REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. E061 OF 2020

GEMINIA INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

GULF AFRICAN BANK LIMITED.....1ST DEFENDANT

UNITED PHARMA (K) LIMITED.....2ND DEFENDANT

RULING

NOTICE OF MOTION

The Plaintiff/Applicant filed Certificate of Urgency Application on **4th March 2020** for reasons that; -

1. On or about **28th February 2020**, the Defendant unlawfully and arbitrarily debited the Plaintiff's accounts numbers **0320008718 & 0320008719** domiciled at the Respondent's Branch at Geminia Insurance Plaza, Upper Hill in Nairobi.

2. The Plaintiff moved the Court in its Notice of Motion Application dated **4th February 2020** and sought a mandatory injunction directing the Respondent to reverse all unlawful debit entries made to the Applicants Bank **A/C 0320008718 & 0320008719** and reinstate and reimburse the said account the sum of **Kshs 258,043,691.07** being funds unlawfully debited with attendant interest.

3. The Plaintiff/Applicant sought grant of temporary order of injunction restraining the Defendant whether by itself, its employees, servants or agents from continuing freezing and/or preventing the Plaintiff/Applicant from dealing with Accounts Number **00320008701, 0320008719 and 0320008718** pending the hearing of the said Application and the suit.

The Application was supported by the sworn Affidavit of **Moses Gitiria Mbuciri** dated **4th March 2020** on the grounds that; -

a. The Plaintiff's three operational accounts which hold life insurance policy holders' funds are with the Defendant. The said account details are:

i. Name of the accounts: GEMINIA INSURANCE COMPANY LIMITED.

ii. Bank: GULF AFRICAN BANK LTD.

iii. Branch: Geminia Plaza, Upper Hill, Nairobi and Account Numbers xxxxxxxxx, xxxxxxx and xxxxxxxxx.

b. That on or about **1st June 2018**, the Plaintiff provided a one year guarantee on behalf of the United Pharma (k) Ltd (hereinafter referred to as 'Client') in respect of a working capital loan it was taking from the Defendant to cover a working capital. The Client also gave other securities to the Defendant, attached is a copy of title marked **MGM-3.**

c. The said cover was to lapse on **31st May 2019** and the tenor provided was for **90 days** from the date of disbursement or raising of letters of credit. The cover lapsed on **31st May 2019**. By that time the Client had commenced discussions with the Defendant with a view of extending the tenor's period from **90 days to 210 days** to cover client's cash conversion cycle.

d. On **17th June 2019**, the Plaintiff issued a fresh guarantee for a loan sum to a maximum of **Kshs. 376M** and agreed to uphold, for the benefit of the Defendant, the contractual obligations of the Client if the Client breached loan terms. The guarantee however did not give the Defendant the right of lien or set off over the Plaintiff account and/or assets.

e. As per the Plaintiff's express terms, the guarantee was issued on the basis that there would be a restructuring of repayment terms to match the Client's cash conversion cycle of 210 days as opposed to the 90 days that had subsisted in the first cover.

f. By virtue of its longstanding business relationship and legal provisions that promote out of court settlement and without prejudice to its position that **27th November 2019** recall was untenable. The parties initiated discussions amongst themselves aimed at settling this matter amicably and as a result, on **17th January 2020** a payment plan was agreed upon with the terms that the client would pay the Defendant in the following installments;

i. Kshs. 2.7 Million on or before 20th January 2020

ii. Kshs. 26.2 Million on or before 27th January 2020

iii. Kshs. 63 Million on or before 25th February 2020

iv. Kshs. 45 Million on or before 28th February 2020

v. Kshs. 14.3 Million on or before 31st March 2020

vi. Kshs. 32 Million on or before 25th April 2020

vii. Kshs. 67 Million on or before 30th April 2020

viii. Kshs. 52 Million on or before 16th May 2020

ix. Kshs. 10 Million on or before 25th May 2020

x. Kshs. 87 Million on or before 25th May 2020

g. Vide letters dated **22nd and 29th January 2020**, the Defendant without any justification exited from the repayment plan it committed itself to on **17th January 2020** and demanded **Kshs.374, 048, 178** in full thus failing to deduct **Kshs.748, 178** already paid by the Client which the Client paid and the Plaintiff paid **Ksh 1,951.822** to complete payment of 1st instalment of **Ksh 2,700,000/-** on **20th January 2020.**

h. Further, the Defendant issued a demand letter dated **21st February 2020** giving a 7 days' notice expressing its intention to, among other things, freeze and/or exercise right of lien over the Plaintiff's accounts pursuant purportedly to **Clause 11 of Banks Terms and Conditions.**

i. Before the lapse of the said notice period, the Defendant froze and/or exercised right of lien over aforementioned Plaintiff's accounts notwithstanding there was no court order and the accounts held monies belonging to policy holders who are non-parties to the dispute. Further, the matter in dispute was in respect to a contentious cover which the Plaintiff averred was recalled by the Defendant unlawfully and hence the lien could not be triggered.

j. The Plaintiff/Applicant alleged particulars of fraud, misrepresentation and illegalities by the Defendant by; recalling the guarantee prematurely without any breach by the Plaintiff; issued restructured facility on **4th November 2019** and failed to match Client's cash conversion cycle [from 90 days to 210 days]; by unilaterally freezing Plaintiffs Accounts; demanding profit of 12.5% not covered by guarantee; illegal recovery actions outside timelines of 7 days deadline; failure to deduct **Kshs 748,178** already paid by 2nd Defendant; failing to allow the guarantee to run its full course and failed to comply with Islamic banking principles **Mudarabah**-profit sharing and loss – bearing; **Wadiah**-safekeeping and **Murabahah**- cost-plus.

1ST DEFENDANT'S REPLYING AFFIDAVIT

The Application was opposed vide the sworn Replying Affidavit of **Amina Bashir** dated **19th March 2020** and stated as follows; -

1. Under the guarantee, the Plaintiff expressly in writing affirmed unconditionally, that it was a guarantor in respect of advances that the Defendant made to United Pharma (K) Limited and irrevocably guaranteed to pay the Defendant **Kshs.376, 000, 000** on demand and without the Defendant needing to prove reasons for the demand.

2. Prior to execution of the Guarantee, there were extensive negotiations as shown by email of **14th June 2019**, where the Applicant sought reasonable time for payment would be 30 days after the Defendant made a demand.

3. The Defendant confirmed that it issued letter of **4th November 2019** restructuring the facility granted to the 2nd Defendant and retained the terms of the previous facility letter. The restructuring letter is marked **MGM- 6** of Plaintiff's documents.

4. By a letter dated **27th November 2019**, the Plaintiff acknowledged receipt of the letter restructuring the principal debt which the Defendant responded to on **2nd December 2019** reminding the Plaintiff that it had recalled the guarantee that the Plaintiff had issued and that payment was due within 30 days of 27th November 2019. These letters were annexed and marked **AB-1** and clearly show that the Plaintiff never objected to or raised issue with the Recall Notice of 29th November 2019, [instead the Plaintiff gave proposals on settlement of the guarantee.] Therefore, the Plaintiff's claim that the Recall Notice is invalid is an afterthought that disentitles it from the equitable injunctions that it is seeking.

5. The Plaintiff negotiated to have 30 days to pay on demand being made under the guarantee and the Defendant offered to indulge the Plaintiff to make periodic payment to discharge its obligations under the guarantee.

6. The Defendant admitted that by letter dated **17th January 2020** marked **MGM- 8B** of Plaintiff's documents, that the Defendant offered to indulge the plaintiff to make periodic payments detailed in the said letter. The terms of the indulgence were that any delayed payment would vitiate the indulgence and that the indulgence was without prejudice to the guarantee or the recall notice issued on 27th November 2019.

7. On 22nd January 2020, the Defendant withdrew the offer before it was accepted by the Plaintiff after the 2nd Defendant made a proposal on its debt that militated against the spirit in which the Defendant had to indulge the Plaintiff as communicated vide letter of 29th January 2020 marked **MGM-10B.**

8. On 14th February 2020, the Plaintiff in acknowledgement of its obligation to pay under the guarantee and without questioning the Recall Notice, and/or that the settlement offer made by the Defendant on 17th January 2020 was withdrawn on 22nd January 2020, offered to settle its obligations under the guarantee as demanded in the Recall Notice by paying equal monthly instalments running up to November 2020. Letter of 14th February 2020 annexed as **AB** Pg **5-6.**

9. The Plaintiff cannot claim that the Recall Notice of 27th November 2019 is valid and invalid at the same time. The Plaintiff wants to be allowed to discharge its obligations under the guarantee on terms it claims were agreed yet the said terms were pursuant to the recall that it wants the court to nullify. The Plaintiff lacks a *prima facie* case to seek injunctive orders.

10. The three accounts set out in the Supporting Affidavit of Moses Mbuciri are normal transactional current accounts and are not custodial or nominee accounts as alleged. The allegation that the accounts hold life insurance policy holders' funds is dishonest and meant to deceive the court to create an impression that the funds in these accounts are held in trust for third parties.

