



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO 389 OF 2015

SYNERGY INDUSTRIAL CREDIT LIMITED.....PLAINTIFF/DECREE HOLDER

VERSUS

DANIEL WAGUCHU NG'ANG'A.....1ST DEFENDANT/JUDGMENT DEBTOR

LUCY NJERI WAGUCHU.....2ND DEFENDANT/JUDGMENT DEBTOR

AND

IRENE NJERI WAGUCHU.....SURETY/GUARANTOR/RESPONDENT

RULING

1. There are two applications for consideration before this court which, by consent of the parties, were to be heard simultaneously. The first is by the proposed Surety being a Notice of Motion application dated 9th March, 2021 The second is the Plaintiff's Notice of Motion dated 18th November, 2020. I have taken the approach to first dispense with the proposed Surety's application dated 9th March, 2021 as it concerns her opportunity to present her case in opposition to the other application.

2. The proposed Surety's application dated 9th March, 2021 is brought under **Order 8 Rule 3** and 5 and **Order 5 Rule 16** of the **Civil Procedure Rules 2010, Section 1A, 1B** and 3A of the **Civil Procedure Act, Article 159** of the **Constitution of Kenya** and all other enabling provisions of the law. It seeks the following orders:

i. Spent.

ii. THAT leave be granted to the Surety/Guarantor to file another Replying Affidavit in place of the one they filed on behalf of proposed Surety/Guarantor dated 10th February 2021

iii. THAT leave be granted to the Applicant for the extension of time to file their submissions to the Notice of Motion application dated the 18th November, 2020 by the Respondents.

3. The application is predicated on the grounds on the face of it and supported by the Affidavit of **MAINA GACHOYA**, an advocate practicing in the firm of Messrs Gachoya Maina & Company Advocates who have the conduct of this matter on behalf of the proposed Surety. He deposed that upon perusal of the Replying affidavit sworn by the proposed Surety and filed on 10th February, 2021 in response to the Plaintiff's application, he noticed that there was an apparent error of wrongful commissioning that had been occasioned by it being commissioned alongside documents from another law firm that were being commissioned in their firm on the same day. He noted that the error on commissioning offends **Section 4 (1)** of the **Oaths and Statutory Declarations Act** in that the drawer of a document cannot commission the same but, the error was due to an oversight and mix up of documents and can be rectified with the leave sought.

4. He averred that no prejudice will be occasioned to the other parties as the proposed Surety does not intend to change the content of the Replying affidavit that is already on record, save as to have the same properly commissioned by another advocate who is not the drawer. However, the proposed Surety will suffer great prejudice in the event that the application proceeds without being allowed to correct the error which has been admitted as a mistake on the part of counsel and should not be visited on an innocent litigant. He therefore urged the court to exercise its wide discretionary powers so as to dispense justice on substantive issues of merit.

5. In response, the Plaintiff filed a Replying Affidavit sworn on 16th March, 2021 by its legal officer **SUSAN NDUNGE MUTAVA**

deposing that the application is inelegantly drawn and the prayers sought therein are not diligently drawn. She stated that the Plaintiff raised the issue of defectiveness and inadmissibility of the Proposed Surety's Replying Affidavit sworn on the 10th February, 2021 for want of compliance with Section 4(1) of the Oaths and Statutory Declaration Act in its submissions dated 5th March, 2021 and served on the Proposed Surety's Counsel on the 8th March, 2021. In her view, the averments in the Supporting Affidavit of Mr. Maina Gachoya Advocate are misleading and designed to steal a match on and defeat the Plaintiff's aforesaid Submissions.

6. She argued that the reason tendered by the proposed Surety's counsel pertaining the wrongful commissioning of the Replying Affidavit sworn on the 10th February, 2021 is inadequate, vague and confirms that the proposed Surety did not appear before the Commissioner for Oaths as required under section Sections 4 and 5 of the Oaths and Statutory Declaration Act. It was further her contention that the Replying Affidavit sworn by the proposed Surety on 10th February, 2021 and the new Affidavit annexed to the Supporting Affidavit of her advocate are not affidavits by virtue of Sections 4 of the Oaths and Statutory Declaration Act and cannot be cured by invoking **Order 19 Rule 7** of the **Civil Procedure Rules**, 2010 which is a subsidiary legislation. She averred that any Affidavit that fails to strictly comply with the requirements of Oaths and Statutory Declaration Act has no legal value and are incurably defective since that is not a mere technicality.

7. In its written submissions dated 5th March, 2021, the Plaintiff restated the contents of the Replying Affidavit in response to the application. Additionally, it relied on the case of **Caltex Oil (Kenya) Limited v New Stadium Service Station Ltd & another [2002] eKLR** where the court stated that an Affidavit which offends the provisions of Section 4(1) of the Oaths and Statutory Declaration Act, for all intents and purposes, is not an affidavit as envisaged in law. Further, that the same is incapable of being received under **Order 18 Rule 7** of the **Civil Procedure Rules** as it offends a provision of an Act of Parliament and does not represent a mere irregularity either in defect as to form or by misdirection of the parties, or in the title. For this reason, the Plaintiff urged that the Affidavit be struck out.

8. In her written submissions dated 9th March, 2021, the proposed Surety identified three issues as arising for determination in respect of her application. These are: whether the Court should grant the leave sought to replace the Replying Affidavit in place of the one dated 10th February, 2021 rectifying this error of commissioning; whether the Plaintiff will suffer any prejudice from granting these orders; and whether the court should strike out the Replying affidavit on grounds that it is incurably defective, and inadmissible.

9. The proposed Surety submitted that the circumstances under which the Affidavits in the case of **Caltex Oil (Kenya) Limited v New Stadium Service Station Ltd & Another (supra)** cited by the Plaintiff were struck out, are distinguishable from her case. That in the said case, there were several Affidavits commissioned on diverse dates by the same counsel, and it was also not a one-time mistake of counsel, as is the situation in the present case, which informed the mind of the court while deciding to strike out the said affidavits. It was argued that a one-time mistake of counsel has been admitted in this present matter which mistake is one of form and therefore inconsequential under **Order 19 Rule 7** of the **Civil Procedure Rules** which states as follows:

“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdirection of the parties or otherwise in the title or other irregularity in the form thereof.”

10. Further, it was her submission that the error which has been admitted by Counsel on record is not fatally defective in any event. Reliance was placed on the case of **Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 2001 KLR 470** where the Court held that deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue. She submitted that the error in the Affidavit herein does not go to the jurisdiction of the Court nor does it in any way prejudice the adverse party and thus Counsel should be allowed to file another Affidavit in the prescribed manner.

11. It was also submitted that the above position is further buttressed by the Oxygen Principle provided for under **Article 22 (3) (d)** and **Article 159(2) (d)** of the **Constitution of Kenya 2010** as well as **Sections 1A and 1B** of the **Civil Procedure Act**. Further reliance was placed on the case of **Kamani v Kenya Anti-Corruption Commission (2010) eKLR**, where the Court of Appeal stated that striking out of pleadings is a drastic remedy that should only be resorted to only where a pleading is a complete sham.

12. Further, it was submitted that the proposed Surety should be allowed to file the annexed Replying Affidavit on the basis that the mistakes or errors of the Advocate ought not to be visited upon the client as held in the case of **Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 others [2018] eKLR**. Additionally, the proposed Surety submitted that failing to admit the Affidavit in question would offend the rules of natural justice, particularly the right to be heard and reliance was placed on the case of **Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others [2018] eKLR**.

Determination on the Proposed Surety's application

13. I have considered the prayers sought in the application, the response by the Plaintiff and the rival arguments made by both parties. I have also perused the Replying Affidavit sworn on 10th February, 2021. I note that indeed the said Affidavit was wrongly commissioned by a commissioner who is also the advocate for the deponent in the proceedings herein. This is contrary to the provisions of Section 4(1) of the Oaths and Statutory Declarations Act Cap 15 of the Laws of Kenya which states as follows:

“(1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in

which he is interested.”

14. In view of the outright statutory requirements, I am in agreement with the Plaintiff that the error on the Affidavit sworn on 10th February, 2021 is not a mere technicality or irregularity of form that can be cured under **Order 19 Rule 7** of the **Civil Procedure Rules**. I am persuaded by the **Caltex Oil (Kenya) Limited Case (supra)** where the court confronted with a similar situated stated as follows:

“In my humble opinion any attempt to reduce such an Act of Parliament to a mere irregularity is an affront to our laws. Indeed a look at this provision will clearly show that the provisions in Order 18 Rule 7 being provision for taking Oaths for civil proceedings emanates partly from the Section of an Act of Parliament. Breach of this section as happened here cannot be treated as a mere irregularity or as an irregularity as to form only. I do think that the courts have a duty to rightly interpret the laws and to ensure that they do not condone any breaches of the same laws under any pretences whatsoever.”

15. In view of the foregoing, I find that the Replying affidavit sworn by the proposed Surety on 10th February, 2021 is incurably defective for want of proper commissioning and is hereby struck out.

16. Be that as it may however, Counsel for the proposed Surety has admitted that the error was occasioned by an inadvertent mistake on their part which he has urged that should not be visited on an innocent litigant. It is for the said reason that he now seeks this court's leave to substitute the defective affidavit with a compliant Replying Affidavit sworn on 9th March, 2021 which is already part of the court record. I have perused the affidavit and I confirm *the averment* by Counsel for the proposed Surety that the contents are similar to the affidavit that has been struck out.

17. **Section 3 A** of the **Civil Procedure Act** empowers this court to make any orders that may be necessary to meet the ends of justice or to prevent abuse of its process. The court is also obligated under **Section 1A (2)** of the Act to give effect to the overriding objective of the **Civil Procedure Act** which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. In this case, Counsel for the proposed Surety has tendered a satisfactory explanation regarding how the mistake of filing the defective affidavit arose. I have no reason to doubt the explanation given. In the circumstances, I am inclined to exercise my powers under **Section 3A** of the **Civil Procedure Act** to allow the proposed Surety's prayer in order to give her an opportunity to present her case in opposition to the Plaintiff's application. In any case, granting the said prayer will not occasion the Plaintiff any prejudice that cannot be compensated by way of costs.

18. In addition, the proposed Surety has urged the court to extend time in order to deem her submissions in respect of the Plaintiff's Notice of Motion application dated the 18th November, 2020 as duly filed and properly on record. It is noteworthy that the directions that were given by this court regarding the filing and exchanging of documents were so done in the interest of time and justice to parties herein. However, upon considering the explanation tendered by Counsel for the proposed Surety, which I find to be reasonable, I exercise my discretion by extending the time within which she was required to file her written submissions. The said Replying Affidavit which is already on record is deemed and duly filed and served.

19. The costs of this application are awarded to the Plaintiff.

Plaintiff's Application dated 18th November, 2020

20. The second application for consideration is the Plaintiff's Notice of Motion dated 18th November, 2020 brought under **Order 50 Rule 1** of the **Civil Procedure Rules, 2010, Sections 3A, 34, 63** and **92** of the **Civil Procedure Act**, Chapter 21 Laws of Kenya and all other enabling provisions of the law. The Applications seeks the following orders:

a) That IRENE NJERI WAGUCHU be declared a guarantor and surety of the Judgment Debtors herein and be ordered to satisfy the Decree issued herein.

b) That in addition to any other mode of execution available, the Plaintiff/Decree Holder be permitted, allowed and/or authorized to execute the Decree issued herein against one IRENE NJERI WAGUCHU in her personal capacity in enforcement of an undertaking made on the 21st March 2018 in favor of the Plaintiff/Decree Holder.

