



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
COMMERCIAL DIVISION, MILIMANI**

**Civil Suit 1529 of 1999**

**KENYA PLANTER'S CO-OPERATIVE UNION LTD.....PLAINTIFF**

**VERSUS**

**DR. STEPHEN NYAGA KIMANI .....1ST DEFENDANT**

**JOYCE MUTHANJE .....2ND DEFENDANT**

**J U D G M E N T**

When this case came up for hearing on 18th July 2005, the defendant's counsel had been served with a hearing notice but neither he, nor the two defendant attended court.

P w 1, **JOHN KINYUA KARIUKI**, stated he had worked for the plaintiff for 26 years, and is now presently their Farmer's Credit Manager. His duties include receiving application forms from farmers and indeed he assisted farmers to fill their application forms. He said that he was familiar with the 1st defendant's record at the plaintiffs office. He presented to court a number of application forms filed and signed by the 1st defendant. He said that the content of those application forms, has the amount applied for, the reasons for the application and indication showing whether the applicant has delivered coffee or not, and finally the applicant signs thereon. He said in each of those applications, there is attached thereon a statement of amount the applicant owes the plaintiff. The application forms are then presented to the lending review committee, of the plaintiff. Once that committee approved the application the forms are forwarded to the Finance Department, who rubber stamp them, and indicate thereon the cheque number, the date of the cheque, the amount approved, then the cheque is credited to the applicant's account. Pw 1 confirmed that he had in court the 1st defendant's application forms, and that those forms had undergone all the aforesaid formalities, and he confirmed that the cheques were posted into the 1st defendant's account. He said that the finance department posts to all farmers statements indicating the amount outstanding. He confirmed that the 1st defendant, with every application he made, he acknowledged the amount he owed the plaintiff. That the 1st defendant had never disputed the amount he owed the plaintiff.

P w 2, **James Peter Muli**, an employee of the plaintiff for 18 years, stated that he works for the plaintiff as a grower's accountant. He described his duties as, handling farmer's inquiry, correspondence and maintaining farmers account. He described the procedure of how a farmer could open an account with the plaintiffs as follows: - · The farmer register with coffee Board of Kenya;

- Upon registration he is issued with a licence;
- With that licence he buys from the plaintiff an ordinary share;
- Then, he is given a grower's code and the name by which he is to operate;
- He is finally issued with a distribution mark or reference by the Coffee Board of Kenya.

P w 2 said that the 1st defendant's code is BDOO17, the reference name is PRIME ESTATE. From then

on, the farmer is advanced facilities and advanced farm inputs. Pw 2 confirmed that the 1st defendant applied for several advances. P W 2 stated that the 1st defendant's debt is secured by a charge over the second defendant's property, namely L.R. No. GATURI/NYANGURE/96; that charge is for kshs 600, 000 advanced to the 1st defendant. P W 2 produced the 1st defendant's statements, which reflected as at 30.6.1997, Kshs, 11, 909, 784. 55. P W 2 said after that date no more interest was applied to that account. P W 2 produced various correspondence which indicated that the 1st defendant admitted the debt and was attempting to pay it. P W 2 also produced a chamber summons application and the supporting affidavit in HCCC 3489 of 1994, which case was filed by the two defendants, herein, against the plaintiff. P W 2 alluded to the supporting affidavit sworn by Joyce Muthanje, where she admitted that she guaranteed the debt of the 1st defendant to the plaintiff.

The plaintiff's claim as against the 1st defendant is for monies advanced to him on diverse dates. The claim against the 2nd defendant is one of being a guarantor to the 1st defendant.

The claim against the 2nd defendant was not provided on a balance of probability. The plaintiff sought to rely on an affidavit sworn by the 2nd defendant in another court action, where she described herself as a guarantor of the 1st defendant. To my mind that does not make the 2nd defendant liable as a guarantor. The mere fact that one describes themselves as being one thing does not necessarily make them so. The word guarantee is defined in the Law Dictionary of Mozley & Whiteley as: -

**“.....where one person contracts as surety on behalf of another an obligation to which the latter is also liable as the primary party. A promise to answer for the debt, default or miscarriage of another, which to be enforceable must be in writing.....”(underlining mine)**

It is obvious from the above definition that when one undertakes to be a guarantor, that undertaking must be evidenced in writing. There was no written document of guarantee that was submitted in evidence by the plaintiff, and accordingly the plaintiff's claim against the 2nd defendant must on that account fail.

The plaintiff's claim against the 1st defendant is proved on a balance of probability. The 1st defendant's application for advances were presented to the court. The plaintiff's witnesses gave clear and uncontroverted evidence and I do find that the case is indeed proved.

The judgment of this court is: -

**(1) That judgment is entered against the 1st defendant as prayed in the plaint, with costs to the plaintiff.**

**(2) That the case against the 2nd defendant hereof is dismissed.**

Dated and delivered this 16th day of August 2005.

**MARY KASANGO**

**JUDGE**