



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 1100 OF 2000**

FINA BANK LIMITEDPLAINTIFF

VERSUS

ANIL MOHANLAL CHANDARANA1ST DEFENDANT

MIRA ANIL CHANDARANA2ND DEFENDANT

JUDGEMENT

The 1st and 2nd defendants apart from being husband and wife were also directors of Unibilt Kenya Limited.

Unibilt Kenya Limited (hereinafter called the Principal debtor) was a customer of the Plaintiff bank.

P.W 1 said in evidence that the Principal debtor was granted 3 facilities;

(i) Was a fluctuating loan agreement dated 17.11.1995 for kshs 6,000,000, the letter of offer for this facility was signed by both 1st and 2nd defendants in their capacity as directors, as an acceptance of the offer.

(ii) Were the local bills discounting facility, dated 13.12.1996, which was in lieu of the fluctuating facility. This P.W 1 said in examination in chief that it was signed by both directors but on being cross examined by 2nd defendant's counsel changed his testimony and said that the 2nd defendant did not sign;

(iii) Was the restructured facility for kshs 15, 5000, 000.

The first two facilities were for a period of 12 months and on being crossexamined P.W 1 said that those facilities had not been called in prior to the restructuring facility.

In regard to the bill discounting facility P w 1 did accept in cross-examination that if the bills were not paid the liability was upon the drawer, who he accepted was not the principal debtor herein. The witness further confirmed that he had not produced before the court those bills, which had not been paid the subject of this facility.

In regard to the loan fluctuating facility P.W 1 accepted that there was no statement of account produced in this case to prove the amount due.

The documents in support of these facilities were, credit agreement for kshs 6 millions dated 22.11.1997 and signed by the two directors; second credit agreement dated 19.12.1996 for kshs 8 million which was signed by the two directors; guarantee dated 23.11.1995 signed by the 1st defendant for kshs 6 million;

guarantee dated 23.11.1995 signed by the 2nd defendant for kshs 6 million; guarantee dated 19.12.1996 signed by the 1st defendant for kshs 8 million; and guarantee dated 19.12.1996 for kshs 8 million signed by the second defendant.

P.W 1 further said that by a letter dated 30.7.1999, page 37 of the Plaintiff's exhibit No. 1, the Principal debtor requested for the outstanding loans to be restructured to convert the outstanding loans into short term loan and consequently on 31.8.1999 a new account (restructured account) was opened with a debit balance of the previous loans. A contract letter relating to the restructured amount dated 9.8.1999 was signed by both directors for kshs 15, 457, 188.31. Even though P.W 1 stated that this letter was signed by both directors on being cross examined by the 2nd defendant's counsel he accepted that this restructured facility not was discussed with the 2nd defendant. P.W 1 said that the statement of account of the Principal debtor pages 42 to 43 of the Plaintiff's exhibit related to the period 1.8.1999 to 30.4.2000. In other words it covered the period of the restructured loan. On being cross-examined by 1st defendant's counsel P.W 1 accepted that he had not produced to court any evidence that the loans had been disbursed to the principal debtor nor had he produced a resolution of the principal debtor authorizing the borrowing hereof. Of the figure of kshs 15, 500, 000, the restructured facility, P.W 1 said that he was unable to distinguish what was principal and what was interest.

The 1st and 2nd defendant did not adduce evidence hereof and a consequence thereof there were issues raised in their defences which were not proved by evidence; such as the 2nd defendant's allegation that she signed guarantee of 1995 and 1996 due to the undue influence of the 1st defendant or the allegation that the plaintiff failed to advise her (the 2nd defendant) of her rights. In regard to the 1st defendant's allegation that the interest charged by the plaintiff was exorbitant the court is unable to make a finding without evidence being adduced on behalf of the 1st defendant.

The 1st defendant in his defence has pleaded that no financial accommodation was granted to the principal debtor and the plaintiff failed to prove either by documentary or oral evidence that such financial accommodation as pleaded in the plaint were granted to the principal debtor. The plaintiff provided to this court a two-page statement of account for the period of August 1999 to April 2000. This is not sufficient to satisfy the burden upon the plaintiff to prove those accommodations on a balance of probability.

The 1st defendant also raised an issue of consideration. He pleaded that his guarantee of 1996 was unenforceable because of failure of consideration. Consideration is a basic, necessary element for the existence of a valid contract. The first facility the plaintiff allegedly afforded the principal debtor was the loan fluctuating facility in November 1995, thereafter the plaintiff granted the principal debtor a bill discounting facility in lieu of the fluctuating loan facility, this was December 1996. There is no evidence before this court that these facilities were granted it would therefore follow that the guarantees signed by both defendants are unenforceable since they were not supported by any consideration evidenced before this court.