c) That if IRENE NJERI WAGUCHU fails to satisfy the Decree issued herein, her personal assets and all assets in which she has a beneficial interest, entitled to or has legal or equitable interests in the whole or in part thereof be attached in execution of a Decree herein.

d) That if IRENE NJERI WAGUCHU fails to satisfy the Decree issued herein for whatever reasons, a third (1/3) of her salary be attached in execution of the Decree issued herein.

e) That if IRENE NJERI WAGUCHU fails to satisfy the Decree issued herein for whatever reasons, Warrants of Arrest be issued against her in execution of the Decree issued herein.

f) Costs of this application be awarded to the Applicant/Decree Holder.

21. The application is predicated on the grounds on the face of it and supported by the Affidavit **JACOB MBAE MEEME**, a legal officer of the Plaintiff. He deposed that on 21st March, 2018, the 1st Defendant was apprehended and presented before this court in pursuance of Warrants of Arrests against him issued herein on 14th December, 2017. Subsequently, Ms. Irene Njeri Waguchu, the proposed surety herein, who is the Defendants' daughter, offered herself by way of an undertaking before the Honourable S. A. Opande Deputy Registrar on the 21st

March, 2018, to be liable to satisfy the Decree issued herein by making monthly installments of Kshs. 100,000/- starting from the 5th April, 2018.

22. Upon consideration of the above, the Decree-Holder accepted Ms. Irene Njeri Waguchu as a surety and reluctantly consented to the release of the 1st Defendant. Consequently, a consent was recorded in that regard thus making the Surety liable to the full extent of the obligation of settling the decretal sum. Despite that, the Surety has failed to honour the said undertaking and consent order.

23. The 1st Defendant and the proposed Surety undertook to sell a property known as Kajiado/Kitengela/17632 situated at Kitengela within Kajiado County that was estimated to fetch at least Kshs. 3,000,000/- which amount was to be remitted to the Decree-Holder towards settlement of the decretal sum but the same has never happened to date. He has since established that the said property was not and has never been owned by either the Defendants herein or the proposed Surety. He faulted her for misleading this court to secure the release of the 1st Defendant. Further, he averred that the 1st Defendant mischievously filed a debtor's Petition against himself being Nairobi High Court *Insolvency No. 19 of 2018* where he was adjudged bankrupt on the 24th January, 2019.

24. He contended that the foregoing actions reveal a choreographed plan by the Defendants and the proposed Surety to avoid the payment of a just debt and ultimately fleece and defraud the Plaintiff. He stated that whereas the Defendants appear to be unable to settle the decretal sum herein, the proposed Surety is a person of means.

25. Further, he averred that the Plaintiff issued two (2) demand letters cum Notice of Intention to enforce the undertaking/Surety dated 19th March, 2020 and 10th June, 2020 to the proposed Surety and copied the same to the Judgment Debtors through the Surety's email address namely waguchuirene@gmail.com and by registered post via Postal Office Box Number 41043-00100 being the last known address of the Defendants and the same have not been returned as uncollected/unclaimed to date.

26. The proposed Surety responded to the application by way of a Replying Affidavit sworn on 9th March 2021. She confirmed that the basis of the Plaintiff's application is a consent and court proceedings of the 21st March, 2018 before Hon. S. A. Opande. She averred that her joinder at this stage is prejudicial and there is no power donated to this court to make the orders sought against a non-party to the primary suit after proceedings have concluded and judgment has already been delivered. Nevertheless, she deposed that the consent recorded in court was between the 1st Defendant and the Plaintiff and that she was never privy nor a party to the matters that led to the suit or the recording of the said consent.

