



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 710 OF 1999

**ESTATE FINANCE COMPANY OF KENYA
LTDPLAINTIFF**

VERSUS

**NAROK TRANSIT HOTEL LIMITED.....1ST
DEFENDANT**

**GEDEON LETOYA OLE HAPU.....2ND
DEFENDANT**

**MAGDALENE HAPU.....3RD
DEFENDANT**

JUDGMENT

1. By way of a brief background, the plaintiff's claim as stated in the plaint is that the 2nd and 3rd defendants executed a continuing guarantee and indemnity on 9th January 1990 in favour of the plaintiff. In that continuing guarantee and indemnity, the 2nd and 3rd defendants bound themselves to pay the monies owed by the 1st defendant to the plaintiff either jointly or severally with other persons to the tune of Ksh.5. million together with interests thereon at the applicable rates. It is further claimed that the plaintiff advanced certain monies to the 1st defendant and paid certain monies for and on behalf of the 1st defendant to the tune of Ksh.20,966,758/- with interest at the rate of 30% per annum. The plaintiff is also claiming for judgment against the 2nd and 3rd defendants each for a sum of Ksh.5 million together with interest at the rate of 30% per annum from 22nd July 1997 until payment in full.

2. The defendants denied the plaintiff's claim in their statement of defence. They denied that the plaintiff existed as a legal body as at the time the alleged monies were advanced. The defendants also denied indebtedness and contended that a company known as Estate Finance Limited (that is not the plaintiff) had advanced the 1st defendant a sum of ksh.2.7 million but failed to disburse a sum of Ksh.145,000 which was a breach of the contract. Moreover, it is further contended that the 1st defendant

paid in excess of Ksh.5.95 million to the plaintiff as at August 1996. Thus the plaintiff is merely seeking to unjustly enrich itself.

3. The evidence in support of the plaintiff's case was led by **Jurius Mwaniki Gikonyo (PW1)** an employee of the Consolidated Bank of Kenya which owns the majority shares in the plaintiff's company. PW1 testified that the 1st defendant is a company owned by the 2nd and 3rd defendants. He gave the details and the chronology of how the 2nd defendant approached the plaintiff with a request for financial facility so as to develop a tourist hotel within Narok Town to be called Narok Transit Hotel Limited. At the time the loan was applied for and granted the 1st defendant had not been incorporated. The hotel was supposed to be built on the Plot Numbers 360 and 361 Narok town. However the titles in respect of the plot were being processed in the name of the 2nd defendant. 4. This information that the plot was allotted to the 2nd defendant and the titles were being processed was also confirmed by a letter dated 21st May 1987, from the County Council of Narok. By a letter dated 25th June 1987 the 2nd defendant requested for a loan of Ksh.2.9 million which letter clearly alluded to the discussion of how he intended to develop a hotel on the plots. He further requested to be allowed to withdraw Ksh. 300,000/- which was to be paid to Parbat Construction Company who was undertaking the construction of the hotel. The plaintiff duly accepted and approved to grant the 2nd defendant the request and a sum of Ksh.2.9 million was fully utilized on account of the 1st defendant through direct payments to the contractor.

5. However the 1st defendant failed to provide the titles to the hotel to be charged as security as agreed. The 2nd and 3rd defendants executed a debenture dated 28th February 1990 to secure the indebtedness by the 1st defendant. The 1st and the 2nd defendants also executed gauntness and indemnities on 9th January 1990 in which they respectively bound themselves to pay a sum of Ksh.5 million together with interest on account of the 1st defendants' indebtedness to the plaintiff.

6. According to the plaintiff, they demanded for the repayment from the defendants by a letter dated 28th August 1997 and the 2nd defendant wrote a letter in reply in which he sought for further indulgence and also questioned the rate of interest charged. This according to the plaintiff was an admission of liability. PW1 also produced several documents which were marked as exhibit 1 – 79 except for exhibit 13, 14 and 15 which were expunged from the records. Counsel for the plaintiff also filed detailed written submission and quoted several authorities in support of the claim.

