REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 313 of 2007

COMMERCIAL BANK OF AFRICA LIMITED …....………………. PLAINTIFF

VERSUS

FIVE CONTINENT TRAVELS LIMITED *also known as*

FIVE CONTINENTS TRAVEL LIMITED ………..……….... 1ST DEFENDANT

DILIP KUMAR SHAH ……………….……..……………….. 2ND DEFENDANT

PANKAJ MEGHJI SHAH ………………………..........…. 3RD DEFENDANT

RULING

(1) Commercial Bank of Africa Ltd. ("**CBA**") brought this action on the 21st June 2007 against Five Continent Travels Ltd. (*also known as Five Continents Travel Ltd.*) ("**the first Defendant**"), Dilip Kumar Shah ("**the second Defendant**") and Pankaj Meghji Shah ("**the third Defendant**"). CBA states that by two guarantees in writing, both dated the 19th December 2003, the one signed by the second Defendant and the other by the third two Defendant respectively, in consideration of First American Bank of Kenya Ltd. ("**FAB**") giving or continuing to give credit or other banking facilities to the first Defendant at its request, each of them second and third Defendants guaranteed payment on demand to FAB of all sums of money which may be owing to FAB from the first Defendant.

(2) CBA further states that FAB granted facilities to the first Defendant; that the entire shareholding of FAB was transferred to CBA in 2005 with the approval of the Minister for Finance as required under the Banking Act [Cap.488] whereupon all assets of FAB and all guarantees in its favour became vested in CBA and recoverable and enforceable by CBA by virtue of the said Act; that on the 15th September 2006, CBA demanded payment from the first Defendant of the sums of money and interest then due and payable which the first Defendant failed to pay; and that on the 29th January 2007, CBA demanded payment from the second and third Defendants as guarantors of the first Defendant the total sums of money and interest then due and payable to CBA which the second and third Defendants failed to pay. CBA therefore prays for judgment against all three Defendants jointly and severally for the sums of K.Shs.1,243,933/07 and US$61,422/53 together with interest thereon respectively.

(3) In their joint Defence dated and filed on the 28th August 2007, each of them the second and third Defendants deny having guaranteed any payments to CBA allegedly owed to FAB as claimed or at all. The first Defendant also denies CBA's claim in its entirety and all three Defendants deny indebtedness to CBA; they also deny receipt of any demand for payment.

(4) On the 12th May 2008, CBA took out a Notice of Motion under Order 35 of the Civil Procedure Rules seeking orders that judgment be entered against the Defendants jointly and severally as prayed in the Plaint on the grounds that the Defence does not disclose any *bona fide* triable issues and that the Defendants are justly and truly indebted to CBA.

(5) The affidavit in support of the application was sworn on the 9th May 2008 by Brian Kilonzo, CBA's Manager, Credit Risk Management. He says that the Defendants are justly and truly indebted to CBA jointly and severally in the respective sums of K.Sh.1,243,933/07 and US$61,422/50 together with interest thereon at the respective rates of 7.717% and 7.25% per annum from the 1st May 2007 in respect of the first Defendant's accounts with CBA. Mr. Kilonzo

produces correspondence dating from May 2001 to January 2007, the said two guarantees dated the 19th December 2003, and bank statements and explains in considerable detail how and when the various credit and other banking facilities were granted by FAB to the first Defendant at its request.

(6) In paragraph 12 and 13 of his affidavit, Mr. Kilonzo says –

"12. By two separate guarantees signed by the second and third defendants respectively on 19th December, 2003, the second and third defendants guaranteed payment on demand to First American Bank of Kenya Limited of all sums of money which may at any time be owing to First American Bank of Kenya Limited from the first defendant. A copy of the duly stamped guarantee signed by the second defendant is at pages 187 to 195 of the exhibit hereto. A copy of the duly stamped guarantee signed by the third defendant is at pages 196 to 204 of the exhibit hereto.

13. By a letter dated 26th May, 2004, First American Bank of Kenya Limited agreed to extend the duration of the overdraft facility granted to the first defendant under the letter dated 11th October 2002 on the terms and conditions set out in the letter and outlined herein below:

a. the first defendant would redeem the amounts which were then outstanding in first defendant accounts, being, Kshs.4,784,463/= outstanding in account number 23138018 and US$150,627/04 outstanding in account number 23138026 by 15th June, 2004.

b. the overdraft facility was to be secured by the guarantees given by the second and third defendants as set out in paragraph 12 above and the cash deposit of Kshs.3,000,000/= and US$50,000 and the bank guarantee from HSCB for US$50,000 to secure the overdraft facility.

c. the overdraft facility was repayable on demand but in the absence of demand the facility was repayable in full not later than 28th February, 2005.

The first defendant accepted the offer by the second and third defendants, as directors of the first defendant, countersigning the letter on 12th June, 2004 and attaching a copy of a board resolution of the first defendant which was also signed by the second and third defendants as directors of the first defendant. A copy of the letter and the board resolution is at pages 205 to 213 of the exhibit hereto."

Mr. Kilonzo also produces letters to show that CBA demanded payment from the first Defendant on diverse dates; that the first Defendant acknowledged the indebtedness and made various proposals for payment which it did not honour.

(7) The three Defendants oppose the application on the grounds set out in the replying affidavit of Dilip Shah, the Managing Director of the first Defendant, made on the 4th June 2008. He states as follows in paragraph 5 of his affidavit:

"5. THAT I verily believe that they are triable issues in this matter including:

(i) That the letter of offer dated 31st July 2001 was not properly executed. The said letter is annexed at pages 6 – 11 of the Applicant's annexure "BK1".

