REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 272 OF 2012

PLATINUM TRADERS LTD …….....……. PLAINTIF

VERSUS

EAST AFRICAN PORTLAND CEMENT & CO. LTD …….... 1ST DEFENDANT

GULF AFRICAN BANK LTD …….....……...……..... 2ND DEFENDANT

R U L I N G

1. Before me for consideration is the Plaintiff's Notice of Motion dated 3rd May, 2012 brought under order 40 Rules 1, 2 and 9 of the Civil Procedure Rules seeking injunctive orders to restrain the 1st Defendant from demanding payment and the 2nd Defendant from paying a sum of Kshs.71,883,922/72 pursuant to certain guarantees given by the Plaintiff. The grounds for which the application is made are set out in the body of the motion and the supporting and supplementary affidavits of Ahmed Mahat Kuno sworn on 3rd May, 2012 and 20th July, 2012, respectively.

2. The Plaintiff's case is basically that by letters dated 15th and 19th January, 2009, it was appointed by the 1st Defendant as a distributor of the 1st Defendant's cement in Garissa and Nairobi East subject to guarantees of Kshs.5million and Kshs.10million, respectively. That under the said appointments the Plaintiff was entitled to cash discounts, Promotional Incentive Related bonuses and volume related discounts, that as at 27th March, 2012 the 1st Defendant owed the Plaintiff a total sum of Kshs.107,136,298/- on the said cash discounts, volume related discounts and unpicked cement. That on 13th April, 2012 the 1st Defendant had demanded payment for Kshs.71,883,922/72 on the two guarantees given by the 2nd Defendant for Kshs.75,000,000.

3. Mr. Issa, learned Counsel for the plaintiff submitted that the two guarantee Nos.GAB/GTEE/130/11 for Kshs.50million and GAB/GTEE/169/11 for Kshs.25 million, respectively were based on an agreement dated 29th January, 2009 which never existed, that the two guarantees are void for mistake, that even if enforceable they were only enforceable in the event of default, such default had not been demonstrated, that the Plaintiff had established a prima facie case. Counsel relied on the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd (2003) KLR 125.**

4. In opposition, the 1st Defendant filed a Replying Affidavit or Roselyne Ominde sworn on 12th June, 2012. The 1st Defendant admitted that it had entered into a distributorship agreement with the Plaintiff for Garissa and Nairobi as pleaded by the Plaintiff, that the Plaintiff presented the guarantees issued by the 2nd Defendant, to wit, guarantee Nos. GAB/GTEE/169/1 and GAB/GTEE/130/11, respectively

(hereinafter **"the said Guarantees"**) which the 1st Defendant accepted and allowed the Plaintiff to enjoy credit trading terms. The Defendant sought to show that the alleged sum of Kshs.107,136,298/- was not due from the 1st Defendant to the Plaintiff, the 1st Defendant further contended that the said guarantees were separate and independent contracts between the 1st and 2nd Defendant. That the terms of the said guarantees were clear that they had been given without any condition whatsoever.

5. Mr. Sigei, learned Counsel for the 1st Defendant submitted that the said guarantees were separate contracts enforceable without reference to previous agreements. Counsel referred to the case of **Kenindia Assurance Co. Ltd -vs- First National Finance Bank Ltd 2008 eKLR** for that proposition. That there was default in the current case which was the event required to provoke the recalling of the guarantees. Counsel further referred to the text on **Bank Guarantees and Interference by Court**, **The Law Revisited and Halsbury's Laws of England Vol.34** paras 319 & 185 4th Edn. counsel urged that the application be dismissed with costs to the 2nd Defendant.

6. I have carefully considered the Affidavits on record, the written submissions, oral hi-lights of learned Counsel and the authorities relied on. This is an injunction application. The principles are well known as set out in the **Giella –vs- Cassman Brown (1973) EA 358** that an applicant must establish a prima facie case with a probability of success, that the applicant must show that it will suffer loss that cannot be compensated by an award of damages if an injunction is not granted and that if in doubt the court will decide the matter on a balance of convenience.