FURTHER REPLYING AFFIDAVIT

A Further Affidavit dated **2nd February 2021** was sworn by **Lawi Sato** in addition to what **Amina Bashir** stated in the Affidavit filed on **19th March 2020** as follows; -

1. The Statement of Account No. **xxxxxxxxx** shows payment of Motor Vehicle premiums as follows;

   a. Kshs. 100, 000 for KCA 126Y ON 31.01.2020.

   b. Kshs. 8, 000 for KCF 933T on 04.02.2020.

   c. Kshs. 15, 000 for KCL 665C on 22.05.2020.

   d. Kshs. 30, 000 for KCS 542N on 23.11.2020.

Motor Vehicle premiums are not trust funds as claimed.

2ND DEFENDANT'S REPLYING AFFIDAVIT

The 2nd Defendant responded to the Plaintiff's Application vide a Replying Affidavit sworn by Abdullahi Hashi dated 4th November 2020 as follows;

1. The 2nd Defendant engages in pharmaceutical business and in order to guarantee supplies, the 2nd Defendant has put in place cycle importation and stocking policies. These cycles can only be optimally managed within a 210-days spectrum.

2. The 1st Defendant imposed upon the 2nd Defendant an impractical 90-days cycle which destroyed the 2nd Defendant's business as it could not trade profitably or at all.

3. The 1st Defendant then offered the 2nd Defendant restructuring schemes which were not intended to be honored but which were presented to the 2nd Defendant to camouflage the 1st Defendant's breaches.

4. Without affording the 2nd Defendant an opportunity to honor these restructured facilities, the 1st Defendant purported to recall the facilities within the period listed as the restructuring window. This was in bad faith, illegal and contrary to Central Bank of Kenya Prudential Guidelines.

5. The recalling of the guarantees was premature as the terms under which the 2nd Defendant agreed to take the facility were not honored. The restructuring was undertaken without the direct consent of the guarantor, the consequence of which the guarantor has been completely discharged. The guarantor's attached accounts were not designated accounts under the security instruments and the attachment was illegal as the monies belong to third parties.

6. The 2nd Defendant is willing to pay Kshs.5 Million per month on account after the hearing and final determination of the suit herein. It is just and fair that the 2nd Defendant be allowed to make the proposed installment payments.

PLAINTIFF'S FURTHER AFFIDAVIT

1. The Plaintiff/Applicant deposed that in 2018, the Plaintiff lodged an application for demerger or separation of its life and general insurance business as per annexed application marked **MGM-1.**

2. Insurance Regulatory Authority (IRA) authorized the Plaintiff to advertise in the Kenya Gazette as per approval letter of **11th June 2020,** marked **MGM-2.**

3. IRA approved the Plaintiff/Applicant's application for registration as per the letter of **5th June 2020** & Certificate of registration.

4. The Plaintiff/Applicant asserted that at the time of the Defendant's unlawful debits, it held funds for Geminia Life Insurance Co Ltd as approval of demerger and registration by IRA was pending.

PLAINTIFF/APPLICANT'S SUBMISSIONS

The Plaintiff submitted that consideration for granting mandatory injunction was stated in ***Kenya Breweries Ltd & Anor vs Washington O.Okeyo [2002] eKLR*** ***by C.A. thus;***

> ***"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once of if the act done is a simple and summary one which can be easily remedied, or if the Defendant attempted to steal a match on the Plaintiffs…..a mandatory injunction will be granted on an interlocutory application."***

See also; ***Locaball International Finance Ltd vs Agroexport & Others (1986) 1All ER 901*** on mandatory injunction.

The Plaintiff submitted that the considerations for granting an interlocutory mandatory injunction is well stated in the case of ***Nation Media Group & 2 Others –versus- John Harun Mwau [2014] eKLR*** where the Court of Appeal opined;

> ***"It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances… a different standard higher than in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted exceptional and in the clearest of cases."***

The Plaintiff submitted that the debited accounts hold monies belonging to Life Assurance Policy holders and pensioners and that it only manages the accounts as an approved insurer under the Retirement Benefits Regulations. The 1st Defendant's actions were illegal and unlawful as the debited monies amounting to **Kshs.258, 043, 691.07** were strictly managed for third parties who are not parties to the dispute.

The 1st Defendant's actions present special and exceptional circumstance justifying the grant of an interlocutory mandatory injunction.

It was the Plaintiff's submission that it had adduced material before the court that offered substantive issues for determination and that it will suffer loss that cannot be adequately compensated by an award of damages as the debiting of the accounts by the 1st Defendant crippled the operations of the Plaintiff's business as well as dented its reputation.

