



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

Civil Case 413 of 1997

TRUST BANK LIMITEDPLAINTIFF

VERSUS

PORTWAY STORES (1973) LIMITED 3RD DEFENDANT

KIRTESH PREMCHAND.....2ND DEFENDANT

RAJESH NEMCHAND SHAH3RD DEFENDANT

HETAL NEMCHAND SHAH4TH DEFENDANT

NISHEEL NEMCHAND SHAH5TH DEFENDANT

JUDGEMENT

This suit proceeded before me against the 2nd Defendant only.

The second Defendant is alleged to have entered into a written guarantee in respect of advances or otherwise giving credit or other financial accommodation to the 1st Defendant herein limited to a sum of Kshs.22 million, together with legal charges and interest accruing after demand was made upon him notwithstanding that the amount recoverable from him may result in total amount in excess of the limit of Kshs. 22 million.

The Plaintiff alleges that it called upon the 1st Defendant to pay a sum of Kshs.61,510,405/25 together with interest thereon by a letter dated the 20.12.1996 and that by a letter dated the 15th November, 1996 it called upon the 2nd Defendant to pay a sum of Kshs.22 million together with interest thereon within 14 days.

The Plaintiff claims from the 2nd Defendant a sum of Kshs. 22 million together with interest thereon at 36% per annum from the 15.11.1996 until payment in full.

Initially a joint Defence was filed in respect of all the Defendants but subsequently the 2nd Defendant filed an amended Defence in which he denied executing a guarantee in favour of the Plaintiff. Without prejudice to that Defence, he contends that if monies were advanced by the Plaintiff to the 1st Defendant he was discharged of his liabilities as guarantors after the Plaintiff made numerous material variations of the original agreement.

Further he alleged that the guarantee is a forgery by the Plaintiff in collusion with the 3rd Defendant and

was fraudulently made to extort money from him. He then sets out particulars of fraud.

Mr. Ngugi Muhindi in his final submissions raised the question of the execution of the guarantee and also material alterations of the original agreements.

There are therefore two issues before the court one is matter of fact and the other mixed fact and law.

The Plaintiff called two witnesses. The first an employee of the Deposit Protection Fund Mr. Lavicha. It was his evidence the 1st Defendant had the accounts with the Plaintiff bank which were overdrawn and by the 1.3.1995, Kshs.25,031,276.15 was outstanding. As a result on the 8.5.2005 the 1st Defendant wrote to the Plaintiff in the following terms:-

“REF: APPLICATION FOR LOAN OF KSH.TWENTY-

TWO MILLION (22,000,000)

As per discussion with Mr. Malkahn/Nitin Chandaria/Arun Jain/Kirtesh Shah of Sigma feeds held on 05/05/95, we would like to apply for the above loan to enable us to clear the overdraft in our current account.”

On the 5.5.95 the 1st Defendant passed a Board Resolution approving the borrowing of a sum of Kshs.22 million from the Plaintiff to be secured by the following security;

- 1) Property on Brookside Drive worth 12 million.
- 2) Personal guarantee from Kirtesh Shah for 22 million.
- 3) Directors personal guarantee for 22 million each.

On the 15.3.1996 the Plaintiff wrote to the 1st Defendant and copied inter alia to the 2nd Defendant referring to the sum of Kshs.47,392,505.95 as being due by the 1st Defendant and stating that unless the full payment was made within seven days the matter would be referred to its lawyers for full recovery of the entire debt.

On the 23.3.1996 the Plaintiff wrote to the 2nd Defendant demanding payment of Kshs.22 million being the amount due in respect of the guarantee he had issued for the borrowing of the 1st Defendant and giving notice that unless it received his remittance within seven days it would refer the matter to its advocates for recovery of the same.

The witness also produced a credit agreement dated the 25.9.95 executed by the 1st Defendant in respect of credit facilities advanced to the 1st Defendant in the sum of Kshs.40 million.

The Plaintiff also called Arun Jain who was the branch manager of the Plaintiff bank at Parklands. He knew the 2nd Defendant and had witnessed his signatures on the guarantee. In cross examination he said that the 3rd Defendant was in a meeting with the directors and General Manager of the Plaintiff at its head office but he was not in the meeting but was waiting outside. He had been called to head office as negotiations were going on.

He agreed that the name “Premchan” should end with a “d”. The written words on page 1 and figure on page 5 were not inserted by him. It is normal for alternations to be initiated.