7. Prima facie case was defined by the Court of Appeal in the case of **Mrao Ltd –vs- First American Bank of Kenya ltd (2003) KLR 125** as a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal by the latter. Has the Plaintiff's rights been infringed by the 2nd Defendant as to call for rebuttal by the latter in the circumstances of this case?

8. The Plaintiff's case is simple. Its contract between it and the 1st Defendant is contained in the letters dated 15th and 19th January, 2009 which required guarantees for Kshs. 5million and 10 million, respectively, that there were terms and conditions therein relating to discounts, rebates and bonuses in respect of which the 1st Defendant had not credited it with a sum in excess of Kshs.107million, that the 1st Defendant had demanded Kshs.71million in enforcement of two guarantees given by the 2nd Defendant for a total sum of Kshs.75million on an inexistent agreement between the 1st Defendant and the Plaintiff. That the said guarantees are invalid and cannot be enforced.

9. The law regarding guarantees is very clear. In **U.P State Sugar Corporation –vs- Sumaac International Ltd Air 1997 SC 1644 (1997) 1 SCC 568** it was held by the Apex Court that

"The law relating to invocation of such bank guarantee is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee."

In the case of state of **Maharashtra –vs- National Construction Co. (1996) 1 SCC 735** the Court held:-

" The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order the bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. The courts will not interfere directly or indirectly to withhold payment. Otherwise trust in commerce

internal and international would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle the disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract"

In **Wood Hall Ltd –vs- The Pipeline Authority (1979) 141 CLR 443** the Court held:-

"By each of the bank guarantees, the Bank 'unconditionally' undertakes 'to pay on demand' the sum demanded up to the limit specified in the bank guarantee. To hold that the bank guarantees are conditional upon the making of a demand that conforms to the requirements of the contract between the Authority and the contractor would of course be quite inconsistent with the express statement in the bank guarantees that the undertaking of the Bank is unconditional. To hold that the Bank should not pay on receiving a demand, but should be bound to enquire into the rights of the Authority and the contractor under a contract to which the Bank was not a party would be to depart from the ordinary meaning of the undertaking that the Bank is to pay on demand. It would be contrary to the settled rules governing the implication of terms in contracts to imply provisions that would contradict the ordinary meaning of the words of the bank guarantees in this way"

10. Closer home, the Court of Appeal confirmed this principle that guarantees are special contracts in the case of **Kenindia Assurance Company Ltd –vs- First National Finance Bank Ltd 2008 e KLR** wherein the Court held that:-

"It is in the nature of a covenant by the appellant to pay upon the happening of a particular event. It is a form of security of guaranteeing payment by a third party. In such cases, the most important factor to consider before liability can attach is whether there has been default. Once default is established and there has been a formal demand the other conditions are of a secondary nature and may not be used to defeat the security."

11. That then is the sacred nature of position of bank guarantees. No court is to interfere by way of an injunction to restrain an enforcement of such a guarantee. The court is not to inquire as to the validity and/or the appropriateness or compliance of the underlying contracts. However, what happens when the guarantee is alleged to be invalid and void? Is a contract not enforceable only when it is valid? In the text **Law of Guarantees 4th Edn Sweet & Maxwell 2005 at para 1-003**, the learned writers observe:-

"……the liability of a guarantor is normally co-extensive with the liability of the principal. Therefore, if the obligation of the principal to the creditor is unenforceable or has been discharged, the liability of the surety may depend on whether he contract is a guarantee of an indemnity."

In **Halsburys Laws of England** (4th Edn. 2004 re issue) at para 101 the learned writers have observed:-

"A guarantee is an accessory contract by which the promissory undertakes to be answerable to the promise for the debt, default or miscarriage of another person whose primary liability to the promise must exist or be contemplated." (Emphasis added).

In paragraph 5-002 of the Law of Guarantees (Supra) it is observed:-

"As with any other contract, a fundamental mistake by all, or sometimes by one, of the parties to it may make a contract of suretyship null and void, or voidable. If the contract is fundamentally different from what the parties believed it to be, it will be void at common law. …. Since the decision of the House of Lords in Kleinwort Benson –vs- Lincoln City Council (1998) 3 WLR 1095, it does not matter whether the mistake is one of law or of fact."

