NCBA Bank Kenya PLC v WYSS Logistics Limited (Civil Appeal E277 of 2023) [2024] KEHC 13675 (KLR) (6 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13675 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E277 OF 2023

HM NYAGA, J

NOVEMBER 6, 2024

BETWEEN

NCBA BANK KENYA PLC ..... APPELLANT

AND

WYSS LOGISTICS LIMITED ..... RESPONDENT

RULING

1. The Applicant moved this court under certificate of urgency vide the Notice of Motion dated 25th March,2024 brought under Sections 1A, 1B,3 and 3A of the *Civil Procedure Act* and Section 11(1) (b) of the *Banking Act* seeking the following orders:-

    1. Spent

    2. That the Appellant's bank guarantee dated 6th March, 2014 furnished herein contravenes Section 11(1) (b) of the *Banking Act* Cap 488 of the Laws of Kenya hence it is null and void.

    3. That the costs of the Application be borne by the Appellant/Respondent.

2. The Application is premised on the grounds on its face and the supporting affidavit sworn by the Herodian Machoka, the Director of the Applicant, wherein he averred that on 14th February, 2024 the court made an order staying execution of the decree of the subordinate court dated 21st April 2023 made in Nakuru CMCC No. E 026 of 2022 pending the hearing of the appeal and that the order of stay of execution was conditional upon the appellant/respondent furnishing a bank guarantee for the decretal sum within 30 days, and in default the order of stay shall lapse automatically without reference to court.

3. It was his averment that on or about 11th March, 2024 the Appellant furnished a purported bank guarantee dated 6th March, 2024 guaranteeing the decretal sum itself which according to it the said bank guarantee contravenes Section 11(1) (b) of the *Banking Act* and hence null and void.

4. He asserted that the time appointed by the court within which the appellant was to deposit the bank guarantee having lapsed on 15th March,2024 without the Appellant furnishing any valid bank guarantee, the court order staying execution of the decree of the subordinate court lapsed automatically.

5. He stated that the respondent wishes to proceed with earnest to execute the decree of the subordinate court but out of abundance of caution it is desirous of having the court pronounce itself on the validity of the bank guarantee furnished by the appellant before it proceeds with execution.

6. The Application is opposed by the Appellant/Respondent's Legal Counsel one Jackson Nyaga vide replying affidavit sworn on 19th April, 2024. He averred that the Application is frivolous, vexatious, an abuse of the court process, devoid of merit, incompetent, misconceived and ought to be dismissed in the first instance.

7. He deponed that the Appellant's aforesaid bank guarantee is valid, furnished within the time frame directed by the court , the stay order is running and the provision upon which the application is premised on is inapplicable in the circumstance.

8. He posited that the Applicant's averment exhibits its tricks, uncouth methods and malice employed to prevent the appellant from being heard on the main suit in CMCC No. E626 of 2022 and is bend on a slightest opportunity possible to execute.

9. He stated that it is now obvious that the Applicant is out to ensure that the Appellant suffers prejudice through delay tactics and the orders sought are prejudicial to the Appellant as it shall interfere with the Appellant's stay pending hearing and determination of the appeal.

10. It was his deposition that the Applicant shall not suffer any irreparable loss and damage should it be denied the orders sought as it can recover the sum claimed in the event its suit succeeds.

11. He deponed that the Applicant has not met the threshold for granting the orders sought as required in law.

12. The Application was canvassed through written submissions. Both parties duly complied.

Respondent's/ Applicant's Submissions

13. The Appellant submitted that the bank guarantees are typically issued by a bank on behalf of a customer to a beneficiary, ensuring that the customer will fulfil their obligations under a contract with the beneficiary. It posited that the bank act as a guarantor and it is highly unusual for the bank to issue a bank guarantee guaranteeing its own obligation as such an action is to be considered a conflict of interest and is legally invalid and unenforceable.

14. The Applicant argued that court while ordering the appellant to furnish a bank guarantee envisaged the bank guarantee to be furnished would be issued in compliance with the *Banking Act*.

15. The Applicant posited that the bank guarantee ordered to be furnished ought to have been furnished by a bank other than the appellant and that the purported bank guarantee violates section 11(1) (a) and (h) of the *Banking Act* and as such it is hollow and in contravention of the court's order herein.

16. The applicant urged this court to find the bank guarantee furnished herein dated 26th February 2024 and executed on 6th March 2024 is illegal, invalid, and null and void. In buttressing its submissions, the Applicant relied on the case of Okiya Omtatah Okoiti & another v National Transport and Safety Authority & 2 others [2017] eKLR.

Appellant's/Respondent's submissions

17. The Respondent on its part reiterated that the aforesaid bank guarantee is valid and was furnished within the time frame directed by the court.

18. The Respondent submitted that the stay of execution of the Judgement and ensuing decree in Nakuru CMCC No. E 626 of 2022 pending the hearing and determination of the appeal issued on 14th February, 2024 was conditional upon the appellant providing a bank guarantee for the decretal sum less costs within 30 days from the date of the ruling. However, in the said order there was no mandatory condition that the bank guarantee ought to be provided by a reputable institution other than the Appellant. The appellant argued that the order was specific that the Appellant herein was the one to provide the bank guarantee. In support of their submissions, the respondent relied on the case of Geonet Communications Limited v Safaricom Plc [2021] eKLR where the court cited the Southern African case of Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) Trollip JA in which the court made some general observations about the rules for interpreting a court judgment or order. It stated: -

> "...the basic principles applicable to the construction of documents also apply to the construction of a court's judgment or order: the Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the Court's granting the judgment or order may be investigated and regarded in order to clarify it....
>
> It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment."

