



**Bachulal Popatlal (K) Limited v Midland Construction Co Limited & another
(Civil Appeal E119 of 2024) [2025] KEHC 8695 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8695 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E119 OF 2024
BM MUSYOKI, J
JUNE 20, 2025**

BETWEEN

BACHULAL POPATLAL (K) LIMITED APPELLANT

AND

MIDLAND CONSTRUCTION CO LIMITED 1ST RESPONDENT

I & M BANK LIMITED 2ND RESPONDENT

*(Being an appeal against judgment and decree in the Chief Magistrate's Court at
Kisumu (D.O. Onyango) civil case number E033 of 2023 dated 22nd May 2024)*

JUDGMENT

1. The 1st respondent instituted suit in the lower court against the appellant and the 2nd respondent praying for the following orders;
 - a. Permanent orders of injunction restraining the 1st respondent from making any payments to the 2nd respondent as to regards the bank guarantee No. 007/COM/LG/1160/2022.
 - b. Orders of permanent injunctions restraining the 2nd defendant from making any demands of payment of the bank guarantee issued on the 14th July 2022.
 - c. Damages.
 - d. Costs and interest.
2. The 1st respondent's case was that in June 2022, it entered into an unwritten agreement with the appellant in which the appellant agreed to supply it with petroleum products on terms that the 1st appellant would obtain a bank guarantee in favour of the appellant. The 1st respondent proceeded to get a guarantee from the 2nd respondent which was to run for the period between 14th July 2022 and



- 13th July 2023. During this period, the appellant did not supply any goods to the 1st respondent but proceeded to invoke the guarantee for Kshs 5,477,600.00.
3. The appellant filed defence and counterclaim dated 18th April 2023 in which it admitted that there was a contractual relationship between it and the 1st respondent from 2017. The appellant pleaded that during the period of engagement, the 1st respondent accumulated a debt of Kshs 4,840,357.00 which prompted the appellant to ask for a bank guarantee of Kshs 10,000,000.00. The appellant pleaded further that the guarantee was to cover the sums owed by the plaintiff and not for any further supplies for the period between 14th July 2022 and 13th July 2023 as alleged by the 1st appellant. The appellant counterclaimed as follows;
- e. Judgment against the plaintiff and 1st defendant jointly and/or severally for the sum of Kshs. 5,477,600/=.
 - f. That the plaintiff's claim against the 2nd defendant in this suit be dismissed and that judgment be entered in favour of the 2nd defendant against the plaintiff for Kshs. 5,477,600/=.
 - g. Costs of the suit, counterclaim on an Advocate/client basis.
 - h. Interest on (a), (b) and (c) above at court rate until payment in full.
 - i. Any further or other relief which the Honourable Court may deem fit and just to grant.
4. The 1st respondent filed a defence to the counter-claim dated 3rd May 2023 where it maintained that the guarantee was for the future transactions and the appellant had no right to invoke the guarantee. It also denied owing the appellant the sum of Kshs 5,477,600.00.
5. From the original lower court record, I have seen a defence by the 2nd respondent which is not included in the record of appeal. In the said defence, the 2nd respondent pleaded privity of contract in that it was not a party to the contract between the appellant and the 1st respondent and admitted that it issued the guarantee in question.
6. According to the proceedings, the 2nd respondent did not participate in the hearing of the main suit in which the court heard two witnesses; one for the appellant and one for the 1st respondent. After the hearing, the trial court delivered judgment in favour of the 1st appellant by granting the injunction sought and Kshs 994,000.00 in favour of the appellant against the 1st respondent. This is the judgment which has triggered this appeal in which the appellant has raised the following grounds;
- 1. The learned Magistrate erred in ordering that the 1st defendant should not make payments to the 2nd defendant with respect to guarantee no. 007/COM/LG/1160/2022 dated 14th July 2022.
 - 2. The learned Magistrate erred in failing to find that the 1st defendant was liable under the guarantee no. 007/COM/LG/1160/2022 dated 14th July 2022.
 - 3. The learned Magistrate erred in failing to find that the guarantee should be enforced.
 - 4. The learned Magistrate erred in failing to find that the bank guarantee was procured to secure the sums owed by the plaintiff to the 2nd defendant and not for any further supplies to be made by the 2nd defendant.
 - 5. The learned Magistrate erred in awarding the 2nd defendant Kshs. 964,000/= of the counterclaim and dismissing the rest of the counterclaim.



6. The learned Magistrate erred in awarding Kshs. 964,000/= purely on the basis of the plaintiff's admission and disregarding the 2nd defendant's filed documentary evidence to the contrary.
 7. The learned Magistrate erred in failing to find that the plaintiff had admitted that he provided a bank guarantee double the amount he owed the plaintiff.
 8. The learned Magistrate erred in law and fact in disregarding the evidence tendered by the 2nd defendant and/or failing to consider the said evidence in totality.
7. A first instance appellate court has an obligation to subject the evidence produced in the trial court to a fresh evaluation, analysis and consideration and come to its own independent conclusion but always being cautious of the fact that it did not hear the witnesses and therefore did not have the advantage of observing their demeanour and should therefore give due allowance for that. This is the well-established principle of law as it was held in *C.K. Bett Traders Limited & 2 others v Kennedy Mwangi & another* (2021) KEHC 5107 (KLR) thus;

This being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.'

