



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MILIMANI**  
**MILIMANI LAW COURTS**  
**TAX AND COMMERCIAL DIVISION**  
**CIVIL SUIT NO 68 OF 2010**  
**MIDDLE EAST BANK OF KENYA LIMITED.....PLAINTIFF**  
**VERSUS**  
**RAYMOND THOMAS DUNNET.....DEFENDANT**  
**AND**  
**HAWKEYE VILLAS MANAGEMENT LIMITED.....THIRD PARTY**  
**RULING**

**INTRODUCTION**

1. The Third Party's Notice of Motion application dated 29<sup>th</sup> March 2013 and filed on 19<sup>th</sup> April 2013 was brought under the provisions of Order 25 Rule 5, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 and all enabling provisions of the law and procedure. It sought the following orders:-

- a. That the Third Party had satisfied the decretal amount claimed by the Plaintiff, in full and final settlement of the loan facility received by the Defendant from the Plaintiff, and guaranteed by the Third Party.**
- b. THAT the Defendant and/or the Third Party were no longer indebted to the Plaintiff.**
- c. THAT the Third Party's costs of this application and the entire suit were to be borne by the Plaintiff.**

**THE THIRD PARTY'S CASE**

2. The application was supported by the Affidavit of Shelagh Hawkins that was sworn on 29<sup>th</sup> March 2013. He also swore a Further Affidavit on 31<sup>st</sup> July 2014. The same was filed on 18<sup>th</sup> September 2014. The Third Party's written submissions were dated 16<sup>th</sup> September 2014 and filed on 18<sup>th</sup> September 2014.

3. Both the Defendant and the aforesaid deponent were directors of the Third Party. The Third Party and the Defendant ventured into the development of the property known as LR No. 209/7153/34 (hereinafter

referred to as “the subject property”).

4. Around 2008, the Plaintiff extended a loan facility to the Defendant in the sum of Kshs 3,500,000/=, which loan the Third Party guaranteed to pay. Both the Defendant and the Third Party executed the Guarantee and Indemnity dated 19<sup>th</sup> January 2009.

5. However, the Defendant fell into arrears and applied for an extension of the loan. The Plaintiff therefore instituted the proceedings herein and on 26<sup>th</sup> July 2010, it obtained judgment against the Defendant in the sum of Kshs 4,164,764.13. An award of costs in the sum of Kshs 192,059/= was also made against the Defendant.

6. The Plaintiff served the Third Party with a Third Party Notice in April 2012 and after negotiations between the Plaintiff and the Third Party, on or about 23<sup>rd</sup> January 2012, the Third Party paid the Plaintiff a sum of Kshs 3,000,000/=. Subsequently, the Third Party deposited a sum of Kshs 1,500,000/= into court after the Plaintiff refused to accept the said sum demanding that the said amount had accrued and continued to accrue an interest rate of 35% per annum. The Third Party averred that interest ought not to have accrued as it was not part of what had been agreed upon.

7. It was the Third Party’s contention that the sum of Kshs 4,500,000/- more than satisfied the decree obtained by the Plaintiff which was for the sum of Kshs 4,164,764.13/- as well as the costs claimed in the sum of Kshs 192,059/- and that the Plaintiff had deliberately failed to take into account the amounts paid to it thus far, to off-set the decree.

8. In view of the fact that the Third Party did no longer wish to suffer the burden of unnecessary litigation, legal expenses and interest and wished to have this matter concluded as expediently as possible, it contended that it was fair and just that the application herein be allowed as there was no other valid claim by the Plaintiff against the Defendant and/or the Third Party having satisfied the decree and judgment herein.

#### **THE PLAINTIFF’S CASE**

9. On 9<sup>th</sup> May 2014, Dhirendra Rana swore a Replying Affidavit on behalf of the Plaintiff herein. The same was filed on 11<sup>th</sup> June 2014. The Plaintiff’s written submissions were dated 9<sup>th</sup> October 2010 and filed on 15<sup>th</sup> October 2014.

10. The Plaintiff contended that the sum of Kshs 3,500,000/= was to be repaid with interest by 31<sup>st</sup> August 2008 but that the Defendant failed, neglected and or refused to repay to the Plaintiff the same and as at 21<sup>st</sup> December 2009 a sum of Kshs 3,572,486.13 was due and owing, a fact the Defendant admitted owing in his letter of 31<sup>st</sup> January 2010 and promised to make arrangements to pay.

