



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

Civil Suit 121 of 2005

THE CO-OPERATIVE BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

CHARTERHOUSE BANK LIMITED.....DEFENDANT

RULING

The defendant raised a preliminary objection on three grounds. That is: -

- (1) The entire suit and consequently the application is incompetent and does not lie for want of jurisdiction.
- (2) The guarantee subject matter of the suit is specifically expressed to be governed by GERMAN law thereby ousting Kenya Law and jurisdiction.
- (3) The instant guarantee has in any event been unilaterally varied by the plaintiff thereby discharging the defendant from its obligation, if any.

The defendant in support of that objection submitted as follows; that the entire suit cannot lie for want of jurisdiction because the counter guarantee, which is subject of this suit is governed by German Law. That there are two guarantees, one between the plaintiff and defenant, and the second between the plaintiff and American Express Bank of Frankfurt of Germany. That it was in regard to that relationship that the plaintiff filed the present case.

Defence counsel referred to the counter guarantee dated 15th December, 2003, between the plaintiff and American Express Bank Frankfurt which states:

“German law shall govern our counter guarantee and all transactions performed there under.”

For the reason of the above provision the defendant submitted that the plaintiff’s suit is premature and cannot lie.

Defence counsel further argued that there were prerequisites contained in the counter guarantee, which the plaintiff ought to have met before filing this suit, such as first demand by registered mail.

In response, the plaintiff’s counsel, opposed the preliminary objection on the basis that the same was

misconceived. That the same was misconceived because the defendant is not a party to the counter guarantee, and accordingly the provisions of that counter guarantee was not available to the defendant. Plaintiff's counsel said that the plaintiff's claim was captured in paragraph 3 of the plaint where the plaint pleads that it issued a counter guarantee to a known beneficiary on behalf of the defendant's client and at the defendant's request. That the plaintiff's claim therefore prays for payment by the defendant in terms of their request for guarantee by the plaintiff.

The defendant responding to plaintiff's opposition argued, that it was not open to the plaintiff to argue, that the defendant is not a party to the counter guarantee, when infact that counter guarantee mentions the defendant's customer.

The preliminary objection No. 1 and 2 can be collapsed into one for the defendant in its submissions treated them as one.

The defendant, in its defence does not deny that it requested by letter the plaintiff to issue the counter guarantee but denies that the letter requesting that counter guarantee, was operative at the time the plaintiff made payment on the counter guarantee.

With those pleadings in mind of the court, the plaintiff argued that its claim arose because of the counter guarantee. In other words the counter guarantee is only in issue as proof that the plaintiff complied with the defendants request. Having determined that the counter guarantee is not in issue but is a vehicle to prove the defendant's liability the court then needs to determine whether the defendant can derive a benefit from the counter guarantee when indeed it was not a party to that counter guarantee. The court's response is in the negative. The counter guarantee was between the plaintiff and the American Express Bank. If anyone is entitled to raise an issue in respect of jurisdiction it is only the plaintiff and the American Express Bank. The defendant is not privy to that counter guarantee. The first two limbs of the defendant's preliminary objection are therefore rejected.

The last objection is not a true legal objection because it involves the court's examination on whether demands were sent to the defendant. If the court was to venture into that direction it would be exercising its discretion to determine the same. That would not be a preliminary objection as envisaged by the case MUKISA BISCUIT COMPANY – V – WEST END [1969] E.A. 696 where Sir Charles Newbold, P said

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct”.

The end result is that the defendants preliminary objection dated 10th February 2006 is dismissed with costs to the plaintiff.

MARY KASANGO

JUDGE

Dated and delivered this 26th May 2006

MARY KASANGO

JUDGE