



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL SUIT NO 1522 OF 2001
SURGIPHARM LTDAPPLICANT
VERSUS
AWUONDO & ANOTHER.....RESPONDENTS

RULING

The application dated 19.11.01 seeks a summary judgment or alternatively the striking out of the defences filed by the defendants and entering judgment on the ground that the defences are scandalous, frivolous and vexatious.

It is predicated on a claim for goods supplied on credit to a third party and guaranteed by the defendants. The claim is for Kshs 8,243,407 with interest thereon at 30% pa from 31ST December 1999 until payment in full.

It is not in dispute that the two defendants did sign a guarantee dated 26.8.1997 the consideration of which was that the plaintiff would supply goods and giving and continuing to give credit to the third party company entitled Pharma Med Ltd. What is in dispute however is the effect (if any) of the Guarantee in the light of what transpired between the parties thereafter.

The plaintiff/applicant relies on two affidavits in support of the application, that is the affidavits sworn on 19.11.01 and on 3.4.2002 by a Mr SM Patel together with annexures to the affidavits.

The defendant/respondent rely on three affidavits sworn on 14.1.2001, 9.1.2002 and 10.5.2002 respectively, the first one by L Kimbo and the last two by I Awuondo. The affidavits have some annexures:

The first defendant's defence sets out the following: Para (3) It admits that the third party Pharma Med Ltd did apply for a credit facility for supply of goods but that there was no agreement to pay interest at 30% on delayed payments. Para (4) That the credit was limited to Kshs 75,000 only.

Para (5) and (6) That the credit only related to account PO22 in the name of Pharma Med Ltd.

Para (7) That there was a fundamental departure from the original terms of the principal contract on 28.8.98 when account PO22 was closed and therefore the defendant was discharged.

Para (9) The supply of goods is denied and the liability of Kshs 8,243,407.

The second defendant's defence is framed as under:

Para (3) Existence of Guarantee is denied.

Para (4) Supply of goods is denied.

Para (5) There is a mere denial of Shs.8,243,407 or any other sum.

Para (6) If any guarantee existed it was in respect of a different transaction and that the earlier guarantee is time barred.

Para (7) There was no agreement of default interest at 30% and if there was any such agreement, it was punitive.

Para (8) Demand on notice of intention to sue has not been given.

Turning to the affidavits the following represent common ground.

(i) Application for credit VM1, 1A1, LK1. However in VM1 exhibited on behalf of the plaintiff the credit facility is given as Kshs 1,750,000 whereas in the defendants exhibits the figure is Kshs 75,000 only.

(ii) The guarantee dated 26.8.97 signed by the defendants has been exhibited by all the parties.

(iii) Statements of account PO22 for the period May, June and July, August 1998.

(iv) That two creditors meetings to discuss the liability of the Pharma Med Ltd, the third party or principal debtor were held on 20.3.00 and 24.3.2000 and the first one was attended by the 2nd defendant and the second one was attended by both defendants together with other creditors of the principal debtor and proposals for payment to the general body of creditors were made.

(v) Paragraphs 5 and 6 of second defendant's affidavit acknowledge and admit the supply of goods. Similarly para 6 of the first defendants affidavit admits the supply of goods under account PO22, although in the defences there were denials in paras (9) and (4) of the first and second defendants.

(vi) Although the second defendant denies in para.8 of the affidavit of 9.1.02 and that the supply to AAR was done behind his back the second defendant accepts the position as per para 8 and 9 of her affidavit sworn on

14.1.01. The second defendant was the one in charge of the day to day operations of the Company. Her admission of the application for new facility, the new account and the supply are therefore convincing.

As regards the point of departure or areas on which the parties express differences, the defendants allege:

(i) Material alteration of the application for the facility VM1 from Kshs.75,000 to Kshs 1,750,000.

(ii) That the account number POO2 was not covered by the first undisputed guarantee although they acknowledge the existence of the account in para 8 of the first defendants affidavit of 9.1.02 and the second defendants affidavit of 14.1.2001 para 9. Their argument is that this account exhibited as VM3 is not covered by the undisputed guarantee dated 26.8.97. Their claim is that liability of P022 had been cleared in August 1997.

