



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO.569 OF 2013**

**NAIROBI HOSPICE.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**DUBAI BANK KENYA LIMITED.....2<sup>ND</sup> DEFENDANT**

**JERRY HONEYWELL TRAVELS LIMITED.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. At the heart of the dispute herein is a Bank Guarantee issued by Kenya Commercial Bank (the 1<sup>st</sup> Defendant or KCB) at the instance of Nairobi Hospice (the Plaintiff or Nairobi Hospice) to Dubai Bank Kenya Ltd (the 2<sup>nd</sup> Defendant or Dubai Bank).

2. Nairobi Hospice is a registered charitable trust established in 1988 and provides palliative care to patients and their families. Desirous of expanding its functions, Nairobi Hospice developed plans to construct a building on its property known as L.R No. 25140. That would require substantial funding and Nairobi Hospice was forced to seek financial assistance from a 3<sup>rd</sup> party financier. A condition given by the financier was that it required an international guarantee from an acceptable Bank. Jerry Honeywell Travels Limited (the 3<sup>rd</sup> Defendant) promised to arrange the Guarantee on behalf of Nairobi Hospice but at a fee.

3. The agreed fees was 2% of the value of the Bank Guarantee. So as to assure payment of the fees, the parties agreed that a local Bank would hold the fees in an escrow account to be released to the 3<sup>rd</sup> Defendant upon receipt of the full project funding from the financier. The chosen bank was KCB into which Nairobi Hospice made a deposit of Kshs.20 million to facilitate the arrangement of the Bank Guarantee.

4. The fees to the 3<sup>rd</sup> Defendant was estimated at Kshs.7.5 million and it is the case of Nairobi Hospice that it instructed KCB to issue a guarantee to Dubai Bank to remit the said sum upon receipt of the full project funding from the 3<sup>rd</sup> party financier. It would seem that the 3<sup>rd</sup> Defendant has not carried out its side of the bargain and no Bank guarantee has been obtained by it. Consequently, no funding has been forthcoming from the 3<sup>rd</sup> party financier. Nairobi Hospice therefore maintains that the 3<sup>rd</sup> Defendant is not entitled to any fees.

5. All would have been well for Nairobi Hospice had it not been that by a Demand received by KCB on 23<sup>rd</sup> December 2013, Dubai Bank demanded the immediate payment of the guaranteed sum of Kshs.7.5 million. If the demand was honoured then, according to Nairobi Hospice, the 3<sup>rd</sup> Defendant would have been paid fees which is not yet due. In a Plaint dated 24<sup>th</sup> December 2013 and filed on 27<sup>th</sup> December 2013, Nairobi Hospice seeks the following prayers:-

a) A permanent injunction restraining the 1<sup>st</sup> Defendant, its servants, agents or assigns from transferring the sum of Kshs. 7.5 million to the 2<sup>nd</sup> Defendant, or proceeding with the intended implementation in response to the demand by the 2<sup>nd</sup> Defendant for Kshs.7.5 million made on or around 23<sup>rd</sup> December 2013, from any of the Plaintiff's accounts held with the 1<sup>st</sup> Defendant bank.

b) A permanent injunction restraining the 1<sup>st</sup> Defendant its servants, agents or assigns from drawing the sum of Kshs.7.5 million from any of the Plaintiff's account, on account of the demand by the 2<sup>nd</sup> Defendant of Kshs.7.5 million made on or around 23<sup>rd</sup> December, 2013.

c) A permanent injunction restraining the 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendants by themselves, their servants, their agents or otherwise howsoever from demanding Kshs.7.5 million from the 1<sup>st</sup> Defendant.

d) A permanent injunction restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by themselves, their servants, their agents or otherwise however from utilizing any sums received from the 1<sup>st</sup> Defendant Bank in response to the demand by the 2<sup>nd</sup> Defendant for Kshs.7.5 million made on or around 23<sup>rd</sup> December 2013.

e) A mandatory injunction compelling the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to remit back to the 1<sup>st</sup> Defendant Bank any sums of money received by any of them by themselves, their servants, their agents or otherwise however, from the 1<sup>st</sup> Defendant Bank, in response to the demand by the 2<sup>nd</sup> Defendant for Kshs.7.5 million made on or around 23<sup>rd</sup> December 2013.

f) The costs of this suit.

6. KCB denies the claim and asserts that on 6<sup>th</sup> November 2013, Nairobi Hospice made a formal application requesting it to issue a guarantee in its standard form in favour of Dubai Bank on the following terms:-

a) The 1<sup>st</sup> Defendant was to debit the sum of Kshs.7,500,000/= from the funds held under the Plaintiff's fixed deposit account number 1145254438 and hold the same separately as cash collateral for the guarantee.

b) The sum of Kshs.7,500,000 would be held in the 1<sup>st</sup> Defendant's name and be its sole property until cancellation of the guarantee or its discharge.

c) The 1<sup>st</sup> Defendant would pay any claim made against it under the guarantee subject to the maximum sum of Ksh.7,500,000/- prior to the guarantee's expiry date of 26<sup>th</sup> December 2013.

d) The aforesaid payment would be made without any reference or further authority from the Plaintiff and without the requirement to enquire or confirm whether the same was due or whether any dispute exists as between the Plaintiff and the 2<sup>nd</sup> Defendant beneficiary; and

e) The Plaintiff's liability under the guarantee to be issued would not lapse on the expiry of the guarantee but would subsist up to and until discharged by the 1<sup>st</sup> Defendant.

7. On 23<sup>rd</sup> December 2013, Dubai Bank made a demand upon KCB but KCB did not act on it because of a Court order served upon it on 27<sup>th</sup> December 2013 restraining it from complying. Basically, KCB makes the argument that the guarantee issued was strictly limited to the terms set out above and was not subject to any underlying contract between the Nairobi Hospice and Dubai Bank and/or the 3<sup>rd</sup> Defendant.

8. On the part of Dubai Bank, it avers that on or about 15<sup>th</sup> November 2013, KCB gave an irrevocable and unconditional undertaking to pay to it a sum of Kshs.7,500,000/= on demand within a maximum of 5 days thereof upon default by the 3<sup>rd</sup> Defendant to pay to it a debt of equal sum. The guarantee was valid until 26<sup>th</sup> December 2013. There was default on the part of the 3<sup>rd</sup> Defendant and through a letter of 20<sup>th</sup> December 2013, Dubai Bank demanded payment of the said sum from KCB. This has not been done and Dubai Bank lays a cross-claim against KCB for Kshs.7,500,000 with interest thereon at Commercial rates from 25<sup>th</sup> December 2013 until payment in full.

9. Although the 3<sup>rd</sup> Defendant entered appearance it did not file defence nor did it participate at the hearing. Three witnesses testified namely Mugo wa Karanja for Nairobi Hospice, Christine Muturi for KCB and Adam Boru for Dubai Bank.

10. In their closing arguments, the parties herein each gave their set of proposed issues. This Court has considered those issues in the context of the pleadings herein and frame the following for determination:-

(i) What instructions did Nairobi Hospice give to KCB on issuance of the guarantee?

(ii) Did KCB act outside the scope of the instructions given by Nairobi Hospice?

(iii) Is Nairobi Hospice entitled to the prayers sought?

(iv) Is Dubai Bank entitled to the prayers in the counterclaim?

11. The evidence of Mugo wa Karanja (PW1) is that Nairobi Hospice instructed KCB to issue a guarantee to Dubai Bank that KCB would remit to Dubai Bank a sum of Kshs.7.5 million upon receipt of the full project funding from the 3<sup>rd</sup> party financier. The evidence is that the request for the guarantee was first communicated to KCB through an email from Brigid Sirengo (one of the officials of Nairobi Hospice) (D1 Exhibit page 12) which was said to enclose communication from Mugo wa Karanja. Shown to this Court is the following internal email dated 5<sup>th</sup> November 2013 of Nairobi Hospice:-

“Dear Dr. Sirengo,

Please find attached,

1. Letter from Jerry Honewell Travels Limited requesting for a Bank Guarantee form KCB to Dubai bank (their Bank).

2. Addendum to the agreement on Bank Guarantee arrangement.
3. Scanned signed Agreement on Bank Guarantee arrangement.
4. Sample of MT 760.
5. Copy of letter from Jerry Honeywell Travels' bank (Dubai bank) offering to lend them the needed money to facilitate BG arrangement.