27. Further, she noted that in paragraph 6 of the consent cited herein, it is clear that the consequences of default on the monthly remittances to be made were to fall upon the 1st Defendant and not on her. That she only offered to assist the 1st Defendant pay part of decretal sum owed but did not offer herself as a Surety/Guarantor as alleged. She argued that executing a decree against a person who is not a party to the proceedings offends the provisions of Article 47 of the Constitution and the Fair Administrative Action Act as the person would be condemned unheard. She maintained that the Plaintiff cannot execute the decree against a non-party to the proceedings as they have no judgment against her.

28. It was also her contention that Paragraph 1 of the consent referred to is unclear and ambiguous as it does not indicate the total amounts of money owed to the Plaintiff and more specifically the total amounts that were allegedly to be paid by her. Further, that there is no time duration within which she was to pay the alleged monthly installments of Kshs. 100,000/- and in any event, it is clear from the consent that the 1st Defendant was never discharged from the liability of the decretal amounts. She stated that the attempts to enjoin her in the suit as a surety in solidum towards the full satisfaction of the decretal sums are ill advised as there have never been any legal proceedings conducted to enjoin her in the suit.

29. Further, that there is not a single shred of evidence presented to court by the Plaintiff that shows that the property. KAJIADO/KITENGELA/17632 belongs to her. That from the wording of the Consent, the 1st Defendant is the one who undertook to sell the said property to realize part of the Decretal sum and not her.

30. Additionally, she averred that she is a stranger to the *Insolvency Petition Number 19 of 2018*, cited by Plaintiff, and has never participated in those proceedings or any others touching on the 1st and 2nd Defendants herein. She maintained that she was and still is an innocent third party who has never been part of nor participated in any of the proceedings or circumstances that led to the debt and consequential arrest of the 1st Defendant. In her view therefore, this application is a malicious attempt by the Plaintiff to illegally enjoin an innocent third party into a dispute that she is neither privy to nor part of. She noted that the Plaintiff is trying to illegally pass off responsibility of the decretal sums to her on account of her being the blood daughter of the 1st and 2nd Defendants knowing fully well that this fact is not a legal basis of enjoining her as a party into the already adjudged suit.

31. In the Plaintiff's submissions dated 5th March, 2021, it reiterated the averments in the Affidavit and formulated four issues for determination which it argued as follows:

i. Whether the proposed Surety offered herself as a Surety/Guarantor

32. The Plaintiff submitted that since the undertaking to settle the entire claim herein was personally given by the proposed Surety for the benefit of the 1st Defendant, the same is binding, unequivocal, irrevocable and thus enforceable under Section 92 of Civil Procedure Act. The Plaintiff relied on the Proposed Surety's words in the proceedings before Hon. S. A. Opande, Deputy Registrar made on the 21st March 2018 that:

'I am privy to the discussion herein. It is in my name to settle the claim. I undertake to make monthly installments from 5th April

2018.'

33. It was submitted that the above statement showed that the proposed Surety contemplated that the promise, when accepted, would be binding in law and that there was background knowledge of the consequences of legally enforceable promises to settle the claim herein. Reliance was placed on the case of *Central London Property Trust Ltd v High Trees House Ltd (1956) 1 ALL ER 256* where Lord Denning held as follows:

"They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on. In such cases the courts have said that the promise must be honoured."

34. It was the Plaintiff's submission that it relied on the Proposed Surety's promise and thus she is bound to settle the entire claim herein and took issues with her averments in the Replying Affidavit that she is a stranger to these proceedings. It was emphatic that the proposed Surety became a party to these proceedings and thus the execution of a Decree herein should be levied upon her. The Plaintiff supported its argument with the case of the *Combe v Combe (1951) 2 KB 215* when Lord Denning stated that:

"The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave a promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word."

ii. Whether the Promise/Undertaking by the proposed Surety to settle the decretal sum herein can be enforced by the Plaintiff

35. The Plaintiff submitted that **Section 92** of the **Civil Procedure Act** makes provision for enforcement of liability upon a decree against a surety to the extent to which she had rendered herself personally liable. It was submitted by the Plaintiff that she was accepted as a surety for the 1st Defendant and is bound by the consent order entered herein *inter alia*: that

"IRENE NJERI WAGUCHU of the ID No. 27785418 shall make payment to the Decree Holder on monthly installments of Kshs. 100,000/= starting from the 5th April 2018 and thereafter she shall make subsequent monthly payments of Kshs.100,000/= on or before 5th day of every month."