No evidence of payment has been offered and it is evident that in account P022 in respect of the October entry there is reference to a debit of 479016.20 and credit of 479016.20 being a transfer from account P002. This cannot be a payment constituting a discharge but a book entry linking the two accounts.

(iii) Interest rate of 30% was not agreed. However this cannot constitute a triable issue in view of its express stipulation in VM1, LK1 and JA1 which are exhibits by all the parties. All provide for 30% interest and I cannot find anything punitive about this, the rate being comparable to the commercial rates

prevailing.

(iv) That there was no demand or notice before action and therefore guarantees were never called up.

Concerning the allegation of material alteration of the application for credit, it is correct that two figures of Kshs.1,750,000 and Kshs.75,000 do appear although all the other terms remain the same but what is being claimed is the sum of Kshs.8,243,407. By a letter dated 15.12.99 marked "Without Prejudice" the third party – principal debtor Pharma Med Ltd in a letter entitled "outstanding balance" signed by the second defendant made an offer to pay by three instalments of Kshs 150,000 up to March 2000 and suggested a review. A bankers cheque for Kshs 150,000 in part payment was subsequently issued and accepted on a without prejudice balance – see letter of 20th December, 1999 marked in a bundle SMP 2. Since the letter of 15.12.99 did not lead to an agreement I will not accept it as an admission of liability.

All the same a payment of Kshs 150,000 was credited into account P002, VM3 on 21.12.1999 and the balance outstanding as at the date of payment if Kshs 8,243,407.00 which is the amount claimed in the plaint.

In addition in the document SMP1 entitled Pharma Med Ltd Proposal for Creditors dated 24.3.2000, the proposals could not have referred to any other account except Pharma Med Ltd which in turn was account P002, in view of the contention by defendants that account P022 was closed on 28.8.98.

The balance outstanding as at date of the letter appears at page 15 of VM3 which is account P002 and which is the amount claimed in the plaint.

Granted that there could be alteration to the letter applying for the facility what is the significance of this in the face of the wording of the undisputed guarantee dated 26.8.97 including the admission of the balance outstanding and the making of the proposal to pay at a time when only account P002 was operational. The proposal to pay cannot logically refer to any other account or balance other than P002 because it was the only one in existence at the date of the proposal, on 24.3.2000 (see pages 3 of 9 and 4 of 9 and 7 of 9).

This evidence is in my opinion admission of the Pharma Med Ltd account and it has not been controverted at all. Turning to the effect of the Guarantee VM2 reads as under:

"In consideration of your supply of goods and giving and continuing to give credit to Pharma Med Ltd of PO Box 53704 Nairobi (hereinafter called the Company), we hereby jointly and severally guarantee you the payment of all moneys now or at any time or times hereafter to become due to you from the Company. We agree that we are at liberty to grant to the Company such extensions of credit or time for payment or other indulgence as you may deem appropriate without discharging or impairing our liability hereunder. This guarantee is to be a continuing guarantee and is to continue to be binding notwithstanding any change in the constitution of the company/business."

It follows that the Guarantee did cover the ultimate balance and is unlimited. If the Guarantee is unlimited and this is what it says in my opinion the limitation of credit in the application for the facility is irrelevant to the Guarantee which covers all sums whether Kshs 75,000 or Kshs 1,750,000 or 8,243,407 as claimed. In my opinion the limitation of the facility as per the application is clearly wiped away by the terms of the Guarantee because the Guarantee is unlimited.

The defendants denies that a demand letter was issued or sent to them ie VM4. I do grant the defendants this because the certificates of posting were never exhibited although the letter is marked under a certificate of posting but what is the importance of this in law in view of the fact that the Guarantee whose terms have been set out above is not a demand Guarantee?

Halsbury Laws of England 4th Edition Vol 20 para 194 page 124 reads: On the default of the principal debtor causing loss to the creditor, the guarantor is, apart from special stipulation, immediately liable to the full extent of his obligation, without being entitled to require either notice of the default or previous

recourse against the principal.....”

Para. 195 reads:

“Where there is no express or implied requirement in the Guarantee for a demand and no circumstance rendering a demand upon him a legal obligation the guarantor is liable without being requested to pay.”

