



**Prime Bank Limited v Talib & another (Civil Appeal E255 of 2021)
[2024] KEHC 12563 (KLR) (Civ) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12563 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E255 OF 2021

WM MUSYOKA, J

OCTOBER 22, 2024

BETWEEN

PRIME BANK LIMITED APPELLANT

AND

NOOR MOHAMED TALIB 1ST RESPONDENT

ARGOS FURNITURES LIMITED 2ND RESPONDENT

*(An appeal arising from the judgment of Hon. DO Mbeja, Principal Magistrate,
PM, delivered on 16th April 2021, in Nairobi CMCCC No. 5371 of 2013)*

JUDGMENT

1. The suit, at the primary court, was initiated by the appellant, against the respondents, for a sum of Kshs 944,639.55. The case was that it granted credit card facilities to the 1st respondent, an employee of the 2nd respondent, supported by a guarantee and indemnity by the 2nd respondent, that it would indemnify the appellant, upon demand, of the entire credit facilities and expenses incurred, subject to a principal of Kshs 500,000.00, together with interests. On 25th May 2011, the 2nd respondent notified the appellant that the 1st respondent had left its employment, and thus the guarantee and indemnity, given by it, stood discontinued. It was further the case by the appellant that, by that time, the credit account stood at Kshs 921,990.55.
2. The 1st respondent did not react to the suit, but the 2nd respondent filed a defence, in which it averred that if any such guarantee and indemnity existed, it was invalid and unenforceable, as it was not sealed with its common seal, neither were the persons signatory to it identified by name. It was further averred that the said guarantee and indemnity had ceased once the 2nd respondent gave notice to the appellant



- of the 1st respondent's termination of employment. It was further averred that the document offended the provisions of the [Stamp Duty Act](#), Cap 480, Laws of Kenya.
3. A trial was conducted, on 7th June 2022, when 1 witness each testified for the appellant and the respondent. Judgment was delivered on 16th April 2021, in favour of the appellant as against the 1st respondent, but the claim against the 2nd respondent was dismissed.
 4. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 13th May 2021, turn around the trial court failing to appreciate that the 2nd respondent was bound by the guarantee and indemnity of 17th December 2007; erring in finding that there was no privity of contract between the appellant and the 2nd respondent; finding the statements admissible in one breath; and failing to appreciate the overwhelming evidence that it had presented.
 5. Directions, on the disposal of the appeal, were given on 11th May 2023, for canvassing of the appeal by way of written submissions. Both sides have filed written submissions.
 6. The appellant identified only 1 issue for determination, whether the judgment of the trial court should be varied. It is submitted that it should. Firstly, because the trial court made a finding of fact that the guarantee and indemnity document was properly executed, and, based on that, the conclusion that the 2nd respondent was not liable, had no foundation. Secondly, it is submitted that the trial court was wrong in finding that there was no privity of contract, for having found that the guarantee and indemnity issued by the 2nd respondent, to the appellant, was properly executed, the trial court erred in excluding the 2nd respondent from obligations, under that guarantee and indemnity. [Ecobank Kenya Limited v Solution Wizards Limited & 2 others](#) [2017] eKLR (Sewe, J) and [Rose Chepkirui Mibei v Jared Mokuu Nyariki & others](#) [2015] eKLR (Sila, J) are cited, on the effect of a guarantee and indemnity. Thirdly, the trial court erred in relying on the doctrine of privity of contract, given that the issue was not on the lending contract, but the guarantee and indemnity that it had executed in favour of the 1st respondent. [Aineah Liluyani Njirah v Agab Khan Health Services](#) [2013] eKLR (Nambuye, Maraga & M'Inoti, JJA) is cited in support.
 7. The 1st respondent did not participate in the appeal. The written submissions on record are by the 2nd respondent, and cover inadmissibility of the statements of accounts presented by the appellant; proof of the debt of Kshs 944,639.55, with monthly interest at 5%; no guarantee and indemnity being given in respect of the credit cards alleged to have been a replacement of the first one; the limit on the guarantee and indemnity signed by the 2nd respondent; the issue around the replacement of the initial credit card; among others.
 8. The principal issue for determination would be whether the 2nd respondent entered into a guarantee and indemnity with the appellant on behalf of the 1st respondent.
 9. So, what does the material on record disclose? The appellant claimed that it first extended credit card facilities to the 1st respondent on 4th May 2005, with a limit of Kshs 300,000.00. There was evidence that that facility was guaranteed by the 2nd respondent, as could be seen from the approval of the credit card, dated 10th May 2005. The 2nd respondent then wrote to the appellant, requesting that the limit on the credit card be increased to Kshs 500,000.00. What is in contention is the document dated 17th December 2007, which the 2nd respondent denies signing. It further argues that a bank statement that the appellant was relying on was not admissible under the [Evidence Act](#), Cap 80, Laws of Kenya, as it did not bear the name or signature of the maker, it did not indicate the date when it was made, it did not state the account number card number and the branch in respect of which it purported to be prepared, it did not have a seal or stamp or endorsement of the bank, it did not bear the heading



or letterhead of the bank, neither was it proved and verified by an agent of the bank or manager of the appellant.