36. The Plaintiff insisted that the promise made by the proposed Surety must be honored and this court should not allow her to act in a manner that is inconsistent with the same as equity would not allow such a party to go back on such a Promise/undertaking. It relied on the case of *Carol Construction Engineers Limited & another v National Bank of Kenya [2020] eKLR* where J. Ngugi, J held that:

"..... It might be arguable that indeed the law has inched closer to the American position where a promissory estoppel can found a cause of action – but at worst – the doctrine of equitable estoppel prevents a party from acting inconsistently with a promise the party has made if that promise or representation had the effect of inducing another party to reasonably rely on it to that other party's detriment"

37. The Plaintiff maintained that the injustice that it is about to suffer can only be avoided by enforcement of the Promise/Undertaking herein made by the proposed Surety as equity will not suffer wrong without a remedy.

iii. Whether the Plaintiff is entitled to the prayers sought in the Notice of Motion dated 18th November 2020

38. On this, it was submitted that the Plaintiff contended that courts must do justice by promotion of honesty and good faith, as far as it lies in their power. It argued that the objectives of Section 1A and 1B, 3A of the Civil Procedure Act is to uphold the dignity and authority of the court; ensure compliance with orders of the courts, observance and respect of the process of law; preserve an effective system of justice and maintain public confidence in the administration of justice by the courts.

39. The Plaintiff argued that the authority of the courts and dignity of their processes are maintained when their court orders are obeyed, respected and executed so courts become effective in the discharge of their constitutional mandate. It submitted that unless the undertaking/promise herein is enforced, confidence in recourse to law as an instrument to resolve civil disputes will be undermined and this may have a negative impact on the rule of law and cause perpetual injustice upon the Plaintiff. It was urged that the Plaintiff should not suffer detriment for putting reliance on the proposed Surety's Promise/Undertaking. The Plaintiff cited the case of *Gabriel Smith Otieno Awiti v Homabay County Assembly & Another [2013] eKLR* where the Court of Appeal held that:

"-----that where one party by his words of conduct made to the other party a promise or assurance which was intended or affects the legal relations between them and to be acted on the other party --- the party who gave the promise of assurance cannot afterwards be allowed to revert to the previously legal relationship - he must accept their legal relations subject to the qualifications which he has himself introduced."

iv. Who will pay costs?

40. On this, it was submitted that Section 27 of the Civil Procedure Act gives Courts the unfettered discretion to determine by whom costs

are to be paid. It was also submitted that it is trite that costs follow the event and the Plaintiff/Decree Holder/Applicant being the successful party herein, it ought to be fairly reimbursed for the costs that he has had to incur.

41. As for the proposed Surety, she formulated three issues for determination in her written submissions dated 9th March, 2021 being:

a. Did Irene Njeri Waguchu offer herself as Surety in this case on the 21st March 2018;

b. Can the Plaintiff have Irene Njeri Waguchu enjoined to these proceedings as a Surety on the basis of the Consent;

c. Can Irene Njeri Waguchu be personally liable for the 1st Defendant's Debts after the latter is adjudged bankrupt?

42. The proposed Surety reiterated that she did not offer herself as Surety in this case but only agreed to make remittances of Kshs. 100,000/, failure to which the Warrant of Arrest issued against the 1st Defendant would be revived but this does not justify enjoining her to this suit.

