

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 375 OF 2002

COMPUTER SOURCE POINT LTD. PLAINTIFF

- Versus -

1. LANTECH LIMITED 1ST DEFENDANT

2. MUSILI NZAMBU 2ND DEFENDANT

3. DAVID GATAMA 3RD DEFENDANT

4. AQUINAS WASIKE 4TH DEFENDANT

R U L I N G

In its Notice of Motion dated the 13th January 2004, the plaintiff seeks judgment against the defendants on admission. The application is supported by the affidavit of Mujtaba Jaffer the Managing Director of the plaintiff company in which it is deposed that at the time of filing this suit the first defendant owed the plaintiffs a sum of US Dollars 150,440.15. It has since made part payment leaving a balance of USD 132,146.48. In respect of this balance the first defendant issued 8 cheques some of which have bounced. It was argued for the plaintiff that the issuing of those cheques is a clear admission by the first defendant of its indebtedness of the plaintiff.

As regards the other defendants counsel submitted that their liability is based on their personal guarantees they had given to the plaintiff in respect of the first defendants in indebtedness.

Mr. Omondi for the defendants argued that this application is unmeritorious. He said that the defendants have not admitted the claim. Citing the authority in the case of **Kenya Commercial Bank Ltd. Vs James Kuria Njine Nairobi HCCC No. 606 of 1998** (unreported) Mr. Omondi argued that the admission which can support an application like this must be clear, complete, unambiguous and unequivocal. According to him the mere issue of cheques by the first defendant does not meet this test. As regards the guarantees, he argued that they are ambiguous as they do not name in their bodies the directors of the first defendant. He further argued that the guarantees are in any case inadmissible as they not stamped as required by the Stamp Duty Act. He urged me to dismiss the application with costs.

In reply on the issue of the stamping of the guarantees Mr. Munyithya for the plaintiff submitted that the issue has been raised too late.

I have considered the submissions made by counsel for the parties. Before judgment is entered on an admission the defendant must be shown to have clearly, completely, unambiguously and unequivocally admitted the amount claimed in the plaint. The admission may be contained in correspondence exchanged in the pleadings or in affidavits filed. Mr. Omondi argued that the mere issue of cheques was not an admission made by the first defendant. He argued that the cheques could have been issued for some other transaction. I disagree. The first defendant does not dispute issuing the cheques. If they were issued for some other transaction why did the first defendant not swear a replying affidavit and state so. This having not been done counsel cannot be allowed to speculate. The cheques total to the exact balance of the amount claimed by the plaintiff. I find that the issue of those cheques is a clear and unqualified admission by the first defendant.

The law on guarantees is clear. If the guarantees are clear unqualified and unambiguous and relate to the amount claimed once default has been made by the principal debtor or once liability against the principal

debtor has been established the surety is automatically liable.

I have looked at the copies of the guarantees exhibited in the supporting affidavit. They are clearly not stamped. Section 19 of the Stamp Duty Act Cap 480 of the Laws of Kenya provides that:-

“19(1) subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except

(a) in criminal proceedings; and

(b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped”

Subsection (3) of the section and section 20 make provisions for late stamping. Section 21 deals with documents improperly stamped. A guarantee is one of the documents required to be stamped under the Act. As Mr. Munyithya did not offer to pay the requisite stamp duty into court or adjourn the application until the guarantees are stamped I hold that the copies exhibited by the supporting affidavit are inadmissible. Since the liability of the 2nd and fourth defendants hangs on those guarantees this application as against them fails. However, as regards the first defendant and as I have already found its issue of the cheques for the balance of the amount claimed is a clear admission of liability. I therefore enter judgment for the plaintiff against the first defendant in the sum of USD 132,146.48 together with interest and costs as well as the costs of this application.

DATED this 3rd day of June 2004.

D.K. Maraga

Ag. JUDGE