



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
MILIMANI COMMERCIAL COURTS  
CIVIL CASE NO 1260 OF 2000

EMCO BILLETS LIMITED ..... PLAINTIFF

VERSUS

NALIN NAIL WORKS LIMITED

(IN RECEIVERSHIP) .....1<sup>ST</sup> DEFENDANT  
APEX STEEL LIMITED .....2<sup>ND</sup> DEFENDANT  
NIKU HARDWARE LIMITED .....3<sup>RD</sup> DEFENDANT

**JUDGMENT**

1. The plaintiff's claim against the defendants is that pursuant to agreement made partly orally and partly in writing and also by conduct on or about June 1998, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants issued post dated cheques dated 15<sup>th</sup> May 1998 totaling to 2.4 million. Those cheques were meant to guarantee the payments for goods supplied to the 1<sup>st</sup> defendant by the plaintiff. According to V.D. Popat PW1 the defendants used to buy steel from the plaintiff who manufacture and sell steel to customers. The 1<sup>st</sup> defendant placed an order but the 1<sup>st</sup> defendant was experiencing financial difficulties. The plaintiff wanted a guarantee to ensure that the goods supplied to the 1<sup>st</sup> defendant would be paid.
2. That is when the 1<sup>st</sup> defendant provided the plaintiff with a list of their esteemed customers who issued post dated cheques which guaranteed payments for the goods supplied to the 1<sup>st</sup> defendant. According to PW1 the goods were supplied to the 1<sup>st</sup> defendant, unfortunately when the payment for the goods was not forthcoming, the plaintiff banked the cheques. Upon presentation of the cheques to the bank they were dishonored, and that is the basis of the claim by the plaintiff.
3. The plaintiff relied on documents filed in the list of documents which are basically correspondence exchanged between the 1<sup>st</sup> defendants regarding the two cheques which were to guarantee the payment. The 1<sup>st</sup> defendant was requesting the plaintiff to absorb the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from the responsibility of settling the outstanding account. However the 1<sup>st</sup> defendant did not settle the account and for that reason the plaintiff said they were not willing to release the 2<sup>nd</sup> and 3<sup>rd</sup> defendant. The other correspondence included demand letters from the advocates for the plaintiff addressed to all the defendants. The 1<sup>st</sup> defendant did not enter appearance or a defence.
4. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a defence in which they denied liability. The 2<sup>nd</sup> and 3<sup>rd</sup>

defendants in particular denied having guaranteed any payment to the plaintiff. The post dated cheques that were drawn in favor of the plaintiff were done without consideration. No goods were received from the 1<sup>st</sup> defendant consequently the 2<sup>nd</sup> and 3<sup>rd</sup> defendants cannot be made to pay on behalf of the 1<sup>st</sup> defendant who had written a letter absorbing the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from any liability. The defence was also supported by P.N. Nathwani DW1. He confirmed that the post dated cheques were issued on accounts of the 1<sup>st</sup> defendant who had requested the cheques to be issued but on condition that the 1<sup>st</sup> defendant would supply them with goods before the due date of the post dated cheques.

5. Moreover there was no written agreement between the plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants that the cheques were to guarantee the payment of goods supplied to the 1<sup>st</sup> defendant. All the arrangements were done through a telephone conversation with the plaintiff's director. Since the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were not supplied with any goods as agreed they stopped the payment.

6. Both counsel for the plaintiff and for the defendants filed written submissions in support of their respective positions. I have considered the evidence as well as the submissions. The claim by the plaintiff is for payment of the sum of Ksh.2.4 million being the value of two post dated cheques against which the plaintiff claims he supplied goods to the 1<sup>st</sup> defendant who failed to pay. The plaintiff's evidence that they supplied goods to the 1<sup>st</sup> defendant is not challenged. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants defence is that the 1<sup>st</sup> defendant absorbed them from liability through the letter dated 7<sup>th</sup> August 1998 and also a fax message dated 25<sup>th</sup> January 1999. Moreover the 2<sup>nd</sup> and 3<sup>rd</sup> defendants claim that they stopped payments of the cheques on 14<sup>th</sup> May 1998 but the plaintiff went ahead to present the cheques for payment.

7. The demand letters addressed to the defendants by the plaintiff's advocates have clearly set out the invoices for the goods supplied to the 1<sup>st</sup> defendant. This evidence has not been at all challenged, that is the plaintiff supplied goods to the 1<sup>st</sup> defendant and the two cheques were issued to guarantee payment for the goods. I therefore find there was consideration for the two cheques. I agree with counsel for the plaintiff that by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants issuing post dated cheques, that was tantamount to guarantying the payment by the 1<sup>st</sup> defendant. It is the 1<sup>st</sup> defendant who failed in his obligation to further supply the goods to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

8. There was no written agreement between the plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to support the contention that the cheques were not supposed to be banked before the 1<sup>st</sup> defendant fulfilled its obligation or also stating that the obligations of payments guaranteed by the post dated cheques would shift to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant did not pay for the goods supplied thus the obligation and liability to pay shifted to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants which obligation could be enforced by presentation of the chques for payments.

9. I am satisfied that the plaintiff has met the onus of proving its claim against the defendants. The 1<sup>st</sup> defendant did not file a defence and the defence by the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants is in the face of the plaintiff's evidence without merit. Accordingly I enter judgment for the plaintiff in the sum of Ksh.2.4 million with interest from the 1<sup>st</sup> June 1998 at court rates until full payments. The plaintiff shall also have the costs of this suit.

JUDGMENT READ AND SIGNED ON 28<sup>TH</sup> DAY OF JANUARY 2011 AT NAIROBI.

M.K. KOOME  
JUDGE