10. Let me start with the document dated 17th December 2007. The said document expressed that it related to card number 4167 0500 6001 1745. It expressed that the guarantor could only be liable to pay an amount not exceeding Kshs 500,000.00, together with interest thereon, but the rate of interest was not indicated. 2 signatures were affixed to it, but no company stamp or seal was affixed. I note that the appellant testified that the 2nd respondent was liable to pay a sum of Kshs 944,639.35, with interest, even though the rate was not specified in the contract. It is trite, as stated in *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* [2002] 2 EA 503 [2011] eKLR and *Pius Kimaiyo Langat v Cooperative Bank of Kenya Ltd* [2017] eKLR, that a court of law cannot rewrite a contract for the parties, and parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.
11. The appellant had testified that the interest rate was outlined in clause 4.4 of the application for credit card, which only the 1st respondent signed. That, however, did not mean that the same interest rate applied to the second credit card, as that was not indicated in the guarantee and indemnity that the appellant was relying on. I agree with the 2nd respondent, that it was not party to the application by the 1st respondent, for a credit card, where the 5% interest was indicated, and the 2nd respondent should not be bound by the terms of that agreement.
12. In the guarantee and indemnity there were 2 signatures, which the appellant stated were similar to the one in the letter of 17th December 2007, which had requested the increase in the credit card limit, from Kshs 300,000.00 to Kshs 500,000.00. That was not disputed by the 2nd respondent, instead it said that the signatures bore no names, and it was impossible to ascertain who had signed them. I have closely scrutinised the guarantee and indemnity document, and I have noted that the signatures were appended beside the title “Director,” but no names were indicated.
13. I agree with the trial court, that the guarantee and indemnity agreement was a valid contract, as per section 3(1) of the *Law of Contract Act*, Cap 23, Laws of Kenya. However, there was no telling whether the 2nd respondent was party to that contract, for it bore only the name of the 1st respondent.
14. On the admissibility of the documents that the appellant sought to rely on, section 106B of the *Evidence Act* would apply, which requires that computer generated printouts be accompanied and proved by a certificate of electronic evidence. The appellant conceded that the statement of accounts that it relied upon was computer generated, but no accompanying certificate was produced in court. The law on that was well stated in *William Odhiambo Oduol v Independent Electoral & Boundaries Commission & 2 others* [2013] eKLR (Muchelule, J), with emphasis being given on the susceptibility of electronic evidence to manipulation, hence the need for caution and strict compliance with section 106B of the *Evidence Act*.
15. There was the argument that the appellant did not comply with sections 176 and 177 of the *Evidence Act*, with respect to the banker’s book. Section 177 requires that a copy of an entry in a banker’s book should not be received in evidence under section 176, unless certain things are proved, which include the book being one of the ordinary books of the bank, the book being in the custody of the bank, the book being in the custody and control of the bank, and a copy of it being in the custody and control of the bank. Such proof could come from an officer of the bank, or by such other person as may have examined the original banker’s book, through oral evidence in court, or by affidavit. There was no evidence that the 2nd respondent had waived sections 176 and 177 of the *Evidence Act*, which are mandatory, to do away with proof along those lines, which made the documents sought to be produced



inadmissible. See *Kenya Commercial Bank Limited v James Kuria Njine* [2002] eKLR (Ringera, J) and *Guardian Bank Limited v Skyflyers Travel and Tours Limited* [2004] eKLR (Ibrahim, J).

16. Overall, I find no merit in the appeal herein, and I hereby dismiss it, with costs. It is so ordered.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 22ND DAY OF OCTOBER 2024.

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani.

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Eva Adhiambo, Legal Researcher, Busia.

Advocates

Ms. Njihia, instructed by Macharia-Mwangi & Njeru, Advocates for the appellant.

Mr. Wendoh, instructed by Lubulellah & Associates, Advocates for the respondent.