19. The Respondent submitted that the bank guarantee provided conforms to the order issued by this court and Section 11 (1) (b) of the *Banking Act*.

20. The Respondent contended that there is no eminent threat or possibility of it not honoring the given bank guarantee and the appellant being a party to this suit has issued a guarantee and thus it would not be difficult for the respondent to enforce any orders it might get concerning such a bank guarantee.

Analysis and determination

21. I have considered the application, the supporting affidavit, the response, submissions before me and the authorities cited by both sides. In my view, the only issue that crystalize for determination is whether the Respondent's bank guarantee dated 6th March, 2024 is enforceable.

22. It is not in dispute that this court vide its ruling dated 14th February,2024 directed the Respondent to provide a bank guarantee for the decretal sum, less costs within 30 days as security for stay of execution

pending appeal. The court was persuaded that the proposed bank guarantee by the Respondent herein was acceptable. The court pronounced itself as follows:-

> " I have considered the security offered by the Applicant. It is not in dispute that the applicant is reputable banking institution. From the perusal of the lower court record, the dispute between the parties arose within a customer and bank relationship. I do not think that the guarantee by the bank is any less effective than the amount being deposited in another bank account. I am prepared to accept the proposed bank guarantee.
>
> Having considered the application dated 3rd October 2023, I find it meets the threshold for the grant of stay of execution, but subject to conditions. I therefore order as follows;
>
> A. That the execution of judgement and the ensuing decree in Nakuru CMCC No. E 626 of 2022 be and is hereby stayed pending the hearing and determination of the appeal.
>
> B. The applicant shall provide a bank guarantee for the decretal sum within the next 30 days."

23. In compliance with the court orders, the Respondent provided a bank guarantee dated 6th March,2024 guaranteeing and undertaking to pay this court Ksh. 2,000,000/= as a result of the final disposal of the Appeal herein.

24. The Respondent in its aforesaid guarantee expressly stated as follows;

> " This Guarantee shall be governed by and construed in accordance with Kenyan Law and the parties hereto subject to the jurisdiction of Kenyan Courts"

25. The Applicant holds the view that the bank guarantee issued by the Respondent contravenes Section 11(1) (b) of the *Banking Act* for the reason that a bank cannot issue a bank guarantee guaranteeing its own obligation. The Respondent on its part is of the view that the bank guarantee is valid and was issued in accordance with the orders of this court.

26. The said Section 11(1)(b) provides that:

> " An Institution shall not in Kenya –
>
> .....
>
> (b) grant or permit to be outstanding any advance or credit facility or give any financial guarantee or incur any other liability to, or in favour of, or on behalf of, any company (other than another institution) in which the institution holds, directly or indirectly, or otherwise has a beneficial interest in, more than twenty-five percent of the share capital of that company;..."

27. The import of the above Section was extensively discussed in the case of Okiya Omtatah Okoiti & another v National Transport and Safety Authority & 2 others (supra) where the court held inter alia as follows:-

> " ... it must be a third party bond and the parties to a contract cannot issue to each other bid bonds drawn on themselves. Secondly, a bid bond must be a surety guarantee in the sense that the third party issuing it must guarantee to assume liability that may accrue to one of the parties to the contact.

> To permit a tenderer to also perform the role of a surety ... amounts to a hollow security and defeats the very essence of security."

28. It is clear therefore that the Respondent ought to have issued a bank guarantee from another bank other than itself. To that extent, I agree with the Applicant that the bank guarantee in issue is not an independent contract and thus it is unenforceable.

29. The court in First Community Bank Limited v Osman Abdi Kassim [2022] eKLR was faced with the similar issue herein and relying on the aforesaid case of Okiya Omtatah Okoiti & another v National Transport and Safety Authority & 2 others (supra) was persuaded by the respondent's argument that the applicant should have provided a bank guarantee from an independent third party bank instead of issuing its own guarantee and found that the bank guarantee by the Respondent was unacceptable.

30. In Ansal Energy Projects Limited v Tehri Hydro Development Corporation Limited and Anor [1996] 5 SCC 450] cited in *Paramount Bank Limited v First National Bank Limited & 2 others (Civil Appeal 468 of 2018)* [2023] KECA 1424 (KLR) (24 November 2023) (Judgment) the Supreme Court of India observed as under:

> "It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary...."

31. Flowing from the above, I opine that guarantees typically involve a third party providing assurance on the obligations of a borrower, so a bank guaranteeing itself would not fulfill the purpose of a guarantee and if a bank needs to secure its own obligations or enhance its financial standing, it would usually seek alternative financial instruments or arrangements rather than providing a self-guarantee.

32. In view of the foregoing, I find that the Bank Guarantee dated 6th March, 2024 would offend section 11 of the *Banking Act*. To that extent I am inclined to agree with the applicant in terms of prayer 2 of the application. The effect of this would be that the 'guarantee' as offered by the respondent is unenforceable.

33. So what happens next?

34. The respondent has always shown willingness to furnish security pending the determination of the appeal. The fact that the guarantee has been found to be wanting should not be a reason to punish it by allowing execution to proceed. What is important is that the decretal sum is secured.

35. I would thus be inclined to give the respondent time to provide another guarantee that does not flout section 11 of the Act or move the court to seek for an alternative security. To this end I will grant the respondent 30 days to do so.

36. The applicant shall have costs of this application in any event, payable in the cause.

37. The parties are advised to proceed to have the appeal determined expeditiously.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MERU THIS DAY OF 6TH DAY OF NOV 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Munene