



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**MILIMANI COMMERCIAL COURTS**

**Civil Case 156 of 2004**

**DONHOLM RAHISI STORES (suing as firm).....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD. ....1ST DEFENDANT**

**EAST AFRICAN PORTLAND CEMENT CO. ....2ND DEFENDANT**

**RULING**

Some background is useful to this Ruling. Firstly, on or about 13.09.2002, the 1st Defendant granted to the Plaintiff Ancillary Facility in the sum of KES.100,000,000/= which comprised Bills Guarantees and indemnities. The ancillary Facility was to be used for the purpose of Guarantee in favour of East African Portland Cement Company Ltd. The Ancillary Facility was payable strictly on demand, the terms of the Ancillary Facility were accepted by the Plaintiff.

Secondly, on 26.09.2003, a year later, the 1st Defendant offered the Plaintiff an Overdraft Facility (of Guarantees and Indemnities) in the sum of Kshs.100,000,000/= the purpose of which was to facilitate issuing guarantees to East African Portland Cement Ltd. for trading purposes, repayable on demand, and scheduled for review by 23.09.2004.

The Ancillary Facility was secured by a First Charge over cash for Kshs.100,000,000/= held in the names of the individuals named in the offer letter, Mohammed K. Mahat and Abdi-Aziz Mahat at the 1st Defendant Bank.

Thirdly, in keeping with the terms of the offer for the first Ancillary Facility, the 1st Defendant issued to the 2nd Defendant on 24.09.2002 a **Cheque Guarantee** No. 74GTEE 04943 for Kshs.100,000,000/=, said to be in consideration of the 2nd Defendant agreeing to supply the Plaintiff with goods on credit in connection with the Plaintiff (Customer's) business. Clause 5 of the guarantee provided as follows –

"5) ANY CLAIM HEREUNDER SHALL BE MADE BY YOU TO THE BANK IN WRITING NOT LATER THAN THIRTY (30) DAYS FROM THE DATE OF DEFAULT BY HE CUSTOMER AND ANY SUCH CLAIM SHALL BE ADDRESSED TO THE BANK'S BARCLAY'S PLAZA BUSINESS CENTRE AT P. O. BOX 4661 NAIROBI."

The other terms in the Cheque Guarantee included the Bank's right to revoke it, and it would expire twelve (12) months from the date of issue.

This original document was forwarded to the Plaintiff on 24.09.2002.

Fourthly, the said Guarantee was on 21.11.2003 at the request of the Plaintiff extended in the said sum of Kshs.100,000,000/= until 23.09.24.

Fifthly, a demand was made in writing by the 2nd Defendant to the 1st Defendant by a letter dated 18.03.2004, and within the subsistence of the Cheque Guarantee.

In the context of the above captioned background, the Plaintiff herein filed suit on 22.03.2004. Simultaneously with the Plaintiff, the Plaintiff also filed an Application by way of a Chamber Summons on which the Plaintiff prayed for five Principal Orders, including prayers No. 3 and 4 which were in these terms – 1 – 2

"3. That the Honourable Court do issue a temporary injunction restraining the 1st Defendant whether by itself, its agents, employees, management staff howsoever from paying the 2nd Defendant and/or anyone else other than the Plaintiff the sum of Kshs.100,000,000/= deposited with it by the Plaintiff firm pursuant to a cheque guarantee No. 74GTEE 04943, or any other sum on account of the said cheque guarantee pending the hearing and final determination of the suit.

4. (Is in the same terms as prayer 3.)

On 22.03.2004, I granted orders in terms of prayer No. 3 as drafted above. I am not sure whether the above prayer NO. 3 was deliberately worded the way it is, or whether it was intended to say or refer to the hearing of the application "**inter partes**" as the rules clearly provide that an **ex parte** injunction may be granted only once for not more than 14 days and shall not be renewable (Order XXXIX, rule 3 (2) of the Civil Procedure Rules).

I am grateful to Ahmed Nasir learned Counsel for the Plaintiff for the apparent clarification of this matter in his submission dated 15.04.2005 in Reply to the submission by the 2nd Defendant, that the **ex parte order** was an interim measure, and that all the parties understand that, and that the Plaintiff did not at anytime argue that it was a final order, although it was so framed. It was my understanding at all times that it was to be a temporary, and not a final order. I shall however, revert to this matter in the concluding parts of this Ruling. I am also grateful to three learned Counsels Mr. Ahmed Nasir, former Chairman of the Law Society of Kenya, Prof. Githu Muigai (Ph.D), and Oriaro for the plaintiff, 1st and 2nd Defendants for their lucid and well presented submissions on this rather difficult and confusing subject.