(ii) That there are fundamental breaches on the part of the Applicant in relation to the letters of offer dated 31st July 2001, 9th April 2002, 11th October 2002 and 26th May 2004 which were not executed under the Common Seal of the 1st Respondent."

The Defendants contend that arising from the issues which they have raised, the second and third Defendants cannot be held liable under the guarantees; that the first Defendant never authorized any Electronic Funds Transfers alleged to have been made by FAB or CBA on its behalf; that CBA has not established its *locus* to sue the Defendants; and that the amount due and payable is disputed.

(8) In submission, Ms. Babu, learned counsel for CBA, pointed out that by virtue of section 38 of the Companies Act [Cap.486], the letters of offer referred to in paragraph 5 of the replying affidavit are valid and binding on the first Defendant, having been duly signed by its Director and they need not have been executed under the common seal of the first Defendant. Further, the guarantees signed by the second and third Defendants in any event stand independently of the letters of offer as between CBA and the second and third Defendants as guarantors. Learned counsel also drew the court's attention to section 9(3) of the Banking Act by virtue of which all assets of FAB and all guarantees in its favour

(including the two guarantees executed by the second and third Defendants respectively) became vested in and recoverable and enforceable by CBA.

(9) In reply, Mr. Mwanyale, learned counsel for the Defendants, argued that the Defendants had raised triable issues which can be determined only at trial; such issues include that the conditions of lending set out in the Commitment Letter dated the 31st July 2001 were never fulfilled and that that letter was signed for FAB's Managing Director by a person whose identity has not been disclosed; and that the first Defendant never authorized the Electronic Funds Transfers alleged to have been effected by CBA. Learned counsel was therefore of the view that in light of these breaches of the terms and conditions of the contract between CBA and the first Defendant as the principal debtor, the guarantees are unenforceable and the second and third Defendants discharged accordingly. In the absence of any evidence to show that the relevant gazette notice was published as required by section 9(5) of the Banking Act, learned counsel took the view that the alleged vesting of the assets and liabilities of FAB to CBA did not occur. Finally, Mr. Mwanyale urged the court to ignore the statements of accounts exhibited by CBA on the basis that they are *prima facie* evidence only which the Defendants challenge as the amount due to CBA is in dispute. He cited sections 37 and 176 of the Evidence Act [Cap.80] in this regard.

(10) Having considered the evidence, the submissions of learned counsel as well as the various authorities cited in support of their respective contentions, I have some difficulty in accepting the arguments advanced by the Defendants.

As I have already pointed out, the Defendants in their joint Defence filed on the 28th August 2007 merely deny CBA's claim generally and put the Plaintiff to strict proof thereof; the second and third Defendants also expressly deny having guaranteed payment of any moneys owed by the first Defendant to CBA. Yet in the replying affidavit of Dilip Shah dated the 4th June 2008, sworn on his own behalf and also on behalf of the first and third Defendants and with their authority, the Defendants do not deny that credit and other banking facilities were granted to the first Defendant by CBA at their request; the second and third Defendants do not deny that they signed the guarantees dated the 19th December 2003 – no allegation has been made that such guarantees were obtained fraudulently, or under duress or without valuable consideration or otherwise irregularly.

(11) All that the Defendants have done in answer to CBA's supporting affidavit sworn by its Credit Risk Manager on the 9th May 2008 is to say that there are "**triable issues"** which ought to be canvassed at the full hearing of the suit. The Defendants say that CBA is in breach of the terms and conditions of various commitment/facility letters and that they dispute the bank statements provided by CBA for the period January 2001 to June 2007, but the Defendants have not offered any credible evidence to show in what respects the said terms and conditions have been breached or the said statements of account inaccurate or that the Defendants have at any one time taken up these "**triable issues"** with CBA and with what result. It is clear from the letter dated the 26th May 2004 referred to in paragraph 13 of Mr. Kilonzo's affidavit that the Defendants not only accepted the terms and conditions thereof but also undertook to repay the facility "**on demand by the Lender** (FAB), **but in the absence of demand shall be repaid in full not later than 28th February 2005."** Thereafter, the first Defendant by letter dated the 18th April 2005 confirmed that it would "**clear all the outstanding amount on both the above accounts by 31st March 2006."** In view of this and subsequent correspondence, I reject the Defendants' denial of CBA's claim and find and hold that they are justly and truly indebted to CBA.

(12) The Defendants through their learned counsel have advanced the argument that the transfer of assets and liabilities from FAB to CBA is invalid because CBA has not shown that it complied with section 9(5) of the Banking Act requiring publication of the notice of the passing of the resolutions by FAB and CBA confirming such transfer. Mr. Kilonzo in his affidavit has stated on oath that the Minister for Finance approved the transactions on the 11th May 2005. I reject the Defendants' argument for two reasons. Firstly, the onus of publication under section 9(5) of the Act is on the Central Bank of Kenya and not on CBA. Secondly, if the Defendants believed that CBA is not entitled to claim the moneys lent by FAB, the Defendants would have taken action to restrain CBA from seeking to recover the moneys due and/or to strike out the Plaint – they have done neither and their actions are inconsistent with the arguments they now belatedly advance.

(13) In the result, CBA's Notice of Motion filed on the 12th May 2008 succeeds and is allowed. In terms of prayer No.1 therein, there will be judgment for the Plaintiff against the Defendants jointly and severally for the sum of K.sh.1,243,933/07 together with interest thereon at the rate of 7.717% per annum from the 1st May 2007 until payment in full and also for the sum of US$61,422/53 together with interest thereon at the rate of 7.25% per annum from the 1st May 2007 until payment in full. The Plaintiff will also have the costs of the application and the suit.

So ordered.

Dated and delivered at Nairobi this Thirtieth day of January, 2009.

P. Kihara Kariuki

Judge.