



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 685 OF 2003

MAHENDRA V. PATELPLAINTIFF

-VERSUS-

VIOLET W. GATEI.....1ST DEFENDANT

CITY FINANCE BANK LIMITED.....2ND DEFENDANT

J U D G M E N T

PRELIMINARY

1. The Plaintiff's case was fully heard by Justice A. Mabeya on 13th November 2012. The matter came before me on 25th February 2019, after Justice A. Mabeya had been transferred from the Commercial and Tax Division of Milimani Court. On that day the Plaintiff's Learned Counsel did not attend Court even though that date had been given in the presence of that Counsel. The 1st Defendant, on that date failed to attend Court and on the Court rejecting her Counsel's application to adjourn the hearing the Court recorded the 1st Defendant's defence as closed. The 2nd Defendant adduced evidence through its Legal Manager. That witness of the 2nd defendant, in the absence of the Plaintiff was not cross-examine. The 2nd Defendant closed its case on that day.

2. **Mahendra Vitalbhal Patel (Patel)** is the Plaintiff. **Violet W. Gatei (Violet)** is the 1st Defendant. **City Finance Bank Limited (the Bank)** is the 2nd Defendant.

3. Patel and Violet were customers of the Bank.

PLAINTIFF'S CASE

4. Patel's case is that the Bank, through its then managing director, Mr. Ramani, persuaded him to grant a loan facility to Violet of Kshs. 14,264,000. This he did and as security Violet charged her immovable property, as security for that loan.

5. On Violet defaulting in her repayment of the said facility Patel approached the bank, that is Mr. Ramani, who convened a meeting, at his office, between Patel and Violet. That it was at that meeting that Mr. Ramani made the proposal for settlement of the debt. Ramoni, according to Patel, proposed that the bank would pay Kshs. 594,000 on behalf of Violet; thereafter the bank would issue a bank guarantee to guarantee the payment by Violet whereby Violet was to pay on monthly basis Kshs. 200,000, with effect from 1st August 2000; and that the title documents of Violet's property would be surrendered to the bank together with the discharge of charge. Patel confirmed the terms of that meeting by his letter dated 25th July 2000, which letter Mr. Ramani acknowledge receipt on behalf of the bank. Mr. Patel stated that thereafter the bank took over the loan repayment of the loan and a total sum of Kshs. 4,600,000 was paid to Patel for the period between July 2000 and July 2002. The balance unpaid was Kshs. 5,000,000. In his view and in view of the meeting with Mr. Ramani on 25th July 2000, Patel said that the bank guaranteed repayment of the outstanding loan. Mr. Patel stated that in view of the representation made by the bank, he took action that was detrimental to him, that is he discharged the security over Violet property.

6. It is on the above basis that Patel seeks judgment against Violet and the bank for Kshs. 5 million and for an order directing the Defendant (he does not specify which one) to provide him with a guarantee for the payment of the agreed monthly installments of Kshs. 200,000 with interest.

THE 1ST DEFENDANTS CASE

7. Violet, the 1st Defendant, failed to attend Court and her case was closed without her adducing evidence in support of her defence. It follows that her defence was not proved and it therefore cannot be considered in this case.

2ND DEFENDANT'S CASE

8. The bank's evidence was adduced by Christine Wahome, its Legal Manager. She stated that the 2nd Defendant changed its name and it is now known as **Jamii Bora Bank Limited**.

9. This witness stated that from the files within the bank she found out that Mr. Ramani was familiar with both Patel and Violet, as customers of the bank. She denied that bank gave any guarantee for the payment due from Violet. She stated that although Patel had obtained a charge over Violet's property, as security for her loan, he on his own volition discharged that security but that at no time did the bank undertake to shoulder Violet's debt.

ANALYSIS

10. There are two issues for determination in this matter:

- a. Has the Plaintiff proved his claim for Kshs. 5 million against the 1st and 2nd Defendants.
- b. Did the 2nd Defendant guarantee the indebtedness of the 1st Defendant.