After several adjournments with a view to negotiating a settlement, the parties positions hardened. The Plaintiff filed an Application by way of a Notice of Motion, dated 7.12.2004 seeking summary judgement against the 1st Defendant for the sum of Kshs.100,000,000/=. The 2nd Defendant in turn filed an application by way of a Notice of Motion dated 26.01.2005 seeking orders for stay of the Plaintiff's application of summary judgement dated 8,12.2004 pending the hearing of the application of 22.03.2004 and setting aside of the orders made on that date.

The 1st Defendant was not left behind because it filed inter pleader proceedings on 2.02.2005 in which it sought a stay in the proceedings pending the determination of its own application.

So when these matter came up for hearing, the parties agreed to urge the Plaintiff's Chamber Summons application of 22.03.2004, and the 2nd Defendant's application of 26.01.2005 filed on 28.01.2005 praying that the ex parte orders made on 22.03.2004 be set aside. The 1st Defendant's Counsel, I think, did not object to this arrangement. This Ruling therefore concerns these applications, seeking for the Plaintiff confirmation of the injunctive orders made on 22.03.2004, and for the 2nd Defendant, discharge of those orders.

During those submissions, Mr. Ahmed Nasir narrowed his application to one prayer, namely prayer 3 which I have already set out above. He told the Court that he elected to take this stand on two grounds.

Firstly, that in light of the 1st Defendant's inter pleader application which is still pending and in particular

grounds 1 and 4 thereof – that 1st Defendant claims no interest in the subject matter in dispute other than for charges and costs, (Ground 1) and that the applicant (1st Defendant) is willing to pay or transfer the subject matter of the suit ..... into court or to dispose the same as the court may direct (Ground 4), the 1st Defendant has no interest in the matter, and that it cares less who is the eventual winner of the suit as it will suffer no prejudice. If it now opposes the Plaintiff's application for injunction, it means that the 1st Defendant has contradictory pleadings and that this is contrary to the rules pleadings and is by virtue of Section 120 of the Evidence Act (Cap 80, Laws of Kenya) estopped from opposing the application.

Secondly, Counsel submitted, that since the Plaintiff is not seeking any orders against the 2nd Defendant, it could not be heard at all in opposition to the Plaintiff's application for injunction against the 1st Defendant. The legal basis for this is that the Plaintiff seeks no order either restraining or compelling the 2nd Defendant to do or stop doing anything. It cannot intrude into the application before the Court, that it is a complete stranger, it is a disinterested person in the application.

Let me dispose of this aspect of the Plaintiff's argument. My understanding of the 1st Defendant's interpleader application is that it was based upon the mistaken understanding of the ex parte order of 22.03.2004 that it was final in nature, hence if it was, then 1st Defendant had no interest in the outcome of the dispute between the Plaintiff and the 2nd Defendant. Even if the 1st Defendant is not heard, or the written submission of its Counsel are not considered, it is still does not dispose of the Plaintiff's application.

As for the 2nd Defendant, it cannot be locked away. By the Plaintiff's pleadings themselves, the 2nd Defendant is made a party, a Defendant, it is not a stranger. It is not a disinterested party. I do not therefore accept or agree with this part of the Plaintiff's submissions.

I now turn to the Plaintiff's case. It is set out and grounded upon the Plaint dated 22.03.2004, Chamber Summons of 22.03.2004, the grounds and the Supporting and the Supplementary Affidavits of Mohammed Mahat Kuho sworn on 22.03.2004 and 18.02.2005 respectively. The Plaintiff's case is that the Cheque guarantee is governed by the laws of guarantee and is not a performance bond, and the relief sought by the Plaintiff is an equitable remedy, and is subject to the Court's discretion. To earn that discretion, the Plaintiff must show that it has always done equity to the 2nd defendant. The Plaintiff has had extensive dealings with the 2nd Defendant, worth over of Kshs.1.3 Billion and all cheques issued in relation thereto had been honoured, and had therefore come to Court with clean hands. It merely seeks to enforce its rights against the 2nd Defendant from receiving the Kshs.100,000,000/= which is not due to the 2nd Defendant. The Plaintiff has come to Court without delay, and is not guilty of any laches.