11. It stated that it never accepted to receive Kshs 4,500,000/= from the Third Party in full and final settlement of its claim although the Third Party had made the said request. Its contention was that the terms of the settlement was that the Third party would pay the said sum of Kshs 4,500,000/= for the release of the Third party as the Guarantor of the Defendant but that the Plaintiff would pursue the balance of the decretal sum from Defendant.

12. It was its averment that the Third Party had purported to unilaterally vary the original judgment and decree of the Honourable court and that of the agreed settlement by attempting to pay the balance of Kshs 1,500,000/- as the full and final settlement of the entire debt and urged the court not to allow the application herein.

#### **THE DEFENDANT’S CASE**

13. Raymond Thomas Dunnet swore his Replying Affidavit on 25<sup>th</sup> July 2014. The same was filed on

28<sup>th</sup> July 2014. His written submissions were dated 12<sup>th</sup> September 2014 and filed on 15<sup>th</sup> September 2014.

14. In 2008, the Defendant was approached by the Third Party to borrow a sum of Kshs 3,500,000/= on its behalf from the Plaintiff because the Defendant had a better credit rating and banking history with the Plaintiff. The purpose of the loan was to enable the Third Party complete the building of nine (9) town houses in Lavington, Nairobi.

15. On 19<sup>th</sup> January 2009, the Third party and the Plaintiff entered into a Guarantee and Indemnity agreement as security for the said loan wherein it was agreed *inter alia* that the Third Party would be the primary obligor and not merely a surety and would on demand pay all moneys inclusive of interest, costs and expenses and discharge all obligations incurred by the Defendant to the Plaintiff. The settlement Agreement between the Third Party and the Defendant was intended to be in full and final settlement of the obligations of the Guarantor.

### **LEGAL SUBMISSIONS**

16. Having due regard to the parties' submissions, it was not in dispute that the guarantor's liability only arose if and when the principal debtor became liable to the creditor. The court did not therefore find the need to analyse the submissions in this regard as the Plaintiff had not demanded that the Third Party indemnify it for all amounts that the Defendant was advanced by the Plaintiff. The Defendant was to pay the amounts that were over and above the said sum of Kshs 4,500,000/=.

17. The question that was really before the court was whether or not the Defendant and the Third Party were discharged from meeting further financial obligations to the Plaintiff after the Third Party paid a sum of Kshs 4,500,000/= as had been submitted by the Third Party.

18. The Defendant referred the court to Clause 1 of the Guarantee and Indemnity Agreement entered into between the Defendant and the Third Party which provided as follows:

**“The Guarantor, as primary obligor and not as surety on demand will pay to the Bank, all moneys and discharge all obligations and liabilities whether actual or contingent now or hereafter due, owing or incurred to the Bank by the principal...whether alone or jointly and in whatever style, name or form and whether as principal or surety.”**

19. It was his argument that **unless otherwise provided** the liability of a guarantor was co-extensive with the liability of the debtor. This essentially means that unless otherwise provided, both the principal debtor and the surety were liable at the same time to the creditor. He pointed out that the liability though co-extensive was separate and not in the alternative.

20. He placed reliance on the case of **Ibrahim vs Barclays Bank Plc and another [2012] 4 All ER 160** in which it was held as follows:-

**“Payment by a third party to a creditor under legal compulsion on account of a debt owed by a debtor automatically discharged the debtor's debt even if the legal compulsion arose out of a contractual obligation voluntarily assumed by the third party, irrespective of whether or not the payment by the third party was made as agent for the debtor”.**

21. It was his contention that the Plaintiff had received from the Third Party more than the decretal sum of Kshs 4,164,767.13 and that he was entitled to a refund of the appropriated amounts as tabulation of alleged interest showed that the same was unlawful.

