



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 8 of 2002

EPHANSON KARANJA KIRIONGI.....PLAINTIFF

VERSUS

**ROSEMARY WANJIKU MWINGA T/A
MIRACLE GENERAL MERCHANTS.....1ST DEFENDANT
NATIONAL BANK OF KENYA.....2ND DEFENDANT**

JUDGMENT

In his further amended plaint Samuel Peter Gitau, the legal representative of the original plaintiff, the late Ephanson Karanja Kiriongi (the deceased), claims that at the request of the 1st defendant on 20th December 1994 the deceased signed a personal guarantee and charged his property known as **Title No. Bahati/Wendo Block 3/16 (Rimuku)** (the charged property) for Kshs.2 million to secure an advance of Kshs.1.2 million made to the 1st defendant by the 2nd defendant (the bank). Though the 1st defendant repaid that sum in full, instead of the bank discharging the charged property it fraudulently agreed with the 1st defendant to use it as security for further advances that it made to the 1st defendant. He further deposed that upon enquiry the deceased discovered there is a guarantee dated 8th February 1995 in which he was alleged to have guaranteed repayment by the 1st defendant to the bank of a sum of Kshs.2 million. To stave off the imminent sale of the charged property in the year 2000, the deceased's family was forced to pay some money to the bank. He therefore seeks a declaration that the 1st defendant having paid the sum secured by the deceased's guarantee of 20th December 1994 the bank be restrained from selling the charged property and be ordered to discharge it forthwith. He also prays for a refund of the amount his family paid to the bank together with interest as well as general damages for breach of contract, costs and interest.

In her defence the 1st defendant denied the plaintiff's claim and averred that the same is bad in law and should be struck out. On its part the bank also denied the plaintiff's claim and in particular denied the allegation of fraud against it and put the plaintiff to the strict proof thereof. It further averred that the plaintiff guaranteed the 1st defendant's overdraft of Kshs.400,000/- and supported that guarantee with a charge over the charged property. It is therefore entitled to sell the same and recover the amount due and prayed for the dismissal of the suit with costs.

The deceased testified and called two witnesses. In his testimony he said that at the request of the 1st defendant who was carrying on business with his daughter, Wangui, he charged the charged property to the bank and signed a personal guarantee to secure an advance of Kshs.1.2 million made by the bank to the 1st defendant to assist her in the business of

buying and selling gunny bags. In 1998 he received a demand notice demanding the amount due to the bank and instructed an advocate to follow up the matter. He was surprised to learn from that advocate that he had allegedly given another guarantee to the bank. He reported the matter to the police and had the signature on that guarantee examined and found to be a forgery. He denied authorizing the bank to give the 1st defendant the second overdraft and demanded for the refund of Kshs.820,000/- that his family paid to the bank. In cross examination he denied that the payment of that amount by his family was an admission of his liability.

The plaintiff's second witness was the deceased's son, Samuel Peter Gitau Karanja, PW2, who has now been substituted as the plaintiff after the death of the plaintiff. He reiterated the testimony of his deceased father that he did not sign the second guarantee and added that in the year 2000 upon the bank's threat to sell the charged property which he said was valued at Kshs.20 million to recover a sum of Kshs.1,489,000/- he undertook to pay that amount. He thereafter gave standing orders and paid a total of Kshs.802,000/- by monthly instalments of Kshs.42,000/-. He also said that that payment was no admission of liability on the part of the plaintiff.

The plaintiff's last witness was Assistant Commissioner of Police, Emmanuel Kenga, PW3. He said that he is a Government document examiner. He testified on behalf of his Deputy, Mr. Antipas Nyanjwa, who had been attacked by thugs and injured to the extent that he was unable to come to court. Before that attack Mr. Nyanjwa had at the request of the plaintiff's advocate examined some documents and made a report. He produced that report the thrust of which is that the deceased plaintiff did not sign the second guarantee.