1ST ISSUE

11. Patel produced a letter of offer dated 10th October 21998. By it he offered Violet a loan of Kshs. 14,264,000. It was repayable in 60 months, from the date of drawdown. The security was a legal charge over Violet's immovable property. Violet signed and accepted the terms in that letter.

12. For Patel to succeed in proving Violet's indebtedness of the amount claimed in this case, Kshs. 5 million, he needed to provide statements showing how the payments were made and the amount due and outstanding in the tune of Kshs. 5 million.

13. Patel produced (at Page 10 of the Plaintiff's documents) a running statement of the projection of the repayments of loan. That statement does not reflect the actual payments made by Violet. At page 9 of the Plaintiff's documents Patel exhibited a letter written by him to his Advocate which simply sets out lump sum payments made and reflects an outstanding amount of Kshs. 5 million. That letter is in the following terms:

“OUTSTANDING ACCOUNT OF MS VIOLET N. W. GATEI & CITY FINANCE BANK LIMITED

08/12/1998 Loan given against charge

L.R. 9104/45 For same amount Kshs. 14,264,000

Payment received from Violet up

to 19/04/2000 Kshs. 4,070,000

Payment received from City

Finance Bank Ltd up to 30/07/2002 Kshs. 5,194,000

Still to collect + Delay interest on

Outstanding Kshs. 5,000,000

14. That rudimentary statement of account fails to show the exact dates the repayments were made and credited into the loan account. After all the letter of offer had provided for application of interest of 25% payable monthly from the date of drawdown. Is it that Patel decided not to charge interest? It would seem so. This is because when one subtracts the amounts reflected as payments, in that letter above, one is left with the figure claimed in the Plaint against both Defendants, that is Kshs. 5 million.

15. Patel has proved, by letter of offer dated 10th October 1998 and the letter from Violet (*page 45 of the Plaintiff's documents*). That he advanced a loan to Violet. Violet by her letter at page 45 admitted being advanced the loan. She also admitted, in that letter, that she had not fully paid that loan. In the absence of a defence on her part the claim for Kshs. 5 million against Violet was proved to the required legal standard. Here I wish to allay the misunderstanding of Violet and state that the fact the discharge of the security was done did not

necessarily mean she had fully repaid her loan to Patel.

16. Patel did not at all prove indebtedness of the bank for the amount of Kshs. 5 million. I will discuss this further in my consideration of issue (ii) below.

ISSUE (ii)

17. The Plaintiff alleges that the bank guaranteed Violet's loan. Patel basis this assertion on the correspondence between him and the bank written by Mr. Ramani. Patel wrote a letter dated 25th July 2000 to the bank. In that letter Patel confirmed a meeting in Mr. Ramani's office where he stated it was agreed that the bank would pay to Patel Violet's debt, immediately, by Kshs. 594,000 and would give a guarantee for the payment of Kshs. 200,000 per month from 1st August 2000. Patel by that letter forwarded the title documents of Violet. Mr. Ramani responded by his letter dated 26 July 2000 by acknowledging receipt of that letter then stated:

“Our Lawyers Maina Karanja will be keeping in touch with you for the discharge of the charge in your favour. We shall arrange for the bank guarantee and initial payment after the documentation procedure is complete.”

18. A guarantee is essentially a contract. The Court of appeal in the case **FIDELITY COMMERCIAL BANK LIMITED V KENYA GRANGE VEHICLE INDUSTRIES LIMITED [2017] EKLK** had this to say:

“Because a contract of guarantee is essentially a contract the following basic principles of contract law will apply.

A contract of guarantee binds the person giving a guarantee to honour its terms irrespective of any dispute that may be existing between the parties to the transaction for which the guarantee was given. A guarantee is therefore an accessory contract by which the guarantor undertakes to be answerable to the promisee for the debt or default of another person whose primary liability to the promise must exist.

The duty of the guarantor is created by the guarantee document itself and not the terms of the underlying contract.