Jerry Honeywell Travels are requesting the Nairobi Hospice to ask Kenya Commercial Bank to issue a bank guarantee to Dubai Bank for the sum of Kshs.7,500,000. Dubai bank is lending money to Jerry Honeywell Travel to pay for part of the transmission fee for the Bank Guarantee processing.

The money to Dubai bank is part of the transmission fee held by KCB in an Escrow account. Jerry Honeywell Travel ltd will only receive the balance of the transmission fee when Nairobi Hospice receive the funds for the project.

Kindly deliberate on the issue and act as promptly as possible.

Best regards

Thomas Ondigi (*my emphasis*)

12. It is common ground that on 6<sup>th</sup> November 2013, Nairobi Hospice formally applied for the guarantee facility (see Exhibit D1 page 14-17). On 15<sup>th</sup> November 2013 (Exhibit D page 18) KCB issued a Bank guarantee to Dubai Bank. This guarantee is a promise as follows:-

15<sup>th</sup> November, 2013

Dubai Bank Kenya Ltd

P.O. Box 11129-00400

Nairobi

KENYA

PAYMENT GUARANTEE NO.MD1331900008R FOR KSHS.7,500,000=00 BY ORDER OF NAIROBI HOSPICE IN RESPECT TO AGREEMENT ON BANK GUARANTEE ARRANGEMENT FOR NAIROBI HOSPICE NEW BUILDING CONSTRUCTION.

At the request of our customer Nairobi Hospice, we hereby guarantee as follows:-

At the request of Nairobi Hospice of P.O. Box 74818-00200, Nairobi, Kenya, we KCB Limited, Trade Finance Centre, P.O. Box 484400-00100, Nairobi, Kenya, incorporated/registered under the companies Act, and having our registered office at 6<sup>th</sup> floor, Kencom House, hereby undertake to indemnify you against all and any claims to the extent of Kshs.7,500,000=00 (say Kenya Shillings Seven Million Five Hundred Thousand only) which may become due to you on account of performance contracts held by Nairobi Hospice.

We confirm that such claims will be duly honoured by ourselves upon receipt of your first written demand without any reference to or contestation on the part of Nairobi Hospice. All claims under this guarantee should be forwarded to KCB Limited, Trade Finance Centre, P.O box 484400-00100, Nairobi, Kenya. For the purposes of verification and identification of any claim/s received under this guarantee, your authorized signature/s on your claim letter/document must be verified by your bankers, prior to forwarding your claims.

This guarantee shall remain valid effective from 15<sup>th</sup> November, 2013 to 26<sup>th</sup> December 2013. No claim shall be entertained by us under the guarantee if it is not received in writing in our office on or before the expiry date.

This guarantee should be returned to us upon its expiry or upon fulfilment of our undertaking to you, whichever may occur earlier. Our liability under this guarantee will cease after the expiry date whether or not the original guarantee is returned to us.

In any case our liability towards you in this connection will never exceed the guarantee amount viz.Kshs.7,500,000=00 (say Kenya Shillings Seven Million Five Hundred only).

This guarantee is subject to the Uniform Rules of Demand Guarantees, ICC Publication No.758.

On expiry please return this guarantee to us.

Signed in Nairobi this 15<sup>th</sup> day of November, 2013.

Signed

J. M MWENDA

MANAGE-GUARANTEES

TRADE SERVICES

13. Of some significance is that by a letter of 26<sup>th</sup> November 2013 (Exhibit D1 page 19) Nairobi Hospice makes what seems to be a further request:-

26<sup>th</sup> November 2013

The Manager

Kenya Commercial Bank Limited

Mortgage Centre

Haile Selassie Avenue

NAIROBI

Dear Sir/Madam

NAIROBI HOSPICE BANK GUARANTEE APPLICATION FOR KSHS.7,500,000.

Please issue to Dubai Bank a Bank Guarantee of Kenya Shillings seven million five hundred thousand (Kshs.7,500,000/=) through SWIFT via an authenticated MT 760.

