REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E207 OF 2019

GEONET COMMUNICATIONS LIMITED.....PLAINTIFF

VERSUS

SAFARICOM PLC.....DEFENDANT

RULING

1. On **21st** December 2020, this court (Odero J) issued a temporary injunction limited to **60** days restraining the Respondent whether by itself, its agent and/or servants from suspending, terminating or otherwise interfering with the telecommunication interconnectivity link between the applicant and the Respondent's respective networks in any way whatsoever **subject** to the Plaintiff/applicant depositing in court a Bank Guarantee for **Kshs. 15,000,000/=** within **30** days of the date of the said ruling. The court decreed that in the event of failure to comply with the aforesaid condition, the interim orders would automatically lapse with no further reference to the Plaintiff/applicant.

2. Vide an application dated **21st** January 2021, the Plaintiff sought enlargement of the above period by a further **45** days citing *inter alia* delay in processing the Bank Guarantee attributed to the Christmas break. On **3rd** March 2021, this court granted the Plaintiff an extension of **14** days from the said date to comply with the said order. The Plaintiff filed the Bank Guarantee in court on **18th** March 2021, **15** hours after the lapse of the **14** days.

3. In order to cure the aforesaid delay, vide a Notice of Motion dated **31st** March 2021 the Plaintiff seeks extension of time to deposit in court a Bank Guarantee of **Kshs. 15,000,000/=**. It also prays that the Bank Guarantee dated **18th** March 2021 filed in court on 18th March 2021 be deemed to be properly filed in this court. Lastly, the Plaintiff prays for costs of the application.

4. During the hearing of the application, the defendant's counsel Mr. John Ohaga, informed the court the he was not objecting to the extension of time. However, he strongly objected the entreaty that the said Bank Guarantee be deemed to be properly filed in this court.

5. The applicant's case is that unless this court admits the said Bank Guarantee, it will suffer irreparable loss. On the other hand, it argues that the Respondent will not suffer any prejudice if the said prayer is allowed.

6. The defendant filed grounds of opposition dated **19th** April 2021 stating:- that the application is misconceived, without proper foundation and a gross abuse of the court process; that there has been no compliance with the Order made on **3rd** March 2021; and, that the purported Guarantee is not in compliance with the order made on **21st** December 2020.

7. The only common ground is that the Plaintiff was on **21st** December 2020 ordered by this court to furnish a guarantee in the sum of **Ksh. 15,000,000/=** to secure the performance of its obligations to the defendant. The point of divergence is that the defendant maintains that the guarantee does not conform with the court order issued on on **21st** December 2020 because it was issued in favour of a third party **M'Big Limited** by Kenya Commercial Bank Limited. The defendant's contestation is that **M'Big Ltd** is described as the principal Debtor in the Guarantee instrument, yet the said company is not a party to these proceedings and therefore it is a stranger to the Respondent. The Respondent maintains that it does not matter what arrangements the said company has with the Plaintiff, but what matters is that the guarantee must demonstrate a liability and an obligation on the part of the applicant. The defendant maintains that the guarantee must accord with the court order. As a consequence, the defendant maintains that the guarantee is not valid for the purposes of this case because the debtor is a stranger to these proceedings.

8. In in order to put the parties diametrically opposed positions into a proper perspective, it is apposite to examine the wording of the subject guarantee. It reads: -

Deputy Registrar,

High Court of Kenya,

P. O. Box 30041-00100

Nairobi

Kenya

BANK GUARANTEE NO: MD2107700005C FOR KES15,000,000.00 BY ORDER OF M'BIG LTD IN RESPECT TO NAIROBIHC CIVIL CASE E207 OF2019 (GEONET COMMUNICATIONS LIMITED VS. SAFARICOM PLC)

*At the request of our customer **M'Big Ltd**, we hereby guarantee as follows: -*

*We **KCB Bank Kenya Limited, Trade Services**, P.O. Box **484800-00100**, **Nairobi, Kenya**, Incorporated/Registered under the companies Act, and having our registered office at **5th Floor, Kencom House**, (hereinafter called " the Bank")hereby Guarantee and undertake to pay you, within Fourteen (14)days from the date of receipt of the demand, without cavil or argument to you on your first written demand declaring **M'Big Ltd** of P.O. Box 732, **Bungoma, Kenya**, (hereinafter referred to as the "Principal Debtor) to be in default, any sum or sums subject to an aggregate liability of **KES 15,000,000.00** (say **Kenya Shillings Fifteen Million only**).*

This Guarantee will remain in force until the earlier of:

a. The date the judgment is delivered; or

b. The Bank receives a written order from the court discharging this Guarantee; or

c. Payment by the Bank to the Deputy Registrar High Court of Kenya of the full guarantee amount.

d. 18th March 2024 at the latest.

*Our liability under this Guarantee is limited to an aggregate of **KES15,000,000.00** (say **Kenya Shillings Fifteen Million only**). This Guarantee is personal to you and is not transferrable or assignable and is governed by the Laws of Kenya.On expiry or upon demand please return the Original Guarantee to us.*

Signed in Nairobi this 18th day of March 2021.