43. She contended that the consent entered to on 21st March, 2018 did not amount to a Guarantee in view of the following reasons: the Agreement was not entered into at the time of the Contract between the Plaintiff and the 1st Defendant to ensure the latter performs his obligation; the proposed surety's obligation did not arise upon the 1st Defendant's failure to honour his obligation. It only arose later on, on her own volition, for the Warrant of Arrest issued by court to be set aside for the time being; and the consent did not provide for the monthly installments to go on in perpetuity until the debt was paid but until the 1st Defendant could pay back his debts.

44. She stated that a contract of guarantee is a secondary contract that cannot exist if the primary contract does not. She noted that the primary contract was between the Plaintiff and the Defendants which in this case terminated by the Bankruptcy adjudication thus vacating any relationship, if at all, between the proposed Surety and the Plaintiff. She relied on the **Law of Guarantees by Geraldine Andrews & Richard Millet 2nd Edition**, at page 156 where it was stated that:

"A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependent upon the default of the principal and which does not arise until that point. In Ex-parte Gardon (1808) 15 Vs 286, it was held that no claim could be brought by the creditor for the price of goods sold and delivered until the period for payment of the price for the goods allowed to the principal had expired" (emphasis added).

45. Reliance was also placed on the case of **James G. K. Njoroge t/a Baraka Tools & Hardware (a firm) v Kenya Cement Marketing Co Ltd. & 2 others [2019 eKLR]** where the court held that the guarantees in question were incapable of enforcement as they were subject to conditions such as the judgement debtor's right to Appeal and orders of the Court.

46. Further, she submitted that the Consent clearly states that should there be a default on the monthly remittances; the Warrant of Arrest will automatically come into force and does not provide for any other consequences on default. She argued that the Plaintiff trying to make her personally liable to the Decree herein amounts to a variation of the Consent which is contrary to law. She noted that this position was highlighted by Harris J. R. in the case of **Kenya Commercial Bank Ltd V. Specialised Engineering Co. Ltd (1982) KLR P. 485**:

"A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement."

47. Further, it was her submission that if the Plaintiff intended for her to be personally liable for the debts of the Defendant instead of the Warrant of Arrest coming into force, the same should have been included in the Consent. It was noted that in **The Construction of Contracts by Gerald McMeel, 2nd Edition at Page 150, Paragraph 4.04**, the learned Author says the following:

"In the construction of all instruments it is the duty of the court not to confine itself to the force of a particular expression but to collect the intention from the whole instrument taken together...." Emphasis Added.

48. She also relied on the case of **National Bank of Kenya Ltd v. Pipeplastic Samkolit (K) Ltd [2002]2 EA 503** where the court upheld the position that a court of law cannot rewrite a contract between parties as parties are bound by the terms the same unless coercion, fraud or undue influence are pleaded and proved.

49. Further, the proposed Surety submitted that even if there were grounds for the varying or setting aside the consent, the Plaintiff cannot unilaterally purport to vary or set aside the same. She relied on the case of **East African Portland Cement Company Limited v Superior Homes Limited [2017] eKLR**, where the Court of Appeal stated, *inter alia*, that the only remedy available to parties who want to get out of a consent order is to set aside the consent order by way of review or by bringing a fresh suit in court.

50. Finally, it was submitted that the proposed Surety cannot be held liable for the 1st Defendant's debts merely because they are related by blood or because she is a woman of means. The court was thus urged to dismiss the application dated 18th November, with costs.

Analysis and determination of the Plaintiff's application

51. I have carefully considered the application, the proposed Surety's response and the parties' respective rival submissions. In my view, the only issue for consideration is whether the proposed Surety can be held personally liable for the decretal sum owed to the Plaintiff by the Defendants.