The definition of irreparable loss was given in **Halsbury's Laws of England 3rd Edition, Vol. 21 Par. 739 Pg. 352** as follows;

> ***It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the Court interferes by way of an injunction is to prevent an injury in respect of which there is a legal remedy. It does so, upon 2 distinct grounds, first, that the injury is irreparable and the 2nd, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned by damages…….***

The Plaintiff submitted that it established a *prima facie* case and demonstrated irreparable harm to its business and adverse effect on 3rd parties not party to these proceedings. Even on a balance of convenience, it tilts heavily in favor of the Applicant.

See ***Paul Gitonga Wanjau vs Gathuthi Tea Factory Co Ltd & 2 Others [2016] eKLR***

1st DEFENDANT'S SUBMISSIONS

The 1st Defendant submitted that the guarantee of **17th June 2019** [was/is valid] and the Plaintiff irrevocably guaranteed to the Defendant **Kshs 376,000,000/-** upon the Defendant's written demand. the 1st Defendant issued the 1st written demand through the Recall Notice of 27th November 2019 for payment of the guarantee within 30 days.

The above-mentioned guarantee expressly provides that:

> ***Any claim must have been reported to Geminia Insurance Company Limited on or before the 31st May 2020 otherwise it will be inadmissible. The Guarantee will expire on 31st May 2020 regardless of whether it is brought back to Geminia Insurance Company Limited for cancellation or not. Upon receipt of a demand under this guarantee, Geminia Insurance Company Limited shall make payment of the Claim Sum to the Bank within reasonable time but not later than 30 days of receipt of the demand.***

The 1st Defendant relied on the following cases to buttress its position;

Kenindia Assurance Co Ltd vs First National Finance Bank Ltd [2008] eKLR the Court of Appeal, referring to the guarantee that was issued by the appellant, observed that:

> ***"In our case the appellant's obligation was to pay upon demand. The obligation was established when it was served with a notice of default and upon a demand of payment being made. Liability to pay in the circumstances is not and cannot be an issue. There is no question outstanding to go to trial or which will require the examination of witnesses."***

Fidelity Commercial Bank Ltd vs Kenya Grange Vehicle Industries Ltd [2017] eKLR the Court of Appeal pronounced that;

> ***"….where the intention of parties has in fact been reduced to writing, under the so called parol evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms."***

The 1st Defendant posited that the guarantee by the Plaintiff was valid and rightly enforced as contract between the parties and the Court cannot rewrite its terms. Secondly, the Plaintiff did not establish a *prima facie* case to warrant grant of mandatory injunction as elucidated by the case of;

Robai Kadili Agufa & Anor vs Kenya Power & Lighting Co Ltd [2015] eKLR the High Court stated; -

> ***"A mandatory injunction is not the same as a prohibitory injunction and considerations for granting the two injunctions are slightly different. Whereas in the case of prohibitory injunction an applicant must establish prima facie case with a probability of success, that the applicant will suffer irreparable damage which cannot be adequately compensated by an award of damages if an injunction is not granted or further still, that the balance of convenience tilts in the applicant's favour. In the case of mandatory injunction, the applicant must in addition establish special circumstances and the standard for its grant is usually higher than that of prohibitory injunctions.***

The 1st Defendant submitted that the Plaintiff failed to establish *prima facie* case with probability of success, to warrant grant of Interlocutory/Temporary Injunction as it did not prove irreparable damage.

See; ***Nguruman Ltd vs Jan Bonde Nielson & 2 Others [2014] eKLR***

On the issue on whether the 1st Defendant had legal right to freeze funds in Plaintiff's Accounts as listed above, the 1st Defendant relied on reasoning in the case of;

> ***Fidelity Commercial Bank Ltd vs Azim Jiwa Tajwani [2019] eKLR*** in which the Court observed;
>
> ***"Clearly, then the Bank had a general right of lien for customer's indebtedness to the Bank and a right of set off such debts against deposits held in the Account……. but in respect to whether the bank had a right of Lien and setoff, it would not matter that there was no meeting of 7th January 2005 because this Court has found that right to have been expressly given in the document on Rules & Regulations governing Rajwani's Current Account."***

The 1st Defendant submitted that the Plaintiff is not entitled to equitable remedy of Injunction for failure to fully disclose material facts and relied on the case of;

Geoffrey Kinja vs Gilbert Kabeere Mmbijiwe & Anor [2015] eKLR which referred to ***Bahadurali Ebrahim Shamji vs Alnoor Jamar & 2***

Others C.A. No 210 of 1997 thus;

> ***"It is perfectly well settled that a person who makes an ex parte application to the Court – that is to say, in the absence of the person to be affected by that which the Court is asked to do – is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained. That is perfectly plain and requires no authority to justify it."***

2nd DEFENDANT'S SUBMISSIONS

The 2nd Defendant who joined the proceedings vide Court order, submitted that the liability of parties disputed and thus, the Court is called upon to determine the same. Secondly, the recall on the facility and guarantee was/is unconstitutional and unconscionable and negatively affects rights of 3rd Parties. Thirdly, that the 1st Defendant is trying to benefit from its own misconduct.

