

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL SUIT 522 OF 2004

AKIBA BANK LIMITED.....PLAINTIFF

VERSUS

REKHA CHANDIDAS1ST DEFENDANT

GAUTAM CHANDIDAS.....2ND DEFENDANT

RULING

The Defendant has filed a Chamber Summons dated 16th June 2006. That application is brought under Order VI Rule 8 [2] of the Civil Procedure Rules. The defendant seeks an order that the plaintiff do within 14 days deliver to the defendants' particulars of the plaint in terms of a request dated 23rd August 2005. The defendant in default seeks that the Plaint be struck out. The Application is supported by defence counsel Mr. Paul M Mwangi. He states in his affidavit that the request for particulars was served on the plaintiff's Advocate on the 7th day of November 2006. He said in his affidavit that in his view those particulars requested are necessary for the proper conduct and preparation of the defendants case. In a replying affidavit sworn by the legal officer of the plaintiff, it is deponed that the plaintiffs are sued for USD 2,420,000 which is in regard to their liabilities under the unconditional and irrevocable guarantee executed by them in favour of the plaintiff. The deponent further stated that the defendants in their defence alleged that those guarantees were conditional. That by so stating the defendant did not deny that they were Directors of the Principal Debtor. The deponent further stated that the particulars of the loan and advances made to the Principal Debtor were within the knowledge of the defendants at material times. The deponent therefore concluded by saying that the request of particular amounted for a request for evidence.

In order to understand what is before the court it is important to refer to the Amended Plaint filed by the plaintiff on the 28th July 2005. In the plaint the averments are that the Defendants executed unconditional and irrevocable guarantees in favour of the plaintiff on consideration of the plaintiff making or continuing to make loans or advances or giving credit and granting facilities or accommodation to Indigo Garments Export Process Zone Ltd, which is the Principal Debtor herein. In the defence filed on behalf of the defendants, the defendants averred that the guarantees were conditional and subject to the plaintiff granting to the Principal Debtor monies or facilities which the Principal Debtor was allowed by Law to borrow. The defendants deny having knowledge of the loan or advances made to the Principal Debtor. The defendants therefore conclude that their liabilities under the guarantee are subject to the establishment of the liability against the Principal Debtor. In the plaintiff's submissions by their counsel, counsel emphasized the fact that the defendants were Directors of the Principal Debtor and therefore ought to have knowledge of all the dealings of the Principal Debtor. In making that argument plaintiff's counsel did not state whether the defendants were Executive Directors, in other words whether they were involved in the day-to-day running of the Company of the Principal Debtor. Plaintiffs counsel also emphasized that the guarantees executed by the defendants are entirely independent of the primary contract between itself and the Principal Debtor. In response the court would say that for the plaintiff's claim against the defendants to succeed it would be essential for the plaintiff to prove the liability of the Principal Debtor. Even considering paragraph 4 of the Plaint together with other paragraphs that relate to

the guarantees of the defendants, the plaintiff has pleaded that the consideration of the guarantees executed by the defendant was the loan that were to be given to the Principal Debtor. Having that in mind, in considering the definition of *guarantee* as found in the Blacks Law dictionary, I am of the view that the particulars that are sought by the defendant namely particulars (a) – (f) are pertinent to this action. The definition of *guarantee* in that said Dictionary is stated to be “**to assume suretyship obligation; to agree to answer for a debt on default**” **The Supreme Court Practice 1999** has stated that the requirement to give particulars reflects the overriding principal that litigation between the parties and particularly the trial should be conducted freely openly without surprises and far as possible to minimize costs. I have considered the requests made by the defendant and as stated herein before, I am of the view that the plaintiff in answering the same it will ensure that the trial of this case will be conducted with no surprises to the defendant. The plaintiff in the present claim has pleaded that the defendants have breached the guarantee. The defendants can only be said to have breached the guarantee if the liability of the Principal Debtor is proved. For that reason I will order that the particulars contained in the defendants request for particulars dated 23rd August 2005 be provided by the plaintiff namely particulars (a)– (f). In respect of particular (g), I am of the view that the same seeks evidence from the plaintiff and is therefore not proper to be supplied to the defendant.

The court therefore grants the order as stated herein before and the costs of the Chamber Summons dated 16th June 2006 shall be in the cause. Orders accordingly.

Dated and delivered on the 19th day of February 2007.

MARY KASANGO

JUDGE