22. The Third Party contended that the Plaintiff was estopped from seeking any more monies from the Defendant and referred the court to the case of **Doge vs Kenya Cannery Limited 1989 KLR 127** in which it was held as follows:-

**“If a party is made to believe in a certain state of facts and that party acts on those facts to his detriment and the other party stands by and does not stop him from so acting that other person is stopped from changing his stand.”**

23. Similarly in the case of Muti v Kenya Finance Corporation & Another 2004 2 EALR 182 also referred to by the Third Party, Ochieng J held thus:-

**“If a man, either in express terms or by conduct makes a representation to another of the existence of a certain state of facts to the damage of him who so believe and acts the first is estopped from denying the existence of such state of facts.”**

24. It referred the court to the Plaintiff's letter dated 31<sup>st</sup> May 2012 marked “DR 4” to in which it was stated as follows:-

**“... we wish to confirm that out of the agreed settlement amount of Kshs 4.5 m...we have only received Kshs 3m...”**

25. There was no representation by the Plaintiff that it would not demand any more monies from the Third Party or Defendant and it could therefore not be estopped from calling for interest. Notably, the Third Party failed to disclose the remaining part of the contents of the said letter of 31<sup>st</sup> May 2012 in which it had also stated as follows:-

**“...While the Bank was reaching this settlement agreement, the exception was that this matter would be closed within a short time but we have been pursuing the balance of Kshs 1.5 m without success. Please communicate to Kaplan & Stratton Advocates that if the balance of Kshs 1.5 m is not paid on or before 15<sup>th</sup> June, 2012, then this amount will attract interest at the prevailing non- facility interest rate of 35% p.a. until settlement...”**

26. It was also evident that the Plaintiff and the Third Party had not agreed on how interest should be treated. The Plaintiff pointed out that the Third Party had requested it to waive interest, a request it rejected. The Plaintiff then deducted the sum of Kshs.1, 313,250/= from the Defendant's bank account to go towards extinguishing part of the accruing interest.

27. The court did, however, note from the Plaintiff's submissions that the claim it was maintaining against the Defendant was not for sums already paid for by the Third Party but that it was a claim for interest as decreed by this Honourable Court.

28. What was evident from the Decree was that judgment was entered for the sum of Kshs 3,575,486.13 together with interest thereon at twenty five (25%) per annum from 30<sup>th</sup> November 2009 until payment in full. This rate of interest was never challenged by the Third Party or the Defendant and/or set aside. Suffice it to state that interest can only be at the rates in the Decree and will continue to accrue on the amounts not paid until payment in full.

29. As it was not known whether or not the sum of Kshs 4,500,000/= had satisfied the decretal sum in full, the court was not persuaded that the Third Party had demonstrated that neither it nor the Defendant was indebted to the Plaintiff. Nothing would have been easier than for the Third Party to have established the amount due if at all, from the court to enable the court make a firm decision on this matter.

30. Whilst the court noted the parties submissions as regards the discharge of the Third Party herein, it was unable to come to a definite conclusion as there was no sufficient evidence before it. There was no documentation that was presented before the court evidencing the agreement on the extent of the liability of the Third Party. What was annexed were copies of letters exchanged between the parties' advocates.

31. Having considered the parties pleadings, affidavit evidence, written submissions and case law in support of their respective case, the court was also not satisfied that the Third Party's present application

was of the nature that could fall under the provisions of Order 25 Rule 5 of the Civil Procedure Rules, 2010. As judgment had already been entered, there was nothing to be compromised herein.

32. Order 25 Rule 5 of the Civil Procedure Rules provides as follows:-

**1. Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit be adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfied the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.**  
(emphasis court)

**2. The court, on the application of any party, may make any further order for the implementation and execution of the terms of the decree.**

### **DISPOSITION**

33. Accordingly, the upshot of this court's ruling was that the Third Party's Notice of Motion dated 29<sup>th</sup> March 2013 and filed on 19<sup>th</sup> April 2013 was not merited and the same is hereby dismissed with costs to the Plaintiff. No costs shall be payable to the Defendant as it was supporting the Third Party's present application.

34. It is so ordered.

**DATED and DELIVERED at NAIROBI** this 30<sup>th</sup> day of January 2015

**J. KAMAU**

**JUDGE**

1. Attached hereto is a copy of a letter dated 27<sup>th</sup> January 2012 from the Plaintiffs Advocates to the Defendants Advocates expressing the position and is marked **DR3**.