REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 206 of 2004

BAMBURI CEMENT LTD……...……..……...PLAINTIFF

VERSUS

MANUCAN ENTERPRISES LIMITED…..……1ST DEFENDANT

BANK OF BARODA (K) LIMITED…..……2ND DEFENDANT

JUDGMENT

The Plaintiff sued the two Defendants on a claim of debt. The first Defendant was a principal debtor and the second Defendant was a guarantor of the debt incurred by the principal debtor the first Defendant and the payment thereof guaranteed by 2nd defendant.

The plaintiff did obtain judgment in default against the first Defendant. Regarding the 2nd Defendant he filed a statement of defence admitting the guarantee but pleaded that he is not liable on the grounds that the guarantee had expired when the demand was made and that the Plaintiff had breached the guarantee by allowing 1st Defendant to exceed the guarantee limits without knowledge or consent of the 2nd Defendant and failing to notify the 2nd Defendant of any claim pending against the Plaintiff at the time the guarantee was in existence also accommodating the first Defendant on its outstanding accounts without knowledge or consent of the 2nd defendant and lastly notifying the 2nd Defendant of the claim against first Defendant well after the expiry of the guarantee.

By agreement both parties filed written submissions and requested the court to pass judgment in accordance with submissions and documentary evidence submitted and the authorities cited by each party.

The agreed issues filed on 20.03.2007 are stated as follows:

1. Did the Plaintiff supply to the Defendant goods to the value of Kshs. 4,587,149.95

2. Was the guarantee subject to the terms and conditions set out in letters between the parties.

3. Did either the Plaintiff or the 2nd Defendant breach the said terms and conditions of the guarantee.

4. At the time of invocation of the guarantee had the guarantee lapsed

The Plaintiff submits that the guarantee entered into by Plaintiff and 2nd Defendant is and was contained in the letter dated 15.05.1996 Exhibit "P EX1". The terms and conditions of the guarantee are set out. The aggregate liability under the guarantee was of Kshs.5,500,000 /= for 2nd Defendant. Claims to the guarantor shall be made within 30 days from the date of default by the principal debtor.

The plaintiff's claims shall be settled within 30 days from the date of demand. The guarantee was to expire on 31.03.97 unless revoked earlier by notice. The exhibits produced show that at the request of guarantor, the date set out for expiration of the guarantee came and past and before the date of expiration the guarantee was extended from time to time at the request of 2nd Defendant for 1st Defendant as shown by exhibit "PEX 3" dated 24.03.97, "PEX 5" dated 17.12.97 and on 26.06.98, 24.12.98, 17.06.99, 27.09.99, 18.01.2001, 26.06.00 and 28.03.2002.

It is therefore not true to say that the Plaintiff discharged the 2nd Defendant from liability by accommodating and/or giving to the 1st Defendant after it had defaulted. This was all in the knowledge of the 2nd Defendant who in all cases negotiated the extension of time and variation of the terms of guarantee on behalf of the 1st Defendant.

The last date of the extension of guarantee was to be 30.06.2002 by a letter dated 28.06.2002 well before expiration of term, the Plaintiff notified the 2nd Defendant there was outstanding sum of Kshs. 4.5 million on the account of the first Defendant.

The statement of account at page 28 of the buddle shows that the total had accrued from the month of January 2002 to 8th May, 2002. The 2nd Defendant refused to pay raising the following points in its defence:

(i) That the Plaintiff allowed the first Defendant to exceed the guarantee limit without knowledge or consent o the 2nd Defendant. On this issue it is true that the aggregate limit was reduced to 4.5 million with full knowledge and at the request of the 2nd Defendant.

(ii) Failing to and neglecting to notify the 2nd Defendant of any claim pending within the stipulated time.

(iii) Accommodating the first Defendant on its outstanding accounts without the knowledge or consent of the second defendant.

(iv) Notifying the 2nd Defendant of the claim against first Defendant well after the expiry of guarantee.

As to time and interpretation thereof it is shown that on 28.06.2002 was a Friday when the letter was written. The last date then was on 01.07.2002 which was next working day.