The Plaintiff also claimed that it had satisfied the triple tests for the grant of an injunction in East Africa as set out in the *GIELLA –VS- CASMAN BROWN & CO. LTD.* [1973] EA 358 that the Plaintiff's case has a high probability of success that the Plaintiff will suffer irreparable injury and loss unless the injunction is granted and that the balance of convenience lay with the Plaintiff. The Plaintiff says that it created the guarantee for the benefit of the 2nd Defendant, but that this was subject to certain conditions being fulfilled, and that those conditions not having been fulfilled, the Plaintiff has not breached any condition of contract between it and the 2nd Defendant, and that therefore, the Kshs.100,000,000/= belongs to the Plaintiff, and that once the Plaintiff shows the Court that it has a legal right which ought to be protected, by injunction, the Court must protect it.

The Plaintiff also submitted that it would suffer irreparable loss. It would not be able to recover from the 2nd Defendant. The second Defendant is in financial straits as per the Replying Affidavit sworn by ALI R. HAJI at paragraph 11 in support of the 2nd Defendant's application dated 26.03.2005 to discharge the injunction. So the Plaintiff has also fulfilled the second leg of the **Giella –vs- Casman Brown** case principles.

As for the third principle, the balance of convenience also lay with the Plaintiff.

The money contested belongs to it, it had not breached any agreement between the parties, and more so, the 2nd Defendant as deposed by one of its officers, is in financial woes.

For these prepositions, the Plaintiff relied upon the speech of Lord Diplock in AMERICAN CYNAMID CO. –VS- ETALLON LIMITED [1975] 1 ALL ER 504 at page 509 (a-l) where he said –

**"My Lords, when an application for an interlocutory injunction to restrain a Defendant from doing acts alleged to be in violation of the Plaintiff's legal rights is made on contested facts, the decision, whether or not to grant an interlocutory injunction has to be taken when ex hypothesis the existence of the rights or violation of it, or both is uncertain and will remain and with reasons uncertain until the final judgement is given in the action. It was to investigate the risk of injustice to the Plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction.**

**But since the middle of 19th century this has been made subject to his undertaking to pay damages to the Defendant for any loss sustained by reason if it should be held at the trial that the Plaintiff had not been entitled to restrain the Defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in this favour at the trial.**

**But the Plaintiff's need for such protection must be weighed against the corresponding need of the Defendant to be protected against any injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the Plaintiff's undertaking in damages if the uncertainty were resolved in the Defendant's favour at the trial. The Court must weigh one need against another and determine where the balance of convenience lies."**

I agree with Mr. Ahmed Nasir's view that the above dictum sets out the juristic flesh upon which the **Giella –vs- Casman Brown & Co.** revolve, and are not in any way inconsistent with the Giella principles. To this case, I shall return later.

The Plaintiff's third issue was that the Court is guided exclusively by the pleadings before the Court. The Plaintiff's Counsel submitted that by the 1st Defendant inter pleader application filed, it has informed the Court that it has no interest in the matter before the Court, and the Defence filed in Court failed to raise any issue, is a sham comprises of bare denials and fails to answer any of the issues raised in the Plaint.Counsel submitted that only paragraphs 8 and 9 of the 1st Defendant's Defence raised **seemingly** legal issues. Paragraph 8 reads –

**"8. In reply to paragraph 19 and 20 of the Plaint, the 1st Defendant avers that there was no requirement under the guarantee for disclosure of the nature of default. The 1st Defendant further states that it was not under any obligation to ascertain the nature of the alleged default or investigate whether any liability had arisen in relation to the said guarantee."**

Paragraph 9 reads –

**"9. The 1st Defendant further avers that it was under an obligation to honour the guarantee according to its terms and was not in any way concerned with the relations between the Plaintiff and the 2nd Defendant."**

Learned Counsel for the Plaintiff advanced six grounds to show that these two paragraphs of the Defence were mutually contradictory that paragraph 8 was false but that paragraph 9 was more in tune with the true state of affairs. Counsel gave five reasons why paragraph 8 is false: firstly, that the cheque guarantee gave conditions precedent which must be fulfilled before any payments could be made under the guarantee, the nature and type of cheques were specified in clause 4 of the guarantee, the default by the Plaintiff must be raised by the 2nd Defendant with the 1st Defendant; the claim must be lodged within 30 days and lastly, the Plaintiff relied upon the 1st Defendant's letter dated of 19th March 2004 demanding an explanation as to which cheques of the Plaintiff had not been paid –

"Please note that we have addressed yourselves a cheque guarantee dated 24.09.2002. Consequently, we have guaranteed our customers cheques to a maximum of Kshs.100,000,000/= to enable us progress your claim, please let us have details of our customer's cheques that have not been honoured in that regard."