The making of proposals for payment to the General Body of Creditors in meetings attended by both defendants reflects the fact that although they were making proposals on behalf of Pharma Med Ltd, the principal debtors, it is clear that the two guarantors were aware of default, otherwise the written proposal could not have been made.

I accordingly find that it was not necessary to send out a demand letter. I have read and considered the authorities cited on behalf of both parties including submissions of counsel but I see no need of reproducing them here except one in view of the above analysis and the clear wording of the Guarantee. The authorities would have been relevant if the wording of the Guarantee was ambiguous or distorted. In my opinion the second unsigned guarantee does not in law discharge the previous admitted and signed guarantee. I find that the second unsigned guarantee appearing in SMP2 was intended to cover further forbearance including suing or intended winding up and this clearly appears on the first line of the unsigned Guarantee. It did not discharge or vary the signed Guarantee because it was extrinsic to it and was dealing with a different situation. It did not revoke the signed Guarantee nor alter it in any way. See *Halsburys Laws of England* 4th Edition Vol 12 on Interpretation of Deeds and Non- Testamentary Instruments: Para 1478 reads:

Extrinsic evidence generally excluded:

“Where the intention of the parties has been reduced to writing it is in general, not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the documents. The principle applies to records, arbitrators awards, bills of exchange and promissory notes, bills of lading and charterparties, bonds, description of boundaries, guarantees, leases or contracts for sale of

.....

Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document.

Page 1480 reads:

.....

The instrument is to be construed as at the time of its execution”.

The Guarantee is dated 26.8.97.

“Section 97 and s 98 of the Evidence Act are on all fours with the *Halsbury’s Commentary* as set out in para 1478”.

A guarantee can either be discharged by notice if it is for a definite period of time and there is provision to determine it or by payment as per its terms. This is not the case here and the signed guarantee was of a continuing nature and unlimited. I find that it did cover the amount claimed in the plaint, the Guarantee being of a continuing nature.

The legal position the Court has taken as above is also confirmed in the following paragraphs of the *Halsburys Commentary* referred to earlier: Para 198 pg 199:

Duration of a Guarantee

“The duration of the guarantors liability depends upon the terms of the Guarantee. Some guarantees are intended to cover a single credit or transaction only while others, called “continuing guarantees are framed so as to apply to a series of credits or transactions. In the case of a single credit or transactions the guarantors liability extends only to the one credit or transaction agreed upon, while in the case of a continuing guarantee the liability endues until the credits or transactions contemplated by the parties and covered by the Guarantee have been exhausted or until the Guarantee itself has been revoked.”

There is no suggestion that the Guarantee relied on in this matter was ever revoked or that it was not of continuing nature. It follows that both accounts, namely P022 and P002 were covered by the signed Guarantee. Para 199 pg 199.

Mercantile or trade guarantees

“Mercantile or trade guarantees are usually given either to secure the supply of goods on credit or advances of money, and, so far as the guarantor’s liability is concerned, may be limited in amount or absolutely unlimited. Where there is a prescribed pecuniary limit, the Guarantee, if continuing is not exhausted by the first advance or credit equal to the prescribed amount”

.....

[After the hearing of this application had been completed and upon perusing the exhibit SMP2, I noted that my former firm had some involvement in this matter and one of their letters was exhibited forwarding an unsigned Guarantee I regret that both counsels did not draw my attention to it. I do confirm that the firm’s periphery involvement has not influenced my decision in any way].

Although there was a limit of Kshs 75,000 in the initial application form the application itself is not the Guarantee in law and as outlined above it cannot be used to explain the Guarantee, and this suit is based on the Guarantee whose words are not ambiguous. It is clear from the accounts and the subsequent dealings between the parties that higher amounts than Kshs 75,000 were contemplated and indeed transacted and the Guarantee itself is unlimited in amount and is of a continuing nature. I accordingly accept the legal position as outlined above.

From the above analysis I find no *bona fide* triable issue or defence. The prayer for summary judgment succeeds. I would therefore enter judgment as prayed in the plaint and also award the costs of this application to the plaintiff.

Dated and delivered at Nairobi this 21st day of March, 2003

J. G. NYAMU

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JUDGE