Section 57 (B) cap 2 Interpretations and General Provisions Act provides:

"*If the last day of the period is Friday (30.06.02) or a public holiday or all official non working days which days are in this section referred to as excluded days, the period shall include the next following day not being an excluded day.*"

The provision of this Act is not as stated in Halsbury's Laws of England Vol.45 cited by Defendant paragraph 1138 "Period expiring on Sunday or holiday. The fact that the last day of a prescribed period is Sunday or other non-judicial day does not as a general rule give the person who is called upon to act an extra day. It is no excuse for his omission to do the act on some prior day. Therefore the letter of demand sent on 28.06.2002 a Friday was received on first July 2002 by post was received on the day when the document of guarantee was due to expire.

Of the issues agreed upon, issue No. 1 is not relevant in view of judgment entered into against the first

Defendant. The amount claimed against first Defendant is as claimed Kshs.4,587,147.95. Regarding issue No. 2, there is no dispute about the conditions and terms of the guarantee as written in the exhibit. However, issue numbered 3 is relevant here. The 2nd Defendant submits strongly that the Plaintiff committed breach of the contract of guarantee. The amount of liability was reduced from the original sum of Kshs.8,500,000/= to Kshs.5,5000,000/= and lastly to the sum of Kshs. 4,500,000 /= at the request of the 2nd Defendant. Therefore, by the time the period of extended guarantee expired the liability was Kshs.4,500,000 /=

There is nothing turning on that variation of the liability as this was purely between Plaintiff and the guarantor. The issue of the demand letter of 28th June 2002 , we have seen the legal situation. I would follow the provisions of our Act Cap 2. Interpretation and General Provisions Act and say it is my finding that the letter was given within the period of the existence of the contract of guarantee.

The limit of liability was Kshs.4,500,000.00 as at 30.06.2002 as stated in the varied condition of guarantee and Plaintiff can recover no further funds above that figure from end Defendant.

It appears to me that the Defendant as a banker was only obliged to pay on demand any amount not paid by first Defendant. Ordinarily it appears the 1st Defendant used to pay for goods supplied in the usual cause of business. However, by 16.05.2002 there was default. The Plaintiff wrote to the Principal debtor, the 1st Defendant on overdue Account for the period January 2002 to April 2002 and said "*you are advised that your account is due by 15th of the month following the date of purchase."* That was according to agreement reached between Plaintiff and the 1st Defendant. 2nd Defendant was not involved.

This letter indicates that the 1st Defendant Account was overdue and no payments had been made by 1st Defendant since January 2002. The date of default was at the latest 16.05.2002 and the letter to the 2nd Defendant was received on 01.07.2002, a period of 40 days. The Defendant in its letter of 23.10.2002 refused to honour guarantee on the ground that the Plaintiff had requested its claim when guarantee had already lapsed.

I have already said following the provisions of interpretation and General Provisions Act Cap 2, the claim was requested within the validity of the guarantee. Furthermore, the 2nd Defendant had by its conducts lead the Plaintiff to believe that there could be an extension granted since so many extensions had been requested for by second Defendant.

Regarding the breach of guarantee complained of clause number 4 of the exhibit specifically proves"

"*Any claim hereunder shall be made by you to us not later than 30 days from the date of default upon which the claim is made"*

The 2nd Defendant was bound to pay only when the 1st Defendant defaulted payment for the goods supplied within a period of 30 days from date of default. And this would be after demand. In this case the Plaintiff did not demand payment for a period of several months. It appeared the amount of credit accumulated to the sum of Ksh.4,587,147.95. The Defendant submits that in any case, this claim should have been requested within 30 days from 15.05.2002. Defendant has cited several authorities and a decision of the court of Appeal in the *English case of Midland Motor Showrooms Ltd –Vs- Newman.* This was a hire purchase agreement, the payment of money under the agreement was guaranteed by the Defendant as surety. The principal defaulted. The creditor agreed to take cheque from a third party. It was held that there was a binding contract by creditors to give time to principal debtor. And that the liability for payment under the hire purchase agreement was one and indivisible debt and the Defendant was entirely discharged from her suretyship.

The court found that the Plaintiff has for consideration extended time to debtor. The 2nd Defendant also relies on the authority of *Midland Counties Motor Finance Co. Ltd –vs- Slade (1951) 1 K.B 346.* This was also a higher purchase guarantee where the word "*overdue"* was discussed. The two cases were

concerting fixed hire purchase installments. And it was held that the guarantor was entitled to be informed where the Plaintiff extended time to the principal debtor failure to which the guarantor would be discharged of the whole debt.