8. To enable me give the evidence a fresh shot of evaluation and analysis, I will reproduce abridged version of evidence of the parties as produced in the lower court.
9. The 1st respondent called one Divyesh Ramesh Kotecha who told the court that he was a director of the 1st respondent. He added that on a date he did not specify in June 2022, the appellant agreed to supply the 1st respondent with petroleum products on terms that the 1st respondent issued the appellant with a bank guarantee from a reputable bank which was issued by the 2nd respondent. This guarantee was to run for the period between 14th July 2022 and 13th July 2023. He added that the appellant did not supply any goods or services to the 1st respondent within the said period but proceeded to recall the guarantee from the 2nd respondent.
10. The witness alleged that the invocation of the guarantee was an attempt to obtain by false pretences and would damage the reputation of the 1st respondent. The 1st respondent's witness produced its certificate of incorporation, CR12 form, the bank guarantee dated 14-07-2022 and a copy of his identification card as exhibits.
11. When he was placed on cross-examination, the witness stated that he used to communicate with the director of the appellant through WhatsApp and admitted that there was no signed contract between the parties and that he would receive invoices and make payments. He admitted owing the appellant Kshs 964,000.00. He maintained that the guarantee was for future supplies. He also stated that he was not the one receiving fuel at the site and denied receiving a demand notice and stated that he came to know of the alleged debt when the appellant invoked the guarantee.
12. The appellant's witness was one Neeral Praful Pranchmatia who described himself as a director of the appellant. He stated that the appellant had been supplying the 1st respondent with diesel and other products since the year 2017. The 1st respondent fell into default in payments in respect of supplies made to the it so that as at March 2022, the debt stood at Kshs 4,840,357.00. The witness added that upon several follow ups, the 1st respondent requested for more time to settle the sums owed and



- proposed to furnish a bank guarantee in favour of the appellant to secure the debt together with interest thereon.
13. The witness stated further that, the appellant accepted the proposal of a bank guarantee on condition that the plaintiff paid interest on the sums owed and the same would be secured together with interest. He added that upon provision of the guarantee, the 1st respondent stalled payments of the debt. He added that the 1st respondent asked the appellant to discount the bank guarantee which the appellant declined and hence the invoking of the guarantee.
 14. The witness ended its testimony in chief by producing copies of invoices and delivery notes, statement of account of the 1st respondent, printouts of WhatsApp communication, a copy of the bank guarantee, demand letter dated 21-06-2023, letter dated 4-07-2023, letter dated 11-07-2023 and electronic evidence certificate. He stated that the guarantee was not for future supply and that the 1st respondent told him that business was tough and he had problem paying debts and the guarantee was to secure the debt. Despite the appellants sending invoices and statement of account through email the 1st respondent had failed to pay.
 15. In cross examination, the witness stated that they shared statement with the 1st appellant through email and maintained that the bank guarantee was to cover default of up to Kshs 10,000,000.00. He admitted that the guarantee did not mention that it covered goods which were already supplied.
 16. The appeal was argued by way of written submissions. The appellant filed submissions dated 28-11-2024 while the 1st respondent filed submissions dated 24-01-2025 which were filed on 27-01-2025 although the respondent's advocate had when he appeared before me on 5-12-2024 told the court that he had already filed submissions. That conduct of telling the court untruth is uncalled for and it is hereby condemned. The counsel should learn to tell the court the true state of his pleadings.
 17. I have gone through the submissions as compared to the memorandum of appeal and the evidence of the parties and in my opinion, the issues which call for determination in this appeal are;
 - a. Whether the guarantee dated 14-07-2022 could cover debts which had accrued before that date.
 - b. Whether the 1st respondent owed the appellant and if so, how much.
 - c. What orders are appropriate in the circumstances.
 18. There is no dispute that the guarantee was issued. There is also no dispute that the parties were engaged in a business relationship. I also find that the 1st respondent owed the appellant money from the previous dealings before the guarantee was issued. This is borne by the fact that the 1st respondent admitted owing the appellant a sum of Kshs 964,000.00 and has not appealed the trial court's finding on that.
 19. A guarantee is a commercial instrument which is issued by the guarantor committing the guarantor to pay or to meet specified or general obligations to the beneficiary once the same is demanded. It is an undertaking by the guarantor that is not depended on directions or instructions of the person being guaranteed and can only be invalidated by effluxion of time or rescission by the beneficiary. In other words, it is a contract between the guarantor and the beneficiary and the guarantor is not bound by the opinion or directions of the person being guaranteed. It is independent from the contract between the beneficiary of the guarantee and the person being guaranteed. The 2nd respondent was therefore right in pleading privity of contract.



20. In *Eli Holdings Ltd v Kenya Commercial Bank (2020) KEHC 3508 (KLR)*, Honourable Lady Justice Maureen Odero held as follows;

A bank Guarantee is an autonomous contract which requires strict compliance to its terms. The Bank has no obligation to question the performance or otherwise of the obligations of the parties in the underlying contract.