The 1st defendant appears not to have been involved in the hearing of this case although she had entered appearance and filed a defence. So she did not testify. On its part the bank called two witnesses, David Macharia Muraya, DW1 and James Gatune Wathigo, DW2.

David Macharia Muraya, DW1, is a Recoveries Officer of the bank's Nakuru Branch. He testified that on 31st March 1994 the 1st defendant opened a current account at National Bank Nakuru Branch. On 24th November 1994 she applied for a bank guarantee of Kshs.1.5 million and offered the deceased's charged property as security for that. Upon the bank's acceptance of that offer the deceased charged the property to the bank for Kshs.2 million and executed a personal guarantee for a similar sum.

On 24th January 1995 the 1st defendant applied for an overdraft of Kshs.400,000/- and offered her property known as Title No. Bahati/Kerongero/112 and the deceased charged property as security to secure it. The bank approved an overdraft of Kshs.300,000/- on the security of the deceased's charged property and demanded a separate guarantee of Kshs.400,000/- from the deceased. On 15th November 1995 the 1st defendant applied for a further overdraft of Kshs.1 million but the bank approved only Kshs.300,000/- on the security of the deceased's charged property and the existing personal guarantee of the deceased.

On failure by the 1st defendant to regularly repay the amount advanced to her the bank demanded the same from the deceased. To save the charged property from being sold the deceased's family offered to pay the amount owing by the 1st defendant and paid a total of Kshs.802,000/- by monthly installments of Kshs.42,000/- leaving a balance of Kshs.689,120.15. He said the bank released the title to 1st defendant's property because it had secured a personal loan

which she had fully repaid. In cross examination he conceded that the first guarantee by the deceased was “discharged because there was due performance.” He also conceded that the deceased was not consulted on the two overdraft facilities.

After this evidence counsel for the plaintiff filed written submissions in which they cited several authorities and urged the court to find that the second guarantee was a forgery and enter judgment for the plaintiff as prayed in the plaint.

I have considered these submissions and the evidence on record. I have also carefully read the exhibit produced. With respect to counsel for both parties I do not understand the cause of the hullabaloo about the amount due from the 1st defendant to the bank. Whatever amount the 1st defendant owed the bank should not have been the concern of the plaintiff. I will demonstrate.

According to David Machaira Muraya, DW1, a Recoveries Officer of the bank, the 1st defendant started relations with the bank on 31st March 1994 when she opened an account with the bank. On 24th November 1994 she applied for and obtained a bank guarantee. On 24th January 1995 she applied for and obtained an overdraft facility of Kshs.300,000/-. The bank’s letter **Ex.6** confirms that. On 15th November 1995 she applied for a further overdraft of Kshs.1 million to enable her expand her general merchandise business but she was given only Kshs.300,000/-. Her letter **Ex.8** and the bank’s reply thereto **Ex.9** confirm this.

Although the charge document **DEx.6** talks of the plaintiff having agreed to secure an overdraft by the bank to the 1st defendant, in my view, that is not what that charge and the guarantee by the plaintiff dated 20th December 1994 **Ex.3** secured. Those documents should not be read in isolation. As I have stated on 24th November 1994 the 1st defendant applied for a bank guarantee of Kshs.1.5 million. Her letter of that date **DEx.3** makes that clear. By its letter dated 16th December 1994, **DEx.4** the bank acceded to that request and said it would give that guarantee “To assist in buying and selling gunny bags and general merchandise.” Although no details of this guarantee are given it is clear from the bank’s said letter that the guarantee was given to whoever was supplying the 1st defendant with the gunny bags. The bank’s said letter **DEx.4** states that that guarantee was for 12 months and was to expire on 31st December 1995.

