nd respondent to remit a further Kshs.80,000,000.00, which was being held by the appellant on behalf of the 2nd respondent towards the settlement of the loan facility, and the 1st respondent's counsel confirmed remittance to the 1st respondent.



30. As regards the contention that the learned Judge disregarded the weight of evidence tendered before the Court, including the fact that the appellant and the respondent had orally altered the terms of the agreement, the appellant submits that, whereas the general rule is that a contract cannot be varied by an oral agreement. It must be recognized that there are some exceptions to the rule. In this regard, the appellant points out that, on 19th December 2018, the Managing Directors of the appellant and 1st respondent held discussions with a view to unlock the stalemate between the parties, and that it was agreed that the terms of the guarantee be varied to the effect that payment to the 1st respondent be made within 7(seven) days from the date of receipt of payment of invoice No.00229 by issuing a fresh guarantee by the appellant. That the new guarantee was issued on 29th January 2019, and from this, it is the appellant's contention that the parties had altered terms of their original contract. It is submitted that the trial Judge erred in making a finding that there was no evidence demonstrating that the guarantee was executed by the parties, as the undertaking was issued by the appellant, and did not need to be executed by the 1st respondent.
31. This being a first appeal and as has been reiterated in several decisions of this Court, it is this Court's primary duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per rule 29(1) (a) of the Court of Appeal Rules. This duty has been reiterated in Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Company Advocates [2013] eKLR.
32. In our considered view, the main issues in this appeal are:
- i. When did the appellant become liable to pay the 1st respondent the sums indicated in the tax invoice, and
 - ii. whether the court erred in allowing prayer (a) of the Originating Summons, which sought a determination on whether National Bank should be compelled to pay the sum of USD3,681,924.64 together with interest at 13% per annum until payment in full, being proceeds of tax invoice No.00229 dated 24th November, 2017.
33. The crux of the appellant's case revolves around the question regarding when the appellant became liable to pay the 1st respondent the sums indicated in the tax invoice. The contention is that the payment to the 1st respondent on Invoice No.00229 was to be made after payment of the invoice by NTSA was received by the appellant.
34. From the evidence on record, Clause 2 of the notice of assignment reads:
- “In accordance with the provisions of the contract, we hereby give you notice that we have assigned to Ecobank Kenya Limited (the bank) all our right, title and interest, present and future, with respect to all the money that at any time be owing, or incurred by you to us in connection with the payment request and/or invoice No.00229 dated November 24th, 2017 (the receivables) to be paid within one hundred and fifty (150) days.”
35. From this notice of assignment and acknowledgment, we concur with the sentiments expressed by the learned Judge that the notice did not expressly state that payment was to be made upon receipt of funds from NTSA. The letter of offer also clearly states that payment would be made within 150 days from the date of receipt of the Invoice by National Bank of Kenya. The letter of offer does not state that payment was to be made after receipt of funds from NTSA as alleged by the appellant.



36. We have considered the contents of the letters requesting for extension of time and note that they do not mention an inability to pay due to a “commitment to pay upon availability of funds from NTSA”. For purposes of clarity we reproduce the letter dated 19th April, 2018 hereunder.

Re: Pesa Print Limited

As advised in our letter dated 24th November 2017: Ref:NBK/RET:NTSA Project, our obligation as contained in the letter subsists, It would therefore be prudent to extend the time frame by 150 days to allow us more time with respect to the receivables. The delay has been occasioned by the length of time taken to process the invoice and receive payment from the procuring entity. However, we have already channeled USD 400,063,197 through the said account on 23rd March 2018 being balance of the advance payment.

37. The letter of 14th June stated thus:

Re: Pesa Print Limited

Referring to the letter dated 19th April 2018:

As advised in our letter dated 24th November 2017 Ref: NBK/RET: NTSA Project, our obligations as contained in the letter subsist. It would therefore be prudent to extend the time frame by 150 days to allow us more time with respect to the receivables. The delay has been occasioned by the length of time taken to process the invoice and receive payment from the procuring entity. However we have already channeled USD 400,063.97 through the said account number 0301015027916701 on 23rd March 2018, being balance of the advance payment.

38. Indeed, the contents of the two letters are similar, and we are unable to find fault with the trial Judge’s finding that the letters did not alter the appellant’s obligation to pay. The extension was in relation to the duration of payment, as the letters in question clearly stated that the delay was occasioned by the time taken to process the invoice and receipt of payment from the procuring entity
39. The appellant has submitted that parties engaged in out of court settlement of the matter, and that the Managing Directors of the appellant and 1st respondent met with a view of settling the deadlock. Pursuant to this meeting, the appellant sent the 1st respondent a new guarantee dated 29th January 2019 for approval, which was received on the same date by the 1st respondent. The appellant contends that this new guarantee was clear that payment was to be made within 7(seven) days of receipt of payment by NTSA, and the appellant insists that no payment has been made by NTSA.
40. Ultimately, we are persuaded, as was the trial Judge, that there is no evidence that the new guarantee was executed by the parties. If it was, then no rational explanation has been offered as to why it was not produced before the trial court. It is clear from the evidence on record that the original 150 days for payment is long overdue, and there is no evidence of any further mutual extension of that period.
41. As to whether the trial court erred in allowing prayer (a) of the Originating summons, it is useful, for purposes of clarity, to reproduce that prayer to wit:

“Whether National Bank should be compelled by an order of this Court to forthwith pay to the plaintiff the sum of USD 3,681,924.64 together with interest at 13% per annum until payment in full being proceeds of Tax Invoice No.00229 dated 24th November, 2017 issued by the Interested Party to the defendant.”

42. On this issue, the appellant submits that the trial court erred in allowing payment to the 1st respondent on prayer (a) for USD 3,681,924.64000 without taking into consideration the USD 1,408,000 already



paid to the 1st respondent. We have grappled with the question as to what reason would lead to a conclusion that the payments made, though not related to the invoice in question, were actually made in relation to the amount in issue? From the evidence on record the USD 1,408,000 was made on invoice No.00235 and not on Invoice No.00229. The appellant has not led any evidence to the contrary. In our view, the trial Judge duly considered the relevant evidence as presented and properly allowed prayer (a) of the Originating Summons without deduction of USD 1,408,400.

43. We also note that, when allowing the said prayer, the learned Judge declined to award interest of 13% p.a. to which the 2nd respondent has filed a cross petition whereby it alleges that the trial court was silent on the issue of default interest which, according to the 2nd respondent, went against the now repealed section 33B (1) of the *Banking Act*.

It is our view that, once the trial court disallowed interest on prayer (a) of the Originating Summons, the issue of default interest does not come into play. Accordingly, the cross-appeal fails and is hereby dismissed.

44. Consequently, and in light of the foregoing, we hold that this appeal lacks merit and the same is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