The 2nd Defendant submitted that 1st Defendant approached them for transfer of their Account from NIC Bank and undertook to offer better terms a cycle of 210 days instead the 1st Defendant issued 90-day cycle which made it impossible for the2nd Defendant to operate within that trade cycle.

Following months of protracted discussions, the 1st Defendant restructured the banking facilities on 4th November 2019 and then recalled the entire loan facility barely 3 weeks later on 27th November 2019. The 1st Defendant's action amounted to clear breach of 2nd Defendant's rights in addition it was malicious and unconscionable.

The 2nd Defendant referred to the following cases on unconscionable acts;

> See; ***Housing Finance Co of Kenya Ltd vs Palm Homes Ltd & 2 Others Nbi HCCC 918 of 1999.***
>
> ***Pius Kimaiyo Langat vs Cooperative Bank of Kenya [2017] eKLR***
>
> **Which referred to the case of;**
>
> ***Margaret Njeri Muiruri vs Bank of Baroda (Ky) Ltd [2014] eKLR***
>
> > ***"the discretion on the respondent in the present case was not completely unfettered, and applying those sentiments to the appeal now before us, we find it objectionable that the lender can vary interest to its benefit, without any recourse to or passing such information to the borrower, especially where such interest rises up to an exorbitant level. There does not appear to be any notice to the appellant in this case as to what the rate of interest would be. As stated earlier, the right or discretion given under the contract to vary interest was not unfettered and the contract must be construed reasonably. It must be shown or at least be self-evident that at the time the interest was being changed, it was brought to the attention of the borrower."***

Kenya Commercial Finance Company Ltd vs Ngeny & Anor [2002] 1 KLR the court stated; -

> ***"The court will not interfere where parties have contracted on arms-length basis. However, by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional terms upon the other party. Equity can intervene to relieve that party of such conditions."***

The 2nd Defendant submitted in support of the Plaintiff's Claim that the 1st Defendant could not offer a restructured facility in response to its own misrepresentation on 4th November 2019 and then on 27th November 2019 pronounce that it called off the Loan and raid the Guarantor's Account.

On a balance of convenience, the 1st Defendant will not be prejudiced and will not suffer if the Plaintiff's Application is allowed. The 2nd Defendant is ready and willing to pay **Kshs 5 million** per month till payment in full. The Court ought to take judicial notice of the Covid-19 pandemic and its adverse impact on local and International businesses and taking into account that the default was engineered by the 1st Defendant's own misconduct.

DETERMINATION

After consideration of pleadings and detailed oral and written submissions by parties through their respective Counsel the issues that emerge for determination are;

a) Was/is there a valid Insurance Guarantee?

b) Was the recall written Notice of 29th November 2019 valid?

c) Should the Court grant mandatory and/or interlocutory injunction?

1.Was/is there valid Insurance Guarantee?

The Applicant annexed Insurance guarantee of 17th June 2019 duly executed by Plaintiff Company by its Managing Director and director and with the company's seal and reads in part;

> ***We, Geminia Insurance Co Ltd hereby unconditionally and irrevocably affirm that we are Guarantor and irrevocably guarantee to pay you up to a total of Kshs 376,000,000 such sum being payable in the types and proportions of currencies in which the Restructured Facility is payable, unconditionally and irrevocably undertake to pay you upon your first written demand and without cavil or argument any sum within the limit of 376,000,000 as aforesaid without needing to prove or show grounds or reasons for your demand for the sum specified herein, and notwithstanding any objection by us or non- payment of premiums by the Client to us.***

Principles of Commercial Law by K Imaana Laibuta pg 228 defines guarantee as;

> ***"It is a special promise or undertaking constituted by a collateral agreement in which the Guarantor is held liable for a debt of the Principal debtor who is primarily liable''.***

The Plaintiff/Applicant confirms the guarantee of the 2nd Defendant's liability to 1st Defendant and did not contest validity of the guarantee. Secondly, the Applicant agreed to the terms of guarantee as unconditional and irrevocable and upon written demand would pay up to 1st Defendant.

The Contract between the Plaintiff and 1st Defendant of guarantee is a separate and independent of the Contract between 1st & 2nd Defendant's Contract of advance of Loan facility. A reference in the guarantee to the underlying relationship does not change the independent nature of a guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defenses arising from any other relationship except a relationship between the guarantor and the beneficiary. A guarantee is similar to Letter of Credit and /or Professional undertaking, documents recognized in International trade and Legal profession that ensure enforcement or performance.