As security for giving that guarantee, the bank stated in its said letter **DEx.4** “We shall hold a guarantee for Kshs.2.0 million by Mr. Ephanson Karanja Kerongi supported by a legal charge of a similar sum over his property **Title No. Bahati/Wendo Block 3/16 (Rimuko)** valued at Kshs.4.5 million by M/S Kinyua Koech Ltd.” This letter therefore makes it quite clear that the charge **DEx.6** over the plaintiff’s said piece of land and his personal guarantee dated 20th December 1994 **DEx.7** secured the guarantee that the bank gave on behalf of the 1st defendant to whoever was supplying her with gunny bags.

In her letter dated 24th January 1995 **Ex.9**, the 1st defendant applied for an overdraft facility of Kshs.400,000/- to enable her continue with her general merchandise business. She offered as security for that facility her property known as Title No. Bahati/Kirengero/112 and the plaintiff’s property known as Title No. Bahati/Wendo Block 3/16 (Rimuko) both of which had already been charged to the bank for a total of Kshs.2.2 million but committed only to the tune of Kshs.1.24 million. In its letter dated 9th February 1995, **Ex.10**, the bank approved an overdraft facility of Kshs.300,000/- on the

security of “a fresh and separate guarantee for Kshs.400,000/- from Mr. Ephanson Karanja Kiriongi guaranteeing this overdraft. The guarantee will be supported by the legal charge we hold against his title.”

In her letter dated 14th November 1995 **DEx.12** the 1st defendant applied for a further overdraft of Kshs.1 million to enable her expand her general merchandise business and offered as security her said title and that of the plaintiff which, as I have already stated, had already been charged to the bank. In its reply thereto dated 1st February 1996 **DEx.13** the bank approved a further overdraft of Kshs.300,000/-.

There is nothing on record to show that the plaintiff was involved in the negotiations between the 1st defendant and the bank’s approval of those overdrafts on the security of the charge over his property and his personal guarantee. In cross examination DW1 confirmed that. The plaintiff did not sign a further guarantee for Kshs.400,000/- as stated in the bank’s said letter **DEx.6**.

In its letter of 1st February 1996 **DEx.13** the bank did not stipulate the security it required for the further overdraft of Kshs.300,000/-. It, however, stated that “all other terms and conditions remain as stipulated in our letter of offer to you dated 16th December 1994.” I do not know whether this meant that this further overdraft was also secured by the plaintiff’s personal guarantee and the charge over his property. Nonetheless, as I have already stated, there is nothing to show that the plaintiff was appraised of this development and/or his approval was sought or obtained.

The guarantee dated 8th February 1995, **DEx.11**, has given me considerable anxiety. The plaintiff denied having executed it and was categorical that the signature on it resembling his is a forgery. As stated above that guarantee was supposed to secure the overdraft of Kshs.400,000/-. It is not clear how **DEx.11** came to be executed. What is, however, clear from the evidence of David Muraya Macharia, the Bank’s Recoveries Officer, DW1, and that of James Gathune Wathigo Advocates, DW2, is that the bank gave a blank guarantee form to the 1st defendant who took it to Mr. Wathigo’s office for completion after which it was allegedly executed by the plaintiff. It follows therefore that it is the 1st defendant who gave the figure of Kshs.2 million that appears on it to Mr. Wathigo’s office. What her motive was for that is anybody’s guess.

This case was first heard by the Hon. Justice Musinga who took the evidence of the plaintiff and that of his son, Samuel Peter Gitau Karanja, PW2, as well as that of the two defence witnesses, David Macharia Muraya, DW1 and James Gathune Wathigo, DW2. I took over the hearing under the provisions of **Order 17 Rule 10(1)** of the **Civil Procedure Rules**. When the matter came up for hearing before me on 12th October 2009, without any application to reopen the plaintiff’s case, the plaintiff called Emmanuel Kenga, a Government document examiner, as his 3rd witness. I did not notice this anomaly until the time of preparing this judgment. That witness produced a report by his colleague, Mr. Nyanjwa, who had been attacked by thugs and injured to the extent that he could not come to court to produce his report. In that report Mr. Nyanjwa had stated that the signature on the guarantee **DEx.11** was not that of the plaintiff. Mr. Wathigo himself said he had not known the plaintiff before and that he had only identified him by his ID card when he was taken before him by the first defendant to execute the impugned guarantee. He was not categorical that it is the plaintiff who signed the guarantee before him. Instead he only stated he would be surprised if it is alleged that someone other than the one whose ID card he saw signed the guarantee.

