



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 14 of 1997

CANNON ASSURANCE (K) LIMITED.....PLAINTIFF

VERSUS

ELIJAH MWANGI KINYANJUI.....1ST DEFENDANT

AMOS FISCHER.....2ND DEFENDANT

CHARLES NDERITU MUKORA.....3RD DEFENDANT

J U D G M E N T

The third defendant was served on 19.12.2005 with a hearing notice of this case for hearing on 29th and 30th May 2006.

The case proceeded for hearing on 30th May 2006 in the absence of the 3rd defendant. The plaintiff did not proceed against the 1st and 2nd defendant who were stated to be out of the jurisdiction of this court.

P W 1 **TERRY WANGUI MAINA** stated that she is an assistant legal officer with the plaintiff company. That the principal debtor, namely Boma Development Limited, applied for a loan from the plaintiff of kshs 5 million on or about 2nd January 1991 from the plaintiff.

The plaintiff accepted to grant the said loan and made an offer to the principal debtor by a letter dated 6th March 1991. That some of the condition of that offer was that the said facility be secured by a charge over the property L.R. No. 12832/6 and personal guarantees of the directors of the principal Debtor Company. That the personal guarantees were given by the defendants hereof.

P W 1 referred to page 4 of the plaintiff's documents, which was the guarantees, signed by the defendants.

P.W. 1 referred particularly to the guarantee signed by the 3rd defendant dated 12.6.1991. She said that that guarantee was a continuing guarantee.

P W 1 confirmed that loan was dispersed to the principal debtor and receipt of that amount was confirmed by a letter dated 19th June 1991, written by the principal debtor company. The principal debtor company also issued a receipt for the said amount of kshs 5 million.

P W 1 stated that the said loan was never re-paid to the plaintiff and accordingly the amount was demanded by plaintiff's letters of 18th September 1991, and 13th February 1992.

That by their letter dated 21st February 1992, the principal debtor requested for time to settle the debt.

That the plaintiffs advocates made demand from the principal debtor and the 3rd defendant by their letter dated 24th April 1992. The demand to the 3rd defendant demanded kshs 5 million plus interest at 22.5% per annum.

That the interest due was varied by the plaintiff, as provided in the guarantee, to the rate of 35% per annum. That that variation of interest rate was communicated to the 3rd defendant by the plaintiff's letter dated 7th September 1993 and the 3rd defendant acknowledged receipt of that letter.

That thereafter the 3rd defendant made some payments towards the debt namely:

- 29.7.1994 Kshs 150, 000 Cheque cleared
- 24.10.1994 kshs 150, 000 Returned Cheque unpaid
- 3.11.1994 kshs 50, 000 Returned Cheque unpaid.
- 31.5.1995 kshs 150, 000 Cheque cleared
- 8.6.1995 kshs 150, 000 cheque cleared.

P W 1 concluded that the plaintiff was seeking judgment against the 3rd defendant for kshs 5 million together with interest at the rate of 35% per annum.

P W 2 **JOSEPH MUSWETA USIRI** is the plaintiff's accountant. He said that had had been employed by the plaintiff from 1985 to date.

He referred to the statement of account which he said related mortgage account No. 2083 and that it related to Boma Development Limited.

He confirmed that the loan was dispersed to the principal debtor company on 18th June 1991. That the other debits seen in the statements related to the interest charged. He confirmed that all the payments made by the 3rd defendant had been credited into the principal debtors account.

I have considered the plaintiff's evidence and I find the burden of proof has adequately been discharged by the plaintiff in its proof of the case against the 3rd defendant.

The plaintiff has proved that the 3rd defendant executed a guarantee, guaranteeing the principal debtor's debt, dated 12th June 1991. The plaintiff further proved that the said guarantee was supported by a consideration, in that the loan facility was granted to the principal debtor on 18th June 1991. The principal debtor indeed confirmed receipt of kshs 5 million from the plaintiff.

There was no evidence that the plaintiff, subsequent to granting that facility, altered the terms of that facility. The variation was only restricted to the rate of interest which variation was provided for in the executed guarantee and charge.

The court is of the view that a demand was forwarded to the 3rd defendant demanding the guaranteed amount. That demand sent by plaintiff's counsel was dated on 24th April 1992. From that date of demand the 3rd defendant was obligated to settle the amount in the guarantee, that is, kshs 5 million. From that date the plaintiff was legally entitled to apply interest on the guarantee amount which interest the plaintiff's witness in evidence stated was 35%.

I have perused the demand dated 24th April 1992 and I find that the plaintiff stated, therein, that the applicable rate of interest was 22.5% per annum. The variation of interest in the letter dated 7.9.1993 was only communicated to the principal debtor. The court will therefore hold that the applicable interest in respect of the 3rd defendant, is 22.5% per annum from the date of demand.

The defendant is entitled to credit of the amounts he paid of kshs 450, 000, which amount was paid by him after the demand of 24th April 1992.

The court's judgment therefore is in the following terms: -

(1) That judgement be and is hereby entered in favour of the plaintiff against the 3rd defendant for kshs 5 million with interest at 22.5% per annum from 24th April 1992 until payment in full.

(2) Credit be given to the 3rd defendant of kshs 450, 000/- paid as follows: -

- 29.7.1994 kshs 150, 000;
- 31.5.1995;
- and on 8.6.1995 kshs 150, 000/-.

(3) The plaintiff is awarded costs of the suit as against the 3rd defendant.

MARY KASANGO

JUDGE

Dated and delivered this 8th June 2006

MARY KASANGO

JUDGE