



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO.1304 OF 2001

KENYA COMMERCIAL BANK LTD. PLAINTIFF

VERSUS

SUN CITY PROPERTIES LTD. & 5 OTHERS.DEFENDANTS

R U L I N G

This Chamber Summons, under Order 6 Rule 13 (a-d) of the Civil Procedure Rules, and dated 7/8/03, seeks to strike out the amended Plaintiff dated 10/9/03 on the grounds that the same discloses no reasonable cause of action against the Defendant because:-

(a) the Plaintiff does not disclose what attempts have been taken to recover payment from the principal debtor;

(b) the cause of action treats the defendants as principal debtors and not as guarantors

(c) the Plaintiff is guilty of non-disclosure of relevant facts, namely securities offered by the principal debtor.

(d) the Plaintiff is guilty of material non-joinder.

In the alternative, the Plaintiff is:

(a) guilty of material variation of the terms of the principal contract with the principal debtor.

(b) Plaintiff is guilty of releasing securities held under the principal contract with the principal debtor without the express consent of the defendants.

(c) Plaintiff allowed itself to fall from a secured to unsecured creditor without the consent of the defendants.

(d) Plaintiff varied and modified and departed from the terms of the contract of guarantee without express consent of the defendants.

As a consequence the defendants have been discharged from the contract of the guarantee.

The application is supported by an Affidavit sworn by Sadrudin K. Kurji, the 3rd defendant, on behalf of all the defendants; dated 7/8/03.

In opposition, the Plaintiff avers that the Principal debtor – Kenya Cold Storage (Foods) Ltd. was afforded loan facility on 13/10/1995 and the defendants, as directors of the principal debtor signed and executed guarantees; the 4th and 6th Defendants, acting as directors of the principal debtor approached the Plaintiff for enhanced loan facility to be secured by guarantee for Shs.14.6 million by 1st defendant and supported by a further charge over L.R.746 Section V Mainland Mombasa for K.Shs.4.6 m; the guarantees by the defendants were separate contracts and not in any way affected by any collateral or security held by the Plaintiff; the defendants can't have guaranteed on the basis of the principal contract of which they were strangers; there was no term in the guarantee requiring the Plaintiff to exhaust available securities held before pursuing defendants; the Plaintiff exercised its Statutory power of sale over L.R. No.746 Section V Mainland Mombasa but fetched only K.Shs.2.8m; the principal debtor has ceased business and no receivers can be appointed under the debenture and hence the Plaintiff has exhausted the remedies available against the principal debtor.

The Plaintiff never had a charge over Title No. Mombasa/Block XII/59 and Mombasa/Block XII/81, which were charged to **Fidelity Commercial Bank**, not the Plaintiff.

I have literally studied the pleadings and submissions by counsel for both sides, paying particular attention to the loan facility agreement; the guaranteeship contract (document) and I have reached the following findings and conclusions.

The take-off point of this dispute between the parties herein seems to be a misconception with regard to the factual situation and the legal implications arising therefrom.

There is no dispute that the parties entered into a loan facility agreement with the Principal debtor – Kenya Cold Storage (Foods) Ltd. and that the directors of the principal debtor were the guarantors of the loan facility.

In the guaranteeship contract, executed by the Defendants, under the heading “**indulgence**” the Plaintiff/Bank is given the power to vary the terms without prior consent from the guarantors. Hence, the issue of unauthorized variation of the terms, and alleged subsequent discharge of the guarantors based on such variations is a total misconception. All such variations, if any, had been authorized in advance by the guaranteeship agreement; and no fresh consent or authority was required.

The view held by the Bank that there was no express or implied term that it must exhaust its remedies against the principal debtor before going for the guarantors is misconceived. It is a general rule in guaranteeships that the lender has to exhaust his remedies against the principal debtor before turning to the guarantor. Otherwise the law on the liability of guarantors is meaningless.

It was averred by plaintiff/bank that since the defendants were the directors of the principal debtor through whom the debtor transacted all its activities, they knew all about the debtor's defaulters or any variations. Hence there was no need for them to be notified otherwise. This is yet another flaw in the understanding of the separate legal personality of a company from its directors or officials.

The Defendants might have actually signed the papers for enhanced financial facility to the debtor. But that was not their liability. The liability of the company – **Kenya Cold Storage (Foods) Ltd.** can never become the directors' liability. The law requires that even where the guarantor is the author of the letter admitting the liability of the company, he must be formally and separately informed of the default by the principal debtor. Whether the defendants were so informed is a triable issue.

In the end, I hold that the Plaintiff raises reasonable cause of action – the liability of the defendant/applicants as guarantors of the principal debtor.

The application to strike out the Plaintiff for failure to disclose a reasonable cause of action has no merit,

and the same is hereby dismissed with costs against the Defendant/applicants and in favour of the Plaintiff/Respondents.

DATED and delivered in Nairobi this 6th day of May, 2005.

O.K. MUTUNGI

JUDGE