The Bank Guarantee should be on account of Credit facility of Kenya shillings seven million five hundred thousand (Kshs.750,000,000/-) Dubai Bank is offering to Jerry Honeywell Travels Ltd.

Attached herewith please find the original letter dated 15<sup>th</sup> November 2013 of KCB Bank Guarantee for Kshs.7,500,000/- which had been issued by KCB.

We thank you for your continued assistance in this matter.

*Signed*

Vice Chairman

*Signed*

Hon. Secretary

*Signed*

Hon. Treasurer

Signed

Enclosure: 1

14. Three things are worth noting from this request by Nairobi Hospice. The first, Nairobi Hospice was asking KCB to issue a Bank guarantee to Dubai Bank for Kshs.7.5 million through swift via an authenticated MT 760. Secondly, although KCB had on, 15<sup>th</sup> November 2013, already issued a Bank guarantee to Dubai Bank, the original was returned via those instructions. Of relevance to this matter, whilst the Bank guarantee of 15<sup>th</sup> November 2013 was a promise by KCB to pay Dubai Bank Kshs.7,500,000 which would become payable on account of performance contracts held by Nairobi Hospice, the new request by Nairobi Hospice was that the Bank guarantee would be on account of a credit facility of Kshs.7.5 million which Dubai Bank was offering to Jerry Honeywell Travels Ltd (the 3<sup>rd</sup> Defendant).

15. It seems to this Court that Nairobi Hospice was departing from the original instructions and was asking KCB to issue an undertaking

without conditions. It being a Bank guarantee to support the credit facility granted to Jerry Honeywell Travels Ltd by Dubai Bank, this request was met by KCB issuing a standby letter of credit (Exhibit D1 page 21). The finding of this Court is that while Nairobi Hospice had initially instructed KCB Bank to issue a Bank guarantee for Kshs. 7.5 million which would only be payable upon it( Nairobi Hospice) receiving full project funding from the 3<sup>rd</sup> party financier, there was a change of instructions made through the letter of 23<sup>rd</sup> November 2013. The request now was for KCB to issue a guarantee to Dubai Bank for payment of a credit facility of Kshs.7.5 million Dubai Bank had advanced to the 3<sup>rd</sup> Defendant. The backdrop to this request is the email of 5<sup>th</sup> November 2013 from Thomas Ondigi to Mr. Sirengo which I again reproduce,

From: Thomas Ondigi

Sent: Tuesday, November 05,2013 10.58 AM

To: bridged [Sirengo@yahoo.com](mailto:Sirengo@yahoo.com)

CC;ceo@nairobihospice.or.ke

Subject: FINANCING DOCUMENTS

Dear Dr. Sirengo

Plead find attached,

1. Letter from Jerry Honeywell Travels Limited requesting for a Bank Guarantee from KCB to Dubai Bank (their Bank).
2. Addendum to the Agreement on Bank Guarantee Arrangement.
3. Scanned signed Agreement on Bank Guarantee Arrangement.
4. Sample of MT 760.
5. Copy of the letter from Jerry Honeywell Travels' Bank (Dubai Bank) offering to lend them the needed money to facilitate BG arrangement.

Jerry Honeywell Travels are requesting the Nairobi Hospice to ask Kenya Commercial Bank to issue a Bank guarantee to Dubai Bank for the sum of Kshs.7,500,000. Dubai Bank is lending money to Jerry Honeywell Travel to pay for part of the transmission fee for the Bank Guarantee processing.

The money to Dubai bank is part of the transmission fee held by KCB in an Escrow account. Jerry Honeywell Travel ltd will only receive the balance of the transmission fee when Nairobi Hospice receive the funds for the project.

Kindly deliberate on the issue and act as promptly as possible.