The 2nd Defendant gave evidence. He stated he had never seen the guarantee (exhibit 3) before. He knew the 3rd Defendant with whom he studied in school, also his brothers the 4th and 5th Defendants. He also knew Arun Jain (PW2) whom he had met at the Nairobi Gymkhana. The 3rd Defendant had

approached him and asked him to be a witness for his house to the bank. They (sic) asked me to go to the bank to witness the property they were to give to the bank. They called him on phone to go to the bank but he was busy and did not go. The 3rd Defendant called again and said all the necessary things he wanted had been done.

He denied being at the meeting referred to in the letter of 8.5.1995.

He denied signing the guarantee where his signature appears. He had never seen the figure "22 million", he did not insert it. He thought Rajesh (3rd Defendant) had forged his signature. He produced his identity card with his signature on it.

In cross examination he stated they (the 3rd, 4th and 5th Defendants) had asked him to guarantee the loan.

He was referred to the particulars of fraud in his Defence in which he stated Arun Jain had perpetrated the forgery but he replied that he did not recall saying Arun Jain had forged it. He did not report the matter to the police.

He denied that he instructed a Mr. Ngunjiri to file a Defence on his behalf, this was done by the other Defendants without his knowledge. He had not instructed him to enter an appearance on his behalf. He denied receiving a letter of demand. He admitted receiving the letter of the 15.3.96.

There are three issues:-

- 1) Did the 2nd Defendant execute the guarantee or was his signature forged as he alleged?
- 2) Whether material alteration to the guarantee discharged him from liability and
- 3) If he is liable on the guarantee and if so what is he bound to pay.

In the course of his examination, I noted that the 2nd Defendant's signature on the guarantee appeared similar to that on his identity card. No expert evidence was adduced and it boils down to a question of who is telling the truth, Mr. Jain or the 2nd Defendant.

The presumption, however, is that the signature on the guarantee is genuine and the onus of showing it is a forgery falls on the 2nd Defendant.

It is difficult to believe the 2nd Defendant when he says he was not aware of the guarantee until he received the copy of the letter of the 15.3.1996 which was a demand made on the 1st Defendant.

He materially altered his evidence as to who forged his signature. In the particulars he names Mr. Jain but in court he accused the 3rd Defendant.

Mr. Jain gave evidence and swore that he was present and witnessed the 2nd Defendant's signature and indeed his signature appears as a witness on the guarantee. I think it highly unlikely that he would have witnessed a signature forged by the 3rd Defendant someone he knew. To do so would involve a conspiracy by the Plaintiff to forge the 2nd Defendant's signature on the guarantee in collusion with the other Defendants. I say this as there was produced a copy of the Board Resolution of the 1st Defendant which indicates as security a guarantee from the 2nd Defendant for KShs.22 million. The letter of the 8th May, 1995 refers to a meeting at which the 2nd Defendant was present and the letter of demand to the 2nd Defendant on the 23.3.1996 in addition to the copy letter to him of the 15.3.1995. Having admitted receiving this last letter he did not make any reply or query. I find Mr. Jain to be a truthful witness and believe that he did in fact witness the 2nd Defendant's signature as he stated on oath.

Having found that the 2nd Defendant did execute the guarantee, do the written words on page 1 and 5 of the guarantee absolve him from liability. It appears to me that their signatures were required as the guarantee form is a standard form in which the blank spaces are to be completed. It is not necessary for them to be either typed or printed. The 2nd Defendant's name although missing a "d" in the second name is clearly a spelling mistake. The sum of Kshs.22 million was the sum stated in the Board Resolution. If indeed the guarantee was to be forged why not make it for Kshs.40,000,000/= the sums guaranteed by the 3rd, 4th and 5th Defendants.

I am satisfied that these writings were on the form of guarantee when the 2nd Defendant signed it and see no reason why these writings should discharge him from liability.

Lastly the sum claimed against him is Kshs.22 million together with interest thereon at 36% from the 15.11.1996.

The accounts (exhibit) 1 adduced in evidence although they show the indebtedness of the 1st Defendant were not claimed in the Plaint as special damages.

The guarantee does not state what rate of interest was to be charged to the Defendant. This is a matter of proof and no evidence was brought before me to show what rate was charged. In the absence of such proof I give judgement in favour of the Plaintiff in the sum of Kshs.22 million together with interest at court rates from the date of the filing of the Plaint together with costs.

Dated and delivered at Nairobi this 25th day of January, 2006.

P. J. RANSLEY

JUDGE