See: Law of Guarantees by Geraldine Andrews & Richard Millet, 6th Edition at Page 617

The Applicant & 2nd Defendant contest the recall for the Guarantee to be paid after the 2nd Defendant obtained restructured facility from 1st Defendant on 4th November 2019 and repayment was not due when the recall of 27th November 2019 was issued.

The Applicant & 2nd Defendant also contest the unlawful frozen Accounts that hold funds belonging to policy holders who are not party to these proceedings. The 1st Defendant had no lien for the said funds as it was/is not provided for in the Guarantee.

2. Was the recall written Notice of 29th November 2019 valid?

Since, the Court on its own motion brought in the 2nd Defendant into these proceedings, who confirmed that the 1st Defendant advanced them loan facility as evidenced by letter of 6th February 2018. Thereafter the Plaintiff/Applicant issued a guarantee on 1st June 2018 which expired on 30th May 2019.

The 2nd Defendant's letter of 9th May 2019 confirms meeting of 8th May 2019 where a renewal of the facility was agreed upon and culminated with the Restructure of banking Facilities of 4th November 2019 and on 27th November 2019, the 1st Defendant issued Recall Notice of payment of the Guarantee by the Plaintiff/Applicant.

After meetings held by Plaintiff and 1st Defendant and letters of 8th January & 14th January 2020 by the Plaintiff outlining its repayment installment schedule to pay the Guarantee, on 17th January 2020 a payment plan was agreed upon with the terms that the Client, 2nd Defendant, would pay the Defendant starting with the following installment; Kshs. 2.7 Million on or before 20th January 2020.

The letter of 17th January 2020 read in part;

> ***'In light of the good business relationship that you share with the bank, the Bank is amenable to indulge you on your request strictly on the following conditions……***
>
> ***Any delayed payment vitiates the concession granted to you (Geminia Insurance Co Ltd) and the total guaranteed sum of Ksh 376 m shall become due and payable immediately without cavil or argument.'***

It is confirmed by Plaintiff's letter of 27th January 2020;

> ***We are informed that United pharma deposited Kshs 748,178 only out of the 1st expected settlement of Kshs 2,700, 000/-.There was therefore underpayment of Kshs 1,951,822.00. We attach herewith our confirmation of deposit of Kshs 1,951,822.00 in settlement of the balance thereof. We further commit to make good any future shortfall on the committed settlements within 10***

days from the date the deposits fall due.

The 2nd Defendant and Plaintiff did not make good the promise to pay the agreed instalment on time, Kshs. 2.7 Million on or before 20th January 2020. The 2nd Defendant paid Kshs 748,178/- the Plaintiff Kshs 1,951,822.00 after the 20th January 2020 as agreed**.**

The Plaintiff upon receipt of written demand of 27th November 2019 did not fulfil the Guarantee and later wrote letter dated 14th January 2020 one, to confirm that the 2nd Defendant would pay instalments to settle the debt and two, the Plaintiff would settle the Guarantee in monthly instalments of 37,300,000 each month from 28th February 2020.

The 2nd Defendant failed to pay the debt from the 1st instalment on 16th - 20th January 2020. The 2nd Defendant paid Kshs 748,178/- the Plaintiff paid the balance of Kshs 1,951,822.00 on 27th January 2020.

Therefore, since the Loan facility advanced to 2nd Defendant vide letter of offer of 6th February 2018, varied on 10th June 2019 and a further irrevocable guarantee was issued by the Plaintiff, the 1st Defendant rightfully issued a valid written guarantee demand on 29th November 2019 to be settled within the 30 days' notice. Even after the lapse of 30 days, the 2nd Defendant failed to make payment as per the proposal agreed with the 1st Defendant and the Plaintiff failed to settle the guarantee.

Halsbury's Laws of England 4th Ed Vol 41 Pg 819 provides;

The contractual obligations arising under such guarantees or bonds are separate from and not dependent upon those existing under the sale contract between seller and the buyer. Under, a performance guarantee or bond payable under demand the legal position is similar to that of letter of credit.

The Court of Appeal in ***Kenindia Assuarance Company Ltd vs 1st National Finance Bank Ltd Civil Appeal No 328 of 2002*** which observed on guarantees;

"It is in the nature of a covenant by the Appellant to pay upon the happening of a particular event. It is a form of security guaranteeing payment by 3rd party. In such cases the most important factor to consider before liability can attach is whether there has been default. Once default is established and there has been a formal demand, the other conditions are secondary and may not be used to defeat the security."

