REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO.365 OF 2003

KENYA OIL COMPANY LTD :: PLAINTIFF

VERSUS

TOTEM SERVICE STATION LTD ::::::::::::::::::::::::1ST DEFENDANT

CONCORD INSURANCE COMPANY LTD ::::::::2ND DEFENDANT

RULING

The Notice of Motion dated 12th August, 2004 was brought by the Defendants under Section 80 of the Civil Procedure Act, Orders 44 Rule, 1, 21 Rule 22 and Section 3A of the Civil Procedure Act.

The motion seeks 2 main orders and these are that there be a stay of execution and that the ruling and decree herein be reviewed and/or set aside. The grounds for the application are:

1. That the Plaintiff and the 1st Defendant have to the exclusion of the 2nd Defendant entered into agreement which was subject to judgment being entered against the 2nd Defendant;

2. That the Plaintiff withheld material information from the Court.

3. That there is an error on the face of the record of the Courts construction of the guarantee;

4. That the Plaintiff will be unjustly enriched if the judgment is upheld;

5. That the suit has been compromised.

The application is supported by an affidavit sworn by one Raju Umamaheswar the 2nd Defendant's director. The application was opposed and there is a replying affidavit sworn by one George Njoroge Mwangi the Plaintiff's Assistant Managing Director.

Counsel for the Plaintiff also filed Grounds of Opposition.

The application came up for hearing before me on 3rd September, 2004. Mr. Ocharo argued the application for the 1st Defendant, Mr. Havi for the 2nd Defendant and Mr. Ngatia opposed the application for the Plaintiff.

The gist of the 2nd Defendant's case is that there is an error on the face of the record and there has been discovery of new and important evidence. The error alleged is that summary judgment was entered on the

basis of a document dated 24th December, 2002. The Learned Judge who entered the summary judgment found that this document constituted a valid guarantee by the 2nd Defendant in favour of the Plaintiff. Yet this document was not stamped and therefore offended the provisions of the Stamp Duty Act. In Counsel's view it should not have been received in evidence. For this proposition Counsel relied on the case of Trust Bank –v- Portway Stores (1993) Ltd (2001) 1 E.A. 296 CCK. In this case summary judgment was set aside upon discovery that a guarantee had not been stamped. Reliance was also placed on Mulla: The Code of Civil Procedure 13th Edition page 1505 which quotes an occasion where review was granted where an error on a point of law was apparent on the face of the judgment.

On the alleged discovery of New and important matter counsel for the 2nd Defendant referred to a document titled "Memorandum of Understanding". The document appears to have been made into after the filing of the suit and after the 2nd Defendant had filed its defence. According to the 2nd Defendant he got possession of this document after the pleadings were closed, submissions in the summary judgment application concluded and the matter was pending ruling. In Counsel's view the effect of the Memorandum of Understanding was to reduce the Defendants' indebtedness to the Plaintiff. The document in Counsel's view compromised the suit between the Plaintiff and the 1st Defendant and if the 2nd Defendant had knowledge of the document its defence would have been different. Counsel placed reliance upon the case of ELLIS –VSCOTT (No.2) 1 ALL E.R. 3 where the Court granted leave to amend a defence and adduce new evidence and consequently set aside a judgment which had been entered against the Defendant.

Reliance was also placed on Chitty On Contracts 28th Edition Volume 2 page 1297 paragraph 44-001 for the proposition that on the basis of the new evidence the principal debtor had taken over its primary responsibility and liability under the guarantee had not arisen.

Mr. Ochwo for the first Defendant associated himself with the submissions by Counsel for the 2nd Defendant.

Responding to the application, Counsel for the Plaintiff submitted that the points raised by the Defendants in their application were in the nature of an appeal, and should not be argued in an application for review.

On the inadmissibility of the guarantee for want of a revenue stamp, Counsel for the Plaintiff argued that this is not an error on the face of the record. The document was authored by the 2nd Defendant. It was transmitted to the Plaintiff by the 2nd Defendant. It is not open to the 2nd Defendant to now allege that because it was not stamped it is inadmissible. Counsel added that the 2nd Defendant cannot now raise a defence which was available to it at the time of hearing. For this proposition Counsel relied on the case of Yat Tung Investment Co. Ltd –v- Dao Heng Bank Ltd & Another (1975) A.C. 581.

Counsel further relied upon the case of Ganijee Glassmart Ltd –v- First American Bank of Kenya Ltd & Others: Nairobi HCCC. No.752 of 2003 (unreported) for the proposition that failure to stamp the guarantee could not invalidate it. Further reliance was placed on the case of Shah –v- Shah (2001) 4 ALL E.R. 138 for the proposition that the 2nd Defendant is estopped from challenging its own document.

Responding to the allegation of discovery of new and important evidence, Counsel submitted that there is none. The Memorandum of Understanding is merely an admission of a debt, it has nothing to do with the commitment made by the 2nd Defendant to the hearing of the application for summary judgment. It is not material which could have been availed by the 2nd Defendant and was made subsequent to the of hearing of the application for summary judgment.

Finally Counsel submitted that the application is an act of collusion by the Defendants against the Plaintiff. He based his submission on the fact that the first Defendant in the Memorandum of Understanding freely admitted its indebtedness to the Plaintiff. Yet it now purports to support the 1st Defendant in this application. Counsel observed that both Defendants were represented by the same advocate. The Advocate knew about the Memorandum of Understanding. The 2nd Defendant cannot therefore claim ignorance. Counsel therefore urged me to dismiss this application with costs.

I have now considered the rival submissions, the affidavits relied upon by both sides, the Grounds of Opposition and the authorities cited. Having done so I take the following position. I can without hesitation state that there is no error apparent on the face of the record. Judgment against the defendants was given pursuant to an application made under Order 35 Rule 1 of the Civil Procedure Rules. The error alleged is the inadmissibility of the guarantee dated 24th December, 2002. This guarantee was written by the 2nd Defendant and delivered to the Plaintiff. It was annexed to the affidavit of George Njoroge Mwangi in support of the application for summary Judgment. In the replying affidavit of George Njoroge Mwangi aforesaid the complaint made against the said guarantee was that it was inadmissible and bad in Law for want of consideration. There was no complaint in respect of want of stamp duty. Indeed the 2nd Defendant did not make this challenge in its statement of defence. If the 2nd defendant now thinks that the guarantee was inadmissible, and was wrongly admitted by the Learned Judge his remedy does not lie in review but in an appeal.

The second ground that there has been discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the Defendants or could not be produced by the Defendants at the time when the decree was passed has also no merit. The Defendants were represented by the same advocate. The Memorandum of Understanding was entered into by the 1st Defendant and the Plaintiff. The 1st Defendant cannot claim ignorance. Its counsel had this knowledge or is deemed to have had this knowledge. The 2nd Defendant therefore had knowledge through its Counsel. The second Defendant cannot claim that “after the exercise of due diligence” it could not have had this information. In any event I do not think the Memorandum of Understanding would qualify as new and important matter of evidence as envisaged by Rule 1 (1) of Order 44 of the Civil Procedure Rules.

On the material before me therefore I hold that the Defendants have failed to prove discovery of new and important matter. I have not found any other sufficient reason to warrant review. Having found that review under Order XLIV Rule 1 is not available to the Defendants the 2nd Defendant is not entitled to prayer 3 of the Notice of Motion dated 12th August 2004. In the result the entire Notice of Motion is dismissed with costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of: