



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 270 OF 2000**

NATIONAL BANK OF KENYA LTD. PLAINTIFF

VERSUS

DUNCAN KINYANJUI WANJUU DEFENDANT

RULING

This is an application for summary judgment against the defendant for Shs.1,292,269.90 with interest thereon at the rate of 3.5% per month from 30.12.1999 till payment in full. The plaintiff National Bank of Kenya is a limited liability company carrying on business as a Bank in this country. The defendant is a male adult who held an International Visa Card Account No. 4999-6300-000-9976 by virtue of which he enjoyed credit facilities upto a limit of Shs.500,000/=.

Under the terms and conditions for the use of the card, the defendant would ultimately be liable to pay to the plaintiff all the charges incurred by the use of the card, the arrangement between the parties being that the plaintiff would pay and settle all monies incurred by the defendant at various outlets for goods supplied and for services rendered to the defendant by the use of the card and the defendant would in turn pay and compensate the plaintiff with interest thereon at the plaintiff's rate. As is apparent from paragraph 5 of the defence, the basic terms and conditions as averred by the plaintiff in the plaint are not seriously challenged by the defendant.

The bone of contention between the plaintiff and the defendant does not even relate to the terms and conditions stated in the card. It relates to a side agreement concerning a guarantee which the defendant was required to procure to be given by his bankers, the Standard Chartered Bank to the plaintiff before the card could be issued to him. As the issue to be resolved in this application relates to the interpretation of the guarantee, it is I think appropriate to set it out in full at this stage. Although as aforesaid the document is crucial to the resolution of the dispute between the parties hereto, the plaintiff did not apparently consider it of sufficient importance to include it in the documents tendered in court in support of this application. It is to be found in the annexures to the Defendant's replying affidavit and reads: -

"GUARANTEE FOR KES.500,000.00 FOR ISSUANCE OF A VISA CARD- DOLPHIN AUCTIONEERS *In consideration of your agreeing to issue a Visa Card to DUNCAN KINYANJUI WANJUU T/S DOLPHIN AUCTIONEERS, we the undersigned, in our capacities as the Managers of STANDARD CHARTERED BANK KENYA LIMITED, CREDIT ADMINISTRATION UNIT, KENYATTA AVENUE, Nairobi, do hereby bind the same Bank for the sum of Kshs.500,000.00 (Kenya Shillings Five Hundred Thousand only) as surety of the principal debtor the due payment to yourselves by the said Duncan Kinyanjui Wanjuu of all monies due and payable for the issue of the said Visa Card in terms of your conditions for such issuance. We further undertake to give yourselves two (2) months written notice of the Bank's intention to withdraw this Indemnity Bond.*

This guarantee is valid upto 31/10/1997.

The guarantee once expired/withdra wn is considered NULL AND VOID irrespective of whether or not the guarantee is returned to the Bank for cancellation.

Yours faithfully,

EUNICE MUSEMBI

M. K. MWAURA

MANAGER, SECURITY

SECURITY

DOCUMENTATION
OFFICER”

DOCUMENTATION

In paragraph 7 of the plaint the plaintiff avers that the above guarantee guaranteed payment to the plaintiff upon demand of the charges incurred by the defendant in connection with the use of the card subject to the limit of Shs.500,000/=. This paragraph is admitted by the defendant in paragraph 6 of his defence. He however denies the claim made in paragraph 8 of the plaint that he exceeded the credit limit specified in the card, averring instead that he charged the card up to Shs.491,051/= (equivalent to 40,921 Rand) at the hospital he attended at South Africa and paid the balance of the hospital bills in cash.

The entry in the defendant’s statement of account for January, 1997 shows an initial debit of Shs.504,449.35 equivalent to 41,600 South African Rand. Particulars in the statement show that the payment was made to Morning Side Clinic. Although the difference of Shs.13,398.35 between the two figures is relatively small, it is significant in that it is almost equal to the sum that would have initially been outstanding if the Standard Chartered Bank had promptly paid the sum guaranteed to be paid by them under the guarantee aforesaid. There is ample evidence to show that there was considerable delay by the Standard Chartered Bank in effecting payment of the sum of Shs.500,000/= which it had guaranteed to pay. The sum was not paid until 26.6.1997 (Shs.100,000/=) and 8.9.1997 (Shs.400,000/=) by which time the initial paltry sum of Shs.13,865/75 (which may not even have been outstanding if what the plaintiff claims is true) had within 6 months increased at what appears to be astronomical rates, through the imposition of interest and penalties to a figure of Shs.265,073.60 as at 7.10.1997 which was more than 20 times the original outstanding debt.

Given all that, it is my view that the difference between the sum representing what the defendant says he charged the card and what the initial and indeed only debit on the defendants account has to be resolved. Though it may on the face of it appear to be a minor issue, it nevertheless is a matter, which must be resolved before one can say with certainty that the defendant is truly, and justly indebted to the plaintiff in the sum claimed in the plaint.

By its letter of 19.2.1997 communicating the defendant’s wishes to surrender the visa card and also their intention to cancel the guarantee vide which the card was returned to the plaintiff, Standard Chartered Bank, inter alia stated:-

“Kindly therefore release the original guarantee to us and advise the outstanding in the account on our undertaking to pay you the total amount on receipt of the guarantee.”

In response to that request, the plaintiff wrote to Standard Chartered Bank requesting payment of the sum of Shs.13,865.75 mentioned above which was said to be over the limit of the Shs.500,000/= guarantee given by Standard Chartered Bank in connection with the issuance of the Visa Card. I have already referred to the delay relating to the payment of the sum of Shs.500,000/= and what happened in the intervening period concerning interest and penalties to the original sum of Shs.13,865/75. What is of more significance however is the fact that when effecting payment of the sum of Shs.400,000/= vide their letter of 8.9.1997, Standard Chartered Bank (after making reference to previous correspondence which obviously included their undertaking to pay the plaintiff (not only the amount of Shs.500,000/= it guaranteed) but “the total amount”, requested the plaintiff to advise them the outstanding balance by

return. In my opinion, that letter strongly suggests that as at 8.9.1997, Standard Chartered Bank was after paying the local guaranteed sum of Shs.500,000/= and was prepared to assume responsibility for what may have then been outstanding. Despite the request, there is no indication or evidence by the plaintiff that the outstanding balance was ever notified to Standard Chartered Bank. Given the above, the other issue that arises and which must be resolved is, in my view, whether the conduct of both the plaintiff and Standard Chartered Bank released the defendant from his obligation under the contract and transferred liability to Standard Chartered Bank (or to the plaintiff) as the defendant avers in his defence. It is trite law that a surety can be held liable by dint of subsequent dealing with the creditor.

O. XXXV rule 2(1) permits a defendant against whom a summary application has been lodged to show either by affidavit or oral evidence or otherwise that he should have leave to defend the suit. For the reasons give above, I am of the opinion that the defendant has satisfactorily shown that he should have such leave. Accordingly, I find that no basis has been established for summary judgment and the application must be dismissed with costs. It is so ordered.

Dated at Nairobi this 19th day of January, 2001.

T. MBALUTO

JUDGE