Best regards

Thomas Ondigi

16. Now, it is submitted by Counsel for Nairobi Hospice that the standby letter of credit was issued without authority. Secondly Counsel attempts to distinguish a standby letter of credit from a Bank guarantee. This argument had been countered in paragraph 7 of the Defence in which KCB had averred:-

“7. In further response to paragraph 13 of the Plaintiff, the 1<sup>st</sup> Defendant avers that it issued to the 2<sup>nd</sup> Defendant a guarantee dated 15<sup>th</sup> November 2013 in the terms instructed. Further, on 27<sup>th</sup> November 2013, the 1<sup>st</sup> defendant issued the said guarantee to the Plaintiff, on its express written instructions, in swift format on terms that the guaranteed sum was payable within a maximum of five (5) days from the first demand being made by the 2<sup>nd</sup> Defendant by way of swift message to the 1<sup>st</sup> Defendant”.

17. Even before evaluating the evidence in the context of the issues raised by Nairobi Hospice, it seems clear (and as pointed out by counsel for Nairobi Hospice) that reference to Plaintiff in that portion of the Defence is reference to the 2<sup>nd</sup> Defendant. So, is a standby letter of credit different from a Bank guarantee? A standby letter of credit is defined as follows:-

“A letter of credit used to guarantee either a monetary or a nonmonetary obligation (such as the performance of construction work), whereby the issuing Bank agrees to pay if the beneficiary of the Bank customer defaults on its obligation”. (Black's Law Dictionary, 10<sup>th</sup> Edition).

Without doubt, a standby letter of credit is a type of a guarantee.

18. It then has to be recalled that Nairobi Hospice requested the Bank through the letter of 26<sup>th</sup> November 2013, to issue a guarantee 'on account of credit facility of Kenya Shillings seven million five hundred thousand (Kshs.7,500,000) Dubai Bank is offering to Jerry Honeywell Travels Ltd'. It was a request to KCB as the issuing Bank to assure Dubai Bank as the beneficiary Bank of payment of the credit granted to Jerry Honeywell Travels Ltd. The standby letter of credit issued by KCB was exactly the type of Bank guarantee that Nairobi Hospice had asked it to issue.

19. The finding I make is that the standby letter of credit by KCB is tandem with the instructions of Nairobi Hospice.

20. The nature of the promise in the guarantee was that KCB would pay to Dubai Bank Kshs.7,500,000 "within a maximum of 5 days" upon Dubai Bank first making the demand by swift message declaring the principal debtor to be in default. The statutory letter of credit was valid until 26<sup>th</sup> December 2013. In a Demand received by KCB on 23<sup>rd</sup> December 2013 (Exhibit D1 page 22), Dubai Bank informs KCB Bank of the default by the principal Debtor and demands for payment of Kshs.7,500,000. In terms of the standby letter of credit, payment would have to be made within 5 days of the demand, that is, on or before 28<sup>th</sup> December 2013.

21. The case for KCB was that it was always willing to abide by the Demand but was served with a Court order herein on 27<sup>th</sup> December 2013 restraining it from complying. In so far as KCB was duty bound to obey the Court order, it cannot be blamed for not honouring the demand.

22. That leads the Court to discussing the cross-claim by Dubai Bank against KCB. In addition to demanding payment of Kshs.7,500,000, Dubai Bank claims interest at Commercial rates from 25<sup>th</sup> December 2013. However, this Court has found that KCB is not liable to Nairobi Hospice and would not be to blame for not meeting the demand when made because it had to obey the Court order. It would not be just and fair to condemn KCB to pay more than it was obliged to pay had it not been for the Court order. Given the outcome of the case, it has emerged that any blame will have to be attributed to Nairobi Hospice which has failed in its claim. But since Dubai Bank has no claim against Nairobi Hospice, then Dubai Bank cannot obtain an order for interest.

23. The upshot is that the Plaintiff's suit is dismissed with costs to KCB and Dubai Bank. The cross claim succeeds but with no order as to costs. KCB shall honour the terms of the standby letter of credit within 7 days of this judgement in default then the same to be enforced as a Judgment of Court.

**Dated, Signed and Delivered in Court at Nairobi this 1<sup>st</sup> day of February, 2019.**

.....

**F. TUIYOTT**

**JUDGE**

**Present:-**

**Akongu for 1<sup>st</sup> Defendant**

**Waweru for Maina for 2<sup>nd</sup> Defendant**

**N/a for Plaintiff**

**Nixon – Court Assistant**