REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI COMMERCIAL & TAX DIVISION)

CIVIL CASE NO. 68 OF 2007

BANK OF INDIA.....PLAINTIFF

VERSUS

DISCOUNT CASH & CARRY LIMITED.....1ST DEFENDANT

SEMNIK HOLDING LIMITED.....2ND DEFENDANT

VIPIN MAGANLAL SHAH.....3RD DEFENDANT

RAJESH BHOGILAL VYAS.....4TH DEFENDANT

TALIB ABUBAKAR AHMED.....5TH DEFENDANT

NEELAM VYAS.....6TH DEFENDANT

R U L I N G

The Plaintiff, Bank of India filed this application by way of Chamber Summons under Order VI rule 13(1) (b) (c) and (d) of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, seeking the following orders:

1. **The defence dated 22nd February, 2008 and filed herein on the same day on behalf of the Defendants be struck out and judgment be entered against the said Defendants jointly and severally.**

2. **The cost of this application and of the suit be paid by the Defendants.**

The application is based on three grounds which are as follows:

a) That the defence is scandalous, frivolous or vexatious.

b) That the defence may prejudice, embarrass or delay fair trial of this suit.

c) The Defence is otherwise an abuse of court process.

In addition to the above, the application is supported by the affidavit of Lenkal Raja Kishore. In their

written submissions the applicant has submitted that the affidavit sworn by the 1st, 3rd and 4th defendants do not demonstrate or show any form of authority by the 2nd, 5th and 6th defendants authorizing the former to swear the affidavits on their behalf as co-defendants. Based on that argument, the applicant has submitted that this application is not opposed by the 2nd, 5th and 6th defendants and hence the application should be allowed in that regard. In support of that submission, the applicant has quoted the case of **CHALICHA FCS LIMITED VS. ODHIAMBO AND 9 OTHERS [1987] page 192 KLR**. In that case the court stated as follows:

"It is not proper procedure and amounts to miscarriage of justice for a party to be allowed to represent his co-defendants without their written authority, as required by the Civil Procedure Rules Order I rule 8 or rule 12."

Further to the above, the applicant has also submitted that the defendant's board of directors agreed to borrow from the plaintiff by way of an overdraft facility the sum of Kshs. 75 million and that the plaintiff agreed to advance the said sum of money. Besides the above, the applicant has also availed to the court the debit entries made in the statement of account marked as 'LRK6' which shows the debit entries. Unfortunately the 1st defendant later on refused and/or failed to comply with the terms of overdraft facility agreement and has defaulted in paying the sums of money advanced and remains indebted to the applicant in the sum of Kshs. 73,203,890.05/-. Though the applicant wrote a demand letter through its advocate in October 2006 the defendants have refused and/or failed to comply with the said demand. The applicant has also contended that the 2nd – 6th defendants guaranteed the facility extended to the 1st defendant in terms of the instruments of guarantee and indemnity exhibited at pages 66 to 73 of the annextures. A guarantee has been defined by the Law dictionary of Mozley and Whiteley:

"***Where a person contracts as a surety on behalf of another an obligation to which the latter is also liable as a primary party, a promise to answer for the debt, default of miscarriage of another which to be enforceable must be in writing."***

In this particular case the 1st defendant and the principal debtor has breached the contract between itself and the plaintiff by failing and or refusing to perform its part of the contract in terms of servicing the facility extended to it. As a general rule, where the principal commits a breach of the principal contract, then the surety is liable to the creditor. In the case of **Rawstone vs. Parr [1827] 3 Russ. 539** the learned authors stated as follows:

"If the contract on which the creditor proposes to sue the surety is a contract of guarantee, the liability of the surety accrues at the earliest when the principal defaults in his obligations."

It is the contention of the applicant that the 2nd – 6th defendants herein are liable to pay the amount due from the 1st defendant from 1st July 2006 when the latter breached the terms of contract by defaulting in servicing the facility that had been extended to them. In addition to the above, the applicant has also submitted that the 2nd – 6th defendants executed guarantees on whose strength the plaintiff extended a loan facility to the 1st defendant. In support of that submission, the applicant has quoted the case of **Canon Assurance (K) Limited vs. Elijah Mwangi Kinyanjui & 2 others [2006] eKLR** where the court held as follows:

"The plaintiff has proved that the 3rd defendant executed the guarantee, guaranteeing the principal debtors debt dated 12th of June, 1991. The plaintiff further proved that the said guarantee was supported by consideration, in that the loan facility was granted to the principal debtor on 18th June, 1991…. The court is of the view that a demand was forwarded to the 3rd defendant demanding the guaranteed amount. That demand sent by the plaintiff's counsel was dated 24th April 1992. From that date of demand the 3rd defendant was obligated to settle the amount in the guarantee that is Kshs. 5 million."