12. It would therefore seem that although bank guarantees appear to be specially treated by the courts in the world of commerce, they are still subject to the normal norms that govern the law of contract.

13. Let me now turn to the guarantees in question. They appear at pages 265 to 267 of exhibit **"AMK12**

and 13" respectively. The said guarantees provides in their recitals:-

"WHERAS

a) It has been stipulated in the Distributorship Agreement dated 29th January, 2009 (hereinafter "the said Agreement")

b)……..

c) EAPPCC has consented to the Guarantor providing the required Guarantee on the following terms.

NOW THIS DEED WITNESS

1. In consideration of EAPCC having agreed to provide to the Distributor with cement and cement products specified in the Agreement …….

The Guarantor hereby AGREES, DECLARES AND WARRANTS AS FOLLOWS:-

1. The Guarantor shall pay to EAPCC upon its first written demand, but in any event, not later than thirty (30) days from the date of the written demand, declaring the Distributor to be in default under the Agreement and without Cavil or Argument any sum or sums ……..." (Emphasis added)

14. The Plaintiff has contended that here is no agreement between itself and the 1st Defendant dated 29th January, 2009 in respect of which the said guarantees were predicated upon. If that be the case, can the said guarantee be valid if the agreement on which they are based does not exist? If he obligation to pay the amount guaranteed under the guarantees was based on **"provision of cement and cement products specified in the Agreement",** and there is no such agreement, will there be an obligation to pay under the guarantee. On what basis was the letter of demand of 13th April, 2012 issued? Does the liability to pay the sum of Kshs.71,883,932.72 other than the impugned guarantee arise out of an agreement dated 29th January, 2009? My understanding of the authorities cited above is that the court will not question bank guarantees on the basis that there is a dispute between the principal and the creditor on the primary contract, but here we do not have any primary agreement upon which the guarantees were predicated upon! Although this issue was raised by the Plaintiff, the 1st Defendant did not respond as to the non-existence or otherwise of a Distributorship Agreement dated 29th January, 2009.

15. To my mind therefore, the issue that there is no agreement dated 29th January, 2009 upon which the subject guarantees were predicated upon is a prima facie issue that require to be investigated.

16. As regards the second principle in **Giella –vs- Cassman Brown**, I have looked at the Affidavits filed by the Plaintiff. It has not been sworn in the affidavit in support that damages will not be an adequate remedy. It has however in the body of the motion given the same as one of the grounds for making the application. In the case of **Dornholm Rahisi Stores –vs- Barclays Bank of Kenya Ltd & Anor –vs- E.A Portland Cement Co. Ltd C.A No. NAI 152 of 2005** the Court of Appeal held that:-

"As regards the issue of whether the appeal would be rendered nugatory if the interim injunction is not granted, we would think that would be the inevitable consequence if the money is paid out of the respondent bank. The 2nd Respondent's claim would have been settled without the suit pending in court having been resolved. Moreover, this court has not been shown the ability of the 2nd respondent to be readily able to refund the sum of Kshs.100,000,000/- should the appeal succeed. In the best interests of both parties the sum should remain where it is, that is in the vaults of the 1st Respondent until further orders of the court."

17. I am alive that in that case the court was considering an application under Rule 5(2) (b) of the rules of

that court, but I am persuaded by the principle that if the monies being demanded herein are paid over, the 1st Defendant disputed claim against the Plaintiff would be settled before the suit is heard. I am also alive to the fact that the 1st Defendant has counterclaimed for the sum demanded under the guarantees and the Plaintiff has filed a suitable defence thereto. The justice of the case demands that the parties be heard at the trial on their respective cases whereby in the meantime the status quo is maintained until then.

18. In any event, I am satisfied that a sum of Kshs.71million is not small sum. The balance of convenience tilts in favour of allowing the injunction and leaving the money in the vaults of the 2nd Defendant.

19. Accordingly, the application is allowed as prayed. However, the parties are reminded of the provisions of Order 40 Rule 6 of the Civil Procedure Rules.

DATED and delivered at Nairobi this 28th day of September, 2012.

……
A. MABEYA

JUDGE