Counsel for the Plaintiff concluded that these are conditions precedent which the 2nd Defendant had to fulfil before payment could be made under the guarantee.

I will stop here for the purposes of considering the Plaintiff's submissions on the third issue that parties are bound by their pleadings, and that there were conditions precedent to any release of payment by the 1st Defendant to the 2nd Defendant.

The fourth issue raised by the Plaintiff is that the cheque guarantee is a normal guarantee and not a promissory note. I agree with learned Counsel for the Plaintiff that determination of the nature of the cheque guarantee is very important in this matter. In my view, this is the only issue in law which needs to be considered in the Ruling, and I will now proceed to consider it in conjunction with the submissions by the 1st and 2nd Defendant's Counsel.

The first Defendant's case is set out in its Defence filed on 27.04.2004. The 1st Defendant disputes the Plaintiff's claim, and alleged in paragraph 2 of the Defence that the Plaintiff has no cause of action in respect of the cheque guarantee dated 24.09.2002, (the cheque guarantee) in favour of the 2nd Defendant. The 1st Defendant acknowledges that he validity of the guarantee was extended to 23.09.2004 by the 1st Defendant's letter dated 21.11.2003 upon the Plaintiff's request. A demand was made during the currency of the guarantee. A demand was made by letter dated 18.03.2004, pursuant to clause 5 of the cheque guarantee. The 1st Defendant avers in paragraph 8 of its Defence that there was no requirement under the guarantee for disclosure of the nature of the default, that the 1st Defendant was not under any obligation to ascertain the nature of the alleged default or investigate whether any liability had arisen in relation to the said guarantee.

The 1st Defendant acknowledges in paragraph 9 of the Defence that it had an obligation to honour the guarantee ascertaining to its terms and was not in any way concerned with the relations between the Plaintiff and the 2nd Defendant, and ultimately prayed that the Plaintiff's suit be dismissed.

The 2nd Defendant's contention is that the cheque guarantee issued by the 1st Defendant was a trading practice and requirement by the 2nd Defendant, and predated the contract of 02.04.2003 that the Plaintiff incurred a debt of Kshs.99,568,103.35 between 19.02.2004 and 9.03.2004 for goods supplied on credit, and that the 2nd Defendant made a demand on the 1st Defendant on 18.03.2004 and that the 1st Defendant was obligated to pay under the terms of the Cheque guarantee. The Defendant has in its Defence made a Counter-Claim against the Plaintiff for the sum Kshs.99,568,103.35 for goods supplied, and also seeks a declaration that the 2nd Defendant is entitled to the benefit of the guarantee by the 1st Defendant for the sum of Kshs.100,000,000/= as guarantor of the said sum under the cheque guarantee.

These are in essence the various Parties submissions. It is necessary to restate again that the Ruling concerns the Plaintiff's Application by way of Chamber Summons dated 22.3.2004 and the ex parte orders given to the Plaintiff on that date which the Plaintiff seeks to be confirmed pending the hearing and determination of this suit, and which the 2nd Defendant prays that it be set aside, ex debito justitiae as it was granted in the form of a final order. The 1st Defendant has become ambiguous in its pleadings.

Whereas it has unequivocally stated in its defence that it is bound by its guarantee and was not obliged to investigate the nature of the breach once the 2nd Defendant made a demand upon the cheque guarantee, it has also filed inter pleader proceedings in which it seeks like Pilate in the face of hostility of the pious crowds, that it is innocent of the Plaintiff's and 2nd Defendant's claim, and is ready to deposit the disputed sum in Court.

Well, I am firmly of the view that the 1st Defendant cannot hold two contradictory views. The 1st Defendant is bent upon finding an escape root under the cheque guarantee by which it has expressly pleaded is bound, and at the same time wants to leave the fight between the Plaintiff and the 2nd

Defendant. The 1st Defendant cannot be allowed to do so, it cannot reprobate and approbate at the same time. It is therefore necessary to inquire into the true nature of the cheque guarantee issued by the 1st Defendant to the 2nd Defendant.