In the case of **Edward Owen Engineering Co. Limited vs. Barclays Bank International Limited [1978] 1 All ER** at page 96 the court stated as follows:

"All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer, nor

with the question whether the supplier has performed his contractual obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. …"

The court further stated as follows:
"In our case the appellant's obligation was to pay upon demand. The obligation was established when it was served with a notice of credit and upon a demand of payment being made. Liability to pay in the circumstances is not and cannot be an issue. There is no question of standing to go to trial or which will require examinations of witnesses."

In conclusion the applicant also quoted the case of **Lep Air Services vs. Rollowin [1973] A.C. 331** wherethe House of Lords stated as follows:
"It is because the obligation of the guarantor is to see to it that the debtor performed his own obligations to the creditor that the guarantor is not entitled to notice from the creditor of the debtor's failure to perform an obligation which is the subject of the guarantee, and that the creditor's cause of action against the guarantor arises at the moment of the debtor's default…"

The House of Lords went further to hold as follows:
"The legal consequence of this is that whenever the debtor has failed voluntarily to perform an obligation which is the subject of the guarantee the creditor can recover from the guarantor as damages for breach of his contract of guarantee whatever sum the creditor could have recovered from himself as a consequence of that failure."

On the other hand the defendants have opposed the application to strike out the defence dated 22nd February, 2008 and for judgment which application is premises on Order VI rule 13(1) (b) (c) and (d). According to the defendants, their defence raises triable issues, and that it has filed a bona fide defence with reasonable chances of success. Further to the above, the respondents have also submitted that for them not to be heard would amount to the contravention of the rules of natural justice. In addition to the above, the respondents rely on the affidavits sworn by the 3rd and 4th defendants and on the written submissions. Besides the above, the respondents sought to distinguish this case from that of **CHALICHA FCS LIMITED VS. ODHIAMBO & 9 OTHERS** which has been quoted above. It was their contention that in the above case, the same was a representative suit and that the co-defendants mentioned did not enter any appearance either in person or through an advocate on their behalf neither did they file any defence. It was due to the above reason that the Court of Appeal ruled that those defendants other than the 1st, 2nd, 5th and 7th defendants, Odhiambo and another co-defendant were not properly represented. In contra-distinction the six defendants in this suit have entered appearance and filed their defence. To prove the above, he referred the court to the memorandum of appearance of all the six defendants dated 25th January, 2008 which clearly indicates that F.E. Jamal Advocates had entered appearance for the defendants. Apart from the above, the respondents also submitted that the defence dated 22nd February 2008 similarly indicates the same. Secondly, the respondents have pointed out that though the applicant claims to have extended a loan of Kshs. 75 million to the 1st defendant; it now seeks judgment for Kshs. 73,203,890.05/- without any reasons for the discrepancies between the two figures. In addition to the above, the respondents have also taken issue with the fact that the applicant has failed to disclose to this court that at the time of filing this suit and filing the present application, it did crystallize a security better known as L.R. No. 209/11548 belonging to the 1st defendant/respondent. According to the respondents this salient fact is instead hidden in the plaintiff's annexture marked 'LRK6' at page 169 of its annextures. That apart, the respondents have also submitted that on page 169 of the defendants' statements of accounts there is unexplained credit of Khss. 30,700,000/- yet the applicant has omitted from taking into account the said credit in its claim. It was the contention of the respondent that the actual amount claimed by the plaintiff cannot be ascertained without a full trial. In support of their submissions, the respondents quoted the case of **Delphis Bank Limited vs. Cephas Osoro, Kennedy Monari, Ulrich Johnson and Estehr Nyarenchi Osoro** (unreported) in which the court stated as follows:
"What I find to be wanting in the plaintiff's application as relates to these very serious issues is that the plaintiff did not provide to the court a complete set of statements of account of the defendant….The court is unable to confirm that, that was indeed the amount due since there are no statements to

support the claim and the court is unable to confirm whether or not there were credits of the fixed deposit or the sale proceeds of the car. Those issues raised by the defendant are sufficient to enable me find that the 1st Defendant's defence is not scandalous, frivolous or vexatious and nor is it an abuse of the court process."