52. The basis of the Plaintiff's application is the Consent Order recorded before Hon. S. A. Opande, Deputy Registrar on 21st March, 2018 when the 1st Judgement Debtor was presented in court on account of a warrant of arrest. The terms of the said Consent read as follows: “

1. *THAT Njeri Waguchu of the ID No 27785418 shall make payment to the Decree holder on monthly installments of Kshs. 100,000/- starting from the 5/4/2018 and thereafter she shall make subsequent monthly payments of Kshs 100,000/- on or before the 5th day of every month.*
2. *THAT the judgement debtor undertakes to sell property known as Kajiado/Kitengela/17633 to realize part of the decretal sum.*
3. *THAT the judgement debtor to provide his physical address to the decree holder.*
4. *THAT Warrant of Arrest lifted against the judgement debtor on condition he submits himself to court at the next court appearance.*
5. *THAT the mention on 26/6/2018 to review progress.*
6. *THAT should there be a default on the monthly remittances the warrant of arrest against the judgement debtor will automatically come in force.”*

53. The Plaintiff is now seeking to enforce the liability arising from the decree herein against the proposed Surety in view of Clause 1 of the Consent above. Its application has been made pursuant to the provisions of Section 92 of the Civil Procedure Act which allows for the same to the extent to which a Surety had rendered himself or herself personally liable. The same reads:

“Where any person has become liable as surety—

(a) for the performance of any decree or any part thereof; or

(b) for the restitution of any property taken in execution of a decree; or

(c) for the payment of any money, or for the fulfillment of any condition imposed on any person, under an order of the court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall for the purposes of appeal be deemed a party within the meaning of section 34:

Provided that such notice in writing as the court in each case thinks sufficient has been given to the surety.”

54. In my considered view, Clause 1 of the said Consent cannot form the basis of an application under Section 92 of the Civil Procedure Act. The fact that the proposed Surety undertook to make monthly remittances of Kshs. 100,000/= on account of the decretal sum owing to the Plaintiff does not, of itself, make her liable for the entire debt of the judgment debtors. Indeed, the Consent embodies other actions that were to be taken in seeking to recover the same from the judgment debtors. This includes an undertaking by the judgement debtor to sell to the property known as Kajiado/Kitengela/17633 to realize part of the decretal sum.

55. Further and more importantly, Clause 6 of the same Consent clearly excuses the proposed Surety from being held personally liable for the decretal sum owing. This is so because, it provides for the consequences of non-remittance of the monthly installments by the proposed Surety which consequences do not include the Orders now being sought by the Plaintiff. It states that in case of any default on the monthly remittances, the arrest warrant against the judgement debtor will automatically come in force. Indeed, I hold no doubt that if the parties had intended otherwise, the same ought to have been put down in the Consent without leaving any room for any unilateral construction of the terms thereunder by any party thereto.

56. It is noteworthy that a consent is essentially a contract and this court cannot set aside or vary the terms of the same except on **grounds which would justify setting it aside, or if certain conditions remain to be fulfilled** (See *Flora Wasike v Destimo Wamboko (1988) KAR 625*). In another case of *Board of Trustees National Social Security Fund v Michael Mwalo [2015] eKLR*, the Court of Appeal stated as follows;

“A court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, collusion or by an agreement contrary to the policy of court.”

57. In the case of *Hirani v Kassam [1952] 19 EACA 131*, the East African Court of Appeal stated as follows:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or

action, and on those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court... or if consent was given without sufficient material facts, or in misrepresentation or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

58. In the instant case, there is no suggestion or proof of fraud, collusion or misrepresentation of facts. All the material facts were known to the parties who willingly consented to compromise in clear and unequivocal terms leaving no room for any possibility of mistake or misapprehension. A court cannot re-write the contract for the parties so as to vary the consent that they themselves agreed upon. (See ***Amos Mutungi v Francis Njihia Chege [2020] eKLR***).

59. The upshot is that the Plaintiff's application dated 18th November, 2020 lacks merit and is hereby dismissed. Each party shall bear its own costs in respect of this application. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Miss Mutava for the Plaintiff/Decree Holder.
2. No appearance for the Defendants/ Judgment Debtors.
3. No appearance for the Proposed Surety.