The first point to observe is that the cheque guarantee was an independent contract between the 1st and 2nd Defendants respectively. The Plaintiff is a stranger to that contract. By that contract, the 1st Defendant bound itself on demand upon 30 days default by the Plaintiff, to pay the 2nd Defendant the sum of the guarantee not exceeding the sum of Kshs.100,000,000/= whether or not such payment is right or wrong is a matter upon which the Plaintiff may find an action probably in contract for damages .....it cannot find an action, and claim an injunction on it. That was the Court's thinking and holding in the case of CENTURY OIL TRADING COMPANY LTD. –VS- KENYA SHELL LTD. (Milimani Commercial Courts HCCC No. 988 of 2002) where Mwera J held –

**"The Plaintiff is trying to say in essence, if the Defendant makes a demand under the guarantee on the Bank, the bank should not perform as it bound itself to because a 3rd party has instigated such a breach to be committed by the bank. That will not do" page 6 paragraph 1**

The Plaintiff sought to obfuscate the true nature of the cheque guarantee by calling it a **trade agreement**, and not a **performance bond**, or a **demand guarantee**. Of all the authorities cited by the Counsel for the parties, I find the discussion in Benjamin's SALE OF GOODS, 5th Edn. (1997) as the clearest exposition of the nature of Standby Credits, Performance Bonds, and Demand Guarantees. This is what they say at page 1769, paragraph 23 – 217,

**"Background: from a practical point of view, standby credits, performance bonds and first demand guarantee serve one and the same purpose. In all the three types of document the issuing bank at the request of the "account party" undertakes to pay a certain amount of money to the "Beneficiary" provided a certain event takes place. The event in question is usually nonperformance of an obligation undertaken by the account party towards the beneficiary ..... In the case of a first demand guarantee or of [standby credits is a system of bank guarantees, peculiar to the United States. We are not concerned with the concept here-]. "In the case of a first demand guarantee, or of a performance bond payment is usually due against the beneficiary's' "written demand". The similarity is obvious. The point to be emphasised is that in all three types of documents, just as in the case of documentary letters of credit, payment is due when the beneficiary complies with a prescribed procedure. The policy involved is to separate the letter of credit, the performance bond or the first demand guarantee from the underlying transaction between the beneficiary and the account party."**

At page 1782, paragraph 23 – 237 – the said authors of Benjamin's Sale of Goods (supra) – say –

It has been suggested that there is a fundamental difference or distinction between first demand guarantees and performance bonds. It is often argued that a performance bond is an undertaking of an insurance company or of a surety company to indemnify the beneficiary against the account party's failure to perform the underlying contract. In comparison, a first demand guarantee is an undertaking, issued by a bank, to pay a given amount of money upon a demand made by the beneficiary. In practice, though the two terms are used interchangeably and a performance bond is, usually, just as payable upon the beneficiary's first demand as the very first demand itself. In point of fact, the essence of both facilities is that they include an undertaking by the issuer to pay a certain amount of money, or to accept a bill of exchange, when a demand to that effect is made by the beneficiary. In both facilities, the parties seek to furnish the beneficiary with an autonomous and independent undertaking of a bank or a first class financial institution.

So, in practice, first demand guarantees and performance bonds serve the same purpose as standby credits. All three facilities are usually opened in order to indemnify the beneficiary against the loss incurred as the result of the non-performance of a contract made between the beneficiary and the account party or a faulty performance of the same contract. In the sale of goods transactions (like in this case), a

performance bond (or a first demand guarantee) is normally issued by the bank at the request of the seller for the benefit of the buyer. It may cover an amount of liquidated damages due from the seller if the goods are defective or supplied out of time, or it may cover the repayment of a deposit paid by the buyer at the initial stages.