7. On the part of the defence Gedeon Letoya OLe Hapu DW1 and also the 2nd defendant gave evidence. He denied that he was served with the demand letters. He contended that he signed the letter of guarantee and indemnity without knowing what he was doing. He contended that he was called by Mr. Njuki who was the chief manager of the plaintiff to attend the offices of Messrs Ndungu Njoroge & Kwach to sign a transfer of share which was held by Mr. Ngethe in trust. He travelled to Nairobi with his wife, Magdalene Hapu DW2. They were hurriedly asked to sign documents without knowing what was contained therein. Both witness confirmed that they have a son called George Lenaonge who was born on 31st October 1991. They denied that their son was ever a director or share holder of the 1st defendant. They also denied the indebtedness.

8. During cross examination, DW1 admitted that he is a director of the 1st defendant. He confirmed that he came up with an idea of constructing a hotel and borrowed a sum of Ksh.2.9 million from the plaintiff for the construction of the hotel. He confirmed he wrote the letter dated 25th June 1987, requesting for the loan of 2.9 million but he claimed that he was not involved in the way the money was disbursed to the contractor. He also confirmed that on 24th June 1987, he requested the plaintiff to pay a sum of ksh.300,000 to Parbat Constructors. He also confirmed that the agreement between him and Parbat contractors was drawn by his advocates Ndungu Njoroge and Kwach.

9. That is the firm that advised him that Mr. Ngethe could hold a nominal share in the 1st defendant and signed a declaration of trust which the 2nd defendant produced as an exhibit. He also confirmed that the

money advanced by the plaintiff was for the construction of the hotel. He claimed to have paid 5.9 million. He however denied that there was any money outstanding and the interest rates charged by the plaintiff was unilateral and was never disclosed to him. He also denied having written a letter dated 27th June 1989. Apparently he confirmed that he wrote the letter dated 15th September 1997 when he wanted to know the balance of the loan. DW2 also contended that she was made to sign the guarantee and indemnity in a hurry. She was not informed what was contained in the document but said she signed it in good faith. Both Counsel for the plaintiff and the defendants filed very detailed submissions in support of their respective positions and cited several authorities.

10. The above is the summary of the claim and the evidence that was adduced before the court. The plaintiff's claim is challenged by the defendant on three principle issues. Firstly, the defendant challenged the local standi of the plaintiff and alleged that the plaintiff did not exists in law and therefore it has no capacity to file this suit. On the part of the plaintiff they produced copies of annual returns filed with the registrar of companies to show that the plaintiff is a company owned by Consolidated Bank of Kenya who own the majority of shares and a Mr. Fred Ojiambo one share. Further more the 2nd defendant admits having dealt with the plaintiff when he borrowed a sum of Ksh.2.9 million which is supported by various correspondences that was exchanged between the plaintiff and the 2nd defendant who was at the time acting on behalf of the 1st defendant. The court finds that although the defendants alleged the legal capacity or legal existence of the plaintiff, there was no evidence to support the fact that the plaintiff is not a legal entity that lacks capacity to sue.

11. The other defence raised by the defendants is regarding the execution of the guarantee and indemnity by the 2nd and the 3rd defendants. It is contended that the guarantees were signed in the office of Mr. Ngethe, an Advocate with the firm of Ndungu Njoroge and Kwach Advocates who acted for the plaintiff. The said Mr. Ngethe had registered himself as a director of the 1st defendant where he held nominal share and he signed a declaration of trust. According to the 2nd and 3rd defendants they did not know what they were signing when they signed the guarantee. Counsel for the defendant also urged the court to be guided by the decision in the case of **Barclays Bank Plc vs Obrien & Another (1943) 4 ALL ER 417, and adopted in Nairobi High court Milimani Commercial Courts Civil case No.374 of 2005** to support the contention that the 3rd defendant did not know that she was to be a guarantor and personally liable for the debts of the 1st defendant.

12. I have examined the above contention against the background that both the 2nd and 3rd defendants admits having signed the guarantee and indemnity. During the hearing of this case, the court had the opportunity to listen and evaluate the evidence and demeanor of both defendants who are apparently literate and the 2nd defendant came across as a seasoned businessman. I am of the view that the guarantees and the indemnity signed by the 2nd and 3rd defendants are binding upon them. This is because in ordinary commercial transactions it is not necessary to prove that parties infact intended to create legal relations. The onus of proving that there was no such intention is on the party who has asked that no legal effect is intended and the onus is a heavy one. See the case of **Edwards v Skyways Ltd [1964 1 W.L.R. 349]**.

13. Applying the objective test I do not find the contention by the defendants that they signed the guarantee in a hurry without reading the contents credible. This is because the 2nd defendant had borrowed money to develop a hotel for the benefit of the 1st defendant. For that reason

I do not see why their signatures which they appended should be impugned merely because they have been called upon to honor the obligations therein. Moreover going by the correspondence on record, the 2nd defendant admitted having applied for the loan and having utilized to develop a hotel owned by the 1st defendant.

14. The third point of defence raised by the defendant is regarding the capacity of the 1st defendant to borrow when the loan was acquired before the 1st defendant was incorporated. The Memorandum and

Articles of Association of the 1st defendant that was produced in evidence by the defendants were signed on 2nd June 1997. None of the parties produced the certificate of incorporation but going by the letter dated 25th June 1987, which is not denied by the plaintiff the loan was applied for and some of the disbursements were done on or about 26th June 1987. The 1st defendant did not present a bond resolution to ratify the borrowing that had been secured by the promoters. Thus the 1st defendant seriously challenged the loan that was acquired on its behalf by the promoters without a resolution.

15. Also the debenture that was secured over the assets of the 1st defendant is challenged. The debenture is dated 9th January 1990, it was signed by the directors on 28th February 1990. The 2nd defendant and his son signed the debenture and it is contended that his son was still a minor as at the time he signed the debenture. I find this is a valid point that compels me to make a finding that the debenture is a nullity. It is also trite that a company has no soul or mind of its own it acts through directors. Therefore a resolution of the board of directors was necessary to support the creation of the debenture.

16. Regarding the plaintiff's case it is a straight forward claim for money loaned that was secured by individual guarantee by the 2nd and the 3rd defendants. It hinges on four issues that there was a contract that is demonstrated by the 2nd defendant applying for a loan for a commercial venture. The loan was granted and utilized for the benefit of the 1st defendant thus there was consideration. The 2nd and 3rd defendants signed a guarantee and indemnity which according to Halsbury Laws of England is defined as:-

“A guarantee is an accessory contract by which the promissory undertakes to be answerable to the promisee for the debt, default or miscarriage of another person, whose primary liability to the promisee must exist or be contemplated. As in the case of any other contract its validity depends upon the mutual assent of the parties to it, their capacity of contract, and consideration, actual or implied. An additional statutory requirement is that the contract must either be in writing or be evidenced by a written note or memorandum signed by or on behalf of the party to be charged . . .

A guarantee, being merely an accessory contract, does not, even when under seal, cause a merger with it of the principal debtor's simple contract debt to which it relates and, generally, when the principal contract or liability is determined, the guarantee itself is also determined.”

17. The other issue is regarding the so called admission of the loan by the 2nd defendant. The 2nd defendant does not deny having borrowed the money and having benefited from the proceeds. He however conveniently denies having written the letter that was received by the plaintiff on 16th September 1997. Even if that letter is ignored the plaintiff admitted even by way of an affidavit which I found in the court file and was filed in court on 14th May 2001. He admitted that he borrowed a sum of 2.9 million and he received a sum of Ksh.2,755,000 leaving a balance of Ksh. 145,000/-. Although the 2nd defendant claims to have paid 5.9 million towards the settlement of that loan, there is no evidence on record to support that contention.

18. I find that there was consideration for the guarantee. The 2nd and 3rd defendants are bound to honor the guarantees and indemnity that they signed. I accordingly enter judgment against the 2nd and the 3rd defendants each to pay a sum of Ksh.5 million with interest at court rates from 22nd July 1997 until full payment. The plaintiff's claim against the 1st defendant fails with no order as to costs. The plaintiff will also be entitled to costs from the 2nd and 3rd defendants.

JUDGMENT READ AND SIGNED ON 28th DAY OF JANUARY 2011 AT NAIROBI.

M.K. KOOME

JUDGE