In regard to the restructured facility P.W 1 said that the amount thereof was the amounts outstanding and owing to the plaintiff by the principal debtor as at August 1996, it therefore follows that the guarantee signed by the 1st defendant dated 9th September 1999 will fail for lack of consideration. The consideration here ought to have been the plaintiff's forbearance of recalling the outstanding loan due from the principal debtor but a close examination of the guarantee of 1st defendant dated 9th August 1999 and the letter dated 9th August 1999 one finds that they refer to past consideration which is not legally sufficient to support a contract.

Both defendants in their submissions stated that there is no liability on the guarantees for lack of demand. That the plaintiff has failed to prove it demanded payment from the defendants. Indeed the guarantees state in paragraph No. 1 that payment from the guarantee is payable on demand; in paragraph 2 (i) it states that interest shall accrue on the money of the guarantee from the date of demand. The plaintiff did not produce before this court demand made to the defendants. On that account alone the defendants are not liable under the guarantees. The defendants quoted various cases in support of this contention and one of those is the case of **KENYA COMMERCIAL FINANCE COMPANY LTD – V**

– **KIPNG'ENO ARAP NGENY C.A. 100 OF 2001.** It was found that the guarantor had no liability for lack of demand. To quote a section:

“It is equally true that no demand was made to the 1st Respondent to pay up the money he had guaranteed..... The two letters addressed to the 1st and 2nd Respondent.were clearly marked and did not amount to statutory notices that the Appellants Statutory right for sale in respect of the two properties in issue had risen. This cannot be construed by any stretch of imagination as demand on the 1st Respondent to meet his obligation as a guarantor. I find no merit in this claim.” *Owour J.A*

In regard to the bill discounting facility P.w. 1 accepted that if payment was not made on any bill the liability was upon the drawer and not the principal debtor. That indeed is the correct legal interpretation as per Bills of Exchange Act, Cap 27 Section 55 (1). If that is the case and in the absence of documentary evidence that the principal debtor had bound itself to pay the amount, the amount is payable by third party not before court. The second defendant's contention, in submission, that she was not liable for the amount of the restructured facility I think has merit, but in view of my previous findings hereof I will not delve in greater detail on this submission.

In addition to what I have stated herein before I am of the view that the plaintiff ought to have proved by board's resolution and perhaps by the Articles of Association that the facilities granted to the principal debtor were authorized, otherwise it might be said that the directors had acted ultra vires, in this regard a case in point is **ASHBURY CARRIAGE COMPANY – V - RICHE (1875) L.R. 7.** An appropriate quote is as follows: -

“If a company, incorporated by or under a statute, acted beyond the scope of the objects stated in the statute or in its memorandum of association, such acts were void as beyond the company's capacity, even if ratified by all the members.”

The court did not have the benefit of proof that the acts of obtaining financial facility were accordingly authorized.

The only issues that are in the court file are the ones filed by the Plaintiff.

Issue No 1 states: *“Did the plaintiff grant financial accommodation to Unibilt Kenya Limited (now in receivership)as alleged in paragraph 4 of the Pl aint?”*

The answer to this issue is in the negative because the plaintiff failed to produce evidence to support paragraph 4 of the plaint, in that, there is no evidence that the principal debtor received those facilities.

Issue No. 2 states: *“Did the defendants enter into agreement of guarantee with the plaintiff on the said financial accommodation?”* The answer to this issue is in the positive.

Issue No 3 states: *“is the guarantee executed by the 2 nd defendant valid and enforceable?”*

The answer is in the negative for reasons, which are stated here in this judgment, for example lack of consideration, non-liability on the bill discounting facility failure to prove indebtedness of fluctuating loan and failure to prove demand

Issue No 4 states: *“is the borrower in default in repayment of the monies as scheduled or at all?”*

The answer is in the negative because of failure to prove that the facilities were granted. The only liability seen in regards to these facilities as against the borrower are the letters pages 37 to 41 of the Plaintiff's exhibit.

Issue No 5 states; *“Are the defendants jointly/or severally liable to the plaintiff as set out in paragraph 7 of the plaint?”*

The answer to that issue is in the negative for lack of consideration and lack of demand to the guarantors amongst other reason stated herein before.

Accordingly the plaintiff's suit fails and the same is dismissed with costs to the defendants.

Dated and delivered this 11th day of November 2004.

MARY KASANGO

AG JUDGE