Taking all these factors into account and in the light of the document examiner's report that the signature on DEx.11 is not that of the deceased, I am left with no option but to accept the deceased's claim that he did not sign the guarantee and that the 1st defendant took a different person to Mr. Wathigo's office to sign that guarantee.

In the circumstances I find that the guarantee **DEx.11** is a forgery and does not bind the plaintiff. Consequently I further find that the plaintiff's personal guarantee and charge over his said property only secured the guarantee that the bank gave on behalf of the 1st defendant and not the subsequent overdraft facilities granted by the bank to the 1st defendant. The bank having not been required to make any payment on the guarantee it gave on behalf of the 1st defendant as is clear from the evidence of DW1, the deceased's obligation to the bank ended. That is why DW1 stated in cross examination that "The first guarantee was discharged because there was due performance."

I am alive to the fact that on demand being made to the deceased, his family paid to the bank a sum of Kshs.802,000/. I believe the evidence of the plaintiff's son Samuel Peter Gitau Karanja, PW2, that that payment did not constitute any admission of liability on the part of the plaintiff. As that witness said and DW1 confirmed that amount was paid to stave off the imminent sell of the plaintiff's charged property which as PW2 said was valued at Kshs.20 million.

There is reference in the deceased's evidence and that of his son PW2 to the second overdraft the repayment of which they said the plaintiff did not guarantee. I am certain that they are mistaken in referring to it as the second overdraft. This is because there is nothing on record to show that the deceased had been advised that what he secured by his personal guarantee and the charge over his property was actually the guarantee the bank gave on behalf of the 1st defendant. It is clear from his evidence and that of his son that he thought the security he gave was for the loan or overdraft facility that was granted by the bank to the 1st defendant. That is why they referred to the advances made to the 1st defendant as the second overdraft. I therefore find that the plaintiff is discharged from the guarantee of Kshs.2 million that he gave on 20th December 1994, **Ex.3** and is entitled to immediate discharge of his charged property.

Having found that the plaintiff did not secure the 1st defendant's overdraft and that the bank was not required to pay any money on the guarantee it gave on behalf of the 1st defendant, it follows that the plaintiff was not under any obligation to pay any money to the bank and that the payment of Kshs.802,000/- that his family admittedly made to the bank was under the erroneous view that the deceased had guaranteed and secured by the charged property some advance the bank made to the first defendant. In the circumstances I find that the plaintiff is entitled to a refund of that sum. Although that figure is not mentioned in the further amended plaint, the plaintiff sought for a refund of whatever amount his family paid to the bank. As DW1 admitted that that sum was indeed paid to the bank the failure to put the figure in the plaint has not caused the bank any prejudice to justify denying the plaintiff of the same.

In the upshot I find for the plaintiff and:-

1. Grant him the declaration that he is discharged from the guarantee of Kshs.2 million that he gave on 20th December 1994, vide **Ex.3** and that the guarantee dated 8th February 1995 is a forgery and is therefore null and void.
2. Grant him a perpetual injunction to restrain the bank from selling his said charged property and order that the bank shall discharge it and deliver to the plaintiff the Title Deeds thereof forthwith.

3. Enter judgment for the plaintiff in the sum of Kshs.802,000/- together with interest thereon at court rates from the date of filing this suit.
4. The plaintiff shall have the costs of this suit together with interest thereon at court rates.

DATED and DELIVERED this 28th day of April, 2010.

D. K. MARAGA
JUDGE.