



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 1885 of 2001

NATIONWIDE FINANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

J. H. A LUIES.....1ST DEFENDANT

FRANCIS MBURU.....2ND DEFENDANT

RULING

The 2nd defendant has brought this application pursuant to the provisions of Order 6 rule 3 of the Civil Procedure Rules. He is requesting the court for leave to amend the Defence which he had filed earlier.

It was the applicant's case that it was only at the time when the plaintiff's application dated 14th February 2005 had come up for hearing, that he (the applicant) discovered that the guarantee which he had signed, was so signed after the conclusion of the contract between the principal debtor and the creditor.

The facts, as set out by the applicant, were that the letter of offer was dated 3rd October 1983. The date of that letter is stated at paragraph 4 of the Amended Plaintiff, which was filed in court on 13th July 1992.

The applicant then asserted that, (at paragraph 5A of the Amended Plaintiff), the Agreement was completed by 4th October 1983.

Therefore, in the light of the fact that the guarantee instrument, which is the foundation of the claim against the applicant herein, was executed on 15th October 1983, the applicant contends that the guarantee was in respect of past consideration. For that reason, the applicant desires to bring out, by his proposed amendments, the facts which will enable him demonstrate that the guarantee was for a past consideration.

In support of its application, the applicant placed reliance on the text titled "**THE LAW of GUARANTEE**", which was authored by Kevin Patrick McGuinness. At page 94 of that treatise, the learned author had this to say at paragraph 4.64;

"By definition, a guarantee must (as a secondary obligation) relate to a primary obligation of some

other person. However, the mere existence of a present, or possibility of a future, primary liability is not by itself sufficient to constitute the consideration required to support the guarantor's promise to answer for that primary liability. In general, a guarantee in respect of an existing indebtedness must be purchased by the creditor, through the giving of a new consideration, such as a binding agreement to extend further credit, or by entering into a binding agreement to restructure the terms of repayment of the existing indebtedness. If there is no such new consideration, then the guarantee will be unenforceable, and the surety may require it to be delivered up for cancellation. Where it is not clear from the agreement whether fresh consideration is being given, extrinsic evidence may be introduced to show whether such consideration exists. The consideration in support of a guarantee must be real rather than illusory."

If that quotation be the embodiment of the correct interpretation of the law, it may well provide the defendant with an arguable line of defence. However, as the defendant had not incorporated that line of defence into his original defence, it may not be open to him to canvass issues geared towards proving that the consideration herein was past consideration. It is for that reason that the 2nd defendant is asking the court to grant him leave to amend the Defence.

In response to the application, the plaintiff contends that the application has been brought in bad faith. And in an endeavour to demonstrate the said bad faith, the plaintiff points out that the applicant was not being candid when he asserted that he first became aware that the consideration for the guarantee may be past, only when the application dated 14th February 2005 was being canvassed.

For the record, the said application (dated 14th February 2005) was argued, before the HON AZANGALALA J. on 15th March and 12th April 2005.

Why does the plaintiff contend that the applicant knew of the alleged "**past consideration**" before the 15th of March 2005?

According to the plaintiff, the answer lies in the 2nd defendant's affidavit which was sworn on 14th February 2005, and which was then filed in court on that same date. Paragraph 4 of that affidavit reads as follows:

"THAT I am advised by my advocate, which advice I verily believe to be true that the plaintiff's suit is grounded on past consideration which offends the principles of the Law of Contract."

Based on that deposition, amongst others, the applicant herein had sought to have the plaint struck out and the suit dismissed, with costs.

In the light of that deposition, which was in support of the 2nd defendant's own application, it is obvious that on a strict interpretation of the factual sequence of the events, the applicant did form the opinion that the guarantee was founded on "**past consideration**", before he filed the application dated 14th February 2005. It is for that reason that he made an assertion to that effect, in his affidavit sworn on 14th February 2005.

Therefore, he had formed that opinion prior to the arguments on the application dated 14th February 2005, as the said arguments were placed before the court on 15th March and 12th April 2005.

The second issue raised by the plaintiff is that the issue regarding the alleged belated execution of the guarantee, vis-à-vis the contract that was being secured thereby, had been fully canvassed before the court, when the application dated 14th February 2005 was heard.

I have perused the record of the proceedings relating to the said application. There is no doubt that the parties did address the issue as regards the assertion that the guarantee herein was based on past

consideration.

Having given due consideration to that issue, the HON AZANGALALA J. addressed his mind thereto in the manner following, in his ruling dated 18th May 2005;

“Regarding the challenge made that the consideration for the guarantee was past consideration it was argued for the plaintiff that that was not the case as the guarantee related to sums then owing and to be owing, which is not past consideration.

.....

It is significant that the 2nd Defendant filed his defence on 14th August, 1987. He did not challenge the guarantee.”

Because of that finding, amongst others the learned judge dismissed the 2nd defendant’s application to strike out the plaint.