Apart from the above, the respondents have submitted that the guarantee documents at page 73 of the applicant's annextures guaranteeing Kshs.25 million is not properly executed and is thus fatally defective as the 3rd and 5th defendants did not execute the documents. In support of their submissions, they have quoted the case of **Kenya Planters Co-operative Union** case which has been cited by the applicant. In that case, the court stated as follows:
"…when one undertakes to be a guarantor, that undertaking must be evidenced in wiring. There was no written document of guarantee that was submitted in evidence by the plaintiff, and accordingly the plaintiff's claim against the defendant must on that account fail."

It was their contention that where the guarantee document is itself fatally defective then no liability can attract to the intended guarantor as the document is made void by its defects. The Plaintiff's claim against the 3rd – 6th defendants as guarantors to the 1st defendant must also fail. Apart from the above, the respondents have also sought to distinguish this case from that of **Akiba Bank Limited vs. Rekah Chadidas & Anor**. It was the contention of the respondents that by the conduct of the applicant, he is estopped from demanding the discretionary powers of this court that it now seeks. According to the respondents, the plaintiff refused and/or neglected to provide the defendants with particulars when requested as per the defendants request for particulars dated 28th January 2008. In addition to the above, the respondents have also claimed that the plaintiff also failed to comply with the consent order to provide the said particulars and it was only after the defendants had filed an application to dismiss this case on19th June, 2008 that the said particulars were provided. The respondents quoted the Supreme Court Practice 1999 rules which state as follows:
"…The requirement to provide particulars reflects the overriding principle that litigation between parties and in particular the trial should be conducted freely, openly, without surprises, and as far as possible to minimize costs."

It was the contention of the respondents that the plaintiff has never provided the defendants with the particulars sought and that its answer to the request for particulars dated 4th July 2008 declines to provide particulars stating that that information amounts to evidence. On that note the respondents have submitted that the plaintiff cannot then claim that the defence filed by the defendants, be struck out when it has willfully frustrated the defendants' attempts to have as much information about the claim in order to prepare an adequate defence. Besides the above, the respondents have also submitted that the applicant has failed to show that it has notified the 2nd and 6th defendants as guarantors of the principal debtor that the debtor had defaulted in repayment of the loan. It was their contention that the plaintiff has only annexed a copy of a demand letter dated 17th October 2006 which was only addressed to the 3rd and 5th defendants. That letter demanded a sum of Kshs. 73,731,712.80/-. The same letter made reference to the defendants guaranteeing of an advance to the 1st defendant for a total amount of Kshs. 50 million. Since the plaintiff has not shown that it has ever forwarded any demand to the 2nd and 6th defendants it cannot now hold them liable when it has failed to inform them of the principal debtor's default and/or made any demand prior to filing this suit. In conclusion the respondents have submitted that the defence raises triable issues which ought to be ventilated at a full hearing of the suit. They also submitted that the defence raised is not groundless and/or fanciful, and does not embarrass or delay fair trial and is not otherwise an abuse of the court process.
This court has carefully considered the opposing submissions by the learned counsels. From the outset it is apparent that the plaintiff's claim to have availed an overdraft facility to the sum of Kshs. 75 million. However, the plaintiff has not explained in its plaint and application why they are now demanding a lower sum of Kshs. 73,203,890.05/- . That explanation has not been given in both the application and the plaint. Though the discrepancy seems to be small given the total amount which was advanced, there was need for the applicant to explain whether the respondents had paid the difference. Secondly, the applicant has not denied the fact that the 3rd and 5th respondents did not sign the guarantee document at page 73 of

the applicant's annextures. Thirdly, it is in issue whether the applicant had actually notified the 2nd and 6th defendants as guarantors of the principal debtor that the latter had defaulted in repayment of the loan. That requirement seems to be crucial in the present facility. Fourthly, it is not clear from the pleadings the obligations of each of the defendants as sureties. This court is of the considered opinion that all the above are triable issues which can only be resolved during a full trial. At this stage it is not possible for this court to make any conclusions as to the merits or demerits of the issues which have been raised by the respondents. However, I do believe that in a full trial the applicant will have a full chance to present all the documents and adduce clear evidence on how the money was advanced to the respondents. In case the respondents paid any portion of that money, then the applicant will also have an opportunity to explain the amount that has been paid. It also follows that he will explain the balance due.
In view of the above, I hereby dismiss the application since the same has no merits. Costs to the respondents in any event.

MUGA APONDI
JUDGE

***Ruling read signed and delivered in Open Court in the presence o*f:**
Orare - Applicant's Counsel
Mayamba for Anzala - Respondents' Counsel

MUGA APONDI
JUDGE
23RD JUNE 2010