In ***Sinohydro Corporation Ltd vs GC Retail Ltd & Anor [2016] eKLR*** again citing the above mentioned case; held;

"The bank must pay according to its guarantee on demand if so stipulated without proof of conditions. The only exception is when there is clear fraud of which the Bank has notice of……..It is important to state that Courts do not enjoin payment of a demand bond or bank [insurance Company]guarantee unless the party seeking an injunction can show that the demand on the bond or guarantee is fraudulent and that the bank [insurance Company]knew it to be fraudulent."

In this case, the Plaintiff issued the guarantee, the 2nd Defendant defaulted in servicing the loan facility and the 1st Defendant issued a formal demand of settlement of the guarantee.

3.Should the Court grant mandatory and/or interlocutory injunction?

To grant injunctive relief the Court is guided by the celebrated case of ***Giella –vs- Cassman Brown and Co. Ltd [1973] [EA 358]*** the court set out the principles for Interlocutory Injunctions; these principles are: -

i) The plaintiff must establish that he has a prima facie case with high chances of success;

ii) That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;

iii) If the court is in doubt, it will decide on a balance of convenience.

In the case of ***Mrao Limited –vs- First American Bank of Kenya Limited [2003] KLR 125,*** the court stated as follows;

"A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher that an arguable case."

In ***Mureithi vs City Council of Nairobi [1976-1985] EA 331*** Madan JJA referred to ***L Diplock in American Cynamid Co vs Ethicon Ltd [1975] 1All ER 504*** as follows;

"The object of Interlocutory injunction is to protect the plaintiff against injury by violation of his right of which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the Trial……"

The Plaintiff and 2nd Defendant submitted that the recall formal demand of the guarantee was premature, arbitrary, unconscionable

and illegal.

To this claim as considered above a Guarantee is a separate and independent contract from the underlying contract. The Guarantee by the Plaintiff of 17th June 2019 was irrevocable and unconditional upon the 1st written demand it was to be settled. Once default is confirmed and there is formal demand then it is due for settlement. In this case the recall of 27th November 2019 was pursuant to default by 2nd Defendant to settle/service loan facility obtained in 2018 and restructured in 2019.

The 2nd Defendant submitted that the 1st Defendant despite various negotiations leading to the restructure of loan facility, they intimated that the trade/cash conversion cycle ought to be 210 days and not 90 days which negated the guarantee.

By the 1st Defendant's letter to the 2nd Defendant dated 16th May 2019 marked **MGM-4B** it confirms that the 1st Defendant bank revised the cash cycle period as follows; - '***total financing period is 12 months with maximum period of <u>210 days</u> for each IC/PIF'*** the 1st Defendant agreed and considered the 2nd Defendant's trade/cash conversion cycle.

The 2nd Defendant objected to the Recall Notice of 27th November 2019 to the Plaintiff after it obtained the Restructured Banking Facilities on 4th November 2019. The Recall Notice to the Plaintiff was/is based on a separate and independent contract of guarantee between the Plaintiff and 1st Defendant. The Restructure of Bank Facility is the underlying Contract between the 1st Defendant and 2nd Defendant.

The Recall Notice is pursuant to the 2nd Defendant's default on the facilities advanced and in the terms of the Guarantee the Plaintiff undertook to pay the Bank the insured sum. There was no breach of the terms of the Guarantee contract. The 2nd Defendant has not denied default of servicing the facility nor disclosed how much it has paid to reduce the outstanding amount. In fact, the 2nd Defendant proposed Repayment Plan to the 1st Defendant on 17th January 2020.

And defaulted by payment of part of the amount and the Plaintiff stepped in to pay the balance.

The Plaintiff submitted that the 1st Defendant's recall of guarantee of 27th November 2019, repudiation of the settlement Plan of 17th January 2020 by letters of 22nd & 27th January 2020 freezing the Plaintiff's accounts was fraudulent, illegal null and void. This is by demanding profit of 12.5% which was not covered by the guarantee and freezing the accounts which was not contracted for in the guarantee and there was no Court order.

The 1st Defendant relied on **Clause 10 & 11 of the Bank's Terms & Conditions** which at **Clause 11- The Bank's Right of Setoff & Lien** in part reads;

> ***…….The bank shall have absolute right to combine or merge any of the Customer's Accounts for the purpose of setting off any debit balance any debit balance against available credit balance or to reimburse itself or recovery of monies for which the customer is liable. The bank shall have a general lien over all the property in the Bank's possession……..***

Although it was not a term of Guarantee Contract these are the terms and Conditions for customers with Accounts with the 1st Defendant Bank have to comply with. These Terms & Conditions are set out for all Customers with Accounts in the Bank. The Bank holds a valid Guarantee that has become due and owing due to 2nd Defendant's default and formal notice was issued. In the absence of settlement of the guarantee the bank as per its terms and conditions legally withheld the funds in the frozen Accounts.