9. Mr. Simiyu, the applicant's counsel argued that a guarantee can be issued by a third party. To him, the question is whether the guarantor can be called upon to settle the debt in the event of a default. He urged the court to consider whether the defendant is exposed in the circumstances of this case. He argued that the basis of the guarantee is consideration for shares held by a third party, and, that, the money is available in the event of default. To buttress his argument, Mr. Simiyu cited several decisions. However, I have read all the decisions cited. None of the cases fits the peculiar facts of this case discussed below. Cases are context sensitive. A case is only an authority for what it decides. This is correctly captured in the following passage: -[1]

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides..." (Emphasis added)

10. The ratio of any decision must be understood in the background of the facts of the particular case.[2] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[3] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[4] Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[5]In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[6] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[7]

11. The unique facts of this case which are absent in the cited cases are that the provision of the guarantee was ordered by a court. A key question which is absent in the cited cases is whether the subject Guarantee complies with the court order and if it does not what are the consequences. Also absent in the cited cases is the fact that that the guarantee was given by an entity which is not a party to these proceedings. Lastly, the said entity is described as the Principal Debtor yet the principal debtor is the Plaintiff.

12. The Respondent's opposition to the Guarantee is underpinned by the three grounds, namely; non-compliance with the court order; the fact that the principal debtor named in the guarantee document is a stranger to this case; and, underneath these two grounds is the

apprehension that the Guarantee as drawn may not be enforceable. These salient features are absent in all the cases cited by the Plaintiff/applicant and distinguish this case from the cited cases.

13. For starters, a Guarantee issued pursuant to a court order must as of necessity comply with the terms of court order. To determine whether the Guarantee dated **18th** March 2021 surmounts this hurdle, it will be necessary to interpret the court order made on **21st** December 2020. In this regard, I find useful guidance in the Southern African case of *Firestone South Africa (Pty) Ltd v Genticuro AG**[8]*** 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."***

14. The relevant part of the order stated *"…Subject to (ii) the Plaintiff/applicant depositing in court a Bank Guarantee for Kshs. 15,000,000/=…"* The learned judge deployed simple and clear language which is not capable of entertaining more than one meaning. The judge was specific that the Plaintiff was to deposit a Bank Guarantee. The order is directly addressed to the Plaintiff/applicant. To ascertain the intention, we must read the whole ruling and if the meaning is clear no extrinsic evidence is permitted. Finally, the courts directions are to be found in the order. A reading of the entire ruling and the final order leaves no doubt that the order is directed to the Plaintiff. The judge never used words such as *"agents, servants, assigns or persons acting on the Plaintiff's behalf."* An interpretation that seeks to accord a leeway to the applicant to suggest that the order as framed can be extended to cover other parties not before the court or to whom the order was not directed would in my view amount to ascribing the court order with a meaning it cannot reasonably bear. It would amount to excessive peering of the language deployed by the judge.

15. The nub of this dispute lies in the nomenclature deployed in the Guarantee document. The principal debtor is described as ***M'Big Ltd,*** a company which is not a party to these proceedings and a stranger to the Plaintiff. The order did not give the Plaintiff the leeway to substitute his position as the Principal debtor with another party nor did the order permit the Plaintiff to provide a Guarantee provided by any other person on its behalf. On this ground alone, the guarantee does not comply with the court order. This Plaintiffs application collapses on this ground.

16. Closely tied to the failure to comply with the court order is the question whether the guarantee as drawn is enforceable. In this regard, Mr. John Ohaga, the defendant's counsel correctly pointed out that the principal debtor named in the guarantee is a stranger to this court and to the Respondent. He submitted that the guarantee as drawn is not enforceable within the context of this litigation and urged the court to reject it.

17. A bank guarantee is an act of trust with full faith to facilitate the fine flow of trade and commerce in international (or internal) trade or business. A guarantee is a casuistic contract. It always derived from a relationship between the principal debtor and the creditor (beneficiary). This relationship is referred to as the underlying relationship or contract. The Supreme Court of Appeal of South Africa made it clear in *First Rand Bank Ltd v Brera Investments*[9] that:- *"A guarantee of this nature must be paid according to its terms, and liability under it is not affected by the relationship between other parties to the transaction that gave rise to its issue*".

18. The issuance of a guarantee amounts to an offer, which must be accepted by the beneficiary. It is common ground that the offer is generally accepted tacitly which acceptance is afterward evidenced by the call from the beneficiary. Thus, by virtue of the issuance of the guarantee by the bank and the tacit acceptance of the beneficiary (the beneficiary's acceptance can be deemed to exist when he does not object), the bank and the beneficiary are contractually bound and they can no longer change or amend the terms of the guarantee.

19. Now that there is no acceptance, certainly, no relationship can lawfully come into existence in the circumstances of this case between the defendant and the company described as the Principal debtor in the guarantee or between the Bank and the defendant. A court cannot compel a party to enter into an agreement he is not comfortable with. The foregoing becomes clear if we consider that a direct bank guarantee gives rise to three distinct contracts: The underlying contract between the debtor and the creditor; the counter-indemnity (or reimbursement contract) between the debtor and his bank; and finally, the contract established between the debtor's bank and the creditor. However, it should be noted that these three contracts although related are completely independent.