Because of the special features of performance bonds and first demand guarantees, they are treated by the Courts as being closer to letters of credit than to traditional guarantees. In *HOWE RICHARDSON SCALE CO. LTD. –VS- POLIMEX CEKOP* [1978] 1 LLOYDS Rep. 161. a contract for the supply of valuable equipment between an English manufacturer and Polish buyer/importer, stipulated for a bank guarantee assuring the importers of the repayment of a deposit paid on account of the price if the manufacturers failed to dispatch the goods. After supplying a portion of the goods the manufacturers refused to send the balance of the goods as the Polish importers failed to furnish an irrevocable credit agreed upon the contract by claiming payment under the first document guarantee. The manufacturers applied for an injunction to restrain the importers from making the claim. Refusing to grant such an injunction, Roskill L. J. in the Court of Appeal said –

**"the Bank in principle, is in a position not identical with but very similar to the position of a bank which has opened a confirmed irrevocable letter of credit whether the obligation arises out of a letter of credit or under a guarantee, the obligation of the bank is to perform that which it is required to perform by that particular contract, and that obligation does not in any ordinary way depend on the correct resolution of a dispute as to the sufficiency of performance by the seller to the buyer or by the buyer to the seller as the case may be under the sale and purchase contract; the Bank here is simply concerned to see whether the event has happened upon which its obligation to pay has arisen. The bank takes the view that the time has come and that it is compelled to pay; in my view it would be quite wrong for the Court to interfere with (the 2nd Defendants) apparent right under this guarantee to seek payment from the Bank, because to do so, would involve putting upon the bank an obligation to inquire whether or not there had been timeous performance of the seller's obligations under the sale contract."**

Similarly, in *EDWARD OWEN N. A. ENGINEERING LTD. BARCLAYS BANK INTERNATIONAL LTD* [1978] 1 ALL E.R. 976, dismissing the application for an interim injunction by the Plaintiff's, Lord Denning MR after reviewing the functions of performance guarantees and stated as follows –

**"In case of a guarantee payable on demand because the buyer does not have to show default by the seller, the buyer cannot be prevented from claiming where there has been no proven breach by the seller or when the alleged breach is trivial Lord Denning equated performance guarantees to Promissory notes payable on demand and since the banks will only rarely be in a position to know that the demand is fraudulent or dishonest, they will have to pay the agreed amount."**

And as for fraud – In *BOLIVINTER –VS- CHASE MANHATTAN BANK NA.* [1984] 1 W.L.R. 392 – the Court said –

**"..... the wholly exceptional case where an injunction may be granted is where it is proved that the Bank knows that any demand for payment already made or which may thereafter be made will be fraudulent, the evidence must be clear, both to the fact of fraud and as to knowledge of the Bank of such fraud. A sufficient case must be made out to the satisfaction of the Court."**

In *Lloyds Maritime Commercial Quarterly* 1990 an academic and Maritime law practitioners publication on the distinction of between guarantees and the terms of underlying contract, for their effectiveness, depend upon the form of demand of payment.

The situation here is quite clear. The 1st Defendant gave written undertaking to the 2nd Defendant – under what was called a cheque guarantee, or "trade guarantee" as the Plaintiff's Counsel sought to call it,

the cheque guarantee, or trade guarantee was a contract between the 1st Defendant and 2nd Defendant quite apart from and independent of the underlying contract (sale and purchase contract) between the Plaintiff and the 2nd Defendant. The 1st Defendant is bound by that contract with the 2nd Defendant, and is liable to pay the 2nd Defendant under the cheque guarantee.

The Plaintiff had sought that prayer 3 of its application of 22.03.2004 to restrain the 1st Defendant from paying the 2nd Defendant be granted the Plaintiff's grounds were inter alia that there were conditions precedent to such payment. As the foregoing analysis has shown, the cheque guarantee had no such conditions. The cheque guarantee, whether it was called a trade guarantee as the Plaintiff's Counsel urged was in effect a first demand guarantee very similar to performance bonds and are not very dissimilar to letters of credit. In other words the issuing Bank, like the 1st Defendant in this case, is bound to pay, on demand, the sum guaranteed to the beneficiary.

The remedy of the account party, that is to say, the Plaintiff herein is hardly against the beneficiary but the issuing bank for wrongful payment if the account party will establish a cause of action to that effect. As of the moment, it is extremely doubtful that the Plaintiff (the account party) has any cause of action against the issuing bank.

Consequently, it cannot be said to have established any case let alone, a prima facie with a high probability of success against the 1st Defendant. Being of this view, it is not necessary to consider the other considerations under the *Giella –vs- Casman Brown & Co. Ltd.* trilogy or indeed as fleshed out in the **American Gynamid Case** (supra)

For these reasons, the temporary injunction/it was temporary granted to the Plaintiff on 22.03.2004 must be discharged. I also order the 1st and 2nd Defendants will also have the costs of this application.

There shall be orders accordingly.

Dated and delivered at Nairobi this 31st day of May 2005.

**ANYARA EMUKULE**

**JUDGE**