The 2nd Defendant has also referred to Halsbury's Laws of England Vol. 18 at page 500 there is a dismissal of discharge of guarantor by material alteration. Failure of the consideration and at paragraph 921 non compliance with conditions precedent to liability have not been fulfilled. A condition precedent is one which the party for whose benefit it was inserted can insist upon being fulfilled before he carries out the contract. The surety is entitled to be relieved altogether from liability.

Variation in terms of contract must be material between creditor and principal debtor and will discharge the guarantor which is released from liability by the creditor dealing with principal debtor in a manner at variance with the contract the performance of which is guaranteed.

The same authority discussed the departure from terms of contract with surety.

"*Any departure by the creditor from his contract with surety without the consent whether it be from the express terms of the guarantee itself or from the embodied terms of the principal contract will discharge the surety from liability. Therefore where a guarantee stipulates that a certain period of credit shall be given to the principal debtor. This stipulation must be strictly adhered to."*

The Defendant has cited the local case of Kanyoro –vs- Wakarwa Printers Ltd. and another (2003) 1KLR 127. In that case, the Plaintiff admitted that he had entered into a contract of guarantee on terms which were breached by first Respondent. Further a material variation of the loan contract had been undertaken by the Respondents without his knowledge. The presiding Judge (Hon. Ojwang J.) stated: "the Governing Principle of Law is clearly stated in Halsbury Laws of England 4 Ed. Vol 30 paragraph 253, any material variation between the creditor and the principal debtor will discharge the surety who is relieved from liability by creditor dealing with the principal debtor. In this case, the Defendant Bank was acting as surety to the Plaintiff.

It said to the Plaintiff "*Supply goods to the customer first Defendant, if he does not pay within 30 days I will pay you if you notify me and demand payment within 30 days of default."* It is clear here the Plaintiff delayed to make the demand within that time but made the same within 40 days according to the Defendant. By a letter dated 16.05.2002, the Plaintiff wrote to first Defendant saying "*Your account is long overdue, your account is due by 15th of the month following the month of purchase."* This would bring the days of default up to 15th June and there would be another 30 days to make demand to the second Defendant bringing the final date to 15th July 2002. As it is the letter of demand was dated 28.06.2002 well within the time stipulated under clause 4 aforesaid.

In view of the above the agreed issue numbered 3 has to be answered in this manner that the limited liability to Kshs.4,500,000 /= covered an indivisible debt in that sum. And that cover a period of time the Plaintiff supplied goods on credit to the first Defendant amounting to Kshs.4,587,147.95. This amount should have been paid by 30 days installments according to the agreement. However the Plaintiff failed to notify the 2nd Defendant (guarantor) as each 30 days passed but chose to make demand on 28.06.2002 all at once. There was a stipulation of how much credit the Plaintiff should give to the first Defendant but the agreement simply stated:

"*In consideration of your having agreed to supply M/s Mamucan Enterprises Ltd. of P.O Box 69890, Nairobi (the customer with goods on credit for their business,…… we Bank of Baroda (k) Limited agree with you……."*

Therefore the issue of giving time and extending credit or accommodation does not arise. The Plaintiff claim was made within 30 days of default namely date due was 15th May, 2002 and date of demand was 28th June 2002 and the debt was incurred during the validity of the guarantee.

I therefore find that the Plaintiff did not commit any breach of the terms of the guarantee but that the 2nd Defendant has failed to comply on its part by paying to the Plaintiff the amount claimed limited to Kshs.4,500,000 /= in terms of extended guarantee.

Regarding issue numbered 4, I have already said that the demand made on 28.06.2002 and received on 01.07.2002 was within the life of the guarantee and therefore the demand was made in accordance with the agreement. The upshot is therefore that the 2nd Defendant is bound to pay up the amount guaranteed to the limit of Kshs.4.5 million only.

Judgment is therefore entered for Plaintiff against both fist Defendant and second Defendants jointly and severally in the sum of Kshs. 4,58,147.95 with 2nd Defendant liability limited to Kshs.4,500,000 /=. The amount shall bear interest at court rates from the date of filing the plaint to the date of full payment. The Plaintiff shall also have costs of this suit.

It is so ordered.

DATED this 28th day of October 2008.

JOYCE N. KHAMINWA

JUDGE