



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

**Civil Case 400 of 2004**

**MAGANLAL M. CHANDARIA .....1<sup>ST</sup> PLAINTIFF**

**MAHESH CHANDARIA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SOLOMON MUTHAMIA .....DEFENDANT**

**RULING**

In the application dated 22.8.2007, the defendant seeks;

- (1) That the plaint be struck out
- (2) That the suit be dismissed and
- (3) That the plaintiffs pay costs.

The application is under order 6 Rule 13(1) b and section 3A of the Civil Procedure Rules and Act. It is alleged that the plaintiff's whole case depends on a guarantee as stated in paragraph 3 of the plaint being such one as was a guarantee in writing dated 2<sup>nd</sup> April 2002 and executed by the defendant. The defendant avers that;

- (1) There does not exist any guarantee executed by the defendant at all to the alleged effect.**
- (2) There does not exist any guarantee to the best of his knowledge dated 2<sup>nd</sup> April 2002**
- (3) There does not exist any written guarantee.**

And that in the absence of a guarantee, it is not possible to determine the guarantor's obligations and rights as to any relay of funds, amount thereof how the amounts were constituted and accumulated, and a claim such as interest as sought in the plaint. The applicant therefore alleges that the plaintiffs have no case against him in the absence of a duly executed guarantee, especially in view of the defendant's denial in his defence and to allow the case to proceed to full hearing in such circumstances shall be in vain and inconsiderate stewardship of court's time.

It is also the case of the defendant that;

- (1) No attempt has been made to effect recovery from the principal debtor, before resort to guarantor (if there was any guarantee at all) and no cause has arisen as against the defendant.
- (2) Even if there was any guarantee (which is denied) then the same was discharged when the plaintiff's and the principal debtors offered each other accommodations and latitudes to the exclusion of the defendant thereby fatally frustrating any guarantee that may have been obtained, therefore the plaintiffs have no competent locus to purport to seek to enforce a right that did not belong to them and which has not been properly devolved to them.

The application was argued by **Mr. Kilukumi** on behalf of the defendant/applicant, who stated that the genesis of the application is paragraph 3 of the plaint, which is claiming a sum of over 107 million against the defendant. The claim is said to be founded on a guarantee and it is alleged that the defendant guaranteed payment to **Guardian Bank Limited**, and that the applicant had given unlimited guarantee. And when the matter was filed the defendant requested for particulars of the unlimited guarantee and none was supplied. However the plaintiff supplied a limited guarantee as part of its exhibits for the hearing of this suit.

**Mr. Kilukumi** Advocate then made several attacks on the provisions in the alleged document in that the intention of the document and that of the parties are at variance. According to him the intention of the parties was to enter into a limited guarantee and that he does not understand how and why the plaintiffs claim the sum claimed in the plaint. **Mr. Kilukumi** Advocate further submitted that the amount guaranteed was so fundamental or central and it renders the unlimited guarantee unenforceable. And since the parties intended to govern their relationship the document should contain the intention of the parties, hence he urged me to allow the application.

**Mr. Fraser** Advocate for the plaintiffs submitted that the submissions made in support of the application is very far away from the application before it. That the application is based on the allegations that there is no guarantee, while **Mr. Kilukumi** Advocate submissions was based on the interpretation and contents of the guarantee documents. **Mr. Fraser** Advocate was of the view that the defendant was unable to show and/or establish that the plaint is scandalous to stand a chance of succeeding at the hearing. According to **Mr. Fraser** the test is whether the claim is sustainable or is it totally without merit.

I have considered the application, the affidavits of the parties and the submissions made by the two Advocates. As a start, it is essential to note that it is not the place of this court to determine the strength of the cause of action as pleaded and denied by the parties. It also suffices to say that this court has no jurisdiction to embark on the correct interpretation of the central document i.e. the guarantee. The test at this stage is whether the plaint discloses a sustainable cause of action which must await a full hearing of the issues in dispute between the parties.

It is the case of the defendant that there does not exist any guarantee executed by him on 2<sup>nd</sup> April 2002. And that to the best of his knowledge there does not exist any guarantee dated 2<sup>nd</sup> April 2002. It is also the contention of the defendant that there does not exist any written guarantee. And that in the absence of a guarantee, it is not possible to determine the guarantor's obligations and rights in so far the amount and the actual liability is concerned.

