KCB Bank Limited Formerly Kenya Commercial Bank Limited v Bamburi Cement Limited & another (Civil Appeal E195 of 2017) [2024] KEHC 2063 (KLR) (Civ) (1 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2063 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E195 OF 2017

DAS MAJANJA, J

MARCH 1, 2024

BETWEEN

KCB BANK LIMITED FORMERLY KENYA COMMERCIAL BANK LIMITED ..... APPELLANT

AND

BAMBURI CEMENT LIMITED ..... 1ST RESPONDENT

PATRICK KARIITHI NJERU & FELESTA KAMORI T/A PAFEKA GENERAL STORES ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P.N. Gesora, CM dated 12th April 2017 at the Commercial Magistrates' Court, Milimani, in Civil Case No. 3749 of 2009)

JUDGMENT

Introduction and Background

1. On 17.06.2009, the 1st Respondent filed suit claiming a sum of Kshs. 1,213,373.13 for a debt arising out of a sale and supply of cement by the 1st Respondent to the 2nd Respondents and guaranteed by the Appellant ("the Bank") through a guarantee issued on 14.02.2000. The 1st Respondent claimed that the Bank guaranteed to settle all its claims resulting from transactions with the 2nd Respondents and as such, sought the claimed sum jointly and severally from the Bank and the 2nd Respondents, interest at 1.5% per month from 01.07.2003 until payment in full and costs of the suit.

2. In their defence, the 2nd Respondents denied owing the 1st Respondent any money. On its part, the Bank denied that it issued the 1st Respondent with a guarantee on 14.02.2000 as alleged, neither was it obliged to pay the 1st Respondent the claimed sum and interest thereon or any sum of money whatsoever. Without prejudice, the Bank stated that it guaranteed the 1st Respondent the sum of

Kshs. 1,000,000.00 on 01.12.2000 following the supply of goods on credit to the 2nd Respondents. It reiterated that it was a term of the guarantee that the Bank's maximum aggregate liability would not exceed the sum of Kshs. 1,000,000.00 and that the guarantee was valid for one year from 01.12.2000 to 31.12.2000, thus the 1st Respondent's demand for payment was unfounded.

3. When the matter was set down for hearing, the 1st Respondent called its Revenue Accountant, Linet Kiyeng (PW 1) whereas the Bank called its Head of Trade, John Langat (DW 1). The 2nd Respondents did not call any witness or produce any evidence. Following the hearing, the Subordinate Court rendered its judgment on 12.04.2017. It held that the Bank was obligated to make payment to the 1st Respondent once the 2nd Respondents defaulted in paying for the cement that was supplied. That there was a demand made by the 1st Respondent to that effect implying that the 2nd Respondents had defaulted in paying for the cement that was supplied and that the Bank had the duty to follow up for the formal instructions to be issued in writing so that it could be discharged from any liability. That the Bank did not do so after the demand was made during the period when the guarantee was valid. The Subordinate Court relied on the Court of Appeal decision in *Kenindia Assurance Company Limied v First National Finance Bank Limited* [2008] eKLR to hold that once there was default and a demand has been made, the guarantor, in this case the Bank, was obligated to make payment.

4. The Subordinate Court agreed with the 1st Respondent's submission that it is entitled to interest at the rate of 1.5% per month commencing 01.07.2003 until payment in full. As such, judgment was entered against the Bank and the 2nd Respondents as prayed by the 1st Respondent.

5. The Bank's appeal against the judgment is grounded on its memorandum of appeal dated 28.04.2017. The appeal was canvassed by way of written submissions. I do not find it necessary to summarize the same but I will make relevant references in my determination below.

Analysis and Determination

6. Since this is the first appeal, this court is enjoined by the provisions of section 78 of the Civil Procedure Act to evaluate and examine the trial court's record and the evidence presented before it in order to arrive at its own conclusion. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 where the Court of Appeal stated that this court is not bound necessarily to accept the findings of fact by the court below, that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it neither saw nor heard the witnesses and should make due allowance in this respect.

7. The Bank's memorandum of appeal raises 9 grounds of appeal but in sum, it faults the Subordinate Court's appreciation of the evidence and findings and urges the court to allow the appeal

8. There is no dispute that the crux of the suit against the Appellant before the Subordinate Court was in respect of a guarantee issued and renewed by the Bank between 01.12.2000 and 31.08.2003 to cover the 1st Respondent's credit supplies to the 2nd Respondents and subject to a maximum aggregate liability of Kshs. 1,000,000.00.

9. The law on guarantees has now been settled. The Court of Appeal in *Karuri Civil Engineering (K) Limited v Equity Bank Limited* NRB CA Civil Appeal No. 339 of 2012 [2019] eKLR summarized the position as follows:

> [G]uarantees fall into two broad categories. The traditional guarantee or surety on one hand, and "on demand" guarantee on the other. "On demand" guarantees are also known as performance guarantees, performance bonds or demand bonds. (See *Vossloh AG v Alpha Trains (UK) Limited* [2011] 2 All ER (Comm) 307 at [24]– [28]). "On demand" guarantee

is distinguishable from the traditional guarantee as liability is primary not secondary and payment by the guarantor is to be made in response to demand and is not dependent whether there has been a default under the principal contract. [Emphasis mine]

10. The independence of performance guarantees and like agreements is explained in *Halsbury's Laws of England*, 4th Ed., Volume 41 at Page 819 on Performance Guarantees and Bonds as follows:

> 960. Nature and effect. Some commercial contracts include provision for one party, often the seller, to procure a so-called performance guarantee or bond from a bank or an insurance or other company in favour of the other contracting party. A performance guarantee or bond commonly provides for payments to be made on the demand of the beneficiary. The contractual obligations arising under such guarantees or bonds are separate from and not dependent upon those existing under the sale contract between the seller and the buyer.

11. In *Edward Owen Engineering Limited v Barclays Bank International Limited* [1978] 1 All ER 976, Lord Denning MR made the following observations which were cited with approval by the Court of Appeal in *Kenindia Assurance Company Limited v First National Finance Bank Limited* (*Supra*);

> A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit, with which of course we are very familiar. It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honor the credit.
>
> It is well established that a letter of credit is independent of the primary contract of sale between the buyer and the seller. The issuing bank agrees to pay upon presentation of documents, not goods. This rule is necessary to preserve the efficiency of the letter of credit as an instrument for the financing of trade

12. It was not disputed that on 09.09.2002, the Bank had renewed the guarantee it issued to the 1st Respondent earlier on and that this guarantee was now to run from 31.08.2002 to 31.08.2003. It was also not disputed that during this period, the 1st Respondent issued a demand on 01.07.2003 calling in the guarantee on the ground that the 2nd Respondents' had defaulted on the contract for sale and supply of the cement. Under the guarantee, the Bank was obligated to make payment within 30 days from the date of the first demand letter. Whereas the Bank does not deny that it was obligated make this payment, it claimed that on 03.07.2003, the demand was cancelled by the 1st Respondent's employee by way of phone call and that the Bank was informed that formal written instructions of the cancellation would follow. However, no such written instructions were forthcoming. The Bank insisted that the verbal instructions issued to it were sufficient to cancel the demand and thus discharge the Bank from paying up the guarantee. The 1st Respondent denied issuing verbal instructions as alleged by the Bank and insisted that the demand of 01.07.2003 stood.

13. Section 107 (1) and (2) of the *Evidence Act* provides that

> " whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist" and that "When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person".

Section 109 therein goes further to stipulate that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. As the Bank relied on the 1st Respondent's

verbal instructions as its defence, it follows that it had the burden of proving that such instructions were indeed issued in the face of the 1st Respondent's denial. From the record, the Bank did not also call as a witness the person who allegedly gave those verbal instructions. I cannot therefore fault the Subordinate Court for concluding that the 1st Respondent did not issue verbal instructions to cancel its demand.

14. Even if I accept that the 1st Respondent did issue verbal instructions, I find and hold that the Bank could not rely on such verbal instructions as clause 4 of the guarantee itself made it mandatory for such demands to be made in writing. It then follows and it should have been expected that any such cancellation would also have been in writing and this explains why the Bank was also waiting for the formal and written instructions as it knew any verbal instructions could not be sufficient.

15. The Bank could also not refuse to make payment under the pretext that the 2nd Respondents were not indebted to the 1st Respondent or that there was a dispute as to the level of their indebtedness to the 1st Respondent. As stated, any such dispute between the 1st and 2nd Respondents did not vitiate the guarantee and that the Bank, as issuer had no option but to honour it. Whether or not the 2nd Respondents had defaulted in their contract with 1st Respondent was immaterial to the Bank as it had an obligation to honour the demand as the Bank lacked privity of the contract between the 1st Respondent and the 2nd Respondents. The Bank was to honour the demand without seeking any further explanation from the 1st Respondent or such clarification or affirmation from the 2nd Respondents.

Disposition

16. I hold that the Subordinate Court came to the right conclusion when it held that the Bank was obligated to honour the demand issued in accordance with the guarantee it issued to the 1st Respondent.

17. This appeal lacks merit. It is dismissed with costs to the 1st Respondent assessed at Kshs. 50,000.00.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF MARCH 2024.

D. S. MAJANJA

JUDGE