The only time a Bank may decline to honour a guarantee is where there is fraud or if payment of the guarantee would result in irretrievable harm to a party.’

21. It is clear from the above holding which persuades me that, once a guarantee is recalled, the guarantor does not have to resort to the debtor or defaulter for confirmation whether it should pay or not.
22. The 1st respondent has alleged that the guarantee was for future supply of goods and services. I have looked at the guarantee which was produced by both parties. The words therein must be interpreted and given their ordinary meaning. The only timeline provided in the guarantee is its lifetime or period of validity and not the period of supply of the goods therein. If the guarantee was meant to cover future debts only, there would have been nothing easier than to state so.
23. The 1st respondent admitted that as at the time the guarantee was issued, it owed the appellant some money. In my mind, the guarantee must have been a product of negotiations between the parties about the debt the 1st respondent owed the appellant. I believe the version of the appellant that, the previous debts were part of the negotiations that introduced the guarantee is part of engagements going forward.
24. It is my considered view that a guarantee can cover debts or liabilities which are already due as at the time the guarantee is issued. It is for the parties to stipulate in their independent contract how that guarantee should be liquidated or recalled. The contract between the parties in this matter was not in writing and the court is not in a position to tell what terms or conditions the appellant could invoke the guarantee.
25. In absence of a written contract and consensus between the parties, this court finds that the guarantee could cover the debts which were existing as at the time of the issuance of the guarantee as long as the same were related to the business engagements between the parties which were part of the negotiations leading to the issuance of the guarantee. The WhatsApp communications which were produced as the appellant’s exhibit 3 are clear that the parties were making reference to the bank guarantee and the context and totality of the same suggest that the bank guarantee had a bearing on the previous debts which are discussed therein.
26. The 1st respondent’s witness did not deny the WhatsApp communication and actually confirmed that it happened. For instance, in one of the chats, the 1st respondent’s director told the appellant’s director that he had given a bank guarantee which was double what was owed which corresponds with the appellant’s statement of account which showed that the 1st respondent owed Kshs 4,840,357.00. In my judgment, there was meeting of the minds that the guarantee would cover all debts relating to the business between the parties irrespective of when the same became due.
27. The second issue is whether the 1st respondent owed the appellant and how much. The first limb of this issue is answered to the affirmative to the extent that the 1st respondent admitted owing Kshs 964,000.00. The appellant claimed that the debt was Kshs 5,477,600.00. The appellant produced delivery notes and invoices. The 1st respondent’s witness admitted in cross-examination that they would receive invoices and pay. The 1st respondent was made aware of the claim the appellant had placed before the court including the statement of account.



28. With the said notice of the nature of claim, the 1st respondent did not challenge the statement of account which was produced as the appellant's exhibit 2. Once the 1st respondent admitted that it received supplies, it was its duty to prove to the court that those supplies as shown in the appellant's invoices and statement of account were paid. The 1st respondent did not tell the court how it arrived at Kshs 964,000.00. In the WhatsApp communication I have referred to, it is clear that the 1st respondent was disputing interest and bank charges and not the principal debt. Based on what I have stated above, it is my finding that the 1st respondent owed the appellant a principal sum of Kshs 4,840,357.00 as shown in the statement of account. This is the amount the appellant's witness mentioned in his evidence in chief.
29. The statement of account shows that the appellant applied interest of Kshs 506,125.00 on 1-12-2022; Kshs 49,730.00 on 3-12-2022 and Kshs 51,388.00 on 31-01-2023. The contract between the parties as I have said was oral. It is not ascertainable on whether the parties agreed on interest or rate of the same. In that regard, I would find the interest the appellant unilaterally applied was not justified. I will therefore disallow the interest as the same is not justified. In ordinary circumstances, interest accrue from the time of filing suit unless the interest and the rate are proved to have been contractual. In that regard, I find that the 1st respondent liability of Kshs 4,840,357.00 and did not include the stated interest.
30. Having said the above, I find and hold that the appellant was entitled to invoke the guarantee and call for the payment of the amount owed from the 2nd respondent. The court's orders of injunction were therefore not properly issued and they should be set aside. I note that the appellant made demand for payment during the period of validity of the guarantee and the 2nd respondent was therefore bound to pay but I understand it could not pay because there was a court order. In that case, the bank as a guarantor is bound to satisfy and honour the guarantee in absence of the court order.
31. The upshot of the above is that, the 1st appellant's suit in the lower court was for dismissal and the counterclaim of the appellant should have succeeded to the extent stated above. I proceed to set aside the judgement of the lower court dated 22nd May 2024 and substitute therefor with the following orders;
1. The 1st respondent's suit against the appellant and the 2nd respondent in Kisumu Chief Magistrate's civil suit number E033 of 2023 is hereby dismissed with costs.
 2. Judgment is entered for the appellant against the respondents jointly and severally for Kshs 4,840,357.00 plus costs and interest on the principal sum at court rates from the date of filing the suit in the subordinate court until payment in full.
 3. The 1st respondent shall pay the costs of this appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Muutu for the appellant and in absence of the respondent.