In my understanding, the judge did not purport to make any definitive and final findings on the issue. He only made it clear that the Amended Plaint was not lacking in seriousness. He also said that the said plaint was neither frivolous nor vexatious. Furthermore, he found that the plaint was not scandalous.

Instead, he left the issue to be determined by the trial court. And in my considered view, the learned judge was right to have left the issue to be so determined.

Similarly, I find that the issues as to the validity and enforceability of the guarantee instrument is best left for determination by the trial court. I therefore decline to pass any verdict, as I was invited so to do, by the plaintiff, that the execution of the contract between the principal debtor and the borrower constituted a single transaction, together with the execution of the guarantee.

Another issue which was raised by the plaintiff was to the effect that the delay in bringing this application would occasion prejudice to it. The main prejudice cited was that which would arise due to the fact that the plaintiff’s crucial witnesses were no longer available. In particular, Mr. P J K Mwangi, is said to have retired from the plaintiff’s employment.

The said Mr. P J K Mwangi was the plaintiff’s Managing Director at the material time, and he is said to have handled the 1st defendant’s loan with the 1st defendant.

In the case cited by the applicant, being **CENTRAL KENYA LTD V TRUST BANK LTD [2000] 2 EA 365**, the Court of Appeal observed (at page 368) that;

“.... the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage at the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot be compensated for in costs.”

In this case, the respondent’s former Managing Director had since retired. It is that development which is seen as being the basis for the prejudice which the plaintiff would suffer. However, the plaintiff did not disclose to the court when exactly its former Managing Director retired. That omission is significant because the plaintiff itself had, on 7th March 2005, filed a Replying Affidavit sworn by a Mr. Mwinyi F. Khatib, who was their Officer-in-Charge of the Remedial Unit.

If Mr. P J K Mwangi was still the plaintiff’s Managing Director as at 7th March 2005, one would have expected him to have sworn the Replying Affidavit, as it is said that he is the person who had handled the 1st defendant’s account, at the material time. But, as the plaintiff was able to get someone else to make the Replying Affidavit, that fact suggests that the plaintiff is not entirely without witnesses.

In any event, I believe that mere retirement from employment cannot preclude Mr. P J K Mwangi from making himself available as a witness for the plaintiff. Of course, it might become more inconvenient to get him to come to court, especially if he might have retired to his rural home, but that kind of inconvenience can be compensated by an appropriate order for costs.

In the case of **CENTRAL KENYA LTD V TRUST BANK LTD** (above-cited) the Court of Appeal went on to state as follows, at pages 369 – 370;

“As we stated earlier, the Learned Trial Judge took issue with the length of the proposed amendments. In his view they were too long. Mere length of proposed amendments is not a ground for declining leave to amend. The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposin party beyond monetary compensation in costs.”

As the plaintiff has not demonstrated that if the proposed amendment were to be allowed, it would suffer such prejudice as would be incapable of being compensated by an appropriate order for costs, I find that the delay herein, is not, of itself, a bar to an order granting leave to the applicant to amend his defence.

Although neither of the parties touched on the following point, I believe that it has a direct bearing on the application. The point being, that the applicant’s proposed amendments do not emanate from any new matters of fact. The applicant is simply placing reliance on dates which have hitherto been cited by the plaintiff, to give rise to a defence. Those matters of fact should not thus surprise the plaintiff at all.

On another note, I failed to find the inconsistencies which the plaintiff contends are to be found between the original line of defence and the proposed amendments. In the Defence dated 13th August 1987, the 2nd defendant, pleaded thus, at paragraph 2 thereof;

“The Second Defendant makes no admission of paragraph 4 and 5 of the Plaint save and except that he signed some forms to guarantee overdraft facilities to the Second Defendant to the extent of Shs. 674,950/=. If the said guarantee was in respect of Hire Agreement, the Second Defendant will plead NON EST FACTUM and further state that the requirements of Hire Purchase Agreement have not been complied with, and furthermore the amount guaranteed by the Second Defendant has been paid in full.”

In effect, the applicant had not denied signing the guarantee, as the plaintiff contended in its submissions before me. Indeed, that part of the original defence is not being changed even if the applicant is granted leave to amend.

To my mind, as the dates when the plaintiff accorded facilities to the 1st defendant, and when the 2nd defendant executed the guarantee instrument, are common ground, the real issue for determination between the parties would be whether or not the said guarantee was enforceable. And, in order to make it clear beyond any doubt that that is an issue for determination, I hold that the interests of justice demanded that the applicant be granted leave to amend the defence. Accordingly, the application dated 8th September 2006 is allowed.

The 2nd defendant shall amend his defence as per the draft attached to his application dated 8th September 2006. The said amendment shall be effected within the next TEN (10) DAYS from today.

As regards costs, the same shall be borne by the 2nd defendant, in any event, for he cannot fault any other person for having not got it right on the first occasion.

Dated and Delivered at Nairobi this 27th day of October 2006.

FRED A OCHIENG

JUDGE