This Court explained in **Kenindia Assurance Company Ltd V. First National Finance Bank Ltd** Civil Appeal No. 328 of 2002 that guarantees are special contracts and are;

“..... in the nature of a covenant by the appellant to pay upon the happening of a particular event. It is a form of security of guaranteeing payment by a third party.”

19. It follows that a guarantee has to have essential elements of a contract, offer, consideration, acceptance and intention to create legal relationship. If the letter of Mr. Ramani, of 26th July 2000 is the one the Plaintiff relies upon as providing guarantee then it fails the test of a guarantee. Looking at what is reproduced above Mr. Ramani promised to arrange a bank guarantee after the documentation procedure was complete. Patel did not adduce evidence to show which documents were referred to by Mr. Ramani and whether indeed the “procedure” was completed. It is clear that Mr. Ramani said in that letter that it is on the documentation procedure being completed that the bank was going to provide a guarantee. On the ground that there is no evidence showing the documentation was complete or that a guarantee was issued the claim that the bank issued Patel a guarantee fails.

20. In considering the evidence adduced before Court and the correspondence it does seem that Mr. Ramani, in dealing with Patel and Violet acted in his personal capacity rather than on behalf of the bank. This evident from Patel's evidence while under cross examination as follows:

“I wanted to help the 1st Defendant. Mr. Ramani was trying to assist us. These funds were with the bank in fixed deposit. At the time the bank was experiencing liquidity problems. If the bank went under it would have taken time to get my money back. Mr. Ramani asked me to lend to the 1st Defendant. I got my money close to Kshs. 9 million. The other depositors did not get anything.

... I am better off with Mr. Ramani's advise than the other depositors who had waited. Mr. Ramani was my personal friend
...

... I had the confidence on Mr. Ramani that he will recover the money for me.”

21. When one considers that evidence and Patel's letter to Violet dated 15th January 2003 one realizes that Mr. Ramani was not acting in his official capacity of the Managing Director of the Bank. This is what Patel in part stated in that letter of 15th January 2003 to Violet:

“... The last mutually agreed standing (sic) agreement between us demands that you repay the loan by monthly installment of Kshs. 200,000.00 (until fully repaid) – through the offices of our mutual friend Mr. S. V. Ramani of City Finance Bank Ltd...

As such you have also betrayed the trust and confidence bestowed on you by our mutual friend, Mr. S. V. Ramani of City Finance Bank Ltd. – who introduced us to assist you during your impossible and difficult financial period you were facing”

22. From Patel's testimony and from that letter and other correspondence it seem clear that the bank was undergoing financial/liquidity problem and there was the danger that fix deposits held by the bank on behalf of Patel could have been locked in the bank with its imminent collapse. From the evidence it shows that Mr. Ramani, a close friend of Patel, advised Patel to advance to Violet the amount held on his behalf by the bank. It seems that with that advancement Patel's funds would not be in the Bank when it collapsed. Patel did confirm that he had known Mr. Ramani at least 5 years before he entered into the transaction with Violet. Patel and Mr. Ramani were close friends. I therefore make a finding that the transaction between Patel and Violet was orchestrated by Mr. Ramani because of that close friendship. Mr. Ramani did not commit the bank.

23. On the whole the Plaintiff (Patel) failed to prove that the Bank gave a guarantee to guarantee the debt of Violet.

CONCLUSION

24. The Plaintiff has proved his claim for Kshs. 5 million against the 1st Defendant (Violet). The Plaintiff has however failed to prove the claim against the 2nd Defendant (the Bank).

25. In the end the following is the Judgment of this Court:

- a. Judgment is hereby entered in favour of the Plaintiff against the 1st Defendant for Kshs. 5 million with interest at Court rate from the date of filing suit until payment in full.**

- b. The case against the 2nd Defendant is dismissed with costs.**

- c. The 1st Defendant shall pay the Plaintiff's costs of this suit.**

DATED, SIGNED and DELIVERED at NAIROBI this 17TH day of OCTOBER, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE 1ST DEFENDANT**

..... **FOR THE 2ND DEFENDANT**