The Plaintiff submitted that the freezing of its accounts paralyzed its operations and reputation; Kshs 258,043,691.07 was debited. The Plaintiff deposed that the monies held belong to Life Assurance Policy holders and pensioners who are not party to these proceedings. The Plaintiff asserted that it is a registered Insurer and an approved issuer and the funds in the 3 Accounts are a guarantee fund. By Further Affidavit dated 15th January 2021, the Plaintiff confirmed approval by IRA to conduct life assurance as one of its products. Therefore, the freezing of Accounts exposed the Plaintiff to litigation by the 3rd parties whose deposits are part of frozen funds.

The 1st Defendant opposed the allegation and in the Further Affidavit of 2nd February 2021, that the statement of account No. 0320008719 shows payment of Motor Vehicle premiums and not life assurance funds.

On the other hand, the Plaintiff deposed that (IRA) approved the Plaintiff/Applicant's Application for registration as per the letter of 5th June 2020 & Certificate of Registration and it held funds for Geminia Life Insurance Co. Ltd as approval of demerger and registration by IRA was pending.

This issue of whether the funds here are funds/deposits by pensioners and life policy holders or not cannot be determined/confirmed at this stage. Although the Plaintiff carries out insurance business which may or may not include life assurance, the Court notes that the bank froze accounts on 28th February 2020 while the Plaintiff obtained registration to operate life assurance policies on 5th June 2020, after the fact. This issue calls for further confirmation.

In light of the above considerations and totality of the evidence presented by parties through Counsel compelling and competing arguments

have been made. However, this Court is called upon to determine if the Recall Notice and Guarantee by the Plaintiff and 1st Defendant were valid.

The Guarantee of 17th June 2019 was valid up to 31st May 2020 and since it was irrevocable and unconditional to be paid upon the 1st written demand, the 1st Defendant made the demand through recall notice of 27th November 2019 in light of default by 2nd Defendant. The Plaintiff contracted and waived any notice of any change, addition or modification that would release them from liability under the Guarantee. The 2nd Defendant made payment proposals on 17th January, 2020 after default and that was a separate arrangement from the Guarantee. This Court cannot rewrite terms of contract by parties in the absence of proof of fraud, illegality and misrepresentation that vitiate a valid contract.

See; ***National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd [1999] eKLR.***

Fraud would amount to presentation of an invalid claim as the basis of freezing accounts or misrepresentation that the bank invoked the Guarantee when the 2nd Defendant paid the facility or the 1st Defendant's action is illegal as it is contrary to law. None of these aspects have been proved against the Bank. Therefore, the Plaintiff has not established a *prima facie* case.

The Plaintiff has not proved special and exceptional circumstances to warrant grant of a mandatory injunction in form of immediate lifting of frozen accounts and the funds released to the Plaintiff because there is a valid and lawful guarantee awaiting performance.

DISPOSITION

However, in light of the possibility that the frozen funds may/might include Life Assurance Policy holders and pensioners who are not party to these proceedings, and the possibility that their rights may be violated which would cause irreparable damage, and the 2nd Defendant's allegation that the 1st Defendant arbitrarily and hastily recalled the guarantee from the Plaintiff , the balance of convenience tilts towards safeguarding innocent parties who may suffer loss of their deposits and the right to redeem the guarantee by 2nd Defendant.

Therefore, the Court grants Temporary /Interlocutory injunction for 120 days on the following terms;

1) That further to Interim orders of this court of 9th March 2020, the funds frozen in Account Numbers xxxxxxx, xxxxxxxx and xxxxxxxxx, Geminia Plaza, Upper Hill, Nairobi, with the 1st Defendant bank shall be preserved and/or bank guarantee of the same provided by the bank pending;

2) The Plaintiff settling the Guarantee and Recall Notice of 27th November 2019 and thereafter to obtain release of frozen funds to safeguard 3rd party rights, or

3) The 2nd Defendant making payments of arrears and outstanding bank facility after reconciliation of Accounts and/or

4) Releasing for sale the charged suit property or in any other legal manner agreed with the Bank settle the outstanding debt.

5) In default after the 120 days grace period, the guarantee shall be performed by release of the funds frozen in the Plaintiffs accounts with the 1st Defendant Bank to the 1st Defendant Bank.

6) Each Party to bear its own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 19TH JULY 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONSOF 17TH APRIL 2020) DELIVERED SIGNED & DATED IN OPEN COURT ON 19th JULY 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MS. WACHIRA H/B FOR MR. NJOMO FOR PLAINTIFF

MR. OGUNDE FOR 1ST DEFENDANT

MR. KIPLGAT FOR 2ND DEFENDANT

COURT ASSISTANT: TUPET