Having taken into consideration the contents of the defence, which I do not wish to address with a view not to circumvent and/or pre-empt the case of the defendant I think it is important to say that the suit of the plaintiffs cannot be struck out or dismissed at this stage. It is clear in my mind that the application under my determination and the submissions made by **Mr. Kilukumi** Advocate goes contrary to averments contained in the defendant's defence. The defendant positively asserts that there does not exist any guarantee executed by him on 2<sup>nd</sup> April 2002. It therefore means the question of whether the guarantee is limited or unlimited does not arise. It cannot arise because the defendant has denied knowledge of the existence of any guarantee. The liability and limit of the alleged guarantee cannot be questioned by the defendant, since he has totally denied having knowledge of the same. The law does not allow parties to plead both sides of the coin with a view to defeat the claim of the opposite party.

According to **Mr. Kilukumi** Advocate, the case of the defendant is that he did not execute the alleged guarantee to the alleged effect. And that the defendant says that he never executed any unlimited guarantee. I have closely scrutinized the contents of the defence filed and I am afraid to report that such allegations is not part of the defendant's defence. In my understanding the plaintiff does not admit owing the defendant the amounts alleged or at all because;

- (1) That any monies that may have been borrowed was borrowed by Euro Bank Ltd.
- (2) That Euro Bank Ltd is a separate and distinct entity from him, therefore he cannot be liable for the debts and liabilities of **Euro Bank Ltd**.
- (3) He also says that he acted for **Euro Bank Ltd** as an agent but not in his personal capacity or as an alleged guarantor.
- (4) That he is a stranger as an alleged guarantor to the sums claimed by the plaintiffs etc.

Again let me say that since the defendant has categorically denied the existence of the guarantee document, it is outside his jurisdiction to question its contents. It is not within the powers of the defendant to employ double standard in order to defeat the case of the plaintiffs. It was open to the defendant to first admit the guarantee and then question whether it was to be limited or unlimited. However it is not within the legitimate powers of the defendant to say that the plaintiffs have in their possession unlimited guarantee allegedly signed and executed by me, while the document I intended was for a limited liability. I agree with **Mr. Kilukumi** Advocate that the amount guaranteed is so fundamental in a guarantee document but is it open to a party who has denied the existence of a guarantee to say the issue of unlimited renders the guarantee unenforceable. I think for a party to question the kind and nature of a guarantee, he must first bring himself within the boundary of an acceptable pleadings.

In my humble opinion it is not an acceptable pleading for a party to totally deny the existence of a document and thereafter seek the intervention of the court to interpret and assign a particular meaning to the same he denied. For you to be heard on the contents of a document, liability accrued and intention of the parties to that document, it is incumbent you to first admit the existence of the same. I do not think the defendant has admitted the existence of the document he blatantly attacks as unenforceable. I fail to understand how the guarantee dated 2<sup>nd</sup> April 2002 is unenforceable against the defendant, when he totally denies anything to do with it. If he runs away from the said document, this court must too run away from its interpretation. I think the sufficiency of the guarantee document against the defendant is a premature question for this court to answer. In the premises the attack on the contents and nature of the guarantee as understood by the defendant is without foundation. The objection on the said guarantee lacks seriousness because the defendant is pre-empting a situation which is not ideal. It is not ideal because that would be determined at the hearing through oral evidence.

In my understanding and as is always said to strike out a pleading is extremely draconian measure to be employed by the entity entrusted to give parties a chance on their case. The general attitude of the courts has always been to allow parties their day in court so that they can present their grievances for determination. I do not think the pleadings of the plaintiffs is incontestably bad and beyond curative remedy of a suitable amendment. The case of the plaintiffs is fairly sustainable against the defendant and I think the attempt to put in a bad picture cannot succeed.

Having taken into consideration the strength and weakness of the plaintiffs' case against the defendant, I think the application must fail. It has failed for the reasons advanced hereinabove.

**Order: The Chamber Summons dated 22<sup>nd</sup> august, 2007 is dismissed with costs to the plaintiffs.**

Dated and delivered at Nairobi this 26<sup>th</sup> day of November, 2007.

**M. A. WARSAME**

**JUDGE**

**Court:** Ruling delivered in the presence of **Mr. Kaluu** for the applicant and **Mr. Fraser** for the respondent in open court.

**M. A. WARSAME**

**JUDGE**

**26.11.07**