20. As was appreciated by the Supreme Court of India in *Mahatma Gandhi Sahakra Sakkare Karkhane v National Heavy Engg. Co-op. Ltd*., [10]the language deployed in a guarantee becomes important if we consider that usually a plain reading of the provisions of a standard unconditional bank guarantee reflects that the guarantor undertakes to pay without demur which makes the demand conclusive and binding. Some bank guarantees make the beneficiary a sole judge in regard to invocation and enforcement of bank guarantee, which leaves the decision of invocation to the absolute discretion of that beneficiary.[11]

21. It is permissible for a court to determine, in context, whether compliance with the intention and purpose of the on-demand guarantee is sufficient. Accordingly, parties should seek to phrase mode of delivery clauses carefully in order to ensure that they are prescriptive in nature and that a failure to comply with the mode of delivery clause would result in an invalid demand. The Supreme Court of Appeal of South Africa in *Schoeman & Others (Schoemans) v Lombard Insurance Co Ltd* was tasked with considering the correct interpretation of the mode of delivery clause contained in an on-demand guarantee and whether delivery to the guarantor (albeit not in the manner prescribed) is

sufficient and constitutes a valid demand. The court held that when interpreting a document, regard must be had to the context by reading the provisions in light of the document as a whole and the circumstances which surrounded the document coming into existence. The court further noted that a sensible (business-like) meaning should be preferred to one which is not sensible and which undermines the apparent purpose of the document.

22. Talking about the language used in the guarantee, guidance can be obtained from the Supreme Court of India decision in *U.P. Co-op. Federation Ltd. v Singh Consultants and Engineers (P) Ltd.**[12]* Here, the obligation was undertaken by the Bank to repay the amount on "first demand" and "without contestation, demur or protest and without reference to such party and without questioning the legal relationship between the party in whose favour guarantee was given and the party on whose behalf guarantee was given." The Supreme Court held that the Bank was obligated to pay the moment a demand was made without protest and contestation, irrespective of any dispute between the parties.

23. Whereas the above decision provides the correct interpretation of the law, I am alive to the fact that in light of the stringent law governing Bank Gurantees, there are only two narrow exceptions where a gurantee can be challenged. One is in the event of fraud of an egregious nature as to vitiate the entire underlying transaction, of which the bank has notice. *The only exception to the rule that the guarantor is bound to pay without demur, is where fraud on the part of the beneficiary has been established. The party alleging fraud has to establish it clearly on a balance of probabilities.*[13] Lord Denning MR in *Edward Owen Engineering Ltd v Barclays Bank International Ltd***[14]** where he said: -

> "*A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice."*

24. The second exception relates to special equities in the form of preventing irretrievable injustice between the parties. This second exception relates to the cases where in allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. The harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature that it would override the terms of the guarantee and the adverse effect of declining to accept such a guarantee. A guarantee which does not conform to a court order fits this second exception because it is voidable. If this court were to accede to the request to admit such a guarantee it would amount to forcing an unwilling party to enter into a voidable contract.

25. In conclusion, it is my finding that the guarantee dated **18th** March 2021 does not conform with the court order dated **21st** December 2020; that since a guarantee creates a binding contract, its acceptance by the beneficiary is a requirement; that the aforesaid omissions render the Guarantee voidable which brings the circumstances of this case within the permissible exceptions discussed above; and, that the omission to link the company named in the Guarantee with the parties in this case and in particular, renders the Guarantee susceptible to court challenge in the event of default because it is not clear whether the Plaintiffs default will constitute default on the part of the said company.

26. For the reasons stated herein above, the Plaintiffs prayer that the Bank Guarantee dated **18th** March 2021 filed in court on **18th** March 2021 be deemed to be properly filed in this court is refused. Each party shall bear its own costs for this application.

Orders accordingly

Signed, Dated and Delivered at **Nairobi** this **18th** day of **May** 2021

John M. Mativo

Judge

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[1] As observed in State of Orissa vs. Sudhansu Sekhar Misra MANU/SC/0047/1967

[2] Ambica Quarry Works vs. State of Gujarat and Ors. MANU/SC/0049/1986

[3] Ibid

[4] Bhavnagar University v. Palitana Sugar Mills Pvt Ltd (2003) 2 SC 111 (vide para 59)

[5] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr. (Citing Lord Denning).

[6] Ibid

[7] Ibid

[8] 1977 (4) SA 298 (A) Trollip JA

[9] *CC* 2013 (5) SA 556 (SCA).

[10] (2007) 6 SCC 470.

[11] Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Co-op. Ltd., (2007) 6 SCC 470.

[12] (2006) 13 SCC 599

[13] *See* The Supreme Court of Appeal stated in *State Bank of India and another v Denel Soc Limited* {2015} 2 All SA 152 (SCA).

[14] [1978] QB 159 (CA) [1978] 1 All ER 976; (1977 3 WLR 764) at 983 B-D.