



**Prime Bank Limited v Baryan & 2 others (Civil Case E318 of 2022)
[2025] KEHC 1480 (KLR) (Commercial & Admiralty) (18 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1480 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL CASE E318 OF 2022
A MABEYA, J
FEBRUARY 18, 2025**

BETWEEN

PRIME BANK LIMITED PLAINTIFF

AND

RAJINDER SINGH BARYAN 1ST DEFENDANT

PORSCHE CENTRE NAIROBI LIMITED 2ND DEFENDANT

**KULPRIT KAUR TARLOCHHAN [SUED AS THE EXECUTOR OF
THE ESTATE OF TARLOCHAN SINGH CHANJA SINGH HEER
(DECEASED)] 3RD DEFENDANT**

RULING

1. By a Motion on Notice dated 5/10/2022, the defendants sought for the striking out of the suit in the alternative that the same be stayed to await the determination of NBI HC Insolvency Petition No. E 010 of 2020 – *Synergy Industrial Credit Ltd v Multiple Hauliers EA Ltd*. The Motion was brought under Order 15 Rules 1 of the *Civil Procedure Rules*.
2. The grounds were set out in the body of the Motion and the affidavit of Rajnder Singh Baryan sworn on 4/10/2022. These were that the suit was predicated upon guarantees and given by the defendants for Multiple Hauliers EA Ltd. That the suit should be struck out or stayed for being sub-judice NBI Insolvency Petition No. E010/2020 (“the petition”). That the plaintiff was one of the Creditors seeking to recover the same debt in the petition.
3. That a guarantee being a contingent liability, there has to be proof of debt in the liquidation before the guarantor’s liability crystallizes. That unless the suit is struck out, there is a likelihood that the plaintiff might recover the debt both in the petition and in this suit leading to unjust enrichment. That the



principal borrower has made a payment proposal to the creditors in the petition in which the plaintiff is one of them.

4. The motion was opposed vide the affidavit of George Mathu sworn on 15/12/2022. That the application was brought under inexistent provisions of the law, to wit, order 15 Rule 1(d). That the Insolvency of the principal borrower is not a bar to the creditor from instituting recovery proceedings against the guarantors.
5. That the guarantees were separate securities which could be reinforced during the pendency of the petition. That the petition was not instituted by the plaintiff who was only invited to those proceedings vide Gazette Notice No. 3136 of 17/4/2020. That the petition was yet to be heard. That the defendants can only be discharged if the petition succeeds, the assets of the principal borrower liquidated and the plaintiff's entire debt settled.
6. The allegations that the principal debtor had paid the debt was denied. That there will be no unjust enrichment as due credit will be given for any payment received into the principal debtor's account. That the 1st defendant had in an affidavit sworn on 17/3/2021 in the petition, acknowledged that the principal debt owed Kshs. 341,563,000/= as at 30/9/2020. That in the premises, the application should be dismissed and/or struck out.
7. Both the parties filed their respective submissions dated 2/3/2024 and 13/5/2024, respectively. The court has considered those submissions and the authorities cited. The defendants relied on section 6 of the *Civil Procedure Act*, and the cases of *Thiba Min. Hydro Co. Ltd v Josphat Karu Ndwiga* [2013] KLR, *Clesoi Holdings Limited v Prime Bank Ltd* [2020] KLR and *Chase International Investment Corporations & Anor v Laxman Keshra & 3 others* [1998] eKLR in support of their submissions.
8. On the other hand, the plaintiff relied on *Bailey and Grooves on Corporate Insolvency Law and Practice*, *Bank of Bihar Ltd v Damodar Prasad & Anor* [1969] 1 SCR 620, *State Bank of India v Ms Indexport Registered* 1992 SCC (3) 159, *Peter Munga v African Seed Investment Fund LLC* [2017] eKLR and *Ecobank Kenya Ltd v Francis Tole Mwakidedi* [2018] eKLR in support of its submissions.
9. I have considered the contestations of the parties. The issue for determination is, should the suit be struck out or stayed for reason that there is a Petition pending against the principal debtor? The defendants allege that the plaintiff should first pursue the principal debtor in the Insolvency proceedings before resulting to enforcing the guarantees.
10. The plaintiff on its part contend that the pendency of the petition is not a bar to its recovery proceedings herein. That there will be no unjust enrichment as due credit will be given.
11. Before determining the application on merit, there was an objection raised in the affidavit of George Mathu that the Motion was predicated on an inexistent provision of the law. The parties did not address the same in their submissions and I believe it may have been abandoned. In any event, it is an error that may be cured under Article 159, of the *Constitution* and Order 51 Rule 10 of the *Civil Procedure Rules*.
12. On merit, the law is clear on guarantees. A guarantee is a collateral security given for the liability of the principal debtor. The same is enforceable as per its terms. The cases relied on by the plaintiff are clear that, a lender does not need to pursue the principal debtor before pursuing the guarantor once there is default. Indeed, as stated in the case of *Peter Munga v African Seed Investment Fund LLC* [*supra*], it is the creditor to choose from its multiple securities which one to enforce and when.
13. In the view of this Court, the pendency of the Petition cannot be a basis for striking out the suit. There can be no legal justification for the prayer for striking out.



14. As for the prayer for stay, the defendants fear is the likelihood of unjust enrichment. That there has been no proof of debt yet in the petition. I think that cannot be the case, the liability of the guarantors does not arise from proof of debt, but from the guarantees that they executed.
15. As to the applicability of Section 6 of the *Civil Procedure Act*, I do not think that this suit is sub-judice the petition. The petition is against the principal debtor. The liability of the defendants under the guarantee may never be an issue in that petition. Accordingly, the doctrine of sub-judice does not apply.
16. In view of the foregoing, the Court finds no merit in the application and hereby dismisses the same.
It is so ordered.

SIGNED AT NAIROBI THIS 12TH DAY OF FEBRUARY, 2025.

A. MABEYA, FCI ARB

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2025.

F. GIKONYO

JUDGE

