



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 240 of 2007

STANBIC BANK KENYA LIMITEDPLAINTIFF

VERSUS

ELECTROFLOW TECHNOLOGIES LIMITED 1ST DEFENDANT

MARY BASWETI NYACHAE 2ND DEFENDANT

RULING

Notice of Motion dated 17/10/07 seeks order for summary judgment against the 2nd defendant, Mary Basweti Nyachae hereinafter called the “Respondent”. The grounds are set out on the application and the application is supported by affidavit sworn by Eunice Lumallas sworn on 17/10/07. The facts as disclosed are that the respondent guaranteed and bound herself to pay to the plaintiff all sums owing to the plaintiff from the first defendant in terms of the written and executed guarantee copy exhibit marked ELI. And that the first defendant has defaulted payment and a sum of Kshs.19,368,070.75 with interest at the rate of 18.75% is now due and owing to the plaintiff. And a demand has been made for payment to the respondent in the letter dated 9/10/2006 but no payment has been received by the plaintiff from respondent.

The respondent in her affidavit sworn on 29/11/07 disputes her liability under the guarantee and that the said debt is highly disputed by the first defendant as indicated by the request for particulars as in exhibit “MBN-2”. And that the defence raises a number of triable issues and that plaintiff has changed the whole nature of the transaction and that the respondent has been discharged from any obligations under the guarantee. Furthermore the plaintiff frustrates the operations of the first defendant. The starting point is an examination of the document of guarantee which is admitted by respondent as her exhibit number MBN-1”.

Regarding her liability to pay the plaintiffs claim under the guarantee paragraph 2.1.states:

“In consideration of the Bank (plaintiff) making or continuing to make available banking facilities or other accommodation for so long as it may think fit to the debtor (Electroflow Technologies Ltd) the guarantor (respondent) hereby unconditionally guarantees to discharge the debtors obligation to the plaintiff on demand in writing by the plaintiff to the respondent without deduction set-off or counter-claim together with interest thereon from the date of such demand.

The total amount recoverable under the guarantee is limited to Shs.20,000,000/=. The Notice of Motion is brought under Order 35 rule 1 (1) (a) and (2) which provides that a plaintiff may apply for summary judgment in a case of liquidated claim. There is opposition to this application. The second

defendant has filed a replying affidavit stating that the pleadings show that the debt is disputed by the first defendant, the principal debtor. And that the issue is whether the first defendant is liable to the plaintiff at all and whether she (second defendant) is liable therefore under the guarantee or not. The debt of Kshs.19,368,070.75 is disputed and has to be proved before the respondent can be called upon to pay. She admits having received demand letter. Further she alleges that the nature of the transaction has been changed due to conduct of plaintiff and the second defendant had been discharged. And that the plaintiff has frustrated the business of the first defendant. Finally she says there are triable issues and the same should proceed to trial. In his arguments counsel for second defendant relied on several authorities.

In the case of Lalji t/a/ Vakkep Building contractors which was dealing with sub-contract in a construction main contract it was held that summary judgment is a draconian measure and should be given in only the clearest of cases. A trial must be ordered if a triable issue is found or one issue which is fairly arguable. The court commented with approval the case Zola v. Ralli Brothers 1969 EA 691.

The counsel for defendant also cited the case of Gicem Construction 1983 KLR and Tinwood Products Ltd. 2004 – KLR, Court of Appeal decision in Civil appeal No.11 of 2000, Kenindia Assurance Co. Ltd. vs. CBA Ltd, Njoroge Mungai vs. Surendra Jethl Shah. The court has perused all these authorities and another principle indicated in favour of the 2nd defendant is that court should not grant an application for summary judgment where there is a reasonable ground of defence and if there exists triable issues. Looking at the statement of defence filed jointly by first and second defendants paragraph 4 deals with the relationship between 1st defendant and the plaintiff and avers that at the time of filing the plaint the first defendant account had not exceeded the limit and no notice has been given of cancelling the facility and therefore the suit was premature.

Regarding paragraph 5 of the statement of defence the complaints relate to the agreement between plaintiff and first defendant and dealings on the first defendant account. It is denied that the plaintiff owes the defendant Shs.19,368,070/75. The second defendant denies the plaintiff's claim that she guaranteed the first defendant indebtedness to the extent of Shs. 20,000,000/= she denies she was a principal debtor and that now by plaintiffs action she is discharged from liability as the purported guarantee is unenforceable. The circumstances under which the debt arose are different and not contemplated by parties when signing the guarantee and she is therefore entitled to a full discharge of the guarantee.

The document of guarantee and indemnity is exhibited by both parties and is clearly signed by 2nd defendant and witnessed by advocate Charles Nyachae on 22/6/2005. Paragraph 2.1 of the document provides that the 2nd defendant unconditionally guarantees to discharge the first defendants obligations to the bank on demand in writing by the plaintiff without deduction, set-off, or counter-claim together with interest thereon from the date of such demand.

Furthermore, paragraph 4, the second defendant covenanted that the plaintiff may in its absolute discretion and without the consent of 2nd defendant without affecting, reducing or releasing the liability of the 2nd defendant under the guarantee or the validity of validity of the security hereby created. The guarantee empowers the plaintiff to enter, vary or determine any agreement, or other arrangement with the debtor and may grant to the first defendant any new or increased facility and increase any rate of interest or charge.

(b) renew, vary, hold or exchange, release or refrain from enforcing or perfecting any present or future security from first defendant or any other person

(c) grant indulgence to the debtor.

(d) Make a demand under or enforce this guarantee either with or without first resorting to other means of payment or other security and with or without making a demand to or taking proceedings against the debtor and the guarantee shall not be discharged nor shall the liability of guarantor under Clause 2 be affected by anything which would not have discharged, released, reduced or otherwise affected the

liability of 2nd defendant if the 2nd defendant were the principal debtor.

Demand letter for repayment dated 9/10/06 is exhibited by the plaintiff. In the circumstances, it is clear that the 2nd defendant, guarantee and indemnity was a separate contract between the plaintiff and the 2nd defendant. It does not touch in any way the terms and conditions existing between the plaintiff and first defendant.

I am of the view that the decision of Court of Appeal in Kendia Assurance Company is correct law. A guarantee and indemnity is a separate transaction and the guarantor (2nd defendant) is obliged to pay to the plaintiff full liability guaranteed to maximum limit as is here of Shs.20 million. The points of defence by the second defendant are not sincere, the document of guarantee and indemnity is in favour of the plaintiff and it is my finding that there is no defence available to the defendant against the plaintiff's claims.

For the above reasons I allow application. I enter judgment in the sum of Shs.19,368,070.75 against the 2nd defendant as prayed in the plaint with interest and costs.

DATED and DELIVERED at NAIROBI this 15th day of July 2008

JOYCE N. KHAMINWA

JUDGE