



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)**

**CIVIL SUIT 78 OF 2010**

**BAMBURI CEMENT LIMITED.....PLAINTIFF**

**VS**

**BANK OF AFRICA KENYA LIMITED.....DEFENDANT**

**RULING**

1. On 16<sup>th</sup> May 2008, the Defendant issued a guarantee in favour of the Plaintiff in consideration of the Plaintiff agreeing to supply goods on credit to a customer of the Defendant, Nyeri Cement Suppliers.
2. Following default by the principal obligant in payment of a sum of Kshs. 11,000,000/-, the Plaintiff filed suit in this matter on 12<sup>th</sup> February 2010 seeking to enforce the guarantee against the Defendant for the said sum of money.
3. In reply to the suit, the Defendant filed defence on 18<sup>th</sup> March 2010 in which it confirmed that it was ready and willing to honour the guarantee by paying the sum of Kshs. 11,000,000/- claimed by the Plaintiff but was impeded from doing so by court orders issued in Nairobi (Milimani) High Court Misc. Civil Application Number 16 of 2010 between the principal obligant and the Defendant in which the court had ordered that status quo be maintained.
4. By a Notice of Motion application dated 23<sup>rd</sup> April 2010 and filed on 10<sup>th</sup> May 2010, the Plaintiff applied for summary judgment for the sum of Kshs. 11,000,000/- plus costs and interest on grounds that the defence filed by the Defendant was a sham and did not raise any triable issue.
5. By a replying affidavit sworn by James Njoroge the Defendant's Credit Manager, and filed on 14<sup>th</sup> June 2010, the Defendant stated that the Plaintiff's application for summary judgment did not lie as the Defendant had already honoured the guarantee by remitting the sum of Kshs 11,000,000/- to the Plaintiff's account 16<sup>th</sup> April 2010 following the recording of a consent in Misc. Civil Application No. 16 of 2010 which in essence had lifted the court orders that had prevented the Defendant from honouring the guarantee earlier. This position had been communicated to the Plaintiff's Chief Finance Officer by the Defendant's Legal Assistant vide an email message sent on of 30<sup>th</sup> April 2010.
6. The principal claim has been settled and the outstanding issue before the court is whether the Plaintiff

is entitled to costs of the suit and costs of the application dated 23<sup>rd</sup> April 2010.

7. The Plaintiff's case is that costs follow the event and therefore that since the Defendant eventually acceded to the claim after action had been taken in terms of the court proceedings enumerated above, the Defendant must bear the costs of the suit and of the application dated 23<sup>rd</sup> April 2010.

8. On its part, the Defendant contends that the application of 23<sup>rd</sup> April 2010 was filed when the claim had already been settled hence it should not be condemned to bear the costs appertaining to the application.

9. The court record is clear that the guarantee was not honoured within the time prescribed in Clause 5 of the letter of guarantee dated 6<sup>th</sup> May 2009. Demand for payment was made by the Plaintiff on 11<sup>th</sup> January 2010 and Clause 5 of the guarantee required that payment be done within 30 days from that date. However, payment was only made on 16<sup>th</sup> April 2010. The Defendant attributes the delay in honouring the guarantee to a court order issued in Misc. Civil Application No. 16 of 2010 which required that status quo be maintained in effect blocking payment in honour of the guarantee.

10. Although by a letter dated 22<sup>nd</sup> February 2010 the principal debtor had advised the Defendant to honour the guarantee notwithstanding the status quo orders, the Defendant remained adamant and withheld payment taking the view that it was obliged to obey court orders. The Plaintiff cites the authority of **Bungoma Misc. Civil Application No. 53 of 2004 Mohamed Yeslam Awadh vs. Dr. Peter Wilbur Marumbu** where the court reiterated that a party who knows of an order, whether null or valid, cannot be permitted to disobey it. The Defendant therefore only honoured the guarantee after the order had been lifted by consent on 16<sup>th</sup> April 2010.

11. Meanwhile, while actual remittance of the funds was done on 16<sup>th</sup> April 2010 as per the transmission notification marked 'JN1', the earliest intimation to the Plaintiff of this remittance by the Defendant was vide an email message sent on 30<sup>th</sup> April 2010 ('JN2'). In a reply to the email sent to the Plaintiff on 10<sup>th</sup> May 2010, the Defendant was still inquiring if the court case had been withdrawn. This is the same day the Plaintiff filed the Notice of Motion dated 23<sup>rd</sup> April 2010 seeking summary judgment for the sum of Kshs. 11,000,000/-. This application was then responded to by the Defendant through the replying affidavit filed on 14<sup>th</sup> June 2010.

12. At the same time, the court record shows that the parties appeared in court on 31<sup>st</sup> May 2010 and agreed that the matter should not proceed as the principal sum had been paid and that the only outstanding issue was costs.

13. In my view, while the respective clients knew as of 30<sup>th</sup> April 2010 that the principal sum had been paid, these failed to inform their respective advocates leading to the filing of the application of 23<sup>rd</sup> April 2010. Even then, the advocates themselves appear not to have heeded to the fact that further proceedings were not necessary as of 31<sup>st</sup> May 2010. This is demonstrated by the Defendant's filing of a replying affidavit to the application dated 23<sup>rd</sup> April 2010 as late as 14<sup>th</sup> June 2010.

14. In addition, the application of 23<sup>rd</sup> April 2010 has since remained alive albeit on the question of costs.

15. In the circumstances, although the Defendant honoured the guarantee well before the application of 23<sup>rd</sup> April 2010 was filed, I find the conduct of both parties as regards withdrawal of the suit as having been mutually cagy leading to the absurdity that the suit was never conclusively finalized until at least 14<sup>th</sup> June 2010 when a substantive reply to the application of 23<sup>rd</sup> April 2010 was filed. In that regard, I do not find a basis upon which the application itself can be excluded from computation of costs.

16. In addition, given that the principal debtor had as early as 22<sup>nd</sup> February 2010 allowed payment of the guaranteed sum notwithstanding the court orders seeking maintenance of status quo, and given that the

said court orders were issued at the instance of the principal debtor, further activity in this suit would have been forestalled had the Defendant taken action to intimate the intended settlement of the guaranteed sum even before the filing of the defence on 10<sup>th</sup> March 2010. Nothing would have been easier that to notify the Plaintiff accordingly and to enter into an early consent with the principal debtor for the withdrawal of those orders. This never happened. Neither was the Plaintiff notified of the court orders necessitating the delay in honouring the guarantee. The Plaintiff was therefore entitled to press on with enforcement of the guarantee.

17. Consequently, and as costs follow the event, I am inclined to award costs of the suit and those of the application dated 23<sup>rd</sup> April 2010 to the Plaintiff.

IT IS SO ORDERED

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>th</sup> DAY OF MAY 2012.**

**J. M. MUTAVA  
JUDGE**